

# **THE EFFECTS AND THE EFFECTIVENESS OF THE INTERNATIONAL CRIMINAL COURT: A GAME-THEORETIC ANALYSIS**

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## Abstract

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Traditional legal literature on the International Criminal Court (ICC) has generally sidestepped the question of enforcement. Approaches to questions of the Court's effectiveness have also largely ignored the demand for credible, legitimate and relevant administration of international criminal justice. The said literature displays an obvious lack of concern for the impact of institutions such as the ICC on prospects of democratic transformations in post-conflict societies. This Thesis posits that the critical goals of the international criminal justice regime are best achieved by integrating concerns for democratic transitions in post-conflict societies in the debate about the effectiveness of the ICC. Building on a nascent game theoretic literature, the Thesis advances three theoretical models to show that: (i) because of a lack of distinction between crimes committed by government leaders on the one hand, and by opposition groups on the other, ICC prosecutions may incentivize leader crimes as opposed to deterring them; (ii) to enhance the effectiveness of the Court, leniency programs targeted towards lower-level perpetrators should be utilized (as is the case in anti-trust law enforcement and the fight against organized crime); and (iii) leniency programs may enhance deterrence (by making it costlier for leaders to commit crimes) and may also enable the ICC to gather convincing evidence of the commission of atrocities. This, in turn, is expected to lead to the collapse of political structures responsible for the commission of international crimes. The central insight of the Thesis is that the ICC could be both self-enforcing and relevant to questions of political transformation in post-conflict societies provided innovative approaches to law enforcement are used. The Thesis provides preliminary and counterintuitive theoretical pronouncements that need to be verified by further elaborations of the models and appropriate empirical investigations of the effects and the effectiveness of criminal prosecutions by the ICC.

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## CHAPTER 1: Introduction

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### 1.1. Background

Most contemporary narratives of the evolution of International Criminal Law (ICL) leading up to the creation of the International Criminal Court (ICC) start with the Nuremburg Trials.<sup>1</sup> At Nuremburg, the Allies subjected German Officials to criminal trials for violations of international law which occurred during World War II.<sup>2</sup> The judges at Nuremburg, when breathing life into a whole sub-discipline of international law, were content that 'crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'<sup>3</sup> Having successfully sown the seeds of individual accountability for crimes committed during war then, legislative efforts waned in the face of mounting horrors throughout the 20<sup>th</sup> century mainly because of the divisive politics of the Cold War.<sup>4</sup> It was not until the 1990s when the UN Security Council established the International Criminal Tribunals for the Former Yugoslavia (ICTY) and for Rwanda (ICTR) - in response to the horrors of the Yugoslav Wars and the Rwandan Genocide respectively - that the international criminal justice project resumed.<sup>5</sup>

It is often invoked that the ad-hoc tribunals for Yugoslavia and Rwanda were hastily set-up by an international community, which at the time when these conflicts erupted, was incapable of taking any meaningful steps towards halting the atrocities in the afflicted

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<sup>1</sup> See e.g. M.M. Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law', *Am. U. Int'l L. Rev.*, 15 (1999), 321; Leila Nadya Sadat, 'Rawlsian Approach to International Criminal Justice and the International Criminal Court, A', *Tul. J. Int'l & Comp. L.*, 19 (2010), 261.; Sarah M. H. Nouwen 'Justifying Justice' in James Crawford and Martti Koskeniemi, *The Cambridge Companion to International Law* (Cambridge University Press, 2012); Ved P Nanda, 'The Establishment of a Permanent International Criminal Court: Challenges Ahead', *Human Rights Quarterly*, 20/2 (1998), 413-28.

<sup>2</sup> M.C. Bassiouni, 'Combating Impunity for International Crimes', *U. Colo. L. Rev.*, 71 (2000), 409.

<sup>3</sup> Quoted in Robert Cryer et al., 'An Introduction to International Criminal Law and Procedure', (Cambridge, University Press 2010) 8.

<sup>4</sup> Cheriff Bassiouni 'International Criminal justice in Historical Perspective: the Tension between States' Interests and the Pursuit of International Justice' in Antonio Cassese, *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009); A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law*, 9/1 (1998), 2-17.

<sup>5</sup> Bassiouni (n 4).

regions.<sup>6</sup> It is perhaps because of this equivocal origin of international criminal justice that these tribunals continued well after their inauguration and many years into their operation to search for a *raison d'être* for their existence. Teitel questions whether the administration of international criminal justice at the ICTY managed to achieve any of its subsequently declared goals from deterrence to reconciliation and truth-telling.<sup>7</sup> He noted, however, that '...the tribunal's international authority did have one singular advantage: By intervening unambiguously from outside, it operated beyond the strained political circumstances that continued to trap participants within the Balkans'.<sup>8</sup> But, it is not clear how this marginalization of the political is necessarily a good thing when adjudicating what are inherently political conflicts.

For better or for worse, the establishment of the ad-hoc tribunals spurred on a very active institutional, substantive and normative evolution of ICL that culminated in the creation of a permanent international criminal court in 2002 and the growth of an ever expansive jurisprudence.<sup>9</sup> The ICC has a wide jurisdiction to try individuals for the commission of crimes against humanity, war crimes and genocide wherever they may occur in the world subject only to few limitations.<sup>10</sup> An important example of the jurisdictional reach of the court is its involvement in the adjudication of the Darfur Conflict in Sudan; Sudan not being a party to the Rome Statute which established the Court, nor having provided its consent for this exercise of jurisdiction.<sup>11</sup> Still, the Sudanese sitting Head of State; Omar Al Bashir, finds himself indicted today for crimes committed in the region of Darfur pursuant to UN Security

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<sup>6</sup> Ruti G Teitel, *Humanity's Law* (Oxford University Press, 2011).; Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000); C.C. Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction', (21: Springer, 2010), 1-65.

<sup>7</sup> Teitel (n 6) 81.

<sup>8</sup> *ibid* 81.

<sup>9</sup> Nouwen (n 1).

<sup>10</sup> Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 1002 (1998) [hereinafter the "Rome Statute"], art. 1, 12-14. The ICC has, in addition, jurisdiction over the crime of "aggression". However, the analysis in this Thesis is only concerned with the three core crimes of Genocide, Crimes against Humanity, and War Crimes as set out in Articles 6–8 of the Rome Statute. The crime of aggression is excepted because it neither has a negative effect on the exercise of state sovereignty (it on the contrary guards it), nor does it have a direct effect on internal political dynamics which forms a particular focus of this research. In addition, the three former categories of crime under the jurisdiction of the ICC can be seen as forming a normative unit suitable for analysis in that they seek to enforce standards of international humanitarian law and human rights law in the face of ill-treatment by a state of its own citizens.

<sup>11</sup> See discussion in Jalloh (n 6).

Council Resolution No.1593.<sup>12</sup> Similarly, the involvement of the ICC in more recent conflicts like Libya promises to transcend the traditional bounds of sovereignty further, thereby ushering in an era of increasing accountability for gross human rights violations even if, strictly speaking, such jurisdiction remains delineated by existing distributions of power.<sup>13</sup>

There is no denying that international criminal justice and international criminal tribunals (ICTs), including the ICC, are here to stay in what seems to be an irreversible trend towards a liberal legalist project in which '[h]umanity can assert itself by law'.<sup>14</sup> Teitel treats the extended reach of legality apparent in the evolution of international criminal justice institutions and their expansive role vis-à-vis conflicts as an indication of the paradigm shift in international law away from sovereignty and towards the inception of what he terms "Humanity's Law".<sup>15</sup> This new paradigm of international law seeks to place people and people's rights at the heart of international justice.<sup>16</sup> This paradigm is also sometimes referred to as the "Universalist" turn in international criminal law which denotes the tendency of this body of law to speak in the name of all of humanity.<sup>17</sup>

Yet, it is this focus on humanitarian concerns in the response to atrocities that is most troubling at times. Mamdani notes how the shift from the old language of sovereignty to one of humanitarian intervention in international law marks the shift from the political to the apolitical or anti-political.<sup>18</sup> He states:

The international humanitarian order... is not a system that acknowledges citizenship. Instead, it turns citizens into wards...To the extent the global humanitarian order claims to stand for rights, these are residual rights of the human and not the full

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<sup>12</sup> UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593 (2005). Article 13(b) of the Rome Statute allows the court to adjudicate cases where 'A situation in which one or more of [the crimes falling under the jurisdiction of the court] appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.'

<sup>13</sup> M. Mamdani, 'Responsibility to Protect or Right to Punish?', *Journal of Intervention and Statebuilding*, 4/1 (2010), 53-67; Sarah Nouwen, 'Legal Equality on Trial: Sovereigns and Individuals before the International Criminal Court', *Netherlands Yearbook of International Law 2012* (Springer, 2013), 151-81.

<sup>14</sup> Quoted in Teitel (n 6) 77.

<sup>15</sup> *ibid.*

<sup>16</sup> Teitel (n 6).

<sup>17</sup> R.G. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', *Cornell Int'l LJ*, 35 (2001), 355.

<sup>18</sup> Mamdani (n 13).

range of rights of the citizen. If the rights of the citizen are pointedly political, the rights of the human pertain to sheer survival...<sup>19</sup>

Helena Cobban, one of the most vocal critics of the international criminal justice project, argues that an important difference between the Nuremburg trials and the work of contemporary international criminal institutions is that in the former international criminal prosecutions were conducted as part of a wider social and economic rehabilitation program that was concerned with more than the judicial determination of guilt and innocence or the simple imposition of harsh punishments.<sup>20</sup> Cobban's frustration with the international criminal justice project stems partly from the fact that while these prosecutions are carried out in the name of the affected populations of post-conflict societies, they often ignore these people's own preferences and aspirations.<sup>21</sup> Such state of affairs is, perhaps, an expected consequence of what Kendall and Nouwen see as the excessive narrowing of the class of victims of war by ICTs to include only those at the receiving end of physical violence.<sup>22</sup> With the victim as a political being effectively positioned at odds with the international criminal justice project,<sup>23</sup> it is not surprising that the operation of ICL tends to 'eclipse conceptions of political justice in conflict situations.'<sup>24</sup>

The administration of international criminal justice, instead of resolving the political issues at the heart of contemporary conflicts, tends to gloss over them or otherwise distort them through the lens of individual criminal responsibility.<sup>25</sup> The de-politicization of conflict is arguably the natural consequence of the imposition of individual responsibility for crimes committed in the furtherance of or during political conflicts. It effectively turns considerations of the criminal actions of states and state-like institutions from politics to law and reduces the injustices visited on populations to mere crimes –albeit serious crimes- as opposed to manifestations of wider and deeper political crises. Be that as it may, how effective is any effort to pursue the criminalization of acts committed in internal conflicts

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<sup>19</sup> *ibid* 54-55.

<sup>20</sup> Helena Cobban, 'International Courts', *Foreign Policy*, (2006), 22-28.

<sup>21</sup> *ibid* 26.

<sup>22</sup> Sara Kendall and Sarah Nouwen, 'Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', *University of Cambridge Faculty of Law Research Paper* 24 (2013).

<sup>23</sup> *ibid* 259.

<sup>24</sup> Teitel (n 6) 75.

<sup>25</sup> *ibid*.

likely to be when it is conducted with complete disregard to the politics giving rise to such wars in the first place?

## ***1.2. Thesis Motivation and Direction***

The motivation behind this research work is an overarching concern for the absence of political considerations from questions of international criminal justice. The Thesis, however, is concerned with the very specific issue of the enforcement of ICL by the fledgling ICC. The ICC is the first permanent tribunal set up with the express goals of putting an end to ‘impunity for the perpetrators of [the most serious crimes of concern to the international community]’ and the prevention of these crimes.<sup>26</sup> However, the court lacks the necessary infrastructure, such as a dedicated police force, to arrest individuals indicted for crimes under its jurisdiction. This, coupled with the fact that the court has almost unlimited geographical jurisdiction over the core Nuremburg crimes creates particular challenges for the enforcement of arrest warrants. With the court struggling to bring to justice nearly half of those most responsible for the commission of war crimes, crimes against humanity and genocide, what hope does it have for the effective administration of international justice?

While this Thesis takes the international criminal justice project as is and assumes that the ICC is here to stay, it attempts to integrate concerns for the political in the dialogue about the effectiveness of the ICC. It seeks to advocate a role for the ICC, and other international criminal institutions, that goes beyond mere retribution and instead enacts “good politics” while adjudicating political conflicts. Instead of calling for the denouncement of the ICC as an irrelevant and potentially futile institution, the Thesis suggests instead a number of mechanism designs that can empower the court to achieve its institutional goals.

The central argument of the Thesis is that while the ICC may be undermining its own institutional goals by pursuing justice in complete disregard for political considerations, the court may be able to fulfil its declared objectives as well as play an important role in addressing the plight of affected populations in post-conflict societies if it pursues pragmatic law enforcement policies. The exercise of prosecutorial discretion is the key to making this transition from an irrelevant institution to a serious contender in the fight against atrocities. The suggestion in the Thesis is that the court may be able to achieve deterrence, fulfil its truth-telling function, and enhance the evidentiary basis on which prosecutions are

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<sup>26</sup> The Rome Statute, at the Preamble.

advanced as well as facilitate the removal of political spoilers in post-conflict societies if it becomes more open to the adoption of tried and tested law enforcement strategies such as leniency programs. Mindful of the fact that the court has a declared policy of pursuing key perpetrators of atrocities, offering concessions to minor actors may facilitate the administration of international criminal justice without necessarily compromising the Court's integrity.

### ***1.3. Structure, Composition and Constitutive Research Questions***

The Thesis is comprised of a series of essays, each of which seeks to critique the potential of the ICC with reference to the likely effects of its operation on prospects for the resolution of political crises and for regime change in post-conflict societies. These self-standing essays appear in Chapters 2-5 as explained below.

#### **1.3.1. Developing the Conceptual Framework (Chapter 2)**

Despite the exponential growth of the literature concerned with the work of international criminal institutions following the establishment of the ICC in 2002, a normative blindness persists concerning the *raison d'être* for the evident commitment to prosecute war crimes, crimes against humanity and genocide. To echo the concern of Professor Amartya Sen with respect to conceptualizing a theory of human rights, international criminal lawyers seem to be too busy trying to change the World to engage in any rigorous attempts to grasp the theoretical underpinnings of the international criminal law regime.<sup>27</sup> Yet, any serious exploration of questions about the effectiveness of the ICC must begin by asking "What is ICL really for?" The extant legal and transitional justice literature fails to settle on any definitive answer or answers, rather it seems to justify the existence of international criminal institutions by reference to any number of benefits that range from individualizing guilt and deterrence to peace-building, conflict resolution or democratization depending on the particular scholarly tilt of the author.<sup>28</sup> This Thesis attempts to rectify this position by

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<sup>27</sup> Amartya Sen, 'Elements of a Theory of Human Rights', *Philosophy & Public Affairs*, 32/4 (2004), 315-56.

<sup>28</sup> See e.g. M.P. Scharf, 'Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal, The', *DePaul L. Rev.*, 49 (1999), 925 (enumerating individualizing guilt, providing justice to the victims, deterrence, respect for the Rule of Law, reconciliation and developing a historical record); Bassiouni, 'The History of Universal Jurisdiction and its Place in International Law', in E. Decaux, *Stephen Macedo (Dir.). Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law* (Politique Étrangère, 69, 2006) 39-63 (confining The Effects and the Effectiveness of the International Criminal Court: A Game-theoretic Analysis

proposing that: (i) the critical goals of ICL should be confined to ensuring international peace and stability and to promoting the protection of fundamental human rights; and (ii) the potential of prosecutions to contribute to a particular policy objective (e.g. deterrence, reconciliation and truth-telling) should be assessed not by reference to the inherent value of such objectives but by reference to their ability to contribute to the two critical goals of ICL. In developing this position, I rely on a framework proposed by Broomhall in 2002 to explain the unitary nature of the crimes under the jurisdiction of the ICC.<sup>29</sup>

Given that the proposed critical goals of ICL can serve as useful guideposts in the assessment of the effectiveness of the ICC, the question that remains is whether the prosecution of a handful of perpetrators by the court is sufficient to achieve these goals. Chapter 2 attempts to answer this question by providing four examples that demonstrate the limited potential of the international criminal law regime to bring about lasting peace, stability and greater respect for human rights, especially given the inherent complexity of internal conflicts. The central claim in this Chapter is that because ICL is limited in scope, enforced with minimal consistency and devoid of considerations for thicker political constructs, it is ill-equipped, in isolation, to achieve its own goals.<sup>30</sup>

There is no denying that ICL is experiencing a marked shift from the protection of international peace and security towards becoming a legal regime concerned primarily with

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the benefits to deterrence, prevention and ensuring World order and peace); P. Engstrom, 'Transitional Justice and Ongoing Conflict' in Chandra Lekha Sriram et al., *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants* (Routledge, 2012) (adding conflict resolution); R. Nagy, 'Transitional Justice as Global Project: Critical Reflections', *Third World Quarterly*, 29/2 (2008), 275-89 (adding peace-building).

<sup>29</sup> B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, USA, 2003).

<sup>30</sup> See J.E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', *Yale J. Int'l L.*, 24 (1999), 365-613 (arguing that the framework of non-compliance with ICL creates a largely invented divide between villains and victims in internal conflicts); A. Branch, 'Uganda's Civil War and the Politics of Icc Intervention', *Ethics & international affairs*, 21/2 (2007), 179-98 (arguing that ICL results in a reductive narrative that transcends the question of legitimate political demands and grievances often involved in internal conflicts of the type adjudicated by the ICC); C. Turner, 'Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law', *International Journal of Transitional Justice*, 2/2 (2008), 126-51 (cautioning against the effect of international criminal prosecutions on deepening ethnic divisions in post-conflict societies); S.R. Ratner, C.U.N.A. Jason S., and J. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, USA, 2009) (showing that ICL is limited and scope and leaves a number of gross violations without redress).

the protection of individual rights.<sup>31</sup> A clear example of this is the uninhibited decoupling of the jurisdiction to adjudicate gross violations of human rights under the Geneva Convention from international armed conflict by the ICTY in the case of *Tadic*.<sup>32</sup> In extending the scope of protection under the Convention beyond its reasonable limit, the tribunal noted that:

A State-sovereignty oriented approach has been gradually supplanted by a human-being-oriented approach ... it follows that in the area of armed conflict the distinction between inter-state wars and civil wars is losing its value as far as human beings are concerned... If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.<sup>33</sup>

Even though such a shift may be welcomed because of what it promises in terms of added protection of human rights, the issue that Chapter 2 raises is that regarding international prosecutions as the main cornerstone of the response to atrocities by the international community while systematically overlooking the socio-political issues at the heart of vicious internal conflicts is at best unhelpful. The incessant subordination of national concerns to international demands for justice in this regard presupposes the validity of replacing an effective rule of law nation state with a rule of international law that hardly exists and which cannot adequately respond to political violence in all its forms. This position is contrary to the traditional mandate of ICL as regarded by early scholarship in the field. For example, the leading international law jurist Quincy Wright notes:

The function of international criminal law...assumes that each sovereign state enforces within its jurisdiction criminal law adequate to ensure its security and welfare and protect its citizens and residents from common law crimes, leaving to international law the prevention and punishment of acts which threaten the international community as a whole...and acts which threaten the welfare of

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<sup>31</sup> Teitel (n 6).

<sup>32</sup> *Prosecutor v. Dusko Tadic*, Case No. (IT-94-1), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (October 2, 1995), ICTY Appeals Chamber, available at <http://www.icty.org/x/cases/tadic/acdec/en/51002.htm> (last visited July 29, 2014).

<sup>33</sup> *ibid* [97].



individuals likely to be neglected by some or all sovereign states or which are committed outside the jurisdiction of any of them.<sup>34</sup>

The role of the nation state as the main protector of individual rights is adequately acknowledged in the European Convention on Human Rights which states that the fundamental freedoms with which the convention is concerned are 'best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the human rights on which they depend'.<sup>35</sup> In the last section of Chapter 2, I provide an exploration of the relevance of democratic values and practices to the achievement of the goals of international criminal justice and argue that the international criminal law regime needs to be supplanted by a healthy concern for political transformations along democratic lines in post-conflict societies.

### **1.3.2. Exploring the ICC's Enforcement Dilemma (Chapter 3)**

If the thesis of Chapter 2 is accepted - namely that democratic institutions at the level of the nation state are indispensable to the achievement of the kind of justice that goes beyond retribution and aims to bring about fair and less oppressive political systems in countries ravaged by internal conflicts - , it then becomes imperative to understand the effect of the ICC on the internal political dynamics in post-conflict countries. This is not a question ordinarily tackled by traditional legal scholarship, but perhaps receiving some, albeit hardly formal, treatment in transitional justice literature.<sup>36</sup> Social science approaches, by contrast, are better equipped to address such an inquiry. Unlike doctrinal analysis - which is the traditional domain of legal scholarship and which is concerned with the application of the law as is - ; the domain naturally occupied by the social sciences is that of evaluation and contextualization. For this reason, this Thesis largely draws on political science and International Relations (IR) scholarship both in terms of defining the research problem and addressing it. Focused on an exploration of the enforcement problem of the ICC, scholars in these fields attempted to understand the potential of the current international criminal law regime within a broader research enterprise seeking to understand the function of international organizations.

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<sup>34</sup> Q. Wright, 'Scope of International Criminal Law: A Conceptual Framework, The', *Va. J. Int'l L.*, 15 (1974), 561, 562-563.

<sup>35</sup> The preamble to the European Convention on Human Rights.

<sup>36</sup> See, for example, Branch (n 30).

The discourse about the likely effectiveness of the ICC in light of its lack of enforcement power in legal and transitional justice literature seems to be polarized between two irreconcilable positions; on the one hand, international criminal justice hardliners are intent on seeing ‘justice be done though the heavens fall’, while detractors persistently question the validity of the incessant quest for accountability at the risk of prolonging the reign of perpetrators. This bifurcation partly informed the “Peace vs. Justice” debate which ensued. Divided between prioritizing justice and decrying the effects of international prosecutions on prospects of peace and post-conflict construction, both strands of idealism and realism have failed to provide any informed justification for their respective positions. Instead, their espousals about the implications of the Court seem to be based on articles of faith about the viability of a new global order.<sup>37</sup> As noted by Mégret, ‘[a]ll in all, the dense ideological environment in which the debates for and against international criminal justice have been carried out...has contributed to create some sort of normative swamp from which very few arguments emerge clear.’<sup>38</sup>

Mindful of the above debate and aware that insistence on accountability in light of the lack of effective enforcement powers may lead to the uninterrupted assumption of power by individuals wanted for the most heinous crimes against humanity and consequently the continuation of atrocities, a limited game-theoretic literature was developed by IR scholars to examine the self-enforcing potential of the ICC and explore mechanism designs for improving the work of the tribunal.<sup>39</sup> The suggestion emerging from this scholarship is that a median solution between the extremes of at-any-cost accountability and outright impunity may exist. The first theoretical model developed by Michael Gilligan and published in 2006 posits that the ICC may by its mere existence deter crimes (“Gilligan’s Model”).<sup>40</sup> Gilligan’s Model focuses on the effect of the ICC on solving a foreign state’s commitment problem when refusing asylum to a deposed dictator who committed atrocities. It suggests that in certain conditions the court may prove self-enforcing by inducing the self-surrender of indicted leaders faced with imminent regime change. What the prospect of a self-enforcing

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<sup>37</sup> F. Mégret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project', *Finnish Yearbook of International Law*, XII, (2001), 193–247.

<sup>38</sup> *Ibid* 199.

<sup>39</sup> M.J. Gilligan, 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime', *International Organization*, 60/04 (2006), 935-67; E.H. Ritter and S. Wolford, 'Negotiating Surrender: Criminal Courts, Pre-Arrest Bargains, and the Enforcement of Warrants', *Emory University*, (2010).

<sup>40</sup> Gilligan (n 39).

ICC offers is a solution to the ICC's problem of poor enforcement which may be less antithetical to the spirit of ICL. A finding that the ICC is (or could be made to be) self-enforcing will provide additional support to the claim that the court is effective in ending impunity for and preventing crimes of concern to the international community despite its lack of enforcement powers. Such a finding will also contribute to bridging the gap between the two opposing strands of realism and idealism towards a greater and more cohesive understanding of the needs of post-conflict societies.

The remainder of this Thesis builds on and contributes to this nascent game-theoretic literature by developing three theoretical models which suggest that the ICC could be both self-enforcing and relevant to questions of political transformations along democratic lines in post-conflict societies, provided prosecutorial discretion is used to enhance deterrence and improve the truth-finding function of the court. The first of these models appear in Chapter 3 which also defines the research problem and introduces the game theoretic literature on the topic. The Chapter rests on challenging the institutional assumptions underlying Gilligan's repeated game model by positing that because the ICC prosecutes opposition groups as well as leaders for the commission of atrocities, it is likely to encourage leader crimes and undermine its own self-enforcement potential.

However, the modelling and analysis carried out in this Thesis abstracts from the international relations framework in the setting of Gilligan's Model and reverts back to the original framework for the economic analysis of crime developed by Becker in 1968. Becker's formulation of the economics of crime is traditionally concerned with the question of deterrence and is frequently applied in the economic analysis of domestic criminal law to determine the most suitable law enforcement policy under conditions of limited resources. This theme continues in Chapters 4 and 5, which borrow from game-theoretic literature on anti-trust law enforcement and organized crime that take into consideration the consequences (costs and benefits) of criminal behaviour in organizational settings.

### **1.3.3. On the Methodology: The Use of Game-Theory in the Analysis of International Criminal Law (Chapters 3)**

The use of economic analysis in international law is limited and early scholarship focused on explaining broad theoretical topics such as the phenomenon of customary international law

and the drivers behind international cooperation.<sup>41</sup> Topics such as international trade law and international environmental law seem to be a natural fit for the methodological start point of treating states as natural economic maximizers in what can be termed an international market.<sup>42</sup> The nature of international legal instruments can be understood in this respect as enabling the reduction of externalities or the increase of efficiency of certain transactions through cooperation, coordination or institutionalization.<sup>43</sup> Indeed, drawing analogies between various aspects of international law with phenomena in the domestic sphere facilitated an active law and economics (L&E) analysis which drew on established topics from the economic analysis of municipal law. Examples of this include the application of contract theory to the analysis of treaties or the theory of the organization to understand international institutions.<sup>44</sup> However, certain spheres of international law, such as human rights and international humanitarian law, proved immune to an active economic analysis agenda. This is partly because international cooperation on these issues does not readily fit the classical model of mutual exchange of benefits and retaliation in case of default which is characteristic of international relations. It is perhaps a problematic notion that the government of the United Kingdom should care that gross violations of human rights systematically occur in Sudan and even more problematic to envision ways for it to retaliate against the government of Sudan if they indeed occurred. As a result, scholars shied away from the economic analysis of these topics and the limited efforts that emerged were confined to empirically testing the effect of international treaties on compliance with the norms of international law by individual states.

Be the above as it may, Dunoff and Trachtman suggest that economic analysis may be a natural place to start to address issues pertaining to the enforcement of the humanitarian law of internal conflicts.<sup>45</sup> They particularly note that price theory which assumes that individuals engage in a rational cost-benefit analysis may shed light on the question of the effect of the current regime and the sanctions it imposes on the incentives to commit gross

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<sup>41</sup> A Mitchell Polinsky and Steven Shavell, *Handbook of Law and Economics* (2: Access Online via Elsevier, 2007) ; Eric Posner and Jack L Goldsmith, 'The Limits of International Law', Vol. 199. (New York: Oxford University Press) (2005).

<sup>42</sup> J.L. Dunoff and J.P. Trachtman, 'Economic Analysis of International Law', *Yale J. Int'l L.*, 24/ 1, (1999).

<sup>43</sup> Ibid.

<sup>44</sup> Dunoff and Trachtman (n 42).

<sup>45</sup> J.L. Dunoff and J.P. Trachtman, 'The Law and Economics of Humanitarian Law Violations in Internal Conflict', *The American Journal of International Law*, 93/2 (1999), 394-409.

violations of human rights in this context.<sup>46</sup> This is not surprising for two reasons; (i) ICL is tantamount to the internationalization of municipal criminal law, a field highly receptive of an agenda of economic analysis; and (ii) the central issue of enforcement in ICL readily lends itself to Becker's cost-benefit framework which was developed in the particular context of criminal law enforcement to test the effect of legal sanctions on the incentives of individuals to commit crime. It is in this spirit that I undertake the game theoretic analysis in Chapters 3-5 of this Thesis. The models developed in these chapters follow Becker's approach in their quest to determine the effect of the ICC on the incentives of leaders to commit crimes falling under the Court's jurisdiction, but they do so by using the specific methodology of game theory.

Using the tools of game theory to formulate propositions about the possible effects of ICC indictments lends a much needed formalization to existing arguments in the field.<sup>47</sup> As limited as the game-theoretic analysis of ICC warrant enforcement remains, the extant literature has already brought to the lime light important issues often left unexamined by traditional doctrinal approaches. The underlying concept in this approach is Becker's cost-benefit calculation.<sup>48</sup> This idea, which undergirds the economic analysis of law or L&E, allows one to judge the effectiveness of a rule or law by looking at the way it affects individuals' incentives to commit a crime.<sup>49</sup> What game theory provides, in addition, is the means to examine the effect multiple decision makers may have on each other in a given regulatory environment. Law enforcement in general and the context of international criminal justice in particular, often involve the action of various agents and as such make a ripe field for the application of game theory. Game theory has been used to determine the efficiency of law enforcement efforts in anti-trust law, organized crime and corruption.<sup>50</sup> It was also extensively employed in broad theoretical analyses of international law.<sup>51</sup>

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<sup>46</sup> *ibid.*

<sup>47</sup> Michael J Gilligan and Leslie Johns, 'Formal Models of International Institutions', *Annual Review of Political Science*, 15 (2012), 221-43.

<sup>48</sup> S. Becker Gary, 'Crime and Punishment: An Economic Approach', *Journal of Political Economy*, 76/2 (1968), 169-217.

<sup>49</sup> K. Basu, *Beyond the Invisible Hand: Groundwork for a New Economics* (Princeton Univ Pr, 2010) 57.

<sup>50</sup> Acconcia, A., Immordino, G., Piccolo, S., and Rey, P., 'Accomplice-Witness and Organized Crime: Theory and Evidence from Italy', 2 (March 2011) (on file with Cultura dell' integrità nella Pubblica Amministrazione), available at [http://integrita.sspa.it/wpcontent/uploads/2011/04/sspa\\_paper\\_n4\\_080311\\_Acconcia.pdf](http://integrita.sspa.it/wpcontent/uploads/2011/04/sspa_paper_n4_080311_Acconcia.pdf).

<sup>51</sup> Gilligan and Jones (n 47).

A strong assumption in game theory is that each actor behaves rationally to maximize his benefits relative to costs and that he expects other actors to do the same under specific conditions and in light of the information the actors have.<sup>52</sup> Like other rational choice models, game theoretic analysis of ICL may yield inaccurate predictions in so far as it may not accurately capture actual (as opposed to hypothesised) decision-making in the commission of crimes.<sup>53</sup> Jolls et al. maintain that the behaviour of criminals, while largely corresponding to the tenets of rationality, involves “hyperbolic discounting” making immediate rewards disproportionately attractive.<sup>54</sup> In addition to bounded willpower, criminals also exercise bounded rationality in that they assess uncertain events with reference to their perception of the likelihood that the event will occur as opposed to the actual probability of its occurrence.<sup>55</sup> However, the suggestion in the field of Behavioural Law & Economics is that these departures are systemic and can therefore be taken into consideration when assessing the predictions of a certain model.<sup>56</sup>

Notwithstanding the above, rational choice theory remains a mainstream criminological perspective that is both widely used and valued.<sup>57</sup> This theory also informs the deterrence hypothesis central to both municipal criminal law and ICL.<sup>58</sup> Mullins and Rothe state that ‘the assumptions of human nature that undergird the theory of deterrence are grounded in the belief that humans are economically rational actors.’<sup>59</sup> As tempting as it is to classify the kind of gross violations of human rights and humanitarian law that occur in the context of international crimes as pathological, Fattah argues that empirical observations of Norwegian concentration camp guards during the Nazi occupation of Norway illustrate that ‘...anyone placed in certain situations, under certain conditions, subjected to certain pressures and

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<sup>52</sup> D.G. Baird, R.H. Gertner, and R.C. Picker, *Game Theory and the Law* (Harvard University Press, 1998).

<sup>53</sup> Sunstein, ‘Introduction’ in C.R. Sunstein, *Behavioural Law and Economics* (Cambridge University Press, 2000).

<sup>54</sup> Jolls, Sunstein and Thaler, ‘A Behavioural Approach to Law and Economics’ in Sunstein (n 53).

<sup>55</sup> Ibid.

<sup>56</sup> Jolls et al (n 54).

<sup>57</sup> Gibbons, ‘Introductory Chapter: Criminology, Criminologists and the Criminological Theory’ in S. Simpson, *Of Crime and Criminality: The Use of Theory in Everyday Life* (Sage Publications, Incorporated, 2000).

<sup>58</sup> See A.P. Simester and A. Von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Hart, 2011); C.W. Mullins and D.L. Rothe, ‘The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment’, *International Criminal Law Review*, 10/5 (2010), 771-86.

<sup>59</sup> See Mullins and Rothe (n 58) 773.

constraints, is capable of committing acts of extreme atrocity, cupidity and dishonesty.’<sup>60</sup> In addition, an appeal to the irrationality or abnormality of dictators and those that habitually violate the humanitarian norms of ICL automatically disqualifies international criminal justice as anything other than retributive.

In addition to the limitations posed by the rationality assumption which are duly acknowledged, it is also acknowledged that the game theoretic analysis advanced in this Thesis may abstract from important issues because of the over-simplification required to generate testable predictions. However, the analysis remains valuable because of the counterintuitive insights into the possible effects of international criminal prosecutions as well as the formalization it adds to arguments in the field.<sup>61</sup>

### **1.3.4. Developing Three Game-theoretic Models on the ICC (Chapters 3,4 and 5)**

In Chapter 3, I develop and analyse a one-shot game-theoretic model of the interaction between a leader and an opposition group in light of the existence of the ICC. On the one hand, the analysis of this model indicates that the Court could inhibit certain opposition groups from rebelling, thereby positively affecting the survival rates of leaders who commit atrocities. However, the model also suggests that the Court may have a deterrent effect on the commission of atrocities by governments against their own people if indictments can be used to enable the process of peaceful political transformation.

It is without doubt challenging to espouse the proposition that a judicial entity such as the ICC, which regards itself as being fundamentally apolitical, should be concerned with enabling revolution when issuing indictments. However, it has been noted that the issuance of an arrest warrant by the court against a sitting head of state ‘inevitably results, at least de facto, in a change in head of state.’<sup>62</sup> In their article “Doing Justice to the Political”, Nouwen and Werner argue that adjudicating international crimes is inherently political and as such renders the ICC a weapon in on-going political struggles.<sup>63</sup> They use the examples of the

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<sup>60</sup> E.A. Fattah, 'The Rational Choice/Opportunity Perspectives as a Vehicle for Integrating Criminological and Victimological Theories', *Routine activity and rational choice*, 5 (1993), 225, 229.

<sup>61</sup> For a general discussion of the limitations and advantages of using Law and Economics analysis of international law, see Dunoff and Trachtman (n 42).

<sup>62</sup> S.M.H. Nouwen and W.G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21/4 (2010), 941-65, 962.

<sup>63</sup> *ibid.*

situations in Uganda and in Sudan to demonstrate how the Government in the first instance and the Rebels in the second used the Court to legitimize their positions against their respective enemies (the Rebels in the first instance and the Government in the second). Given that the ICC is susceptible to use in this way, Nouwen and Werner conclude by inviting international lawyers to pay attention to ‘what sort of politics is enacted in concrete cases’.<sup>64</sup> While the intuition behind this Thesis is an understanding that enabling well-meaning political transformations in post-conflict societies is the sort of politics that is required to advance the international criminal justice system beyond mere retribution, the work undertaken herein stops short of suggesting that such should be the entire role of the ICC. Even though the theoretical models advanced put the probability of regime change at the heart of the enquiry on the effectiveness of the Court (following Gilligan), they seek to make pronouncements about the ability of the institution to deter the commission of atrocities by leaders of states as well as its potential to advance credible accounts of the commission of atrocities when they occur. In this respect, the models pay attention to doing good politics while also maintaining a healthy concern for the effective administration of justice as traditionally understood.

While one can explore other aspects of the effectiveness of the international criminal law regime such as state compliance with the norms of international humanitarian law, an emphasis on deterrence is warranted for two reasons. Firstly, the deterrence hypothesis is widely accepted and invoked as the main justification for the development and proliferation of international criminal institutions. Secondly, a focus on deterrence as opposed to compliance reinforces the nature of ICL as more akin to criminal law than human rights law. Unlike human rights law which is concerned with the state as a unit of analysis and with obliging it to redress its wrong doing, ICL is primarily concerned with the imposition of individual criminal responsibility for the commission of gross violations of human rights. It is therefore more fitting to measure the effectiveness of this body of law by reference to its ability to deter future atrocities.

The question of using indictments by the ICC to enable well-meaning political transformations in post-conflict societies was tackled in this Thesis by positing that governments implicated in the commission of atrocities display characteristics of “the organization”. This allows for borrowing from law enforcement efforts against entities with similar characteristics. Chapters 4 and 5 borrow from the literature on anti-trust law

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<sup>64</sup> Nouwen and Werner (n 62) 964.



enforcement and organized crime to suggest that the use of asymmetric prosecutions and leniency programs targeted towards lower-level officials in a government outfit implicated in crimes may be the way forward.<sup>65</sup> The original game-theoretic model relied upon in the development of the two models presented in these chapters was put forward by Acconcia et al and depicts the interaction of a criminal organization consisting of a criminal boss and his subordinate with a legislator who is empowered to introduce a leniency program (the “Acconcia Model”).<sup>66</sup> Their model is built on insight from a model developed by Motta and Polo that explores the effect of leniency programs on the behaviour of members of a cartel by studying the interaction between a group of firms deciding on strategies of collusion and reporting to the Anti-trust law authority.<sup>67</sup> The Acconcia Model suggests that the use of leniency programs targeted at low-level perpetrators creates conflict in a criminal organization by encouraging agents to report on the leader of the organization to benefit from reductions in sanctions promised in exchange. This is advantageous from a law enforcement perspective as it increases the probability of punishment suffered by the leader of the organization. In this respect, they conclude that while leniency may result in lowering the cost of crimes for agents, it can also result in deterrence for the leader whose return from crime may be sufficiently negatively affected to preclude him from commissioning the crimes in the first place. An important feature of the Acconcia Model is the integration of the concern that whistleblowing subordinates may be subject to retaliation punishment by the leaders they report. This increases the cost of reporting and necessitates credible promises of sufficient reductions in sanctions by law enforcement authorities that compensate for this risk in order to induce subordinates to self-report. The Acconcia Model was further developed by Piccolo and Immordino who assumed an asymmetry of information between the subordinate and the prosecutor in the original setup.<sup>68</sup> I modify the latter model to gauge the effect of offering leniency to low-level perpetrators in exchange for information

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<sup>65</sup> This is not the first attempt to draw together these seemingly divergent areas of law; Christopher Harding’s exploration of the nature of organizational and individual responsibility was inspired by the affinity between the violation of anti-trust law by cartels, the activities of organized crime syndicates and state criminality (Christopher Harding, ‘Criminal Enterprise: Individuals’, *Organisations and Criminal Responsibility*, Cullompton, UK, (2007).

<sup>66</sup> Acconcia et al (n 50).

<sup>67</sup> Massimo Motta and Michele Polo, ‘Leniency Programs and Cartel Prosecution’, *International Journal of Industrial Organization*, 21/3 (2003), 347-79.

<sup>68</sup> Salvatore Piccolo and Giovanni Immordino, ‘Optimal Accomplice-Witnesses Regulation under Asymmetric Information’, (Centre for Studies in Economics and Finance (CSEF), University of Naples, Italy, 2012).

regarding the culpability of a leader in a government structure implicated in the commission of atrocities.

The contributions in Chapter 4 are twofold: (i) the chapter reviews the practice of international criminal tribunals to argue that the use of leniency programs is justified and practiced in the context of international criminal prosecutions but under the guise of plea-bargaining, and (ii) the chapter introduces a principal-agent model that departs from the literature in positing that retaliation by a leader of a criminal organization (or government) against whistleblowing subordinates is not costless and integrates the idea that the leader may commit assessment errors if the leniency program is confidential. This may, in turn, enhance the effectiveness of law enforcement efforts. The analysis shows that one of the advantages of leniency programs that reward reporting by minor perpetrators is the destabilization of the structures that allow the commission of atrocities. This occurs because a leader is often forced to retaliate to preserve his reputation for toughness. Such retaliations, naturally, impose additional costs on the principal decision maker.

One of the problems with the current effort to enforce international criminal law by the ICC as identified in Chapter 4 is the Court's lack of resources to properly investigate the crimes within its jurisdiction. The chapter reviews some examples of the evidentiary weaknesses plaguing the work of international criminal institutions including the fledgling ICC. These shortcomings were addressed in the work of other tribunals partly through the institutionalization of plea-bargaining. The suggestion in Chapter 4 is that a well-designed leniency program may ensure the availability of truthful accounts of atrocities that may affect the survival rates of regimes implicated in the commission of atrocities. Chapter 5 extends this analysis further by positing that a leniency program may also affect the incentives of subordinates to actually gather hard evidence of the commission of atrocities. The simple decision model presented in Chapter 5 is a modification on the model set out in Chapter 4 which is designed to isolate the effect of leniency programs on the decision of subordinates to engage in evidence gathering activities at the risk of detection and retaliation by the leader. The model introduced in Chapter 5 builds on a very limited literature in anti-trust law enforcement which seeks to explain the phenomenon of firms keeping hard evidence of collusion at the risk of detection by a regulatory authority.

Even though each of the substantive chapters of the Thesis offers its own summative conclusion as well as provides a section on policy implications following the presentation of

the theoretical model, Chapter 6 offers a brief concluding synthesis of the overall arguments in the Thesis.

## CHAPTER 2: The Role of Democracy in International Criminal Justice

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### 2.1. Introduction

The international criminal justice regime is beset by serious deficiencies which combine to preclude it from delivering on its promises of a better World.<sup>1</sup> Limited in scope, enforced with minimal consistency and devoid of consideration for thicker political constructs, the application of International Criminal Law (ICL) to internal conflicts tends to generate conditions that are not less conducive to future political violence despite claims to the contrary. This dissonance between aspirations and achievements is partly caused by a normative blindness to the *raison d'être* for the evidently entrenched commitment to the prosecution of atrocity crimes.<sup>2</sup>

In addition to the theoretical ambiguity beleaguering the international criminal justice project, the political nature of internal conflicts poses a serious challenge to the viability of criminal prosecutions as a cornerstone of the international response to atrocities. The tendency to confront inherently political issues with the apolitical neutrality religiously asserted by International Criminal Tribunals (ICTs) complicates the quest for more just and more stable societies by relegating important structural issues to obscurity. In addition, the implementation of the law by remote international institutions applying rigid categories of guilt and innocence with little regard to the views of the affected populations divests post conflict societies from the opportunity to come genuinely to terms with their past and to inform and shape their future. Even if such curtailment of local aspirations does not qualify for much concern given the Universalist overtones of the international criminal justice project, the incessant subordination of the national to the international often results in undermining the very goals of ICL.

The emphatic assertion of ICL's contribution to rebuilding the rule of law in post-conflict societies overlooks the fundamental conditions of representation and consent in the making of laws necessary for compliance and internalization. Despite an obvious emphasis on formal characteristics such as the preservation of due process rights and the legality of

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<sup>1</sup> M. Damaska, 'The International Criminal Court between Aspiration and Achievement', *UCLA J. Int'l L. & For. Aff.*, 14 (2009), 19-235.

<sup>2</sup> P. De Greiff, 'Transitional Justice, Security, and Development', *World Bank Development Report* (29 October 2010).

criminalization, little attention is paid to the question “Whose law is it?” In seeking to replace the need for an effective Rule-of-Law state with a transcendental rule of international criminal law, the regime creates dependency in populations affected by atrocities that it is ill-equipped to satisfy. Even the modest claim of a demonstrative effect of international criminal prosecutions is hardly tenable in light of the multiple limitations afflicting the regime. Yet, instead of actively encouraging the development of domestic legal systems capable of shouldering the burden, international criminal institutions continue to undermine national courts by wresting away jurisdiction over historical cases the adjudication of which is essential for the resolution of important national questions.

The international criminal justice regime presupposes the centrality of criminal prosecutions to the project of achieving a more stable, safer and less oppressive post-conflict society. However, an inherent bias against the nation state<sup>3</sup> and a general disregard for the role of the affected populations in resolving and overcoming conflicts renders international prosecutions an exercise in futility. On the other hand, the political transformation of post-conflict societies along more democratic lines that guarantee future representation and accountability is more likely to foster political stability, peace and greater respect for human rights. Therefore, while the pursuit of democratization is ordinarily viewed as parallel to the task of prosecuting atrocities yet wholly unconnected,<sup>4</sup> the central argument in this chapter is that enabling genuinely organic democratic transitions is the best means of achieving the critical objectives of ICL. What distinguishes this effort from previous efforts at theorizing a role for democracy in international criminal justice<sup>5</sup> is that instead of extending the remit of ICL beyond its reasonable bounds to include democratization as a goal, it reverts back to the traditional principles of ensuring the international peace and stability and promoting respect for fundamental human rights and argues that they are strictly speaking the critical goals of

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<sup>3</sup> See, Michael A Newton, 'Complementarity Conundrum: Are We Watching Evolution or Evisceration, The', *Santa Clara J. Int'l L.*, 8 (2010), 115 (arguing that despite the apparent deference to national sovereignty afforded by the principle of complementarity in the Rome Statute, the practice of the ICC so far has vacated the concept of its intended purpose). See also, J.E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', *Yale J. Int'l L.*, 24 (1999), 365-613, 476 (arguing that complementarity was reluctantly adopted as the basis for exercising jurisdiction by the ICC as a concession to and in order to maintain the appearance of respect for state sovereignty, while not intended to shift the bias against the nation state).

<sup>4</sup> See for example, W.A. Schabas, 'Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems', (7: Springer, 1996), 523-60 (arguing that the goal of rebuilding the Rwandan judicial system should be separated from the goal of prosecuting atrocities).

<sup>5</sup> See De Greiff (n 2).

this body of law. In this respect, democratization is an indispensable implement in the achievement of these goals, but it is not itself a goal of ICL.

This chapter is divided into three sections. In Section 2.2, I develop the argument regarding the two critical objectives of ICL and demonstrate that the ever evolving policy benefits of international prosecutions can and should be understood as contributing to the achievement of international peace and security and respect for fundamental human rights. In developing the main argument, I adopt Broomhall's framework for classifying the core crimes as a cohesive unit of ICL.<sup>6</sup> Four examples are used in Section 2.3 to demonstrate the inadequacy of international criminal prosecutions to respond to inherently complex internal conflicts in isolation. This section also seeks to highlight the danger in undermining local efforts and institutions given the limitations of ICL. Section 2.4 explores the relevance of democratic values and practices and their ability to contribute to the achievement of the critical goals of international criminal justice. The argument that this section seeks to advance is that genuinely democratic institutions in which norms of accountability and representation are routinely realized are better placed than international criminal prosecutions to ensure against future political violence and repression.

This chapter aims to lay the groundwork for gauging the effectiveness of the ICC by identifying the critical goals of the international criminal justice regime. The chapter questions the ability of international criminal justice institutions such as the ICC to contribute meaningfully to the goals of securing international peace and stability and the promotion of fundamental human rights while wilfully ignoring the question of essential and constitutive political transformation in countries ravaged by internal conflicts. The primary concern here is to extend the discussion of international criminal justice beyond retributive or corrective justice to include '...justice as potentially being manifested through bringing about a more fair, less oppressive and less violent social and political order', as advocated by Branch.<sup>7</sup> In the context of internal conflicts, this requires an honest assessment of the potential of international criminal prosecutions to bring about peace and stability and respect for human rights in the absence of considerations for internal political dynamics of representation and accountability. The argument advanced is simply that international criminal institutions should endeavour to enable genuinely organic democratic transitions in post-conflict

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<sup>6</sup> B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, USA, 2003) 19-24 and 41-51.

<sup>7</sup>A. Branch, 'Uganda's Civil War and the Politics of Icc Intervention', *Ethics & international affairs*, 21/2 (2007), 179-98, 193.

societies in order to fulfil their mandate of achieving international peace and stability and respect for fundamental human rights. In suggesting that democracy has a role to play in the achievement of the goals of ICL, this chapter seeks to provide *a priori* justification for integrating concerns for the effects of the ICC on internal political dynamics in these countries; this being the unifying theme that runs throughout the remainder of this Thesis. The chapter is also intended to provide a rationale for the adoption of regime change as a focal point for the analysis in Chapter 3 as well as for the espousal of a number of mechanism designs in Chapters 4 and 5 and which are aimed at enhancing the effectiveness of the Court.

## ***2.2. Re-conceptualising the Role of International Criminal Justice***

Even though the sub-discipline of ICL concerned with prosecuting the core crimes<sup>8</sup> and its material jurisprudence continue to develop at a remarkable rate, proponents of international criminal justice are still struggling with delineating a definitive role for international criminal prosecutions to play in transitions from conflict. The benefits claimed for these prosecutions range from generic consequences, such as individualizing guilt and providing justice for the victims, to more specific consequences examples of which include deterrence, respect for the rule of law, reconciliation and developing a historical record.<sup>9</sup> The list is incessantly growing and now includes conflict resolution,<sup>10</sup> peace-building<sup>11</sup> and the promotion of democracy.<sup>12</sup> Vinjamuri criticizes the consequentialist logic in the accountability literature, which she sees as a new and undesirable feature.<sup>13</sup> She concludes that this orientation towards end-results can be partly explained in terms of the substitution of international justice for international intervention and the pressure on the International Criminal Court (ICC) to intercede in ongoing conflicts.<sup>14</sup> This state of affairs, she argues, requires accountability advocacy to identify and highlight plausible outcomes of prosecutions which

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<sup>8</sup> The core crimes within the jurisdiction of the court are crimes against humanity, war crimes, genocide and aggression.

<sup>9</sup> M.P. Scharf, 'Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal, The', *DePaul L. Rev.*, 49 (1999), 925.

<sup>10</sup> P. Engstrom, 'Transitional Justice and Ongoing Conflict' in Chandra Lekha Sriram et al. (eds), *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants* (Routledge, 2012).

<sup>11</sup> R. Nagy, 'Transitional Justice as Global Project: Critical Reflections', *Third World Quarterly*, 29/2 (2008), 275-89.

<sup>12</sup> L. Vinjamuri, 'Deterrence, Democracy, and the Pursuit of International Justice', *Ethics & international affairs*, 24/2 (2010), 191-211.

<sup>13</sup> *ibid.*

<sup>14</sup> Vinjamuri (n 12).

may coincide with the policy objectives of important sponsors.<sup>15</sup> Notwithstanding the lucidity of this argument, this section locates the consequentialist logic in international criminal justice scholarship in the very nature of these crimes. The reason for this is that initial theorizing about the function of international criminal justice was informed by reference to the two fundamental principles underlying the imposition of individual accountability for core crimes; namely: preserving international peace and stability and ensuring the protection of inalienable rights. Reverting back to these basic principles may help to understand the divergent aspirations of the international criminal justice project and should continue to guide further efforts to understand the proper role of prosecutions in the context of transitions from conflict. In Sections 2.1-2.4, I provide a justification for the re-conceptualization (or perhaps re-re-conceptualization) of the aims of international criminal justice. The arguments developed in the subsequent Sections 3 and 4 are synthesized with reference to this framework.

### **2.2.1. Reconciling Individual Accountability with the Spirit of International Law**

The leading international law jurist Quincy Wright, writing prior to 1970, explained the function of ICL as the punishment and prevention of acts violating a fundamental interest protected by international law and falling beyond the traditional criminal jurisdiction of a nation state.<sup>16</sup> Wright explains that it is appropriate for ICL to pierce the veil of the nation state to impose direct liability on individuals in the event of violations that threaten the security of another state or jeopardize a neglected aspect of the welfare of individuals.<sup>17</sup> Bassiouni, an ardent advocate of international criminal justice, described the field in 1974 as:

... that branch of the international legal system which represents one of the strategies employed to achieve, in respect to certain world social interests, this greater degree of compliance and conformity with the goals of the world community of prevention, preservation and rehabilitation.<sup>18</sup>

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<sup>15</sup> Ibid.

<sup>16</sup> Q. Wright, 'Scope of International Criminal Law: A Conceptual Framework, The', *Va. J. Int'l L.*, 15 (1974), 561, 562.

<sup>17</sup> Ibid 562-563.

<sup>18</sup> Quoted in R.A. Friedlander, 'Foundations of International Criminal Law: A Present-Day Inquiry, The', *Case W. Res. J. Int'l L.*, 15 (1983), 13, 14.



Such conscientious reference to the interests and goals of the international community is a reflection of the pressing need to locate the concept of individual accountability within the general body of international law. This is because individual accountability imposes criminal sanctions on individuals for the violation of certain international norms, and as such, is at odds with the ordinary domain of international law which seeks to regulate inter-state affairs.

The centrality of this overarching emphasis on exacting individual responsibility is a fundamental feature of ICL and indeed secures it as an autonomous field of International Public Law. However, and as Broomhall astutely notes, while individual accountability may be a unifying theme within ICL, it neither explains the cohesiveness of the core crimes as a distinct unit, nor does it justify the position of this doctrine at the heart of ICL.<sup>19</sup> Indeed, even though the crimes proscribed by international law run in the twenties, the jurisdiction of the ICC is confined to war crimes, crimes against humanity, genocide and (recently) aggression, which are described as the ‘...most serious crimes of concern to the international community’.<sup>20</sup> Broomhall makes a distinction between four classes of international crimes of which the core Nuremburg crimes form but one category.<sup>21</sup> He maintains that this category of crimes is a cohesive whole by virtue of its origin in (i) concerns for international peace and security, and (ii) the fact that incidents of their commission ‘shock the collective conscience of humanity’, thereby justifying a *jus cogens*<sup>22</sup> status in international law.<sup>23</sup> The concurrence of these two elements, he argues, justifies the imposition of individual responsibility and dictates redress for these crimes regardless of the otherwise necessary mediation of a national legal system. The coincidence of these concerns, in addition, renders the preoccupation with the adjudication of the core crimes reasonable.

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<sup>19</sup> Broomhall (n 6) 19-23.

<sup>20</sup> The Rome Statute, at the Preamble.

<sup>21</sup> Broomhall (n 6) 9-24.

<sup>22</sup> See M.C. Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"', *Law and Contemporary Problems*, (1996a), 63-74, 63-67 (noting that the absence of a formal definition of *Jus cogens* crimes in international criminal law scholarship, but goes on to propose that *Jus cogens* is the status which certain international crimes reach and which consequently gives rise to obligations *erga omnes* (i.e. required of all states regardless of consent) to prosecute them or extradite the individuals suspected of their commission. And explaining that the prohibition of *jus cogens* crimes is pre-emptory and non-derogable in the sense that it trumps any other obligation owed under international law).

<sup>23</sup> Broomhall (n 6).

Broomhall's jurisprudential framework<sup>24</sup> suggests that the final goals of international criminal justice should be regarded as (i) ensuring international peace and stability, and (ii) ensuring the protection of fundamental human rights. Indeed, the notion of deterrence at the centre of the international criminal justice discourse can be understood as a means of ensuring both peace and stability and a greater protection for human rights.<sup>25</sup> In addition, even though ICL has been greatly influenced by the rapid development in Human Rights Law post WWII, a Universalist paradigm inherent to this body of law underlies the shift towards liberalist human rights agenda concerned primarily with the protection of individual rights.<sup>26</sup> Bassiouni enumerates four assumed benefits of transcending territory-based jurisdiction when it comes to the prosecution of *jus cogens* crimes; deterrence, prevention, ensuring World order and justice.<sup>27</sup> Even though Bassioun's formulation betrays a certain disregard for the overlap between different objectives, most articulations of the aims of international criminal justice tend to mirror or contribute to these goals.<sup>28</sup> The following Sections 2.2-2.4 elucidate this argument further and demonstrate how the policy objectives of international criminal prosecutions, as varied and ever evolving as they may be, tend towards the realization of the two critical goals of ensuring peace and stability and promoting greater protection for fundamental human rights.

### 2.2.2. Deterring Violations to Achieve Peace

Episodes of the establishment of international criminal tribunals (ICTs), culminating in the creation of the International Criminal Court (ICC), have often been linked with concerns for peace and stability and motivated with the need to deter and prevent further violence. The preamble of the Rome Statute that established the ICC defines the crimes subject to the jurisdiction of the court as crimes that '...threaten the peace, security and wellbeing of the World'.<sup>29</sup> The two ad-hoc international criminal tribunals set up as a response to the massacres in the Former Yugoslavia and in Rwanda (the International Criminal Tribunal for

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<sup>24</sup> Ibid.

<sup>25</sup> R.G. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', Cornell Int'l LJ, 35 (2001), 355.

<sup>26</sup> Ibid. This is what Teitel terms the evolution towards the new paradigm of "Humanity's Law" in Ruti G Teitel, *Humanity's Law* (Oxford University Press, 2011). See for example the discussion in 9-10.

<sup>27</sup> Bassiouni, 'The History of Universal Jurisdiction and its Place in International Law', in Decaux, *Stephen Macedo (Dir.). Universal Jurisdiction, National Courts and the Prosecution of Serious Crimes under International Law* 39-63.

<sup>28</sup> See for example Scharf (n 9) (settling on accountability, truth-telling, deterrence and reconciliation), Diane Marie Amann, 'Assessing International Criminal Adjudication of Human Rights Atrocities', *Third World Legal Stud.*, (2000), 169 (settling on retribution, deterrence, redress and pacification).

<sup>29</sup> The Rome Statute, at the Preamble.

the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) respectively) were both created by the United Nations Security Council (UNSC) pursuant to its powers under Chapter VII of the UN Charter.<sup>30</sup> The UNSC resolutions giving rise to these courts, therefore, explicitly invoked the threat to international peace and security as the basis for their creation.<sup>31</sup> Similarly, prosecutions of high-level German officials at Nuremburg were meant to act as a deterrent from the adoption of state policies likely to contravene international law and destabilize international peace.<sup>32</sup> Hence, and despite being the birth place for the assiduous Human Rights movement that followed, the Nuremburg trials had very little to do with the protection of individual rights and were limited in their adjudication of violations against German Jews. Instead, the focal point at Nuremburg was the crime of waging an aggressive war perceived as particularly detrimental to World Peace.<sup>33</sup>

Bassiouni explains that '[t]he relevance of prosecution and other accountability measures to the pursuit of peace is that through their effective application they serve as deterrence, and thus prevent future victimization.'<sup>34</sup> The prosecution of state agents at Nuremburg was intended to act as a disincentive for high ranking officials from promoting policies that are contrary to international law and which might lead in the future to violent inter-state conflicts and atrocities.<sup>35</sup> Broomhall states that '[a]t Nuremburg, the justification for so invading the normally circumscribed sphere of the individual depended greatly on the status of individuals involved ... and on the link between the core crimes and the fundamental interests of the international community.'<sup>36</sup> He argues that the suspension of sovereign immunity, confirmation of command responsibility and the repudiation of the defence of superior orders were essential to control state behaviour.<sup>37</sup> Such measures were arguably, therefore, intended to provide high-level German officials with sufficient incentives to follow international law norms in the future.

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<sup>30</sup> See UNSC Res 827 (25 May 1993) UN Doc. S/RES/827 (1993) (establishing the ICTY) and UNSC Res 955 (8 November 1994) UN Doc. S/RES/955 (1994) (establishing the ICTR).

<sup>31</sup> Ibid, at the preamble to each.

<sup>32</sup> Broomhall (n 6).

<sup>33</sup> P.W. Kahn, 'From Nuremberg to the Hague: The United States Position in *Nicaragua V. United States* and the Development of International Law', *Yale J. Int'l L.*, 12 (1987), 1.

<sup>34</sup> M.C. Bassiouni, 'Searching for Peace and Achieving Justice: The Need for Accountability', *Law and Contemporary Problems*, 59/4 (1996b), 9-28, 18

<sup>35</sup> Broomhall (n 6) 45.

<sup>36</sup> *ibid*

<sup>37</sup> Broomhall (n 6) 21.

The deterrent effect attributed to international criminal prosecutions, while essentially reflecting one of the most fundamental features in domestic criminal law, has in fact sufficient grounding in the conventional concerns of international law. It simply translates the position that violations of international law are carried out by individuals acting as state agents and as such should be addressed through individual responsibility to ensure that those in power have the right incentives to promote the right policies vis-à-vis the international community. This elite-focused deterrent effect is prevalent in the literature<sup>38</sup> and reflects for example the conceptualization of the function of international criminal prosecutions as a preventative strategy<sup>39</sup> as well as betrays a perception of the issue as state-related despite the individualist rhetoric.<sup>40</sup> Accordingly, it appears that even before the adoption of an expansive role for international criminal tribunals that includes conflict resolution and peace-building,<sup>41</sup> the traditional mantras of deterrence, prevention and accountability were in fact indirectly related to the international community's interest in peace and stability from Nuremburg to Rwanda. Similarly, guided by the intuition that sustainable peace requires more than the incapacitation of a few misguided leaders, promoting reconciliation between parties to a conflict has become a corner-stone of international criminal justice.<sup>42</sup>

### 2.2.3. Preserving the Values of the International Community

In addition to maintaining international peace and stability, international prosecutions of the core crimes are justified on the basis that such crimes 'shock the collective conscience of humanity' and violate common fundamental values that are universally held. Consequently, the prohibition of these crimes is regarded as a non-derogable international norm or *jus cogens* in international law. This classification of crimes has traditionally given rise to universal jurisdiction; which operates - in this context- on the assumption that the violation of core values shared by the international community as a whole warrants overriding the usual limitations in the exercise of coercive powers.<sup>43</sup> Broomhall argues that despite an indirect link to international peace and security, the commission of some *jus cogens* crimes

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<sup>38</sup> Nagy (n 12)

<sup>39</sup> See P. Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *The American Journal of International Law*, 95/1 (2001), 7-31.

<sup>40</sup> Alvarez (n 3).

<sup>41</sup> See Engstrom (n 10).

<sup>42</sup> See Bassiouni (n 34).

<sup>43</sup> Bassiouni (n 27).

such as genocide and crimes against humanity acquires a distinctive value reflecting universal norms when it is no longer required to occur in the context of armed conflict.<sup>44</sup>

Even though some scholars attribute the Universalist overtones of international criminal justice to a rapid development of Human Rights post Nuremburg,<sup>45</sup> others locate a budding concern for the preservation of human dignity in the actions of the 'international community' both prior to and at the time of the institution of the International Military Tribunal (IMT) after WWII.<sup>46</sup> The criminalization of slavery, for example, predated the Human Rights movement and was justified on the basis of a general abhorrence of the practice in the 'international community'. Such criminalization was clearly aimed at the 'preservation of human dignity' and had no additional functional advantages.<sup>47</sup> Ratner et al infer a separate human rights foundation for the criminalization of the core crimes from two main events surrounding the Nuremburg trials.<sup>48</sup> First, Nuremburg ushered in a new era of delimiting the exercise of state sovereignty by determining that a government's treatment of its own citizens may be subject to international oversight.<sup>49</sup> Second, the development of the law on genocide and crimes against humanity towards greater freedom from a linkage to war indicated a general acceptance of a duty to adjudicate gross human rights violations regardless of their effect on inter-state relations.<sup>50</sup>

Together with the exponential development in International Human Rights Law post Nuremburg, this Universalist paradigm paved the way for the current shift in ICL away from the traditional state-centric role of ensuring international peace and stability towards the adoption of a liberalist human rights agenda concerned with the enforcement and protection of individual rights.<sup>51</sup> In this new expansive role, ICL no longer aims simply at regulating the behaviour of states vis-à-vis the international community, but is increasingly concerned with the protection of individuals from their own states. Teitel comments that the international

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<sup>44</sup> Broomhall (n 6) 49.

<sup>45</sup> Teitel (n 25).

<sup>46</sup> S.R. Ratner, C.U.N.A. Jason S., and J. Bischoff, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford University Press, USA, 2009).

<sup>47</sup> *ibid* 115.

<sup>48</sup> Ratner et al (n 46).

<sup>49</sup> *ibid* 7.

<sup>50</sup> Ratner et al (n 46) 7.

<sup>51</sup> Teitel (n 25); D. Robinson, 'The Identity Crisis of International Criminal Law', *Leiden Journal of International Law*, 21/925 (2008) ; S.R. Ratner, 'New Democracies, Old Atrocities: An Inquiry in International Law', *Geo. Lj*, 87 (1998), 707.

criminal regime post Nuremburg became a system of judicially enforced rights through internationalized processes.<sup>52</sup>

Orentlicher argues that international criminal prosecutions must be endorsed primarily on the justification that they make for ‘...the most effective insurance against future repression’.<sup>53</sup> In this context, she regards deterrence not as a self-standing goal of international criminal justice; the achievement of which requires truth-telling and condemnation of perpetrators, but as a necessary ingredient of ensuring future protection of individual rights. She, in addition, argues that international criminal prosecutions of past abuses promote respect for the rule of law and reaffirm the commitment to preserving the inherent dignity of individuals.<sup>54</sup> It is to be noted that the ‘rule of law’ invoked in this discourse refers to the rule of international law regarded as the only regime capable of protecting (and preserving) individual rights; thereby bypassing the nation state.<sup>55</sup> This purist approach is most clearly manifest in the prevalence of a general hostility towards amnesty; which while often framed in terms of consequentialist logic, betrays commitment to advancing the values of the international community.<sup>56</sup>

#### **2.2.4. Peace, Stability and the Protection of Human Rights as Critical Objectives**

Broomhall’s analysis of the cohesiveness of the core crimes provides a useful framework for assessing international criminal justice. In addition to justifying the imposition of individual accountability in a regime mainly concerned with inter-state relations, the two underlying principles informing the criminalization of these acts can serve as useful guideposts for conceptualizing a role for international criminal prosecutions. The above account locates the plethora of policy benefits claimed for international prosecutions within this broad framework and argues that the two goals of ensuring international peace and stability and promoting the protection of fundamental human rights should be regarded as the critical objectives of international criminal justice. Therefore, the potential of prosecutions to

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<sup>52</sup> R. Teitel, 'Universal and the Particular in International Criminal Justice, The', *Colum. Hum. Rts. L. Rev.*, 30 (1998), 285.

<sup>53</sup> D.F. Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime', *Yale Law Journal*, (1991), 2537-615, 2542

<sup>54</sup> *Ibid* 2549.

<sup>55</sup> Teitel (n 51).

<sup>56</sup> See for example M.C. Bassiouni, 'Combating Impunity for International Crimes', *U. Colo. L. Rev.*, 71 (2000), 409.

contribute to divergent intermediate goals (e.g. deterrence, reconciliation and truth-telling) should be assessed not by reference to the inherent value of these goals but by reference to their ability to contribute to the critical values of attaining peace and stability and achieving respect for human rights.<sup>57</sup> Section 3 adopts this framework to demonstrate that certain practices of international criminal justice institutions, while arguably accomplishing general intermediate goals such as ensuring accountability, are self-defeating because they have the potential to undermine the critical goals of achieving peace and stability and ensuring greater respect for human rights.

### ***2.3. Justice in the Context of Internal Conflicts***

In addition to the paradigm shift in ICL towards an increased role in protecting individuals and individual rights, the sphere of ICL's implementation is also changing.<sup>58</sup> While it was traditionally employed to adjudicate violations in the context of international armed conflicts, its remit is now widening to include many situations of in-country violence. Its application is also extended beyond the traditional target of state officials to include non-state actors.<sup>59</sup> The function of international criminal justice institutions as mediators of communal violence is expected to persist in light of the growing proliferation of internal conflicts. Akhavan reports that in 2006, 95% of all armed conflicts were internal.<sup>60</sup> This trend is set to continue according to leading analysts.<sup>61</sup> The traditional treatment of ICL as an enforcement mechanism of international humanitarian law<sup>62</sup> may be logical in the context of international conflicts, yet its contribution to the resolution of internal conflicts is still hotly debated. The neutral forum provided for by international criminal tribunals is, perhaps, required to resolve mutual violations by two warring nations during conflict, but whether or not it is a suitable response to internal conflicts is debatable.

This section attempts to highlight three problematic areas in the application of the international criminal justice paradigm to internal conflicts. The first of these is that ICL presupposes a clear divide between victims and villains. Yet, pigeonholing parties to a

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<sup>57</sup> See Alvarez (n 3).

<sup>58</sup> See Teitel (n 25).

<sup>59</sup> P. Akhavan, 'Self-Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?', *Criminal Law Forum*, (21: Springer, 2010), 103-20.

<sup>60</sup> Akhavan (n 59) 113

<sup>61</sup> P. Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places* (Harper Perennial, 2010) 121.

<sup>62</sup> See A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law*, 9/1 (1998), 2-17.

conflict as either criminal or legitimate fails to cater for the political complexity often at the heart of internal conflicts and may result in undermining prospects for attaining peace and stability in post-conflict societies. The second issue is that with its traditional focus on the role of political elite in fuelling communal violence,<sup>63</sup> ICL tends to sweep aside the question of ethnicity and its effect not just on the occurrence but also on the scale of internal violence.<sup>64</sup> However, achieving reconciliation between warring parties and putting an end to internal conflicts in ethnically diverse societies often requires a serious and honest examination of ethnic tensions and a national determination of how to transcend these issues. The third and more troubling aspect of the adoption of this paradigm is the attempt by international criminal justice institutions to substitute an ill-defined rule of international law in the place of the '...legal and political matrix of a rule of law state'.<sup>65</sup> A serious problem generated by this supplanting is the insistence on a particular brand of justice that often times reduces these institutions to wrestling jurisdiction away from national courts. However, in light of the severe limitations of ICL as well as its selective and irregular enforcement, international courts can hardly afford to jeopardize the establishment of an effective rule of national law, which might prove the only guarantor of peace, stability and human rights. These issues are discussed in Sections 2.3.1, 2.3.2 and 2.3.3 respectively.

### **2.3.1. A Clear Divide between Victims and Villains?**

While the commission of gross human rights violations is a serious breach and requires firm redress, framing the issues giving rise to internal conflicts in terms of violation of international norms is highly reductive and risks detracting from more fundamental aspects at the heart of such conflicts. More disquieting, however, are the political connotations attached to the involvement of international criminal justice institutions on either side of a conflict.<sup>66</sup> As Nouwen and Werner deftly argue, because of the loftiness of the message of Universalism in international criminal justice discourse, the mere involvement of such institutions leads to the empowerment or de-legitimization of the parties to the conflict according to which side they take.<sup>67</sup> While they view the problem as emanating from the ICC's depoliticized approach to the issue of atrocities, Alvarez relates the issue to the very

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<sup>63</sup> See Akhavan (n 39).

<sup>64</sup> See Alvarez (n 3).

<sup>65</sup> Teitel (n 52) 302.

<sup>66</sup> S.M.H. Nouwen and W.G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21/4 (2010), 941-65.

<sup>67</sup> *ibid.*



nature of ICL.<sup>68</sup> He suggest that adopting non-compliance with international law as the normative start-point of analysis encourages a largely invented divide between guilty perpetrators and innocent victims that does not fit well with the realities of contemporary internal conflicts.<sup>69</sup>

Nouwen and Werner argue that the ICC's indictment of the Sudanese president Omar Al-Bashir for atrocities committed in Darfur in 2004, while largely defensible, had a polarizing effect on the image of the two warring parties.<sup>70</sup> As well as ostracizing the Sudanese Government, the court's involvement legitimized rebels conferring on them the label of protectors of law and humanity; possibly undeservedly.<sup>71</sup> Having imposed the shroud of international illegality on the Government of Sudan, the international community was content to absolve the entire rebellion from guilt and responsibility without due consideration.<sup>72</sup> Yet, Flint and De Waal report on a number of atrocities visited on civilians by rebel groups in Darfur that escaped investigation and prosecution by the ICC.<sup>73</sup> The added danger of such bifurcated treatment in conflicts; where the lines between wrongs and righteousness are often blurred, is that by removing a party from politics one axiomatically assumes the other party to be a legitimate representative of the interests of the communities which bore the brunt of the atrocities.<sup>74</sup>

The reverse situation to the ICC's involvement in Darfur occurred in Uganda when the government referred the situation concerning the Lord's Resistance Army (LRA) to the ICC. The Office of the Prosecutor chose not to prosecute abuses by the Ugandan Government based on a tenuous application of the gravity criteria which turned on a comparative quantification of atrocities.<sup>75</sup> Consequently, the ICC practically conferred the status of victim

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<sup>68</sup> Alvarez (n 3).

<sup>69</sup> *ibid*

<sup>70</sup> Nouwen and Werner (n 66) 956-957.

<sup>71</sup> *Ibid* 957.

<sup>72</sup> The ICC's only indictments against the Darfur rebels concerned members of a splinter group regarding an attack on the African Union Mission in Sudan. The proceedings resulted in the acquittal of the alleged leader of the attack Abu Garda for insufficiency of evidence (*Situation in Darfur, Sudan, in the case of the Prosecutor vs. Bahar Idris Abu Garda*, Decision on the confirmation of charges (ICC-02/05-02/09), February 8<sup>th</sup>, 2010).

<sup>73</sup> J. Flint and A. De Waal, *Darfur: A New History of a Long War* (Zed Books, 2008).

<sup>74</sup> *ibid* (see generally, Ch9) (maintaining that despite the commission of a number of atrocities by Minni Minawi, the leader of SLA (Minawi), he continued to be regarded as the 'West's strong man in Darfur' for purposes of the peace negotiations and went on to accept the position of Senior Assistant to the President (fourth most powerful man in Sudan) in settlement of the dispute.)

<sup>75</sup> Nouwen and Werner (n 66).

on the Government.<sup>76</sup> Branch argues that ICL's reductive narrative is not appropriate for situations such as the conflict in Uganda because it detracts from necessary discussions about legitimate demands and grievances that gave rise to the rebellion in the first place.<sup>77</sup> In addition, he notes, the ICC by empowering the violent and undemocratic government of Uganda jeopardizes the Ugandan People's prospects of achieving sustainable peace and human rights.<sup>78</sup>

Operating as a depoliticized Universalist regime, ICL may intensify political struggles instead of ameliorating them.<sup>79</sup> Turner cautions that bifurcated treatments of parties to a conflict along lines of absolute guilt and absolute innocence may reinforce collective mistrust and, in the context of internal politics, '...risk perpetuating divisions and leave a lingering tension within the population'.<sup>80</sup> Stromseth, for example, reports that war crimes prosecutions in the former Yugoslavia were often used to continue ethnic conflict and ended up exacerbating ethnic divisions as opposed to healing the communities involved.<sup>81</sup>

In addition to leaving a legacy of disaffection born out of the uneven treatment of identical offences, ICL has the potential to destabilize future transitions to more secure social and political orders by empowering and legitimizing violent and undemocratic forces. In the words of N. N. Taleb, 'Categorization...becomes pathological when the category is seen as definitive, preventing people from considering the fuzziness of boundaries, let alone revising their categories.'<sup>82</sup> The international criminal justice regime, when it takes at face value the guilt and innocence of opposing parties to a conflict, turns into a political tool which may be used to undermine potentially legitimate forces.<sup>83</sup>

### 2.3.2. Reconciliation in the Shadow of Ethnicity

The dominant classification of internal conflicts in terms of non-compliance with international law has also influenced discourse on the question of ethnicity and its role in

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<sup>76</sup> Akhavan (n 59).

<sup>77</sup> Branch (n 7).

<sup>78</sup> Ibid.

<sup>79</sup> Nouwen and Werner (n 66).

<sup>80</sup> C. Turner, 'Delivering Lasting Peace, Democracy and Human Rights in Times of Transition: The Role of International Law', *International Journal of Transitional Justice*, 2/2 (2008), 126-51, 145.

<sup>81</sup> J.E. Stromseth, 'Pursuing Accountability for Atrocities after Conflict: What Impact on Building the Rule of Law', *Geo. J. Int'l L.*, 38 (2006), 251.

<sup>82</sup> T. Nassim, 'The Black Swan: The Impact of the Highly Improbable', (New York Random House, 2007) 15.

<sup>83</sup> Nouwen and Werner (n 66).

fuelling conflicts. In placing the burden for gross human rights violations squarely on elite shoulders, the international legal paradigm assumes *a priori* that ethnic cleavages are ‘...a mere construct of political elites intent on disregarding the law for their own ends.’<sup>84</sup> This in turn leads to cursory treatment of the underlying ethnic structures in societies emerging from conflict; such treatment being primarily concerned with locating guilt and supplementing the narrative by providing a factual backdrop.

Alvarez argues that in light of this general repudiation of the substance of societal rifts, reconciliation through the judicial process seems to require institutions that ‘...seek to transcend racial or ethnic consciousness in favour of legal rules requiring equal protection regardless of status’.<sup>85</sup> While neutrality with respect to ethnicity is, therefore, seen as a precondition to a successful dispensation of justice, Alvarez argues that the same approach is utterly inapt as a response to structural causes of ethnic violence and incapable of facilitating institutional reforms required to contain such cleavages in the future. Such an approach risks ethnicizing the political discourse further by denying parties to a conflict a reasonable space for airing ethnic grievances in the courtroom. In addition, the presumption that a neutral adjudication of a conflict is sufficient to advance peaceful co-existence with each other as well as with the past may detract from efforts to accommodate the needs of different communities within a culturally-sensitive framework.

Alvarez regards ICL’s preoccupation with neutrality as symptomatic of a general remoteness of international judicial processes from locales of atrocities that form the subject matter of their jurisdiction.<sup>86</sup> This, he argues, entails procedures that are largely disjointed from the concerns of the affected population and disproportionately informed by the preferences and agenda of a distant international community.<sup>87</sup> In order to ‘...reduce internal conflicts to a manageable narrative’,<sup>88</sup> therefore, international prosecutions end up pushing ethnicity to the forefront only to deprive the relevant population from a chance to engage with the issues effectively. An ill resolved ethnic tension, especially one connected with the assignation of guilt and possibly impacting on subsequent power arrangements, rather than encouraging peaceful co-existence and respect for the rule of law is likely to erupt into new

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<sup>84</sup> Alvarez (n 3).

<sup>85</sup> Ibid 437.

<sup>86</sup> Alvarez (n 3) 402, 450 and 482.

<sup>87</sup> Ibid 409-410

<sup>88</sup> Expression used in Akhavan (n 39) 30.

conflicts or otherwise result in disproportionate oppression towards the now criminalized group.

### **2.3.3. Misreading the Requirements of the Rule of Law**

International criminal justice enthusiasts expect that the prosecution of core crimes will contribute to inaugurating a 'Rule-of-Law culture' capable of warding off instability and violence in the future. It is believed that this occurs by setting an example for post-conflict societies to emulate; in dealing with those accused of the most heinous crimes through a judicial system that guarantees their basic rights and passes judgement in accordance with legal rules and reasoning as opposed to one determined by politics.<sup>89</sup> In addition to demonstrating the way 'civilized nations' deal with violators, the process is said to internalize norms regarding the rule of law by subjecting high-level officials to accountability despite their official status. Orentlicher contends that, by subjecting power to law, criminal prosecutions of former regime members foster respect for democratic institutions and thereby deepen commitment to a democratic culture.<sup>90</sup> Yet this contention equates seeking accountability against former regime agents and imposing international due process standards with realizing the rule of law and providing for future democracy. While equality before the law and due process of law are important elements of an effective rule of law, they are not exhaustive. Stromseth argues that despite the potential of international criminal trials in providing justice for the victims and the diffusion of international standards such as due process rights, the internalization and sustainable institutionalization of the underlying norms of criminal justice in domestic legal institutions is essential to ensure the establishment of an effective rule of law culture<sup>91</sup>. She maintains that in order for such criminal trials to have a demonstrative effect, in addition to removing perpetrators from power, they must be regarded as just by the people.<sup>92</sup>

The dilemma of international criminal law is indeed that it lies squarely between international law and criminal law. Friedlander maintains that '[t]he difficulty with the theory of an international criminal law is that it represents a convergence of both public international norms and the international aspects of municipal criminal law'.<sup>93</sup> Unlike criminal

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<sup>89</sup> Orentlicher (n 53).

<sup>90</sup> Ibid 2543.

<sup>91</sup> Stromseth (n 81).

<sup>92</sup> Ibid 263-264.

<sup>93</sup> Friedlander (n 18) 17.

law, it is a creation of agreement between states that is aimed at preserving the peace and stability and the realization of common values; not of a well-defined society of equal individuals with common aspirations but of a heterogeneous society of states with varying interests and unequal international weight. At the same time, unlike international law, its operation does not just affect the rights and obligations of states, but directly impacts individuals and may result in the curtailment of their freedoms and the usurpation of their rights as is the case with domestic criminal law. It is this dichotomous origin that bars the formulation of an effective rule of law to be applied in the context of ICL.

Even though international jurists are at pains to ensure the legality of criminalization, to apply the substantive law with a great deal of consistency and to preserve due process rights, the fact that affected populations often have little or no say in either the formulation of laws or its application detracts from its intended legitimacy. De Greiff argues that ‘...legitimacy does not depend just on formal characteristics of the law, but also on characteristics of the very process of making laws and on the substance of the laws thus produced’.<sup>94</sup> Indeed, in the process of stressing the centrality of accountability and accountability norms to the realization of a functional rule-of-law society, international criminal justice discourse seems to relegate the requirement of representation and the consent to laws to the sidelines.<sup>95</sup> In addition, the regime is infused with a pro-prosecution bias and expansionist tendencies that are antithetical to fundamental justice principles.<sup>96</sup> Robinson states, ‘...human rights liberalism produces a criminal law system that is increasingly authoritarian in its disregard for constraining principles, and risks using the accused as an object in a didactic exercise rather than respecting autonomy and fairness.’<sup>97</sup> He argues that the divergence in approach from strict to lax in interpreting the requirement for crimes by domestic and international tribunals respectively may point to the fact that a deliberative process of making laws as opposed to a unilateral imposition may lead to a greater sensitivity to fundamental principles of the rule of law.<sup>98</sup>

The dichotomous nature of ICL, as well as its severe limitations, makes it an unsuitable vehicle for promoting an effective Rule-of-Law culture. Sporadic prosecutions of a handful of

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<sup>94</sup> De Greiff (n 2) 12.

<sup>95</sup> M. Beutz, 'Functional Democracy: Responding to Failures of Accountability', *Harv. Int'l LJ*, 44 (2003), 387.

<sup>96</sup> Robinson (n 51).

<sup>97</sup> *ibid* 931.

<sup>98</sup> Robinson (n 51).

perpetrators for a limited set of crimes subject to arbitrary temporal constraints are not likely to generate much in the way of compliance or respect for the rule of law. Even if formal compliance is assumed, involuntary compliance - which results from acceptance of the normative value of laws and an expectation of equal internalization of norms by other members of the society<sup>-99</sup> is not conceivable in the international context. In addition, even if compliance is forthcoming because of the universality and acceptance of the underlying values, such compliance will not necessarily result in a safer world, because international justice institutions operate in limited circumstances which may allow less grave violations to slip through the net. In addition to the inherent problems of irregular and selective enforcement, international criminal justice is extremely limited in scope. Criminality in ICL is tied to a number of arbitrary requirements such as the systematic nature of the crime and the nature of the common characteristic shared by affected populations.<sup>100</sup> This allows other heinous violations of fundamental human rights such as isolated murders, rapes and executions to pass unaddressed. Furthermore, international courts and tribunals are often constrained by temporal jurisdictions that are limited to certain time periods or certain geographical locales. For example, because the ICC's jurisdiction extends only to crimes committed after 2002, the court is not able to investigate or prosecute the gross human rights violations committed by the Ugandan Government against the Acholi people in the 1990s even though the situation in this region is under its jurisdiction.

De Greiff states, '[t]o be secure means, in part, to live in contexts in which norms of justice are routinely applied'.<sup>101</sup> An international criminal regime which suffers from a severe crisis-mentality<sup>102</sup> and is normatively limited is, by definition, incapable of supporting routine application of norms. In addition, the exercise of criminal jurisdiction has always been tied to effective territorial control and the ability to secure individuals for the purpose of presenting them at trial.<sup>103</sup> This means that if the international criminal justice regime is ever to have an effective rule of law, it must be backed up by a standing army capable of lending force to the law.

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<sup>99</sup> R. Bhattacharyya, 'Establishing a Rule-of-Law International Criminal Justice System', *Tex. Int'l LJ*, 31 (1996), 57.

<sup>100</sup> Ratner et al (n 46).

<sup>101</sup> De Greiff (n 2) 15.

<sup>102</sup> S. Starr, 'Extraordinary Crimes at Ordinary Times: International Justice Beyond Crisis Situations', *Nw. UL Rev.*, 101 (2007), 1257.

<sup>103</sup> Bhattacharyya (n 99)

### ***The Particular Issue of Undermining National Courts***

The above delineated impediments to establishing a viable Rule-of-Law international criminal justice regime does not preclude a conclusion that criminal prosecutions of gross human rights violations form an essential component of a recovery strategy for post-conflict societies and may be relevant to reinforcing a domestic rule of law. This is because they can entrench expectations for accountability and deepen popular commitment to democracy.<sup>104</sup>

Stromseth explains:

...strengthening the rule of law depends on building people's confidence that they will be protected from predatory state and non-state actors, that they can resolve disagreements fairly and reliably without resorting to violence and the legal and political institutions will protect rather than violate basic human rights ... and... there is a widely-shared cultural and political commitment to the values underlying these institutions and laws.<sup>105</sup>

Stromseth argues further that the dispensation of fair justice in the wake of atrocities may entrench in the citizenry an expectation of and an organic demand for accountability and due processes in the future. In addition, the removal of perpetrators from positions of powers, which prevents the commission of additional atrocities, restores public confidence that violations of human dignity and illegal acts will not be tolerated and that they are protected from such encroachments by an effective legal system.<sup>106</sup> She also suggests that such proceedings may stimulate national dialogue about required reforms to advance justice and promote respect for people's rights.<sup>107</sup> Therefore, the greatest contribution international criminal justice institutions can hope to make is to encourage the establishment of a healthy domestic legal system supported by genuine commitment to both accountability and representation.

Yet, the practice of international criminal justice institutions reveals an exclusionary regime embroiled in endless battles with national courts for jurisdiction over cases of gross human rights violations. Following the ICC's indictment of Saif al-Islam Gaddafi; son of the recently toppled late Libyan leader, the ICC proceeded promptly to wrestle jurisdiction away from

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<sup>104</sup> Beutz (n 95).

<sup>105</sup> Stromseth (n 81) 252.

<sup>106</sup> *ibid.*

<sup>107</sup> Stromseth (n 81).

Libyan courts.<sup>108</sup> This is mostly justified in terms of the inadequacy of the Libyan judicial system and the meagre prospects for receiving a fair trial at the hand of previous foe in Libya.<sup>109</sup> The provision relied on to justify the ICC's keenness regarding the case is Article 17 of the Rome Statute which dictates that in order to ascertain the admissibility of a case, the court should determine "unwillingness to investigate or to prosecute" with regard, amongst other things, to due process considerations. Articles 17(2) (b) and (c) provide that unjustified delays, or a lack of impartiality or independence may indicate "unwillingness" to bring to justice. Stahn argues that the said provisions bear either a narrow interpretation aimed at combating impunity by ensuring the defendant is arrested and brought to trial, or a broader interpretation aimed more generally at ensuring the quality of justice to be provided in the context of criminal adjudication of serious crimes against humanity.<sup>110</sup> While usurping jurisdiction away from a post-conflict society by reason of non-conformity with international due process standards is worrying enough, a more controversial issue with respect to the Libyan dilemma is whether the applicability of the death penalty in Libyan law should constitute a bar to surrendering jurisdiction to national courts. If the determination of venue in the Libyan case turns on this point, it will not be the first time the international community substitutes its own preferences for the preferences of local communities. In 1994, even though it petitioned the UNSC for international assistance to prosecute perpetrators of the Genocide, the Rwandan Government voted against the ensuing Resolution which created the ICTR partly because of the unavailability of the death penalty for convicted genocidaires.<sup>111</sup> In stark defiance to Rwanda's national choice, the ICTR statute provided for a bar on the transfer of suspects to Rwandan courts if there is likelihood that the death penalty will be applied following their conviction.<sup>112</sup> Alvarez criticizes this display of international supremacy arguing that adoption of international liberal values will not lead to accountability to local populations that have been wronged.<sup>113</sup> Instead, he argues, the international criminal justice regime is accountable only to the international community on whose image the justice

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<sup>108</sup> See Libya – Not the International Court – Should Bring Former Leaders to Justice (May. 09, 2012) (posted Apr. 29, 7:49), Shabab Libya (Libyan Youth Movement), <http://www.shabablibya.org/news/libya-not-the-international-court-should-bring-former-leaders-to-justice> (last visited July 26, 2014).

<sup>109</sup> C. Stahn, 'Libya, the International Criminal Court and Complementarity a Test for 'Shared Responsibility'', *Journal of International Criminal Justice*, 10/2 (2012), 325-49.

<sup>110</sup> *Ibid.*

<sup>111</sup> Alvarez (n 3).

<sup>112</sup> Stahn (n 109).

<sup>113</sup> Alvarez (n 3).



process was created.<sup>114</sup> He also contends that the tug-of-war between national and international courts and asymmetry in sentencing may shake the public confidence in domestic proceedings and make a mockery of the whole criminal justice process.<sup>115</sup>

While it is not clear that the ‘international community’ works as a useful reference point for the formulation of an equitable international criminal law, it is equally unclear whether an inherently limited international criminal justice regime is sufficient to ensure the peace and stability of individual member states as well as the World community. On the one hand, a dogged devotion to Universalism yields unnatural dichotomies in post-conflict societies that are capable of developing into future conflicts. In addition, adopting a transcendental approach to the question of ethnicity leaves fundamental structural issues without adequate resolution. Furthermore, and even though ICL seeks to protect citizens and ensure respect for their rights by placing an external control on governments, it remains severely limited in scope and enforced only rarely. Not capable of generating an effective Rule-of-Law culture in post-conflict societies itself; its implementation also habitually undermines prospects for building the rule of law domestically by divesting national courts from jurisdiction. Teitel sums it perfectly when he states, ‘[g]lobalised international criminal law is lacking, removed from national contexts and thicker political constructs; international criminal processes offer only a glimmering of a transcendental rule of law’.<sup>116</sup>

## ***2.4. The Relevance of Democracy***

The democratic peace theory has long since established the relevance of democratic systems of governance to the institution of sustainable peace and the protection of human rights.<sup>117</sup> Guided with the initial intuition that a government constrained by the consent of its citizens is less likely to resort to wars and brutality, it is now widely accepted that aggression can be abated through the promotion of democratic values and practices.<sup>118</sup> In the context of internal violence, as well as providing the means to hold governments accountable for violating individual integrity, democracies offer peaceful channels for the resolution of conflicts thereby diminishing the need for violence. By the same token, the exclusionary nature of totalitarian governments makes it more likely for violent struggle to ensue and, in

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<sup>114</sup> Ibid.

<sup>115</sup> Alvarez (n 3).

<sup>116</sup> Teitel (n 52) 303.

<sup>117</sup> Beutz (n 95).

<sup>118</sup> Turner (n 80).

light of the absence of constraints, for such dissent to be met by brutal force. With international armed conflicts being a thing of the past,<sup>119</sup> contemporary conflicts are often the result of totalitarianism and the absence of the rule of law. In addition, the commission of atrocities, when targeted towards a particular group or singled by ethnicity, is probably indicative of a break down, or indeed an inherent deformity, in socio-political conditions worsened by a repressive and unrepresentative government.

It is, therefore, not surprising that discourse in favour of international criminal prosecutions, while avoiding a direct reference to democracy, has always been replete with innately democratic notions such as the rule of law. Indeed some commentators see the commitment of international criminal justice to establishing the rule of law as a commitment to democracy.<sup>120</sup> Stromseth explains that the potential of criminal prosecutions is in demonstrating a general rejection of repressive practices in order to usher in an era of equality before the law that informs a reconstructed fabric of post-conflict societies.<sup>121</sup> Teitel maintains that this creates a renewed sense of legal order that can lend support to future democratic systems.<sup>122</sup> It is also highlighted in the accountability literature that affirmation of the rule of law obviates the need to carry on the violence and provides a space for reconciliation.<sup>123</sup> Fletcher and Weinstein explain the mechanism through which reconciliation works in terms of stimulating a national dialogue that will help forge ‘...civic unity in the aftermath of mass atrocities’.<sup>124</sup> In addition, there is a clear trend in the jurisprudence of *jus cogens* crimes towards a greater assumption by international courts and tribunals of a duty to protect individual fundamental human rights.<sup>125</sup>

The language of the ‘rule of law’, ‘civic unity’ and ‘respect for human rights’, at the heart of the international criminal justice discourse betrays a very close affinity to democratic aspirations and indeed covert acceptance that democracy holds immense potential for the aversion of gross human rights violations. Even though international prosecutions often

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<sup>119</sup> See Akhavan (n 59).

<sup>120</sup> See De Greiff (n 2) and Stromseth (n 81).

<sup>121</sup> Stromseth (n 81).

<sup>122</sup> R. Teitel, ‘Transitional Jurisprudence: The Role of Law in Political Transformation’, *Yale LJ*, 106 (1996), 2009.

<sup>123</sup> Alvarez (n 3).

<sup>124</sup> L.E. Fletcher and H.M. Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’, *Hum. Rts. Q.*, 24 (2002), 573, p.599.

<sup>125</sup> Teitel (n 25); Robinsons (n 51); Alvarez (n 3).

occur in the absence of formal regime change,<sup>126</sup> they remain firmly rooted in concerns for the achievement of a more responsive polity to ensure future peace and stability. Yet, as the discussion in Section 3 above reveals, international criminal institutions are hardly equipped to achieve these goals in isolation.

In discussing the normative connection between democracy and accountability, Ratner observes that while a democratic transition, by definition, entails accountability for future abuses, accountability is not likely to boost the pace of democratization.<sup>127</sup> If democracy and the effective establishment of the rule of law are the intended consequences of international criminal prosecutions, even if indirectly, it is inconceivable that they will simply materialize in the wake of accountability in a trickle-down or a spill-over effect without the mediation of a self-reliant nation state and a responsible polity. Entrenching these values in conflict-ridden societies is even less likely in light of the fact that the international criminal justice process, while mired in politics, sees itself as above politics and persistently operates on the periphery of critical political contexts.<sup>128</sup> Accountability measures in the wake of atrocities need to strengthen organic democratic processes and to affirm genuine democratic values. Otherwise, they will be an exercise in futility by failing to achieve not just a lateral goal of democratization but the two fundamental goals of ICL.

In the absence of political transformation, redress of past wrongs lacks the normative nexus to the preferences of the affected communities; and as such is neither conducive to stability nor to supporting future transitions to democracy. A democratic context, on the other hand, allows for the stimulation and implementation of a national dialogue that informs the articulation of the narrative of conflict, preferred means of redress and a vision for the future that transcends the confines of international criminal justice constructs. In addition to fostering a meaningful respect for the rule of law emanating from genuine inclusion and ownership of the process of making laws,<sup>129</sup> such dialogue is essential to overcome the divisiveness of conflict, as well as of post-conflict politics. It is also indispensable to achieving reconciliation. The reconciliation invoked here is intended to go beyond pacification of the warring parties to a general reconciliation of the whole society to the idea that they form a cohesive polity which can resolve its conflicts, however complicated, through the operation of political and legal processes and without resorting to violence.

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<sup>126</sup> Teitel (n 122).

<sup>127</sup> Ratner (n 51).

<sup>128</sup> Nouwen and Werner (n 66).

<sup>129</sup> De Greiff (n 2).

Ensuring the evolution of post-conflict societies along democratic lines will have a favourable effect on human rights protection since one of the best guarantees for freedoms is a responsive civic polity.<sup>130</sup> While international law has the capacity to bridge gaps in national legislation concerned with the prevention of abuses and to suggest agenda for development in this area, reliance on it for a more systematic prevention of abuses is misplaced. Peerenboom notes that in contrast to regime type which is amongst the most influential predictors of human rights protection (or indeed violation), the ratification of treaties was not found to be empirically linked to increased respect for rights and freedoms.<sup>131</sup> It is indeed disconcerting that a number of serious human rights abuses are likely to fall through the net of international criminal law where they do not fit the mould of international crimes and barring an effective national rule of law may escape any coercive enforcement measures. National jurisdiction, on the other hand, is by definition exhaustive and even where formal classes of extraordinary crimes do not exist, provided there is sufficient respect for the rule of law and expectation on the part of citizens that their rights are protected by the state, such crimes can be subsumed in the definition of ordinary crimes such as murder.

In addition to providing for consistent formal enforcement, the nation state is also better suited for fostering informal compliance. Voluntary compliance occurs in the absence of coercive action by the state and arises as a result of a self-regarding interest in the order of the society to which one belongs and which reflects on one's rights and responsibilities.<sup>132</sup> Bhattacharyya explains that voluntary compliance with laws requires a perception on part of the individual of '...the necessity of a governing legal order with the capacity to limit the liberty of one individual in the interest of increasing the collective liberty of all members of society'.<sup>133</sup> However, the inherent complexity in the relationship between the "individual" and ICL, as well as the lack of a sufficiently interdependent international society of people prevents the attainment of voluntary compliance on an international level. By contrast, where the rule of law is realized, an individual will have sufficient incentives to comply with prohibitions as a member of a cohesive polity seeking secure and stable conditions for coexistence.

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<sup>130</sup> Turner (n 80).

<sup>131</sup> R.P. Peerenboom, 'Human Rights and Rule of Law: What's the Relationship?', *bepress Legal Series*, (2004), 355.

<sup>132</sup> Bhattacharyya (n 99).

<sup>133</sup> *Ibid* 89.

Even with regards to elementary contributions of ICL such as truth-telling and providing a historical record, it is not clear that criminal prosecutions for past atrocities that occur in the absence of meaningful political transformation contribute much to establishing peace and stability in post conflict societies by way of these median goals. Contrary to prevailing assumptions, Alvarez argues that there is no evidence to support the pacifying value of international criminal prosecutions.<sup>134</sup> In addition, he maintains, judicial treatment of inherently contentious issues is not likely to engender closure.<sup>135</sup> Instead, he advocates for the utilization of trials as forums for “civil dissensus” where a conversation about past conflicts can encompass conceptions of guilt and the role and limitations of the law. He maintains that:

The point of properly conducted criminal trials, at both the national and international levels, is precisely to provoke socially desirable, if contentious, conversations in the hope that through honest discourse the guilty will eventually come to recognize that brutal killings are not morally ambiguous.<sup>136</sup>

Such honest discourse, however, presupposes a democratic environment capable of supporting it.

In order to end political violence, one must strive to create ‘...institutions that are best at protecting people’s rights and making them live up to their obligations’.<sup>137</sup> Genuine democratic institutions that reflect the aspirations of a cohesive civil polity are better placed than international criminal prosecutions at achieving a stable and peaceful society that guarantees respect for fundamental individual rights. Jeopardizing the attainment of such a society by undermining prospects of a successful transition into a new legal and political order is, in this context, antithetical to justice. Instead of blindly pursuing a mythical rule of international law, international criminal justice institutions should endeavour in their practice to facilitate organic democratic transitions capable of safeguarding peace and achieving justice in a divided society. As Nouwen and Werner effectively argue, there is

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<sup>134</sup> Alvarez (n 3) 448.

<sup>135</sup> *ibid.*

<sup>136</sup> Alvarez (n 3) 469.

<sup>137</sup> D.M. Weinstock, 'Prospects for Transnational Citizenship and Democracy', *Ethics & international affairs*, 15/2 (2001), 53-66, 56.

nothing particularly unethical about “doing justice to the political”.<sup>138</sup> In the inherently political context of internal conflicts, justice can best be served by promoting good politics.<sup>139</sup>

## **2.5. Conclusion**

The orientation of ICL along a Universalist legal paradigm and the inherently political nature of internal conflicts conspire against the attainment of a successful criminal justice project. Rather than contributing to the resolution of the underlying structural causes of internal conflicts, international criminal institutions tend to befoe the issues further by adopting a fixed ‘criminal, victim and a transcendental judge’<sup>140</sup> formula. Even though international criminal justice discourse invokes the rights of affected populations, it neglects to take account of their aspirations; political or otherwise, often replacing them with the preferences of a removed ‘international community’. Yet, ICL is severely limited, both by its own scope and its selective and irregular enforcement. It is ill-equipped, in isolation, to ensure international peace and stability and to promote human rights. Genuinely democratic institutions, on the other hand will be a better guarantee for an end to political violence and repression. Therefore, international criminal institutions should strive to enable political transformations along democratic lines, not because democracy is a viable aim of ICL but because the attainment of the traditional and critical objectives of ICL is inconceivable without democratic institutions at the level of the nation state.

This chapter formulated the framework against which the effectiveness of the ICC in quelling atrocities can be understood. By positing that the two critical goals of ICL should be regarded as securing international peace and stability and promoting the protection of fundamental human rights, it delineated the broad boundaries of the international criminal justice project. In addition, and by envisioning a role to be played by democracy in achieving the goals of this regime in post-conflict societies, the chapter provided the theoretical basis for adopting regime change as the focal point of the subsequent analyses in Chapters 3, 4 and 5.

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<sup>138</sup> Nouwen and Werner (n 66).

<sup>139</sup> *ibid.*

<sup>140</sup> Branch (n 7) 190.

## CHAPTER 3: Bringing the Guilty to Justice: Can the ICC be Self-enforcing?\*

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### 3.1. Introduction

While objectionable on a number of grounds,<sup>1</sup> the Kony 2012 Campaign,<sup>2</sup> which was launched by the American non-profit organization of Invisible Children, provides a very useful illustration of the difficulties inherent in the enforcement of International Criminal Law (ICL) and the paradox of illegitimate justice that this creates. The campaign is intended to raise awareness about the activities of the Lord's Resistance Army (LRA) and its leader Joseph Kony, an indicted Ugandan rebel wanted by the International Criminal Court (ICC) since 2005 for crimes that include murder, rape, sexual enslavement, pillaging, and the enlistment of child soldiers.<sup>3</sup> The ultimate objective of the Kony 2012 Campaign is said to be ensuring the arrest of the LRA rebel leader who evaded capture for more than six years.<sup>4</sup>

The impetus of the Kony 2012 Campaign is intelligible. After all, in approving the referral of the situation by the Government of Uganda pursuant to Articles 13(a) and 14 of the Rome Statute,<sup>5</sup> the Pre-Trial Chamber deemed the intervention by the ICC necessary in light of the evident incapacity of the Government of Uganda to arrest the LRA commanders responsible for the gravest abuses.<sup>6</sup> The Chamber issued the warrant to secure Kony's arrest and to

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\* This Chapter was published in substantially the same form in the Chicago Journal of International Law. See Nada Ali, 'Bringing the Guilty to Justice: Can the Icc Be Self-Enforcing?', Chicago Journal of International Law, 14/2 (2014).

<sup>1</sup> Mark Kerten, Too Simple, Too Dumb: KONY2012's Viral Campaign Shows the Effectiveness of New Media—And the Problem with Over Simplifying a Message, SALON.COM (Mar. 12, 2012, 6:20 PM GMT), [http://www.salon.com/2012/03/12/kony2012\\_the\\_danger\\_of\\_simplicity/?utm\\_medium=referral&utm\\_source=pulseneews](http://www.salon.com/2012/03/12/kony2012_the_danger_of_simplicity/?utm_medium=referral&utm_source=pulseneews), (last visited July 26, 2014)

<sup>2</sup> See The Kony 2012 Campaign, <http://invisiblechildren.com/kony-2012> (last visited July 29, 2013).

The viral video developed by Invisible Children about Joseph Kony can be accessed on the same page.

<sup>3</sup> *Situation in Uganda*, Case. No. ICC-02/04-01/05-53, Warrant of Arrest for Joseph Kony, [5] (Issued July 8, 2005, Amended Sept. 27, 2005).

<sup>4</sup> The Kony 2012 Campaign (n 2).

<sup>5</sup> Article 13(a) provides for the court's jurisdiction where "a situation in which one or more of [the crimes referred to in article 5] appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14." Rome Statute of the International Criminal Court, art. 13(a), July 17, 1998, 37 I.L.M. 1002 (1998) [hereinafter "Rome Statute"]. Article 14(a) states that where a crime within the jurisdiction of the court appears to have been committed, a State Party may refer the situation to the ICC 'requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.' *Ibid*, art. 14(a).

<sup>6</sup> *Situation in Uganda* (n 3) [37].

‘prevent him from continuing to commit crimes within the jurisdiction of the Court’.<sup>7</sup> It was the ‘likelihood that failure to arrest . . . [Joseph Kony] will result in the continuation of crimes of the kind described in the Prosecutor’s application’<sup>8</sup> that led to the court’s decision to issue the warrant. Yet, Kony is still at large.

The outstanding arrest warrant against Kony is not the only case demonstrating the inability of the court to enforce its mandate. With twenty-six arrest warrants issued since the inception of the court in 2002, thirteen suspects still remain at large.<sup>9</sup> Most notably amongst the failures of the ICC to execute its outstanding warrants is the court’s inability to bring to justice the Sudanese President Omar Al Bashir (hereinafter “Al Bashir”) for whom two arrest warrants have been issued in 2009 and 2010 for crimes committed in Darfur in the period between 2003 and 2004 – crimes that include the crime of Genocide.<sup>10</sup> Enforcement of ICC warrants is evidently problematic especially when the court’s failure to secure the arrest of more than 50% of individuals suspected of the commission of heinous crimes is compared with national failure rates in the region of only 0.26% for violent crime.<sup>11</sup> The slow pace of the court in bringing the guilty to justice is particularly perturbing because of its implication for the continuation of atrocities.<sup>12</sup>

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<sup>7</sup> *ibid* [43].

<sup>8</sup> *Situation in Uganda* (n 3) [45].

<sup>9</sup> The International Criminal Court, *The Court Today Factsheet*, ICC-PIDS-TCT-01-031/13 (Jul. 15, 2014), <http://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf> (last visited July 26, 2014).

<sup>10</sup> *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Warrant of Arrest (March 4, 2009), <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>; *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010), <http://www.icc-cpi.int/iccdocs/doc/doc907140.pdf> (sources last visited July 26, 2014).

<sup>11</sup> UK national data on the incidents of violent crimes and the outstanding warrants of arrest obtained from the following sources: Office for National Statistics, *Focus On: Violent Crime and Sexual Offences 2011/2012*, at 3 (Feb. 7, 2013), [http://www.ons.gov.uk/ons/dcp171778\\_298904.pdf](http://www.ons.gov.uk/ons/dcp171778_298904.pdf) (putting offenses of violence against the person recorded by the UK police in 2011/2012 at 762, 515); Nicola Beckford, *Arrest Warrants: Police Hunt More Than 30,000 Suspects*, BBC News UK (Mar. 22, 2012, 17:06 GMT), <http://www.bbc.co.uk/news/uk-17179003> (stating that the outstanding arrest warrants for offenses of violence amounted to 2,027 from December 2011 to February 2012 in the UK) (sources last visited July 26, 2014).

<sup>12</sup> Alex Whiting, 'In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered', *Harv. Int'l LJ*, 50 (2009b), 323 (arguing that a balance has to be struck between the desire for expediency in international criminal prosecutions as justifiable as it is, and the need for time-consuming but necessary processes); but see Jean Galbraith, 'The Pace of International Criminal Justice', (2012) (determining that the ICC is much faster in its pre-custody operation than the International Criminal Tribunal for the Former Yugoslavia (ICTY)).



Even though the ICC was instituted ‘...to put an end to impunity for the perpetrators of [the most serious crimes of concern to the international community]’ and to contribute to the prevention of these crimes,<sup>13</sup> its lack of enforcement powers threatens to undermine its ability to achieve its institutional goals and to contribute to the furtherance of international criminal justice. Furthermore, by entertaining the use of alternative means of enforcement that are particularly coercive, such as the use of military force - as is advocated by the Kony 2012 Campaign- , the court treads a very fine line between an arbitrary justice and legitimacy. In an international legal order ‘...more driven by national interests than those of a yet ill-defined international community’ [*sic*] values and interests<sup>14</sup> and in which the use of power to enforce the law remains in the hands of very few states, a consistent legal enforcement as occurs on the municipal level is unlikely. This - coupled with the fact that insistence on accountability leads to the uninterrupted assumption of power by individuals wanted for the most heinous crimes against humanity - renders the hostility of international justice enthusiasts towards the use of amnesties to ensure the removal of political spoilers and prevention of further crimes morally unsustainable.

Game theoretic analysis of the ICC offers a glimpse of a median solution between the extremes of at-any-cost accountability and outright impunity. The suggestion in an emerging International Relations literature is that the ICC could, in certain conditions, be self-enforcing by inducing the self-surrender of indicted leaders to the ICC.<sup>15</sup> The most important contribution of this literature is that it assigns a central role to “self-surrender” in the debate about the effectiveness of the ICC regime. Bearing in mind the viability of this option, policy makers (such as the ICC Prosecutor) can adjust their strategies to induce it.<sup>16</sup> Another

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<sup>13</sup> The Rome Statute (n 5), at the Preamble.

<sup>14</sup> M. Cherif Bassiouni, ‘The Duty to Prosecute and/or Extradite’ in M.C. Bassiouni, *International Criminal Law: Multilateral and Bilateral Enforcement Mechanisms* (2: Martinus Nijhoff, 2008).

<sup>15</sup> See, for example, M.J. Gilligan, ‘Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime’, *International Organization*, 60/04 (2006), 935-67 .

<sup>16</sup> See R. Pati, ‘Icc and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option, The’, *UC Davis J. Int'l L. & Pol'y*, 15 (2008), 265 (arguing that the ICC Prosecutor should use plea-bargaining to encourage the surrender of Al-Bashir to the ICC); G.C. McClendon, ‘Building the Rule of International Criminal Law: The Role of Judges and Prosecutors in the Apprehension of War Criminals’, *Human Rights Review*, 10/3 (2009), 349-72 (suggesting that allowing low-level officials to plead guilty in exchange for lenient sentences will encourage further surrenders). The Trial Chamber in *Prosecutor v. Erdemovic*, in its discussion of the defendant’s guilty plea, acknowledges that ‘[a]n admission of guilt . . . is important for the International Tribunal to encourage people to come forth, whether already indicted or as unknown perpetrators’ (*Prosecutor v. Erdemovic*, ICTY Case No IT-96-22-Tbis, Sentencing Judgment, [16(ii)] (Mar. 5, 1998)).

important input of this literature is its implicit inclusion of regime change in the question of ICC effectiveness.<sup>17</sup> Integrating concerns about political transformation in post-conflict societies is essential to moving the debate towards a broader conception of justice that includes ‘...justice as potentially being manifested through bringing about a fairer, less oppressive, and less violent social and political order’.<sup>18</sup> In addition, such considerations provide the much-required opportunity to treat the constituents of societies subject to conflict not as inert actors who are in perpetual wait for an ‘international community’ to rescue them (as is depicted by the Kony 2012 Campaign) but as active participants in shaping the future of their post-conflict societies.

The extant game theoretic literature did not take into account the fact that the ICC, by prosecuting rebels like Joseph Kony, may discourage some rebel groups from challenging corrupt regimes.<sup>19</sup> If this is the case, the court may in fact undermine its own self-enforcing potential as well as enhance the incentives for the commission of crimes by leaders. In addition to introducing the game theoretic literature on the topic, the aim of this chapter is to test the viability of the hypothesis of a self-enforcing ICC in light of the institution’s policy to prosecute opposition groups as well as state actors for crimes falling under its jurisdiction. I develop and use a game theoretic model of incomplete information involving the interaction between a leader and an opposition (the Model) to show that the ICC is, in certain conditions, self-defeating and may incentivize further crimes by leaders.

The remainder of this chapter includes a review of the literature on the enforcement of international criminal law with regards to arrest warrants that appears in Section 3.2. This section is divided into three subsections: Legal Scholarship (3.2.1); Game Theoretic Literature (3.2.2); and a Note on Regime Change (3.2.3). The game theoretic model on the interaction between a leader and an opposition group which I developed in response to Gilligan’s Model (the Model) is introduced in Section 3.3. This Section includes five subsections on:

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<sup>17</sup> Gilligan (n 15) 937, 942–45. As will be discussed further in Section 3.2.2, Gilligan’s model of ICC effectiveness hinges on the probability of regime survival following the commission of atrocities and assumes that with high probabilities of regime change, leaders will be more inclined to surrender to the ICC in order to escape severe punishment by the opposition following regime change.

<sup>18</sup> A. Branch, ‘Uganda’s Civil War and the Politics of Icc Intervention’, *Ethics & international affairs*, 21/2 (2007), 179-98.

<sup>19</sup> This is contrary to the implicit assumption in Gilligan’s Model that the probability of regime change, and consequently the threat of opposition punishment, is independent of the ICC and unaffected by its operation (See Gilligan (n 15)). By positing that regime change is determined exogenously to the model, Gilligan discounted the effect of the ICC on the behaviour of opposition groups. See Section 3.2.2 of this chapter, for further details.

Motivation (3.3.1); Structure of the Game (3.3.2); Players and Their Payoffs (3.3.3); Discussion and Analysis (3.3.4); and Summary of Results (3.3.5). Practical and policy implications of the Model are set out in Section 3.4 followed by a Conclusion in Section 3.5.

### ***3.2. Literature Review***

The legal literature on the International Criminal Court (ICC) has either neglected or assumed away the substantial hurdles involved in international criminal law enforcement.<sup>20</sup> By invoking state cooperation or humanitarian interventions as alternative means to bring the guilty to justice, ICC proponents seem intent on ignoring the additional problems created by these approaches. In contrast, international justice skeptics argue that in light of this vulnerability, there is very little justification for insisting on accountability at the risk of prolonging the reign of aggressors. This literature is reviewed in Section 3.2.1 below. Section 3.2.2 introduces the specialized game theoretic literature on enforcement. In contrast to the bulk of legal scholarship on the ICC, game theoretic analysis lends formality to the arguments for and against the court and focuses on the impact of the court on individual incentives to commit heinous crimes. In this particular context, this body of literature, as sparse as it is, suggests a clear alternative to the all or nothing trend in legal scholarship. With regards to the question of ICL enforcement, one of the most significant contributions of this specialized literature is its articulation of the relevance of regime change to the question of ICC effectiveness. Section 3.2.3 abridges the arguments presented in Chapter 2 to validate placing regime change at the center of evaluating the court's capacity to bring about international peace and a greater respect for human rights.

Despite the divergent approaches to the issue of enforcement as set out below, a consensus with respect to the need for the effective removal of political spoilers emerges. Legal scholars agree that the legitimacy and credibility of the ICC as well as the aims of international criminal justice in general can only be sustained through a steady flow of successful prosecutions, which are in turn conditional on arrests.<sup>21</sup> As Cassese explains, allowing indicted individuals to maintain their political power and remain free will discredit

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<sup>20</sup> See Damaska, 'The International Criminal Court between Aspiration and Achievement', *UCLA J. Int'l L. & For. Aff.*, 14 (2009), 19-235.

<sup>21</sup> Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', the *American Journal of International Law*, 95/1 (2001), 7-31; M.C. Bassiouni, 'The Icc—Quo Vadis?', *Journal of International Criminal Justice*, 4/3 (2006), 421-27.

the work of international criminal institutions.<sup>22</sup> Furthermore, it is unlikely that unenforceable sanctions will have a considerable deterrent effect on potential perpetrators.<sup>23</sup>

### 3.2.1. Legal Scholarship

The experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) led a number of commentators to identify the ICC's lack of enforcement powers as a potential bar to the regime's effectiveness even prior to the operation of the court.<sup>24</sup> Cassese notes that International Criminal Tribunals (ICTs) differ from national criminal courts in that while they are saddled with the additional burden of investigating the crimes that they need to adjudicate, there is no separate law enforcement agency, such as the police, on which they can depend to apprehend indicted individuals.<sup>25</sup> He argues that this model of international criminal adjudication invariably results in excessive reliance on state cooperation that is, in turn, not always forthcoming.<sup>26</sup> Indeed, just like the ICTY and its sister tribunal the International Criminal Tribunal for Rwanda (ICTR),<sup>27</sup> the ICC has its own statutory provisions detailing the obligations of states to cooperate with the court.<sup>28</sup> However, and despite assertions that state cooperation will be the determining factor of the court's effectiveness in light of the absence of any coercive enforcement powers at its disposal,<sup>29</sup> it is widely

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<sup>22</sup> A. Cassese, 'On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law', *European Journal of International Law*, 9/1 (1998), 2-17.

<sup>23</sup> M.P. Scharf, 'Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal, The', *DePaul L. Rev.*, 49 (1999), 925.

<sup>24</sup> M.M. Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law', *Am. U. Int'l L. Rev.*, 15 (1999), 321.

<sup>25</sup> Cassese (n 22) 11.

<sup>26</sup> *ibid* 10.

<sup>27</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, art. 29, May 25, 1993, S.C. Res 827, U.N. Doc. S/RES/827 (hereinafter ICTY statute); International Criminal Tribunal for Rwanda, art. 28, January 31, 2010, S.C. Res 995, U.N. Doc. S/RES/995 (hereinafter ICTR statute). Article 29 of the ICTY Statute and Article 28 of the ICTR Statute respectively. For the full text, see S.C. Res 827, U.N. Doc. S/RES/827 attaching the ICTY statute (hereinafter the ICTY Statute) and S.C. Res. 995, U.N. Doc S/RES/995 attaching the ICTY statute (hereinafter the ICTR statute).

<sup>28</sup> The Rome Statute (n 6), arts. 86, 89(1), & 92(1).

<sup>29</sup> Akhavan, 'Self-Referrals before the International Criminal Court: Are States the Villains or the Victims of Atrocities?', *Criminal Law Forum*, (21: Springer, 2010), 103-20 (arguing that state cooperation is more likely in cases of self-referrals under Article 14 than otherwise).

acknowledged that securing state cooperation is in practice very difficult and is often hampered by political realities both in the national and international spheres.<sup>30</sup>

Cassese, Penrose and Scharf all cite the experience of the ICTY as evidence that state cooperation is a perilous foundation for the effectiveness of the international justice project.<sup>31</sup> Cassese further identifies this dependence on state cooperation as the '...principal problem with the enforcement of international humanitarian law' in the context of ICTs.<sup>32</sup> The fact that no adequate remedy is provided to compel states to cooperate with the ICC as well as the simple political reality that states act to promote their best interests, which rarely coincide with arresting individuals wanted by international justice bodies, necessarily points to the conclusion that without alternative means of enforcement the ICC will be extremely ineffective in its mandate to administer justice.<sup>33</sup> Bassiouni observes that obligations to assist ICTs are in reality rarely complied with because there are no consequences for breaching the duty to cooperate.<sup>34</sup> Compelling state cooperation is itself in need of an enforcement mechanism that is at the moment non-effectual. Even though the Rome Statute provides for making a finding of non-compliance by the court, no consequences of this breach of duty are detailed except for the referral of the matter to the Assembly of State Parties or the United Nations Security Council.<sup>35</sup> This lack of enforcement bite is not unique to the ICC. Rather, it is a standing feature in the enforcement of ICL.<sup>36</sup> A case in point is the judgment of the International Court of Justice (ICJ) in the application of the Genocide Convention between Bosnia and Serbia. While it held that Serbia was in breach of its duties under the Genocide

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<sup>30</sup> Cassese (n 22) 13–15; Penrose (n 24) 359–63; Scharf (n 23) 978–79.

<sup>31</sup> Ibid.

<sup>32</sup> Cassese (n 22) 4.

<sup>33</sup> A. Wartanian, 'Icc Prosecutor's Battlefield: Combating Atrocities While Fighting for States' Cooperation: Lessons from the Un Tribunals Applied to the Case of Uganda, The', *Geo. J. Int'l L.*, 36 (2004), 1289; Penrose (n 24) 363–64.

<sup>34</sup> M.C. Bassiouni, 'International Crimes: "Jus Cogens" and "Obligatio Erga Omnes"', *Law and Contemporary Problems*, (1996a), 63-74.

<sup>35</sup> The Rome Statute (n 5), art. 87(7).

<sup>36</sup> See Robert Cryer et al., 'An Introduction to International Criminal Law and Procedure, Cambridge, 2', (Baski, 2010) (noting how the U.N. Security Council failed to take any action following numerous reports of non-compliance filed by the ICTY in accordance with Rule 7 *bis* of the Tribunal's Rules of Procedure and Evidence); Alexander Zahar and Gk Sluiter, 'International Criminal Law', (2007) (explaining that the statute of the Special Court for Sierra Leone (SCSL) requires the reporting of state non-compliance to the President of the court but fails to specify actions to be taken following such report.); Cassese, *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) (citing the proclamation of the Trial Chamber in [62] of *Prosecutor v. Blaskic*, Case No. IT-95-14, Judgment of (18 July 1997) that '...the 'penalty' [for non-compliance] may be no more than a finding that a State has failed in its duty to comply with an order').

Convention by failing to arrest and surrender Mladic to the ICTY, the court was of the opinion that the finding of non-compliance was itself sufficient to satisfy the applicant in the case and refrained from the imposition of further sanctions.<sup>37</sup> Damaska notes that the design of such tribunals failed to take into account the ‘...operational realities of criminal law enforcement’.<sup>38</sup>

Even though the ICC reported each of Djibouti, Chad, Kenya and the Republic of Malawi for failure to cooperate with the court in arresting Al Bashir of Sudan,<sup>39</sup> it is far from evident that this measure resulted in any tangible action on part of the offending states. The ineffectiveness of the ICC’s attempts in this regard may be caused by the fact that such states are probably ill-equipped to deal with the ramifications of arresting the head of a neighboring state. In Kenya, a High Court judge issued a ruling in November of 2011 that compels the government of Kenya to arrest Al Bashir if he sets foot in the country.<sup>40</sup> However, the Kenyan Attorney General appealed the decision after a number of measures were taken by the Government of Sudan to sever diplomatic relations and economic ties with Kenya.<sup>41</sup> The African Union (A.U.) had previously requested the ICC to defer the arrest warrant against Al Bashir pursuant to Article 16 of the Rome Statute, and in July 2009 it called on all members not to cooperate with the court because the request in question was not acceded to.<sup>42</sup> Jalloh argues the selectivity and double-standards employed by the ICC in its exclusive attention to African problems is likely to result in substantial legitimacy costs and might hamper its efforts in the continent.<sup>43</sup> Other regional bodies such as the Arab League also took a grim view of the court’s efforts in Sudan and declared a hostile stance towards the ICC in general.<sup>44</sup> In addition to the fact that state interests may not coincide with

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<sup>37</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia & Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 43, 229 (Feb. 26).

<sup>38</sup> Damaska (n 20) 23.

<sup>39</sup> Press Release, ICC, Pre-trial Chamber I informs the United Nations Security Council and the Assembly of State Parties about Chad’s Non-cooperation in the Arrest and Surrender of Omar Al Bashir, ICC-CPI-20111213-PR756, (Dec. 13, 2011).

<sup>40</sup> BBC World News, Sudan to Expel Ambassador after Kenya’s Arrest Warrant, *bbc.co.uk*, (November 29, 2011), <http://www.bbc.co.uk/news/world-africa-15932019> (last visited July 26, 2014).

<sup>41</sup> Pamela Chepkemei, Kenya: AG to Steer Appeal after Bashir Arrest, *Daily Nation on the Web*, (February 17, 2012), <http://allafrica.com/stories/201202171165.html> (last visited July 26, 2014).

<sup>42</sup> The African Union, Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court (ICC), Assembly/AU/Dec. 245(XIII) 2 (July 3, 2009).

<sup>43</sup> Jalloh, 'Universal Jurisdiction, Universal Prescription? A Preliminary Assessment of the African Union Perspective on Universal Jurisdiction'.

<sup>44</sup> Pati (n 16) 274. See also the Resolution of the Arab League No. 464/21 dated 30/03/2009 [4] & [6].

the interests of justice, Barnes argues that the failure of state parties to cooperate with the ICC may be the result of the inconclusiveness of the duty to arrest in the Rome Statute.<sup>45</sup>

The difficulties inherent in compelling state cooperation have led some scholars to advocate alternative means of coercive enforcement. Scharf, for example, advocates for compelling compliance through a myriad of coercive measures such as the imposition of sanctions, the withholding of aid, or even the use of force as is permitted under the mandate of the United Nations.<sup>46</sup> Even such an intransigent supporter of the ICC as Akhavan is ready to admit that the success of the international criminal justice project hinges on the use of military, economic, and political powers to compel states to surrender individuals wanted by the court.<sup>47</sup> He observes that the ICTY's experience in Bosnia was more successful than the ICC's adventure in Sudan because the imposition of financial and other sanctions as well as the presence of peacekeeping troops on the ground, amongst other factors, indicated the seriousness of efforts by the international community to see a peaceful transition.<sup>48</sup> The dilemma is, however, that proponents of the ICC in their appeal for enforcement go beyond financial and diplomatic pressures and entertain, if not actively bless, the use of arbitrary military force. Cassese, for example, maintains that "robust action by the United Nations where required to restore international peace and security" remains essential to the realization of international justice in the wake of conflicts.<sup>49</sup>

The recent political stalemate at the UN Security Council regarding the escalating atrocities against the civilian population in Syria and the persistent opposition of two permanent members of the Council—Russia and China—to any tangible measures against the Assad Government both demonstrate the danger in relying on an international legal system that is tempered only by political will to affect enforcement of international criminal justice.<sup>50</sup> While

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<sup>45</sup> G.P. Barnes, 'International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir, The', *Fordham Int'l LJ*, 34 (2010), 1584.

<sup>46</sup> Scharf (n 23) 938–44 (discussing the merits and challenges of employing a host of indirect enforcement mechanisms previously used in connection with the ICTY, including economic and political sanctions, to give force to international criminal law).

<sup>47</sup> Akhavan (n 21) 30–31.

<sup>48</sup> P. Akhavan, 'Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism', *Human Rights Quarterly*, 31/3 (2009), 624–54.

<sup>49</sup> Cassese (n 22) 17.

<sup>50</sup> See Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Syria That Would Have Threatened Sanctions, Due to Negative Votes of China, Russian Federation, U.N. Press Release S.C./10714 (July 19, 2012), <http://www.un.org/News/Press/docs/2012/sc10714.doc.htm>; Press Release, Security Council, Security Council Fails to Adopt Draft Resolution on Syria as Russian

it is not possible to institute economic and political sanctions indefinitely,<sup>51</sup> the use of military force also has its problems. Goldsmith notes that reliance on coercive political or military force to ensure cooperation with the court leaves the institution vulnerable before hostile powerful states such as the United States.<sup>52</sup> More troubling perhaps, with respect to the use of force to ensure apprehension of individuals wanted for crimes subject to the jurisdiction of the ICC, is the ensuing loss of legitimacy to international criminal law itself from the selective and irregular application of this power.<sup>53</sup> While noting the recognition by Cassese of the centrality of the use of force to the effectiveness of the ICC's regime, Broomhall criticizes similar literature on accountability for its inattention to the conditions under which such force is to be used:

[B]ecause regular enforcement assumes impartiality in the use of force, while in reality a carefully guarded residue of political discretion continues to play a decisive role, one could argue that in its strongest form, "accountability" advocacy may indirectly lend support to highly selective and imperfect form of justice by promoting (irregular) intervention by the Security Council or by individual States.<sup>54</sup>

To add to the above, Nzelibe points to the suggestion emanating from political science scholarship that the prospect of international interventions in situations of conflict may create perverse incentives in that rebel groups are encouraged to recklessly or intentionally make civilians under their control vulnerable to the commission of atrocities in anticipation

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Federation, China Veto Text Supporting Arab League's Proposed Peace Plan, U.N. Press Release S.C./10536 (February 4, 2012), <http://www.un.org/News/Press/docs/2012/sc10536.doc.htm>; Press Release, Security Council, Security Council Fails to Adopt Draft Resolution Condemning Syria's Crackdown on Anti-Government Protestors, Owing to Veto by Russian Federation, China, U.N. Press Release S.C./10403 (October 4, 2011), <https://www.un.org/News/Press/docs/2011/sc10403.doc.htm>. (sources last visited July 26, 2014).

<sup>51</sup> Scharf (n 23) 942–44 (discussing the merits and challenges of using a number of indirect enforcement mechanisms that were previously used in connection with the ICTY, including economic and political sanctions).

<sup>52</sup> J. Goldsmith, 'Self-Defeating International Criminal Court, The', *U. Chi. L. Rev.*, 70 (2003), 89.

<sup>53</sup> B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford University Press, USA, 2003). Also note that with respect to Syria and because it is not a signatory to the Rome Statute, the question of assistance with the execution of a hypothetical arrest warrant for Assad remains a moot point because a UNSC resolution referring the situation in the country to the ICC is itself not foreseeable.

<sup>54</sup> *ibid* 61.



of action by the 'international community.'<sup>55</sup> He also notes that paradoxically such intervention may in addition lead to acute breakdowns in negotiation and hence to the prolongation of crises in anticipation of imminent victory by those on whose behalf the international community intervened.<sup>56</sup>

The issue of enforcement played a significant role in the "Peace vs. Justice Debate," which is characteristic of scholarship on the effectiveness of ICTs. This discourse pits the calls for accountability that prioritize justice (representative of the "Accountability Camp") against those for peace and post-conflict reconstruction that see judicial interference as disruptive and counter-productive (representative of the "Peace Camp"). The most frequently invoked argument by the Peace Camp is that in light of the lack of coercive enforcement powers and the inability to bring suspects to custody, use should be made of more innovative approaches such as amnesties.<sup>57</sup> Wippman, for example, observes that unless the deterrence hypothesis often invoked in accountability advocacy is sufficiently proven, an uncompromising quest for justice is unreasonable.<sup>58</sup> While acknowledging the challenges to enforcement, international justice hardliners reject such approaches as incompatible with the spirit of international criminal justice not to mention ineffective in the attainment of sustainable peace.<sup>59</sup> Bassiouni argues that accountability is not just a prerequisite of deterrence, but also an important factor in securing a stable post-conflict society and a lasting peace.<sup>60</sup> The difficulty in this assertion, however, is that there is very little evidence to suggest that ICTs contribute to post conflict peace or indeed to deterrence.<sup>61</sup> Even though a number of empirical attempts were made to verify the deterrence hypothesis of prosecutions, the limited data available as well as the ideological impasse between

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<sup>55</sup> J.O. Nzelibe, 'Courting Genocide: The Unintended Effects of Humanitarian Interventions', *California Law Review* (2009) 1172-1218.

<sup>56</sup> *ibid* 1198–99. To the best of my knowledge, Nzelibe is the only legal work addressing this issue.

<sup>57</sup> J. Snyder and L. Vinjamuri, 'Trials and Errors: Principle and Pragmatism in Strategies of International Justice', *International Security*, 28/3 (2004), 5-44.

<sup>58</sup> D. Wippman, 'Atrocities, Deterrence, and the Limits of International Justice', *Fordham Int'l LJ*, 23 (1999), 473.

<sup>59</sup> See, for example, M.C. Bassiouni, 'Combating Impunity for International Crimes', *U. Colo. L. Rev.*, 71 (2000), 409.

<sup>60</sup> *Ibid* 410.

<sup>61</sup> D.G. Newman, 'Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem, The', *Am. U. Int'l L. Rev.*, 20 (2004), 293; Snyder & Vinjamuri (n 57) 43–44. But see H. Kim and K. Sikkink, 'Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries', *International Studies Quarterly*, 54/4 (2010), 939-63 (employing data from 100 transitional countries to show that prosecutions of human rights abuses decrease oppression).

supporters and opponents prevented any serious dialogue on the issue.<sup>62</sup> Still, if the goals of the international criminal justice regime include deterrence, not just in the limited form of general deterrence, but as requiring the prevention of atrocities as well as the incapacitation and removal of political spoilers,<sup>63</sup> it could be argued that a dogged adherence to the notion of accountability may prove counterproductive.

Despite the substantial enforcement dilemma faced by ICTs, traditional scholarship in the field treats the issue either as a separate question of a wavering political will to bring about justice, ignores it completely, or otherwise circumvents it by rejecting the need for international justice. This trend is particularly troubling because it seems to mirror the general schism in international criminal justice literature between the drastically opposed ideological strands of realism and idealism, both of which failed to provide any convincing arguments for or against the effectiveness of international criminal prosecutions.<sup>64</sup> This polarization results in approaches to enforcement that either seek to have justice at any cost or are content not to pursue justice at all.

### 3.2.2. Game-theoretic Literature

The ICC enforcement dilemma attracted the attention of a number of international relations scholars who attempted to understand the potential of the current international criminal regime within a broader research framework seeking to answer questions about the function of international organizations.<sup>65</sup> Using the tools of game theory to formulate propositions about the possible effects of the ICC on the behaviour of regime leaders, a limited

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<sup>62</sup> Kim & Sikkink (n 61) 957–58 (concluding that human rights prosecutions after atrocities lead to better human rights protection and generate a deterrent effect beyond the confines of a single country); T.D. Olsen, L.A. Payne, and A.G. Reiter, 'The Justice Balance: When Transitional Justice Improves Human Rights and Democracy', *Human Rights Quarterly*, 32/4 (2010), 980-1007 (demonstrating that prosecutions of gross human rights violations alone have no significant effect on democracy and the protection of human rights and that only a combination of trials and amnesties or trials, amnesties, and truth commissions works); Abel Escribà-Folch & Joseph Wright, Human Rights Prosecutions and Autocratic Survival, 31–32 (May 1, 2013) (unpublished manuscript), <http://www.personal.psu.edu/jgw12/blogs/josephwright/THRP7.pdf> (showing that human rights prosecutions in neighboring countries have a negative effect on democratic transitions in countries where personalist dictators are in power).

<sup>63</sup> Akhavan (n 21) 12–13.

<sup>64</sup> F. Mégret, 'Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project', *Finnish Yearbook of International Law*, XII, (2001), 193–247.

<sup>65</sup> Michael J Gilligan and Leslie Johns, 'Formal Models of International Institutions', *Annual Review of Political Science*, 15 (2012), 221-43.

scholarship emerged to lend a much-needed formalization to existing arguments in the field.<sup>66</sup>

The use of game theory in the analysis of law enforcement problems is not new and indeed owes its use of the basic concept of cost-benefit calculation to Becker's seminal essay on crime and punishment.<sup>67</sup> This idea allows one to judge the effectiveness of a rule or law by looking at the way it affects individuals' cost-benefit calculus and the incentives or disincentives it provides them for committing or refraining from committing a certain act.<sup>68</sup> For example, it is a generally accepted principle of contemporary jurisprudence that evidence obtained as a result of torture must have no weight in a court of law. By legislating to create this rule, lawmakers assign a zero value to evidence obtained this way. This has the effect of offsetting any expected benefit from employing unorthodox means in law enforcement. Because obtaining evidence through the use of torture will not result in a conviction and might in fact result in an acquittal of a guilty defendant, a change in the law to that effect negates the incentive to use torture in the first place.

Game theory is particularly well suited to situations that involve interactions between two or more decision makers. Law enforcement in general, and in the context of international criminal justice in particular, often involves the action of multiple agents. In the international criminal justice context, the cost-benefit calculus of corrupt leaders may be affected by what the ICC<sup>69</sup> does as well as what it is likely to do in a given situation. A leader's behaviour may also be affected by the decisions of third-party states or the actions of a relevant opposition or rebel group. Hviid notes:

[G]ame theory allows us to contrast a myopic view of what is a good legal reform with a more sophisticated view, where each actor's optimal response to the new set of rules is taken into consideration when evaluating the proposed change. By

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<sup>66</sup> See Gilligan (n 15).

<sup>67</sup> S. Becker, Gary, 'Crime and Punishment: An Economic Approach', *The Journal of Political Economy*, 76/2 (1968), 169-217.

<sup>68</sup> K. Basu, *Beyond the Invisible Hand: Groundwork for a New Economics* (Princeton Univ Pr, 2010).

<sup>69</sup> For purposes of this chapter, I assume that the ICC is a unitary actor represented by the ICC Prosecutor. Even though the actions of individual players within the ICC may be of relevance to the effectiveness of law enforcement efforts, (see, for example, McClendon (n 16) 366–70), the focus of the chapter is on the exercise of prosecutorial discretion.

clarifying the likely effects of different changes a more informed (political or legal) decision can be taken.<sup>70</sup>

It is therefore unsurprising that the ICC enforcement dilemma provides a ripe field for the application of game theory.

Using a traditional economic of crimes model, Sutter developed a modest analysis of the ICC suggesting that for the court to have more than a marginal deterrent effect, it must be, but is not, better placed to apprehend leaders who are still in power.<sup>71</sup> He pointed out the possibility that leaders who already committed crimes will likely cling to power and speculated that divergent interests within a certain regime may lead to a more beneficial interaction with the ICC.<sup>72</sup> Gilligan, on the other hand, introduced a sophisticated repeated game model to study the effect of the ICC on a dictator's decision to commit atrocities in light of the willingness of a third-party state to offer him asylum (Gilligan's Model).<sup>73</sup> Gilligan's Model suggests that the ICC is likely to have a deterrent effect on the margin, because it will allow third-party states to credibly decline offering some dictators asylum knowing that surrendering to the ICC provides them with an alternative exit strategy.

Gilligan's Model rests on the assumption that leaders face harsher punishments domestically than at the hands of the ICC. This is not an unreasonable assumption. The fate of Muammar Gaddafi following the successful popular uprising in Libya in 2011 is illustrative of the point.<sup>74</sup> Furthermore, Ku and Nzelibe show that in most cases, political leaders face very severe domestic punishments in the wake of a coup.<sup>75</sup> By contrast, Article 77(1) of the Rome Statute limits the ability of the court to impose a prison sentence in excess of 30 years.<sup>76</sup> By

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<sup>70</sup> M. Hviid, 'Games Lawyers Play', *Oxford J. Legal Stud.*, 17 (1997), 705.

<sup>71</sup> D. Sutter, 'The Deterrent Effects of the International Criminal Court', *Conferences on New Political Economy*, 23/1 (2006), 9-24.

<sup>72</sup> Ibid.

<sup>73</sup> Gilligan (n 15) 942-51.

<sup>74</sup> Death of a Dictator, *Human Rights Watch*, (Oct. 17, 2012), <http://www.hrw.org/node/110724/section/2> (last visited July 26, 2014).

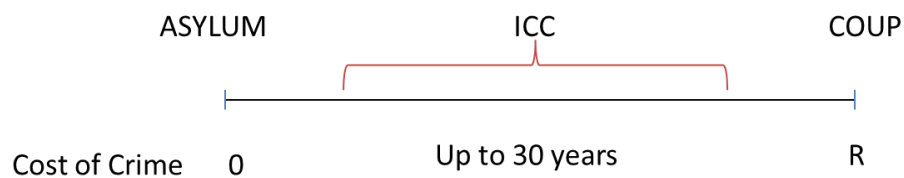
<sup>75</sup> J. Ku and J. Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities', *Wash. UL Rev.*, 84 (2006), 777.

<sup>76</sup> The text of Article 77(1) of the Rome Statute (n 6) states:

Subject to article 110, the court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

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

imposing weaker sanctions, Gilligan maintains, the ICC allows a leader who committed crimes the option of surrendering to the court instead of clinging to power as predicted by Sutter. He argues that the creation of the ICC acts as a third mid-way option between receiving asylum at zero cost and being overthrown at a very high cost.<sup>77</sup> When a state refuses to grant asylum to a leader sufficiently threatened with a coup or regime change, he will be forced to surrender to the ICC and receive the 30-year sentence. Gilligan observes that under these conditions, the ICC's effect is not to make leaders cling to power but rather to make them surrender to the ICC when this option is better for them than to take chances of being overthrown and severely punished. And because surrender to the ICC in these situations entails some positive punishment compared to the zero cost of asylum, the overall effect of the ICC is in fact to make crimes costlier for a leader (See Figure 3.1).



*Figure 3.1 Gilligan's Cost of Crime Logic*

In Gilligan's Model, the decision of the leader to exit power depends on the probability of his survival in office. When this probability is low enough, the leader will be willing to surrender to the ICC despite the promise of punishment. With higher probabilities of survival, the leader will prefer the better option of asylum, which the benevolent third-party state would oblige. It is important to note that Gilligan posits that the ICC will deter the proportion of leaders who would have been granted asylum if not for the ICC. However, when the regime is very likely to survive, neither the ICC nor asylum will be attractive enough. Recent events

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

Even though the court was given the power to impose a life sentence in some circumstances as a compromise on the issue of the exclusion of capital punishment, the same is fettered by a threshold of extreme gravity the determination of which is likely to be problematic if it arises. Schabas argues that the international trend to outlaw the death penalty was also accompanied by a general aversion to the use of life sentences during the negotiations leading up to adopting the text of the Rome Statute. William A Schabas, 'Life, Death and the Crime of Crimes Supreme Penalties and the Icc Statute', *Punishment & Society*, 2/3 (2000), 263-85.

<sup>77</sup> Gilligan (n 15) 943.

in Syria demonstrate this logic. With the onslaught by government forces against civilian populations continuing unabated and the persistent political impasse on international intervention, Tunisia extended an offer of asylum to the Syrian President Bashar Al-Assad.<sup>78</sup> Tunisia's invitation is neither surprising nor uncommon given the numerous incidents of often well-intentioned states offering their territories as safe haven for tyrants.<sup>79</sup> Indeed, Tunisia itself had witnessed a popular revolution in 2011 that inspired a series of demonstrations for political change across the Arab World and which in turn became a catalyst for the Syrian revolution. Tunisia was also the first country to withdraw its ambassador from Syria in protest over the military operations against Syrian demonstrators. It is, hence, reasonable to assume that in offering Assad asylum Tunisia sought the removal of Assad from the political scene in order to end the atrocities.

Gilligan makes it clear that in his model no military intervention by the international community is necessary and deterrence occurs even in the absence of enforcement power. Gilligan's conclusions about the ICC should make for very good news to international criminal justice enthusiasts.<sup>80</sup> In light of the difficulties inherent in international intervention and compelling state cooperation, a self-enforcing ICC would be a great addition to the efforts to end impunity. However, as useful as Gilligan's Model is, especially with regards to highlighting the important role of self-surrender in the effectiveness of the ICC regime, it remains incomplete. This is because this model treats the probability of regime change exogenously (or as a random act determined by Nature) and fails to take into consideration the effect of the ICC on opposition group behaviour and the prospect of regime change. Consequently, the implicit assumption in the model is that the operation of the ICC has no bearing on the actions of opposition groups or in defining their struggle against a government accused of the commission of atrocities. In reality, however, and because the ICC prosecutes opposition groups as well as leaders, the operation of the court restricts opposition groups to the use of acceptable levels of violence that will not bring the opposition groups themselves under the jurisdiction of the court. In Section 3.3 below, I examine the effect of the ICC on opposition group behaviour to determine whether or not

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<sup>78</sup> Tunisia Offers Asylum to Bashar Assad, *The Independent World News (Middle East)*, (February 28, 2012), <http://www.independent.co.uk/news/world/middle-east/tunisia-offers-asylum-to-bashar-assad-7459045.html> (last visited July 26, 2014).

<sup>79</sup> See Gilligan (n 15) 935–36 (citing examples of states that offer dictators asylum).

<sup>80</sup> *ibid* 942–51.

the threat of regime change remains despite the fact the ICC prosecutes leaders and opposition groups alike.

Be the above as it may, the contributions Gilligan made to the debate are invaluable. First, he highlighted the central role for self-surrender in the discussion about the effectiveness of the ICC. Second, he suggested a possible role for plea-bargaining to cover the range of survival probabilities between the lower level, entailing surrender to the ICC, and the higher level, which will result in asylum. Building on this insight, Ritter and Wolford develop a bargaining model to show that the effectiveness of the ICC regime can be enhanced by offering pre-arrest bargaining to some indicted leaders who are less likely to be removed from power or individuals who otherwise stand to lose some utility by staying at large.<sup>81</sup> They conclude, however, that this comes at the cost of incentivizing more crimes in a trade-off between deterrence and the regular administration of justice.<sup>82</sup> Finally, by making the decision to surrender to the ICC dependent on prospects for regime survival, Gilligan managed to place the question of regime change at the heart of the debate. This is a significant development for the reasons set out in Section 3.2.3 below.

### 3.2.3. A Note on Regime Change

Following Gilligan,<sup>83</sup> the analysis advanced in Section 3.3 of this Chapter (as well as the analysis that follows in Chapters 4 and 5) maintains the focus on regime change in the enquiry about the effects and the effectiveness of the ICC given the court's endemic incapacity to bring the guilty to justice. While the integration of concerns for political transformation in post-conflict societies in the debate about the ICC is likely to be met with considerable resistance given the tendency to regard the court as essentially apolitical,<sup>84</sup> the arguments presented in Chapter 2 and summarized in this section evince the importance of enabling democratic transitions in these societies as a constituent element in the realization of international criminal justice.

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<sup>81</sup> Emily Hencken Ritter & Scott Wolford, *Negotiating Surrender: Criminal Courts, Pre-Arrest Bargains, and the Enforcement of Warrants*, 19–21 (May 17, 2010), <http://userwww.service.emory.edu/~ehencke/nonsovereign.pdf>.

<sup>82</sup> *ibid* 19.

<sup>83</sup> Gilligan (n 15).

<sup>84</sup> S.M.H. Nouwen and W.G. Werner, 'Doing Justice to the Political: The International Criminal Court in Uganda and Sudan', *European Journal of International Law*, 21/4 (2010), 941-65.

In addition to the problematic prospects for the enforcement of ICC warrants, the international criminal justice regime suffers from a number of deficiencies that undermine its potential as a freestanding response to political violence.<sup>85</sup> This is particularly the case with respect to internal conflicts that now inform the majority of situations before the ICC.<sup>86</sup> There is indeed a suggestion that the mere involvement of international criminal institutions, instead of ameliorating communal violence, intensifies political struggles and complicates the resolution of structural causes of civil wars.<sup>87</sup> In addition, the undue emphasis on retributive justice and dogged adherence to an agenda of accountability, regardless of cost, ignores more pressing issues such as restoration of the social and political order as required to rectify the structural injustices giving rise to conflict.<sup>88</sup> Even though the international criminal justice regime seeks to consolidate its role as protector of individual rights apart from the nation-state, the fact that it applies only in limited circumstance and is enforced both selectively and irregularly makes it an unsuitable vehicle for a sustainable prevention of political violence.<sup>89</sup> On the other hand, genuine democratic institutions representing the aspirations of post-conflict societies and respectful of the rule of law will provide better safeguards against repression.<sup>90</sup> For these reasons, it is imperative, at a minimum, that the ICC takes into consideration its effect on prospects of democratic transitions within countries experiencing conflict. Otherwise, Newman argues, ignoring domestic political dynamics is likely to result in the poorest and most vulnerable victims of atrocities paying a hefty price for international justice.<sup>91</sup>

An approach to prosecutions that is necessarily subjective in its assessment of the causes of violence and which pursues violators without critical reflection may lead the ICC to become complicit in quelling legitimate struggles for freedom and institutional change while empowering undemocratic and violent forces.<sup>92</sup> Nouwen and Werner argue that the ICC's intervention in internal conflicts often results in the relegation of one party to political irrelevance while elevating the opposing party to protector of humanity and upholder of law,

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<sup>85</sup> R.G. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', *Cornell Int'l LJ*, 35 (2001), 355. (stating that the aim of international criminal law is to end political violence).

<sup>86</sup> Akhavan (29) 113–14.

<sup>87</sup> See Nouwen and Werner (n 84) 962–65; Branch (n 18) 194.

<sup>88</sup> Branch (n 18) 194–96.

<sup>89</sup> See discussion in Chapter 2.

<sup>90</sup> *ibid.*

<sup>91</sup> Newman (n 61) 350–52.

<sup>92</sup> Branch (n 18) 194–95.



often undeservedly.<sup>93</sup> Branch notes that the ICC was widely criticized for its intervention in Uganda because it sided with a known oppressive regime which has itself been implicated in atrocities.<sup>94</sup> He maintains that in agreeing to adjudicate the case, the ICC legitimized the Ugandan Government's repression of its political opponents. In addition, by subscribing to the reductive narrative of 'the criminal, the victim, and the transcendental judge', the court practically consigned the legitimate demands of the LRA, including the end of political violence, to obscurity.<sup>95</sup> While framing of the issues involved in such narrow confines might reflect the appeal to the '...spectacle of courtroom drama, which pits darkness against the forces of light and reduces the world to a manageable narrative',<sup>96</sup> it does not easily fit the genre of contemporary internal conflicts and should not be applied to them as a matter of course.

Branch also argues that institutions such as the ICC create a dependency on international intervention that undermines the demands for change on a national level.<sup>97</sup> It is this dependency that Mamdani finds undesirable and akin to obliterating the concept of citizenship in developing countries.<sup>98</sup> The assumption that justice would be restored and freedom will reign after an international court tries a handful of perpetrators is unreasonable. As John Gray explains in the context of international humanitarian interventions, '[f]reedom is not . . . a primordial human condition: where it exists it is the result of generations of institution building'.<sup>99</sup>

In addition to the centrality of regime change to the attainment of a broader conception of justice that includes political justice,<sup>100</sup> there is a more pragmatic need for the ICC to enable domestic political dynamics seeking democratic transitions. In light of the ICC enforcement problems, democratic transitions often provide the only path to accountability. Both the qualitative accounts of Akhavan<sup>101</sup> and of Snyder and Vanjamuri<sup>102</sup> allude to the fact that

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<sup>93</sup> Nouwen & Werner (n 84) 962–63.

<sup>94</sup> Branch (n 18) 183–85.

<sup>95</sup> Ibid 190.

<sup>96</sup> Akhavan (n 21) 30.

<sup>97</sup> Branch (n 18) 194.

<sup>98</sup> M. Mamdani, 'Responsibility to Protect or Right to Punish?', *Journal of Intervention and Statebuilding*, 4/1 (2010), 53–67.

<sup>99</sup> J. Gray, *Black Mass: Apocalyptic Religion and the Death of Utopia* (Farrar, Straus and Giroux, 2007).

<sup>100</sup> Branch (n 18) 193.

<sup>101</sup> Akhavan (n 21) 8–9.

<sup>102</sup> Snyder & Vanjamuri (n 57) 22–25.

regime change was essential to securing the arrest of indicted criminals in both the former Yugoslavia and Rwanda.

### **3.3. *The Model***

Under the rationality assumption, whether or not the ICC is successful in deterring leaders is determined by the extent to which its operation reduces a leader's payoffs from committing crime. Literature on the topic rightly seeks to incorporate concerns that the ICC imposes weaker sanctions than sanctions imposed by the opposition when a successful coup occurs, and can therefore incentivize crime.<sup>103</sup> It is indeed one of the arguments advanced by proponents of the ICC that international prosecutions keep at bay forces of vengeance in post-conflict societies.<sup>104</sup> In addition, because of the inherent human rights bias in the international criminal justice regime, the ceiling on sentencing imposed by the ICC falls far short of the sentences usually imposed for such crimes in domestic legal systems.<sup>105</sup> The debate surrounding the current struggle for jurisdiction between the ICC and the Libyan National Transitional Council over the case of Saif Al-Islam Gaddafi is partly informed by whether the court should surrender jurisdiction to Libyan courts while knowing that a conviction is likely to result in the death sentence in accordance with Libyan law.<sup>106</sup> As mentioned above, Gilligan posits that it is this feature of the ICC that renders it a self-enforcing regime in certain cases (See Figure 3.1 above). Faced with lower probabilities of survival in office, Gilligan maintains, leaders will have no option but to surrender to the ICC to receive a lesser punishment than the severe punishment likely to be imposed by the opposition after a coup.<sup>107</sup>

In Gilligan's Model, the interaction occurs primarily between a foreign state and a leader. The results of the model turn on the effect of the incorporation of the ICC on the expected present value of the leader's payoffs from the commission of atrocities. These payoffs naturally increase if the leader can benefit from asylum in the foreign state and decrease if

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<sup>103</sup> Gilligan (n 15) 937, 943; Ritter & Wolford (n 81) 19–21; Ku & Nzelibe (n 75) 806 (using empirical evidence to show that autocratic leaders in Africa face harsher sentences domestically than sentences dealt out by international criminal tribunals).

<sup>104</sup> See, for example, Akhavan (n 21) 7–8.

<sup>105</sup> J.E. Alvarez, 'Crimes of States/Crimes of Hate: Lessons from Rwanda', *Yale J. Int'l L.*, 24 (1999), 365–613 (discussing the divergence in sentencing between the ICTR and the domestic legal system in Rwanda).

<sup>106</sup> C. Stahn, 'Libya, the International Criminal Court and Complementarity a Test for 'Shared Responsibility'', *Journal of International Criminal Justice*, 10/2 (2012), 325–49.

<sup>107</sup> See Gilligan (n 15) 956–57.

the foreign state can credibly reject requests for asylum when the ICC is in existence. Turning down the leader's request for asylum may be an option for a foreign state if the leader is able to surrender to the ICC Prosecutor in the face of imminent regime change or collapse. The leader surrenders in this case in order to escape the harsh opposition punishment which will inevitably follow after the leader is removed from power. The foreign state in Gilligan's Model is only concerned with whether a criminal leader is in office or not and strictly prefers that he is not in power regardless of how that occurs; i.e. whether through asylum or surrender to the ICC.

Because Gilligan's analysis is concerned primarily with the effect of the ICC on the ability of foreign states to offer leaders who committed atrocities asylum, the model was structured as a repeated game to provide for a variation in the payoffs of the foreign state from its strategies of accepting the leader's request for asylum or rejecting it. Whether or not the leader remains in office in a subsequent period<sup>108</sup> - which is determined by this decision of the foreign to grant or not grant asylum - itself dictates the payoffs of the foreign state which strictly prefers to have a non-criminal leader in power once atrocities have been committed. Hence, devising a second round of play in which the foreign state can be better or worse off was necessary. The decision of the foreign state to accept or reject the request for asylum then reflects on the leader's payoffs.

While the leader's payoffs determine his decision to commit atrocities or not; the leader's choice between requesting asylum, surrendering to the ICC or remaining in power are determined by the single variable of the probability of survival in office following the commission of atrocities. The results of Gilligan's analysis are such that with high probabilities of survival in office post the commission of atrocities, the leader's payoffs are maximized by staying in office and not requesting asylum. With moderate probabilities of survival in office, the risk of opposition punishment post regime collapse increases and therefore the leader is better off requesting asylum from the foreign state. The insight of Gilligan's Model is that with very low probabilities of survival for the leader post the commission of atrocities, the foreign state may be able to reject the leader's request for asylum because in this case the leader will choose to surrender himself to the ICC in order to escape the harsh opposition punishment. The leader's utility from committing atrocities and surrendering to the ICC is naturally lower than when he is successful in gaining asylum. This is because while self-surrender implies the imposition of a somewhat considerable punishment

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<sup>108</sup> Gilligan calls this second period the Post-atrocities sub-game (Gilligan (n 15)).

- albeit more lenient than the opposition punishment imposed on the leader post regime collapse -, the cost of asylum is normalized to zero in the model.

The incorporation of the ICC in Gilligan's Model affects the foreign state's best play when it comes to accepting or rejecting the leader's request for asylum. This is because for sufficiently low probabilities of survival post the commission of atrocities, a foreign state can reject a leader's request for asylum and still have the leader removed from power because he will prefer to self-surrender to the ICC instead of remaining in power and being toppled and punished by the opposition. The shortcoming in Gilligan's Model is the assumption that the probability of regime survival (which is the inverted probability of regime change), and consequently the threat of opposition punishment - both being central to the implications of the model - is exogenously determined and not affected by the existence of the ICC. However, the ICC may in reality affect the prospects of regime change of a criminal leader by restricting the behaviour of opposition groups who are facing such a leader. This is because the ICC does not just go after leaders who commit crimes falling under the jurisdiction of the Court but also prosecutes opposition groups who are suspected of the commission of atrocities. If the ICC leads opposition leaders to rebel less often at the risk of withstanding criminal sanctions post regime collapse, then the Court will negatively affect the probability of regime collapse and the threat of opposition punishment that make Gilligan's Model work; thereby leading to further impunity and more crimes.

Using the logic advanced in the game theoretic literature reviewed above, I developed a game-theoretic model of incomplete information to demonstrate the possible effects of ICC actions on the behaviour of opposition groups facing a leader who may resort to the commission of atrocities if the benefits of doing so are sufficiently large. The intuition behind this model being that opposition group behaviour may in turn affect the leader's cost-benefit calculus when it comes to perpetrating such atrocities. Unlike Gilligan's Model, a one-shot game is suitable for modelling the interaction between the leader and an opposition group under the specific institutional conditions of ICC operation. This is because the payoffs from each player's different strategy are evident in the same time period and do not depend on what occurs in the next. In a sense, the question of leader survival is collapsed into one time-period. This was possible since the probability of regime change was endogenized in the Model by expressly modelling and making the actions of opposition groups its focus. By contrast, the focus on Gilligan's Model is on the decision by a foreign state to grant or deny

political asylum post the commission of atrocities, which in turn depends on an exogenously determined probability of regime survival.

This model presented in this chapter is intended to add to the debate on the ICC's self-enforcement potential as posited by Gilligan.<sup>109</sup> As noted above, Gilligan's Model remains incomplete as it does not make allowance for the fact that ICC sanctions apply equally to leaders and opposition groups. This is important, because the threat of opposition punishment - which Gilligan advances as the main factor influencing a leader's decision to surrender to the ICC - may not arise if opposition groups find that in order to affect regime change, they may themselves be subject to prosecution by the Court.

### 3.3.1. Motivation

It is not unreasonable to assume that some opposition/rebel groups may resort to the commission of crimes against humanity in the face of vicious attacks by a leader who habitually commits crimes within the jurisdiction of the ICC.<sup>110</sup> This is well demonstrated by the evolving conflict in Syria.<sup>111</sup> The brutal repression that accompanied the Syrian Government's response to peaceful demonstrations calling for political change and which swept the country since March 2011 led to the inevitable resort to armed resistance by the Syrian opposition. Pursuant to the first gross violations of human rights by Government agents and the mounting civilian death toll, the opposition's demands understandably shifted to total regime change. This spurred on a raging conflict in the country that has since metamorphosed into a full-blown civil war. With the Assad Government relentlessly pursuing a scorched-earth policy, escalating the use of heavy weapons and purposefully attacking

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<sup>109</sup> Gilligan (n 15) 953.

<sup>110</sup> The analysis in this Thesis is only concerned with the three core crimes of Genocide, Crimes against Humanity, and War Crimes as set out in Articles 6–8 of the Rome Statute. The crime of aggression is excepted because it neither has a negative effect on the exercise of state sovereignty (it on the contrary guards it), nor does it have a direct effect on internal political dynamics. In addition, the three former categories of crime under the jurisdiction of the ICC are qualitatively different in that they seek to enforce standards of international humanitarian law and human rights law in the face of ill-treatment by a state of its own citizens.

<sup>111</sup> International Crisis Group, *Syria's Mutating Conflict*, The Executive Summary of Crisis Group Middle East Report No. 128 (Aug. 1, 2012), available at [http://www.crisisgroup.org/~media/Files/Middle%20East%20North%20Africa/Iraq%20Syria%20Lebanon/Syria/128-syrias-mutating-conflict.pdf](http://www.crisisgroup.org/~/media/Files/Middle%20East%20North%20Africa/Iraq%20Syria%20Lebanon/Syria/128-syrias-mutating-conflict.pdf) (last visited July 26, 2014).

civilian populations,<sup>112</sup> the opposition may have eventually succumbed to the benefits of visiting atrocities on the other side.<sup>113</sup>

There are indeed further examples of rebellions turning sour in addition to the above. Branch notes that while there is no denying the responsibility of the Ugandan rebel group the LRA for the most heinous crimes against the Acholi people in Northern Uganda, the Government of Uganda itself was involved in a number of massacres, atrocities and forced civilian displacements in the region between 1991 and 1996.<sup>114</sup> He explains that the LRA, before turning against the same people it sought to represent, had initially pursued legitimate demands that remain valid today and which included the end of political oppression and violence as well as the political and economic equality of Southern and Northern Uganda.<sup>115</sup> Keller explains that the conflict in Uganda is typical of intra-state conflicts in the twenty-first century in which ‘...the insurgent group is incapable of overthrowing the government, but more than capable of massacring and mutilating innocent civilians’.<sup>116</sup>

A more nuanced example is perhaps provided by the rebellion of the Sudan People’s Liberation Army (SPLA) in what used to be Southern Sudan. It is both widely known and well documented that the SPLA recruited child soldiers for its military operations and in the process committed a number of atrocities against civilian populations in the South including abductions.<sup>117</sup> The Comprehensive Peace Agreement (CPA), which was finally concluded between the Sudan People’s Liberation Movement (SPLM)<sup>118</sup> and the Government of Sudan in 2005, and which brought to an end one of the longest civil wars in Africa, makes specific reference to the cessation of hostilities against civilian populations and the rehabilitation of child soldiers.<sup>119</sup> Even though the crimes committed by the SPLA are in this respect similar to

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<sup>112</sup> Press Release, General Assembly, General Assembly Adopts Text Condemning Violence in Syria, Demanding That All Sides End Hostilities, U.N. Press Release GA/11372 (May 15, 2013), <http://www.un.org/News/Press/docs/2013/ga11372.doc.htm> (last visited July 26, 2014).

<sup>113</sup> *Ibid.*

<sup>114</sup> Branch (n 18) 180–82.

<sup>115</sup> *Ibid.* 191.

<sup>116</sup> L.M. Keller, 'Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms', *Conn. J. Int'l L.*, 23 (2007), 209.

<sup>117</sup> R. Fegley, 'Comparative Perspectives on the Rehabilitation of Ex-Slaves and Former Child Soldiers with Special Reference to Sudan', *African Studies Quarterly*, 10/1 (2008).

<sup>118</sup> The SPLM is the political arm of the SPLA.

<sup>119</sup> Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities Between the Government of Sudan (GOS) and the People’s Liberation Movement/Sudan People’s

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those for which the Congolese rebel Lubanga was found guilty by the ICC (in what came to be the court's first verdict),<sup>120</sup> it is easy to see that the SPLA rebellion was in fact motivated by the need to resist a corrupt regime. After all, short of affecting regime change and bringing about a New Sudan where political and economic rights are based on citizenship,<sup>121</sup> the SPLA managed to secure the fundamental right of self-determination to the people of the South. In the meantime, Sudanese President Al Bashir remains wanted by the ICC for crimes against humanity in Darfur while the government of Sudan continues to employ similarly vicious tactics in its new conflict in Sudan's South Kordofan region.<sup>122</sup>

Contemporary internal conflicts are rife with examples of benevolent opposition groups which were compelled to resort to the commission of atrocities in their revolt against governments which themselves committed crimes under the jurisdiction of the ICC. Given the ICC's tendency to prosecute opposition groups and leaders alike, it is important to understand how the court's operation is likely to affect the behaviour of opposition groups in order to fully understand the effect of the court on leader behaviour.

### 3.3.2. Structure of the Game

In order to illustrate the interaction between the leader and the opposition group in light of the existence of the ICC, a model of incomplete information is specified that assumes that the ICC will indict all crimes falling under its jurisdiction whether committed by a leader of a particular country or groups opposed to this leader. To capture this, it is assumed that the ICC will impose a punishment of (F) with probability (q) in each case. Therefore, a cost of (qF) will be deducted from the payoffs of a player if the ICC can indict him for crimes he committed. The uncertainty in the model relates to the ability of opposition groups to win the fight for control without committing atrocities.

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Liberation Army (SPLM/SPLA) During the Pre-Interim and the Interim Periods, art. 5 & 24, Sudan-SPLM/A, Dec. 31, 2004 <http://www.usip.org/publications/peace-agreements-sudan> (last visited July 26, 2014).

<sup>120</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012) <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> (last visited July 26, 2014).

<sup>121</sup> Kameir, Elwathig 'Toward Building the New Sudan' in Francis M. Deng (ed.) *New Sudan in the Making?: Essays on a Nation in Painful Search of Itself*, (The Red Sea Press Inc. 2009) 17-32.

<sup>122</sup> *Sudan: Crisis Conditions in Southern Kordofan*, Human Rights Watch (May 4, 2012), <http://www.hrw.org/news/2012/05/04/sudan-crisis-conditions-southern-kordofan> (last visited July 26, 2014).

The game starts with Nature (as a non-strategic player) randomly assigning a probability that the opposition group is one of two types: a weak type that is unable to affect regime change or win without resorting to the commission of atrocities, and a strong type that is able to affect regime change without the commission of atrocities. While opposition groups are able to observe whether they are strong or weak, the leader is not certain which type of opposition he is facing. To simplify the model, it is assumed that if the opposition revolts, they will win.<sup>123</sup> The setting of the model comes from the expectation that extreme violence is employed by weak participants in any given contest. Kalyvas explains that:

[t]he persistent use of indiscriminate violence points to political actors who are fundamentally weak: this is the case with civil wars in failed states . . . where high levels of violence emerge because no actor has the capacity to set up the sort of administrative structure required by selective violence.<sup>124</sup>

An example of such behaviour was recorded in the context of the Nigerian local elections where violence was found to be used more frequently by political opponents than by government incumbents already in control.<sup>125</sup>

### 3.3.3. Players and Their Payoffs

There are two strategic players in the model: (i) a leader (L) who is faced with the choice between committing crimes falling under the jurisdiction of the ICC (appears on the model as (C)) or not committing such crimes (appears on the model as (NC)); and (ii) the opposition (Opp), who has to decide between mounting a rebellion (appears on the model as ( $R_s$ ) when the opposition is strong, and ( $R_w$ ) when it is weak) or not mounting a rebellion (appears on the model as ( $NR_s$ ) when the opposition is strong, and ( $NR_w$ ) when it is weak).<sup>126</sup> Nature is a non-strategic player randomly assigning the probability ( $\alpha$ ) that the opposition is the type

<sup>123</sup> This is a necessary simplification of the model which causes no loss of generality provided the assumption:  $V > 0$  holds. This assumption will hold if there is a high probability of success for a rebellion or otherwise the payoffs from being in office are very high compared with not being in office (See suggestion in Collier (n 125 below) 39).

<sup>124</sup> Nzelibe (n 55) 1187 (quoting Kalyvas, Stathis N (eds.), *The Logic of Violence in Civil War* (2006) 171).

<sup>125</sup> P. Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places* (Harper Perennial, 2010).

<sup>126</sup> Please note that it is assumed that the opposition is a unitary actor. This is a reasonable assumption in so far as the opposition is likely to unite to expel a dictator regardless of ideological or other differences. An instructive example of this is the unified front of the Darfur rebels fighting the Government of Sudan, which includes secular movements (the SLA) as well as Islamist movements (the JEM). See generally, Flint and De Waal, *Darfur: A New History of a Long War* (Zed Books, 2008).



that wins only with the commission of atrocities, and probability  $(1-\alpha)$  that the opposition, when it revolts, can topple the government without committing atrocities. The probability  $(\alpha)$  can be interpreted as an indication of the opposition's political capacity or efficacy to affect regime change peacefully (with  $\alpha=0$  denoting maximum capacity to affect change and  $\alpha=1$  denoting no capacity to affect change), but it can also be an indication of the strength of the government or its control on the reign of power. As stated in 3.2 above, the model assumes that the leader is not privy to the information regarding opposition type at the time of deciding whether or not to commit crimes. However, because the opposition is aware of its type, its moves are predicated on this knowledge.

The extensive form of the one-shot game (See Figures 3.2 and 3.3 below) illustrates the interaction between the two players; firstly, prior to the ICC (Pre Institution) (Figure 2), and secondly, with the Effects of the ICC (Post Institution) (Figure 3.3). Even though the players play consequentially in each model, with the leader going first, the game unfolds in one time period.

The Payoffs of each player are set out as follows:

First: Leader Payoffs:

The leader receives a payoff of  $W_{cr}$  if he commits a crime falling under the jurisdiction of the ICC. If, instead, he chooses to respect the Rule of Law and refrain from committing a crime, he receives a payoff of  $W_{lg}$ .<sup>127</sup> The assumption in the model is that  $W_{cr}$  is larger than  $W_{lg}$  in order to account for the relevance of the gains from crimes. Simply put, if  $W_{cr}$  is smaller than  $W_{lg}$ , there will be no reason for the leader to consider it as an option. Therefore, in the event there are no costs to his behaviour either way, when a leader chooses to commit crimes it is because his payoffs from criminal activity are higher than his payoffs from lawful behaviour. With respect to costs, and in the event that the opposition rebels toppling the leader, the leader suffers either a cost of  $(d)$  if he was overthrown having not committed any crimes, or a cost of  $(R)$  if he is overthrown after he committed atrocities.  $(R)$  is assumed to be higher than  $(d)$  in line with the literature in the field.<sup>128</sup>

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<sup>127</sup> Please note that the subscript  $(lg)$  does not denote the logarithm of  $W$ . In this context  $(lg)$  is used to indicate that the source of the leader's payoff  $(W)$  is other than from criminal activity (denoted by the subscript  $(cr)$ ).  $(lg)$  stands for legal.

<sup>128</sup> Gilligan (n 15) 944.

When the ICC is included in the model, the only change in the leader's payoffs is that he suffers a cost of  $(qF)$  whenever he commits a crime and is not overthrown by the opposition.<sup>129</sup> On the other hand, if a leader commits crimes and is then toppled, he will not suffer the sanction of the ICC because he will be punished by the opposition instead.

Second: Opposition Payoffs:

It is assumed for simplicity that the opposition strictly prefers to be in power. Therefore, if the opposition is unable to overthrow the regime and remains out of office, it receives a payoff of zero. On the other hand, the payoff for overthrowing the regime is  $(V)$ . To reflect the internal costs of committing atrocities, the opposition suffers a cost of  $(L)$  that can be regarded as a legitimacy cost or loss of popular support after the commission of crimes.

When the ICC is included in the model, the only change in the payoffs is that the opposition suffers a cost of  $(qF)$  (in addition to the legitimacy cost  $(L)$ ) whenever it commits crimes in the process of overthrowing the government, in other words, whenever it is weak and it rebels.<sup>130</sup>

The assumption in the Model is that the strategic players are risk-neutral. A player is risk-neutral when he treats expected payoffs the same as certain payoffs (i.e. when he is indifferent between receiving a certain payoff of  $x$  value and receiving a probabilistic payoff that amounts to  $x$ ). To illustrate this: if  $£25 = 25\% * £100$ , a player is risk neutral when they are indifferent between choosing a strategy that leads to receiving  $£25$  with certainty and a strategy that leads to receiving a  $£100$  with a probability of 25%.

Table 3.1 below sets out the notations used in the Model.

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<sup>129</sup> Compare payoffs of  $(L)$  on the paths  $\{C, NR_s\}$  and  $\{C, NR_w\}$  on Figure 3.2 (Pre-institution) and Figure 3.3 (Post-institution).

<sup>130</sup> Compare payoffs of  $(Opp)$  on the paths  $\{\alpha, NC, R_s\}$  and  $\{\alpha, C, R_w\}$  on Figure 3.2 (Pre-institution) and Figure 3.3 (Post-institution).

<b>Table of Notations</b>	
$\alpha$	The Probability that the Opposition is weak <sup>131</sup>
$1-\alpha$	The Probability that the Opposition is strong <sup>132</sup>
$F$	The size of ICC sanction
$q$	The probability of ICC sanction being imposed (for the commission of crimes)
$W_{cr}$	Leader payoff from committing crimes
$W_{lg}$	Leader payoff from not violating the law while in office
$d$	Punishment levied on Leader (by the Opposition) post regime collapse when no leader crimes are committed
$R$	Punishment levied on Leader (by the Opposition) post regime collapse when leader crimes are committed
$V$	Opposition payoff from being in office
$L$	A legitimacy cost suffered by the Opposition when it commits crimes

**Table 3.1 Table of Notations**

<sup>131</sup> The opposition is weak when it is able to remove the leader only with the commission of atrocities.

<sup>132</sup> The opposition is strong when it is able to remove the leader without the commission of atrocities.

### 3.3.4. Discussion and Analysis

The inherent and significant limitation in Gilligan’s Model is that it ignores the effect of the ICC on opposition behaviour. If the ICC leads opposition leaders to rebel less often, then the threat of opposition punishment that makes the model work will diminish, thereby leading to further impunity and more crimes. Section 3.3.4.1 below follows the interaction between a leader and an opposition group before the institution of the ICC. The effect of the ICC on the behaviour of the parties is then explained in Subsection 3.3.4.2.

#### 3.3.4.1. Prior to the ICC

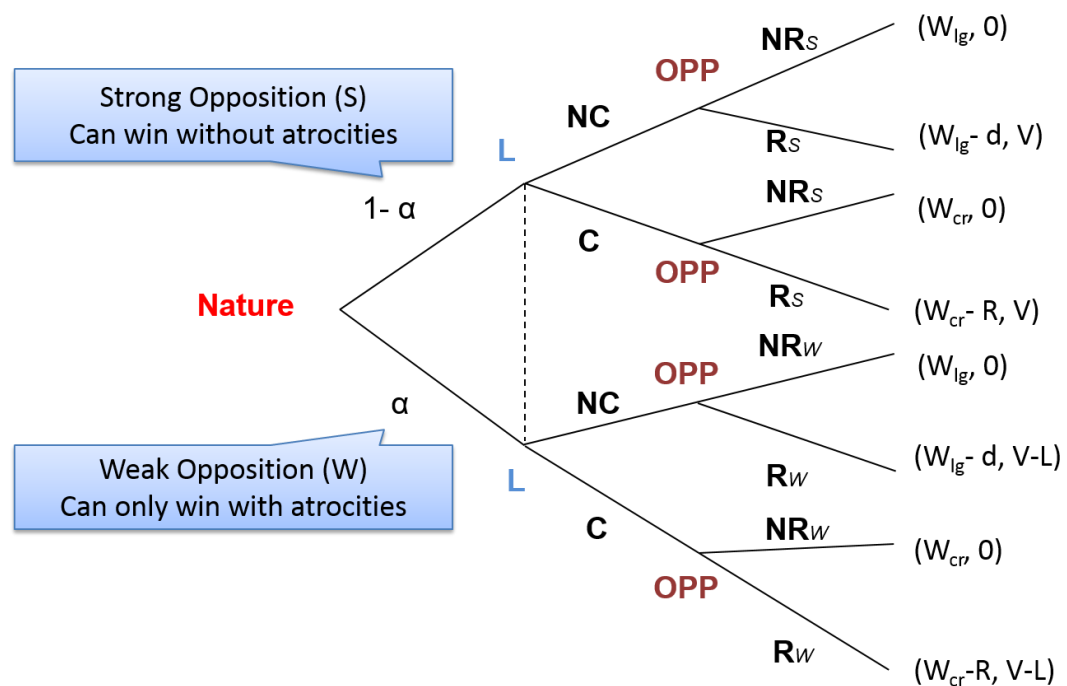


Figure 3.2 Pre-Institution

Figure 3.2 above shows that the leader’s decision to commit crimes or to act lawfully will depend on what the opposition is likely to do in the final stage of the game. Therefore, in order to see whether the leader has a dominant strategy, one must first determine the opposition’s dominant strategy. Knowing the likely course of action for the opposition, a Leader is then able to choose between the paths of committing crimes (C) and not

committing crimes (NC) based on the payoffs he is likely to receive in each case.<sup>133</sup> The results below are based on the solution of the game that appears in Section A of the Annex.

*First: Opposition's Dominant Strategy Prior to the ICC*

Solving for the opposition's dominant strategy reveals that the only relevant strategies are  $(R_s, R_w)$  and  $(R_s, NR_w)$ ; with the other two strategies strictly dominated (see Section A of the Annex). This means that the opposition's best bet is either: (i) to revolt in any case (i.e. whether it is weak or strong); or (ii) to revolt only when it is strong.

This is logical because a strong opposition is always better off in revolt as it loses nothing and stands to gain 'being in power' by rebelling. Therefore, the two strategies that exclude this action on part of a strong opposition (namely:  $(NR_s, NR_w)$  and  $(NR_s, R_w)$ ) are strictly dominated and hence irrelevant.

Whenever  $V > L$ , the dominant strategy for the opposition is  $(R_s, R_w)$ .<sup>134</sup>

This means that the opposition will rebel regardless of its type whenever the gains from rebelling ( $V$ ) exceed the legitimacy cost ( $L$ ). A strong opposition rebels in this case, because it does not suffer any losses by rebelling. A weak opposition on the other hand, suffers a loss of credibility that is not high enough to offset the gains from rebelling. Therefore, a weak opposition will also rebel in this case.

Whenever  $V < L$ , the dominant strategy for the opposition is  $(R_s, NR_w)$ .<sup>135</sup>

This means that where the gains from rebelling ( $V$ ) do not offset the legitimacy cost ( $L$ ), only a strong opposition will rebel. Because a strong opposition does not need to commit any atrocities in order to overthrow the government, it is not affected by any loss of credibility or legitimacy as a result of its rebellion. Therefore, its best course of action is always to rebel because being in office is strictly better than being in the opposition. However, a weak opposition that stands to lose a great deal of its legitimacy and credibility by the commission of atrocities will not rebel when such losses outweigh the gains from being in power.

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<sup>133</sup> Please note that even though the Leader does not know which type opposition he is facing, he is aware that there are two types.

<sup>134</sup> See Section A(2)(a) of the Annex.

<sup>135</sup> See Section A(2) (b) of the Annex.

One can conclude from the above that the dominant strategy for a strong opposition is always to rebel, while a weak opposition will rebel only when the loss in credibility resulting from the commission of atrocities is not too large compared with the benefits from staying in power.

Second: Leader's Dominant Strategy Prior to the ICC

Based on the above, the leader's behaviour can be predicted in accordance with the following (see Section A (3) (a) and (b) of the Annex):

If  $V > L$ , the Leader will not commit atrocities when:

$$R-d > W_{cr}-W_{lg} \quad \Longrightarrow \quad \text{Condition (1)}$$

If  $V < L$ , the Leader will not commit atrocities when:

$$(R-d)(1-\alpha) > W_{cr}-W_{lg} \quad \Longrightarrow \quad \text{Condition (2)}$$

Because  $R-d > (R-d)(1-\alpha)$ ,<sup>136</sup> Condition (2) is harder to satisfy than Condition (1).<sup>137</sup> Consequently, if the loss of credibility resulting from the commission of atrocities by the opposition is too large, it will be less costly, and hence more likely, for the leader to commit crimes. This is because in this case, the leader will be overthrown and ultimately punished only if the opposition is strong enough. Otherwise, he can commit atrocities with impunity. Being subject to severe punishment only with a probability  $(1-\alpha)$  makes it less costly for a Leader to commit crimes.

As can be expected, in the event that all opposition types will rebel or the Leader is facing a strong opposition (if when  $\alpha \neq 0$ ,  $V > L$ ; or if  $(1-\alpha)=1$  (i.e. if  $\alpha=0$ ; meaning that the opposition is never weak) respectively), it is more likely that a Leader refrains from committing atrocities when lawful behaviour by him results in larger gains compared to the benefits from unlawful behaviour ( $W_{lg} > W_{cr}$ ) and when he is certain that no (or minimum) punishment will be meted

<sup>136</sup> For  $0 < \alpha \leq 1$ . For  $\alpha=0$ , the Leader will be facing a strong type ( $1-\alpha=1$ ) and ( $V$ ) will necessarily be larger than ( $L$ ) since  $L=0$ . Hence, in this case condition (2) becomes identical to condition (1). For  $\alpha=1$ , the Leader will be facing a weak type which will never rebel so long as  $V < L$ . Therefore, in this case Condition (2) becomes:  $(R-d)(1-1) > W_{cr}-W_{lg} \iff 0 > W_{cr}-W_{lg} \iff W_{lg} > W_{cr}$ , which is the necessary condition for the Leader to commit a crime absent punishment by the Opposition or otherwise.

<sup>137</sup> And vice versa; it will be easier to overcome the hurdle in Condition (2) necessary for the commission of crimes, i.e.  $W_{cr}-W_{lg} > (R-d)(1-\alpha)$ .

by the opposition if he is deposed having not committed any crimes ( $d=0$  or is low). This is in line with the literature in the field.<sup>138</sup> If the opposition stands to lose much credibility by the commission of atrocities ( $V < L$ ), the Leader's decision to commit atrocities will also depend on the opposition type. The stronger the opposition ( $(1-\alpha) \rightarrow 1$ ), the less likely it is that the leader will commit crimes.

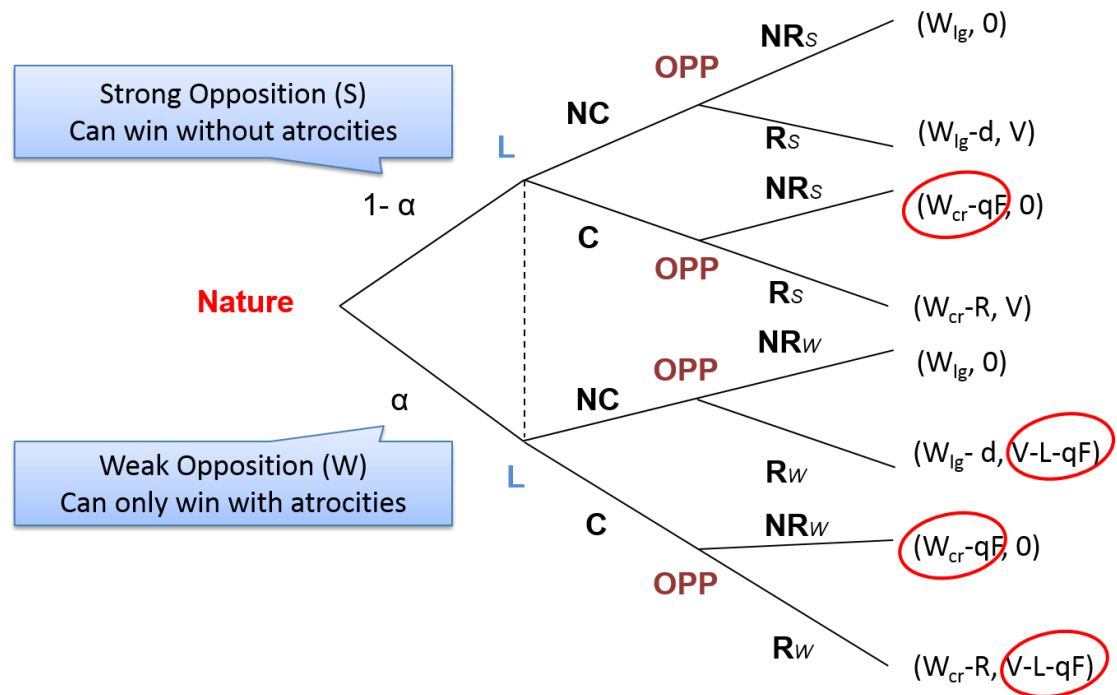
Based on the above, one can conclude that the following variables retain their relevance to the commission of atrocities by a Leader within the set-up of the game:

- (1) The gains by leader from lawful behaviour ( $W_{lg}$ );
- (2) The gains by leader from criminal behaviour ( $W_{cr}$ );
- (3) The punishment likely to be meted out by the opposition to a criminal leader after he is deposed ( $R$ );
- (4) The punishment, if any, likely to be meted out to a leader who refrains from committing crimes after he is deposed ( $d$ ); and
- (5) The opposition type ( $\alpha$ ), *but only when* the opposition's loss of credibility following the commission of crimes outweighs its gains from being in office.

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<sup>138</sup> See Gilligan (n 15) 947.

## 3.3.4.2. Effect of the ICC



*Figure 3.3 Post-Institution*

Figure 3.3 illustrates the change in players' payoffs when the ICC is introduced. Such change will be expected in opposition payoffs whenever it commits atrocities as well as in leader payoffs when he commits crimes and is not punished by the opposition, that is, when he commits crimes but the opposition chooses not to rebel. The ICC's direct effect is the imposition of a deduction on players' payoffs equal to the value of ICC sanction ( $F$ ) multiplied by the probability of the imposition of such sanction ( $q$ ) as marked on Figure 3 above. One should note, for example, that a leader stands to suffer the cost of ( $qF$ ) when he commits crimes but the opposition chooses not to rebel (on the path  $\{\alpha, C, NR_w\}$ ), but not when he commits crimes and the opposition revolts, topples him and imposes its own sanction ( $R$ ) (on the path  $\{\alpha, C, R_w\}$ ). One should also note that the payoffs of a strong opposition do not change with the institution of the ICC, because a strong opposition does not need to commit any crimes and is hence not subject to the ICC sanction.

As with Section 3.3.4.1 above, a leader's decision with respect to the commission of atrocities is determined by the strategies available to the opposition. Therefore, to ascertain



the direct effect of the ICC on a leader's decision to commit crimes, the effect on opposition action must be examined first. Solving for the game reveals that while the opposition's dominant strategies remain the same as in 3.4.1, the ICC makes it harder for weak opposition groups to rebel because of the imposition of an added cost of ( $qF$ ). The results below are based on the solution of the game that appears in Section B of the Annex.

First: Opposition's Dominant Strategy after the ICC

1. Similarly to the Pre-institution game in 3.4.1 above, solving for the opposition's dominant strategy reveals that the only relevant strategies for the opposition after the institution of the ICC remain ( $R_s, R_w$ ) and ( $R_s, NR_w$ ); the other two strategies being strictly dominated (See Section B of the Annex). The ICC, however, affects the conditions that determine which of these strategies dominates the other given the values of ( $V$ ) and ( $L$ ).

2. Whenever  $V > L + qF$ , the dominant strategy for the opposition is ( $R_s, R_w$ ).<sup>139</sup>

This means that the opposition will rebel regardless of its type whenever the gains from rebelling ( $V$ ) exceed not just the legitimacy cost ( $L$ ) (as was the case before the ICC<sup>140</sup>), but also the cost of the ICC sanction ( $qF$ ).

As can be expected, a strong opposition will not be affected by the introduction of the ICC because it does not need to commit atrocities and will therefore not have to bear the additional cost of an ICC sanction. However, a weak opposition stands to incur the additional cost of the ICC sanction. This means that in order for a weak opposition to rebel after the institution of the ICC, the gains from being in office ( $V$ ) must be large enough to offset not just the legitimacy costs but also the possibility of imposition of sanction by the ICC.

3. Whenever  $V < L + qF$ , the dominant strategy for the opposition is ( $R_s, NR_w$ ).<sup>141</sup>

As with the case before the ICC, this means that if the gains from rebelling ( $V$ ) do not offset the legitimacy cost ( $L$ ) and the ICC sanction ( $qF$ ), only a strong opposition will rebel for the same reasons as before namely:

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<sup>139</sup> See Section B(2) (a) of Annex.

<sup>140</sup> See the Opposition's Dominant Strategy under Section 3.3.4.1, p. 85-84 of the Thesis.

<sup>141</sup> See Section B(2)(b) of Annex.

Because a strong opposition does not need to commit any atrocities in order to overthrow the government, it is not affected by any loss of credibility or any ICC sanction. Therefore, its best course of action is always to rebel because being in office is strictly better than being in the opposition. However, a weak opposition that stands to lose a great deal of its legitimacy by the commission of atrocities as well as be prosecuted by the ICC and imprisoned will not rebel when such losses outweigh the gains from being in power.

4. Even though the opposition's dominant strategies remain the same after the introduction of the ICC, because the threshold condition for opposition rebellion is now raised from  $V > L$  (Figure 2) to  $V > L + qF$  (Figure 3), the ICC makes it less likely for a weak opposition to rebel. This is because a weak opposition will bear not just the legitimacy cost of having committed the atrocities, but also the ICC sanction. While some weak opposition groups may still be able to bear these costs (because their gains ( $V$ ) will anyway absorb this new cost), a smaller proportion of weak opposition groups will rebel compared to the case before the ICC, because some of the groups that would have rebelled before the ICC will not be able to absorb the additional ICC sanction.

Second: Leader's Dominant Strategy After the ICC

In order to compare the conditions for non-commission of crimes by the leader before and after the ICC, the conditions after the ICC can be split as follows:

1) Based on the above, the leader's behaviour can be predicted in accordance with the following (See Section B (3) (a) and (b) of the Annex<sup>142</sup>):

a) If  $V > L + qF$ , the leader will not commit atrocities whenever:

$$R - d > W_{cr} - W_{lg} \quad \Longrightarrow \quad \text{Condition (3)}$$

b) (1) If  $L < V < L + qF$ , the leader will not commit atrocities whenever:

$$(R - d)(1 - \alpha) + \alpha qF > W_{cr} - W_{lg} \quad \Longrightarrow \quad \text{Condition (4)}$$

<sup>142</sup> Please note that the conditions are defined in accordance with two relationships of inequality between ( $V$ ) and ( $L + qF$ ) as set out in Annex B. Splitting the two original conditions into three is intended to simplify the comparison with the case prior to the institution of the ICC in which the conditions are defined in accordance with relationships of inequality but between ( $V$ ) and ( $L$ ).

(2) If  $V < L$ , the leader will not commit atrocities whenever:

$$(R-d)(1-\alpha) + \alpha qF > W_{cr} - W_{lg} \implies \text{Condition (4)}$$

2) To compare the conditions necessary for lawful behaviour by the leader:

a) Consider 1(a) above:

If  $(V)$  is larger than  $(L+qF)$  then it is larger than  $(L)$ . In this case, in order for the Leader not to commit crimes prior to the institution of the ICC, the applicable condition was Condition (1). After the ICC, the relevant condition is Condition (3). But the two conditions are identical. Therefore, whenever the opposition's gains from being in office absorb both the legitimacy cost and the ICC sanction, the ICC will have no effect at all on the incentives of the leader to commit or not commit crimes.

b) Consider 1(b)(1) above:

Even though  $(V)$  is larger than  $(L)$ , it is smaller than  $(L+qF)$ . In this case, in order for the leader not to commit crimes prior to the institution of the ICC, the applicable condition is still condition (1). However, after the institution of the ICC, the relevant condition is now condition (4). If the ICC has a deterrent effect in this case, Condition (1) must be more stringent than Condition (4). To guarantee this,  $(qF)$  must be larger than  $(R-d)$  (See Section B (4) of the Annex for the relevant calculation). Therefore, in the event opposition's gains from being in office exceed the legitimacy cost incurred as a result of the commission of atrocities during rebellion but cannot also absorb the sanction of the court, the ICC may incentivize leader crimes unless its sanction is equal to or larger than the net expected opposition punishment  $(R-d)$ .<sup>143</sup>

This is logical, because in this case the ICC sanction must be large enough to compensate for the loss of opposition sanction which, if not for the ICC, would have accrued in case of a non-strong opposition (where  $0 < \alpha < 1$ ).

<sup>143</sup> Compare condition (1) which is applicable to  $V > L$  with Condition (4) which is applicable to  $L+qF > V > L$ . For the ICC to at least not have a negative effect, the following must be true  $(R-d)(1-\alpha) + \alpha qF \geq R-d$ . This condition is satisfied when  $qF \geq R-d$  (See Section B(4) of Annex for full solution).

c) Consider 1(b)(2) above:

If (V) is smaller than (L), then it is also smaller than (L+qF). In this case, in order for the Leader not to commit crimes prior to the institution of the ICC, the applicable condition was Condition (2). After the ICC, the relevant condition is now Condition (4). Condition (2) is naturally more stringent than Condition (4) (Unless  $\alpha=0$ , in which case the two conditions are identical).<sup>144</sup> This is because before the institution of the ICC, if the gains from rebellion do not exceed the legitimacy cost associated with the commission of crimes by the opposition, the threat of opposition punishment depended on opposition type. The stronger the opposition (the higher  $(1-\alpha)$ ), the less incentive the leader has to commit the crime. However, with weaker oppositions the leader has a better chance of committing crimes with impunity since it is too costly for these groups to rebel. After the institution of the ICC, however, the court acts as a second watchdog that punishes a Leader for the commission of atrocities when rebellion does not materialize.

As was the case before the ICC, when the court is in operation and the opposition is strong, the opposition rebels and punishes the leader regardless of the legitimacy costs because it does not have to commit atrocities. If, on the other hand, the opposition is weak and is unable to mount the rebellion because of the legitimacy costs and the court sanction, the leader does not receive the opposition sanction. However, in this case, the ICC punishes the Leader thereby filling in the gap that existed earlier when the rebellion fails to materialize.

As an illustration: If Nature assigns a probability of 0.4 that the opposition is strong and probability 0.6 that the opposition is weak, then the Condition for the commission of the crime becomes:

**Before the ICC:**

$$0.4*(R-d) > W_{cr} - W_{lg}$$

**After the ICC:**

$$0.4*(R-d) + 0.6qF > W_{cr} - W_{lg}$$

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<sup>144</sup> Please note that in this case, the condition becomes identical to condition (1) with or without the ICC.

Despite the effect in (2)(b) above, the imposition of (qF) as well as deterring opposition groups from rebelling and punishing a leader also increases the space within which the Leader has no incentives to commit crimes despite the uncertainty of rebellion by the opposition. Even if the gains from being in office (V) are not large enough, the Leader will be deterred from the commission of crimes because he now faces the possibility of sanction by the ICC (qF) if the opposition does not rebel; a sanction that was not available before the institution of the ICC.

- 3) After the institution of the ICC, in addition to the variables identified in 3.4.1 above, the new variable comprising of the probability of ICC sanction and its size (qF) emerges as a clear determinant of the behaviour of leaders. Given that the ICC quells weak opposition groups from rebelling, it may incentivize criminal behaviour on the part of a leader unless (qF) is of sufficiently large value as to compensate for the increased uncertainty caused by the ICC's intervention.

### 3.3.5. Summary of Results

1. In addition to the variables identified in the literature as affecting a leader's incentives to commit crimes, the model of incomplete information described in this chapter reveals that a leader's decision to commit atrocities will also depend on the type of opposition he is facing. This is, however, only true if a weak opposition is unable to absorb the legitimacy costs occasioned by the opposition's own violence. In this case, the more likely that an opposition is able to mount a rebellion without the commission of atrocities (the stronger the opposition), the less incentive a Leader has to commit crimes. On the other hand, the fact that the opposition is always able to absorb the legitimacy costs of its own commission of atrocities guarantees the best deterrence effect on the leader. In such a situation, a leader's decision will simply turn on the difference between the costs he incurs in committing crimes versus the cost of lawful behaviour.<sup>145</sup> Therefore, one can conclude that before the ICC, the ability of the opposition to absorb the cost of its violence was a necessary condition of better deterrence. Otherwise, the leader's incentive to commit crimes will depend on the opposition type. The less the need to resort to violence on part of the opposition (the stronger the opposition), the

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<sup>145</sup> Because the leader will not commit crimes in the first place unless the gains from their commission ( $W_{cr}$ ) are bigger than the gains from lawful behaviour ( $W_{lg}$ ).

more likely a leader will be punished for his crimes and the less incentive he has to commit crimes.

2. Incorporating the ICC in the model, however, negatively affects the prospect of weak-opposition rebellion since the ICC raises the cost of rebellion by imposing a sanction on the opposition for the commission of atrocities. By dissuading weak opposition groups from rebelling, the ICC enhances leaders' incentives to commit crimes. However, if a leader is facing a strong opposition capable of removing him from office, the court will be redundant. The ICC will also not have any effect on a leader's incentives if a weak opposition is able to absorb all the costs of rebellion including the additional cost of the ICC sanction. In this case, the ICC will be equally incapable of affecting the opposition incentives to commit atrocities, because its sanction is not high enough to offset the gains from being in office. Therefore, the relatively weak opposition will commit atrocities to remove the leader and will consequently punish the Leader as in the case before the ICC, making the ICC redundant.
3. Because the ICC quells weak opposition groups that are incapable of absorbing the additional cost of ICC sanction from rebelling, the size of, and the probability of enforcing, the ICC sanction become relevant to the leader's decision to commit atrocities if he faces a non-strong opposition incapable of surmounting the cost of rebellion. This is because the ICC sanction must now compensate for the decrease in certainty of rebellion. In this case, the ICC may have a deterrent effect, may incentivize crimes, or may be redundant according to the following:
  - a. If the opposition gains are only large enough to offset the opposition's loss of credibility resulting from the commission of crimes, the ICC will incentivize a leader to commit atrocities unless the ICC sanction is larger than the difference between the opposition sanction for lawful behaviour and the opposition sanction unlawful behaviour. This is because, in this case, the ICC will prohibit non-strong opposition groups that would have definitely rebelled before the ICC from rebelling. While before the ICC, the threat of opposition punishment would have been certain, the ICC makes it probabilistic depending on opposition type. Therefore, the ICC sanction must be probable and large enough to compensate for the loss in certainty of opposition sanction.

- b. If the opposition gains exceed the legitimacy cost but the value of the ICC sanction is equal to the difference between the opposition sanction for lawful leader behaviour and the opposition sanction for unlawful leader behaviour, the ICC will be redundant.
- c. If the opposition gains are not large enough to offset the opposition's loss of credibility resulting from the commission of atrocities, the ICC will have a deterrent effect on the leader. This is because, in this case, the ICC works as an additional watchdog that can impose punishment on a leader in the event the opposition is too weak to rebel and impose punishment. This makes it costlier for the leader to rebel, because in addition to the probability that the opposition can mount a rebellion without the commission of atrocities and punish the leader, the Leader has to bear in mind that even if such a scenario is not possible, the ICC will punish him for the commission of crimes.

### ***3.4. Policy Implications***

A leader's decision to commit crimes or refrain from the same depends on a set of variables that pits the gains from lawful behaviour against the gains from unlawful behaviour by the executive. Given that a leader is not likely to consider committing atrocities in the first place unless he stands to gain more from breaking the law, a leader's choice between the commission of crimes and lawful behaviour turns on the cost to be imposed for either action whether by the opposition or by an external institution like the ICC. If the punishment meted out by the opposition to a deposed leader is significantly lower for lawful behaviour and substantially severe for the commission of crimes, a leader will be more likely to refrain from committing atrocities because of the threat of punishment. Before the ICC, the credibility of this threat depended only on the opposition type. While a strong opposition always has an incentive to rebel and will do so, a weak opposition will only rebel if it can absorb the legitimacy costs of having itself to commit atrocities in order to overthrow the regime. As discussed in Section 3.3.1 above, the SPLA is a good example of a weak rebel movement that was willing and able to absorb the legitimacy costs it incurred by committing atrocities in order to resist the regime in Khartoum.

The ICC affects the prospects of opposition punishment because it imposes an additional cost on relatively weak opposition groups thereby quelling them from rebelling. As is mentioned in Section 3.2.3 above, international criminal law is increasingly applied to

regulate the behaviour of non-state actors such as rebel groups. The ICC has been particularly active in this respect with its prosecutions in both Congo and Uganda concerning rebel groups.<sup>146</sup> Such rebel groups will now have to incorporate the cost of possible ICC sanction in their calculus when deciding whether or not to proceed with a rebellion that may require the commission of atrocities. Even though some may regard this as a welcome contribution by the court, the dilemma is that raising the cost of rebellion for weak opposition groups increases the likelihood of a leader's avoidance of punishment barring a definite ICC sanction. This also means that the deterrent effect predicted in Gilligan's model despite, and indeed because of, the ICC's more lenient sentence may not materialize.

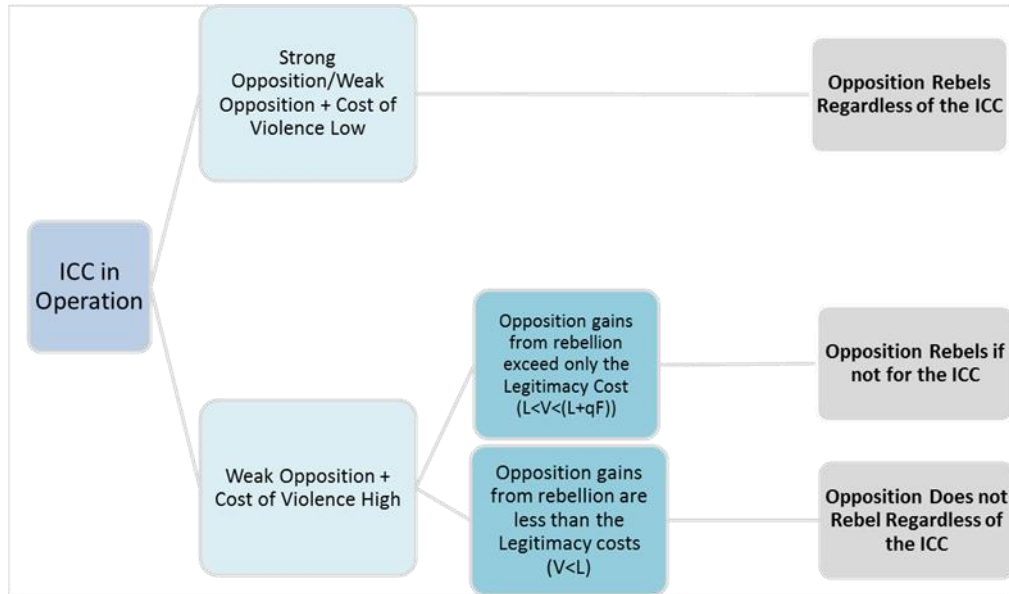
The series of charts in figures 3.4, 3.5 and 3.6 below provide a summary of the results set out above and demonstrate the following: (i) the effects of the ICC on opposition group behaviour given the institutional settings of the Model; (ii) how these effects transmute to affect the incentives of a leader to commit crime; and (iii) what happens to the threat of opposition punishment central to Gilligan's Model given the ICC's effect on opposition groups and leader behaviour. The charts show that there are three caveats to the conclusion that the ICC may end up encouraging leader crimes and that it may undermine its own potential for self-enforcement if it continues to prosecute rebel groups. First, if the probability of ICC sanction and its size are high enough to compensate for the increased uncertainty of rebellion, the ICC will have a deterrent effect on leaders (See Figure 3.5). In this case, Gilligan's self-enforcing effect will not be needed. Second, if the opposition is weak but is at the same time able to absorb the additional cost of the ICC sanction, the ICC need not have a deterrent effect on the leader since he will be punished by the opposition in any event (See Figure 3.5). Finally, if the opposition is positively strong and can mount a rebellion without the commission of atrocities, the ICC sanction will not be needed to ensure deterrence since in this case the leader will be punished by the opposition which will provide sufficient deterrence. In the second and third scenarios, the ICC can afford to be redundant with respect to directly deterring the leader from the commission of crimes, because it will

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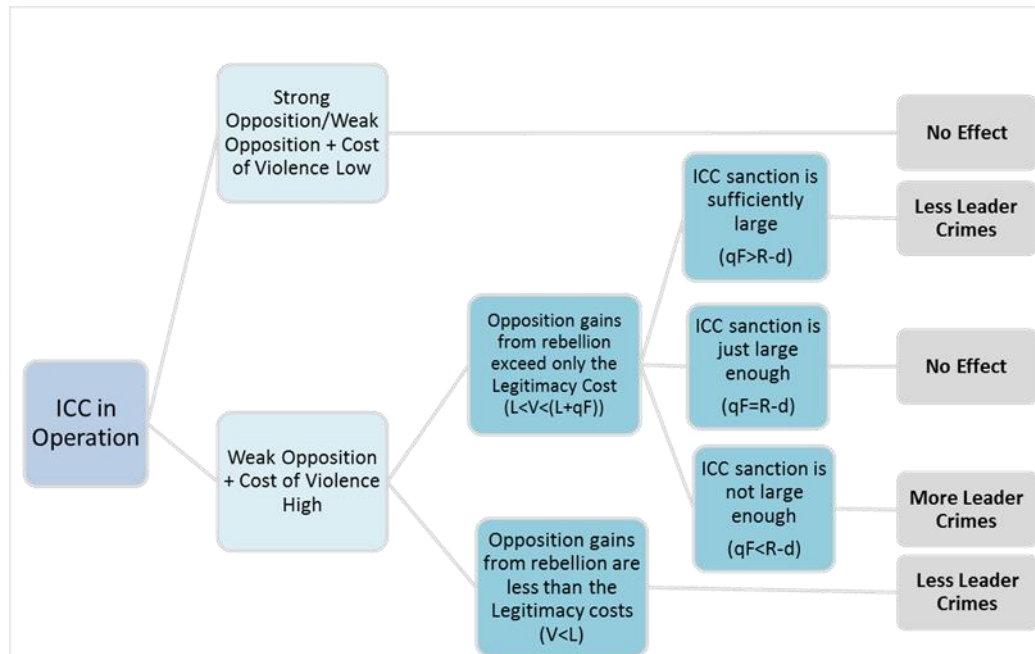
<sup>146</sup> See *Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen*, Case No. ICC-02/04-01/05 [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx); *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/Pages/democratic%20republic%20of%20the%20congo.aspx) (sources last visited July 26, 2014).



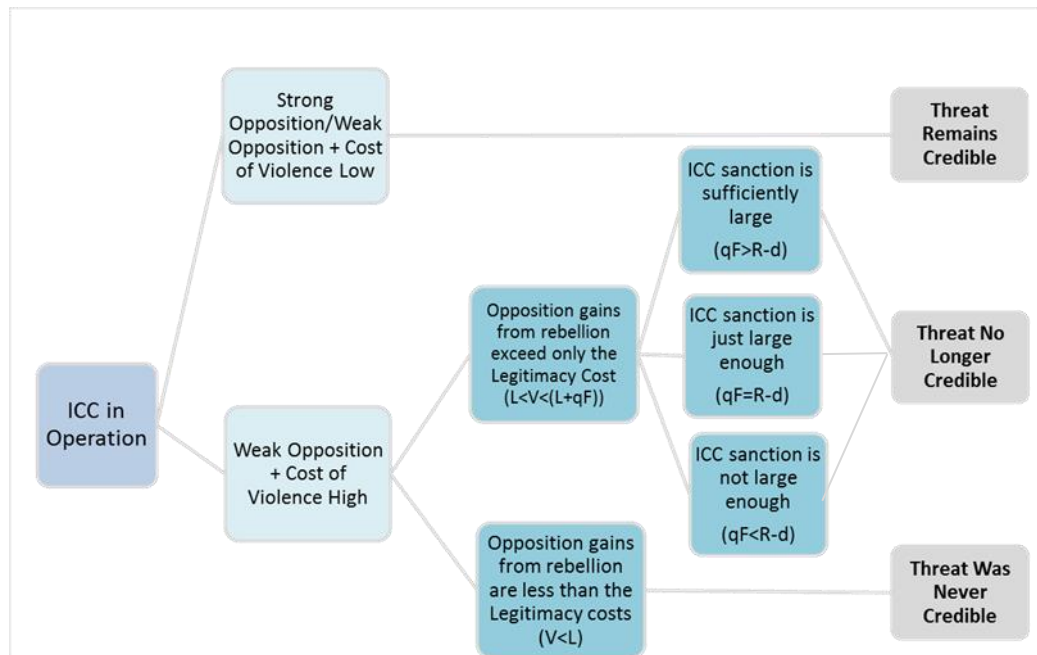
still have a residual deterrent effect on the leader as predicted by Gilligan’s Model (See Figure 3.6).



*Figure 3.4 The Effect of the ICC on Opposition Group Behaviour*



*Figure 3.5 The Effect of the ICC on Leaders’ Incentives to Commit Crimes*



*Figure 3.6 The Effect of the ICC on the Threat of Opposition Punishment*

Based on the above, to ensure that the ICC has either a direct deterrent effect or a residual deterrent effect as predicted by Gilligan's model, policy makers have three options as follows:

- (1) Policy makers can either increase the size of the ICC sanction or ensure that it is applied more frequently. It would of course be preferable if both these factors can be positively enhanced in which case the ICC will be more likely to have a direct deterrent effect on leaders. However, and as mentioned in Section 3.2.2 above, there is a thirty-year ceiling to the ICC sanction as defined by the Rome Statute. In addition, the liberal inclination of international criminal tribunals precludes the adoption of the death penalty as an acceptable punishment for the commission of atrocities.<sup>147</sup> Furthermore, there is no indication that imposing the higher limit of the ICC sanction will become the norm. The court recently sentenced Lubanga to fourteen years in prison for child conscription charges,<sup>148</sup> a sentence equal to the

<sup>147</sup> Alvarez (n 105) 406–07.

<sup>148</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, [99] (July 10, 2012) <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf> (last visited July 26, 2014).

maximum sentence for burglary in the English criminal law.<sup>149</sup> This leaves only the prospect of ensuring a more rigorous enforcement of ICC sanctions. However, as discussed in Section 3.2.1 above, the ICC faces substantial hurdles to the enforcement of its warrants that are not likely to abate except at a very high cost to the international criminal justice project as a whole.

- (2) To ensure that a residual deterrent effect of the ICC materializes in accordance with Gilligan's model, the threat of opposition punishment has to be credible. One way to do this would be for the court to refrain from prosecuting rebel groups altogether, or at least reduce both the incidents of their prosecution and the size of sanction imposed on them in the event of conviction. The difficulty with this proposition is that even though it may ensure that a leader's incentives to commit atrocities are not positively enhanced by ICC practices, it will at the same time encourage the commission of atrocities by rebel groups. However, the model described in this chapter does suggest a third less troubling prospect for ensuring a deterrent effect for the ICC as set out in (3) below.
  
- (3) Because the ICC can afford not to have a direct deterrent effect if the leader faces a strong opposition, the court may be able to contribute positively to the deterrence of leaders if it manages to sufficiently weaken the government through the use of its indictments. An example of how indictments can be used to this end is provided by limited literature on game theoretic analysis of organized crime. Acconcia et al. suggest that the use of indictments targeted towards mid to lower level members of a criminal organization, coupled with leniency programs, increases the social good by creating internal conflicts between members of the organization and enhances the likelihood of conviction of higher officers.<sup>150</sup> Provided a similar dynamic is replicable in the international criminal justice context, the ICC can enhance the chances of opposition groups to affect regime change without the need to resort to atrocities by destabilizing corrupt governments. The suggestion that asymmetric leniency could be used to enhance the enforcement of international criminal law is consistent with

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<sup>149</sup> Theft Act, 1968, c. 60, section 9(3) (U.K.).

<sup>150</sup> Acconcia, A., Immordino, G., Piccolo, S., and Rey, P., 'Accomplice-Witness and Organized Crime: Theory and Evidence from Italy', 2 (March 2011) (on file with Cultura dell' integrità nella Pubblica Amministrazione), available at [http://integrita.sspa.it/wpcontent/uploads/2011/04/sspa\\_paper\\_n4\\_080311\\_Acconcia.pdf](http://integrita.sspa.it/wpcontent/uploads/2011/04/sspa_paper_n4_080311_Acconcia.pdf).

the common perception that offering plea-bargains to lower level perpetrators may improve the effectiveness of international criminal prosecutions.<sup>151</sup> The obvious parallels between the two contexts arguably support this position since in both settings a hierarchical organization engages in opaque criminal conduct that is widely diffused between its members so that it is often particularly difficult to implicate the leadership.<sup>152</sup> Provided indictments can be used accordingly,<sup>153</sup> the ICC will have a residual deterrent effect as predicted by Gilligan, without encouraging unlawful behaviour by opposition groups. In addition, by empowering opposition groups to remove corrupt leaders, the ICC may contribute to bringing about a better social and political order capable of addressing the root causes of internal conflicts.

A residual deterrent effect of the ICC as is predicted by Gilligan is only possible if the threat of opposition sanction remains credible despite the ICC. Taking into consideration the effect of the court on weak opposition groups, this can only follow in practice from sufficiently empowering opposition groups so that they are able to affect regime change without having to commit atrocities. Otherwise, and because a non-discriminatory use of prosecutorial discretion that habitually targets opposition groups creates disincentives for regime change, the ICC's residual deterrent effect will not materialize. Indeed, if all the ICC does is to quell weak opposition groups from rebelling, the court '...may end up ... lending support to violent and anti-democratic political forces.'<sup>154</sup>

### **3.5. Conclusion**

The model developed in this chapter seeks to fill a gap in the growing game theoretic literature dealing with the enforcement problem of the ICC. By taking into consideration the ICC's effect on opposition groups, it puts to the test the optimistic pronouncements

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<sup>151</sup> See Stephanos Bibas and William W Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism', *Duke LJ*, 59 (2009), 637 (suggesting that asymmetric plea-bargains be used to acquire much needed incriminating evidence against high-level officials); N.A. Combs, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes', *University of Pennsylvania Law Review*, 151/1 (2002), 1-157 (arguing that international criminal tribunals need to negotiate with low-level officials in order to attain information because of the rarity of documentary evidence of atrocities); Ralph Henham and Mark Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia', *Criminal Law Forum* (16: Springer, 2005), 49-87 (observing that the guilty pleas rendered regarding the Srebrenica massacre may have led to the eventual admission of responsibility by Bosnian Serb leadership).

<sup>152</sup> See Neal Kumar Katyal, 'Conspiracy Theory', *Yale Law Journal*, (2003), 1307-98.

<sup>153</sup> This is the subject of the investigation in Chapter 4.

<sup>154</sup> Branch (n 18) 189.

expressed in this literature regarding a residual deterrent effect of the ICC despite its lack of enforcement powers. As compelling as the possibility of a self-enforcing ICC may be, Gilligan's proposition that the mere existence of the Court provides dictators with a cogent albeit costlier exit strategy is only applicable if the threat of opposition sanction is credible. However, because the ICC targets leaders and opposition alike, it will cripple weak oppositions thereby incentivizing more crimes by those in power.

The existence of the Court and its practice of prosecuting non-state actors for the commission of atrocities, contrary to what Gilligan suggested, may in fact reduce the probability that a leader who committed atrocities would face the more punitive sanction of opposition punishment. While the ICC would provide a second avenue for the punishment of the leader in this case, it does so at a problematically lower probability of capture and a much lower sanction than otherwise provided by the opposition. In addition, curbing the activities of the opposition will necessarily mean higher survival rates for criminal regimes. Even if the analysis in Gilligan's Model withstands the effect of allowing for ICC punishment of the opposition, the court's insistence on non-discriminatory prosecutions will result in lower probabilities of regime change and therefore lower incentives to surrender to the ICC or indeed request asylum. It is indeed regrettable that Gilligan paid as insufficient attention to the issue of democratic transition as is traditionally bestowed on it by international criminal justice literature. By treating the probability of regime survival as exogenous to the ICC regime, he circumvented the question of how the ICC can contribute to addressing the root causes of political and civil strife in places like the African continent.

Be the above as it may, the Model presented in this chapter does suggest a possible deterrent effect of the ICC despite its negative impact on the activities of relatively weak opposition groups. In the event the ICC indictments can be utilized to weaken the grip of a criminal government on the reign of power to the extent of enabling the opposition to successfully affect a regime change without the need to commit crimes, the ICC will have a deterrent effect. Building on this insight, Chapters 4 and 5 of this Thesis explore the possibility of using indictments of lower-level perpetrators coupled with asymmetric leniency programs to destabilize political structures implicated in the commission of atrocities.

By lending support to internal political dynamics that seek political transformation along democratic lines, the ICC can also contribute to addressing the root causes of internal conflicts. Even though the issue of democratic transition in post-conflict societies often

receives peripheral treatment in international criminal justice discourse, if the impact of the ICC on domestic political movements is not sufficiently understood, the court will end up empowering the same individuals it is attempting to combat.

## Annex

### A. Solution of the Game in Section 3.3.4.1 “Before the ICC”

In order to ascertain the opposition’s dominant strategy and consequently the leader’s dominant strategy in the game prior to the institution of the ICC, I use the normal form of the game set out in Table 3.2 below, which corresponds to the game in Figure 3.2.

Leader Strategies ↓	Opposition Strategies →	PAYOFS		PAYOFS	
		$R_s, R_w$	$NR_s, NR_w$	$R_s, NR_w$	$NR_s, R_w$
C		$W_{cr}-R, V-\alpha L$	$W_{cr}, 0$	$W_{cr}-(1-\alpha)R, (1-\alpha)V$	$W_{cr}-\alpha R, \alpha(V-L)$
NC		$W_{lg}-d, V-\alpha L$	$W_{lg}, 0$	$W_{lg}-(1-\alpha)d, (1-\alpha)V$	$W_{lg}-\alpha d, \alpha(V-L)$

*Table 3.2 Normal Form of the Game Prior to the ICC*

The matrix in Table 3.2 above shows opposition payoffs and leader’s payoffs for the Pre-institution game in Figure 2. Please note:

1. If  $0 < \alpha < 1$ :
  - a)  $V - \alpha L > \alpha(V - L)$  and
  - b)  $(1 - \alpha)V > 0$ .

Consequently, the strategies  $(NR_s, NR_w)$  and  $(NR_s, R_w)$  are strictly dominated by the strategies  $(R_s, R_w)$  and  $(R_s, NR_w)$ .

Therefore, the only relevant strategies for the opposition are  $(R_s, R_w)$  and  $(R_s, NR_w)$ .

2. To determine which of these strategies dominates the other, one must solve for the condition that makes it dominant. Hence:

a)  $(R_s, R_w)$  is the dominant strategy if the following is true:

$$(V - \alpha L) > V(1 - \alpha)$$

$$V - \alpha L > V - \alpha V$$

$$\alpha V > \alpha L$$

$$V > L$$

b)  $(R_s, NR_w)$  is the dominant strategy if the following is true:

$$(V - \alpha L) < V(1 - \alpha)$$

$$V - \alpha L < V - \alpha V$$

$$\alpha V < \alpha L$$

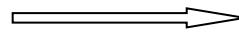
$$V < L$$

3. Based on the above, if the leader's dominant strategy is to be (NC, NC) (the non-commission of crimes) the following must be true:

a) Where  $V > L$ ,

$$W_{lg} - d > W_{cr} - R$$

$$R - d > W_{cr} - W_{lg}$$



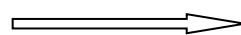
Condition (1)

b) Where  $V < L$ ,

$$W_{lg} - (1 - \alpha)d > W_{cr} - (1 - \alpha)R$$

$$(1 - \alpha)R - (1 - \alpha)d > W_{cr} - W_{lg}$$

$$(R - d)(1 - \alpha) > W_{cr} - W_{lg}$$



Condition (2)

Note that where  $0 < \alpha < 1$ ,  $R - d > (R - d)(1 - \alpha)$ .

Therefore Condition (1) is easier to satisfy than Condition (2).



### B. Solution of the Game in Section 3.3.4.2 “After the ICC”

In order to ascertain the opposition’s dominant strategy and consequently the leader’s dominant strategy in the game after to the institution of the ICC, I use the normal form of the game set out in Table 3.3 below, which corresponds to the game in Figure 3.3.

Leader Strategies	Opposition Strategies	PAYOFFS			
		$R_s, R_w$	$NR_s, NR_w$	$R_s, NR_w$	$NR_s, R_w$
C		$W_{cr}-R, V-\alpha(L+qF)$	$W_{cr}-qF, 0$	$W_{cr}-(1-\alpha)R-\alpha qF, (1-\alpha)V$	$W_{cr}-(1-\alpha)qF-\alpha R, \alpha(V-L-qF)$
NC		$W_{lg}-d, V-\alpha(L+qF)$	$W_{lg}, 0$	$W_{lg}-(1-\alpha)d, (1-\alpha)V$	$W_{lg}-\alpha d, \alpha(V-L-qF)$

*Table 3.3 Normal Form of the Game Post ICC*

The matrix in Table 3.3 above shows opposition payoffs and leader’s payoffs for the Post-institution game in Figure 3. Please note:

1. If  $0 < \alpha < 1$ :

- b)  $V - \alpha(L + qF) > \alpha(V - L - qF)$                       and  
 c)  $(1 - \alpha)V > 0$

Consequently, the strategies  $(NR_s, NR_w)$  and  $(NR_s, R_w)$  are strictly dominated by the strategies  $(R_s, R_w)$  and  $(R_s, NR_w)$ .

Therefore, the only relevant strategies for the opposition are  $(R_s, R_w)$  and  $(R_s, NR_w)$ .

2. To determine which of these strategies dominates the other, one must solve for the condition that makes it dominant. Hence:

- a)  $(R_s, R_w)$  is the dominant strategy if the following is true:

$$V - \alpha(L + qF) > (1 - \alpha)V$$

$$V - \alpha(L + qF) > V - \alpha V$$

$$\alpha V > \alpha(L + qF)$$

$$V > L + qF$$

- b)  $(R_s, NR_w)$  is the dominant strategy if the following is true:

$$V - \alpha(L + qF) < (1 - \alpha)V$$

$$V - \alpha(L + qF) < V - \alpha V$$

$$\alpha V < \alpha(L + qF)$$

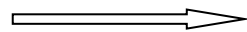
$$V < L + qF$$

3. Based on the above, if the Leader's dominant strategy is to be (NC, NC) (the non-commission of crimes) the following must be true:

- a) Where  $V > L + qF$ ,

$$W_{lg} - d > W_{cr} - R$$

$$R - d > W_{cr} - W_{lg}$$



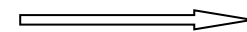
Condition (3)

- b) Where  $V < L + qF$ ,

$$W_{lg} - (1 - \alpha)d > W_{cr} - (1 - \alpha)R - \alpha qF$$

$$(1 - \alpha)R - (1 - \alpha)d + qF > W_{cr} - W_{lg}$$

$$(R - d)(1 - \alpha) + \alpha qF > W_{cr} - W_{lg}$$



Condition (4)

4. To guarantee that the ICC will have a deterrent effect if  $L < V < L + qF$ , let  $(R - d)(1 - \alpha) + \alpha qF > R - d$

$$\alpha qF > R - d - (R - d)(1 - \alpha)$$

$$\alpha qF > \alpha(R - d)$$

$$qF > R - d$$

## CHAPTER 4: Asymmetric Prosecutions, Leniency and Self-reporting in International Criminal Trials

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### 4.1. Introduction

The game theoretic model developed in the previous chapter suggests that the International Criminal Court (ICC) has the potential to become effective despite its acute enforcement problems. In the event that ICC indictments can be used to empower weak opposition groups so that they are able to affect regime change without resort to the commission of atrocities, the Court will have a residual deterrent effect as predicted by Gilligan's Model, while at the same time obviating the opposition's need to commit atrocities in order to remove a particularly ruthless leader.<sup>1</sup> In the presence of the threat of opposition punishment, leaders indicted by the ICC are likely to find it to be in their self-interest to surrender to the ICC in order to escape harsher opposition punishment.<sup>2</sup> This chapter borrows from the literature on organized crime and anti-trust law enforcement to suggest that one way of using ICC indictments to empower opposition groups (or alternatively to weaken a government implicated in the commission of atrocities) is through the adoption of asymmetric leniency programs targeted at low-level perpetrators. It argues that the use of such programs is justified and often practiced in the context of international criminal prosecutions but under the guise of plea-bargaining.

The term "leniency" is used in this chapter to mean the imposition of reduced penalties which may amount to partial reductions in punishment or total amnesty or immunity from punishment. Furthermore, and because regime change and opposition punishment are retained as central to the deterrence of leader crime in tandem with Chapter 3, the reduction in punishment which the Prosecutor is able to offer may be understood as securing amnesty against domestic prosecution or protection against opposition punishment, for example through relocation. Other forms of reduction of opposition punishment may include negotiating a more lenient sentence or a more favourable venue on behalf of the cooperating witness. A similar arrangement was attempted in *Bagaragza*, where the ICTR's

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<sup>1</sup> M.J. Gilligan, 'Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime', *International Organization*, 60/04 (2006), 935-67.

<sup>2</sup> See suggestion that Saif al-Islam Gaddafi concluded it was safer for him to surrender to the ICC than to remain in Libya post regime-collapse in Ben Farmer, *Saif al-Islam Gaddafi 'trying to broker deal to surrender to the ICC'*, *The Telegraph* (October 26, 2011), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8851502/Saif-al-Islam-Gaddafi-trying-to-broker-deal-to-surrender-to-ICC.html> (last visited July 26, 2014).

Prosecutor applied to transfer the case to Norway in exchange for cooperation by the defendant, because the Norwegian courts have no jurisdiction over the crime of Genocide and the charge would have therefore been effectively dropped.<sup>3</sup> In addition, the ICC Prosecutor may be able to guarantee a reduced punishment to a cooperating witness by allowing itself to prosecute the case to the exclusion of national courts; the assumption being that the punishment levied by this international court will invariably be more lenient than opposition punishment.<sup>4</sup>

The use of leniency programs in criminal law enforcement seeks to compensate for gaps in the enforcement capabilities of relevant authorities. Such programs have become a cornerstone of anti-trust law enforcement efforts against cartels following the arguably successful experience of the US Department of Justice in adopting a leniency policy that allowed members of corporate cartels to avoid punishment for collusive or price-fixing behaviour in exchange for cooperation with the authorities.<sup>5</sup> The adoption of this policy is likely to have been influenced in part by a wider recognition of the value of cooperation evidence in criminal law enforcement as well as an implicit acceptance of the need to offer penalty reductions to induce self-reporting of criminal behaviour in the US legal system.<sup>6</sup> This recognition is broader in the sense that it extends to all criminal behaviour and is not particularly limited to corporate crimes.<sup>7</sup> However, and in addition to this general acceptance of the value of enlisting the cooperation of insiders, the inherently secretive nature of cartel behaviour necessitated the adoption of law enforcement strategies geared towards encouraging self-reporting of violations of the law that are otherwise hard to detect.

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<sup>3</sup> Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford University Press, 2007). See Chapter 5, Section 5.2.2 for further details.

<sup>4</sup> J. Ku and J. Nzelibe, 'Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities', *Wash. UL Rev.*, 84 (2006), 777 (using empirical evidence to show that autocratic leaders in Africa face harsher sentences domestically than sentences dealt out by international criminal tribunals). See also discussion of the divergence in sentencing practices between international criminal tribunals and national courts in Chapter 2, p.47-48 and the suggestion that the ICC imposes weaker punishment on perpetrators than would otherwise be imposed by rivals in Chapter 3, p. 73.

<sup>5</sup> Wouter Pj Wils, *Efficiency and Justice in European Antitrust Enforcement* (Hart, 2008) 123-124, 140 & 189.

<sup>6</sup> For an overview, see Miriam Hechler Baer, 'Cooperation's Cost', *Wash. UL Rev.*, 88 (2010), 903.

<sup>7</sup> United States Sentencing Commission, *Federal Sentencing Guidelines Manual* (1987), § 5K1.1, provides the basis for trading penalty reductions for substantial assistance in the investigation or prosecution of persons suspected of the commission of crimes. Please note that the US system of leniency in the context of antitrust law enforcement provides for total immunity from criminal prosecution as opposed to penalty reductions.

The US experience both in anti-trust law enforcement and otherwise strongly suggests that the use of leniency programs enhances the effectiveness of law enforcement when secretive, undetected or inaccessible criminal behaviour is in issue. The perceived success of the 1993 corporate leniency policy in detecting more incidents of collusive behaviour in US markets stimulated an active L&E literature on the subject which extended the extant scholarship on the advantages of self-reporting.<sup>8</sup> The earlier literature has traditionally focused on the role of self-reporting programs in reducing the cost of law enforcement and has identified a number of peripheral advantages to the practice.<sup>9</sup> However, a pioneering work by Motta and Polo shifted the focus instead to the effect of leniency programs on deterrence of criminal behaviour.<sup>10</sup> A number of models have since been developed upon the insights from the model developed by Motta and Polo and have arrived at new conclusions as to the effectiveness of leniency programs and the optimal design of such schemes.<sup>11</sup>

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<sup>8</sup> Despite the exponential growth of the theoretical literature examining the effectiveness of leniency programs in anti-trust law enforcement, very little empirical work has been done to verify the consequences of these programs on firm behaviour. In addition, the conclusions of the empirical studies seem tentative and in some cases ambiguous. Investigating the effect of the introduction of the 1993 leniency policy in the US, Miller found that the introduction of the policy resulted in fewer incidents of cartel formation, thereby affirming the assumed deterrent effect of these programs (See, Nathan H Miller, 'Strategic Leniency and Cartel Enforcement', *The American Economic Review*, (2009), 750-68). However, a study by Brenner of the impact of the European corporate leniency policy revealed that while investigations and prosecutions of violations have become faster by 1.5 years after the introduction of the 1996 EU Leniency Program, there was no evidence that either the number or the duration of cartels were affected (See, Steffen Brenner, 'An Empirical Study of the European Corporate Leniency Program', *International Journal of Industrial Organization*, 27/6 (2009), 639-45). Klein sought to address the shortcomings of these empirical attempts by using the intensity of competition as a measure of the success of leniency programs and found that while leniency seems to negatively affect cartel formation; the effect of the EU supranational leniency program cannot be verified (See, Gordon J Klein, 'Cartel Destabilization and Leniency Programs: Empirical Evidence', (ZEW Discussion Papers, 2010). Cloutier confirms Klein's findings and concludes that there is evidence of a deterrent effect of leniency programs (a long-run effect on cartel formation) but no evidence that cartels desist from violating the law as a result of the introduction of leniency (See, Mike Cloutier, 'An Empirical Investigation of the Us Corporate Leniency Program', (Working Paper, 2011).

<sup>9</sup> See discussion of Kaplow and Shavell, Innes and Fees and Heesen in Section 4.2 below.

<sup>10</sup> Massimo Motta and Michele Polo, 'Leniency Programs and Cartel Prosecution', *International Journal of Industrial Organization*, 21/3 (2003), 347-79.

<sup>11</sup> See e.g. Evgenia Motchenkova, 'Effects of Leniency Programs on Cartel Stability', (Tilburg University, Center for Economic Research, 2004) (arguing that while leniency programs that restrict generous reductions in fines to the first firm to report increase the incentives of firms to stop cartel formation, the introduction of leniency programs in conjunction with low penalties and low enforcement rates may facilitate collusion); Giancarlo Spagnolo, 'Divide Et Impera: Optimal Leniency Programs', *CEPR Discussion Papers*, 4840 (2004) (arguing that sufficiently generous leniency programs that admit only the first reporting agent are optimal and increase deterrence by incentivizing unilateral defection and

Building on the work by Motta and Polo as well as on the ensuing literature, Acconcia et al developed a model of the interaction between a hierarchical criminal organization and a law enforcement agency which extends leniency to low-ranking criminals to induce them to provide evidence of the leader's activities to the authority (the "Acconcia Model").<sup>12</sup> Their model suggests that asymmetric leniency programs enhance deterrence by increasing the likelihood of conviction of the leader of the organization and that providing low-level perpetrators with sentence reductions in exchange for evidence against the leaders of criminal organizations has an overall negative effect on crime rate. Piccolo and Immordino build on the Acconcia model to develop a principal-agent model in which the agent of a criminal boss (his subordinate) is granted leniency by the legislator in exchange for a testimony capable of increasing the conviction rate of the leader (the "P&I Model").<sup>13</sup> Their benchmark model suggests that it is more beneficial to grant reporting agents as much leniency as is sufficient to offset the dangers of retaliation from the leader of the organization so long as the same does not adversely affect the incentives of the agent to engage in the crime in the first place. Their model retains the negative effect of reducing the reservation wage of reporting agents by granting generous reductions in penalties that reflect the cost of retaliation by the leader.

I modify the P&I Model to test the effects of leniency programs in the context of governments accused of the commission of atrocities. Instead of attributing the deterrence effect of such schemes to the enhanced probabilities of detection and punishment, I assume that if more reliable evidence about the commission of atrocities by the leader of a government is publicized the same may lead to regime change. In discussing the possible

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reporting.); Zhijun Chen and Patrick Rey, 'On the Design of Leniency Programs', *IDEI Working Paper*, 452 (2007) (arguing that the optimal leniency rate is characterized by reference to the probability of investigation so that it can balance the two countervailing effects of rewarding accomplices; destabilization of cartels on one hand and making collusion profitable on the other) ; Joseph E Harrington, 'Optimal Corporate Leniency Programs\*', *The Journal of Industrial Economics*, 56/2 (2008), 215-46 (arguing that leniency programs that reward the first firm to report has an ex ante negative effect on cartel stability even when the probability of conviction without insider information is quite high).

<sup>12</sup> Acconcia, A., Immordino, G., Piccolo, S., and Rey, P., 'Accomplice-Witness and Organized Crime: Theory and Evidence from Italy', 2 (March 2011) (on file with Cultura dell' integrità nella Pubblica Amministrazione), available at [http://integrita.sspa.it/wpcontent/uploads/2011/04/sspa\\_paper\\_n4\\_080311\\_Acconcia.pdf](http://integrita.sspa.it/wpcontent/uploads/2011/04/sspa_paper_n4_080311_Acconcia.pdf).

<sup>13</sup> Salvatore Piccolo and Giovanni Immordino, 'Optimal Accomplice-Witnesses Regulation under Asymmetric Information', (Centre for Studies in Economics and Finance (CSEF), University of Naples, Italy, 2012).

political effects of international criminal tribunals, Burke-White suggests that the issuance of indictments may lead indirectly to the removal of a sitting official from power by ‘...giving opposition groups a new rallying point and potentially calling into question the status and stature of the indictee’.<sup>14</sup> While the models of Acconcia et al and Piccolo and Immordino consider the interplay between retaliation, the agent’s reservation wage and deterrence, they neglect to take into account that retaliation is not costless. In this chapter, I specify a model that takes into account the cost of retaliation against unfaithful agents that the Leader has to bear in order to elucidate further the likely effects of leniency programs on the stability of criminal organizations and consequently on deterrence. I also extend the model to see if a confidential leniency program counteracts the negative effect of reducing the reservation wage suggested by the literature. I assume that the leader retaliates under these conditions with a fixed probability of error and I show that this causes leniency programs to become more effective under some conditions and may therefore counterbalance the negative effect of reducing the reservation wage.

A detailed discussion of the Law and Economics (L&E) literature including the relevant game-theoretic models is provided in Section 4.2 below. In recognition of the fact that the context of international criminal prosecutions is easily perceived as quite different from that of organized crime, I discuss the need and justification for the use of asymmetric leniency programs in international criminal justice in Section 4.3. I argue that the practice of international criminal tribunals to date suggests that such programs are largely compatible with the goals of international criminal law. The impetus of this section is that in addition to providing valuable opportunities for deterring criminal behaviour, leniency programs have the potential to address a legitimate deficiency in international criminal prosecutions; namely, the evidentiary weaknesses plaguing ICT cases. Against this theoretical background, I introduce the game-theoretic model I developed to take into account the costs of retaliation against unfaithful agents in Section 4.4. The results from the analysis confirm insights from the literature that leniency programs which reward sentence reductions to some perpetrators in exchange for reliable evidence against other members of the criminal organization may cause criminal enterprises to break down. The contribution that the model makes is two-fold: (i) it shows that leniency programs may cause the destabilization of

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<sup>14</sup> W.W. Burke-White, 'Double Edged Tribunals: The Political Effect of International Criminal Tribunals', *Multilevel Global Governance in the Enforcement of International Criminal Law* (2006) 27, available at: [http://www.icc-cpi.int/iccdocs/asp\\_docs/library/organs/otp/ICC-OTP-20060728-Burke-White\\_en.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-20060728-Burke-White_en.pdf) (last visited July 26, 2014).

criminal organizations by forcing leaders to retaliate against reporting agents; and (ii) it suggests that although publicized leniency programs may have the undesirable effect of making the commission of crime cheaper both for a subordinate and a leader (through the reduction of the reservation wage), a confidential leniency program that forces a leader to retaliate with a fixed probability of error may counteract this effect. Drawing on these insights, a number of policy implications are suggested in Section 4.5 and a general conclusion is provided in Section 4.6.

## **4.2. Relevant L&E Literature**

Kaplow and Shavell extended the model of probabilistic law enforcement developed by Becker in 1968 to see whether self-reporting schemes enhance law enforcement efforts.<sup>15</sup> They concluded that allowing individuals who self-report to bear with certainty a fine equal to or just less than the fine they expect to face given probabilistic law enforcement is welfare enhancing. This is because such self-reporting programs can induce wrong-doers to report (and indeed desist from) harmful acts without materially affecting their incentives to commit the behaviour causing the harm. This occurs when the fine levied with certainty on self-reporters is set to equal the expected fine from the commission of the act given the probability of apprehension and punishment. Such reporting therefore obviates the need to monitor the whole population of possible wrongdoers and reduces enforcement costs. The reduction in sentence for self-reporters is thus shown to be optimal whenever detection and punishment occurs with a probability as opposed to a certainty. Extensions of the Kaplow and Shavell model that consider the heterogeneity of probabilities of detection identified additional advantage of self-reporting schemes including the suggestion by Innes that they allow the authorities to adjust fine levels to reflect the probability of detection applicable to individual offenders thereby providing penalties more capable of affecting ex ante incentives.<sup>16</sup> Innes's model also predicts that such schemes eliminate the inefficiency of over-deterrence by inducing only those with high probabilities of detection to come forward. A comparable extension by Fees and Heesen draws attention to the possibility that providing reduced sanctions in exchange for self-reporting may lead to an increase in the crime rate because offenders can always exercise the option of self-reporting following the commission

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<sup>15</sup>Louis Kaplow and Steven Shavell, 'Optimal Law Enforcement with Self-Reporting of Behaviour', *Journal of Political Economy*, 102/3 (1994); S. Becker Gary, 'Crime and Punishment: An Economic Approach', *Journal of Political Economy*, 76/2 (1968), 169-217.

<sup>16</sup> Robert Innes, 'Self-Reporting in Optimal Law Enforcement When Violators Have Heterogeneous Probabilities of Apprehension', *J. Legal Stud.*, 29 (2000), 287.



of crime to get a lesser punishment.<sup>17</sup> This effect of law enforcement policies that allow for the provision of reduced sanctions in exchange for information about the commission of crimes remains relevant to the ensuing literature on anti-trust law enforcement and is sometimes referred to as the Amnesty Effect.<sup>18</sup> The Amnesty Effect translates the notion that the ex post lenient treatment of law violators increases the payoffs from engaging in the criminal behaviour that is subject to enforcement.<sup>19</sup>

Motta and Polo extend the self-reporting literature by developing a model of the interaction of a group of offending firms sharing symmetric strategies of collusion and reporting with the Anti-trust Authority in order to study the effect of leniency programs on the behaviour of cartels.<sup>20</sup> They model the enforcement problem using a repeated game setting and explicitly make the issue of deterrence of collusion as well as desistence from the commission of crime the focus of their paper. Therefore, the suggestion that emerges from their model diverges considerably from the conventional wisdom in earlier self-reporting literature by positing that giving generous penalty discounts may prove more welfare enhancing than the minimum penalty reductions suggested by Kaplow and Shavell. This is because when the reduction in fines for self-reporting is negligible, firms will find it profitable to collude and not report provided the probability of detection is not high enough to deter collusion outright. On the other hand, generous fine reductions ensure that where collusion is to occur, self-reporting will follow. In agreement with Fees and Heesen,<sup>21</sup> Motta and Polo find that the negative effect of an enforcement policy that allows for such lenient treatment of self-reporters is naturally that it makes it cheaper for firms to collude and report, thereby incentivizing collusion ex ante.

Acconcia et al build on the insights from Motta and Polo and develop a game-theoretic model of the interaction of a criminal organization that consists of a criminal boss and a subordinate or agent with a legislator who must decide whether to introduce a leniency program as well as the level of reduction in sanction to be offered in exchange for reporting (the “Acconcia Model”).<sup>22</sup> Their model hinges on the decision by the agent to report the boss

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<sup>17</sup> Eberhard Feess and Eva Heesen, 'Self-Reporting and Ex Post Asymmetric Information', *Journal of Economics*, 77/2 (2002), 141-53.

<sup>18</sup> See Harrington (n 11) (referring to it as the Cartel Amnesty Effect).

<sup>19</sup> *ibid.*

<sup>20</sup> See Motta and Polo (n 10).

<sup>21</sup> Fees and Heesen (n 17).

<sup>22</sup> See Acconcia et al (n 12).

or face trial following the commission of crime with leniency being the benefit to be gained from reporting to the authorities the activities of the leader of the organization. Their model suggests that the use of leniency programs targeted at low-level perpetrators creates conflict in criminal organizations by encouraging agents to report on the leader of the organization thereby causing an increase in his probability of prosecution and punishment. In line with the earlier literature, they find that leniency may incentivize entry into crime by lowering the agent's expected cost from the commission of crimes and consequently the compensation that has to be paid by the boss to convince the agent to take part i.e. the reservation wage. This results in an overall lowering of the cost of criminal behaviour born by the leader of a criminal organization. However, their analysis shows that leniency could be effective provided the judicial system is particularly ineffective, the reduction in sanction is generous enough to compensate for the low probabilities of punishment, and the information provided by the agent is useful enough to increase the probability of punishment of the leader post reporting. They posit that given a relatively large increase in conviction rates for the leader, leniency could have an overall negative effect on the crime rate by increasing the expected sanction for the leader of the organization. The Acconcia Model also makes the determination of the applicable reduction in sanction partly dependent on the expected retaliation loss to be suffered by the agent when the leader punishes him for reporting.

Piccolo and Immordino develop the basic Acconcia Model further by assuming an asymmetry of information between the subordinate in a criminal organization and the prosecutor.<sup>23</sup> They specify a principal-agent model in which the agent of a criminal boss (his subordinate) is granted leniency by the prosecutor in exchange for a testimony capable of increasing the conviction rate of the boss. They show that because of the asymmetry between the information that the legislator and the agent possess respectively, a leniency program can increase the cost of crime for the boss by increasing his conviction rate. They posit that the welfare enhancing aspect of leniency programs stems from this hierarchical nature, as well as from the asymmetry in information possessed by insiders and the prosecutor. An important feature of their model is the adoption by the prosecutor of an information floor that determines the quality of evidence which will enable an informant to access the leniency program. Unlike the Acconcia Model, Piccolo and Immordino focus on the incentives of the agent to reveal a truthful account of the activities of the boss in a setting where the agent is privately informed and the information he provides is non-verifiable. They conclude that the

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<sup>23</sup> See Piccolo and Immordino (n 13).

interplay between the truthful revelation of insider information and the risk of retaliation by the leader may make it more beneficial to adopt a policy that allows informants to hide some of their information provided the prosecutor sets a high enough threshold of quality of evidence for the admission of agents into the program in the first place. This is because the revelation of only part of the information increases the risk of retaliation and increases the wage of the agent ex-ante, therefore enhancing deterrence. An important aspect of this model is its recognition of the interplay between the risk of retaliation by the boss, the reservation wage of the agent and deterrence.

Both theoretical models of organized crime in Acconcia et.al and Piccolo and Immordino above depart from the traditional literature on the economics of organized crime in that they focus on the potential of leniency programs for the destabilization of criminal organizations.<sup>24</sup> Scholarship in the field is otherwise relatively limited and has focused on the consequences of the illegal market structures created and sustained by activities of organized criminal groups such as the Mafia.<sup>25</sup> This work seeks to provide welfare comparisons between the monopolistic supply of illegal goods and services sustained by centralized organized groups on the one hand, and the competitive supply of the same which is likely to result from robust law enforcement strategies.<sup>26</sup> There has also been some work on the role of the organized crime group as a stand-in for the government in the provision of public goods and the resolution of disputes over market shares and property rights, and on transaction costs as determinative of the illegal activities pursued by criminal organizations.<sup>27</sup> Despite maintaining the traditional lines of enquiry, more recent efforts were inspired by literature on corporate liability and attempted to model organized crime as a vertical structure in which the principal exerts coercive powers over agents.<sup>28</sup>

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<sup>24</sup> Acconcia et al (n 12) and Piccolo and Immordino (n 13).

<sup>25</sup> For an overview of the literature on the economics of organized crime, see Fiorentini and Peltzman, "Introduction" in Gianluca Fiorentini and Sam Peltzman, *The Economics of Organised Crime* (Cambridge University Press, 1997).

<sup>26</sup> *ibid.*

<sup>27</sup> Fiorentini and Peltzman (n 24).

<sup>28</sup> See, for example, Nuno Garoupa, 'The Economics of Organized Crime and Optimal Law Enforcement', *Economic Inquiry*, 38/2 (2000), 278-88.

### ***4.3. The Viability of the Use of Asymmetric Leniency Programs in International Criminal Prosecutions***

As discussed in some detail in Chapter 3, the ICC suffers from a debilitating enforcement problem that prevents it from apprehending key suspects in high-profile cases of violations of international criminal law (ICL) norms. However, as well as its inability to secure arrests, the Court lacks the resources required to investigate properly the commission of complex crimes in what is, for all intents and purposes, an almost indefinite jurisdiction.<sup>29</sup> This has already posed serious challenges for the Office of the Prosecutor which came under strong criticism for its handling of the investigation into the *Lubanga* case, most notably from the ICC's own Trial Chamber.<sup>30</sup> With evidentiary weaknesses affecting the work of most international criminal tribunals (ICTs) post Nuremburg, some of these institutions have found it beneficial to institutionalize the practice of plea-bargaining in order to dispose of cases more efficiently. In addition to avoiding lengthy trials, it has also been widely acknowledged that plea-bargaining induces perpetrators to surrender valuable information and evidence capable of incriminating other individuals who may have conspired or collaborated with the perpetrators to commit the crimes in question. In this section, I argue that, because of the emphasis often placed on inducing cooperation with prosecutors of international crimes, the plea-bargaining practices of ICTs are akin to flexible leniency arrangements that are sometimes agreed on even prior to arrests. While leniency is hardly discussed in the context of international criminal prosecutions, I demonstrate that there are obvious parallels between the commission of international crimes and the dynamics of organized crime that would justify the use of institutionalized and predictable leniency schemes which are common in the fight against organized crime. Even though the literature on the effectiveness of the ICC may be more accommodating of a discussion on plea-bargaining, leniency programs have the potential of solving the ICC's inability to bring the guilty to justice because - unlike plea-bargaining which only becomes relevant after a suspect is in custody - they are designed to induce self-surrenders in the hope of avoiding some or all punishment.

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<sup>29</sup> Carla Del Ponte, 'Investigation and Prosecution of Large-Scale Crimes at the International Level the Experience of the Icty', *Journal of International Criminal Justice*, 4/3 (2006), 539-58.

<sup>30</sup> See discussion in Section 4.3.1 below.

### 4.3.1. The Use of Cooperation Evidence in International Criminal Prosecutions: Between Leniency and Plea-Bargaining

The ICC's lack of enforcement powers is a serious hurdle to the efficient administration of international criminal justice.<sup>31</sup> Unlike its progenitor the International Military Tribunal at Nuremberg, the court does not benefit from the vast resources of a standing army that is able to arrest and deliver suspects.<sup>32</sup> The court's vulnerability is also exacerbated by its limited capacity to investigate crimes within its jurisdiction. Unlike national criminal courts that have the benefit of relying on a police force to investigate and regulate criminal behaviour on a day to day basis, the court's only investigative arm is the Office of the Prosecutor (OTP). With the court's almost unlimited jurisdiction over war-related crimes, it is unsurprising that the OTP is struggling to cope with its mandate to issue defensible indictments and secure convictions.<sup>33</sup>

In delivering its first judgement convicting the Congolese rebel leader Lubanga of child conscription charges, the ICC Trial Chamber dedicated a substantial portion of its judgement to evidentiary issues including the evidence gathering strategies of the Prosecutor. With much of the eyewitness testimony proving highly unreliable, the court's findings of fact eventually hinged on a video footage showing the defendant addressing a rally in which '...children clearly under the age of 15' were present.<sup>34</sup> The Prosecutor has indeed come under a considerable amount of criticism for using unverified evidence provided by third party intermediaries.<sup>35</sup> While it is not uncommon for intermediary organizations such as NGOs or UN missions to be the source of information concerning the commission of atrocities in countries in which they routinely operate, the evidence they provide is often used in international prosecutions as background information to the conflict and is rarely put forward to prove guilt.<sup>36</sup> What was particularly alarming in the *Lubanga* case was the extent to which the Prosecutor relied in each stage of the proceedings on unsubstantiated evidence

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<sup>31</sup> See discussion in Section 2.2 of Chapter 2 above.

<sup>32</sup> Bernard D Meltzer, 'War Crimes: The Nuremberg Trial and the Tribunal for the Former Yugoslavia - the Seegers Lecture', *Val. UL Rev.*, 30 (1995), 895; Meltzer; Elena Baylis, 'Outsourcing Investigations', *UCLA J. Int'l L. Foreign Aff.*, 14 (2009), 121.

<sup>33</sup> See discussion below, p.117-119.

<sup>34</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012) <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> [644] (last visited July 26, 2014).

<sup>35</sup> *ibid* [168].

<sup>36</sup> See Baylis (n 32).

that was independently compiled by third parties.<sup>37</sup> In addition to issues of reliability, this overreliance on intermediaries nearly cost the Prosecutor the whole case in 2010. Following the refusal of the Prosecutor to disclose to the defence exculpatory evidence which came into his possession through a third party; the Trial Chamber held that it was impossible to conduct a fair trial and ordered the stay of the proceedings and the release of the defendant. The crisis was eventually averted when the prosecutor managed to obtain the consent to disclose the evidence from those who supplied the information, as was required by the confidentiality agreements in place, and the Appeals Chamber reversed the Trial Chamber's decision to stay the proceedings.<sup>38</sup> The issue of intermediaries continued to define the *Lubanga* judgement, however, especially when it was brought to the court's attention that three of the intermediaries may have unduly influenced witnesses to provide false testimony. In sentencing the defendant to 15 years imprisonment following the guilty verdict, the judges viewed the conduct of the prosecutor as a mitigating circumstance calling for a more lenient sentence.<sup>39</sup>

The lack of a police force able to investigate as well as to enforce arrest warrants and subpoenas has also affected the work of previous tribunals. Difficulties similar to those caused by reliance on eyewitness testimonies which permeated the *Lubanag* case were more than visible in the judgements of other international criminal tribunals (ICTs).<sup>40</sup> Even though the International Criminal Tribunal for the former Yugoslavia (ICTY) was somewhat protected and assisted by a limited military presence, it failed in its early days to effectively conduct criminal prosecutions.<sup>41</sup> Even when it was able to secure the arrest of high-level suspects, the tribunal was ill-equipped to gather the necessary evidence to convict them.<sup>42</sup> Following the ICTY Appeals Chamber's decision to overturn three of the convictions in the *Kuperskic et al.* case for insufficiency of evidence, the French Prosecutor in charge of the case readily admitted that an indictment based on the evidence presented in the case would not

<sup>37</sup> Ibid (citing that 55% of all the evidence used in the *Lubanga* case was sourced by intermediaries).

<sup>38</sup> Alex Whiting, 'Lead Evidence and Discovery before the International Criminal Court: The Lubanga Case', *UCLA J. Int'l L. Foreign Aff.*, 14 (2009a), 207.

<sup>39</sup> Ibid.

<sup>40</sup> M.M. Penrose, 'Lest We Fail: The Importance of Enforcement in International Criminal Law', *Am. U. Int'l L. Rev.*, 15 (1999), 321.

<sup>41</sup> Pati, 'Icc and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option, The', *UC Davis J Int'l L. & Pol'y*, 15 (2008), 265 (stating that from 1993 to 2003, the ICTY was merely able to conclude 19 cases at the cost of \$800 million). See also Penrose (n 40).

<sup>42</sup> Nancy Amoury Combs, 'Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts', *Vand. L. Rev.*, 59 (2006), 67.

have been issued in France.<sup>43</sup> At the International Criminal Tribunal for Rwanda (ICTR), a number of prosecution witnesses, including Omer Serushago whose cooperation with the prosecution is further discussed below, clearly falsified evidence when they recounted identical stories in different trials but changed the facts to implicate defendants in several other trials.<sup>44</sup> In her book *Fact-finding without Facts*, Combs notes that the International Criminal Tribunal for Rwanda (ICTR) as well as the Special Court for Sierra Leone (SCSL) have rarely engaged in serious scrutiny of evidence advanced by the Prosecutor and have often relied on highly questionable eyewitness testimony in establishing the guilt of the accused.<sup>45</sup> Combs notes that in the CDF case, the SCSL convicted one of the commanders of the Civil Defence Forces (CDF) of a command responsibility crime on the evidence of a subordinate who either committed perjury on the stand or was grossly mistaken about an important aspect of the case.<sup>46</sup> The subordinate testified that after he received orders from the commander to get rid of “infiltrators”, he abducted, tortured and cut the ears of one Joseph Lansana and proceeded to kill his mother. Lansana appeared for the defence at the trial with two intact ears and testified that his mother had been killed years before the date of the prosecution witness’s account. Despite this glaring falsification, the Trial Chamber commended the witness on his ‘...frank and public admission of his personal role in the war’ and for testifying ‘...without hesitation, unambiguously, and...through a genuine desire that the truth be known’.<sup>47</sup> As is illustrated by the *Lubanga* case, while the inadequacy of investigative tools at the disposal of these tribunals is cause for great concern, this coupled with a zeal to indict and convict regardless of the quality of available evidence produces a multiplicity of credibility issues.

The evidentiary weaknesses at the ICTY and ICTR were partly solved through the institutionalization of plea-bargaining which became the strategy of choice for the ICTY’s Prosecutor until 2003 and was used at the ICTR but to a lesser extent.<sup>48</sup> Even though conserving resources through obviating the need for lengthy trials was a readily identifiable advantage of the practice, a number of scholars observed that plea-bargains induced

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<sup>43</sup> Vladimir Tochilovsky, 'Special Commentary: International Criminal Justice—Some Flaws and Misperceptions', *Criminal Law Forum* (22: Springer, 2011), 593-607.

<sup>44</sup> Nancy A Combs, *Fact-Finding without Facts* (Cambridge University Press, 2010) 150.

<sup>45</sup> *ibid.*

<sup>46</sup> Combs (n 44) 164.

<sup>47</sup> *Ibid* 212.

<sup>48</sup> Combs, 'Copping a Plea to Genocide: The Plea Bargaining of International Crimes', ( ; Julian A Cook Iii, 'Plea Bargaining at the Hague', *Yale J. Int'l L.*, 30 (2005), 473.

valuable cooperation from defendants who provided the prosecutor with evidence and testimonies against their co-perpetrators.<sup>49</sup> Combs notes that, and despite a general ambiguity surrounding sentencing guidelines in the case of plea-bargaining at the ICTY, the only expressly formulated mitigating circumstance of which judges are instructed to take account is substantial cooperation with the Prosecutor.<sup>50</sup> Even though the practice of plea-bargaining has arguably delivered a number of benefits and increased the effectiveness of these institutions post arrests, it is not particularly designed to address the enforcement problem facing the ICC since the Court lacks the capacity to affect arrests in the first place. While it could be argued that the institutionalization of plea-bargaining may induce some individuals to self-surrender in the hope of benefiting from the promised reductions in expected sentences, this presupposes a somewhat functional law enforcement system which poses a credible threat of imminent arrests. With very slim chances of arrests, however, there are no real incentives for individuals indicted by the ICC to self-report in the hope of benefiting from plea-bargains that can ameliorate the effect of convictions.<sup>51</sup>

Be the above as it may, the cooperation of some perpetrators with the prosecutors of international criminal tribunals has in some cases led to the arrest of important figures indicted for crimes against humanity, war crimes and genocide. At the ICTR for example, information provided by a low-level militia group leader to the ICTR's Prosecutor led to the arrest and conviction of a number of high-ranking defendants including the Prime Minister of the interim government of Rwanda during whose rule the Rwandan genocide of 1994 took place.<sup>52</sup> While this case is often cited as an example of plea-bargaining practices in international criminal prosecutions,<sup>53</sup> it most closely resembles the use of leniency in criminal law enforcement. In this instance, the defendant's contribution to justice was the provision of valuable information that led to the detection and punishment of other perpetrators as opposed to the mere offering of a guilty plea which preserves valuable court resources and time. In fact when Omar Serushago voluntarily surrendered to the ICTR

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<sup>49</sup> Harmon, M., 'Plea Bargaining: the Uninvited Guest at the International Criminal Tribunal for the Former Yugoslavia', 167 in J. Doria, H.P. Gasser, and M.C. Bassiouni, *The Legal Regime of the International Criminal Court: Essays in Honour of Professor Igor Blishchenko* (19: Martinus Nijhoff, 2009) 163-182 ; Combs (n 48).

<sup>50</sup> Combs (n 42).

<sup>51</sup> But note suggestion in Emily Hencken Ritter & Scott Wolford, *Negotiating Surrender: Criminal Courts, Pre-Arrest Bargains, and the Enforcement of Warrants*, *Emroy Univerity* (2010) 19–21 (May 17, 2010) (positing that indicted individuals may surrender to avoid perilous arrest operations).

<sup>52</sup> Combs (n 42) & (n 48).

<sup>53</sup> *ibid.*



following his collaboration with the authorities, the crimes to which he confessed and later pleaded guilty had not been under investigation by the court nor had he been indicted for any other criminal behaviour.<sup>54</sup> As a result of his cooperation, he received a very lenient fifteen years in prison for crimes against humanity that included murder, rape and torture as well as one count of genocide.

The use of the term “leniency” in the context of law enforcement refers to granting individuals suspected of criminal behaviour partial or full immunity from penalties in exchange for cooperation with law enforcement authorities. Unlike plea-bargaining which takes place after the suspect is in custody and in the presence of some evidence against him, leniency programs are designed to gain access to individuals suspected of wrongdoing who are otherwise insulated from the reach of the law or to acquire evidence of latent, secretive or undetectable wrongdoing.<sup>55</sup> In the context of tax evasion for instance, leniency programs are aimed at generating self-reporting of own behaviour for which evidence is only attainable through random auditing activities by law enforcement authorities which may or may not include the individual in question. From the point of view of a culpable actor in this case, leniency replaces the probable imposition of a large sanction which depends on detection with the certainty of a lesser punishment or no punishment at all following cooperation with the authorities. When leniency is used in the fight against organized crime or in anti-trust enforcement, promises of a reduction in sanction are designed to induce the revelation of crucial information about the criminal enterprise and the involvement of other actors within it. In this respect, leniency programs afford prosecutors the opportunity to identify violators of legal norms whose criminal behaviour may otherwise go undetected, unpunished or uninterrupted as well to conserve investigation and detection costs. The main function of leniency programs is therefore the acquisition of information pertaining to criminal behaviour, including evidence required for convictions, which will otherwise be unavailable to prosecutors.<sup>56</sup> Because self-reporting of criminal behaviour presupposes the

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<sup>54</sup> Combs (n 42) & (n 48).

<sup>55</sup> See Stephen J Schulhofer, 'Is Plea Bargaining Inevitable?', *Harvard Law Review*, (1984), 1037-107, 1037 (defining plea-bargaining as 'any process in which inducements are offered as in exchange for a defendant's cooperation in not fully contesting the charges against him'); Wouter Wils, 'Leniency in Antitrust Enforcement: Theory and Practice', *World Competition: Law and Economics Review*, 30/1 (2007) 4, (defining leniency as 'the granting of immunity from penalties or the reduction of penalties...in exchange for cooperation with the...authorities. The cooperation could consist in the provision of intelligence and/or evidence of the...violations...').

<sup>56</sup> Wils (n 55) 4; Daniel C Richman, 'Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels', *Federal Sentencing Reporter*, 8/5 (1996), 292-95.

existence of mutual benefits to be traded off between prosecutors and criminal actors, sentence reductions ensure that the average criminal has the required incentive to share the information he has with the authorities. This is especially true in a case such as Serushago's where except for the defendant's revelation of information he was under no scrutiny for the crimes he committed. While self-reporting normally occurs under a tangible threat of arrest and conviction by the same institution which offers partial relief from penalty, the incentive in the case of Serushago may have been escaping punishment by the new government of Rwanda. Leniency programs work to optimize the incentive to report to escape harsher consequences.

Despite a growing acceptance of the role of plea-bargaining in the successful prosecution of international crimes,<sup>57</sup> the use of leniency is neither recognized nor theorized in the same context. A possible explanation for this is that a guilty plea may be more readily acceptable as an expression of genuine remorse for wrongful acts committed which can then be imbued with impact on reconciliation.<sup>58</sup> With leniency programs, however, the motivation to cooperate with the authorities often stems from the self-serving desire to escape harsher punishment.<sup>59</sup> Rewarding remorse as well as the reconciliation it is thought to generate with sentence reductions leaves less room for criticism than would otherwise ensue. On the other hand, reporting of useful information about the commission of atrocities by other actors in exchange for reduced sentences remains tainted by an unfavourable hint of opportunism.<sup>60</sup> Yet, international criminal tribunals have consistently traded sentence reductions for information that incriminates actors other than those cooperating with the courts. An example of this is the case of Erdomic who voluntarily reported to the ICTY a massacre of 1200 men in which he was involved and which had not been previously known to the court. The Trial Chamber took into consideration his cooperation with the prosecutor when sentencing him to 5 years in prison.<sup>61</sup> Henham and Drumbl note that in its sentencing judgement in the case of *Nikolic*, the ICTY was clearly concerned with the extent of the

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<sup>57</sup> Combs (n 42).

<sup>58</sup> See for example discussion of Biljana Plavsic guilty plea in Pati ((n 41) 298-299); Combs (n 3) Ch8.

<sup>59</sup> Michael A Simons, 'Retribution for Rats: Cooperation, Punishment, and Atonement', *Vand. L. Rev.*, 56 (2003), 1.

<sup>60</sup> Richard L Lippke, 'Rewarding Cooperation: The Moral Complexities of Procuring Accomplice Testimony', *New Criminal Law Review: An International and Interdisciplinary Journal*, 13/1 (2010), 90-118.

<sup>61</sup> Combs (n 42).

defendant's cooperation with the prosecutor as well as the intrinsic value of evidence he may be willing to provide against others.<sup>62</sup> They conclude that:

Within the plea-bargaining framework, the bald reality is that perpetrators having information on others tend to be given a better bargain than those with nothing to offer. A perpetrator involved in a joint criminal enterprise with high-profile suspects may benefit greatly from the discount (especially if the cases against those high profile suspects are weak)...<sup>63</sup>

Given the grave evidentiary weaknesses plaguing the work of international criminal tribunals and the risk they pose to the prospect of convicting important defendants as well as the credibility of these institutions,<sup>64</sup> it is not surprising that cooperation evidence has gained gradual recognition in the work of these institutions. Indeed, international criminal tribunals were quick to realize that the most convincing evidence of the commission of international crimes often comes from insiders to the political structures under scrutiny; hence, the consistently lenient treatment of cooperating defendants. As Combs notes:

Unlike the Nuremberg prosecutors who had the benefit of a voluminous paper trail, ICTY and ICTR prosecutors must obtain information from human sources, and the best human sources as to, say, a particular command structure or the orders given within that structure, are likely to be the subordinates who received those orders.<sup>65</sup>

There is very little room to question the value of cooperation evidence in international criminal prosecutions. As is readily admitted by even the staunchest critics of plea-bargaining in international criminal prosecutions, such evidence had already played an important role in implicating high level officials as well as getting them to accept responsibility for their crimes.<sup>66</sup>

Even though the ICC Trial Chamber acted with great resolve in the *Lubanga* case, jealously guarded the defendant's due process rights and judiciously scrutinized and disregarded unreliable evidence, this case is an indication of the multiple challenges likely to face the

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<sup>62</sup> Ralph Henham and Mark Drumbl, 'Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia', *Criminal Law Forum* (16: Springer, 2005), 49-87.

<sup>63</sup> *Ibid* 56.

<sup>64</sup> Combs (n 44).

<sup>65</sup> Combs (n 48) 148.

<sup>66</sup> Henham and Drumbl (n 62).

Prosecutor in trying to prove its cases.<sup>67</sup> Given the problems of eyewitness accounts discussed by Combs, the Prosecutor must work to secure better evidence. At the moment, its presentation of facts relevant to the determination of the commission of crimes within the jurisdiction of the ICC does not seem to be very persuasive; not least to the local population. In the ICC's investigation of the post-conflict violence in Kenya, for example, the Prosecutor relies heavily on a report produced by the Commission of Enquiry into Post-Election Violence (or "WAKI Commission")<sup>68</sup> and purports to show that there was a state-like policy to attack civilians perpetrated by senior politicians including the recently inaugurated president of Kenya Uhuru Kenyatta.<sup>69</sup> In his dissenting opinion of the Decision to Proceed with the Investigation, judge Hans-Peter Kaul was of the opinion that the evidence presented supports only a finding that there was a wide-spread violence in which some individuals were involved and which was in all likelihood the result of structural socio-political conditions.<sup>70</sup> Notwithstanding the narrative accepted by the majority judges in the Trial Chamber and the eventual indictment of Kenyatta for his role in the events of 2008, Kenyatta went on to win the presidential elections by a 56% majority and became president of Kenya in February of 2013. The election of Kenyatta despite the outstanding ICC indictment indicates an obvious disconnect between the narrative of the ICC and the perception of conflict held by local populations and may well be attributed to presenting an account of the violence that lacks a great deal of substance.

An empirical investigation by McClendon of the time it takes the ICTY to execute arrest warrants found that the more seats held in government by members of the regime complicit in the atrocities, the longer it takes to secure arrests of wanted defendants.<sup>71</sup> Yet, indictments issued by these tribunals for persons suspected of the commission of atrocities rarely affect local public opinion. In light of the enforcement problems facing international criminal tribunals, a disbelieving local population may prove a serious obstacle to the effective administration of justice especially prior to the execution of arrest warrants. This is

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<sup>67</sup> Baylis (n 32).

<sup>68</sup> *Situation in the Republic of Kenya*, Case no. ICC-01/09 (31 March 2010), Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya (hereinafter the Situation in Kenya, Decision to Proceed with the Investigation) <http://www.icc-cpi.int/iccdocs/doc/doc854562.pdf> (last visited July 26, 2014).

<sup>69</sup> *ibid.*

<sup>70</sup> *Situation in Kenya*, Decision to Proceed with the Investigation (n 68), Dissenting Opinion of Judge Hans-Peter Kaul, [148].

<sup>71</sup> G.C. McClendon, 'Building the Rule of International Criminal Law: The Role of Judges and Prosecutors in the Apprehension of War Criminals', *Human Rights Review*, 10/3 (2009), 349-72.

not least because in the case of institutions such as the ICC regime change -whether democratic or otherwise- may prove the only way to secure the arrest of high-level officials.<sup>72</sup> An admission of guilt or the provision of information by members of a genocidal government may make all the difference between an extremely hostile public opinion and the endorsement of the established record of atrocities as well as acceptance of responsibility for them.<sup>73</sup>

Trading sentence reductions for reliable information on the commission of atrocities and the role of important political figures in them is, therefore, a pragmatic remedy to the dichotomy between the ideal of international criminal justice and its reality with respect to both the truth-telling function and the deterrence objective of international criminal tribunals. As Bibas and Burke-White rightly argue, international criminal institutions need to resort to innovative solutions to their law-enforcement problems if they are to fulfil more than a mere retributive function in the fight against atrocities.<sup>74</sup> Drawing analogies from domestic criminal law enforcement, they propose the asymmetric use of plea-bargains so that sentence reductions are only offered to low-level perpetrators in return for incriminating evidence against officials higher up in the organizational structure.<sup>75</sup> This view of the systems involved in the commission of atrocities as a hierarchical criminal organization is not new and has indeed informed the development of offences such as Joint Criminal Enterprise (JCE) and facilitated the prosecution and conviction of Nazi organizations following WWII.<sup>76</sup> However, Bibas and Burke-White's interpolation reflects a specific understanding of the dynamics of group criminal behaviour that allow some members to have access to and provide information about the criminal enterprise to law enforcement authorities without necessarily being most culpable for the commission of these crimes; a conceptualization clearly influenced by the use of asymmetric leniency in criminal law enforcement. Such programs are regularly employed in the fight against organized crime in several countries<sup>77</sup>

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<sup>72</sup> See discussion in Chapter 3.

<sup>73</sup> Michael P Scharf, 'Trading Justice for Efficiency Plea-Bargaining and International Tribunals', *Journal of International Criminal Justice*, 2/4 (2004), 1070-81.

<sup>74</sup> Stephanos Bibas and William W Burke-White, 'International Idealism Meets Domestic-Criminal-Procedure Realism', *Duke LJ*, 59 (2009), 637.

<sup>75</sup> *ibid.*

<sup>76</sup> Allison Marston Danner and Jenny S Martinez, 'Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law', *California Law Review*, (2005), 75-169.

<sup>77</sup> See for example Acconcia et al (n 12).

and are widely used in law enforcement efforts against cartels under US and EU anti-trust law.<sup>78</sup>

Katyal notes that working within criminal organizations allows for a diffusion of criminal behaviour where the responsibility for a single crime is shared amongst many intermediaries; who may or may not play a major role in the commission of the crimes.<sup>79</sup> Often enough, however, those most responsible at the top remain comfortably insulated from prosecution and punishment.<sup>80</sup> He argues that given this mode of interaction, low-level perpetrators can be encouraged to impart valuable evidence in exchange for leniency at a relatively low cost to the prosecutor.<sup>81</sup>

### 4.3.2. Asymmetric Leniency, Cooperation Evidence and International Crimes

In domestic criminal law enforcement,<sup>82</sup> a prosecutor is sometimes compelled to seek the testimony of accomplices against other members of a criminal organization. This is particularly the case ‘...when [s/he] cannot obtain equally effective evidence from eyewitnesses, victims, documents and other “untainted sources”’.<sup>83</sup> Purchasing cooperation evidence from accomplices for the price for a reduction in sanction is common when dealing with opaque criminal conduct such as organized crime.<sup>84</sup> Katyal notes that in such organizations, those at the top are often insulated from prosecutions with very little documentary or other evidence linking them to the crime.<sup>85</sup> Using the example of war crimes, he remarks that given such a structure ‘...imputing wrongdoing [becomes] exceptionally difficult because leaders hide their actions behind layers of middlepersons’.<sup>86</sup> Confronted by the inability to apprehend those most responsible for the crimes under investigation, prosecutors may choose to trade leniency for information. As Lippke states:

There are circumstances in which prosecutors appear to have few viable options but to employ cooperation rewards. If the crimes for which they can thereby affect just

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<sup>78</sup> Wils (n 5).

<sup>79</sup> Neal Kumar Katyal, 'Conspiracy Theory', Yale Law Journal, (2003), 1307-98.

<sup>80</sup> *ibid* 1326.

<sup>81</sup> Katyal (n 79).

<sup>82</sup> The practice is in common use under § 5K1.1 of the Federal Sentencing Guidelines (n 7).

<sup>83</sup> Richman (n 56).

<sup>84</sup> *ibid*. See also Acconcia et al (n 12)

<sup>85</sup> Katyal (n 79).

<sup>86</sup> *ibid*.

punishment are serious enough and significant in number, and no other viable options for resolving them exist, the prosecutors... should use cooperation rewards.<sup>87</sup>

From a neoclassical economics perspective, the incentives of offenders to commit crimes are affected by increases in either the sanction for criminal conduct or the probability of detection.<sup>88</sup> Baer explains that the use of leniency is directed towards increasing detection.<sup>89</sup> Having achieved a more extensive and geographically wider use in anti-trust law enforcement, the practice has been imbued with numerous other benefits in addition.

The use of leniency programs in criminal law enforcement produces a number of evidently desirable effects. Wils notes that such programs provide a valuable source of insider intelligence and information especially when alternative investigative avenues are particularly expensive or burdensome.<sup>90</sup> This is indeed the main justification for the use of the practice in criminal law enforcement; it makes the job of the authorities in identifying and bringing to justice violators of the law that much easier. A corollary of this is that the criminal behaviour in question is brought to an earlier end than is otherwise possible.<sup>91</sup> What this implies is that the mere existence of such schemes increases the risk of engaging in certain practices for criminals. With a larger probability of detection, the leader of an organization needs to compensate members more generously than before making the criminal enterprise costlier. The ever growing literature on leniency,<sup>92</sup> perhaps in response to mounting criticisms, also identifies a host of other lateral benefits to the practice. In the context of anti-trust law enforcement, Wils argues that creating and sustaining collusion between cartel members is made more difficult by leniency programs because they encourage and reward reporting to the authorities.<sup>93</sup> The existence of profitable exit strategies such as these affects the dynamics of reaching an agreement between members of a criminal team including on the distribution of profits and may induce the organization to invest on monitoring and detecting possible defections.<sup>94</sup> Katyal notes that leniency leads members of criminal teams to distrust each other progressively and forces them ‘...to adopt

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<sup>87</sup> Lippke (n 60) 95.

<sup>88</sup> Baer (n 6).

<sup>89</sup> *ibid.*

<sup>90</sup> Wils (n 55).

<sup>91</sup> Wils (n 5).

<sup>92</sup> This literature is mainly concerned with the use of leniency in anti-trust law enforcement.

<sup>93</sup> Wils (n 5).

<sup>94</sup> *ibid.*

a bundle of inefficient practices (monitoring, compartmentalization, and avoiding discussion) that each cue more distrust'.<sup>95</sup> Baer notes that cooperation with law enforcement authorities weakens the bonds between wrongdoers and destabilizes criminal teams because of the uncertainty generated by offering leniency to lower-level perpetrators.<sup>96</sup> It could be argued that this fragmentation of trust in criminal teams also leads to an increase in the cost of crimes when members of a criminal team have to be compensated for possible defections by colleagues. Leniency programs, in addition, offer the same benefits as plea-bargaining past the stage of investigation.<sup>97</sup> As well as having accomplices readily admit their guilt and receive some form of punishment for their crimes,<sup>98</sup> leniency programs generate evidence from the cooperation of these individuals that can be used to secure convictions of other members of the criminal team. It can, therefore, be argued that such programs also enhance the truth-finding function of criminal justice institutions.<sup>99</sup>

As Baer notes, '[t]rading leniency for information is neither costless nor guaranteed to reduce wrongdoing'.<sup>100</sup> However, the evident advantages of using leniency in criminal law enforcement, led its critics to lobby for establishing institutional reforms that counterbalance its negative effects as opposed to seeking to abolish it all together.<sup>101</sup> The most obvious critique of rewarding accomplice cooperation with immunity or sentence reductions is that it lowers deterrence by imposing a less stringent sanction than would otherwise be expected for a given criminal conduct.<sup>102</sup> In addition to the effect this has on the incentives to engage in criminal conduct, it also means that some offenders will escape just retribution for acts they committed. In order to avoid this outcome, prosecutors must ensure that the reduction in sentence granted does not exceed the level required to induce reporting.<sup>103</sup> However, this view neglects that leniency has ex-ante as well as ex-post effects on the formation of criminal enterprises. If the evidence of accomplices can be used to increase the probability of detection and consequently punishment for a leader, then this will automatically reflect on the incentives of the leader to create the criminal enterprise in the first place. Because accomplices are only secondary actors in this scenario, what is central to the success of the

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<sup>95</sup> Katyal (n 79) 1350.

<sup>96</sup> Baer (n 6).

<sup>97</sup> Wils (n 55).

<sup>98</sup> *ibid.*

<sup>99</sup> Baer (n 6).

<sup>100</sup> *ibid* 967.

<sup>101</sup> Baer (n 6).

<sup>102</sup> Wils (n 55).

<sup>103</sup> *ibid.*



program is whether or not it makes it costlier for the leader to commit crimes. If the program has the effect of dissuading leaders, accomplices will not have to make the decision to engage in the criminal enterprise in the first place. To limit the negative effect of leniency on deterrence further, prosecutors often stipulate a minimum level for the quality or usefulness of the evidence provided that has to be satisfied by accomplices before leniency is granted. This guarantees that the leniency programs have the desired effect of increasing the probability of detection, conviction and punishment.<sup>104</sup>

A more poignant objection to the use of leniency is that it creates inequality of treatment before the law.<sup>105</sup> Lippke notes that the voracity of this critique depends on whether or not the objective of the law in question is retribution or deterrence.<sup>106</sup> If deterrence is the aim of the law and leniency advances it then it should be an acceptable investigative tool. I argue in Chapter 2 that, while retribution cannot be a legitimate goal of international criminal law, deterrence can be in so far as it contributes to the two main objectives of ensuring World peace and security, as well as the promotion of inalienable human rights.<sup>107</sup>

Further detractors of leniency programs dispute the credibility of cooperation evidence.<sup>108</sup> This is indeed a significant risk, but one which can be guarded against by requiring that the evidence provided be documentary, corroborated or of equally probative value.<sup>109</sup> Furthermore, information provided by accomplices can in some circumstances be of the kind that points to where damaging evidence exists.<sup>110</sup>

## ***4.4. The Model***

### **4.4.1. Motivation**

The model developed by Piccolo and Immordino (the P&I Model) demonstrates that the value of leniency programs stems from the asymmetry in information in the prosecutor's possession on the one hand and information accessible to insiders of the criminal organization on the other. The main assumption in the model is that some agents within the organization possess information above and beyond that which is available to the prosecutor

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<sup>104</sup> Wils (n 55).

<sup>105</sup> Lippke (n 60).

<sup>106</sup> *ibid.*

<sup>107</sup> See Chapter 2, Section 2.2 above.

<sup>108</sup> Lippke (n 60).

<sup>109</sup> Baer (n 6). See also the discussion in Chapter 5 of this Thesis.

<sup>110</sup> *ibid*

through independent investigation. They assume that if this information is somehow made available to the prosecutor, it will supplement, clarify or strengthen the prosecution's case thereby increasing the chances of convicting the leader. The thrust of the model is therefore the design of leniency programs that provide agents who possess a certain type of information (high quality information) with sufficient incentives to come forward and report (truthfully), while making sure that the same has a minimal positive effect on their and the leader's incentives to commit crimes in the first place.

The P&I Model is a principal-agent model in which two criminals in a hierarchical criminal organization interact in light of the existence of a leniency program introduced by the legislator. The boss plans the crime and hires the subordinate to execute it at a given wage. After the crime is committed (by the subordinate at the behest of the boss), evidence of the involvement of the leader comes to light but is known only to the two criminals. The Prosecutor opens an investigation into the crime when it takes place and the subordinate can at this stage apply for leniency by disclosing the evidence he has that implicates the boss. If the subordinate blows the whistle but the boss survives prosecution, the boss retaliates against the agent for reporting him. Because this model is concerned with information revelation, the amnesty rate and the probability of conviction of the boss are made dependent on the quality of information at the disposal of the subordinate. The benchmark model suggests that the first best policy would be to grant self-reporting agents as much leniency as is sufficient to offset the dangers of retaliation from the leader of the organization, while still preserving the same payoffs for the agent as he would have received if he had committed the crime, did not report and was convicted with a probability as opposed to a certainty. The first best policy assumption ensures that under conditions of reprisals by a criminal leader who escapes conviction, the overall cost of crime is not inadvertently reduced by availing criminals of reduced punishments in exchange for evidence.

To illustrate what the first best policy in the P&I Model entails, assume that a subordinate in a criminal outfit is likely to get 10 years in prison if he is convicted of certain crimes under investigation by the police. But that the probability of his apprehension and conviction without reporting is 60%. This means that the expected prison sanction faced by the subordinate in the event he commits the crime and not report it stands at 6 years. Now, assume that if the subordinate cooperates with the police and implicates his boss, the boss is likely to be convicted by a 90% probability. However, if the boss is not convicted, he will come after the subordinate and kill him (causing him a loss of 40 years). In this case, the first best

policy under the P&I Model would be to grant the subordinate a leniency rate of 80% so that the cooperating defendant faces a 2 year sentence with certainty in exchange for rendering evidence- an act which will endanger his life unless his boss is convicted. Given the risk of reprisal by the boss (which translates to a loss of 4 years), the subordinate will have an expected cost of 6 years for the commission of crimes whether he reports or not report. In this case, when the subordinate is indifferent between the two outcomes and chooses to report his boss, the Prosecutor acquires the evidence he needs to convict the boss without lowering the cost of crime borne by the subordinate who faces a loss of 6 years in either case.

I modify the P&I model to demonstrate that a similar dynamic may be beneficial in the context of a government suspected of the commission of crimes against humanity. The set-up of the Model is designed to examine the effect of reporting high quality evidence by lower-level officials to the ICC Prosecutor on the incentives of leaders to commit crimes falling under the jurisdiction of the court. Unlike Piccolo and Immordino, I assume that the revelation of insider information increases the probability of regime change. This is not an unreasonable assumption. Nalepa explains that both accusation-based and confession-based revelation procedures often invoked by lustration laws seek to limit access of politicians to public office after the commission of atrocities by releasing damaging evidence of the commission of crimes by such politicians to the public without the need to exact punishment.<sup>111</sup> Thompson argues that in semi autocratic regimes where public dissidence is restricted by the lack of a focal point for revolt, an open act of authoritarianism followed by a severe crack down on opposition may instigate a regime change.<sup>112</sup> While he uses the example of a stolen election as proof of a government's malice towards its constituency, I propose that reliable evidence of the commission of crimes against a part of the population by the leader of a government may result in a similar dynamic. Having said that, the model can be easily extended to apply to the conventional setting in which the information provided by insiders is used instead to secure a conviction of the leader. I choose to focus on regime change because of the implication it has on the ICC's ability to secure the arrest and/or surrender of suspects as per Gilligan's model.<sup>113</sup>

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<sup>111</sup> Monika Nalepa, 'To Punish the Guilty and Protect the Innocent Comparing Truth Revelation Procedures', *Journal of Theoretical Politics*, 20/2 (2008), 221-45.

<sup>112</sup> Mark R Thompson and Philipp Kuntz, 'Stolen Elections: The Case of the Serbian October', *Journal of Democracy*, 15/4 (2004), 159-72.

<sup>113</sup> Gilligan (n 1).

I also extend the model to test the intuition that by providing for confidential reporting, the ICC could weaken such governments further. I incorporate a sub-game of incomplete information to show that a confidential leniency program in which the leader is unable to tell which agent reported will further enhance the positive effects of leniency programs. For example, a prosecutor who indicted a certain leader X may reveal at some point following the indictment that he is in possession of a witness testimony provided by an official of the government which clearly sets out the role played by the leader in planning and instigating the attacks against civilian populations in part of the country. If this more solid and coherent information provides the opposition with enough impetus to mobilize the masses, the leader may or may not survive in office following its revelation and dissemination. If he does survive, he is then faced with the decision whether or not to do something to curb further reporting by agents. He must therefore decide whether or not to retaliate. The decision is easier in the first model, because the leader can always tell – following the fact - if the agent in question had reported. However, with confidentiality he can either not retaliate at all or behave with all agents with a fixed probability of error in the assessment of who reported and who did not. In either case, allowing confidential reporting by agents increases the cost of the commission of crime to the leader. This is the main difference between the model that I specify in this chapter and the P&I Model; in my model, retaliation does not occur as a matter of course but is decided on by the leader based on the payoff structure proposed.

The game-tree in Figure 4.1 depicts the benchmark game between the ICC Prosecutor, a government leader accused of crimes against humanity, and his agent who is employed by the leader to execute the crimes. The ICC prosecutor decides on a leniency program for lower-level officials capable of providing him with evidence that will increase the likelihood of convicting the leader in the court of public opinion and thereby increasing the probability of mass dissent. It is assumed that whenever a crime is committed, the Agent and the Leader are subjected to opposition punishment at a certain probability of regime change. The Leader moves next to employ an agent for the commission of a crime(s) offering him a wage ( $w$ ) for his efforts. The Agent has three options: (i) to decline to commit the crime, following which the game ends; (ii) to accept to commit the crime and subsequently not report, following which the regime changes with probability  $q$  determined by nature but which reflects the quality or amount of evidence available to the prosecutor which is subsequently released to the public; and (iii) to accept to commit the crime and subsequently self-report to the ICC prosecutor to benefit from the reduction in sanction (which may include immunity from reprisal by the opposition or an offer of exile), by releasing further evidence or providing

additional context pertaining to the commission of the crimes. If the agent commits the crime and self-reports, the regime changes with the increased probability  $Q$ . If the Leader is not overthrown following this release of information (with probability  $1-Q$ ), the agent stands to suffer a retaliation cost inflicted by the Leader who needs to maintain a reputation of toughness to guard against future leakage of information. To allow for the possibility that different agents may possess different types of information, I assume that with probability  $\beta$  an agent possesses high quality information (the agent is a High type) and with probability  $(1-\beta)$  he possesses low quality information (the agent is a Low type). This affects the agent's payoffs from reporting in that the high quality information is rewarded by more leniency and hence the punishment he suffers ( $R_{A1}$ ) is less than the punishment suffered by an agent that reports less useful information ( $R_{A2}$ ), as is supported by the literature.<sup>114</sup> This also reflects on the probability of regime change affecting the leader's payoffs following the revelation of insider information; with high quality information revelation causing an increase in the probability of regime change to  $Q_1$ . The revelation of low quality information on the other hand increases the probability of regime change to a more modest  $Q_2$ . In the benchmark model, I start with a non-confidential self-reporting/leniency scheme where the Leader can tell following the fact that a certain agent talked to the ICC.

#### 4.4.2. Players and Their Strategies

There are three strategic players in the game; the ICC Prosecutor; the Leader (L) (leader of a government accused of the commission of atrocities); and the Agent (A) (a lower-level official in the government). Nature is a non-strategic player that assigns a probability  $\beta$  that the Agent is "connected" (i.e. close in the ranks to the Leader and therefore in possession of high-quality information), or "remote" (i.e. a more removed in the ranks from the leader and therefore in possession of only low-quality information). The players make decisions in the following order in accordance with the strategies available to each of them as set out in (a)-(c) below:

##### *(a) The ICC Prosecutor*

The Prosecutor elects whether or not to have a leniency program or not at the outset of the game. Where the Prosecutor elects to have a leniency program, I allow her the discretion to adjust the leniency level to the quality of information offered by subordinates as supported by the literature on the treatment of cooperation evidence by ICTs reviewed in Section 4.3

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<sup>114</sup> See insight from Piccolo and Immordino (n 13).

above. The leniency offered by the Prosecutor in this case may be protection from the full force of the opposition punishment ( $R_A$ ) in the event of regime change. Such opposition punishment may include death, imprisonment, exile and/or exclusion from public office following regime change. Leniency in this case may be interpreted as an offer of asylum or assistance with leaving the country following a coup. For high quality information (or where the reporting Agent is a “connected type”), the punishment is reduced to ( $R_{A1}$ ) and for low quality information (or where the reporting Agent is a “remote type”), the punishment is reduced to ( $R_{A2}$ ). If no reporting takes place, the standard punishment remains  $R_A$ ; where  $R_A > R_{A2} > R_{A1}$ .

*(b) The Leader*

Having observed the choice of the Prosecutor with respect to setting up a leniency program, the Leader (L) must decide whether or not to instigate the crime. Ordering the crime costs him the wage ( $w$ ) which he must pay to a willing Agent who will execute the crime for him. He also stands to suffer the opposition punishment ( $R_L$ ) in the event of regime change. Receiving this punishment depends on whether or not insider information has been reported to the Prosecutor, as well as on the quality of information reported. Receiving this opposition punishment by the Agent is subject to regime change and as such subject to one of three probabilities:  $q$  (where insider information is not reported to the Prosecutor);  $Q_2$  (where low-quality information is reported by a Remote Agent); or  $Q_1$  (where high-quality insider information is reported by a Connected Agent). Based on the assumption that regime change is affected by the revelation of information, it is more likely that the regime changes when information is revealed and when the information revealed is of high quality; so that  $q < Q_2 < Q_1$ .

In the final sub-game of the game, the Leader must decide whether or not to retaliate against a reporting agent if he survives in office following the revelation of information. I specify a legitimacy and destabilization cost ( $\ell$ ) whenever a leader retaliates against an agent. When the Leader retaliates against an Agent, the Agent must be replaced by another from a pool of possible recruits which entails some costs for the Leader. This is what I call a destabilization cost which translates the risk of trusting new people with the secrets of the state which may lead to leakage in the future. In addition, the Leader stands to lose some popularity within the organization when he is perceived as tough on insiders who cooperate with the authorities. If the Leader retaliates against an agent who did report he incurs the minimum cost where  $\ell = \ell_1$ . If, on the other hand, he retaliates against an agent who did not

report, he incurs a higher cost of  $\ell_2$ . If the Leader fails to retaliate against a deserving agent he incurs a reputational cost of (K) that can be interpreted as the cost of loss of reputation as well as the cost of having a double agent in the organization. If the Leader refrains from retaliating where no agent reports, he does not incur any cost. With a leniency program in place, the cost of retaliation to a Leader will form part of his cost-benefit calculus when choosing between the commission of crime and legal activity. This assumption - that retaliation is not without cost to the Leader - is one of the innovations in the Model. Relevant game-theoretic literature correctly identified the risk of retaliation against self-reporting subordinates as a relevant feature to the determination of an effective leniency program. However, they all assumed that retaliation is costless to leaders of organizations engaged in illegal activities.

*(c)The Agent*

Like the Leader, the Agent has two decision points: (i) to commit the crime he is commissioned for or not; and (ii) if he commits a crime, to self-report to the ICC Prosecutor or not. Reporting the crime after it is committed raises the probability of regime change from  $q$  to  $Q_1$  (where the Agent is "Connected" and has high-quality information) or to  $Q_2$  (where the Agent is "Remote" and has low-quality information). If the agent is punished by the leader, he suffers a loss of  $P$ .

The assumption in the Model is that players are risk-neutral (See Chapter 3, Section 3.3.3 on p. 82 for an explanation of risk-neutrality)

Table 4.1 below sets out the notations used in the Model.

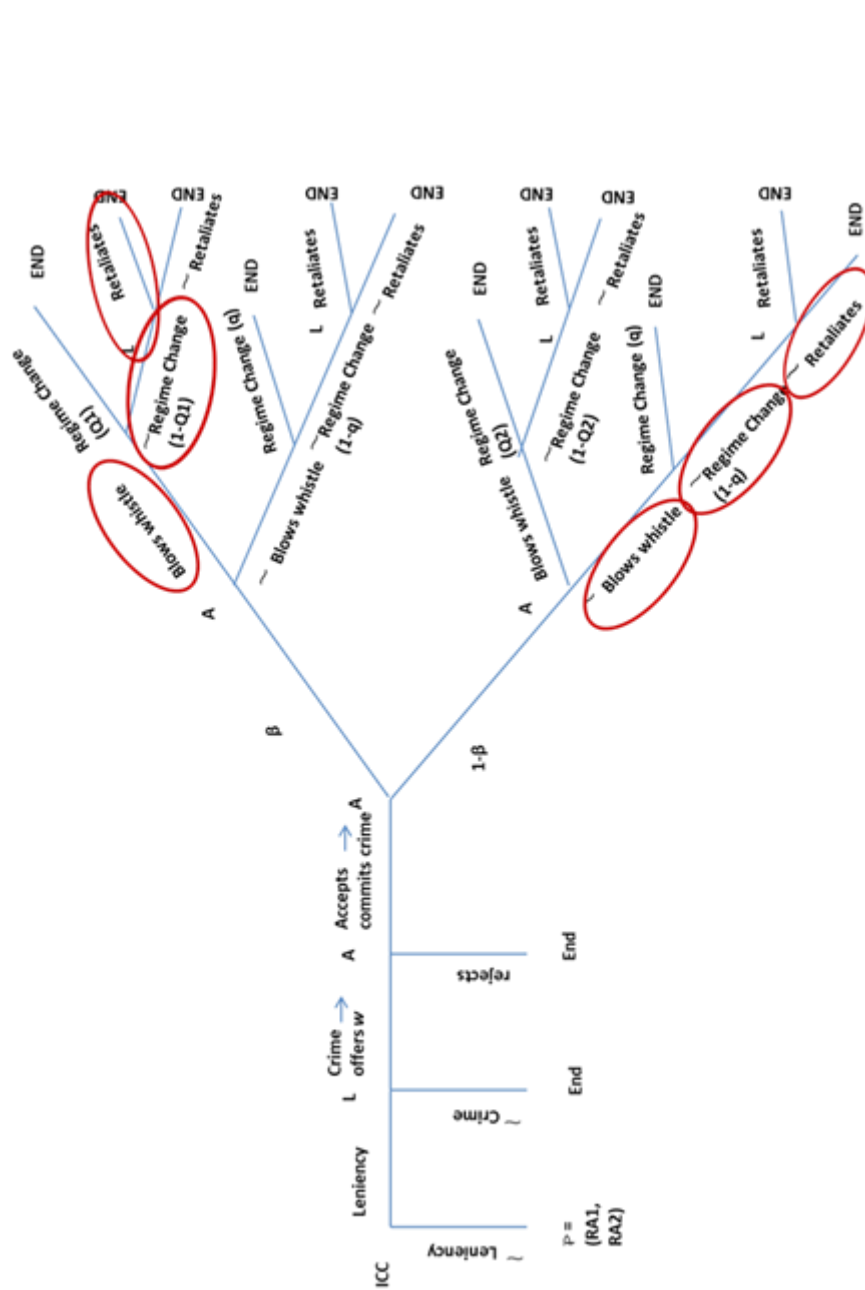
**Table of Notations**

$B$	The probability that an agent possesses high-quality information
$1-\beta$	The probability that an agent possesses low-quality information
$q$	The probability of regime change in the absence of reporting
$1-q$	The probability that the leader survives an investigation and stays in office in the absence of reporting
$Q$	The probability of regime change following reporting (takes values of $Q_1$ or $Q_2$ )
$1-Q$	The probability that the leader survives an investigation and stays in office following reporting.
$Q_1$	The probability of regime change following the reporting of high-quality information
$Q_2$	The probability of regime change following the reporting of low-quality information
$R_A$	The size of opposition punishment levied on the Agent following regime collapse (takes values of $R_{A1}$ and $R_{A2}$ )
$R_{A1}$	The reduced punishment received by a Connected Agent following regime collapse pursuant to the reporting of high-quality information.
$R_{A2}$	The reduced punishment received by a Remote Agent following regime collapse pursuant to the reporting of low-quality information.
$w$	The wage paid by the Leader to the Agent in exchange for the commission of crime
$P$	The size of retaliation punishment levied by the Leader on the Agent for reporting
$R_L$	The size of opposition punishment levied on the Leader post regime collapse
$K$	The reputation cost incurred by the Leader for failing to retaliate against an unfaithful agent
$\ell$	A legitimacy and destabilization cost suffered by the Leader whenever he retaliates against an agent (takes values of $\ell_1$ and $\ell_2$ )
$\ell_1$	The minimum legitimacy and destabilization cost suffered by the Leader as a result of retaliating against an unfaithful agent
$\ell_2$	The minimum legitimacy and destabilization cost suffered by the Leader as a result of retaliating against a faithful agent

**Table 4.1 Table of Notations**



Figure 4.1 The Modified Model: Publicized Reporting (Complete Information)



### 4.4.3. Discussion and Analysis

#### 4.4.3.1. Publicized Reporting

In the game of publicized reporting depicted in Figure 4.1 above, assume that the ICC Prosecutor decides on adopting a completely transparent leniency program targeted at lower-level perpetrators. The said program rewards the reporting of information with protection from opposition punishment proportionate to the value of evidence rendered. In addition, the identities of agents who report the commission of crimes committed by the government are publicized and hence perfectly observable by the Leader. This means that the Prosecutor rewards high-quality information with large discounts of opposition punishment (taking the opposition punishment down to  $R_{A1}$ ) and low-quality information with more modest discounts (taking the opposition punishment down to  $R_{A2}$ ).

#### *Equilibrium in the Game of Complete Information (Benchmark Model)*

In order to arrive at a solution for the game, use backward induction starting at the last decision node. Before considering the strategies of the Agent with respect to reporting, one should understand in what circumstances in the Leader likely to retaliate against a reporting Agent.

Note that a Leader who has complete information will never retaliate against an agent who did not report. To see why this is so, consider the more general case where the subjective probability assessment of the leader that the agent has been reporting be  $z$ .

Then retaliation against agents who report implies expected cost  $z\ell_1 + (1-z)\ell_2$

Non-retaliation incurs  $zK$  in reputational cost.

So, retaliation is optimal where:

$$z\ell_1 + (1-z)\ell_2 < zK$$

So, if the Leader knows an agent reported i.e.  $z=1$ , then the condition is:

$$\ell_1 < K$$

So if the loss of reputation is minor enough, the leader will not punish even when certain.

If the leader knows that the agent did not report i.e.  $z=0$ , then the condition becomes:

$$\ell_1 < 0$$

Hence, a Leader who knows the Agent did not report will never punish if punishing a non-guilty agent incurs a positive cost.

To have an interesting game, I assume that retaliation against Agents always entails a positive cost and make the following assumption:

**Assumption 1:**

The Leader retaliates only against agents who report provided the reputational cost of non-retaliation exceeds the legitimacy and destabilization cost from retaliation  $K > \ell_1$ .

This assumption ensures that under complete information the leader retaliates if and only if the Agent reports. If the assumption is not satisfied, the leader never retaliates and the strategy becomes redundant because it is never credible. Assumption (1) ensures that because retaliation is costly for the Leader, the Leader only retaliates to preserve his reputation which is necessary only when reporting occurs.

Moving backward to the previous stage of the game, and given Assumption (1) above, the Agent must decide between reporting to the ICC Prosecutor and not reporting having already committed a crime. In order to derive the Agent's payoffs from each of these strategies, the payoffs of each type Agent need to be considered separately as follows:

**First:** Utility of the Connected Agent:

The payoffs of a Connected Agent are  $U_{c(r)}$  from committing the crime and reporting and  $U_{c(nr)}$  from committing the crime and not reporting. Given Assumption (1), these payoffs are given by the following equations:

$$U_{c(r)} = w - Q_1 R_{A1} - (1 - Q_1) P, \text{ and} \quad (4.1)$$

$$U_{c(nr)} = w - qR_A$$

Assuming that when the Agent is indifferent between these outcomes, he reports to the Prosecutor, the Connected Agent reports when:

$$U_{c(r)} \geq U_{c(nr)} \iff qR_A \geq Q_1 R_{A1} + (1 - Q_1) P \quad (4.2)$$

If leniency is not offered,  $R_{A1} = R_A$  and since  $Q_1 > q$ , condition (4.2) is impossible to satisfy.

The equilibrium path of the game for Connected Agents and the Leader, if a leniency program is in place, is {Commit Crime and Report, Retaliate} if:

- (a)  $K > \ell_1$ , and
- (b)  $qR_A \geq Q_1R_{A1} + (1-Q_1)P$

Hence, the optimal leniency policy will be characterised by a value of  $R_{A1}$  which satisfies the following condition:

$$R_{A1} \leq (qR_A - (1-Q_1)P) / Q_1$$

**PROPOSITION 1:**

To induce Connected Agents to report, the ICC Prosecutor must offer a sufficient reduction in sanction so that  $R_{A1} \leq (qR_A - (1-Q_1)P) / Q_1$ .

This is in accord with the relevant anti-trust literature which posits that generous fine reductions ensure that where collusion occurs, self-reporting follows.<sup>115</sup>

When the difference between the expected opposition punishment without reporting and the retaliation punishment for reporting is large, the less generous the ICC Prosecutor needs to be to induce reporting. If the expected retaliation punishment for reporting exceeds the expected opposition punishment ( $(1-Q_1)P > qR_A$ ), a mere reduction in punishment will not be enough to induce reporting and a positive reward will be required.<sup>116</sup> However, the more useful the information provided by the Agent ( $Q_1$  is high), the smaller the reduced sanction ( $R_{A1}$ ) needs to be.

Note that in the event  $K < \ell_1$ , so assumption 1 is violated, the Leader does not retaliate against reporting agents and the Participation Constraint in (b) is less stringent with  $qR_A \geq Q_1R_{A1}$

The equilibrium path of the game for Connected Agents and the Leader, if a leniency program is not in place, is {Commit Crime and Not Report, Not Retaliate}, because

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<sup>115</sup> See Motta and Polo n. 9.

<sup>116</sup> This is an objective observation arising from the Model. However, nothing stated in this Thesis should be regarded as advancing recommendations for positive rewards to be provided to informants in the context of international criminal prosecutions.

$qR_A \geq Q_1R_A + (1-Q_1)P$ , i.e. the Agent will have no incentive to report, in which case the Leader will not retaliate (from Assumption 1)

**Second:** Utility of the Remote Agent:

Similarly, the payoffs of Remote Agents are  $U_{R(r)}$  for committing the crime and reporting and  $U_{R(nr)}$  for committing the crime and not reporting and are defined as follows:

$$U_{R(r)} = w - Q_2R_{A2} - (1-Q_2)P, \text{ and} \quad (4.3)$$

$$U_{R(nr)} = w - qR_A$$

Because the information on offer by the Agent in this case is not so useful as to entail the maximum amnesty possible by the ICC Prosecutor (since it only raises the probability of regime change from  $q$  to  $Q_2$  instead of  $Q_1$ ), the Prosecutor is prepared to offer only a minimum leniency which brings the expected sanction to  $R_{A2}$ .

Assuming that when the Agent is indifferent between these outcomes, he reports to the Prosecutor, the Remote Agent reports when:

$$U_{R(r)} \geq U_{R(nr)} \iff qR_A \geq Q_2R_{A2} + (1-Q_2)P \quad (4.4)$$

While in this case, the agent faces the same retaliation by the Leader ( $P$ ) as does the Connected Agent, A Remote Agent does so with an increased probability ( $(1-Q_2) > (1-Q_1)$  because  $Q_2 < Q_1$ ). In addition, the amnesty granted by the ICC Prosecutor is less than that granted to Connected Agents who offer high-quality information ( $R_{A2} > R_{A1}$ ).

In order to have an interesting case, I want to focus on the parameter values for which the outcome differs between the Connected Agent and the Remote agent. I assume that in this set up a Remote Agents is not able to absorb the cost of retaliation by the Leader given the promised limited reduction in expected opposition sanction and will therefore choose not to report to the ICC Prosecutor.

Assumption 2:

The ICC Prosecutor will not offer an adequate reduction in opposition sanction to Remote Agents who possess low-quality information i.e.  $qR_A < Q_2R_{A2} + (1-Q_2)P$ .

Given Assumption (2) above, the equilibrium path of the subgame for Remote Agents and the Leader - whether a leniency program is in place or not- is {Commit Crime and Not Report, Not Retaliate}.

From Propositions (1) and (2), in conditions where a leniency program exists, only Connected Agents who possess high-quality information report to the ICC Prosecutor in equilibrium and the Leader retaliates only against reporting agents.

Hence:

**Third:** Utility of the Agent

Given the existence of a leniency program that rewards high-quality information with large discounts in opposition punishment and low-quality information with less discounts and provided Assumption (1) and (2) hold, the Agent's utility from committing the crime is given by:

$$U_{A(c)} = w - \beta (Q_1R_{A1} + (1-Q_1)P) - (1-\beta)qR_A \quad (4.5)$$

Therefore, in order for the Agent to decide to commit the crime, his utility must be positive. Therefore, the Agent's participation constraint is defined by the reservation wage  $w_{(L)}$  (where the (L) stands for leniency) given by:

$$w_{(L)} \geq \beta (Q_1R_{A1} + (1-Q_1)P) + (1-\beta)qR_A \equiv w^*_{(L)} \quad (4.6)$$

Note that in the absence of leniency no agent reports and the Agent's participation constraint is defined by the reservation wage  $w_{(NL)}$  given by:

$$w_{(NL)} \geq qR_A \equiv w^*_{(NL)} \quad (4.7)$$

From (4.2), a necessary condition for proposition 1, we have that  $qR_A \geq Q_1R_{A1} + (1-Q_1)P$ , from which follows that  $w^*_{(L)} < w^*_{(NL)}$ . This is in line with the literature discussed in Section 4.2 above and which predicts that leniency programs may reduce the compensation that has to be paid by a leader of a criminal organization to his subordinates to violate the law.

Since (4.2) is a necessary condition of (4.5) (for (4.5) to be true,  $qR_A \geq Q_1R_{A1} + (1-Q_1)P$ ), the condition in (4.7) could be more stringent than (4.6). Therefore, introducing a leniency program may have the inadvertent effect of reducing the wage which the Leader has to pay to the Agent to get him to participate in the commission of a crime unless the reduced opposition sanction ( $R_{A1}$ ) is not larger than would satisfy the following condition:

$$qR_A = Q_1R_{A1} + (1-Q_1)P$$

**PROPOSITION 2:**

The optimal reduction in opposition sanction to be adopted by the ICC Prosecutor ( $R_{A1}^*$ ) should have the following value:

$$R_{A1}^* = (qR_A - (1-Q_1)P) / Q_1$$

Because introducing a leniency program may have the inadvertent effect of reducing the Agent's reservation wage for the commission of crime, the ICC Prosecutor should set the reduction in opposition punishment at a level that is just enough to make the Agent indifferent between reporting and not reporting. The reduced sanction will be inversely proportionate to the quality of information (the more useful the information, the smaller the eventual punishment needs to be) and proportionate to the difference between the expected punishment without reporting and the expected retaliation punishment. This is in accord with the relevant organized crime literature which indicates that asymmetric leniency may reduce the agent's reservation wage and therefore incentivize crime.<sup>117</sup> Severe retaliation punishments and lenient opposition punishments may entail positive rewards to incentivize reporting.<sup>118</sup>

Having derived the Agent's Participation Constraint for committing the crime, I move to the previous stage of the game to determine under what conditions the Leader is likely to order the commission of crimes.

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<sup>117</sup> See Acconcia et al (n 12) (arguing that even though asymmetric leniency programs that offer generous sentence discounts reduce the reservation wage of subordinates in the criminal organization, such schemes may be more effective in deterring crime than no leniency if the judicial system is ineffective and the information provided by insiders is useful enough).

<sup>118</sup> *ibid* (concluding that the reduction in sanction to cooperating insiders should correspond to the retaliation rate).

The Leader will instigate the commission of a crime if his utility from doing so  $U_{L(c)}$  is positive.

I define  $U_{L(c)}$  as follows:

$$U_{L(c)} = \pi - (C+w)$$

Where  $\pi$  is the gain from crime,  $w$  is the wage the leader needs to pay to his subordinate to execute the crime and  $C$  is all additional costs occasioned by the commission of the crime which the Leader must bear subsequently.

For the Leader to order the commission of crime, the following condition must be satisfied:

$$\pi \geq C + w \quad (4.8)$$

From Assumptions (1) and (2) above, only Connected Agents who possess high quality information report following the commission of crimes. Hence,  $C$  is give by:

$$C = \beta (Q_1 R_L + (1-Q_1) \ell_1) + (1-\beta) q R_L \quad (4.9)$$

Where  $R_L$  is the expected opposition punishment of the Leader following regime collapse, and  $\ell_1$  is the legitimacy cost of retaliating against a reporting agent.

The Leader's participation constraint is therefore given by:

$$\pi \geq \beta (Q_1 R_L + (1-Q_1) \ell_1) + (1-\beta) q R_L + w$$

Under conditions of leniency, the Leader must pay the minimum amount of ( $w$ ) which will satisfy the Agent's participation constraint as given by equation (4.6), so that:

$$w = \beta (Q_1 R_{A1} + (1-Q_1) P) + (1-\beta) q R_A$$

Substituting the values of  $C$  and  $w$  in (4.7), gives us:

$$\begin{aligned} \pi &\geq \beta (Q_1 R_L + (1-Q_1) \ell_1) + (1-\beta) q R_L + \beta (Q_1 R_{A1} + (1-Q_1) P) + (1-\beta) q R_A \quad \Longleftrightarrow \\ \pi &\geq \beta (Q_1 (R_L + R_{A1}) + (1-Q_1) (\ell_1 + P)) + (1-\beta) (q R_L + q R_A) \end{aligned} \quad (4.10)$$

In the absence of a leniency program, the Leader's Participation Constraint is simply given by:

$$\pi \geq q R_L + q R_A \quad (4.11)$$

To compare (4.10) and (4.11), Let:  $q R_L + q R_A = \Delta$ , so that equation (4.11) can be written as:



$$\pi \geq \Delta$$

Accordingly, equation (4.10) can be rewritten as follows:

$$\pi \geq \Delta + \beta ((R_L(Q_1 - q) + (Q_1 R_{A1} - q R_A) + (1 - Q_1)(\ell_1 + P)))^{119}$$

$$\pi \geq \Delta + \beta (R_L(Q_1 - q) + (1 - Q_1) \ell_1 + [(1 - Q_1)P + (Q_1 R_{A1} - q R_A)])$$

Note that the participation constraint is more stringent under leniency if the second term of (4.10) - i.e.  $\beta (R_L(Q_1 - q) + (1 - Q_1) \ell_1 + [(1 - Q_1)P + (Q_1 R_{A1} - q R_A)])$  - is positive.

As the term in the square bracket may be negative [see equation 4.2], this is not automatically satisfied. This occurs when the probability of regime change without reporting ( $q$ ) is substantially high in which case the institution of a leniency program is unnecessary. However there are clearly parameter values for which the first two terms dominate the term in the square bracket.

Since  $Q_1 > q$  and  $q R_A$  needs only be equal  $Q_1 R_{A1} + (1 - Q_1)P$  for the Connected Type to report,<sup>120</sup> in which case  $\pi$  is clearly greater than  $\Delta$ , I have demonstrated the following:

**PROPOSITION 3:**

The participation constraint for the commission of crimes by the Leader under leniency can be much more stringent than without leniency. In other words, the institution of a leniency programme that rewards lower-level officials for reporting on the commission by crimes by the Leader can deter leader crimes.

Adopting a leniency program may make it costlier for the Leader to instigate the commission of crimes, because (i) by rewarding reporting agents, the ICC Prosecutor may cause the probability of regime collapse to increase; and (ii) even when the regime does not collapse as a result of the revelation of the information, the organization suffers from destabilization since the Leader is forced to retaliate against subordinates who report. This also means that the agents will need more compensation to carry out the crimes because of the risk of retaliation.

<sup>119</sup> This is obtained by substituting  $\Delta - \beta(q R_L + q R_A)$  for  $(1 - \beta)(q R_L + q R_A)$  in the equation.

<sup>120</sup> Equation (4.1).

The above clearly shows that leniency forces the Leader to retaliate, thereby imposing on him the additional legitimacy and destabilization costs of retaliation ( $\ell_1$ ). It can also be concluded from Proposition (3) that the maximization policy of the prosecutor should entail maximizing the enhanced probability of regime change  $Q_1$ . Otherwise, increasing the cost component of retaliation by the Leader which entails a legitimacy cost ( $\ell$ ) may compensate for the lower probabilities of regime change. This is because once the Leader is forced to retaliate, he suffers even when the regime does not change. The set-up of the model assumes that the level of this cost depends on the correct identification of and retaliation against agents guilty of reporting. Otherwise, the Leader stands to lose more by going after non-deserving agents.

The literature emphasises the negative effect of over generous leniency programs which while able to elicit reports and increase the probability of punishment for the Leader, reduces the reservation wage too far (i.e. where  $R_{A1}$  is much lower than  $R_A$ ).<sup>121</sup> The model presented in this chapter provides similar results where an overgenerous amnesty may result in the second term of equation (4.10) above being negative. However, if the additional costs connected with retaliation can be increased, this will create space for prosecutors to design more generous leniency programs without enhancing the incentives for the commission of crimes by leaders. One way of increasing the retaliation costs to the Leader is to force him to retaliate against the wrong agents. This will entail not just the usual destabilization cost but also an added cost of further undermining the trust in the organization when agents become convinced that they may be retaliated against for no good reason. A higher cost ( $\ell_2$ ) will reflect negatively on the participation constraint of the Leader. The intuition here is that this may be possible through the adoption of a confidential leniency program under which the identities of agents cooperating with the authorities are not revealed.

Another reason for considering a confidential leniency program stems from literature on anti-trust law enforcement which considers the effect of type I errors (false convictions of the innocent) and type II errors (false acquittals of the guilty) on the incentives to violate competition law.<sup>122</sup> This work by Schinkel and Tunistra demonstrates how the possibility of assessment errors in anti-trust enforcement may lead to an increase in anti-competitive behaviour. They conclude that type I errors by competition regulatory authorities when they are unable to perfectly observe the past actions of firms in the market may lead to

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<sup>121</sup> Piccolo and Immordino (n 13).

<sup>122</sup> Maarten Pieter Schinkel and Jan Tuinstra, 'Imperfect Competition Law Enforcement', *International Journal of Industrial Organization*, 24/6 (2006), 1267-97.

precautionary collusive behaviour because of the possibility of erroneous convictions.<sup>123</sup> Similarly, type II errors may lead to an increase in collusive behaviour as they negatively affect the costs of collusion by firms which may end up escaping conviction. Applying the same logic to retaliation by the Leader (as an example of enforcement of “law” or standards by a regulator) entails that a confidential leniency program will lead to increased incidents of reporting by agents and therefore better probabilities of regime change. To explore these possibilities, I develop the model of incomplete information in 4.3.2 below.

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<sup>123</sup> *ibid.*



#### 4.4.3.2 Confidential Reporting

In order to understand the effects of confidential reporting, I modify the retaliation sub-game at the last decision node of the benchmark model from complete to incomplete information, as is indicated by the dotted line in Figure 4.2 above which signifies that the leader is unable to observe which agent reported following the fact. Suppose the ICC Prosecutor makes reporting confidential so that following the acquisition of information (whether independently or through an informant), he releases the information to the public but refrains from revealing whether an offer of amnesty has been made or not. Because the value of the information reported to the Prosecutor depends partly on whether it adds to the information held by the Prosecutor, it is not unreasonable to suggest that the prosecutor may be privy to this insight to the exclusion of the Leader. In this case, following an unsuccessful attempt to topple the Leader, the Leader will have to decide whether to retaliate or not against the agent who may or may not have revealed the information made public by the ICC Prosecutor.

#### *Equilibrium in the Game of Incomplete Information (Confidential Reporting)*

Following Schinkel and Tunistra, I assume that the Leader errs in his evaluation of whether an agent reported or not by a probability of  $\alpha$ . Say for example that the Leader is prone to make mistakes 30% of the time, so that 30% of the time when he is suspecting that an Agent reported, the Agent would have in fact been innocent. Similarly, 30% of the time when the Leader thinks the Agent did not report, the agent would have reported. In this case the value of  $(\alpha)$  will be 30%.<sup>124</sup> In what follows, I first consider the effect of this probability of error on the first component of the Leader's cost function ( $w$ ) by reference to the Agent's participation constraint. I then turn to consider the effect of assessment errors on the Leader's general cost ( $C$ ) taking into consideration the effect of making a wrong decision on the retaliation cost born by the Leader.

Similarly to 4.3.1 above, in order to derive the equilibrium in the game of incomplete information, start from the last decision node where the Leader must decide whether to retaliate or not against an agent following the release of information by the ICC Prosecutor.

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<sup>124</sup> This is the reason that  $(\alpha)$  and  $(1-\alpha)$  are inverted in figure 4.3 on the retaliation branches on the last node with the Leader retaliating against Remote Agents who did in fact report with a probability  $(1-\alpha)$  while retaliating against Remote Agents who did not report with probability  $(\alpha)$ .

Let the subjective probability that an Agent reports equal  $\mu$  and the probability that an Agent does not report equal  $(1-\mu)$ .

**Assumption 3:**

When the Leader is unable to tell whether the Agent reported or not the Leader errs in his assessment by a fixed probability ( $\alpha$ ) and retaliates according to his belief whenever:

$$\mu(1-\alpha) \ell_1 + (1-\mu)\alpha \ell_2 < \mu\alpha K \quad (4.12)$$

Moving backward to the previous stage of the game, and given Assumption (3) above, the Agent must decide between reporting to the ICC prosecutor and not reporting having already committed a crime. Similarly to 4.3.1 above, in order to derive the Agent's utility from each of these strategies, the utility of each type Agent needs to be considered separately as follows:

**First:** Utility of the Connected Agent under Assessment Errors:

If  $qR_A \geq Q_1R_{A1} + (1-Q_1)P$ , the Connected Agent is always better off reporting and consistency requires that in this case the Leader assumes that  $\mu=1$ .

When  $\mu=1$ , the Leader always retaliates against the Connected Agent as in the previous model (i.e. with  $\alpha=0$ ) because:

$$\ell_1 < (1-\alpha) \ell_1 + \alpha \ell_2 \text{ for all } \alpha > 0 \text{ since } \ell_1 < \ell_2$$

Hence, as in the previous publicized reporting model (4.3.1 above), the payoffs of the Connected Agent from the commission of the crime stay the same and are given by equation (4.1).

Therefore, as is the case with publicized reporting, the equilibrium path of the game for Connected Agents and the Leader, if a confidential leniency program is in place, is {Commit Crime and Report, Retaliate} if:

- (a)  $K > \ell_1$ , and
- (b)  $qR_A \geq Q_1R_{A1} + (1-Q_1)P$

**Second:** Utility of the Remote Agent under Assessment Errors:

By contrast, and given the setup of the model and Assumption (2) above, a Remote Agent refrains from reporting under a publicized leniency program because when retaliation occurs with certainty, the Remote Agent is unable to absorb the cost of punishment and would therefore prefer not to report. However, with a confidential leniency program and given Assumption (3) above that the Leader will retaliate against agents according to his belief of whether or not they cooperated with the ICC Prosecutor which may be mistaken with probability ( $\alpha$ ), the payoffs of a Remote Agent change and  $\mu$  cannot be deduced as in the case of Connected Agents. The Leader must, therefore, assume that the inability to retaliate perfectly against a Remote Agent may induce some such agents to report. Hence, the Leader chooses to retaliate despite the probability of error provided the reputational costs of non-retaliation are large enough:

$$\mu(1-\alpha) \ell_1 + (1-\mu)\alpha \ell_2 < \mu\alpha K$$

Similarly, the payoffs of Remote Agents are  $U_{R(r)}$  for reporting and  $U_{R(nr)}$  for not reporting and are defined as follows under Assumption (3):

$$U_{R(r)}^{cl} = w - Q_2 R_{A2} - (1 - Q_2)(1 - \alpha) P, \text{ and} \quad (4.13)$$

$$U_{R(nr)}^{cl} = w - q R_A - (1 - q)\alpha P$$

The participation constraint for the Remote Agent to report in this case becomes:

$$q R_A \geq Q_2 R_{A2} + (1 - Q_2) P - \alpha P((1 - q) - (1 - Q_2)) \quad (4.14)$$

Comparing (4.14) with (4.4) reveals that the Remote Agent is more likely to report in the presence of assessment errors as the condition in (4.14) is less stringent than the previous condition under (4.4). This is because in addition to the possibility that an Agent who reports may escape punishment, there is a possibility that an Agent who refrained from reporting might get punished.

Based on the above, the equilibrium path of the game for Remote Agents and the Leader if a confidential leniency program is in place will be {Commit Crime and Report, Retaliate (with fixed probability of error)} if:

$$(a) \quad \alpha K > (1 - \alpha) \ell_1 + \alpha \ell_2, \text{ and}$$

$$(b) \quad qR_A \geq Q_2R_{A2} + (1-Q_2)(1-\alpha)P - (1-q)\alpha P$$

Similarly, the equilibrium path of the game for Remote Agents and the Leader if a confidential leniency program is in place will be {Commit Crime and Not Report, Retaliate (with fixed probability of error)} if:

$$(a) \quad \alpha K < (1-\alpha) \ell_1 + \alpha \ell_2, \text{ and}$$

$$(b) \quad qR_A \leq Q_2R_{A2} + (1-Q_2)(1-\alpha)P - (1-q)\alpha P$$

Accordingly, the total utility of the Agent given Assumption (3) will be as follows:

**Third:** Utility of the Agent under assessment errors

The Agent's total utility under assessment errors is given by:

$$U_{A(C)} = w - \beta (Q_1R_{A1} + (1-Q_1)P) - (1-\beta)[\mu(Q_2R_{A2} + (1-Q_2)(1-\alpha)P) + (1-\mu)(qR_A + (1-q)\alpha P)]$$

**PROPOSITION (4):**

There are two obvious equilibria in pure strategies<sup>125</sup> for the game of incomplete information where the ICC Prosecutor adopts a confidential leniency program; equilibrium in which all Remote Agents report and another equilibrium in which no Remote Agent reports as follows:

(1) Equilibrium Where all Remote Agents Report

Iff  $qR_A \geq Q_2R_{A2} + (1-Q_2)(1-\alpha)P - (1-q)\alpha P$ , all Remote Agents report and the Agent's utility is given by:

$$U_{A(C)}^{cl} = w - \beta (Q_1R_{A1} + (1-Q_1)P) - (1-\beta)(Q_2R_{A2} + (1-Q_2)(1-\alpha)P)$$

In this case, and in order for the Agent to commit to executing the crime, his utility must be positive. Hence, the Agent's participation constraint is defined by the reservation wage  $w_{(CL)}$  (where the (CL) stands for confidential leniency) given by:

$$w_{(CL)} \geq \beta (Q_1R_{A1} + (1-Q_1)P) + (1-\beta)(Q_2R_{A2} + (1-Q_2)(1-\alpha)P) \equiv w_{(CL)}^* \tag{4.15}$$

<sup>125</sup> There is also a mixed strategy equilibrium which is a little more complicated to derive and may be the subject of future efforts by the author.



To compare the reservation wage under a confidential leniency program which induces all remote agents to report ( $w^*_{(CL)}$ ) with the reservation wage under publicized reporting ( $w^*_{(L)}$ ) given by equation (4.6) above, let  $\beta (Q_1R_{A1}+(1-Q_1)P) = \Delta_1$ , so that (4.6) may be written as:

$$w_{(L)} \geq \Delta_1 + (1-\beta)qR_A$$

and (4.15) can be written as:

$$w_{(CL)} \geq \Delta_1 + (1-\beta)(Q_2R_{A2} + (1-Q_2)(1-\alpha)P)$$

Even though following from Assumption (2) above,  $qR_A < Q_2R_{A2} + (1-Q_2)P$ , there are two possibilities for the value of the reservation wage under this equilibrium as follows:

**PROPOSITION (5)**

When a confidential leniency program induces all Remote Agents to report i.e.  $qR_A \geq Q_2R_{A2} + (1-Q_2)(1-\alpha)P - (1-q)\alpha P$ ,

(a) a confidential reporting program will reduce the reservation wage (negative effect) if  $qR_A > Q_2R_{A2} + (1-Q_2)(1-\alpha)P$ ;

(b) a confidential reporting program will not affect the reservation wage if  $qR_A = Q_2R_{A2} + (1-Q_2)(1-\alpha)P$

Please note that a confidential reporting program that induces remote agents to report cannot increase the reservation wage since if  $qR_A \geq Q_2R_{A2} + (1-Q_2)(1-\alpha)P - (1-q)\alpha P$ , it is impossible for  $qR_A < Q_2R_{A2} + (1-Q_2)(1-\alpha)P$ .

From Proposition (5), it can be concluded that the optimal reduction in opposition sanction to be adopted by the ICC Prosecutor ( $R_{A2}^*$ ) should satisfy the following two conditions:

$$R_{A2}^* \leq (qR_A - (1-Q_2)P + \alpha P(Q_2 - q)) / Q_2$$

and,

$$R_{A2}^* = (qR_A - (1-Q_2)(1-\alpha)P) / Q_2$$

Using the latter in the former, I can solve for the former equation which comes to the following:

$$Q_2 - q \geq 1 - Q_2$$

If  $q > 0$ , then

$Q_2 > 1 - Q_2$  (or  $Q_2 > \frac{1}{2}$ ) is a necessary condition.

**PROPOSITION (6)**

From the above, a leniency policy which will induce reporting by additional agents as well as keep the reservation wage large enough so as not to induce the commission of crimes is only possible when the usefulness of the information reported by Remote Agents is particularly high ( $Q_2$  is large) and the standard probability of regime change without reporting ( $q$ ) is very low. In any event, in this case, the probability of regime change pursuant to reports by Remote Agents must be more than 50% (i.e.  $Q_2 > 1 - Q_2$ ).

The reduced sanction for Remote Agents will be inversely proportionate to the quality of information (the more useful the information, the smaller the eventual punishment needs to be) and proportionate to the difference between the expected punishment without reporting and the expected retaliation punishment given the presence of assessment errors. The presence of assessment errors makes it easier for the Prosecutor to offer suitable reductions in sentences (the condition is less stringent than under publicized reporting) Severe retaliation punishments and lenient opposition punishments may not necessitate positive rewards to incentivize reporting if the difference between the probabilities of regime change with and without reporting is high enough ( $(Q_2 - q)$  is large) and the probability of assessment errors ( $\alpha$ ) is substantial.<sup>126</sup>

(2) Equilibrium where none of the Remote Agents Reports:

Iff  $qR_A < Q_2R_{A2} + (1 - Q_2)P - \alpha P(Q_2 - q)$ , then none of the Remote Agents reports and the Agent's utility is given by:

$$U_{A(C)}^{cl} = w - \beta (Q_1R_{A1} + (1 - Q_1)P) - (1 - \beta)(qR_A + \alpha(1 - q)P)$$

In this case, the reservation wage is given by:

$$w_{(CL)} \geq \beta (Q_1R_{A1} + (1 - Q_1)P) + (1 - \beta)(qR_A + \alpha(1 - q)P) \equiv w_{(CL)}^* \quad (4.16)$$

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<sup>126</sup> See (n 116) above.

i.e. ,

$$w_{(CL)} \geq \Delta_1 + (1-\beta)(qR_A + \alpha(1-q)P) \equiv w^*_{(CL)}$$

Remember that from (4.6):  $w_{(L)} \geq \Delta_1 + (1-\beta)qR_A \equiv w^*_{(L)}$

Comparing (4.16) with (4.6) shows that the minimum reservation wage required for the agent to commit the crime under a confidential leniency program is increased by  $\alpha(1-q)P$ . Hence, even when a confidential leniency program is not generous enough to induce reporting by all agents, the bigger risk of retaliation posed by the presence of assessment errors will necessitate a larger compensation for agents in order to induce them to commit the crime.

### **PROPOSITION (7)**

A second best confidential leniency program which sets the value of  $R_{A2}$  at  $R^*_{A2} > qR_A - (1-Q_2)P + \alpha P(Q_2 - q) / Q_2$  will not induce additional reporting by Remote Agents but will increase the reservation wage of government agents and will have a deterrent effect on leaders. This is an interesting result which is not necessarily obvious without the formal modelling of the consequences of a confidential leniency program on the decision by the leader to retaliate against suspect agents.

Having derived the Agent's Participation Constraint for committing the crime, move to the previous stage of the game to see how confidentiality reflects on the Leader's overall Participation Constraint. The change in the reservation wage from having a confidential leniency program has already been analysed above. In addition to the reservation wage, however, the Leader's participation constraint is dependent on the additional costs he incurs for a crime to be committed.

Similarly to 4.3.1 above, the Leader will instigate the commission of a crime if his utility from doing so ( $U_{L(c)}$ ) is positive.

$U_{L(c)}$  is still defined as follows:

$$U_{L(c)} = \pi - (C+W)$$

**First:**

If  $qR_A \geq Q_1R_{A1} + (1-Q_1)(1-\alpha)P - (1-q)\alpha P$ , then all agents (Connected as well as remote) report and the Leader's additional costs will be given by:

$$C = \beta (Q_1R_L + (1-Q_1)\ell_1) + (1-\beta)(Q_2R_L + (1-Q_2)((1-\alpha)\ell_1 + \alpha K)) \quad (4.17)$$

To compare (4.17) with (4.9), let  $\beta (Q_1R_L + (1-Q_1)\ell_1) = \Delta_1$ , so that (4.17) can be written as:

$$C = \Delta_1 + (1-\beta)(Q_2R_L + (1-Q_2)((1-\alpha)\ell_1 + \alpha K)),$$

and (4.9) can be written as:

$$C = \Delta_1 + (1-\beta)qR_L$$

But note that  $Q_2 > q$ , therefore the second term of (4.17) is by definition larger than the second term of (4.9). Hence,

**PROPOSITION 8:**

The optimal confidential leniency program increases the Leader's additional costs of instigating crime, because (i) the Leader gets punished by an increased probability  $Q_2$  when dealing with Remote Agents; and (ii) the Leader is forced to retaliate against Remote Agents with a probability of error - therefore incurring both the standard legitimacy costs of retaliating against disloyal agents as well as reputational costs from failure to retaliate against some reporting agents.

While it is expected for the reservation wage to decrease when all Remote Agents report, the overall effect of the confidential leniency program on the Leader's utility is not straight forward. Whether or not the program results in more or less ex-ante deterrence will depend on a comparison of the decrease in reservation wage and the increase in additional costs. Again, this is not necessarily obvious without formal modelling.

From Propositions (7) and (8), it follows that:

**PROPOSITION 9:**

The overall effect on leader's utility from having a confidential leniency program that decreases the reservation wage may still be negative iff:

$$Q_2R_L - qR_L + (1-Q_2)((1-\alpha)\ell_1 + \alpha K) > qR_A - Q_2R_{A2} - (1-Q)(1-\alpha)P$$

The more useful the information furnished by Remote agents ( $Q_2$  is big), the more likely that a confidential leniency program will make it costlier for the Leader to commit crimes especially when the costs occasioned by retaliation or otherwise by having unfaithful agents in the organization are high.

**Second:**

If  $qR_A < Q_1R_{A1} + (1-Q_1)(1-\alpha)P - (1-q)\alpha P$ , then only connected agents report and the Leader's additional costs will be given by:

$$C = \beta(Q_1R_L + (1-Q_1)\ell_1) + (1-\beta)(qR_L + (1-q)\alpha\ell_2) \quad (4.18)$$

Using the same method as above to compare (4.17) with (4.9), 4.18 can be written as:

$$C = \Delta_1 + (1-\beta)(qR_L + (1-q)\alpha\ell_2)$$

while (4.9) can be written as:

$$C = \Delta_1 + (1-\beta)qR_L$$

Therefore, even when a confidential leniency program is not generous enough to induce additional agents to report to the ICC Prosecutor, it will definitely make it costlier for the Leader to instigate a crime because it will impose additional costs on the leader occasioned by the need to retaliate against faithful Agents.

**PROPOSITION 10:**

In addition to increasing the reservation wage required to incentivize the commission of crime by agents, a second best confidential leniency program will impose additional costs on the Leader occasioned by the need to retaliate against faithful agents.

### ***4.5. Policy Implications***

The model set out above suggests that offering subordinates in a government structure implicated in the commission of international crimes the opportunity to suffer reduced punishment in exchange for reporting useful information implicating their leader to the ICC Prosecutor may, in addition to facilitating the acquisition of valuable evidence of atrocities, may have a deterrent effect on the commission of these crimes.

Even though the model assumes that there are two types of agent who possess either high quality information or information of lesser value in order to bring out the effect of confidentiality on deterrence, the conclusions that arise from the set up that allows only those agents that possess high quality information to absorb the cost of retaliation can be generalized. In order to induce reporting by agents who possess high quality of information, the reduction in punishment must be generous enough to offset the risk of retaliation by the leader of the organization if the regime stays in power despite the revelation of information. However, such reduction has to be set at a level that just makes such agents indifferent between reporting and not-reporting so as to keep the reduction in the reservation wage (and consequently the reduction in the cost of crime) to a minimum. When the information revealed by subordinates is very useful, the reduction in the punishment to be levied against such subordinates in the event of regime collapse must be generous. In addition, severe retaliation punishments for reporting coupled with lenient opposition punishment in the event of organic regime change (that follows without reporting) will force the prosecutor to offer very generous concessions which may still fail to induce reporting.<sup>127</sup>

A leniency program that has the above features, thereby inducing some reporting of incriminating evidence against the leader of a government accused of the commission of crimes, is likely to enhance deterrence for two reasons. First, the leader is removed from power and therefore punished by an increased probability. This makes his expected cost from crime higher. Second, even if the leader manages to cling to power despite the revelation of politically damaging information, he will be forced to retaliate against unfaithful agents. Because retaliation is costly, the leniency program will increase the cost of crime and destabilize the government structure. This naturally assumes that the leader is able to identify with certainty which agent reported.

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<sup>127</sup> The objective conclusion here is that rewards may have to be offered to induce reporting, but the same is not advocated by the author in the context of international criminal prosecutions.

The adoption of a confidential leniency program brings out the above effects further. The Model suggests that if confidentiality forces the leader to retaliate with a fixed probability of error, this may enable agents who would not otherwise be able to report if the program was publicized to report. The reason for this is that if the leader is prone to err in his judgement of who is a faithful agent, he will punish the guilty less often and will punish the innocent sometimes. Both these effects will make it less costly for agents to report. Therefore, more agents will report even if the reduction in punishment expected is not the maximum. Therefore, it is always better to have a confidential leniency program which forces the ICC Prosecutor to retain the names of cooperating insiders.

In a confidential leniency program, the more useful the information furnished by lower-level subordinates, the more generous the Prosecutor needs to be to incentivize reporting. This is because such agents will face punishment only when the regime collapses and the stronger the evidence of the commission of crimes against their leader, the more likely they will face punishment by the opposition. To compensate for the increased probability of punishment, the size of such punishment needs to be reduced. In addition, the more severe the retaliation punishment levied by the leader upon suspicion of reporting and the smaller the expected punishment at the hand of opposition following organic regime change (that follows without reporting), the more generous punishment reductions the Prosecutor needs to furnish. When the regime is not very likely to collapse of its own accord, the Prosecutor has to offer very generous reductions in sanction to induce reporting by lower-level officials. So far, the determinants of the optimal level of reduction are similar to those affecting reporting in the case of agents who possess high quality information. What is different is that in order to keep the reservation wage from dropping too far as a result of admitting more agents into the leniency program, the Prosecutor has to set the reduction of sanction at a reasonably high level. A confidential leniency program that induces reporting by additional agents will cause a reduction in the reservation wage unless the enhanced probability of regime change following such reporting is more than 50%. In this case, the more likely the leader is to err in his assessment of which agent reported, the less generous the ICC Prosecutor needs to be. The optimal leniency program will induce reporting by more agents while keeping the reservation wage sufficiently high.

Notwithstanding the above, a confidential leniency program will also impose additional costs on the leader. This is because he will be punished with an increased probability and will be forced to retaliate against additional agents. Furthermore, a confidential leniency program

that causes the leader to retaliate with assessment errors may impose reputational costs on him for his failure to retaliate against unfaithful agents. When these costs are high enough, an incremental increase in reservation wage because of the leniency program may not affect deterrence.

Even if the Prosecutor elects not to offer generous discounts to agents who possess somewhat useful information (Remote Agents), keeping the identities of cooperating agents secret will have a positive effect on deterrence. This is because even when a confidential leniency program is not able to induce additional reporting by more agents, such a scheme will destabilize the arrangement between leader and agents by forcing the leader to retaliate against some faithful agents thereby making entry into crime more risky for the agent. Because the agents will then have to be compensated for this additional risk, the instigation of crime becomes generally more costly so long as the leader is unable to tell the quality of information available to his subordinates in the organization.

#### **4.6. Conclusion**

The use of leniency programs to enhance anti-trust law enforcement has been extensively studied and the literature suggests that such programs may improve deterrence by increasing the probability of detection, punishment and/or desistance of criminal organizations. In the context of organized crime, the literature took into account the cost that retaliation imposes on agents and proposed the calibration of sentence reductions to reflect the risk of retaliation by the leader. However, the literature does not take into consideration that retaliation against whistle-blowing agents - as vital as it is to the preservation of a tough reputation for the leader - imposes additional costs on the leader of a criminal organization.

I developed a principal-agent model that assumes that retaliation imposes a cost on the leader as well as on the agent. In retaliating against an agent, the leader may suffer two types of losses: (i) a legitimacy cost attached to punishing insiders and which may undermine trust between members of the organization or otherwise the loss of reputation in the event no punishment of reporting agents occur; and (ii) an additional cost which the leader has to pay in order to recruit a replacement for the defecting or punished agent. In addition, and based on a suggestion emanating from anti-trust law literature that the presence of type I and type II errors in the assessment of culpability of firms with respect to violation of the laws may lead to increased incidents of breaking the law, I considered the effect of adopting



a confidential leniency program on the incentives of agents to report given that retaliation by leader occurs with a fixed probability of error.

The Model and analysis in Section 4.4 above suggests that leniency programs in which the prosecutor grants sentence reductions to low-level perpetrators in exchange for reliable evidence against the leader may enhance deterrence by increasing the probability of regime change. As suggested in Section 4.3 above, international criminal prosecutions often suffer from severe evidentiary weaknesses which may make the work of ICTs irrelevant to the local population in post-conflict societies. I propose that publicizing more reliable accounts of the commission of crimes by governments and their leaders may serve as a focal point for peaceful regime change efforts by the opposition in a given country. I integrate this in the model by assuming that insider information communicated to the prosecutor and subsequently released to the public proving the commission of atrocities increase the probability of regime change. The literature, in contrast, assumes that cooperation evidence by informants enhances the conviction rate of leaders hence improving deterrence by increasing the probability of detection or punishment of the leader. Furthermore, the model shows that an additional advantage of leniency programs is the destabilization of criminal organizations by forcing their leaders to retaliate against agents who report. The additional costs imposed on the leader thus increase the overall cost of crime thereby raising the threshold for the instigation of crime by leaders and enhance deterrence.

The literature emphasises the effect of leniency programs on reducing the reservation wage of agents so that the costs borne by the leader for the commission of crime decrease to reflect the change in cost born by the agent who now has a viable exit strategy of reporting. However, I show that the adoption of a confidential leniency program that forces the leader to retaliate against agents with a fixed probability of error may counteract this effect.

A probability of error in the identification of reporting agents results in less punishment for non-loyal agents and more punishment for loyal agents (or agents who possess no reliable information of interest to the prosecutor). This may lead more agents to report despite the fact the sentence reductions offered for less than substantial evidence may be too low. In the model, two effects counteract the inevitable reduction in the reservation wage of reporting agents: (1) the retaliation cost born by the leader for retaliating against the wrong agent; and (2) the enhanced probability of regime change which results from reporting by agents who would have been unable to absorb the cost of reporting if not for the

confidentiality feature of the leniency program. The analysis shows that even if a confidential program incentivizes more agents to report thereby reducing the reservation wage considerably, it may still be more effective in deterring crimes provided the enhanced probability of regime change is large enough. In addition, and because retaliation is not costless, the adoption of a confidential leniency program will raise the cost of the commission of crime by the leader even if subordinates do not possess information capable of affecting the probability of regime change. This occurs because the risk of engaging in the criminal enterprise increases and causes the reservation wage for agents to go up. Therefore, even when no additional agents report, provided the number of agents who possess some information which is of sub-optimal value is high enough and the probability of error is large, the scheme may result in increased deterrence.

The model developed and analysed in this chapter assumes that agents in a particular government structure may become privy to useful information regarding the commission of atrocities by the leader by virtue of their position in the hierarchy. Such agents can then trade this information in for protection from punishment following regime collapse. This model, therefore, assumes that the availability of information or evidence that incriminates top-level officials is exogenously determined (or in other words subject to variables that are external to the model). However, and in light of the evidentiary weaknesses plaguing the conduct of international criminal prosecutions, it is worth enquiring whether such agents may be encouraged to actively gather and report evidence of criminality through the adoption of well-designed leniency programs. The analysis in the following chapter seeks to endogenize the decision by agents to collect evidence which they can then report to the prosecutor. This enquiry is also necessitated by the suggestion in some of the literature reviewed in this chapter and which highlight the various credibility risks of obtaining cooperation evidence in exchange for leniency. If the design of leniency programs also takes into account the need to incentivize agents to collect tangible evidence of the commission of atrocities, the inherent risk in relying on the oral testimony of co-perpetrators will be mitigated.

## CHAPTER 5: The Effect of Asymmetric Leniency Programs on Evidence Gathering by Lower-level Perpetrators

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### 5.1. Introduction

During the much anticipated ICTY trial of the president of the former Federal Republic of Yugoslavia, Slobodan Milosevic, for war crimes and crimes against humanity, the Prosecution made public a video showing the execution of six Muslim civilians at the hands of members of a paramilitary unit “The Scorpions” in events allegedly linked to the Srebrenica massacre. Up until that point, and in keeping up with the image of international criminal prosecutions as exceedingly irrelevant to local populations,<sup>1</sup> the trial failed to inspire Serbian public opinion to face the gruesome facts of the crimes committed mostly by Serbian forces against non-Serbs during the Yugoslav war.<sup>2</sup> Zveržhanovski reports that instead of motivating meaningful reflections of Serbia’s role in the conflict, the trial had in its early days caused Milosevic’s popularity to soar and strengthened support for the same radical ultra-nationalist political forces in Serbia which made the commission of the atrocities during the Yugoslav wars possible.<sup>3</sup> Even though the video was later deemed to be inadmissible, its release caused the focus of the debate on war crimes to shift and even led to some official condemnation of the atrocities.<sup>4</sup> It is of particular interest for the purposes of this chapter to note that the said recording was made by members of the same unit which undertook the executions and was later surrendered by an insider to the unit to a journalist in exchange for promises of securing a safe passage out of Serbia.<sup>5</sup>

In most cases involving gross and systematic violations of human rights, convincing evidence of the commission of abuses can only be obtained by insiders to the organization in question;

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<sup>1</sup> Kendall and Nouwen argue that the adjudication of atrocities by international criminal tribunals results in a severe narrowing of the category of victims so that the process becomes irrelevant even to those in whose name the international community seeks to prosecute war criminals (Sara Kendall and Sarah Nouwen, 'The Practices of the International Criminal Court: Representational Practices at the International Criminal Court: The Gap between Juridified and Abstract Victimhood', *Law & Contemp. Prob.*, 76 (2013b), 235-433. at p. 247.)

<sup>2</sup> Ivan Zveržhanovski, 'Watching War Crimes: The Srebrenica Video and the Serbian Attitudes to the 1995 Srebrenica Massacre', *Southeast European and Black Sea Studies*, 7/3 (2007), 417-30.

<sup>3</sup> Ibid.

<sup>4</sup> Zveržhanovski (n 2); Jelena Obradovic-Wochnik, 'Knowledge, Acknowledgement and Denial in Serbia's Responses to the Srebrenica Massacre', *Journal of contemporary European studies*, 17/1 (2009), 61-74 (arguing that knowledge and acknowledgement of the atrocities are distinct with the latter being in progress even with the release of damning evidence like video recordings of killings).

<sup>5</sup> Zveržhanovski (n 2).

especially when the violations are easier to ignore, deny or explain away in the absence of photographic or video evidence.<sup>6</sup> Because of the unambiguous criminality of the practices in question, they tend to take place in conditions of great secrecy and to the exclusion of non-accomplices. Before the release of the photographic evidence showing the torture and abuse of Iraqi detainees at the Abu Ghraib prison at the hands of US soldiers in charge of its administration, the International Committee of the Red Cross (ICRC) brought the abuses to the attention of the military chain of command which by and large ignored the issue.<sup>7</sup> The photographs that were eventually turned in by a whistle blower who had not been aware of the abuses previously were in fact shot by a soldier who took active part in the abuses and kept the photographs as souvenirs much like in the case of the Scorpions video.<sup>8</sup> Once the photographs were brought to the attention of the military, official investigations became inevitable, and the release of a selection of the photographs in the media provoked apparent antipathy against the Bush administration in the run up to the 2004 Presidential elections.<sup>9</sup>

In adopting pragmatic remedies to counterbalance the dichotomy between the ideal of international justice and its reality such as plea-bargains and leniency programs, the ICC Prosecutor should be mindful of securing deterrence as well as gathering high-quality evidence of the commission of atrocities that is capable of promoting the credibility of the court with local populations. The analysis in Chapter 4 suggests that the adoption of a confidential leniency program in which the Prosecutor grants sentence reductions to low-level perpetrators in exchange for reliable evidence against the leader of a criminal government may enhance deterrence by increasing the probability of regime change and destabilizing the political organization that created the necessary space for the commission of these crimes. Such programs enhance deterrence by posing the risk that some perpetrators will turn against their criminal organizations and their co-conspirators in order to benefit from the concessions offered by the prosecutor. This will in turn destabilize such structures and threaten their continuity. However, in addition to contributing to deterrence, the strategies of the ICC Prosecutor should be geared towards the production of reliable accounts of the commission of atrocities that will not just lead to successful prosecutions - a function arguably served by the now acceptable plea-bargaining framework in international

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<sup>6</sup> Jared Del Rosso, 'The Textual Mediation of Denial: Congress, Abu Ghraib, and the Construction of an Isolated Incident', *Social problems*, 58/2 (2011), 165-88.

<sup>7</sup> Ibid.

<sup>8</sup> Jared Del Rosso (n 6) and Zveržhanovski (n 2).

<sup>9</sup> Jared Del Rosso (n 6).

criminal justice - but also to the emergence of a better political structure capable of guarding the interests of the populations in post-conflict societies and societies in the midst of conflict.<sup>10</sup> While the analysis advanced in Chapter 4 suggests that asymmetric leniency programs may be used to this end, the thesis of this chapter is that reliable accounts of the commission of atrocities are also essential for the stimulation of broader political debates about the occurrence of such atrocities and the role of key political figures in their instigation. A quantitative survey of public opinion regarding accountability in Serbia conducted by Parmentier and Weitekamp in 2007 suggests that the local population in Serbia placed a high value in the truth seeking function of criminal prosecutions of war crimes preferring that accounts of the commission of serious crimes be sanctioned by an official body such as a court or truth commission able to verify and admit the evidence presented.<sup>11</sup> This chapter proposes that fact-finding may be enhanced if investigative strategies are geared towards the accumulation of contemporaneous evidence linking those most responsible to the commission of atrocities on the ground. The current quandary of the international criminal prosecutions, in this respect, seems to be the weak evidentiary basis on which the narrative of atrocities is constructed. This leaves both the objectives of securing notable convictions and building credible accounts of the commission of war crimes, crimes against humanity and genocide, largely unfulfilled.

In addition to the above, there are a number of reasons why prosecutors of the most serious crimes of concern to the international community need to employ strategies that encourage the acquisition and reporting of high quality evidence by lower-level perpetrators. First, hard evidence such as video tapes has been shown to be essential to establishing the culpability of top-level officials who are often insulated from the execution of the crimes on the ground. Second, the availability of tangible evidence from insiders that is independently verifiable solves a number of pressing issues concerning insider testimonies such as the incentive to exaggerate or fabricate evidence or otherwise to shirk on the duty to testify. Finally, the success and effectiveness of other prosecutorial strategies such as plea-bargaining necessarily depends on the ability of international criminal justice institutions to avail themselves of strong incriminating evidence; a capability that is currently lacking. These issues are explored in greater detail in Section 5.2 below, which refers both to the emerging

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<sup>10</sup> See Chapter 2.

<sup>11</sup> Stephan Parmentier and Elmar Weitekamp, 'Punishing Perpetrators or Seeking Truth for Victims: What Does the Population in Serbia Think About Dealing with War Crimes?', *International Criminal Law Review*, 13 (2013), 43-62.

ICC case law and to the somewhat extensive experience of the International Criminal Tribunals of the Former Yugoslavia and Rwanda (ICTY and ICTR respectively) with cooperating defendants.

Against the frame of reference in Section 5.2, I extend the game theoretic analysis of asymmetric leniency programs advanced in Chapter 4 to investigate the possible effects of such programs on the incentives of lower-level officials to gather evidence of the commission of crimes falling under the jurisdiction of the ICC. To isolate the effect on agents, I modify the principal-agent model of the previous chapter to a decision model which endogenizes the Agent's decision to actively gather evidence.<sup>12</sup> This decision model builds on a scarce literature in anti-trust law enforcement which seeks to explain the empirical observation that firms keep hard evidence of cartel activities even at the increased risk of detection by the Anti-trust Authorities. This literature is discussed in Section 5.3.

The set-up of the decision model, its solution and analysis appear in Section 5.4. The analysis rears a number of useful insights about the possible design of an asymmetric leniency program that will encourage subordinates in the political structures which make the commission of atrocities possible and who may have better access to hard incriminating evidence to collate and report it. I conclude that confidentiality will have a positive effect on the incentives to gather evidence and that an effective program would allow the reporting of evidence even after the collapse of the criminal organization provided less generous concessions are afforded for late reporting. I draw a number of policy implications in Section 5.5 and provide a general conclusion in Section 5.6.

## ***5.2. The Need for High Quality Evidence***

It is important to consider the effect of an asymmetric leniency program targeted at low-level officials on the incentives of such perpetrators to gather contemporaneous evidence capable of incriminating top-level officials in the commission of crimes falling within the jurisdiction of the ICC. Insiders to a particular political structure implicated in the commission of such crimes are better placed to gather evidence of the quality of the Scorpions video or the Abu-Ghraib photos which sparked political debate about violations depicted in them. In addition, proving the culpability of those most responsible for the commission of serious crimes of concern to the international community is more likely if such evidence is made

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<sup>12</sup> The principal-agent model set out in Chapter 4 assumes that the Agent's possession of useful information/evidence is subject to a random probability drawn by nature.

available to prosecutors. The availability of high quality evidence may also allow for more comprehensive indictments of key defendants as opposed to charging them with token violations of international law.<sup>13</sup> This will in turn enhance the credibility of institutions such as the ICC especially with victims.<sup>14</sup> There is also a more general point to be made here; the availability of good quality evidence of the commission of atrocities ensures the effective prosecution of international crimes which will help entrench the legitimacy of the institution. As suggested by Fyfe and Sheptyck, '...the question of legitimacy is not unconnected to the practical issue of effectiveness'.<sup>15</sup>

The acquisition of high quality evidence by prosecutors of international crimes may also obviate the need to offer generous plea-bargains to key political figures whose culpability is often hard to establish in light of the complexity of these crimes and the hierarchical nature of the structures involved in their commission which makes it hard to establish the link between the execution of the crimes and their instigation. Furthermore, the reporting of tangible evidence by insiders overcomes concerns attached to the credibility of their testimony against co-perpetrators. While insider testimony has been extensively relied on by institutions such as the ICTY, it is often tainted by suspicions of manipulation to fit the requirements of prosecutors soliciting it so that cooperating defendants may gain maximum benefits of cooperating agreements. Hard evidence of the commission of crimes (such as video recordings) is less likely to be fabricated by cooperating insiders looking for a way out. To add to this, tangible evidence allows prosecutors to ensure timely cooperation before granting insiders sentence reductions or similar benefits. Encouraging subordinates to collect evidence against their co-conspirators may also reflect positively on other more conventional tools for securing convictions such as plea-bargains. Given the evidentiary weaknesses plaguing the work of international criminal tribunals, it is not clear why defendants will find it advisable to plead guilty in the absence of a credible threat of conviction at trial. Sections 5.2.1-2.4 below provide a detailed discussion of these issues.

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<sup>13</sup> See Carla Ferstman, 'Limited Charges and Limited Judgments by the International Criminal Court—Who Bears the Greatest Responsibility?', *The International Journal of Human Rights*, 16/5 (2012), 796-813 (arguing that the ICC Office of the Prosecutor failed to bring adequate charges in the case of *Lubanga* because of its limited investigatory capacity and resources which did not allow for the collection of the required evidence).

<sup>14</sup> *Ibid* 807 (suggesting that victims of sexual violence were side-lined in the process of the *Lubanga* case when the OTP failed to bring charges related to their ordeals).

<sup>15</sup> Nicholas Fyfe and James Sheptycki, 'International Trends in the Facilitation of Witness Co-Operation in Organized Crime Cases', *European journal of criminology*, 3/3 (2006), 319-55, 345.

### 5.2.1. Proving the Guilt of Those Most Responsible for the Commission of Crimes

While it is of particular importance to the context of international criminal prosecutions that evidence of the commission of atrocities be of such high quality and undeniable credibility so as to open the door for meaningful political debate about the crimes and their perpetrators and perhaps political change in post-conflict societies, the acquisition of such evidence is also vital for the successful conclusion of criminal prosecutions. The ICC prosecution of the rebel leader Lubanga for child conscription charges, as was mentioned in Chapter 4, would have failed if it was not for a single video recording showing the defendant addressing a rally in which ‘...soldiers clearly under the age of 15’ were present.<sup>16</sup> The former Chief Prosecutor at both the ICTY and ICTR, Carla Del Ponte, explains that the complex nature of international crimes coupled with the fact that the investigations often take place after a long lapse of time from when the crimes were committed complicate fact finding in international criminal cases.<sup>17</sup> In addition, and because of the importance of demonstrating the link between the commission of crimes by low-level perpetrators and their instigation by higher up officials, victim testimony, despite its central function as a means to air serious grievances for past abuses, is of limited use in the process from an evidentiary point of view.<sup>18</sup> She maintains instead that contemporaneous documentary, audio or video evidence become crucial to proving culpability:

...[A]ccess to contemporaneous records, notes, videos, minutes of meetings, orders, diaries, intercepts and photographs not only creates a clearer picture of what transpired but also provides a more accurate portrayal of the players at the time when used in light of the events on the ground.<sup>19</sup>

In addition, the unreliability of eye witness testimonies that seem to form the backbone of most international criminal prosecutions dictate that the prosecutors at these international tribunals should attempt to secure more reliable evidence of the commission of atrocities if more than vacuous convictions are to be attained. This is particularly important in ethnically-

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<sup>16</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012) <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> [644] (last visited July 26, 2014).

<sup>17</sup> Carla Del Ponte, 'Investigation and Prosecution of Large-Scale Crimes at the International Level the Experience of the Icty', *Journal of International Criminal Justice*, 4/3 (2006), 539-58

<sup>18</sup> *ibid*

<sup>19</sup> Carla Del Ponte (n 17) 553-554.



charged internal conflicts. As is demonstrated by the revelation of the Scorpions video during the Milosevic trial, tangible evidence of the commission of serious crimes may enhance the legitimacy of the international criminal justice process in the eyes of the population to which the perpetrators belong.<sup>20</sup> The availability of strong evidence of culpability in the commission of crimes was a determining factor in the choices international criminal institutions make in the employment of pragmatic strategies such as the granting of sentence concessions in exchange for plea-bargains. In *Jelusic*, the ICTY Trial Chamber explained the unusually harsh 40 years sentence imposed on the defendant following his guilty plea partly by reference to the fact that the defendant was well aware of photographs showing him committing the crimes.<sup>21</sup> This reasoning indicates that without such strong evidence of guilt, the court may have felt compelled to reward Jelusic, a particularly vicious military commander who took pride in the commission of crimes, with a more generous sentence reduction to remain consistent in its plea-bargaining practice. However, in light of this evidence, the court was able to afford only relative weight to the defendant's guilty plea.<sup>22</sup> While the need to gather strong evidence against those most responsible for crimes falling under the jurisdiction of the ICC may compel the Prosecutor to trade some sentence reductions for high quality evidence from low-level officials, such evidence is likely to obviate the need to grant unnecessary sentence concessions for guilty pleas that conserve the resources of the institution but do not serve additional policy objectives of international criminal justice including truth-finding.

The acquisition of high quality evidence will also enable the prosecutor to bring forward comprehensive indictments as opposed to cursory charges limited to conduct that the Office of the Prosecutor is able to prove given the limited investigative capabilities available at its disposal. Nancy Combs suggests that the ICTY Prosecutor had frequently withdrawn important charges against defendants because of the inadequacy of evidence or otherwise resources available.<sup>23</sup> In *Miodrag Jokic*, the ICTY Prosecutor originally charged the defendant with war crimes arising from the repeated unlawful shelling of a number of locations which

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<sup>20</sup> See Zveržhanovski (n 2).

<sup>21</sup> *Prosecutor v. Jelusic*, Case No. IT-95-10-T, Judgement, [127], <http://www.icty.org/x/cases/jelusic/tjug/en/jel-tj991214e.pdf> (last visited July 27, 2014).

<sup>22</sup> *ibid.*

<sup>23</sup> Nancy Amoury Combs, *Guilty Pleas in International Criminal Law: Constructing a Restorative Justice Approach* (Stanford University Press, 2007)

resulted in 42 civilian deaths and 177 civilian injuries.<sup>24</sup> A second amended indictment limited the charges to one such occasion that resulted in a handful of deaths and injuries.<sup>25</sup> The case of *Lubanga* also saw the ICC Prosecutor heavily criticised for building the case on only the charge of child conscription with other more serious charges neglected for lack of evidence.<sup>26</sup> It was also because of the questionable strategies of the Prosecutor in gathering evidence in this case that the Trial Chamber granted the defendant a significant sentence reduction.<sup>27</sup> Despite the lucidity of the criticism that some retribution will have to be foregone in order to encourage the reporting of high quality evidence by low-level officials to the Prosecutor, it remains the case that some retribution may in fact have to be foregone if such evidence is not gathered through the cooperation of insiders.

### 5.2.2. Solving the Insider's Bias Problem

Reliance on insider cooperation is not without its drawbacks. The inherent risk in soliciting the cooperation of co-perpetrators is the strong incentive insiders have to lie in order to satisfy the Prosecutor's goal of obtaining successful convictions of other conspirators so as to escape punishment themselves. In providing testimony against other defendants, insiders are often biased towards achieving their own interest of gaining the benefit from testifying and may thus fabricate or exaggerate evidence to reach the threshold of substantial cooperation.<sup>28</sup> As mentioned in Section 4.3.1 of the previous chapter, it has been noted in the context of the ICTR's plea-bargaining practice that a number of cooperating defendants

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<sup>24</sup> *Prosecutor v. Strugar et al*, Case No. IT-01-42-PT, Amended Indictment (March 31, 2003), [http://www.icty.org/x/cases/miodrag\\_jokic/ind/en/jokic\\_030331\\_indictment\\_eng.pdf](http://www.icty.org/x/cases/miodrag_jokic/ind/en/jokic_030331_indictment_eng.pdf) (last visited July 27, 2014).

<sup>25</sup> *Prosecutor v. Jokic* Case No. IT-01-42, Second Amended Indictment, (August 27, 2003), [http://www.icty.org/x/cases/miodrag\\_jokic/ind/en/jok-2ai030827e.pdf](http://www.icty.org/x/cases/miodrag_jokic/ind/en/jok-2ai030827e.pdf) (last visited July 27, 2014).

<sup>26</sup> Ferstman (n 13)

<sup>27</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on Sentence pursuant to Article 76 of the Statute, [99] (July 10, 2012) <http://www.icc-cpi.int/iccdocs/doc/doc1438370.pdf> (last visited July 26, 2014).

<sup>28</sup> See Angus MacCulloch and Bruce Wardhaugh, 'The Baby and the Bathwater-the Relationship in Competition Law between Private Enforcement, Criminal Penalties, and Leniency Policy', *Criminal Penalties, and Leniency Policy* (June 14, 2012) (observing that, in the context of anti-trust law enforcement, cartel members providing evidence in exchange for amnesty may be motivated to embellish the truth in order to better their position at trial or otherwise to punish other defendants.)

falsified evidence when they recounted identical stories in different trials but changed the facts to implicate several defendants.<sup>29</sup>

As the discussion of the use of cooperation evidence in international criminal prosecutions in Chapter 4 demonstrates, insider testimony is often secured through promises of sentence reductions and to a lesser extent through offers of protection and/or relocation for the cooperating witness and his family. In the case against Miroslav Deronjic, Presiding judge Wolfgang Schomburg was convinced that the defendant should have been indicted for serious crimes related to the general ethnic cleansing campaign in Eastern Bosnia including the Srebrenica massacres, but the Prosecutor had concluded an “Agreement of the Parties” in which it was agreed that any information provided by the witness will not be used against him in ICTY proceedings, in order to induce the witness to cooperate.<sup>30</sup> This gave rise to accusations of selective charging by the Prosecutor who continued to resist the probing attempts of judge Schomburg throughout the trial.<sup>31</sup> Following Deronjic’s extended cooperation with the Prosecutor which spanned five years before he was even indicted and which substantially contributed to the Prosecutor’s understanding of the formulation and implementation of the Bosnian-Serb ethnic cleansing campaign in the region, the defendant was sentenced to ten years in prison despite the dissent of the presiding judge who insisted that a sentence of not less than twenty years should be imposed given the status of the defendant as a high-ranking political leader and his role in the commission of ‘the heinous and long planned crimes’ in question.<sup>32</sup> Judge Schomburg further stated that sentencing the defendant to less than twenty years will make politicians in a similar position to the defendant ‘...believe that he/she could buy him/herself more or less free by admitting some guilt and giving some information to the then competent prosecutor’.<sup>33</sup> While it is a valid concern that individuals in Deronjic’s position may have strong incentives to create, fabricate or exaggerate evidence in order to take advantage of a prosecutor’s promise to reduce sanctions in exchange for implicating actors higher up in the hierarchy, Judge Schomburg

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<sup>29</sup> Nancy A Combs, *Fact-Finding without Facts* (Cambridge University Press, 2010) 150. See also MacCulloch and Wardhaugh *Ibid*, (observing that a number of firms in the case of *Stolt-Nielsen*, provided conflicting evidence to different antitrust authorities having tailored the evidence to suit the particular context in which they were cooperating).

<sup>30</sup> Combs (n 23).

<sup>31</sup> *ibid*.

<sup>32</sup> *Prosecutor v. Deronjic*, Case No. IT-02-61-S, Sentencing Judgement, (Mar 30, 2004) (hereinafter “Deronjic Sentencing Judgement”) [5], <http://www.icty.org/x/cases/deronjic/tjug/en/sj-040330e.pdf> (last visited July 27, 2014).

<sup>33</sup> *Ibid* [19].

ignores the wider implications of admitting and consistently rewarding cooperation evidence. If having a policy of rewarding cooperating defendants is capable of destabilizing the political structures that enable the commission of atrocities in the context of internal conflicts (as is suggested in Chapter 4), it is arguably more advantageous to mitigate the inherent risks in dealing with insiders than to exclude the regime outright. One way of mitigating the risk of insider's bias is to encourage the reporting of independently verifiable evidence such as video or audio recordings.

The problem of insider bias is particularly acute in the context of international criminal prosecutions where cooperating with the prosecutor often saves the cooperating defendants from facing very harsh punishments for their role in the commission of atrocities. At the ICTR, the extensive cooperation of Omer Serushago which led to the arrest and prosecution of 16 other defendants including the Prime Minister of the Rwandan Government responsible for the genocide was rewarded with a mere 15 year sentence for crimes that include genocide; while in all preceding and subsequent cases the Prosecutor asked for a life sentence for similar crimes.<sup>34</sup> The bargaining over the fate of cooperating insiders in other cases included the transfer of cases to national courts with no jurisdiction over the crime of genocide and the relocation of defendants and their families to Western countries to guarantee their safety.<sup>35</sup>

What the above cases demonstrate is that the context of international criminal prosecutions where the nature of the crimes involved is heinous and often attracts severe punishment means that cooperating defendants stand to gain much from the ability to provide the Prosecutor with what he requires; namely incriminating evidence against another defendant or defendants. The fact that it is likely to be a life or death situation not just for the defendant but for members of his family as well suggests that accomplice witnesses in these cases have an even stronger incentive to falsify evidence to fit a given prosecutor's case narrative. This is not uncommon in situations where the commission of violent crimes is in issue. Martinez notes that '[w]hen the penalty at issue is jail time, the witness testifies to preserve his personal, physical freedom –essentially his life'.<sup>36</sup> He explores cooperating defendants' incentive to commit perjury to reap the full benefit of cooperation agreements in the context of organized crime and concludes that what compels such witnesses to falsely

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<sup>34</sup> Combs (n 23) 94 -95.

<sup>35</sup> Ibid 108-109 (discussing the case of *Bagaragaza*)

<sup>36</sup> Spencer Martinez, 'Bargaining for Testimony: Bias of Witnesses Who Testify in Exchange for Leniency', *Clev. St. L. Rev.*, 47 (1999), 141.151.

testify is the requirement that the evidence included in their testimony has to be of a certain “quality” to qualify for the contingent benefits to follow.<sup>37</sup> He notes that most US courts will allow a consideration of the utility of the witness testimony by reference to the prosecutor’s objectives in cooperation agreements.<sup>38</sup> Such a requirement may lead a cooperating witness to exaggerate or falsify evidence to ensure that the defendant he is testifying against is convicted as desired by the prosecutor. This, however, assumes that the evidence in question is capable of manipulation by the witness. While this is true in the case of eye witness testimony and some corroborative evidence such as the interpretation of coded messages, it is harder to manipulate hard contemporaneous evidence of the type mentioned by Del Ponte above such as video and audio recordings and minutes of meeting. The solicitation and use of such evidence from insiders solves the bias problem in obtaining cooperation evidence.

An effective leniency program adopted by ICT prosecutors should encourage or at the very least not hamper the gathering of hard evidence by insiders. Unlike witness testimony, the credibility of hard contemporaneous evidence is more easily verifiable in a court of law and bears a lesser risk of manipulation by accomplice witnesses. Insiders to the kind of political structures involved in the instigation and commission of crimes within the jurisdiction of the ICC are in a better position to collate such evidence as is demonstrated by the incidents of the Scorpions video and the Abu-Ghraib photographs. Hence, an effective leniency program geared towards the production of high quality evidence must take into account the effect of the Prosecutor’s policy on the incentives of insiders to gather such evidence.

### **5.2.3. Solving the Insider’s Credibility Problem**

An added problem of reliance on insider cooperation is the ability of the prosecutor to enforce a cooperating witness’s promise to actually deliver a valuable testimony against other defendants. MacCulloch and Wardhaug note, in the context of anti-trust law enforcement, that while the interest of an insider witness is to paint themselves in the most favourable light, that of the prosecutor is in affirming the culpability of the witness as a means of establishing the guilt of the accused.<sup>39</sup> They explain that this conflict invariably leads such witnesses to economize on the revelation of information, thereby compromising

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<sup>37</sup> *ibid.*

<sup>38</sup> Martinez (n 36).

<sup>39</sup> MacCulloch and Wardhaug (n 28) 15-16.

the truth finding function of the prosecutor.<sup>40</sup> In order to guard against this risk, the ICTY Prosecutor had included a clause in plea-agreements concluded with some defendants requesting that sentencing be postponed until after the defendant testifies in other trials so that the court may have the opportunity to scrutinize the testimony and determine its value to the prosecution.<sup>41</sup> The Sentencing judgments of *Obrenovic* and *Nikolic* make clear that the delay in sentencing the defendants may in fact be warranted.<sup>42</sup> Because the Prosecutor was satisfied with Obrenovic's performance, the Trial Chamber sentenced the defendant to a term of imprisonment within the recommended range.<sup>43</sup> On the other hand, it deemed testimony provided by Nikolic in another case evasive and not entirely truthful and sentenced him to a prison term that was 7 years above the recommended range.<sup>44</sup> It is noteworthy to point out that the Prosecution did not particularly regard Nikolic's performance as unsatisfactory, but there were almost no other mitigating circumstances pleaded by the defence.<sup>45</sup> Martinez notes that '...the prosecution...must retain the power to enforce the [cooperation] agreement for as long as necessary to assure that it ultimately receives the benefit of its bargain.'<sup>46</sup>

In addition to the reciprocal nature of cooperation agreements, the inherent risk of retaliation may also force some accomplice witnesses to shirk on their duties to provide a full and honest account of the role of other defendants in the criminal enterprise. Whether the reason for the witness's reluctance to provide testimony at all or truthfully is the very real risk of retaliation or otherwise, the same does not seem to pose problems when the

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<sup>40</sup> *ibid.*

<sup>41</sup> *The Prosecutors v. Blagojevic et al*, Case No. IT-02-06-PT, Joint Motion for Consideration of Amended Plea-Agreement between Momir Nikolic and the Office of the Prosecutor (May 7, 2003) (The attached Momir Nikolic Plea Agreement [10]) (hereinafter Nikolic Plea Agreement), <http://www.icty.org/x/cases/nikolic/pros/en/030507.pdf>; *The Prosecutor v. Obrenovic*, Case No. IT-02-60-T, Joint Motion for Consideration of Plea Agreement between Dragan Obrenovic and the Office of the Prosecutor (May 20, 2003), (Annex A [10]) (hereinafter Obrenovic Plea Agreement), [http://www.icty.org/x/cases/obrenovic/custom4/en/annexplea\\_030520.pdf](http://www.icty.org/x/cases/obrenovic/custom4/en/annexplea_030520.pdf) (sources last visited July 26, 2014).

<sup>42</sup> *The Prosecutor v. Obrenovic*, Case No. IT-02-60/2S, Sentencing Judgement, (Dec 10, 2010) [122-129] & [156] (hereinafter *Obrenovic* Sentencing Judgment), <http://www.icty.org/x/cases/obrenovic/tjug/en/obr-sj031210e.pdf>; *The Prosecutor v. Momir Nikolic*, Case No. IT-02-60/1-S, Sentencing Judgement, (Dec 2, 2003) (hereinafter *Nikolic* Sentencing Judgment) [152-156] & [183], <http://www.icty.org/x/cases/nikolic/tjug/en/mnik-sj031202-e.pdf> (sources last visited July 27, 2014).

<sup>43</sup> *Obrenovic* Sentencing Judgment (n 42) [16], [128-129] & [156].

<sup>44</sup> *Nikolic* Sentencing Judgment (n 42) [19], [156] & [183].

<sup>45</sup> *ibid.*

<sup>46</sup> Martinez (n 36) 148.

cooperation in question consists of the submittal of hard evidence, as opposed to testimony.<sup>47</sup> One possible explanation for this is perhaps that it is easier to maintain confidentiality of the source of cooperation when the witness does not have to appear in a public court of law to condemn others in the community. The case of *Bralo* is perhaps illustrative of this.<sup>48</sup> Bralo self-surrendered to the ICTY Prosecutor and brought with him a bundle of documents which were subsequently used in other cases.<sup>49</sup> Even though he attempted to cooperate with the Prosecutor by providing information about the criminal conduct of a Bosnian Croat general and by revealing the location of a mass grave, he refused to meet with the Prosecution in private for fear of retaliation against his family.<sup>50</sup> What *Bralo* indicates is that the surrender of hard evidence may not be perceived as attracting the same risk of retaliation as that posed by providing oral testimony incriminating other defendants in open court. Hence, provided insiders like Bralo are given sufficient incentives to gather and surrender hard evidence of high quality, neither questions of their credibility nor what they perceive as obstacles to cooperation (such as intimidation) will be relevant. Naturally, the risk of retaliation may still be present even if the cooperation takes a form different from rendering a testimony against other defendants. However, this can be adequately provided for in the design of incentives to encourage the gathering and subsequent reporting of hard evidence.

#### **5.2.4. Solving the Prosecution's Credibility Problem (in Plea-bargaining)**

Despite a growing acceptance of the need for plea-bargaining in the context of international criminal prosecutions not just as a means of establishing the truth, but also as a cogent incentive for self-surrender,<sup>51</sup> its value remains debated especially in light of the evidentiary weaknesses plaguing international criminal prosecutions. Without a credible threat of conviction at trial, it is not likely that perpetrators will be motivated to self-surrender in order to benefit from sentence concessions that may be available in exchange for guilty

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<sup>47</sup> See MacCulloch and Wardaugh (n 28) 9 (suggesting that the risks associated with the need to testify at trial when seeking individual immunity do not present themselves in the context of applying for corporate immunity because the latter involves the exchange of documentary evidence).

<sup>48</sup> *Prosecutor v. Bralo*, Case No. IT-95-17-S, Sentencing Judgement (Dec 7, 2005), <http://www.icty.org/x/cases/bralo/tjug/en/bra-sj051207-e.pdf> (last visited July 27, 2014).

<sup>49</sup> *ibid* [77]. See also discussion in Combs (n 23) 83-84.

<sup>50</sup> Combs (n 23) 84.

<sup>51</sup> Mark B Harmon and Fergal Gaynor, 'Ordinary Sentences for Extraordinary Crimes', *Journal of International Criminal Justice*, 5/3 (2007), 683-712.

pleas.<sup>52</sup> An emphasis on the effect of prosecutorial strategies on the incentives of lower-level officials to collate evidence shifts the debate towards empowering international criminal tribunals to overcome their own evidentiary limitations as well as to promoting deterrence and truth finding. An effective prosecutorial program would, in this respect, enhance the risk of co-conspirators' gathering enough evidence to ensure, amongst other things, the conviction of a defendant at trial; thereby encouraging such a defendant to come forward and self-surrender to the prosecution.

The ICTY Trial Chamber in *Erdemovic* noted that '[d]iscovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation'.<sup>53</sup> It is hence unsurprising that an institution with 'limited resources, no ability to arrest indicted persons, [and] inadequate access to witness and documentary evidence'<sup>54</sup> would find it inevitable to trade sentence concessions for information, evidence and the self-surrender of known war criminals. It is perhaps intelligible to question the viability of adopting leniency programs that reward low-level perpetrators with sentence concessions in exchange for evidence that incriminates high level officials by the ICC. However, it is worth noting that the recent implementation of pragmatic remedies designed to overcome the challenges to overburdened criminal justice systems in continental Europe (such as the formalization of plea-bargaining) followed as opposed to led prosecutorial practices.<sup>55</sup> Similarly, the original ICTY statute did not cater for the provision of plea-bargaining or the solicitation of cooperation evidence in return for sentence reduction, but was later amended to explicitly allow the practice and allow "substantial cooperation with the Prosecutor" to be the only explicitly mentioned mitigating circumstance in the consideration of sentencing.<sup>56</sup>

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<sup>52</sup> Anjali Pathmanathan, 'Round Peg, Square Hole? the Viability of Plea Bargaining in Domestic Criminal Justice Systems Prosecuting International Crimes', *International Criminal Law Review*, 13/2 (2013), 319-84. But Combs notes that *Erdemovic* and *Babic* provided their guilty pleas to the ICTY Prosecutor voluntarily, without any offer of leniency and for no other apparent reason (Combs n (23) 60 & 82).

<sup>53</sup> *The Prosecutor v. Erdemovic*, Case No. IT-96-22-Tbis, Sentencing Judgement (March 5, 1998) [21], <http://www.icty.org/x/cases/erdemovic/tjug/en/erd-ts980305e.pdf> (last visited July 27, 2014).

<sup>54</sup> Harmon and Gaynor (n 51) 699.

<sup>55</sup> Pathmanathan (n 52).

<sup>56</sup> Nancy Amoury Combs, 'Procuring Guilty Pleas for International Crimes: The Limited Influence of Sentence Discounts', *Vand. L. Rev.*, 59 (2006), 67.



### ***5.3. Game-theoretic Literature of Evidence Retention in Anti-trust Law Enforcement***

The decision model introduced in Section 5.4 below builds on scarce game theoretic literature exploring the incentives of firms to keep and to report incriminating evidence on collusive behaviour in the context of anti-trust law enforcement. This literature emerged in an attempt to explain the empirical observation that firms do in fact keep hard evidence of cartel communication and agreements despite the increased risk of detection by a regulatory authority and consequently the higher risk of sanction for the collusive behaviour.<sup>57</sup> Aubert et al assume that the coordination of activities within a cartel requires communication which leads to the production of hard evidence of the legal activity.<sup>58</sup> Their enquiry focuses on the incentives of firms to keep such evidence and to report it given a fixed probability that the cartel collapses and in the presence of positive rewards by the Anti-trust Authority for self-reporting firms. They conclude that firms may be tempted to keep incriminating evidence in order to report it subsequently and to benefit from fine concessions or rewards when they expect the collusion to break down in the future, whether organically or through the deviation of another firm. Their model is limited by the assumption that the regulator is able to provide positive rewards for self-reporting of criminal activity; a suggestion that often attracts a hostile reaction to the idea of rewarding wrongdoers even outside the highly sensitive context of international criminal justice.<sup>59</sup> It is also not clear how their model elucidates the effect of introducing a leniency program on a firm's incentive to keep such evidence.

A reoccurring theme in anti-trust literature exploring this issue is the trade-off involved in keeping hard evidence in the calculus of collusive firms. Silbye shows that while the retention of more incriminating evidence attracts a more substantial fine reduction for a self-reporting firm in an optimal leniency program, it will also result in a higher probability of detection and punishment by the regulator.<sup>60</sup> Hence, he concludes that when firms can generate evidence, fine discounts in optimal leniency should be lower.<sup>61</sup> Agisilaou retains this

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<sup>57</sup> See Cécile Aubert, Patrick Rey, and William E Kovacic, 'The Impact of Leniency and Whistle-Blowing Programs on Cartels', *International Journal of Industrial Organization*, 24/6 (2006), 1241-66.

<sup>58</sup> *ibid.*

<sup>59</sup> See Panayiotis Agisilaou, 'Keep to Sustain or Keep to Exploit? Why Firms Keep Hard Evidence', *CCP Working Paper 12-5*, (12 March 2012).

<sup>60</sup> Frederik Silbye, 'Asymmetric Evidence and Optimal Leniency Programs', *Topics in competition policy: cartels, leniency and price discrimination*, (2010), 41.

<sup>61</sup> *ibid.*

trade-off effect in his repeated game model of the interaction between two firms in conditions where an anti-trust authority enforces the law.<sup>62</sup> And to account for the fact that firms keep evidence of collusion even in the absence of leniency programs, he assumes that the retention of evidence is essential for the sustainability of the cartel and its destruction leads to the collapse of the criminal enterprise. He concludes that the introduction of a leniency program enhances firms' incentives to keep hard evidence and that firms may keep hard evidence without reporting it whenever the sustainability of cartels is highly dependant on the availability of hard evidence and the probability of detection by the authority, despite the availability of evidence, is very low.<sup>63</sup>

#### **5.4. *The Model***

Building on the literature discussed in Section 5.3 above, I use the basic set up of the principal-agent model developed in Chapter 4 to explore the effect of a leniency program on the incentives of lower-level agents in a criminal government to gather incriminating evidence against top level officials. The difference between the decision model advanced in this chapter and the game theoretic model developed in the previous chapter is that the amount of evidence available to an agent to report to the Prosecutor is subject to endogenized decision making on part of the agent in question as opposed to being determined by a random probability drawn by nature. Like Aubert et al I assume that planning and instigating the crimes falling under the jurisdiction of the ICC requires communication.<sup>64</sup> However, unlike them, I do not assume that such communication necessarily leaves a trace of hard evidence. However, I assume that hard evidence can be generated by a subordinate if he calculates that it will be more profitable to gather evidence against top level officials in order to trade it in for a way out of opposition punishment. As Aubert et al suggest in the context of anti-trust law enforcement, members of a criminal organization may be incentivized to retain evidence of a criminal behaviour whenever to do so provides them with an exit strategy when the organization collapses.<sup>65</sup>

I retain certain features of the principal-agent model advanced in Chapter 4, including the assumption that the threat to the criminal enterprise comes from the probability of opposition overthrow, which may be determined by the amount of evidence reported to the

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<sup>62</sup> Panayiotis Agisilaou (n 59).

<sup>63</sup> *ibid.*

<sup>64</sup> See Aubert et al (n 57).

<sup>65</sup> *ibid.*

ICC Prosecutor. When the regime collapses, the subordinate stands to suffer severe punishment imposed by the opposition. This is in line with the literature in anti-trust law enforcement which assumes that the value of trading in evidence with the anti-trust authority emanates from the threat of the disintegration of the cartel which may arise organically (e.g. because of the development of an innovation) or otherwise (e.g. when an insider reports the cartel).<sup>66</sup> Given this, the reduction in punishment which the Prosecutor is able to offer is securing amnesty against domestic prosecution or protection against opposition punishment (for example by relocation of the subordinate or his family, as have been attempted and secured respectively by the ICTR Prosecutor in the case of *Bagaragza*).<sup>67</sup> The provision of protection or relocation in exchange for witness testimony is a standard practice in jurisdictions dealing with organized crime.<sup>68</sup> The US Federal Witness Security Program, for example, authorizes the Attorney General to make offers of protection or relocation to witnesses and their families where there is a risk of violent retaliation by the criminal organization they are testifying against.<sup>69</sup> The US experience in this regard indicates both the importance and the viability of institutionalizing the practice and has since been emulated across Europe in jurisdictions facing a growing threat of organized crime and terrorism.<sup>70</sup> Harmonization efforts by the Council of the European Union focused on securing confidentiality during the process of giving evidence at trial.<sup>71</sup> For this reason, an extension of the analysis below also considers the effect of a confidential leniency program on the incentives of lower-level officials to report hard evidence to the Prosecutor. Because '[w]itness protection programmes are practically intertwined with the business of plea-bargaining and immunity in the prosecutions of cases involving organized crime',<sup>72</sup> I use the term leniency to describe all the benefits to be gained by a cooperating witness from the ICC prosecutor and model such benefits in terms of a general reduction in opposition punishment in the model.

Other forms of reduction of opposition punishment may include negotiating a more lenient sentence on behalf of the cooperating witness, as have been the norm in international

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<sup>66</sup> Aubert et al (n 41).

<sup>67</sup> Combs (n 23) 108-109.

<sup>68</sup> Fyfe and Sheptycki (n 15) (discussing the US Federal Witness Security Program which was established in 1970 to overcome the reluctance of witnesses to break the Mafia code of silence "*omerta*").

<sup>69</sup> *ibid.*

<sup>70</sup> Fyfe and Sheptycki (n 15).

<sup>71</sup> *Ibid.*

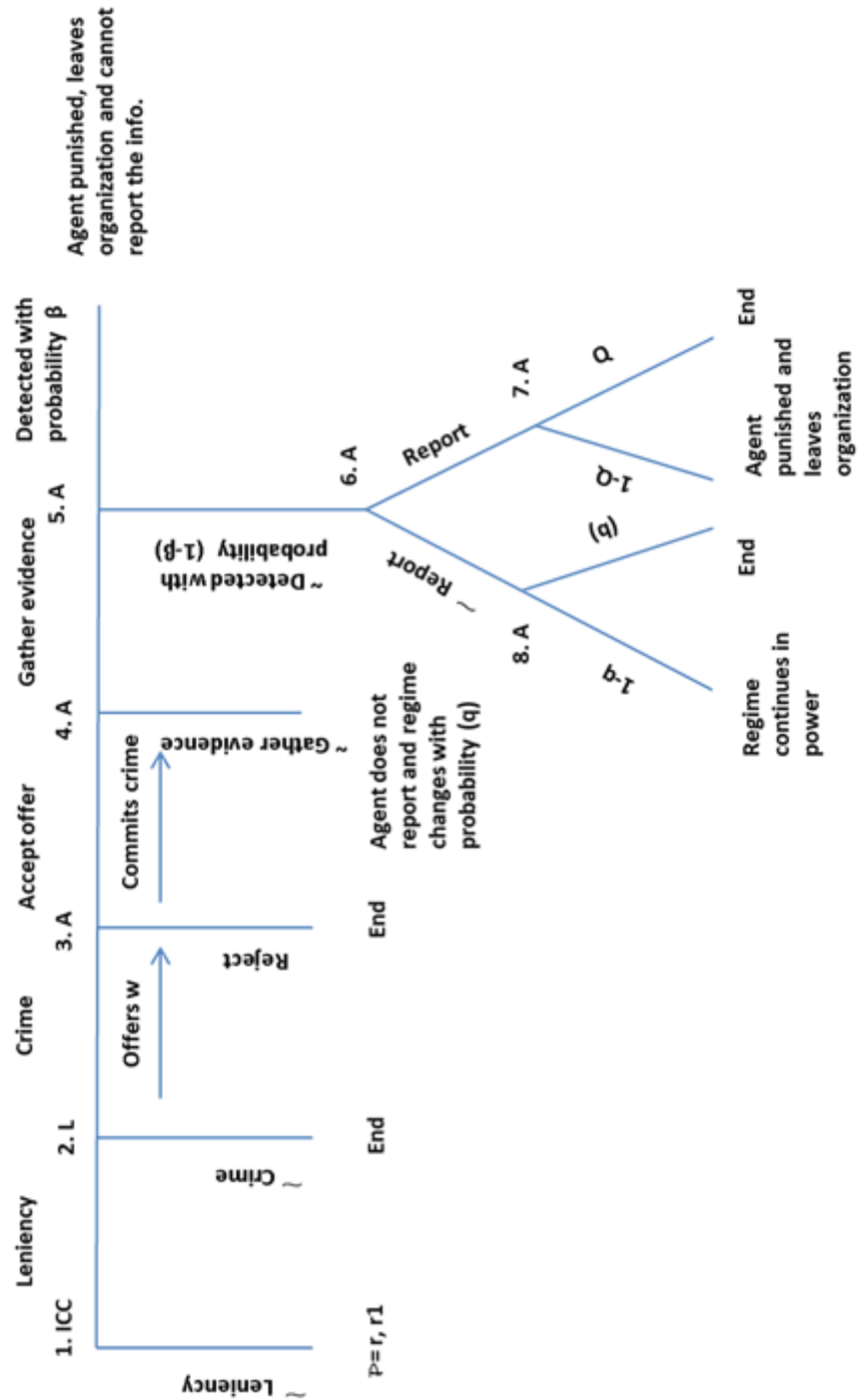
<sup>72</sup> Fyfe and Sheptycki (n 15) 335.

criminal prosecutions. The difficulty in the model's set up, as was in the previous Chapter 4, is whether the ICC Prosecutor is able to commit credibly to tie the hands of the domestic criminal courts or the opposition not to prosecute nor to impose punishment on a cooperating defendant. One way of overcoming this issue would be a decision to try the subordinate at the ICC in order to impose a proportionate sentence that rewards the subordinate's cooperation. Incarcerating the subordinate following such sentencing will take him away from the authority of the opposition in the period immediately following the regime collapse. The assumption here is that the imposition of punishment by an international institution will obviate the need for the opposition to impose a separate punishment which will in all likelihood be expensive to maintain. It is also worth noting that where the cooperating defendants are not particularly important in the political structure that made the commission of atrocities possible, the opposition may be more inclined to forego punishment if the ICC intercedes. But one should note the argument of Judge Schomburg in the Sentencing Judgement of *Deronjic*, where he stated that the promise of the ICTY Prosecutor that the information provided by the defendant will not be used against him in a court of law as '...a misleading promise, amounting to unfairness to the accused as this understanding cannot be binding upon other courts also having jurisdiction over these crimes'.<sup>73</sup> Having said that, the insights of the Model remain the same in the situation where the punishment imposed follows a conviction by the ICC, as opposed to regime change as assumed. Such a set up would more closely mirror the conventional structure of game-theoretic models exploring the effect of leniency programs on the incentives of lower-level perpetrators to gather evidence.

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<sup>73</sup> *Deronjic* Sentencing Judgment (n 32), the Dissenting Opinion of Judge Schomburg [12].

Figure 5.1 Agent's Evidence Gathering Decision Model



### 5.4.1. Structure of the Decision Model

The ICC Prosecutor decides on a leniency program for lower-level officials capable of providing him with evidence that will increase the likelihood of convicting the Leader in the court of public opinion and thereby increasing the probability of mass dissent. The Leader moves next to employ an agent for the commission of a crime(s) offering him a wage ( $w$ ) for his efforts. It is at this stage that the Agent can decide whether or not to execute the crime instigated by his superior. It is assumed that whenever a crime is committed, the Agent and the Leader are subjected to opposition punishment which is imposed whenever the regime collapses and is as such subject to a certain probability of regime change. To endogenize the decision to gather evidence, I add a new node to the Principal –agent model that I developed in Chapter 4 so that when the Agent decides to commit the crime, and instead of the availability of high quality evidence being subject to a random fixed probability, the Agent is now able to elect whether or not to gather the evidence (Node 4 in Figure 5.1). If the Agent chooses not to gather any evidence, he is not able to report to the Prosecutor and the regime changes with the standard probability  $q$ . If, on the other hand, he decides to gather hard evidence of the leader's culpability, he may be detected and punished by the Leader at a random probability ( $\beta$ ). I assume that if the Agent is retaliated against at this stage of the game, the Agent is unable to report the evidence to the ICC Prosecutor because the retaliation punishment is likely to be severe. The case of Uwilingiyimana, an individual who sought to cooperate with the ICTR Prosecutor, provides an indication of how retaliation may inhibit such reporting.<sup>74</sup> Having being indicted for aiding and abetting genocide, the former Minister of Commerce attempted to provide the Prosecutor with important information incriminating members of the inner circle of the President of Rwanda. However, he disappeared shortly after meeting with the Prosecution team in France and his body was later discovered in a Belgian canal.<sup>75</sup> While it has not been officially declared that his death was the result of retaliation by persons that he would have implicated by his evidence, this remains a possible explanation for his demise.

If the Agent is not detected at the earlier stage (Node 4), he must decide whether or not to self-report to the ICC Prosecutor to benefit from the reduction in sanction, which may include immunity from reprisal by the opposition or an offer of exile. If the Agent commits the crime, gathers the evidence, is not detected and subsequently self-reports, the regime

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<sup>74</sup> Combs (n 23) 109.

<sup>75</sup> *ibid.*

changes with the increased probability  $Q$  (where  $Q > q$ ). In this case, the Agent stands to suffer the opposition punishment ( $R$ ) unless a leniency program is in place that allows the Prosecutor to extend some protection to the Agent. If a leniency program is in place and the Agent reports the evidence gathered to the ICC Prosecutor, he is rewarded with a reduced punishment ( $r$ ), which is less than the opposition punishment suffered by other Agents once the regime collapses ( $r < R$ ). If, despite the reporting of hard evidence, the regime continues in power (with probability  $1-Q$ ), the Agent stands to suffer a retaliation cost inflicted by the Leader who needs to maintain a reputation of toughness to guard against future leakages of information. In the benchmark model, I start with a non-confidential self-reporting/leniency scheme where the Leader can tell following the fact that a certain agent talked to the ICC. I then extend the Model to consider the effect of having a confidential reporting program in place that leads the Leader to retaliate with a fixed probability of error, as was the case in the game-theoretic model in Chapter 4. If the Agent refrains from reporting the evidence he had gathered, the regime changes with the normal probability ( $q$ ) and the Agent stands to suffer only the opposition punishment. In an extension of the Model, I allow the agent to report the evidence even after the collapse of the regime.

Based on the above, the Agent has four options: (i) to decline to commit the crime, following which the game ends; (ii) to accept to commit the crime and subsequently not gather the evidence, following which the regime changes with probability  $q$  determined by nature but which reflects the quality or amount of evidence available to the prosecutor which is subsequently released to the public; (iii) to accept to commit the crime, gather evidence and not report it to the Prosecutor; or (iv) to accept to commit the crime, gather evidence and report it to the Prosecutor, provided he is undetected and unpunished by the Leader earlier on in the game (at Node 5 in Figure 5.1). For obvious reasons, I concentrate on strategies (ii)-(iv).

The Principal/Agent decision model that I specify starts with the ICC deciding on a leniency program. The analysis of the strategies of the Agent is carried out with reference to two states of the world: Without Leniency and With Leniency. The conditions under which the Agent operates are determined by the policy of the Prosecutor vis-à-vis the adoption of a leniency program and the Leader's decision to instigate the crime and hire the Agent to execute it. However, the analysis focuses on the actions of the Agent in order to understand under which circumstances a subordinate is likely to actively gather evidence that implicates the leadership in the commission of atrocities.

## (a) The Prosecutor's Policy:

I allow the Prosecutor the discretion to offer leniency in exchange for evidence surrendered by subordinates and which I assume is capable of increasing the probability of regime change from  $q$  to  $Q$  (where  $Q > q$ ). The leniency offered by the Prosecutor in this case may be protection from the full force of the opposition punishment in the event of regime change ( $R$ ). Such opposition punishment may include death, imprisonment, exile and/or exclusion from public office following regime change. Leniency in this case may be interpreted as an offer of asylum or assistance with leaving the country following a coup. Hence, the punishment reporting agents stand to suffer ( $r$ ) is much less than the standard punishment ( $r < R$ ).

## (b) The Leader's Decision to Order the Crime

In light of the leniency program, the Leader ( $L$ ) decides whether or not to instigate the crime. If he opts for ordering the commission of the crime, he extends an offer to the Agent ( $A$ ) which includes payment of a wage ( $w$ ) in return for the service of committing the crime. The Agent can accept or reject the offer.

## (c) The Agent's First Problem: Whether or not to Commit the Crime

The Agent can accept or reject the Leader's offer of a wage in exchange for the commission of crime. In weighing up his options, in addition to the wage ( $w$ ), he has to take into account the cost of the commission of crime, which is the opposition punishment to be levied following regime change. The cost of the crime to the Agent is given by ( $qR$ ) in the event the agent does not report to the Prosecutor following the commission of crime.<sup>76</sup>

## (d) The Agent's Second Problem: Whether or Not to Collate evidence

If the Agent opts to commit a crime, he must decide whether or not to gather evidence that implicates the Leader. There is a very good reason for agents to invest in gathering evidence of the culpability of leaders and higher officials; it is their insurance against opposition punishment whenever the regime collapses. This decision depends on the cost they suffer in collecting evidence, including the increased probability of retaliation when reporting is confidential. But, for the benchmark model (where reporting is publicized), the danger is that they can be detected pre-emptively (at Node 5 of the

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<sup>76</sup> The probability of regime change will depend on whether or not insider information is revealed by subordinates to the Prosecutor so that if no information is revealed the probability stands at  $q$ , and if some evidence is brought to the Prosecutor, the probability increases to  $Q$  ( $Q > q$ ).



Game-tree) and may be punished by the Leader before getting the chance to report the information. This occurs with probability  $\beta$ . Getting detected early on has no effect on the punishment levied by the Leader and the Agent stands to suffer a cost of  $(P)$  whenever he is detected, so that the total cost of detection is  $\beta(P)$ . If the Agent is not detected at this stage, the game proceeds to Node 6 where the Agent must decide whether or not to report the information.

(e) The Agent's Third problem: Whether or Not to Report the Leader (once evidence is gathered)

If the Agent opts to commit a crime and he consequently gathers evidence that implicates the Leader and survives undetected by the Leader (with probability  $1-\beta$ ), he must decide whether or not to report the evidence. While reporting the evidence guarantees the agent a reduction in opposition punishment, it will mean that the probability of regime change (and hence his exposure to opposition punishment  $R_1$ ) increases from  $q$  to  $Q$ . So, an Agent will have something to lose by reporting. In addition, in the event he reports and the regime still survives (with probability  $1-Q$ ), he will be punished by the Leader at a cost of  $(P)$ .

The assumption in the Model is that players are risk-neutral (See Chapter 3, Section 3.3.3 on p. 82 for an explanation of risk-neutrality).

Table 5.1 below sets out the notations used in the Model.

**Table of Notations**

$B$	The probability that the Leader will detect and punish the Agent following evidence gathering and before reporting.
$1-\beta$	The probability that the Agent will go undetected by the Leader following evidence gathering.
$q$	The probability of regime change in the absence of reporting
$1-q$	The probability that the leader survives an investigation and stays in office in the absence of reporting
$Q$	The probability of regime change following reporting
$1-Q$	The probability that the leader survives an investigation and stays in office following reporting.
$R$	The size of opposition punishment levied on the Agent following regime collapse
$r$	The reduced punishment received by the Agent following regime collapse pursuant to reporting gathered evidence (takes the value of $r_1$ when the reporting takes place post regime collapse)
$w$	The wage paid by the Leader to the Agent in exchange for the commission of crime
$P$	The size of retaliation punishment levied by the Leader on the Agent for reporting

**Table 5.1 Table of Notations**

## 5.4.2 Discussion and Analysis

### Whether or Not to Collect Evidence

The central question in the Model is whether the Agent should gather evidence or not. To assess this, I compare the utility of the Agent from collecting evidence and from not collecting evidence given the probability of detection by the Leader.

### First: Utility from Collecting Evidence

If the Agent collects hard evidence that implicates the leadership, there are two possibilities: (i) the Agent may be detected by the Leader prior to reporting (at probability  $\beta$ ) and punished there and then; or (ii) if the Agent is not detected by the Leader at the earlier stage of the game (with probability  $(1-\beta)$ ), he only stands to be suffer punishment from the Leader following reporting (in a transparent leniency program). In this case, the Agent suffers both the retaliation punishment by the Leader and an opposition punishment. Even though it is logical to assume that the retaliation punishment is big enough to render the opposition punishment redundant ( $P > R$ ), I retain the opposition punishment in both the cases of retaliation prior to reporting and after it, to account for the reduction in sanction offered by the Prosecutor after reporting. As mentioned above, such reduction in sanction may include protection from opposition punishment.

Consider the two possible outcomes of collecting evidence below:

- (i) The Agent may be detected and punished with probability  $\beta$ , following which the regime may or may not collapse with probability  $q$  and  $(1-q)$  respectively.

The Agent's utility from collecting the information in this case is given by:

$$uc,d = w - (P + qR)$$

- (ii) The Agent may escape detection in which case the Agent has to decide whether to report the evidence he gathered or not.

If the Agent reports the information, his utility is given by:

$$uc,nd,r = w - (Qr + (1-Q)P)$$

Since there is no value in collecting the evidence if the Agent does not intend to report it, the only relevant payoffs to compare are the payoffs from collecting the evidence given that the Agent intends to use it and those due to not collecting the evidence.

Therefore, the overall Agent utility from collecting evidence is given by:

$$U_c = w - \beta(P + qR) - (1 - \beta)(Qr + (1 - Q)P) \quad (5.1)$$

**Second: Utility from Not Collecting Evidence**

In the event the Agent refrains from gathering evidence, the game ends and there is no question of detection (Node 4). In this case, the regime changes with probability (q) and the Agent is punished by the opposition.

Hence, if the Agent does not collect the information, his utility is given by:

$$U_{nc} = w - qR$$

**Third: The Necessary Condition for Collecting Evidence**

It follows from the above that the following is a necessary condition for the Agent to collect the evidence:

$$w - \beta(P + qR) - (1 - \beta)(Qr + (1 - Q)P) \geq w - qR$$

which can be written as:

$$qR - \beta(P + qR) - (1 - \beta)(Qr + (1 - Q)P) \geq 0 \quad (5.2)$$

Absent leniency, the condition for collecting the information becomes:

$$qR - \beta(P + qR) - (1 - \beta)(QR + (1 - Q)P) \geq 0$$

which can be written as:

$$(1 - \beta)(q - Q)R - (\beta + (1 - \beta)(1 - Q)P) \geq 0$$

which is clearly impossible since  $q < Q$ . Therefore, evidence is not collected unless a leniency program is instituted.

It is clear from Equation (5.2) that it is a dominant strategy for the Agent not to gather any evidence when no leniency program is in place. Because the Leader may find out about the activities of the Agent and punish them at the point of detection, gathering evidence against him is obviously a risky venture. With no leniency, the opposition punishment to be suffered by the Agent does not change ( $r = R$ ) and the regime changes with an enhanced probability ( $Q > q$ ) if the information is reported. In this case, the Agent does not hope to gain anything in

return for gathering the information that may ameliorate the effect of the expected leader punishment. If on the other hand, there is no threat of punishment by the Leader at the point of detection, the Agent may be indifferent between gathering the evidence and not doing so. However, in either case he will not report it. This is because reporting entails an additional risk of punishment which follows when the regime does not collapse. In a publicized leniency program, the Leader is able to tell when an Agent reports and will necessarily punish the Agent unless he is removed from power. In addition, when the Agent reports he stands to stand the opposition punishment (R), at a greater probability (Q). With no leniency in place, the Agent loses either way regardless of whether the Leader punishes snitches or not.

With a leniency program in place that offers a reduction in sanction (i.e.  $r < R$ ), the condition for collecting information becomes:

$$qR - \beta(P + qR) - (1 - \beta)(Qr + (1 - Q)P) \geq 0$$

which can be positive if:

$$r \leq \frac{(1 - \beta)(qR - (1 - Q)P) - \beta P}{(1 - \beta)Q} \quad (5.3)$$

**PROPOSITION 1:**

To induce agents to collect and report evidence of criminal behaviour by their leaders, a leniency program must be in place to reward reports of incriminating evidence with an appropriate reduction in sanction with the reduced sanction to be offered by the Prosecutor ( $r^*$ ) having the following value:

$$r \leq ((1 - \beta)(qR - (1 - Q)P) - \beta P) / (1 - \beta)Q \equiv r^*$$

The reduced sanction will be inversely proportionate to the quality of information as well as to the retaliation punishment by the leader (the more useful the information and the more severe the retaliation punishment, the smaller the eventual punishment needs to be). Furthermore, with bigger probabilities of detection prior to reporting ( $\beta$  is large), the Prosecutor needs to offer more generous reductions in sentence to incentivize agents to collect information. This result is expected since the bigger the risk borne by the Agent in collecting evidence, the bigger the inducement needs to be to convince him to take the

risk.<sup>77</sup> Severe retaliation punishments, lenient opposition punishments and high probabilities of detection may entail positive rewards to incentivize the collection of evidence by lower-level officials.<sup>78</sup>

While a large probability of regime change ensures that retaliation punishment of the Agent in the event of regime survival is less probable, it increases the expected opposition punishment and makes the condition harder to satisfy. In addition, the probability that the Agent will be punished after reporting also depends on the probability of detection. With high probabilities of detection prior to reporting, the Agent is always better off with higher probabilities of regime change provided the protection from opposition punishment is substantial enough ( $r$  is low).

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<sup>77</sup> While this might not be automatically obvious from equation (5.3), note the following: Equation (5.3) can be written as:

$$r \leq \frac{q}{Q} * R - \frac{\beta + (1-\beta)(1-Q)}{(1-\beta)Q} * P$$

This clearly shows that the larger ( $Q$ ) is (i.e. the more useful the information provided by the Agent), the smaller ( $r$ ) needs to be to satisfy the condition. It also shows that more severe retaliation punishments ( $P$  is large), entail smaller punishment for agents who report.

To see the effect of the probability of detection, assume that  $R=P$  (i.e. the opposition punishment is sufficiently severe), the following condition must be true for  $r$  to be positive:

$$\frac{q}{Q} > \frac{\beta + (1-\beta)(1-Q)}{(1-\beta)Q}$$

which reduces to:

$$(1-\beta)(q+Q) > 1$$

For this condition to be satisfied, a necessary condition is:

$$q+Q > 1$$

which is possible (even if  $Q$  is not too large provided the probability of regime change without reporting is large enough). However, the probability of detection by the Leader ( $\beta$ ) must not be too large. With large probabilities of detection, rewards may have to be offered.

<sup>78</sup> This is an objective observation arising from the Model, but positive rewards for informants should not necessarily be viewed as recommended in the context of international criminal prosecutions.

**Allowing Reporting Post Regime-Collapse**

Now consider allowing the Agent to report after the collapse of the regime at a nominal reduction in sentence  $r_1$  (where  $r < r_1 < R$ ). In this case, the Agent payoffs from collecting evidence will be as follows:

$$U_c = w - \beta(P + qR) - (1 - \beta)qr_1 \quad (5.4)$$

Please note that in this case the probability of regime collapse stays at  $(q)$  since no reporting occurs before the regime is overthrown.

If post-regime collapse reporting is allowed, an Agent will collect evidence of criminality against the Leader so long as:

$$w - \beta(P + qR) - (1 - \beta)qr_1 \geq w - qR \quad (5.5)$$

which can be simplified to:

$$\begin{aligned} q(1 - \beta)(R - r_1) - \beta P &\geq 0 \\ q &\geq \beta P / (1 - \beta)(R - r_1) \end{aligned} \quad (5.6)$$

In this case, the optimal reduced sanction ( $r_1^*$ ) should have the following value:

$$\begin{aligned} r_1 &\leq (1 - \beta)qR - \beta P / (1 - \beta)q, \text{ or} \\ r_1 &\leq R - \beta P / (1 - \beta)q \equiv r_1^* \end{aligned} \quad (5.7)$$

If the Prosecutor allows for reporting post regime-collapse, he can afford to offer the Agent a less generous reduction in sentence because the Agent does not have to deal with the probability of post-regime survival punishment  $P$ . This also makes the Agent always better off gathering evidence, provided there is a sufficiently large probability of organic regime change ( $q \geq \beta P / (1 - \beta)(R - r_1)$ ).

**PROPOSITION 2:**

Offering leniency to agents who report post regime-collapse will incentivize the collection of evidence at a lower cost to the Prosecutor, provided the probability of regime collapse without reporting is high enough ( $q$  is large). In this case, the optimal reduced sanction will have the following value:

$$r_1^* = R - \beta P / (1 - \beta) q$$

The reduced sanction will be inversely proportionate to the probability of regime change without reporting as well as to the size of retaliation punishment (the more likely it is that the regime will collapse without reporting and the more severe the retaliation punishment, the smaller the eventual punishment needs to be). Furthermore, with bigger probabilities of detection prior to reporting ( $\beta$  is large), the Prosecutor needs to offer more generous reductions in sentence to incentivize agents to collect information. Smaller probabilities of detection will necessitate allowing reporting post-regime collapse to obviate the need for positive rewards.

With a well-designed leniency program in place, collecting evidence becomes essential for the Agent's survival whenever the probability of regime change in the absence of reporting is so high that it offsets any dangers of leader retaliation.

The Agent reports to the authorities prior to regime collapse whenever to do so reduces his expected punishment considerably given the probability of regime collapse  $Q$ . With high probabilities of collapse  $Q$  and considerable reductions in sentence, the Agent prefers to report early. This is because the threat of Leader punishment post regime survival is less. With good quality evidence, Agents are better off reporting early so long as the reduction in opposition punishment reflects the enhanced probability of regime change.

### **The Effect of Confidentiality on the Agent's Incentives to Gather Evidence**

In accordance with the set-up of the Model in Chapter 4, I assume that the Leader in a confidential program that does not publicize the name of agents who reported to the ICC Prosecutor errs in his evaluation of whether an agent reported or not post reporting with a probability  $\alpha$ .

Under a confidential leniency program, the Agent's overall utility from collecting evidence is given by:

$$U_c = w - \beta(P + qR) - (1 - \beta)(Qr + (1 - Q)(1 - \alpha)P)$$

And the Agent's utility from not collecting evidence will be given by:

$$U_{nc} = w - qR - \alpha(1 - q)P$$



Therefore, the condition for collecting evidence becomes:

$$w - \beta(P + qR) - (1 - \beta)(Qr + (1 - Q)(1 - \alpha)P) \geq w - qR - (1 - q)\alpha P$$

This requires that the optimal reduced sentence ( $r^*$ ) to have the following value:

$$r \leq ((1 - \beta)(qR - (1 - Q)(1 - \alpha)P) + \alpha(1 - q)P - \beta P) / Q(1 - \beta) \equiv r^* \quad (5.8)$$

which is less stringent than condition (5.3) above.

When the agent is allowed to report following regime collapse, the condition for collecting evidence becomes:

$$w - \beta(P + qR) - (1 - \beta)qr_1 \geq w - qR - (1 - q)\alpha P \quad (5.9)$$

This requires that the optimal reduced sentence ( $r_1$ ) to have the following value:

$$r_1 \leq (1 - q)\alpha P + (1 - \beta)qR - \beta P / (1 - \beta)q \equiv r_1^* \quad (5.10)$$

which is also less stringent than (5.7) above.

As can be anticipated from the results of the analysis in Chapter 4, a confidential leniency program allows the Prosecutor to offer a less generous reduction in sanction to the Agent to incentivize the collection of evidence including when reporting is allowed post regime collapse. With higher probabilities of assessment errors, the Prosecutor can offer a lesser reduction in opposition punishment. Otherwise, all the other factors remain relevant.

**PROPOSITION 3:**

Provided it causes the Leader to retaliate with a fixed probability of error, the adoption of a confidential leniency program that keeps the identity of reporting agents secret is always more efficient since it allows the Prosecutor to offer agents less generous reductions in opposition punishments in exchange for collecting and reporting information (even after the regime collapses).

### 5.4.3 Summary of the Results

In conclusion, if no leniency program is in place to reward the reporting of hard evidence by subordinates in a particular political structure implicated in the commission of crimes falling under the jurisdiction of the ICC, lower-level perpetrators will have no incentive to gather evidence of the culpability of top-level officials. This is particularly true if there is a risk of detection by the leader of such organization of attempts by subordinates to collate evidence. Where such a risk does not exist, agents may be indifferent between collating evidence and not but they will not report it to the authorities in any event since this entails a higher a probability of punishment post regime collapse which needs to be ameliorated by an effective leniency program.

Where a leniency program is instituted, agents may have the incentive to gather and report hard evidence, provided the protection afforded against opposition punishment is large enough. The reduction in punishment granted has to offset the risk of retaliation punishment by the organization both prior to and following the reporting of evidence in the event the regime does not collapse. The higher the probability of detection and pre-emptive punishment by the organization for evidence retention, the more generous the protection from opposition punishment needs to be. However, and in order to ensure that leniency programs do not unnecessarily incentivize the commission of crime, they have to be designed so that only minimum concessions are afforded to reporting agents.

If the Prosecutor allows for leniency post regime collapse, agents are more likely to engage in gathering evidence incriminating their superiors. The protection from punishment afforded in this case can be minimal as long as it offsets the risk of detection and pre-emptive punishment against subordinates. While the benefit of having the evidence in this scenario will not be to enhance the probability of regime collapse, such evidence can be used by the authorities to bolster fact-finding at trial. However, in order to encourage reporting as early as possible, the protection afforded to late comers must be kept as limited as possible while substantial protection needs to be afforded to agents who report high quality evidence prior to regime collapse. This asymmetry in protection should increase with increased probabilities of detection within the organization.

Having a confidential leniency program which may lead to assessment errors by the leader of the political organization as to who the cooperating subordinates are will enhance the positive effect of leniency on the incentives of agents to gather and report incriminating

evidence. A confidential program will also make it less costly for agents to report prior to regime collapse which may afford the prosecutor the chance to offer less than generous protection from opposition punishment for cooperating perpetrators. This is because some agents who report may escape possible retaliation punishment from the organization provided the regime does not collapse despite the high quality of reported evidence.

### ***5.5. Policy Implications***

By endogenizing the decision to collate evidence by subordinates in a governmental structure implicated in the commission of atrocities, the Model set out in this chapter attempts to demonstrate the need to offer such agents appropriate protection from punishment post regime collapse in order to induce the gathering of hard evidence incriminating the leadership. A prosecutor can ensure the availability of valuable evidence for the prosecution of leaders by introducing an appropriate leniency program which must take into consideration the probability of retaliation against unfaithful agents by the leader of the organization.

In order for a leniency program to encourage agents to collect evidence against their leaders, it must have the following characteristics:

- (i) The leniency program must reward highly useful evidence with generous reductions in punishment.
- (ii) In the event the retaliation punishment meted out by the leader for betraying the organization is severe, the reduction in punishment offered to cooperating subordinates should be generous enough to offset the retaliation of punishment.
- (iii) With high probabilities of detection by the leader prior to reporting, more generous reductions in punishment will ensure agents have the required incentives to gather evidence.

For the purpose of ensuring the availability of high quality evidence against leaders at the trial stage, the Prosecutor should allow for post regime-collapse reporting by subordinates. By offering leniency to agents who report after the regime falls, the Prosecutor will ensure that more agents are better off collecting evidence that implicates the leadership in order to trade it off for punishment reductions when they are under threat of opposition punishment. Allowing for post regime-collapse reporting will be particularly useful when the probability of

regime change without reporting is high. In the event the Prosecutor is concerned about the effect of granting punishment reductions on the incentives of subordinates to commit crimes (and indeed on the overall cost of crime) (see the discussion in Chapter 4), offering modest reductions in punishments to agents who come forward after the regime falls may be optimal. Even though in this case the Prosecutor will not be able to influence the probability of regime change, the advantage will be ensuring the availability of strong evidence of culpability at trial. This in turn is likely to enhance the credibility of the process of criminal prosecutions for international crimes.

Generally speaking, the adoption of a confidential leniency program in which the identity of cooperating subordinates remains censored will be more conducive to the gathering and reporting of evidence by such agents. In addition, confidentiality is likely to allow the Prosecutor to offer more modest protection from opposition punishment compared to publicized programs.

## ***5.6. Conclusion***

Asymmetric leniency programs targeted at lower-level perpetrators can be utilized in the fight against atrocities and war crimes not just to promote deterrence but also to enhance the fact-finding function of international criminal institutions. The experience of the ICC, as well as that of other institutions, demonstrates the value of tangible and independently verified evidence of the commission of crimes falling under the jurisdiction of the Court. The ICC owes its first verdict for child conscription charges to a video recording showing the indicted rebel leader addressing under-age soldiers. At the ICTY, most trials failed to generate the kind of political debate necessary to break-away from the disturbing past atrocities of the Yugoslav wars until a video showing the execution of Muslim men at the hands of a Serbian paramilitary unit was shown in open court. The acquisition of such irrefutable evidence of gross violations of human rights by the ICC Prosecutor is more likely through the cooperation of insiders to the political structures involved in planning and sanctioning such crimes. The complexity of these crimes as well as the difficulty inherent in demonstrating the link between their execution on the grounds and the role of top-level officials in their instigation makes the availability of such evidence essential to improving the effectiveness of the ICC. In addition to proving the guilt of key political figures, such evidence has the potential to augment other prosecutorial strategies, such as plea-bargaining.

The decision model advanced in this chapter explored the effects of asymmetric leniency programs on the incentives of lower-level perpetrators to gather evidence. It suggests, in line with the established literature, that institutionalizing leniency will encourage insiders to collate evidence of criminality in order to trade it in for protection or sentence reductions. To be effective, such programs must weigh the concessions provided to co-operators against any risk of retaliation whether before or after reporting. The analysis indicates the desirability of a leniency program that rewards the submission of hard evidence even after the collapse of the organization in question. In addition, confidentiality was shown to have a positive effect both on the incentives to collate evidence and on its early reporting to the prosecutor.

## CHAPTER 6: Conclusion

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The International Criminal Court (ICC) was set up by the state parties to the Rome Statute to end impunity for and contribute to the prevention of the most serious crimes of concern to the international community. Yet, the Court suffers from a debilitating enforcement problem that threatens to render its role as the protector of individual rights in the new humanitarian world order untenable. In addition to its enforcement problem, an incessant relegation of the political concerns of affected populations in post-conflict societies in the process of conducting international criminal prosecutions threatens to reduce the whole institution to irrelevance.

The reformulation of the debate about international criminal justice to include concerns for enabling democratic transitions in post-conflict societies is both viable and necessary for the realization of more peaceful and just political orders capable of ensuring respect for human rights on a sustainable basis. Given that the majority of contemporary conflicts are likely to be internal wars which often erupt in response to authoritarian rule or in resistance of repressive and unrepresentative governments, the attainment of the critical goals of International Criminal Law (ICL) is inconceivable without the existence of effective democratic institutions at the level of the nation state. Despite the apparent divergence between the tasks of attaining justice for the victims of atrocities and that of nation building, a pragmatic approach to the administration of international criminal justice as advanced in this Thesis may achieve the former while providing the opportunity to ensure the necessary democratic foundation for realizing the latter.

The literature on the effects and the effectiveness of international criminal prosecutions remains bifurcated along lines largely defined by the peace vs. justice debate. The deep ideological impasse between the irreconcilable positions of realism and idealism on the question of the ICC and its potential produced unfounded pronouncements for and against the Court. This has in turn translated into casual and generic prescriptions for the successful administration of international criminal justice. Between advocating the prosecution of international crimes at any cost and insisting on the abandonment of the quest for justice in favour of peace, the extant literature has, by and large, either neglected or assumed away the question of enforcement. It is of note that this appears to be the case despite the fact that the divergent strands of legal and transitional justice scholarship seem to concur on the necessity of removing political spoilers for prospects of peace, stability and ensuring greater

respect for human rights in post-conflict societies. Given this consensus, a convincing solution to the ICC's inability to bring the guilty to justice is perhaps the key to bridging the gap between these two opposing camps.

This Thesis contributes to the debate by assessing the potential for success of the ICC given its lack of enforcement powers. Such assessment must necessarily be carried out with reference to the institution's own goals as well as the overarching aims of ICL as a discipline. As straightforward as this proposition may be, and despite the exponential growth of the field, the legal and transitional justice literature struggles to define a theoretical basis for the international criminal justice regime against which the effectiveness of the ICC can be measured. As a necessary foundation for assessing the impact of the ICC, a conceptual framework was advanced in Chapter 2 to postulate that the two critical goals of this body of law are limited to ensuring international peace and stability and promoting the protection of fundamental human rights. It was, in addition, proposed that the success or failure of international criminal institutions such as the ICC must be judged not in relation to the various policy objectives claimed for international prosecutions (e.g. deterrence, reconciliation and truth-telling), but with reference to these institutions' ultimate ability to contribute to preserving and restoring international peace and order as well as to protecting inalienable individual rights.

Against the above conceptual understanding, the main proposition advanced in Chapter 2 was that the international criminal justice project unwittingly overlooked the possible benefits of integrating concerns for genuine democratic transformations in post conflict societies and ignored the value of democracy as an important implement in the fight against atrocities. This is because the operation of ICL by itself is incapable of ensuring lasting peace and greater respect for human rights since the original institution of the regime was intended to complement rather than to supplant a rule of law nation state. While it is not possible for the prosecution of a handful of perpetrators for crimes committed in select jurisdictions at particular times (and often subject to the exercise of the arbitrary political powers of members of the Security Council) to fulfil the political aspirations of affected populations in post-conflict societies, international criminal institutions such as the ICC ought to carry out the administration of international criminal justice with explicit concern for facilitating democratic transitions by these communities. Enabling political transformations along democratic lines in the wake of internal conflicts by the ICC is possible through the exercise of prosecutorial discretion in a politically sound manner; not just by selecting the

right conflict to be involved in, but also by selecting the right political actor or actors to prosecute.

The first game-theoretical model advanced in Chapter 3 of this Thesis provided a response to and a critique of the suggestion emanating from limited International Relations scholarship that the ICC may have a deterrent effect because of its mere existence and despite its lack of enforcement powers. The results of the analysis of the model presented in this chapter indicated that by insisting on prosecuting opposing groups in situations where government leaders themselves committed international crimes, the Court may undermine its own self-enforcement potential as predicted in the literature. By imposing additional sanctions on the opposition, the Court risks paralysing some of the less capable of rebel forces, thereby removing an effective source of disincentives to commit atrocities by leaders. While it would be agreeable for the Court to indict such actors for the commission of atrocities if it is capable of replacing such disincentives with equally effective criminal sanctions, the problematically low probabilities of enforcement endemic to ICC arrest warrants suggest that the Court is likely to do more harm than good by going after such groups. Having said that, the analysis in Chapter 3 also showed that the Court might be able to deter atrocities as well as facilitate political transitions in post-conflict countries if its indictments are used to weaken the grip of a criminal government on the reins of power.

Building on the insights emerging from the analysis in Chapter 3, Chapter 4 explored the viability and possible effects of utilizing leniency programs in the fight against atrocities. The emphasis in this chapter was on the use of asymmetric leniency programs targeted at low-level perpetrators to induce reporting of international crimes committed by government leaders. The intuition behind the analysis presented in this chapter was that the revelation of reliable information of the culpability of key political figures in the commission of atrocities may provide the opposition with a new rallying point for affecting regime change. As have been argued throughout this Thesis, given the ICC's lack of enforcement powers, regime change might be the only avenue for ensuring the removal of political spoilers and consequently for bringing indicted individuals to justice. Furthermore, leniency programs that reward insiders have been shown (in anti-trust law enforcement and in the fight against organized crime) to destabilize organizational structures which are involved in activities violating the law. Such destabilization, if it follows in the context of ICL enforcement, will increase the price tag on the commission of atrocities by governments and will make such ventures more hazardous for leaders. In addition, and because what is in issue is the



provision of concessions to minor perpetrators, it is assumed that the adoption of such programs would not compromise the Court's quest for justice against key political figures instigating international crimes. Therefore, while the adoption of asymmetric leniency programs is likely to enhance the administration of international justice, it will have a minimum effect on undermining the legitimacy and credibility of the Court.

Enlisting valuable lessons from the experience of anti-trust law enforcement and the fight against organized crime, the argument that Chapter 4 advanced is that the use of strategies common to these fields of law enforcement is warranted in the context of international criminal prosecutions since the political structures involved in the commission of international crimes often display the kind of organizational characteristics common to cartels and organized crime syndicates. Furthermore, I showed that ICTs (such as the ICTR and ICTY) have sometimes engaged in offering leniency to defendants in exchange for information, evidence or testimony that implicates other defendants under the more acceptable guise of plea-bargaining. Given this, as well as the significant effect of offering sentence reductions in exchange for cooperation on the ability of these tribunals to affect both their truth-seeking function and to secure convictions, the use of leniency in international criminal prosecutions should be acceptable, accepted and institutionalised.

The game-theoretic model set out in Chapter 4 is a principal-agent model of the interaction between a government leader and a subordinate. Under institutional conditions that allow prosecutors to offer reductions in (or protection from) punishment in exchange for information on the commission of atrocities by leaders, the analysis revealed that asymmetric leniency programs that target lower-level perpetrators could have an overall deterrent effect on leaders. This deterrent effect follows from two sources. First, I assumed that receiving information about the criminality of the political leadership will affect perceptions of the conflict held by local populations and may, therefore, make regime change through peaceful resistance more likely. A higher probability of regime change makes the opposition punishment to be levied on the leader following regime change costlier *ex ante*. Second - and this is the effect largely ignored by the literature - providing for a leniency program that encourages insiders to report on leaders' crimes imposes additional costs on the leadership by compelling retaliation against unfaithful agents. What the literature does not take into account is that retaliation by the leaders against agents may be costly for leaders as well as for agents. This effect is exacerbated by having a leniency program that provides for keeping the identity of reporting agents secret provided this causes the leader

to retaliate against agents with a fixed probability of error when he is uncertain which of the agents reported.

I identified three possible benefits from using leniency in the context of international criminal prosecutions; (i) by facilitating the acquisition of credible accounts of the crimes from minor actors, leniency programs can positively affect deterrence of leaders of the organization by influencing the probability of regime change following the publication of these accounts, (ii) the availability of valuable information about the commission of the atrocities, which may otherwise be difficult for institutions such as the ICC to independently acquire, will enhance the truth-finding function of the court; and (iii) allowing low-level officials to come forward and self-report in exchange for more lenient punishments for their roles in the crimes is likely to destabilize the political structures instigating these crimes by creating mistrust between its members and forcing the leaders to retaliate against reporting agents.

Releasing particularly reliable accounts of crimes committed against part of the population in these countries may serve as a useful focal point for political resistance. Such accounts are not likely to become available to the ICC Prosecutor except through insiders to the government. This is because of the severe evidentiary burdens the Court has to bear in its investigations of what are in essence complex crimes in an ever expansive jurisdiction. The ICC has already suffered its share of evidentiary weaknesses in its initial prosecutions. Without innovative approaches to law enforcement such as leniency, this state of affairs is likely to persist, thereby precluding fulfilment of even the most modest goal of compiling a historically accurate record of atrocities whenever they may occur.

However, if leniency programs are to be adopted they have to be designed so as to encourage reporting without making the option of committing atrocities in the first place unnecessarily attractive. Even though offering minor actors in a given political conflict the option to exchange information for reductions in punishment might not strictly speaking impose a huge cost on institutions intent on pursuing those most responsible for international crimes, it may reduce the cost of engaging the criminal behaviour by subordinates which will also reduce the compensation payable by leaders to such subordinates in order to execute the crimes. This means that there is a risk that such programs while generating valuable information, may reduce the overall cost borne by leaders for perpetrating crimes. To guard against this risk, the concessions to lower-level

perpetrators must be kept to a minimum or at such levels as would just be sufficient to induce reporting. However, the adoption of confidential leniency programs, which guard the identity of reporting agents, may provide the ICC Prosecutor with a bigger margin for rewarding the cooperation of minor perpetrators.

In Chapter 5, I extended the analysis of leniency programs further by examining the factors that might lead minor perpetrators to compile their own hard evidence of the commission or instigation of international crimes by government leaders. The importance of the availability of tangible evidence of these crimes cannot be overstated following the ICC's case against the rebel leader Lubanga.<sup>1</sup> This case eventually turned on video evidence showing the defendant addressing a rally in which child soldiers were present. International crimes are particularly complex and one of the difficulties inherent in their adjudication is demonstrating the link between the execution of criminal acts by minor actors and their instigation by top-level officials. Tangible evidence such as video tapes and photographs is naturally of better probative value in such circumstances. In addition, such evidence can also help shape internal political debates about the crimes. While testimonial evidence may be more susceptible to denials and detractions, hard evidence linking the leadership to crimes on the ground is likely to stimulate active political discussions of the conflict if it cannot be explained away by governments.

The model advanced in Chapter 5 is a simple decision model that integrates the decision to collect hard evidence by the agent as opposed to having it determined by a random probability as was the case in Chapter 4. The analysis advanced indicated the desirability of leniency programs that reward low-level perpetrators for the surrender of hard evidence of atrocities whether before or after the political structures in which they are involved collapse. Such programs will have to cater for the risk of retaliation by leaders. Having an explicit policy in this respect is likely to encourage insiders to exert the effort to gather evidence which may be contemporaneous and of very high probative value.

In order to overcome the serious dichotomies between the aspirations and achievements of international criminal justice, institutions such as the ICC need to integrate concerns for the political transformations in post-conflict societies along democratic lines. Only by doing so can these institutions hope to offer the kind of justice that goes beyond retribution and

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<sup>1</sup> *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Judgment pursuant to Article 74 of the Statute (Mar. 14, 2012) <http://www.icc-cpi.int/iccdocs/doc/doc1379838.pdf> [644] (last visited July 26, 2014).

towards the accommodation of the political aspirations of affected populations in these societies. The suggestion in this Thesis is that through the adoption of pragmatic and tried law enforcement strategies such as leniency, the ICC may be able to do more with its resources than just punish a handful of perpetrators for the extraordinary crimes they committed.

The theoretical models advanced in this Thesis provide a much needed formalization of a number of insights and arguments regarding the effects and the effectiveness of the ICC and similar international criminal justice institutions. They also offer counterintuitive insights which may not be easily discernible if not for the formal modelling. As useful as this may be in questioning underlying assumptions and augmenting everyday intuition on the consequences of the international criminal justice project, robust conclusions about the likely effects of international criminal prosecutions on the internal politics in post-conflict societies can only be definitively drawn following empirical testing. While the data required to conduct such verification may not become available for some time, empirical studies investigating the viability of the theoretical models advanced herein may offer a possible direction for future research building on this Thesis.

A number of the variables identified as influencing the commission of atrocities by leaders in Chapter 3 can be verified by empirical investigations of situations of internal conflict. For example, the fragmentation of the opposition in Syria may provide interesting evidence of the relationship between opposition group strength, the cost of violence and such group's tendency to commit atrocities.<sup>2</sup> To illustrate the significance of such enquiry, it could be argued that while the rebel faction of the Islamic State of Iraq and Syria (ISIS) may perceive itself as powerful enough to endure any future prosecutions by the ICC for the commission of atrocities during the Syrian conflict, other opposition groups may shy away from using extreme violence because of the legitimacy costs involved (the loss of support from the civilian population).<sup>3</sup> Furthermore, and perhaps due to their ideological tilt, rebel groups such as ISIS may perceive the expected payoffs from engaging in atrocities (e.g. the

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<sup>2</sup> See for example, Peter Beaumont, Growing strengths of Syria's Islamist groups undermines hopes of ousting Assad, *The Guardian (the Observer)* (December 14, 2013, 15:21 GMT), <http://www.theguardian.com/world/2013/dec/14/syria-islamist-militants-growing-strength> (last visited July 29, 2014).

<sup>3</sup> *Rule of Fear: ISIS Abuses in Detention In Northern Syria*, Amnesty International (19 Dec 2013), <http://www.amnesty.org/en/library/asset/MDE24/063/2013/en/32d380a3-cc47-4cb6-869f-2628ca44cb99/mde240632013en.pdf> (last visited 29 July 2014).

establishment of a regional Islamic union of states) as worth the risk of prosecutions.<sup>4</sup> This can be explored through the use of qualitative analysis by interviewing decision makers of the various opposition groups involved in the conflict. If the link is confirmed, further investigation of the relationship between the overall tendency of the opposition groups to commit atrocities (which is based on whether or not they are able to absorb the cost of violence) and the commission of atrocities by leaders may be explored.

In addition to the above, the differing approaches of the ICC to conflicts in Sudan<sup>5</sup>, Uganda<sup>6</sup> and the Democratic Republic of Congo<sup>7</sup> may provide a good opportunity for gauging the effect of the ICC on internal conflicts. This is because while the ICC largely refrained from prosecuting rebel groups in Sudan, it limited its prosecutions to rebels in the other two countries. An exploration of the effect of ICC intervention in these countries on the intensity, prolongation or the diffusion of rebellion may verify the thesis that the ICC may quell some opposition groups from rebelling. This is because the perception in Sudan, as opposed to the other two countries, is likely to be that if the ICC is to intervene; it will do so on the side of the rebels. The model proposed in Chapter 3 may also explain the existence of inconsistencies in observed deterrence effects in these countries if any. While it is expected that the intervention of the Court in Sudan would at least result in reducing or putting a temporary stop to government crimes in Darfur (the limited situation which is under scrutiny by the ICC), it is not likely that the Court's activities inhibited violations of human rights perpetrated by the governments in Uganda and Congo. If the link between government crimes and the prosecution of opposition groups proposed in this Thesis is empirically verified, the ICC should, on principle, refrain from prosecuting opposition groups in situations where the government leaders they face are suspected of gross violations of human rights.

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<sup>4</sup> Beaumont n (2).

<sup>5</sup> *Situation in Darfur, Sudan*, Case. No. ICC-02/05, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205.aspx) (last visited July 29, 2014).

<sup>6</sup> *Situation in Uganda*, Case. No. ICC-02/04, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx) (last visited July 29, 2014).

<sup>7</sup> *Situation in Democratic Republic of the Congo*, Case. No. ICC-01/04, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx) (last visited July 29, 2014).

Further theoretical explorations of pre-arrest bargaining at the ICC may also be a natural extension of the work in this Thesis. Unlike the leniency models advanced herein, a bargaining model of the Court will entail the offering of sentence reductions to the key perpetrators of international crimes to secure their surrender. Coupled with the appropriate leniency program for lower-level officials, pre-arrest bargaining may be a viable option for securing the arrest of political spoilers. The intuition being that provided the effect of destabilization attributed to leniency programs in this Thesis follows, leaders may choose to approach the Court to self-surrender whenever the possibility of insider reporting makes regime change more likely.

The economic analysis of ICL is in its infancy and the field is ripe for further exploration of the possible ramifications of the international criminal justice project. This Thesis was largely concerned with the issue of deterrence. The effect of the regime on state compliance may also provide a further avenue for research. In addition, exploring the political economy of international criminal law may be in order. Questions concerning the independence of the ICC Prosecutor given the Court's reliance on funding from developed countries would fall under this field of study. Developments in behavioural law and economics may also be helpful in refining the conclusions of the models advanced herein.

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