Bringing the Guilty to Justice: Can the ICC be Self-Enforcing?

Nada Ali

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Bringing the Guilty to Justice: Can the ICC be Self-Enforcing?

Nada Ali*

Abstract

Even though the International Criminal Court was instituted with the express goal of ending impunity, its lack of enforcement powers threatens to undermine its credibility as well as the effective administration of international criminal justice. While proponents of the court are content to rely on questionable means of enforcement such as military interventions, ICC skeptics are adamant that granting amnesties will ensure the removal of dictators from power. But, could there be a median solution between the extremes of at-any-cost accountability and outright exemption from punishment? Game theoretic analysis of the ICC offers a glimmer of hope for the effective enforcement of arrest warrants. A model developed by Michael Gilligan in 2006 suggests that in certain conditions the court may be self-enforcing and may have a deterrent effect. This, as Gilligan posits, occurs because the ICC provides corrupt leaders with a cogent but costlier exit strategy than asylum in the event of imminent regime collapse. However, the model does not account for the fact that the ICC prosecutes leaders and opposition groups alike and may therefore quell some opposition groups from rebelling. I develop a model of incomplete information involving the interaction between a leader and an opposition group to examine this effect. The results suggest that the ICC could inhibit certain opposition groups from rebelling, thereby positively affecting the survival rate of corrupt regimes.

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* Nada Ali is a Ph.D. candidate at the Law School of the University of East Anglia, United Kingdom. The author is indebted to her supervisors Morten Hviid and Peter Whelan for the stimulating discussions that led her to this research and to writing this Article. She is also grateful to them for suggesting improvements to the Article's earlier versions. The usual caveat applies.
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I. INTRODUCTION

While objectionable on a number of grounds, the Kony 2012 Campaign, which was recently 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. 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.

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, 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. The Chamber issued the warrant to secure Kony’s arrest and to “prevent him from continuing to commit crimes within the jurisdiction of the Court.” 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

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4 The Kony 2012 Campaign, supra note 2.

5 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.” Id. art. 14(a).

6 Situation in Uganda, Case No. ICC-02/04-01/05-53 ¶ 37.

7 Id. ¶ 43.
application” 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-three arrest warrants issued since the inception of the court in 2002, twelve suspects still remain at large.9 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 that include the crime of Genocide.10 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.11 The slow pace of the court in bringing the guilty to justice is particularly perturbing because of its implication for the continuation of atrocities.12

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,13 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.

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8 Id. ¶ 45.
12 Alex Whiting, In International Criminal Prosecutions, Justice Delayed Can Be Justice Delivered, 50 HARV. INT’L L.J. 323, 326 (2009) (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, 31 MICH. J. INT’L L. 79, 117 (2009) (determining that the ICC is much faster in its pre-custody operation than the International Criminal Tribunal for the Former Yugoslavia (ICTY)).
13 Rome Statute, supra note 5, at Preamble.
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" 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. 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. Another important input of this literature is its implicit inclusion of regime change in the question of ICC effectiveness. Integrating concerns about

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17 Gilligan, supra note 15, at 937, 942–45. As will be discussed further in section III.B, 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.
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.” 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. 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 Article 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 group to show that the ICC is, in certain conditions, self-defeating and may incentivize further crimes by leaders.

The remainder of this Article includes a review of the literature on the enforcement of international criminal law with regards to arrest warrants that appears in Section II. Section II is divided into three subsections: Legal Scholarship (II.A), Game Theoretic Literature (II.B), and a Note on Regime Change (II.C). The game theoretic model on the interaction between a leader and an opposition group I developed in response to Gilligan’s Model (the Model) is introduced in Section III. This Section includes five subsections on: Motivation (III.A), Structure of the Game (III.B), Players and Their Payoffs (III.C), Discussion and Analysis (III.D), and Summary of Results (III.E). Practical and policy implications of the Model are set out in Section IV followed by a Conclusion in Section V.

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19 This is contrary to the implicit assumption in Gilligan’s model (see supra note 15) that the probability of regime change, and consequently the threat of opposition punishment, is independent of the ICC and unaffected by its operation. By positing that regime change is determined exogenously to the model, Gilligan discounted the effect of the ICC on the behavior of opposition groups. See Section II.B, supra at 300, for further details.
The legal literature on the International Criminal Court (ICC) has either neglected or assumed away the substantial hurdles involved in international criminal law enforcement. 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 Subsection A below. Subsection B 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.

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. As Cassese explains, allowing indicted individuals to maintain their political power and remain free will discredit the work of international criminal institutions. Furthermore, it is unlikely that unenforceable sanctions will have a considerable deterrent effect on potential perpetrators.

A. 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

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the operation of the court. 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. He argues that this model of international criminal adjudication invariably results in excessive reliance on state cooperation that is, in turn, not always forthcoming. Indeed, just like the ICTY and its sister tribunal the International Criminal Tribunal for Rwanda (ICTR), the ICC has its own statutory provisions detailing the obligations of states to cooperate with the court. 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, it is widely acknowledged that securing state cooperation is in practice very difficult and is often hampered by political realities both in the national and international spheres.

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. Cassese further identifies this dependence on state cooperation as the “principal problem with the enforcement of international humanitarian law” in the context of ICTs. 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

26 Id. at 10.
28 Rome Statute, *supra* note 5, at arts. 86, 89(1), & 92(1).
29 Payam Akhavan, *Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?,* 21 CRIM. L.F. 103 (2010) (arguing that state cooperation is more likely in cases of self-referrals under Article 14 than otherwise).
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.\textsuperscript{33} Bassiouni observes that obligations to assist ICTs are in reality rarely complied with because there are no consequences for breaching the duty to cooperate.\textsuperscript{34} 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.\textsuperscript{35} This lack of enforcement bite is not unique to the ICC. Rather, it is a standing feature in the enforcement of ICL.\textsuperscript{36} 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 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.\textsuperscript{37} Damaska notes that the design of such tribunals failed to take into account the “operational realities of criminal law enforcement.”\textsuperscript{38}

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


\textsuperscript{35} Rome Statute, \textit{supra} note 5, art. 87(7).

\textsuperscript{36} \textit{See} ROBERT CRYER ET AL., \textit{AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE} 2, 518 (2d ed. 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 \textit{bis} of the Tribunal's Rules of Procedure and Evidence), ALEXANDER ZAHAR \\& GORAN SLUITER, \textit{INTERNATIONAL CRIMINAL LAW: A CRITICAL INTRODUCTION} 476 (2008) (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); Goran Sluiter, \textit{Cooperation of States with International Criminal Tribunals}, in \textit{THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE} 187, 198 (Antonio Cassese ed., 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”).


\textsuperscript{38} Damaska, \textit{supra} note 20, at 23.
Bringing the Guilty to Justice

of Sudan, 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. 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. 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 called on all members not to cooperate with the court because the request in question was not acceded to. 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. 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. In addition to the fact that state interests may not coincide with the interests of justice, Barnes argues that the failure of state parties to cooperate with the court because the request in question was not acceded to. The difficulties inherent in compelling state cooperation 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

44 Pati, supra note 16, at 274. See also the Resolution of the Arab League No. 464/21 dated 30/03/2009 ¶ 4, 6.
force as is permitted under the mandate of the United Nations. Even an intransigent supporter of the ICC like 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. 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. 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.

The recent political stalemate at the U.N. 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 demonstrate the danger in relying on an international legal system that is tempered only by political will to affect enforcement of international criminal justice. While it is not possible to institute economic and political sanctions indefinitely, 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

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46 Scharf, supra note 23, at 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).


49 Cassese, supra note 22, at 17.


51 Scharf, supra note 23, at 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).
vulnerable before hostile powerful states such as the United States. 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. 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.

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 of action by the “international community.” 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.

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

53 BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 61 (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.
54 Id.
55 Id. at 61.
57 Id. at 1198–99. To the best of my knowledge, Nzelibe is the only legal work addressing this issue.
powers and the inability to bring suspects to custody, use should be made of more innovative approaches such as amnesties. Wippman, for example, observes that unless the deterrence hypothesis often invoked in accountability advocacy is sufficiently proven, an uncompromising quest for justice is unreasonable. 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. 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. 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. 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 supporters and opponents prevented any serious dialogue on the issue. 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, it could be argued that a dogged adherence to the notion of accountability may prove counterproductive.

61 Id. at 410.
63 Kim & Sikkink, supra note 62, at 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); Tricia D. Olsen, Leigh A. Payne, & Andrew G. Reiter, The Justice Balance: When Transitional Justice Improves Human Rights and Democracy, 32 HUM. RTS. Q. 980, 980–1007 (2010) (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).
64 Akhavan, supra note 21, at 12–13.
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.\textsuperscript{65} 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.

B. 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.\textsuperscript{66} Using the tools of game theory to formulate propositions about the possible effects of the ICC on the behavior of regime leaders, a limited scholarship emerged to lend a much-needed formalization to existing arguments in the field.\textsuperscript{67}

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.\textsuperscript{68} This idea, which informs the economic analysis of law (the field of law and economics or L&E), 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.\textsuperscript{69} 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


\textsuperscript{67} See Gilligan, supra note 15, at 941.


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 is affected by what the ICC\(^1\) does as well as what it is likely to do in a given situation. A leader’s behavior 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 clarifying the likely effects of different changes a more informed (political or legal) decision can be taken.\(^1\)

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

Using a traditional economic 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.\(^2\) 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.\(^3\) 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).\(^4\) 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.

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\(^{70}\) For purposes of this Article, 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 supra note 16, at 366–70, the focus of the Article is on the exercise of prosecutorial discretion.


\(^{72}\) Daniel Sutter, *The Deterrent Effects of the International Criminal Court*, INTERNATIONAL CONFLICT RESOLUTION 9, 11–19 (Stefan Voigt, et. al. eds., 2006).

\(^{73}\) Id.

\(^{74}\) Gilligan, supra note 15, at 942–51.
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.\textsuperscript{75} Furthermore, Ku and Nzelibe show that in most cases, political leaders face very severe domestic punishments in the wake of a coup.\textsuperscript{76} 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.\textsuperscript{77} By 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. 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 1).

\textsuperscript{75} Death of a Dictator, HUMAN RIGHTS WATCH, (Oct. 17, 2012), http://www.hrw.org/node/110724/section/2.


\textsuperscript{77} The text of Article 77(1) of the Rome Statute, supra note 5, 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

(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, 2 PUNISHMENT & SOC'Y 263, 266 (2000).
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 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. 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. 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. In light of the

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79 See Gilligan, supra note 15, at 935–36 (citing examples of states that offer dictators asylum).

80 Id. at 942–51.
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 behavior 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 III below, I examine the effect of the ICC on opposition group behavior to determine whether or not 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. Firstly, he highlighted the central role for self-surrender in the discussion about the effectiveness of the ICC. Secondly, 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. 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. 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 Subsection II.C below.

C. A Note on Regime Change

In addition to the problematic prospects for the enforcement of ICC warrants, the international criminal justice regime suffers from a number of

82 Id. at 19.
deficiencies that undermine its potential as a freestanding response to political violence. This is particularly the case with respect to internal conflicts that now inform the majority of situations before the ICC. 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. 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. 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. 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. 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.

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. 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, often undeservedly. Branch notes that the ICC was widely criticized for its deficiencies that undermine its potential as a freestanding response to political violence. This is particularly the case with respect to internal conflicts that now inform the majority of situations before the ICC. 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. 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. 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. 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. 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.

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intervention in Uganda because it sided with a known oppressive regime which has itself been implicated in atrocities. 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. 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,” 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. It is this dependency that Mamdani finds undesirable and akin to obliterating the concept of citizenship in developing countries. 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.”

In addition to the centrality of regime change to the attainment of a broader conception of justice that includes political justice, 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 and Snyder and Vanjamuri allude to the fact that regime change was essential to securing the arrest of indicted criminals in both the former Yugoslavia and Rwanda.

92 Branch, supra note 18, at 183–85.
93 Id. at 190.
94 Akhavan, supra note 21, at 30.
95 Branch, supra note 18, at 194.
98 Branch, supra note 18, at 193.
99 Akhavan, supra note 21, at 8–9.
100 Snyder & Vanjamuri, supra note 58, at 22–25.
III. THE MODEL

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. 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. 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. 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. 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 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.

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 behavior of opposition groups, the intuition being that this may in turn affect a leader’s cost-benefit calculus when it comes to committing crimes. This model is intended to add to the debate on the ICC’s self-enforcement potential as posited by Gilligan. As noted in Section II.B above, Gilligan’s Model remains incomplete as it does not make allowance for the fact that the ICC sanctions apply equally to leaders and opposition

101 Gilligan, supra note 15, at 937, 943; Ritter & Wolford, supra note 81, at 19–21; Ku & Nzelibe, supra note 76, at 806 (using empirical evidence to show that autocratic leaders in Africa face harsher sentences domestically than sentences dealt out by international criminal tribunals).
102 See, for example, Akhavan, supra note 21, at 7–8.
105 See Gilligan, supra note 15, at 956–57.
106 Id. at 953.
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groups. This is important because the threat of opposition punishment, which he 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 be subject to prosecution by the court themselves.

A. 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. This is well demonstrated by the evolving conflict in Syria. 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 civilian populations, the opposition may have eventually succumbed to the benefits of visiting atrocities on the other side.

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.

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107 The analysis in this Article 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, 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.


110 Id.
between 1991 and 1996. 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. 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." 

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. The Comprehensive Peace Agreement (CPA), which was finally concluded between the Sudan People’s Liberation Movement (SPLM) 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. Even though the crimes committed by the SPLA are in this respect similar to those for which the Congolese rebel Lubanga was found guilty by the ICC in what came to be the court’s first verdict, 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, 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

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111 Branch, supra note 18, at 180–82.
112 Id. at 191.
114 Randall Fegley, Comparative Perspectives on the Rehabilitation of Ex-Slaves and Former Child Soldiers with Special Reference to Sudan, 10 AFRICAN STUD. Q. 35, 36–39 (2008).
115 The SPLM is the political arm of the SPLA.
116 Agreement on Permanent Ceasefire and Security Arrangements Implementation Modalities Between the Government of Sudan (GOS) and the People’s Liberation Movement/Sudan People’s Liberation Army (SPLM/SPLA) During the Pre-Interim and the Interim Periods, arts. 5, 24, Sudan-SPLM/A, Dec. 31, 2004 http://www.usip.org/publications/peace-agreements-sudan.
118 Elwathig Kameir, Toward Building the New Sudan, in NEW SUDAN IN THE MAKING?: ESSAYS ON A NATION IN PAINFUL SEARCH OF ITSELF 17 (Francis M. Deng ed., 2009).
humanity in Darfur while the government of Sudan continues to employ similarly vicious tactics in its new conflict in Sudan's South Kordofan region.\(^\text{119}\)

**B. 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 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. 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.\(^\text{120}\)

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.\"\(^\text{121}\)

An example of such behavior 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.\(^\text{122}\)


\(^{120}\) 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, infra note 122, at 39).

\(^{121}\) Nzelibe, supra note 56, at 1187 (quoting STATHIS N. KALYVAS, THE LOGIC OF VIOLENT CIVIL WAR 171 (2006)).

\(^{122}\) PAUL COLIER, WARS, GUNS, AND VOTES: DEMOCRACY IN DANGEROUS PLACES 39 (2009).
C. 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)) when the opposition is strong, and (Re) when it is weak) or not mounting a rebellion (appears on the model as (NR) when the opposition is strong, and (NRw) when it is weak). Nature is a non-strategic player randomly assigning the probability (a) that the opposition is the type that wins only with the commission of atrocities, and probability (1-a) that the opposition, when it revolts, can topple the government without committing atrocities. The probability (a) can be interpreted as an indication of the opposition’s political capacity or efficacy to affect regime change peacefully (with a=0 denoting maximum capacity to affect change and a=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 III.B 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 2 and 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). 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:

**Leader Payoffs**

The leader receives a payoff of $W_c$ 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 $W_{lg}$. The assumption

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123 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, JULIE FLINT & ALEX DE WAAL, DARFUR: A NEW HISTORY OF A LONG WAR (2d ed. 2008).

124 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.
in the model is that $W_{cr}$ is larger than $W_{ig}$ in order to account for the relevance of the gains from crimes. Simply put, if $W_{cr}$ is smaller than $W_{ig}$, there will be no reason for the leader to consider it as an option. Therefore, in the event there are no costs to his behavior either way, when a leader chooses to commit crimes it is because his payoffs from criminal activity are higher than his payoffs from lawful behavior. 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.\footnote{Gilligan, \textit{supra} note 15, at 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.\footnote{Compare payoffs of $(L)$ on the paths $\{C, NR_s\}$ and $\{C, NR_w\}$ on Figure 2 (Pre-institution) and Figure 3 (Post-institution).} 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.

\textbf{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.\footnote{Compare payoffs of $(Opp)$ on the paths $\{a, NC, R_s\}$ and $\{a, C, R_w\}$ on Figure 2 (Pre-institution) and Figure 3 (Post-institution).}
D. Discussion and Analysis

The flaw in Gilligan’s Model is that it ignores the effect of the ICC on opposition behavior. 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. Subsection III.D.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 behavior of the parties is then explained in Subsection III.D.2.

![Figure 2: Pre-Institution](image)

1. Prior to the ICC.

Figure 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 ascertain a leader’s 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.\textsuperscript{128} The results below are based on the solution of the game that appears in Section A of the Annex.

\textit{First: Opposition's Dominant Strategy Prior to the ICC}

Solving for the opposition's dominant strategy reveals that the only relevant strategies are \((R_s, R_v)\) 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; 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: \((NR_s, NR_v)\) and \((NR_s, R_v)\)) are strictly dominated and hence irrelevant.

Whenever \(V>L\), the dominant strategy for the opposition is \((R_s, R_v)\).\textsuperscript{129} 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 \((R_s, NR_v)\).\textsuperscript{130} 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.

We 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.

\textsuperscript{128} Please note that even though the Leader does not know which type opposition he is facing, he is aware that there are two types.

\textsuperscript{129} See Section A(2)(a) of the Annex.

\textsuperscript{130} See Section A(2) (b) of the Annex.
Second: Leader’s Dominant Strategy Prior to the ICC

Based on the above, the leader’s behavior 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:
\[
R - d > W_{cr} - W_{kg} \quad \text{Condition (1)}
\]

If \( V < L \), the Leader will not commit atrocities when:
\[
(R - d) (1 - \alpha) > W_{cr} - W_{kg} \quad \text{Condition (2)}
\]

Because \( R - d > (R - d)(1 - \alpha) \), Condition (2) is harder to satisfy than Condition (1). 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 (when \( V > L \) or \((1 - \alpha) = 1\) respectively), it is more likely that a Leader refrains from committing atrocities when lawful behavior by him results in larger gains compared to the benefits from unlawful behavior \((W_{kg} > W_{cr})\) and when he is certain that no (or minimum) punishment will be meted 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. 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, we can conclude that the following variables retain their relevance to the commission of atrocities by a Leader within the set-up of the game:

- The gains by leader from lawful behavior \((W_{kg})\).
- The gains by leader from criminal behavior \((W_{cr})\).

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131 For \(0 < \alpha < 1\). 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: \((R - d) (1 - \alpha) > W_{cr} - W_{kg} \quad \text{Condition (2)}\)

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

133 See Gilligan, supra note 15, at 947.
• The punishment likely to be meted out by the opposition to a criminal leader after he is deposed (R).
• The punishment, if any, likely to be meted out to a leader who refrains from committing crimes after he is deposed (d); and
• The opposition type (α), but only when the opposition's loss of credibility following the commission of crimes outweighs its gains from being in office.

2. The effect of the ICC.

Figure 3
Post-Institution

Figure 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. 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 \{α, C,NRw\}), but not when he commits crimes and the opposition revolts,
topples him and imposes its own sanction (R) (on the path \( \{x, C, R_w\} \)). Also note, 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 subsection III.D.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**

Similarly to the Pre-institution game in III.D.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 definition of the conditions that determine which of these strategies dominates the other given the values of \((V)\) and \((L)\).

Whenever \(V > L + qF\), the dominant strategy for the opposition is \((R_s, R_w)\).\(^{134}\) 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\(^ {135}\)), 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.

Whenever \(V < L + qF\), the dominant strategy for the opposition is \((R_s, NR_w)\).\(^{136}\)

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:

\(^{134}\) See Section B(2) (a) of Annex.
\(^{135}\) See ¶ 2 of the Opposition's Dominant Strategy under III.D.1, supra, at 313.
\(^{136}\) 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.

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:

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

If $V>L+qF$, the leader will not commit atrocities whenever:
$$R-d > W_{cr}-W_{lg} \quad \text{Condition (3)}$$

(1) If $L<V<L+qF$, the leader will not commit atrocities whenever:
$$R-d \cdot (1-\alpha) + \alpha qF > W_{cr}-W_{lg} \quad \text{Condition (4)}$$

(2) If $L>V<L+qF$, the leader will not commit atrocities whenever:
$$R-d \cdot (1-\alpha) + \alpha qF > W_{cr}-W_{lg} \quad \text{Condition (4)}$$

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 ($L$).
To compare the conditions necessary for lawful behavior by the leader:
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.

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 \((R-d)\).38

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 \(0<\alpha<1\)).

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).39 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

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38 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 \((R-d)(1-\alpha)+aqF\geq R-d\). This condition is satisfied when \(qF\geq R-d\) (See Section B(4) of Annex for full solution).

39 Please note that in this case, the condition becomes identical to condition (1) with or without the ICC.
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: Consider that Nature assigns a probability of 0.4 that the opposition is strong and probability 0.6 that the opposition is weak, the Condition for the commission of the crime becomes:

Before the ICC
0.4*(R−d)>Wcr−Wlg

After the ICC:
0.4*(R−d)+0.6qF>Wcr−Wlg

Despite the effect in (2)(ii) 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.

After the institution of the ICC, in addition to the variables identified in III.D.1 above, the new variable comprising of the probability of ICC sanction and its size (qF) emerges as a clear determinant of the behavior of leaders. Given that the ICC quells weak opposition groups from rebelling, it may incentivize criminal behavior 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.

E. Summary of Results

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 Article 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 behavior. Therefore, we 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 more likely a leader will be punished for his crimes and the less incentive he has to commit crimes.

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.

Because the ICC quells weak opposition groups that are incapable of absorbing the additional cost of ICC sanction from rebelling, the size and 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:

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

140 Because the leader will not commit crimes in the first place unless the gains from their commission ($W_c$) are bigger than the gains from lawful behavior ($W_b$).
between the opposition sanction for lawful behavior and the opposition sanction unlawful behavior. 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.

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 behavior and the opposition sanction for unlawful leader behavior, the ICC will be redundant.

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.

IV. 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 behavior against the gains from unlawful behavior 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 behavior 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 behavior 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 III.A 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 II.C above, international
criminal law is increasingly applied to regulate the behavior 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.141 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 will not materialize.

There are three caveats to the above conclusion. Firstly, 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. In this
case, Gilligan’s self-enforcing effect will not be needed. Secondly, 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. 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 still have a residual deterrent effect on the leader as
predicted by Gilligan’s model.

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
Subsection II.B above, there is a thirty-year ceiling to the ICC sanction as
defined by the Rome Statute. In addition, the liberal inclination of international

141 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%20related%20cases/icc%200204%200105/Pages/uganda.aspx (last visited
icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/
Bringing the Guilty to Justice

Criminal tribunals precludes the adoption of the death penalty as an acceptable punishment for the commission of atrocities.142 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,143 a sentence equal to the maximum sentence for burglary in the English criminal law.144 This leaves only the prospect of ensuring a more rigorous enforcement of ICC sanctions. However, as discussed in Subsection II.A 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 Article 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. Accconcia 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.145 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

144 Theft Act, 1968, c. 60, § 9(4) (U.K.).  
corrupt governments. The suggestion that asymmetric leniency could be used to enhance the enforcement of international criminal law is consistent with the common perception that offering plea-bargains to lower level perpetrators may improve the effectiveness of international criminal prosecutions.\textsuperscript{146} 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.\textsuperscript{147} Provided indictments can be used accordingly,\textsuperscript{148} the ICC will have a residual deterrent effect as predicted by Gilligan, without encouraging unlawful behavior 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.”\textsuperscript{149}

\textsuperscript{146} See Stephanos Bibas & William W. Burke-White, *International Idealism Meets Domestic-Criminal-Procedural Realism*, 59 DUKE L.J. 637, 685–89 (2010) (suggesting that asymmetric plea-bargains be used to acquire much needed incriminating evidence against high-level officials); Nancy Amoury Combs, *Copping a Plea to Genocide: The Plea Bargaining of International Crimes*, 151 U. PA L. REV. 1, 90–102 (2002) (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 & Mark Drumbl, *Plea Bargaining at the International Criminal Tribunal for the Former Yugoslavia*, 16 CRIM. L. F. 49, 84 (2005) (observing that the guilty pleas rendered regarding the Srebrenica massacre may have led to the eventual admission of responsibility by Bosnian Serb leadership).


\textsuperscript{148} This is the subject of ongoing research by the author investigating the possible effects of asymmetric leniency schemes on the incentives of leaders to commit crimes.

\textsuperscript{149} Branch, supra note 18, at 189.
V. Conclusion

The model developed in this Article 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 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 International Criminal Court is, 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 Article 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 atrocities, the ICC will have a deterrent effect. 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 III.D.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 1 below, which corresponds to the game in Figure 2.

TABLE 1. Normal Form Game Prior to ICC

<table>
<thead>
<tr>
<th>Leader Strategies</th>
<th>Opposition Strategies</th>
<th>R_s, R_w</th>
<th>N_R_s, N_R_w</th>
<th>R_s, N_R_w</th>
<th>N_R_s, R_w</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td></td>
<td>W_c − R, V − αL</td>
<td>W_c, 0</td>
<td>W_c(1−α)R, (1−α)V</td>
<td>W_c−αR, (α(V−L))</td>
</tr>
<tr>
<td>NC</td>
<td></td>
<td>W_{g−d}−d, V−αL</td>
<td>W_{g−d}, 0</td>
<td>W_{g−(1−α)d}, (1−α)V</td>
<td>W_{g−(1−α)d}, (α(V−L))</td>
</tr>
</tbody>
</table>

The matrix in Table 1 above shows opposition payoffs and leader’s payoffs for the Pre-institution game in Figure 2. Please note:

1. If 0<\(α\)<1:
   (a) \(V−αL>\alpha(V−L)\) and
   (b) \((1−α)V>0\).

   Consequently, the strategies \((N_R_s, N_R_w)\) and \((R_s, R_w)\) are strictly dominated by the strategies \((R_s, R_w)\) and \((R_s, N_R_w)\).

   Therefore, the only relevant strategies for the opposition are \((R_s, R_w)\) and \((R_s, N_R_w)\).

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

   (a) \((R_s, R_w)\) is the dominant strategy if the following is true:
       \[(V−αL)>V(1−α)\]
       \[V−αL>V−αV\]
       \[αV>V−αL\]
       \[V>L\]

   (b) \((R_s, N_R_w)\) is the dominant strategy if the following is true:
       \[(V−αL)<V(1−α)\]
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 III.D.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 2 below, which corresponds to the game in Figure 3.

<table>
<thead>
<tr>
<th>Leader Strategies</th>
<th>Opposition Strategies</th>
<th>Rs, Rw</th>
<th>NRs, NRw</th>
<th>Rs, NRw</th>
<th>NRs, Rw</th>
</tr>
</thead>
<tbody>
<tr>
<td>C</td>
<td></td>
<td>Wc-R,</td>
<td>Wc-(1-α)</td>
<td>Wc-(1-α)qF-αR,</td>
<td>Wc-(1-α)qF-αR,</td>
</tr>
<tr>
<td></td>
<td></td>
<td>V-α(L+qF)</td>
<td>R-αqF,</td>
<td>(1-α)V</td>
<td>α(V-L-qF)</td>
</tr>
<tr>
<td>NC</td>
<td>Wk-d,</td>
<td>Wk, 0</td>
<td>Wk-(1-α)d,</td>
<td>Wk-αd,</td>
<td>α(V-L-qF)</td>
</tr>
<tr>
<td></td>
<td>V-α(L+qF)</td>
<td></td>
<td>(1-α)V</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The matrix in Table 2 above shows opposition payoffs and leader’s payoffs for the Post-institution game in Figure 3. Please note:

1. If 0<α<1:
   (a) \( V-\alpha(L+qF)>\alpha(V-L-qF) \) 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, we 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:
   \[ V-\alpha(L+qF)<(1-\alpha)V \]
   \[ V-\alpha(L+qF)<V-\alpha V \]
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

   \[ (R - d)(1 - \alpha) + \alpha qF > R - d \]
   
   \[ \alpha qF > R - d - (R - d)(1 - \alpha) \]
   
   \[ \alpha qF > \alpha (R - d) \]
   
   \[ qF > R - d \]