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Law Versus Politics:
The ICC as an Obstacle to Successful Peace Negotiations?

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List of Abbreviations

AU	African Union
CPA	Comprehensive Peace Agreement
DPA	Darfur Peace Agreement
DRC	Democratic Republic of the Congo
H1/2	Hypothesis one/two
ICC	International Criminal Court
ICG	International Crisis Group
ICID	International Commission of Inquiry on Darfur
JEM	Justice and Equality Movement
LJM	Liberation and Justice Movement
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NRA	National Resistance Army
OTP	Office of the Prosecutor
P5	The five permanent members of the UNSC
PTC I/II	Pre-Trial Chamber I/II
Rome Statute	Rome Statute of the International Criminal Court
SAF	Sudanese Armed Forces
SCCD	Special Criminal Court for Darfur
SLM/A	Sudan Liberation Movement/Army
SPLM/A	Sudanese People's Liberation Movement/Army
UN	United Nations
UNSC	United Nations Security Council
UPDF	Ugandan People's Defense Force
ZOPA	Zone of possible agreement

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Introduction

Since its establishment in 2002, the International Criminal Court (ICC) has taken on the ambitious goal of ending impunity for the gravest international crimes: genocide, crimes against humanity, and war crimes.[1] However, this judicial institution has been criticized for arguably obstructing peace. Although peace and justice are inevitably linked, this argument goes, blindly pursuing justice without considering political implications such as its potential impact on peace negotiations is not only reckless, but fails to recognize the existence of a bigger picture. As a young permanent institution that does not prosecute crimes that occurred before 1 July 2002,[2] the ICC will often intervene while the conflict is still ongoing. In fact, of the current eight 'situations'[3] facing proceedings before the ICC, four were still entrenched in conflict at the time of the ICC's intervention. Strong criticism arises from victims and academics concerning the repercussions on the ground, who argue that ICC action risks being counterproductive and may possibly contribute to the failure of peace negotiations (Gegout, 2013). Unsurprisingly, tensions arise between ICC proponents and conflict resolution practitioners, as the effects of ICC intervention might impact the type of concessions or the possibility of amnesties within negotiations (Grono and O'Brien, 2008, p. 14). More concretely, intervention by the ICC may alter the scope of the zone of possible agreement (ZOPA),[4] by expanding or contracting it, meaning that ICC intervention can impact negotiations by either drawing parties closer or pushing them further away from finding a possible solution.

The potential impact of ICC intervention on the success or failure of peace negotiations bears great relevance to the fields of conflict resolution, international relations,

[1] An *international crime* is a crime that falls under the jurisdiction of the ICC. Currently, the ICC has jurisdiction over three international crimes, listed in article 5 of the Rome Statute: genocide, crimes against humanity, and war crimes. The ICC's jurisdiction over the crime of aggression will be reviewed after 2017.

[2] This is the date the ICC's founding treaty – the Rome Statute – entered into force. The treaty foresees a temporal limitation to the jurisdiction of the ICC. Consequently, the ICC can only prosecute crimes committed *after* 1 July 2002, as it cannot prosecute crimes committed before the entry into force of the Rome Statute (article 11 of the Rome Statute). This follows the *nullum crimen sine lege* principle, under which a person cannot face criminal punishment for an act that was criminalized *after* it was performed.

[3] A *situation* is a set of events in a particular country that serves as the basis for criminal investigations by the ICC. Within each situation there can be several cases and accused.

[4] The *ZOPA* is the intellectual zone between the negotiating parties in which an agreement can be reached between them.

and international criminal law. Deeper understanding and acceptance of political implications of judicial action is fundamental for effective international prosecution and its broader – and ambitious – goal of ending impunity for international crimes. Although the fight against impunity should be continuously pursued, international criminal lawyers must not be blinded by the *judicial* character of the institution, and neglect *political* implications that might prolong a conflict and cause further atrocities on the ground (Rodman, 2012).

Although the 'peace versus justice' debate has been largely discussed in the literature, the impact of the ICC on peace negotiations (as opposed to 'peace' in general) has been mostly neglected. This thesis attempts to address this gap somewhat. It focuses on whether and how ICC interventions impact peace negotiations in ongoing civil conflict, and aims at answering the following research question: *under what conditions do ICC interventions in ongoing civil conflicts facilitate the success or failure of peace negotiations?*

In this thesis I argue that international law cannot be seen as functioning in complete isolation from politics. If ICC action has in fact an impact on peace negotiations, the ICC needs to be aware of this and take it into account before intervening in an ongoing conflict. Furthermore, if ICC interventions actually do have an impact on peace negotiations, policy makers should be aware of the possible consequences of such action within ongoing conflicts when fulfilling their obligation to cooperate with the ICC.

In order to analyze this argument, I will conduct two case studies on the situation and peace negotiations in Uganda and Darfur (Sudan) respectively. These are cases in which the ICC has intervened while the conflict was ongoing and in which peace negotiations took place after the ICC intervention. I have identified two conditions under which interventions by the ICC might influence the success or failure of peace negotiation processes. These are situations in which (1) the referral to the ICC was made by the government of the conflicted state itself (self-referral), and/or (2) ICC intervention is directed against a key negotiator. The two case studies display unequal support for the first condition and both provide strong evidence for the second.

Framing the Debate: The ICC as a Catalyst or an Obstacle for Peace Negotiations?

Existing scholarly literature on the impact of ICC intervention on the success or failure of peace negotiation has two main focuses: (1) different factors that influence peace negotiations; and (2) the ICC and peace negotiations. The former focuses on negotiation processes in general, and what academics have identified as potential causes of their success or failure. The latter is centered on the complex relationship between peace and justice, and the factors that, according to several authors, may impact peace. The possible direct link between efforts to pursue justice and the outcome of peace negotiations remains relatively understudied.

Factors Influencing Peace Negotiations

Authors have identified the difficulties of negotiating peace-settlements in civil wars as opposed to interstate wars (I. W. Zartman, 1995), and have focused on different aspects of the negotiation process and potential outcomes (Findley, 2013; Vuković, 2014a). A number of studies focus on the timing of negotiations (Findley, 2013; Mahieu, 2007; I. W. Zartman and Touval, 1996; I. W. Zartman, 2001); the role of power and bargaining positions in negotiations (Butler and Gates, 2009; Findley, 2013; Vuković, 2014a; Wagner, 2000; Young, 1991; I. W. Zartman, 1995); and on game-theoretic models predicting certain behavior of the parties involved (Young, 1991; I. W. Zartman and Rubin, 2002).

When examining peace negotiation *outcomes*, the signing of a peace agreement or a ceasefire is often considered to signify the *success* of the negotiation. However, it is important to note that some authors, such as Wanis-St. John (2008) and Clark (2011), argue that the culmination of negotiations in a peace agreement does not necessarily lead to the resolution of the conflict and may even allow for continued violence. In fact, Beardsley, Quinn, Biswas and Wilkenfeld (2006) make a distinction between formal agreements, the reduction of post-crisis tension, and crisis abatement as different outcome variables, showing the insufficiency of merely focusing on the agreement itself. Furthermore, it makes more sense to already consider the movement towards a solution within the negotiation process, such as concessions in order to expand the ZOPA and signs of good will, as a form of success (Kriesberg, 1991). *Failure* can be equally seen as the inability to

find the ZOPA and signs of bad will which render a solution more difficult, if not impossible.

Kriesberg (1991) emphasizes the difficulty of assessing the *causes* of the success or failure of negotiations, as internal dynamics are often obscure to researchers. He further notes that the ultimate failure of negotiations is usually easier to identify, although it depends on the goal that was initially established by the parties. The general literature mainly focuses on eight distinct potential causes. First, one party's reluctance to negotiate is considered a straight forward cause for the failure (or the initial absence) of negotiations (I. W. Zartman, 1995). Second, the lack of a perceived mutually hurting stalemate[5] may indicate that a conflict is not (yet) ripe enough for negotiations (Mahieu, 2007; I. W. Zartman and Touval, 1996; I. W. Zartman, 2001). Third, information and power asymmetries can escalate the conflict and render negotiations more difficult (Butler and Gates, 2009; Findley, 2013; Hultquist, 2013; Young, 1991; I. W. Zartman, 1995). Fourth, a high degree of mutual distrust between the parties (Findley, 2013; Ghosn, 2010; Vuković, 2014b) and/or the exclusion of certain parties from the negotiating table (Wanis-St. John, 2008; J. Zartman, 2008) are often seen as hindering the success of the negotiations. A fifth potential factor is the prevalence of battlefield victory by one side contributing to a perception by that side of a possible military win and a corresponding lack of incentives for negotiation (Wanis-St. John, 2008). Sixth, the imposition of a ceasefire before the negotiations have begun can be problematic, as it gives both parties the time to recover, rebuild, regroup, and rearm, increasing the duration and intensity of the conflict (Mahieu, 2007). Seventh, when one or more parties perceive the mediator to be subjective and biased they may be less open to negotiating in good faith (Vuković, 2014b). Eighth, and finally, pressure from one side's constituencies towards a negotiated agreement, if incompatible with the other side's requests, can constitute an obstacle for the success of the negotiations (Kriesberg, 1991; Putnam, 1988).

Without denying the relevance of any of these particular eight factors, the action of relevant international actors such as the United Nations (UN), the North Atlantic Treaty Organization (NATO) and the ICC should also be considered as potential causes of the success or failure of peace negotiations. Representatives of international organizations

[5] A *mutually hurting stalemate* refers to the when "the parties find themselves locked in a conflict from which they cannot escalate to victory and this deadlock is painful to both of them (although not necessarily in equal degree or for the same reasons), they seek an alternative policy or way out" (I. W. Zartman, 2001, p. 8).

often serve as mediators, and the UN (through peacekeeping missions) and NATO (through its military intervention in multiple conflicts such as in Kosovo and Libya) can have a particularly direct influence on conflicts and their resolution. The ICC, as a judicial institution with different and ostensibly legal aims, is usually seen as falling under a different category. Nonetheless, the fact that the ICC's judicial mandate is often seen as apolitical should not serve as justification for the ICC to disregard the potential political impact of its actions in ongoing conflicts.

The ICC and Peace Negotiations

Most recent literature concerning ICC intervention in ongoing civil conflicts has focused on the relationship between international justice and *peace* itself, rather than specifically on peace negotiations. This reflects a broader debate – the so-called 'peace versus justice' debate – in academia, where controversies include whether peace and justice are mutually exclusive, whether peace must exist for there to be justice, or whether peace can be achieved through or after justice.

Although the existence of possible tensions between justice and peace are well known, different academics propose diverse interpretations. Clark (2011), Kersten (2011), Sriram (2007), and Grono and O'Brien (2008) are of the view that it is not necessary to make a choice between them (Clark, 2011). In this sense, the ICC should intervene in ongoing conflicts, seeing as justice and peace are inextricably linked and, thus, one cannot exist without the other (Grono and O'Brien, 2008, p. 6). These authors following an institutionalist approach grant the ICC and its action a high degree of significance. They imply that there will be no (durable) peace unless the ICC prosecutes those responsible of international crimes.

Gegout (2013) agrees that there cannot be durable peace without justice and emphasizes that peace building attempts which ignore justice are doomed to fail. Justice, in her opinion, addresses the victims' resentment and erases extremism, creating conditions for durable peace. However, in the author's opinion this is only viable under certain circumstances, as she acknowledges a possible contradiction between justice and peace. Gegout (2013) and Clark (2011), follow a similar yet slightly more rational institutionalist approach than the authors mentioned above, as they agree that justice should be pursued in

order to ensure peace, yet stress that this cannot be done without taking all factors of the individual conflict into account.

Grono and O'Brien (2008) argue that while peace can be achieved without justice, justice is the necessary next step. Rodman (2012) takes this further by stressing that peace and political aspects of the conflict should not stand in the way of justice. In his normative and slightly constructivist institutionalist view, there are certain atrocious violations of international humanitarian law and human rights that are so terrible they belong outside normal politics. The prosecution of such, Rodman (2012) says, should therefore not be compromised by political factors, even peace processes.

On the one hand, normative institutionalist ICC proponents in particular stress the moral and legal obligations of international criminal justice to marginalize human rights violators, provide non-violent retribution for victims, shed light on the truth of the events, and allow a sense of closure to the victims (Kersten, 2011). On the other, critics such as Kersten (2011) discredit ICC action and its pursuit of international accountability as naïve. In his slightly realist view, attempts at bringing perpetrators to justice may encourage ongoing violence through providing fewer incentives to end the violence by taking amnesties and/or exile off the table, and/or giving the impression that peace negotiation will result in imprisonment.

Other authors such as Sriram (2007) and Beitzel and Castle (2013) give less primacy to traditional accountability mechanisms and argue that 'justice' offers a wide spectrum of tools apart from trials that can achieve a similar outcome – such as truth commissions, reparations, and/or amnesties.

The peace versus justice debate is ongoing and is far from reaching consensus. Although it focuses on peace, rather than specifically on peace negotiations, it provides useful insights into the context in which ICC action is perceived, and highlights the different and even unintended effects it may have on individual ongoing conflicts.

Peace negotiations are seen as a preliminary stage of peace. Authors such as Clark (2011), Gegout (2013), Meernik, Nichols, and King (2010), Rodman (2012), and Kersten (2011) have tried to address the question of whether ICC interventions actually constitute

an obstacle for peace. Here, the focus has been primarily on two sets of factors – institutional and external – that may impact prospects for peace. Institutional factors include arrest warrants (Clark, 2011; Gegout, 2013; Kersten, 2011; Rodman, 2012; Scharf, 1999), self-referrals (Branch, 2007; Kersten, 2012; Rodman, 2012), and the ICC's structural limitations including lack of resources and dependency on state cooperation (Gegout, 2013; Rodman, 2012). External factors include victims' negative perceptions of ICC action (Gegout, 2013; Glasius, 2009; Rodman, 2012; Williams, 2007), and the ICC's lack of credibility as an effective judicial institution (Gegout, 2013; Rodman, 2012).

Both sets of factors are analyzed mainly to determine the likelihood of achieving, or failing to achieve, lasting peace. The concrete link between them and the success or failure of peace negotiations has been insufficiently examined in academia. The studies that do mention such a connection are either of a purely legal nature and miss the importance of international politics on judicial processes, or belong to the field of international studies and fail to pay sufficient attention to concrete institutional rules and processes. This is mainly due to the fact that legal studies are often concerned with the meaning and achievement of 'justice', while international relations is usually more concerned with political factors and outcomes (in this case 'peace').

Insufficient attention has been paid to the relationship between the inherently political outcome of peace negotiations and the legal institution of the ICC and its judicial processes. The effect of these two institutional factors in particular across different ICC situations and cases has remained relatively understudied. Furthermore, authors tend to focus on the ICC as an actor in the international realm. They mostly follow normative or constructivist subsets of the institutional school of thought, and thus downplay the relevance of state action *vis-à-vis* the ICC and potential consequences for the development of the conflict.

A Rational Choice Institutionalist Approach to ICC Intervention

As outlined in the literature review, there is a wide spectrum of material on institutional factors of the ICC and the politics of peace negotiations in civil conflicts. However, few have studied the influence of international legal actions – specifically self-referrals and ICC intervention against key negotiators – on political outcomes in civil conflict. By adopting what could be termed a rational choice institutionalist approach, this thesis aims to provide insight into the relationship between the two and concludes by identifying potentially fruitful areas of further study.

Most of the existing body of literature follows either normative or constructivist institutionalist views. By contrast, this thesis adopts a rational choice institutionalist approach as it is arguably best suited to analyze the interplay between the ICC as an international judicial institution, the political factors on the ground, and the role of state actors.

Institutionalism (or 'neo-institutionalism' in its modern manifestation), as its name suggests, considers institutions to be at the heart of world politics. It therefore focuses on the relationship between these political constructs and the interaction of institutional rules and processes with political agency, arrangements, performance, as well as change (Lowndes, 2010, p. 61). Its main underlying assumption is that institutions matter in international politics. In choosing to study the actions of an international organization in this thesis, I am reflecting assumptions that the ICC bears decision-making capabilities beyond its states parties and that its actions matter.

The institutionalist worldview recognizes the ICC is a supranational organization with international legal personality granted by its member states (Lüder, 2002).[6] However, a narrow, legalistic interpretation of institutionalism expects the ICC to only follow the law as set out in its statute and disregard any political factors. This approach downplays the

[6] See article 4 of the Rome Statute (in appendix). International legal personality refers to international entities provided with the capacity to have rights and obligations under public international law. This is a prerequisite for any independent action in the international sphere. The ICC does thus not require instructions from the states parties and can issue arrest warrants that are binding on these states (Lüder, 2002).

rationality of state actors and the importance of their actions *vis-à-vis* the ICC, and contradicts political and practical realities that impact the ICC's actions. Due to the ICC's strong dependence on state cooperation, funding, and resources regarding the execution of ICC arrest warrants and the surrender of indictees, states have more significance than strictly institutionalist views care to admit.

Rational choice institutionalism, as a subset of institutionalism, combines institutionalist views with elements of rational choice theory.[7] It sees institutions as organizational structures that are voluntarily created by actors aiming to address collective action difficulties and maximize their utilities (Hall and Taylor, 1996, p. 943; Lowndes, 2010, p. 65). Hence, the focus of this form of institutionalism is the management through strategic interaction and/or reduction of insecurity created by an anarchical political environment (Hall and Taylor, 1996, pp. 944–945). This implies the possibility of political agency in which 'principals' operate through international organizations as their 'agents' while exercising a high degree of discipline and monitoring capabilities. However, it is important to note that while it is the actors that shape the institutions, the institutions themselves influence the actors in their understanding of what is acceptable and/or useful. In this sense, rational choice institutionalism recognizes the importance of actors pursuing their interests, but also that they do this inside institutionalist constructs (e.g. the law within the institution's founding treaty; international norms) that restrict their actions and/or shape their concepts of acceptable outcomes.

This form of institutionalism can be contrasted with two other subsets: normative and constructivist institutionalism. The former stresses the role of norms and values within institutions in the shaping of actors' behavior; while according to the latter, institutions mold actors' behavior through ideas and narratives that serve the purpose of explanation, deliberation, and/or legitimization of political action (Lowndes, 2010, p. 65). In the context of ICC intervention in ongoing conflicts, these two theoretical approaches promote and pursue the idea of 'international justice' as an irrevocable global value and goal. However, justice may take many forms and cannot be simply applied to all societies. Rational choice intuitionalism theory sees the pursuit of international justice as collectively agreed upon by all states parties, and this view can be shaped and altered by the states and/or the institution.

[7] For more information on rational choice theory, see Hindmoor (2010).

Of course, rational choice institutionalism is not without its criticisms. By granting states a higher degree of influence, the ICC is mostly seen as a political – rather than purely judicial – institution. This assumption risks destabilizing the international criminal law regime and its goal. It is true that the ICC should not be seen as immune to politics; however, the ICC loses all its legitimacy and deterrent effect if it is considered a mere extension of powerful states' interests. Unfortunately, due to timely and spatial limitations, this thesis is not able to address all potentially relevant theoretical approaches. Nonetheless, rational choice institutionalism appears to be the best approach to address the gap identified in then literature review. To mitigate any potential problems concerning the shortcomings of rational choice institutionalism, I will focus on the ICC as an international organization with decision-making capabilities beyond its states parties, but recognizing its significant structural and political constraints *vis-à-vis* its states parties.

In this context, I have chosen to analyze the potential impact of two institutional factors that may be expected to bear strong relevance to the ICC process and its mandate on peace negotiations: (1) self-referrals and (2) ICC intervention directed against key negotiators.

Concerning the former, it is official policy of the Office of the Prosecutor (OTP) to encourage states to refer their own situations to the ICC (ICC, 2006, p. 2). This is not surprising as the ICC would strongly benefit from the cooperation of the situation country. However, although self-referrals strongly facilitate the ICC's work, they might have the contrary effect for the conflict's potential peaceful resolution. Regarding the latter institutional factor, in order for the ICC to end impunity for alleged perpetrators of international crimes, the ICC needs to take action against those most responsible. This usually involves individuals standing high on the command chain which often also happen to be key negotiators. ICC action, such as arrest warrants, directed against them is indispensable for bringing the indictees to justice. However, such action might hinder them from engaging in negotiations and ending the conflict. Therefore, these two factors bear strong significance to the work of the ICC, and both could be counterproductive for the resolution of the conflict.

First, I will examine whether ICC intervention impacts peace negotiations when the intervention takes place after the government of the state, on whose territory the

international crime(s) in question has/have been committed, voluntarily refers the situation to the ICC (self-referral).

As stated in the literature review, most authors see self-referrals as problematic (Branch, 2007; Kersten, 2012; Rodman, 2012). If the government of the state in which the crimes are taking place is the one to refer the situation to the ICC, concern arises regarding the underlying reasons for the referral and particularly suspected strategic manipulation. Although the ICC has the possibility of investigating and indicting either or both sides of the conflict (regardless of the fact that it is only the government who is able to refer the situation to the ICC), the ICC might decide to restrict the investigations to the non-state side (if the government's actions do not pass the gravity threshold for ICC intervention, for example). In fact, this has been the case for all four self-referrals[8] so far, and raises suspicion of ICC bias and government manipulation of the ICC (Rodman and Booth, 2013, pp. 299–300).

Furthermore, the timing of the self-referral can be crucial for the success or failure of peace-negotiations as (depending on the level of violence on the ground) the referral can be used to pressure the rebel side into making concessions towards reaching a ceasefire[9], and/or to increase the government's reputation by comparison. Branch (2007) points to the Ugandan case, where he believes that "the government cynically referred the ongoing conflict to the ICC, expecting to restrict the ICC's prosecution to the rebels in order to obtain international support for its militarization, and to entrench, not resolve, the war". There seems to be agreement in the literature that the timing of the referral can generate the perception of ICC bias and that the ICC can be used as a weapon for political aims (Branch, 2007; Rodman, 2012).

The acceptance of a self-referral by the ICC can generate the impression that the ICC is 'picking sides', especially because it relies heavily on the cooperation of the government concerned for investigations and the capture of the indicted person. Without such cooperation, the ICC is rendered incapable of fulfilling its mandate. This dependence of the ICC on the government (and other states) renders the rebel side of a conflict more vulnerable to international prosecution, as it faces a structural disadvantage when the ICC

[8] Self-referrals have so far taken place in Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali.
[9] A *ceasefire* refers to the temporary suspension of violence by all parties to the agreement.

is involved, especially following a self-referral (Rodman and Booth, 2013, pp. 287–288; Ssenyonjo, 2007, p. 365). This can hurt the prosecutor's reputation as impartial, and generate protests from the rebel side and even victims of the conflict. Such apparent ICC bias can complicate peace negotiations (Gegout, 2013; Glasius, 2009; Rodman, 2012; Williams, 2007). Negotiations perceived as 'unjust' might lead to unreasonable demands at the negotiating table from the side that feels unjustly treated, and further complicate (if not collapse) the peace negotiations. This view assumes that (1) the ICC accepts the referral and initiates an investigation; (2) the ICC intervenes while the conflict is still ongoing; (3) the intervention is only directed against the non-state side; and (4) the negotiations take place after the ICC has intervened. This leads to my first hypothesis:

***H1**: When a 'situation' is voluntarily referred to the ICC by the government of the conflicted state itself (self-referral), peace negotiations are more likely to fail.*

The second important factor that may affect peace negotiations is whether ICC intervention is directed against a key negotiator (usually a head of state or a top rebel leader), where he/she is considered at least by one party to be essential to the success of the peace negotiations. Such intervention usually takes the form of arrest warrants.

In such a situation, ICC intervention may be seen as a threat to peace, as there seems to be no guarantee for the indictee that he/she will not be arrested during or after the negotiations. This risky scenario can discourage those individuals essential for the achievement of peace to come forward and engage in the negotiation process (Clark, 2011; Kersten, 2011; Rodman, 2012; Scharf, 1999). One explanation for the perceived threat of arrest can be explained by the deep level of distrust between the parties, as the indictee would not see any reason for the other side to ensure his/her safety. Another important explanation depends on the location of the negotiations. There is less risk of arrest, for instance, if the negotiations take place on the territory of a state which is not party to the ICC's founding treaty, the Rome Statute of the International Criminal Court (hereinafter Rome Statute). In such a scenario, the host state bears no contractual responsibility towards the ICC and it seems unlikely that the authorities would surrender him/her. Here, the discouraging effect of the arrest warrants to participate in the negotiations seems very small. If, however, the negotiations are held on the territory of a state party, the authorities would be obliged under the Rome Statute to arrest him/her. Nonetheless, it is important to

note that, in practice, there have been cases where state parties to the Rome Statute have allowed the indictee to travel into their country without arresting him/her. In other words, ICC intervention creates disincentives for the indictee to negotiate if there is a high risk of arrest, and incentives to negotiate when the parties feel safe at the location of the negotiations.

Furthermore, ICC intervention may in some cases even encourage further violence, instead of deterring such action (Gegout, 2013). In fact, some indictees may use violent backlashes as a way to blackmail the ICC into removing the arrest warrants. Another explanation would be that as the risk of prosecution generally reduces the incentives of participation in negotiations and the conclusion of peace-agreements (Clark, 2011), the indicted party may see the only option left to be the continuation of conflict.

On the other hand, the threat of ICC prosecution might also push key negotiators to the negotiating table by creating an incentive to reach a negotiated settlement which might grant them amnesty from prosecution (Grono and O'Brien, 2008, p. 15). This seems contradictory, as ICC arrest warrants aim to exclude amnesties as a powerful bargaining chip at the negotiation table (Kersten, 2011; Scharf, 1999). Amnesties are often seen as conductive to durable peace because they ensure a peaceful political transition (Clark, 2011; Grono and O'Brien, 2008; Scharf, 1999); however, granting them to an indictee contradicts the ICC's goal of ending impunity (Scharf, 1999; Souaré, 2009, p. 375). It is important to note that the ICC is not bound by national amnesty grants, and can nonetheless prosecute the individual in question (Ssenyonjo, 2007, p. 373), rendering the initial incentive void. In this sense, ICC intervention might bring key negotiators to the negotiating table, but the ICC action ultimately becomes the main obstacle to a negotiated agreement.

Setting the possibility of amnesties aside, arrest warrants induce international pressure on the indicted side (Ssenyonjo, 2007, p. 385). This is particularly relevant in two constellations. The first one refers to situations in which the indictee is a head of state and his function as such is considerably undermined by the fact that he can no longer travel abroad without fearing arrest, nor conduct international relations as usual. Such an impediment to his duties would give the ICC indictment more weight and hinder diplomatic and economic relations with other states. The second constellation concerns situations in which the indictee obtains (and depends on) external support from an

international actor (e.g. a neighboring state). Here, the international pressure generated by the arrest warrants may intensify the isolation of and halt the flow of resources to the indicted side of the conflict (Rodman and Booth, 2013, pp. 291–292), thus forcing the indictee to look for a way out. In this sense, ICC arrest warrants can actually generate incentives to negotiate a peace agreement, since the lack of resources might leave the indictee no choice but to negotiate (Rodman and Booth, 2013, p. 293). Nevertheless, despite these initial incentives, factors and requests *within* the negotiation process can still lead to the failure of negotiations. In fact, it is highly improbable that an individual will sign an agreement if eventual prosecution is still on the table (Apuuli, 2008, p. 805; Ssenyonjo, 2007, p. 370). Consequently, while ICC intervention (particularly in the form of arrest warrants) can incite negotiations, it seems likely to eventually obstruct them.

Moreover, the legitimacy of key negotiators can be undermined if they are considered 'criminal' (Gegout, 2013). In this sense, public statements by the prosecutor might increase the indictee's reputation as a criminal, making it more difficult for the other side to justifiably 'negotiate with a criminal' or grant it a better bargaining position at the negotiating table (even small concessions to a 'criminal' are too much). Ultimately, this may push both sides away from finding a negotiated agreement. Under such conditions, the chances of finding the ZOPA are quite slim, and the failure of the negotiations is likely. This argument assumes that (1) the ICC intervenes while the conflict is still ongoing, (2) negotiations take place after the ICC arrest warrant has been issued, (3) the participation of the indicted person is essential for reaching a peace agreement, and (4) ICC interventions can have an intimidating effect on negotiators. This leads to my second hypothesis:

***H2**: When an ICC intervention is directed against a key negotiator, peace negotiations are more likely to fail.*

Research Design

Conceptualization and Operationalization of Variables

This thesis examines two key ICC institutional factors affecting the success of peace negotiations. Specifically, I argue that the success or failure of peace negotiations (dependent variable) are affected by a self-referral (independent variable 1) and/or intervention directed against a key negotiator (independent variable 2). In what follows I will discuss these variables in detail, providing an overview of how each was conceptualized and operationalized.

Concerning independent variable 1, a *self-referral* occurs when (the government of) the state on whose territory the international crime(s) in question has/have been committed voluntarily refers the situation to the ICC, thus allowing the court to exercise its jurisdiction. Under article 13(a)-(c) of the Rome Statute, the ICC only has jurisdiction over an international crime when the crime has been committed on the territory of a state party has been referred to the ICC by a state party to the Rome Statute or the UN Security Council (UNSC), or the Prosecutor her/himself. This is usually done through a written statement from the government of the state in question, addressed to the ICC.

Independent variable 2 refers to ICC intervention directed against a key negotiator. Generally, *ICC intervention* refers to all actions undertaken by the ICC regarding a situation, including investigations, arrest warrants, fact-finding missions, prosecution, and/or public statements by the ICC Prosecutor[10]. When directed against a key negotiator, this largely entails statements, arrest warrants and prosecution. Of these, arrest warrants are the most common and reliable legal instruments.

A *key negotiator* is a person that is considered (at least by one party) to be essential to the success of the peace negotiations. This will usually be either the head of state or a top rebel leader, as their opposition to the negotiations would impair any attempts at ending the conflict through negotiations. Negotiations held by other members of the rebel group or the government would not have as much weight. Within rebel groups, the democratic process is usually abandoned during conflict, making leadership clearly identifiable. The

[10] According to article 42(4) of the Rome Statute, the ICC Prosecutor is elected by the Assembly of States Parties for a period of nine years. From June 2003 to June 2012, the Prosecutor was Mr. Luis Moreno Ocampo, and since June 2012 it is Ms. Fatou Bensouda.

ICC will always target the leaders, as they are ultimately responsible for the atrocities committed by their forces. However, not all leaders are automatically key negotiators; this thesis focuses on only the *top* leaders, without whom peace negotiations are futile.

The evidence for both independent variables (ICC intervention directed against a key negotiator and self-referrals), have been obtained from the ICC website, NGO reports, ICG reports, and peer reviewed articles.

The dependent variable is *the success or failure of peace negotiations*. Although most of the existing literature focuses on *peace* as a dependent variable, peace is difficult to measure. There are many factors and specific constellations that come into play which could lead to a complex interaction of variables (Clark, 2011; Kersten, 2011). Consequently, instead of focusing on *peace* as a dependent variable, I propose to focus on a more quantifiable and observable variable: the success or failure of negotiations. Successful negotiations will not necessarily lead to peace, but their failure will certainly constitute a hurdle which is important to overcome. Success and failure are usually a matter of perception, which is why I intend to focus on factors that can be analyzed from an objective point of view.

Generally, *peace negotiations* are joint decision-making processes under belligerent and uncertain conditions, where divergent positions are merged into one single outcome which ideally benefits all parties (Young, 1991; I. W. Zartman and Rubin, 2002; I. W. Zartman, 2001): the end of an armed conflict. In order to reach a settlement, the parties to such a negotiation process will often include individuals who have allegedly committed human rights abuses, and steps towards power-sharing are often made (Souaré, 2009, pp. 370–371).

I operationalize the *success* of peace negotiations as the conclusion of a peace agreement. However, the lack of a peace agreement does not necessarily mean total failure. In such cases, previous stages such as finding the compatibility of interests, and/or showing signs of good will are also seen as a form of success. It is important to note that success in the form of the conclusion of a negotiated peace agreement or a ceasefire does not necessarily lead to (durable) peace, because agreements may not resolve the root causes nor permanently stop the violence (Clark, 2011; Wanis-St. John, 2008).

The *failure* of peace negotiations is operationalized as the inability to conclude an agreement, and/or showing signs of bad will, such as the continued violence during the negotiations, negative public statements, and/or strategic stalling.

Cases in which no peace agreements have (yet) been concluded might be problematic as there is a possibility of interaction between indicators of both success and failure. In these, the sequence of events and the possibility of finding agreement are crucial for determining success/failure. The fact that an agreement has not yet been reached does not necessarily mean the negotiations have failed. Instead, the analysis will have to focus on the particular interaction of indicators in each individual case and in the parties' ability to find the ZOPA in particular. If, for example, the parties are (still) able to find the ZOPA, signs of bad will may not cause failure of the negotiations. However, if the parties are unable to find the ZOPA, signs of good will are unlikely to be enough for eventual success.

For the dependent variable (success or failure of peace negotiations), I will be gathering necessary evidence from case study specific Non-Governmental Organization (NGO) reports, International Crisis Group (ICG) reports, peer reviewed articles, and books.

Case Selection

To test the two above-mentioned hypotheses, I will conduct two case studies: Uganda (since the self-referral on 16 December 2003 until the end of the peace negotiations in April 2008) and Darfur (since the UNSC-referral on 25 March 2005 until the end of the peace negotiations in February 2010). From the eight current ICC situations, these two are the only ones in which the ICC intervened (most obviously with arrest warrants) during an ongoing civil conflict *and* where peace negotiations took place after the ICC's intervention. The ICC's intervention in the Democratic Republic of the Congo (DRC) is at times referred to in the context of the peace versus justice debate; however the ICC played a comparatively minor role in that case (Grono and O'Brien, 2008; Rodman, 2009, pp. 115–117). This is mainly due to the fact that the most important peace process concluded in December 2002 in Sun City, South Africa, before the situation was referred to the ICC in April 2004. Information on further peace negotiations is unfortunately insufficient to conduct a full analysis.

The fact that both case studies are African states could raise concerns of possible selection bias. However, lessons learned from these African case studies might be generalizable to other cases once the ICC opens investigations into a non-African situation. This is a realistic possibility as the ICC is currently conducting preliminary investigations into situations on the territory of countries such as Colombia, Honduras, Georgia, Afghanistan, the Republic of Korea, and Ukraine. This study could open the door, allowing for testing if its results on a larger number of cases in order to control for a possible bias. If the results of this thesis display that ICC intervention does indeed have an impact on the success or failure of peace negotiations, it would be interesting and of relevance for future ICC policy to compare these results with future cases. This would give more weight to the argument that the ICC needs to take political aspects of future situations into account or risk the discreditable reputation of being an 'obstacle' to peace negotiations.

The government of Uganda issued a self-referral to the ICC, while the situation in Darfur was referred to the ICC by the UNSC. In Uganda, arrest warrants in particular have been issued against top rebel leaders, while in Darfur they have been issued against a head of state. Interestingly, peace negotiations in Uganda *and* in Darfur seem to have failed. Although this displays little variation within the dependent variable, the independent variables and the causal mechanisms differ across both cases.

I intend to analyze these two case studies by conducting a structured comparison. The analysis of each case study will be guided by the research objective in order for the findings to be systematically compared across cases (George and Bennett, 2004, p. 67). In this way, I will be able to examine and compare the two cases in detail in order to test the hypotheses.

Case Studies: Uganda and Darfur

This section analyzes the two case studies: Uganda and Darfur (Sudan). Within each case study, I will first introduce the root causes, dynamics and relevant major events of the civil conflict; second, describe the ICC's intervention in the conflict; third, examine the causes of the peace negotiations' outcome; and finally, summarize findings.

Uganda, the ICC, and the Juba Peace Talks

Background: The Ugandan Conflict

Uganda has been entrenched in civil war since the mid/late 1980s, a conflict which has been described as constituting one of the most horrible humanitarian crises around the world (Apuuli, 2006, p. 179). On the ground, the struggle is between the Lord's Resistance Army (LRA) and the Ugandan government led by President Yoweri Museveni. However, the root causes of the war go back to ethnic divisions and British colonialism. The British separated its Ugandan colony into two main regions: the economically developed and prosperous south and the cheap (mainly military) labor reservoir of the Acholi people in the north (Apuuli, 2006, p. 181; Rodman and Booth, 2013, p. 278; Ward and Hackett, 2004). After Uganda gained its independence in 1962, the country was ruled by Dictator Milton Obote, originating from the north. Obote was overthrown in 1971 by his army chief, only to regain power in 1980 (Rodman and Booth, 2013, p. 278). Museveni, a politician from the south, rose within the National Resistance Army (NRA), an insurgent group that fought against Obote's government. The NRA took Kampala in 1985, and Museveni became president of Uganda in 1986 (Rodman and Booth, 2013, p. 279).

The LRA, led by Joseph Kony, emerged in 1988 from the unification of several northern insurgent groups formed against President Museveni. Claiming to be following the instructions of several spirits who "speak through him" (Ward and Hackett, 2004), Kony's stated goal is to overthrow the Museveni government and to rule Uganda following the Biblical Ten Commandments (Apuuli, 2006; Beitzel and Castle, 2013, p. 43; Feldman, 2007, p. 135; Ward and Hackett, 2004, p. 182). The LRA claims to fight for "democracy, constitutional reforms, and against the marginalization of tribes in Northern and Eastern Uganda" (Ssenyonjo, 2007, pp. 362–363). The LRA operates mainly in Acholiland, a sub-region of Northern Uganda and its attacks were initially targeted at the government.

However, the LRA has had few direct confrontations with the Ugandan People's Defense Force (UPDF), and Kony has not received the degree of support from the Acholi people that he had expected. This has made Acholi civilians – Kony's own ethnic group – the target of the LRA attacks (Feldman, 2007, pp. 135, 138; Ward and Hackett, 2004; Williams, 2007, p. 70). The LRA engages mostly in guerrilla tactics and has managed to survive largely due to the existence of a proxy war between Uganda and Sudan in which both countries supported the insurgency on the other's territory (Apuuli, 2006, p. 180; Rodman and Booth, 2013, p. 292). In this context, Kampala supported the Sudanese People's Liberation Movement/Army (SPLM/A), while Khartoum openly reinforced the LRA by providing it with sanctuary, arms supplies, and training (Apuuli, 2006, p. 182; Grono and O'Brien, 2008, p. 16).

The LRA also heavily relies on extensive (mostly involuntary) recruitment. Boys are abducted mainly to join the army, while girls serve as sexual slaves (Beitzel and Castle, 2013, p. 43; Ssenyonjo, 2007). Children are further forced to kill (often their own parents) and to participate in acts of torture (Feldman, 2007, p. 135). By 2007, the LRA had abducted at least 25,000 children and civilian killings amounted to tens of thousands (Ssenyonjo, 2007, pp. 362–363). However, it is important to note that the LRA is not the only force that has committed atrocities, and that the UPDF is far from innocent. In fact, the UPDF has committed arbitrary arrests and detentions, extortion, rape, torture, and killings of civilians in northern Uganda (Apuuli, 2006, p. 185; Human Rights Watch, 2004b). Moreover, the UPDF has perpetrated major human rights violations involving the relocation of the majority of the northern population to so-called 'protected villages' (or rather internment camps) in order to 'protect' forced displaced populations from LRA attacks (Branch, 2007; Souaré, 2009, p. 373). Most of the UPDF crimes have been committed within these camps (Rodman and Booth, 2013, p. 272). Former UN Under-Secretary-General Olara Otunnu has gone so far as to characterize Museveni's approach towards the Acholi population in the north as a policy of genocide (Rodman and Booth, 2013, p. 272). However, ICC former Prosecutor Moreno Ocampo has labelled the UPDF's crimes as less numerous and less grave than the LRA's.

After over 20 years of civil war, the LRA remains resilient. It has also increasingly come to be viewed as a terrorist organization, especially by Uganda and the United States (Beitzel and Castle, 2013, p. 43; Feldman, 2007, pp. 138–139). Nevertheless, an Amnesty

Act was passed in the Ugandan Parliament in 2000, offering a pardon to all Ugandans participating in acts of rebellion since 26 January 1986 (Apuuli, 2006, p. 183). This gives the Ugandan people the chance to bring the LRA insurgency to an end by using traditional Ugandan dispute resolution traditions and institutions (Apuuli, 2006, p. 184). The Acholi people in particular have advocated traditional methods of reconciliation and forgiveness, rather than in prosecution (Williams, 2007, p. 79). However, these do not seem to be enough to deal with the scale of the conflict and fail to address victims properly, especially non-Acholi (Beitzel and Castle, 2013, p. 48; Williams, 2007, p. 79).

The LRA has seen its power decrease, particularly through Sudan's withdrawal of support (Feldman, 2007, pp. 138–139; International Crisis Group, 2008, p. 14; Ward and Hackett, 2004). In fact, its resources dried up at a time in which Kony's military forces had multiplied, thus rendering war increasingly unsustainable (Rodman and Booth, 2013, p. 293). As predicted in the theory section above, it was mainly these two factors, together with the ICC arrest warrants against five LRA leaders, including Kony, which created the necessary incentive for Kony to negotiate his safety (Rodman and Booth, 2013, p. 293). Consequently, peace talks were initiated in Juba, South Sudan, on 14 July 2006. However, the final signing of the drafted peace agreement never took place (Souaré, 2009, p. 374).

Museveni's Self-Referral and the ICC's Intervention

Uganda ratified the Rome Statute on 14 June 2002, and in doing so became a state party to the ICC regime. Despite the Ugandan Amnesty Act, President Museveni referred the situation concerning the LRA to the OTP on 16 December 2003, constituting the first self-referral in the history of the ICC. In January 2004, the Ugandan government and former Prosecutor Moreno Ocampo reached an agreement to initiate investigations into post-2002 LRA activities (Apuuli, 2006, p. 180), and announced this decision at a joint press conference in London (Human Rights Watch, 2004b; Williams, 2007, p. 71).

On 8 July 2005, arrest warrants were issued under seal by Interpol on behalf of the ICC against five senior LRA leaders: Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya (ICC-PTC II, 08.07.2005a-d, 27.09.2005).[11] These men have been charged with crimes against humanity (murder, sexual enslavement, rape,

[11] Proceedings against Raska Lukwiya were terminated on 11 July 2007, following strong evidence of his death brought before ICC Pre-Trial Chamber II (ICC-PTC II, 11.07.2007).

inhumane acts of inflicting serious bodily injury and suffering)[12] and war crimes (murder, cruel treatment of civilians, intentionally directing an attack against a civilian population, pillaging, inducing rape, forced enlistment of children)[13]. On 27 September 2005, requests for arrest and surrender were transmitted by the ICC Registry to the governments of Uganda, Sudan, and the DRC. The warrants were unsealed on 13 October 2005. Of the five indictees, only Kony is a key negotiator, as he is the top rebel leader and is essential for the success of the peace negotiations.

As Uganda is a state party to the Rome Statute, the Prosecutor did not necessarily need the referral in order to commence investigations in Uganda. In fact, the Prosecutor could have initiated investigations on his own initiative after receiving approval from the ICC Pre-Trial Chamber.[14] Nonetheless, official OTP policy invites states to voluntarily refer their situation to the ICC in order to ensure cooperation and support from the government on the ground (ICC, 2006, p. 2; Rodman and Booth, 2013, p. 276). This policy is not surprising: as mentioned above, the ICC has no power to execute its arrest warrants and is also dependent on state cooperation in order to access evidence and witnesses. Nevertheless, the self-referral has raised a lot of criticism, particularly by NGOs and victims in the north (Williams, 2007, p. 81).

Museveni's referral has been widely seen as a political strategy, even manipulation (Rodman and Booth, 2013, pp. 276–277; Souaré, 2009, p. 377). Museveni had a lot to gain from voluntarily referring the situation in Uganda to the ICC. First, Museveni had been strongly criticized for *allowing* the conflict to go on, particularly by victims in the north (Williams, 2007, p. 77). By referring the situation to an independent judicial institution, he obtained legitimacy and demonstrated apparent commitment to ending the conflict (Rodman and Booth, 2013, p. 277). Second, by explicitly referring the *LRA activities* to the ICC,[15] the LRA was framed as being the only side committing atrocities, and Kony was characterized as a madman and chief villain (Williams, 2007, p. 81). Third, the referral internationalized the conflict and the enemies of the Ugandan government became the enemies of the international community (Rodman and Booth, 2013, p. 285). This

[12] See article 7(1) of the Rome Statute (in appendix).
[13] See article 8(2) of the Rome Statute (in appendix).
[14] See articles 13(c), 12(2), and 15 of the Rome Statute (in appendix).
[15] Note that referrals are limited by the Rome Statute to *situations*, rather than *suspects* in order to reduce the risk of politicization of the ICC.

contributed to the isolation of the LRA, particularly from external support like that it had received from the government of Sudan.

The fact that the Prosecutor announced the initiation of investigations at Museveni's side was regarded as a major political mistake. It caused significant uproar from victimized communities, and generated the impression that the ICC operated merely as an extension of Museveni's policy in the north (Williams, 2007, pp. 69–71, 76). Former Prosecutor Moreno Ocampo clarified a few months later that he maintained his discretion to investigate both sides (Apuuli, 2006, p. 186; Rodman and Booth, 2013, p. 272; Williams, 2007, p. 73). However, it remained the case that the only arrest warrants were for rebel leaders. Although he justified this action by claiming that the UPDF's crimes did not meet the 'gravity' threshold,[16] or were committed outside of the ICC's temporal jurisdiction, the reputation of an impartial prosecutor was damaged.

Furthermore, due to the OTP's dependence on the Ugandan government's cooperation, the rebel side faced a structural disadvantage and vulnerability *vis-à-vis* the government. The likelihood of prosecution towards members of government was relatively slim, particularly after a self-referral (Rodman and Booth, 2013, pp. 287–288; Ssenyonjo, 2007, p. 365). If ICC intervention was to threaten Museveni, the thus-far cooperative relationship between the ICC and the Ugandan government would develop into an adversarial one in which access to witnesses and evidence would be restricted (Rodman and Booth, 2013, p. 300).

Statements by Museveni and official Ugandan policies further indicate the President's strategic use of the ICC as a political tool, and his lack of actual commitment towards ending the conflict peacefully. Despite the fact that it was Museveni himself who involved the ICC, Museveni has offered LRA members full amnesty if they lay down their weapons (Beitzel and Castle, 2013, p. 43; Ssenyonjo, 2007, p. 371). This openly contradicts the ICC's aim of ending impunity. Moreover, Museveni has repeatedly promised to 'finish off' the LRA through military means, and constantly undermined mediation efforts (Williams, 2007, p. 76). The President has attempted to justify his apparently contradictory action by claiming that he had only referred the situation to the ICC because Kony was at the time outside of Uganda and its jurisdiction; if Kony returned (partly due to ICC action)

[16] Only the 'gravest' crimes are prosecuted by the ICC. According to article 17(1)(d) of the Rome Statute, the court must dismiss a case if it does not meet a certain threshold.

and signed a peace agreement, he would be tried before Ugandan courts (Apuuli, 2008, p. 805; Rodman and Booth, 2013, pp. 299–300).[17] In reality, the decision to withdraw the ICC's involvement, particularly its arrest warrants, is not up to the Ugandan government (Rodman and Booth, 2013, p. 294).

The arrest warrants themselves have also been a source of controversy, particularly in the context of President Museveni's amnesty offer. As mentioned above, five arrest warrants were issued against the top LRA leaders. Their arrest (or their cessation of hostilities) would most likely end the conflict (Feldman, 2007, pp. 135–136), making them essential to the negotiating process. Initially counterintuitive, yet in accordance with the expectations created by the underlying theory of H2, the arrest warrants played an important role in bringing the indictees to the negotiating table (Rodman and Booth, 2013, p. 273; Souaré, 2009, pp. 374, 383). This is mainly due to the fact that the international pressure resulting from the arrest warrants helped in cutting the LRA's external (mainly Sudanese) resources (Apuuli, 2006, p. 187; Ssenyonjo, 2007, p. 385). However, the warrants then became the major obstacle for reaching an agreement (Beitzel and Castle, 2013, p. 43; Souaré, 2009; Ssenyonjo, 2007, p. 374). Kony and Otti have been reported as saying that there will be no peace so long as the arrest warrants are still in force (Ssenyonjo, 2007, p. 370). Consequently, civil society and the affected Ugandan population have strongly criticized the ICC's intervention and have demanded it withdraw its arrest warrants in order to aid peace efforts (Apuuli, 2006, pp. 184–185, 2008, p. 804).

Museveni's amnesty offer may seem to represent an implicit unilateral withdrawal from the ICC process. However, the government of Uganda waived this right when it signed and ratified the Rome Statute, as well as when it referred the situation to the ICC (Ssenyonjo, 2007, p. 387). Now the only actor that can withdraw the arrest warrants is the ICC (Apuuli, 2008, p. 812). Such action, however, would damage the court's reputation as an impartial body and generate the impression that the ICC is a political tool of states. This would indeed jeopardize the successful prosecution of future crimes (Ssenyonjo, 2007, p. 387).

[17] This would be possible under the Principle of Complementarity in articles 1 and 17(1)(a) of the Rome Statute, as the ICC is a court only complementary to national jurisdiction. This means that as long as the national institutions are willing and able to genuinely carry out the investigations and prosecution, the ICC cannot intervene. Ugandan courts were in fact willing and able to carry out the proceedings; however, there is concern as to whether they would *genuinely* ensure impartial and fair trials (Apuuli, 2008, pp. 805, 808).

Even if Uganda succeeded in granting amnesty to the LRA, the ICC is not bound by the Ugandan government's decision when it comes to international crimes such as genocide, crimes against humanity, or war crimes, and could (at least theoretically) proceed with the prosecution (Feldman, 2007, pp. 134–135). This is reaffirmed by two factors. First, the OTP is not a party to the Juba peace talks, which makes any decision rendered within the process not binding for the ICC (Ssenyonjo, 2007, p. 373). Second, prevention of these crimes is a so-called *erga omnes* obligation, meaning that they are norms that the international community as a whole has an interest in upholding (Ssenyonjo, 2007, pp. 376, 380). Furthermore, Uganda is a party to other international treaties which require states parties to ensure the prosecution of alleged perpetrators of international crimes, including the International Covenant on Civil and Political Rights, the 1949 Geneva Conventions, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Ssenyonjo, 2007, p. 376).

In practice, however, the fact that the ICC requires the cooperation from the Ugandan government is problematic even under such circumstances and regardless of the international obligations in place. The work of the ICC would be crippled without state support (Ssenyonjo, 2007, p. 388). Museveni has apparently indicated to the Prosecutor that he intends to amend the Amnesty Act to exclude LRA leadership (Souaré, 2009, p. 375), yet his actions have so far demonstrated otherwise. The absence of such an exemption would constitute a dangerous precedence for the prosecution of future crimes. Without getting further into whether or not amnesties should be granted, it is important to identify the impact that the arrest warrants may have on the peace negotiations.

The Juba Peace Talks

The LRA and the Ugandan government have engaged in several unsuccessful peace negotiations (Apuuli, 2006, p. 183). The most important and promising were the peace talks held in Juba, South Sudan, which commenced on 14 July 2006 – less than a year after the ICC arrest warrants were issued. During these negotiations, a ceasefire was agreed upon on 26 August 2006 which, despite the collapse of the negotiations in 2008, improved the humanitarian situation in Uganda (Rodman and Booth, 2013, p. 291; Ssenyonjo, 2007, pp. 368–369).

As mentioned above, the arrest warrants had contributed to the initiation of the peace talks in 2006. However, "the ICC's insistence on the irrevocable nature of the arrest warrants against the LRA made a negotiated settlement of the conflict improbable and biased the conflict resolution process toward military solutions" (Rodman and Booth, 2013, p. 273). It does not seem plausible that Kony would sign a peace agreement, containing a provision that would try him before a court. Since the ICC would not withdraw the arrest warrants, Kony did not appear for the final signing of the negotiated peace agreement on 14 April 2008 (International Crisis Group, 2008; Rodman and Booth, 2013, p. 292; Souaré, 2009, p. 374). This is not to say that the ICC arrest warrants were the *only* complicating factor at the negotiations; other issues such as the LRA's request for monetary compensation and the mobilization of funds played a role (Souaré, 2009, p. 374). However, the withdrawal of the ICC arrest warrants was the main request out of the control of the other negotiating party (i.e. the Ugandan government).

Despite the failure to conclude a peace agreement, the parties initially seemed able and willing to find the ZOPA. The government seemed optimistic in putting a reasonable offer on the table, and even Kony expressed willingness to find an agreement (Williams, 2007, p. 81). However, Joseph Kony is known to be a total spoiler (Rodman and Booth, 2013, p. 295), and has often used negotiation processes as a tactic to gather supplies and regroup (Feldman, 2007, p. 136). Furthermore, the fact that Kony does not have an official political agenda complicates bargaining, as it is difficult to negotiate with "a man who believes his agenda is determined not by man but by God" (Feldman, 2007, p. 139). Moreover, Kony's behavior has caused confusion, particularly concerning the acceptance of the amnesty offer. On 5 July 2006, Kony issued a statement rejecting the offer, while on 9 July 2006, he claimed he had accepted it (Feldman, 2007, p. 140). However, Kony's actions are not the only ones that have been counter-intuitive and which further complicated the process. Despite his self-referral, his amnesty offer, and stated commitment to ending the conflict, President Museveni often predicted the failure of the negotiations due to "lack of faith in negotiating with terrorists" (Feldman, 2007, pp. 140-141) and would not give up a military solution (International Crisis Group, 2008, p. 15).

Summary of Findings

The peace negotiations in 2006 did not conclude in the signing of a peace agreement. However, the negotiations could still have been seen as successful if the parties had still been able to find the ZOPA, and/or they show signs of good will. Despite the initial potential of apparently compatible interests, both sides failed to demonstrate a commitment to negotiate in good faith by generating confusion and lack of trust through public statements. Furthermore, although violence ceased during the negotiations, it seems highly probable that the LRA was using the negotiations as a strategy to rearm. These points hint at the failure of the peace negotiations.

There seems to be considerable evidence supporting H1, as Museveni strategically manipulated the ICC by referring the situation and generated resentment by the rebels and victims for the ICC. This intensified the belligerent relationship between the LRA and the government, increased the mutual distrust, and reduced the incentives to negotiate. Nonetheless, the precise extent of the self-referral's impact on the outcome of the negotiations is relatively unclear. Although the self-referral generated the impression of ICC bias (fueled by political mistakes by the OTP) and provoked further calls for the ICC's retreat, it is unlikely that it alone caused Kony's fixation on the withdrawal of the ICC arrest warrants, and by extension the failure of the negotiations. In fact, there seems to be no clear link between the self-referral and the failure of the peace negotiations as such (partly due to the lack of information on the exact content of the negotiations). However, it would be a mistake to rule out any connection, as the self-referral clearly further complicated the relationship between the two sides of the conflict, including the negotiations themselves. This seems to support H1.

Turning to the ICC intervention against Kony as a key negotiator, it is clear from the analysis above that the arrest warrants were seen as a decisive obstacle for the conclusion of a peace agreement, providing strong evidence for H2. However, it is important to note that despite the arrest warrants' seemingly solid contribution to the failure of the peace negotiations, other complicating factors played a role. For one, it was the combination of the arrest warrants with international pressure (in particular on Sudan), not the arrest warrants alone, which made the strongest contribution. Furthermore, the fact that the conflict has been so deeply rooted in the country for over two decades, the lack of

trust between the parties, the disagreement concerning financial issues, and the difficulty of negotiating with someone lacking a clear political agenda and who is considered to be a terrorist and a spoiler, can fundamentally constrain the negotiations and lead to their ultimate failure.

In this sense, it would seem that both Museveni's self-referral *and* the ICC arrest warrants against Kony as the key negotiator had an impact on the failure of the negotiations in Uganda. Consequently, there is evidence in support of both H1 and H2; the latter in particular.

Darfur, the ICC, and the Darfur Peace Negotiations

Background: The Conflict in Darfur

The government of Sudan has fought its more than two-decade-long civil conflict on two major fronts: the so-called North-South Conflict; and the Darfur War in the west of the country (Lipscomb, 2006, p. 188). The former, as the name suggests, was a dispute between the mostly Muslim north, and the politically excluded animist majority and Christian minority in the south (Bechtold, 2009, p. 151). The south demanded to be included in Sudanese policy-making, and opposed the government's policy of Islamization of the country. This conflict ended in 2005 with the signing of the Comprehensive Peace Agreement (CPA) and a referendum saw South Sudan gain its independence on 9 July 2011. The agreement was concluded between the government of Sudan and the Sudanese People's Liberation Army (SPLA).

The Darfur War takes its name from the western Sudanese province of Darfur, and constitutes a dispute between the mostly Arab government and mainly two Darfurian African Muslim groups rebelling against the government: the Sudan Liberation Movement/Army (SLM/A); and the Justice and Equality Movement (JEM). The conflict can be classified in two ways. Some see it as a struggle for political power, triggered mainly by political and socio-economic marginalization of African Muslims by the mostly Arab government (Dagne, 2010, p. 18; International Commission of Inquiry on Darfur, 2005, p. 23; Lipscomb, 2006, pp. 188–189; Reynolds, 2010, p. 185; Ssenyonjo, 2010, p. 206; Taber, 2008, p. 176). Others it is a fight for the control of scarce resources (Bechtold, 2009, p. 153; Taber, 2008, p. 175). The conflict erupted on 26 February 2003, when the SLM/A

(and a few weeks later the JEM) attacked government outposts in Darfur (Bechtold, 2009, p. 154). This took place while the CPA negotiations were still ongoing, thus seizing the opportunity to gain a strategic initial advantage as the government had focused all its efforts on the negotiations and was not able to directly respond to the crisis (Bechtold, 2009, p. 155; Reynolds, 2010, p. 185; Taber, 2008, p. 178).

Furthermore, the government faced a problem in that most of the Sudanese Armed Forces (SAF) had been recruited from Darfur, rendering soldiers from that province a potential liability (Bechtold, 2009, p. 155). Consequently, as both the SLM/A and the JEM were becoming more organized and increasingly threatening to the government, the Sudanese government led by President Omar al-Bashir decided to arm an Arab militia with existing animosity and hostility towards the SLM/A and the JEM: the so-called 'Janjaweed' (Bechtold, 2009, p. 155; de Waal, 2008, p. 29; Reynolds, 2010, p. 185). Together with the Janjaweed, the government led a disproportionate counter-attack campaign against the rebel groups, terrorizing Darfurian civilians (Dagne, 2010, p. 18; de Waal, 2008, p. 29; Human Rights Watch, 2004a, pp. 9, 39; Reynolds, 2010, p. 185; Ssenyonjo, 2010, p. 206).

To further complicate the situation, the two main rebel groups (as well as the Janjaweed) have fragmented into different movements and factions due to internal disputes (Bechtold, 2009, p. 157; Reynolds, 2010, p. 186). This means that it would be an oversimplification to state that the conflict entails merely a 'rebel' side fighting the government and the 'government' fighting back. In fact, within each side smaller groups also fight each other.

In January 2005, the International Commission of Inquiry on Darfur (ICID) presented a report to the United Nations Secretary-General accusing the Sudanese government and the Janjaweed of complicity in crimes against humanity and the SLM/A and JEM of complicity in war crimes (Elagab, 2014, p. 52). To date, hundreds of villages have been destroyed, tens of thousands of civilians have died, and millions of people have been displaced; indeed, the conflict has turned into a major humanitarian catastrophe (de Waal, 2008, p. 29; Reynolds, 2010, p. 180; Taber, 2008, p. 173). By April 2008, more than 200,000 people had fled to neighboring Chad (Reynolds, 2010, p. 186). In a delayed international response to the crisis (International Crisis Group, 2014), The UNSC adopted Resolution 1769 in July 2007. This authorized the deployment of a peacekeeping mission,

the joint African Union – United Nations Hybrid Operation in Darfur (UNAMID). Despite these efforts, the rebel groups have remained resilient. This is mainly due to external material support provided by neighboring countries with an interest in Sudanese politics, namely Eritrea, Libya, Ethiopia, and Uganda (Bechtold, 2009, p. 159).

The high degree of fragmentation of the rebel side has been particularly problematic for the peace negotiations, as every group displays a different set of interests (Bechtold, 2009, p. 155). In 2006, negotiations took place in Abuja, Nigeria, between the government, the SPM/A, and the JEM. These culminated in the Darfur Peace Agreement (DPA), signed by all parties except for the JEM, which rejected the agreement. Since then, the DPA negotiations have been re-launched in order to convince the remaining rebel groups to adhere. The government, the JEM, and the Liberation and Justice Movement (LJM) – which formed in 2010, sat at the negotiating table in Doha, Qatar, first in 2009 and again in 2011. Only the 2011 negotiations culminated in an agreement between the government and the LJM, and that agreement was rejected by the JEM. For these reasons, and as the ICC intervened mainly after 2007, this section analyzes the negotiations as a *process* and focuses primarily on the 2009 and 2011 negotiations.

The UNSC-Referral and ICC Intervention

Unlike in the Ugandan case study, the situation was not referred to the ICC by the government of Sudan. Instead, the UNSC referred the situation in Darfur to the ICC on 25 March 2005, constituting the first ever UNSC-referral in accordance with article 13(b) of the Rome Statute (Ssenyonjo, 2010, p. 207). As Sudan has not ratified the Rome Statute, the form of referral was indispensable in establishing the ICC's jurisdiction over the situation in Darfur. However, H1 only theorizes that *self-referrals* promote the failure of peace negotiations. This could still be indirectly confirmed, if the absence of a self-referral (in this case in the form of a UNSC-referral) were to promote the *success* of peace negotiations.

The referral took place after the report by the ICID was presented to the UN Secretary General (Oette, 2010, p. 347). At that point, the UNSC seemed unwilling to intervene in Darfur as all of its five permanent members (P5) had interests at stake and expressed an unwillingness to intervene. Three of them, and China in particular, had

heavily invested in the oil sector of Sudan; four were negotiating arms deals with al-Bashir; and all P5 states wanted to promote state sovereignty (Lipscomb, 2006, pp. 192–193). However, although the international community seemed unwilling to induce regime change, it refused to allow impunity of those responsible of grave violations of international crimes (Lipscomb, 2006, p. 193). Consequently, the UNSC adopted Resolution 1593 on 31 March 2005, proclaiming the situation in Sudan to be a threat to international peace and security, and referring the situation in Darfur since 1 July 2002 to the ICC Prosecutor. Although no P5 veto was issued, the United States and China abstained from voting.

President al-Bashir was surprised at the adoption of the resolution, as he had expected China or Russia to veto the motion (Williamson, 2006, p. 21). He immediately denied all charges and threatened non-cooperation, posing a serious challenge for the ICC (de Waal, 2008, p. 30; Oette, 2010, p. 346). Additionally, in the hopes of rendering the case inadmissible before the ICC, al-Bashir attempted to trigger the court's complementarity regime by demonstrating that national courts were able and willing to prosecute the perpetrators. In June 2005, al-Bashir set up the Special Criminal Court for Darfur (SCCD). He emphasized the fact that Sudan was not party to the Rome Statute (Williamson, 2006, p. 23) and claimed that the national judicial system was dealing with these cases (Babiker, 2010, p. 89; Oette, 2010, p. 347). However, to date the SCCD has prosecuted only a few lower level perpetrators, and these mainly for isolated offences not related to international crimes (Oette, 2010, p. 347; Reynolds, 2010, pp. 195–196).

Despite al-Bashir's efforts, the ICC issued arrest warrants in multiple stages and against a total of six alleged perpetrators. Of these six, four belonged to the government and Janjaweed side, and two were members of the JEM. However, it is important to note that the charges against the two JEM rebels have been dropped; one due to death, another because the ICC Pre-Trial Chamber I (PTC I) refused to confirm the charges brought forward by the Prosecutor. Therefore, unlike the Ugandan case study, this analysis will only consider ICC intervention (particularly arrest warrants) directed against members of the government and the Janjaweed. Of these, al-Bashir is the key negotiator as the head of state.

The first two arrest warrants were issued by the ICC on 27 April 2007. These were directed against former Minister of the Interior Ahmad Harun (ICC-PTC I, 27.04.2007a) and alleged Janjaweed leader Ali Kushayb (ICC-PTC I, 27.04.2007b). Such action was widely seen as an astute tactical move by former Prosecutor Moreno Ocampo, as it allowed the ICC to issue arrest warrants while preserving limited cooperative relations with al-Bashir. Harun was indeed a high-level politician with command responsibility, yet he could be sacrificed politically as he was neither well-connected to al-Bashir nor sufficiently senior (de Waal, 2008, p. 31). Kushayb was already in detention and could be surrendered without political consequences (de Waal, 2008, p. 31).

On 4 March 2009, the third ICC arrest warrant was issued; this time, it was against President al-Bashir himself (ICC-PTC I, 04.03.2009). He was charged as an indirect co-perpetrator[18] with crimes against humanity (murder, extermination, forcible transfer, torture, and rape) and war crimes (intentionally directing attacks against a civilian population or against individual civilians not taking part in hostilities, and pillaging). Interestingly, the PTC I did not charge al-Bashir with genocide at this time, as the Prosecutor had failed to provide sufficient evidence on this count (Reynolds, 2010, p. 181; Ssenyonjo, 2010, pp. 219–220).

This was the first time that the ICC had targeted an incumbent head of state (Dagne, 2010, p. 8; Reynolds, 2010, p. 181; Ssenyonjo, 2010, p. 208),[19] and the move caused considerable controversy. First, the Prosecutor faced strong criticism from civil society and victims for having requested the arrest warrant despite al-Bashir threat of violent backlashes against the population (Reynolds, 2010, p. 181). With the issue of al-Bashir's warrant, the Prosecutor appeared to have prioritized the ICC's pursuit of justice over the safety of the population. As the discussion above foreshadowed, ICC action arguably encouraged the commission of further crimes in this case. Second, in response to the latest ICC arrest warrant, al-Bashir refused to further cooperate with the ICC (Dagne, 2010, p. 8; Reynolds, 2010, p. 181). This undermined the ICC's credibility and has proven to be a major obstacle for the fulfillment of the ICC's mandate, especially as it became almost impossible to obtain evidence and access to witnesses. Third, only hours after the arrest warrant was issued, al-Bashir expelled thirteen NGOs and humanitarian aid agencies based in Darfur. He accused them of cooperating with and providing 'tainted evidence' to the

[18] See article 25(3)(a) of the Rome Statute (in appendix).
[19] According to article 27 of the Rome Statute, heads of state bear no immunity from the ICC.

ICC and politically interfering in Sudanese domestic affairs (Bechtold, 2009, p. 149; Dagne, 2010, p. 9; Oette, 2010, p. 349; Reynolds, 2010, p. 182). Such action jeopardized the provision of humanitarian aid to the victims.

These events generated strong and conflicting reactions from the international community. On the one hand, the ICC action fueled criticism of the court, particularly by the African Union (AU) and the Arab League. AU member states have heavily criticized the ICC and expressed either their support for al-Bashir, or at least concerns that the indictment could undermine peaceful negotiations (Reynolds, 2010, p. 201). The AU has repeatedly stated that its members will not cooperate with the ICC (Dagne, 2010, p. 9), and some states are even considering their withdrawal from the Rome Statute (Bechtold, 2009, p. 160). Theoretically, this contradicts the obligations of those AU members which are simultaneously parties to the Rome Statute. In practice, this means that al-Bashir is able to travel within most African states without fearing arrest, as was confirmed by his uninterrupted travels to Chad and Malawi (both Rome Statute states parties). This raises an interesting point, as the underlying theory of H2 suggests that the international pressure generated by the ICC arrest warrants would impair al-Bashir's travel possibilities and the fulfillment of his functions as head of state. However, al-Bashir has been able to conduct business as usual with AU support and has not thus found himself with many (if any) new incentives to negotiate due to international pressure.

In addition to the AU, other states such as China have called for a deferral of the investigation and prosecution by the UNSC as they claim that the ICC arrest warrants endanger the possibility of political solutions to the conflict (Dagne, 2010, pp. 10–11; Oette, 2010, pp. 348, 354).[20] However, a deferral would cause significant damage to the ICC's credibility and jeopardize its deterrent effect for future crimes. Potential perpetrators would fail to see the ICC as a threat, as it seems to be subjected to political limitations and the will of the P5.

On the other hand, the United States maintains the view that there must be no impunity for the crimes committed in Darfur, and has emphasized its intention to exercise its veto power on any UNSC resolution aiming to defer al-Bashir's prosecution by the ICC

[20] According to article 16 of the Rome Statute, the UNSC may adopt a resolution under Chapter VII of the UN Charter requesting the ICC not proceed with the investigation or prosecution for a renewable period of twelve months.

(Dagne, 2010, pp. 10–11). Additionally, the Obama administration has attempted to pressure other states with influence in Khartoum, such as China, to convince the Sudanese government to cease its commission of the atrocities (Bechtold, 2009, p. 161).

President al-Bashir has responded to the United States' approach by claiming that the entire campaign against him and his government has from the beginning been orchestrated by Washington in order to induce regime change (Bechtold, 2009, p. 162). He justifies his argument by stating that the United States has singled him out because he is Islamist, and discards reports of human suffering in Darfur as Western propaganda (Bechtold, 2009, p. 163). The ICC has not been excluded from this charade. Al-Bashir refuses to see the ICC as an independent body and refuses further cooperation (de Waal, 2008, p. 35).

The unbalanced, mostly negative, reaction from the international community is somewhat ironic since it was the UNSC that referred the situation to the ICC in the first place. The theoretical framework set out above and supported by the previous case study would lead on to expect ICC intervention (especially in the form of arrest warrants) to induce international pressure that generates incentives to negotiate. This, however, does not seem to be the case here. Instead of the arrest warrants being executed by the international community, al-Bashir enjoys widespread support from many (mainly neighboring) countries. This is an important reason for al-Bashir's failure to take the ICC and the risk of prosecution seriously (de Waal, 2008, p. 35). Furthermore, those countries that do support al-Bashir's prosecution by the ICC are too busy focusing on other aspects of the conflict (resuming negotiations to end the Darfur conflict, deploying peacekeepers, sustaining a jeopardized relief effort, and/or seeking cooperation from China) to find ways to bring him to justice (de Waal, 2008, p. 35). The ICC has been placed in a very awkward situation and cannot move to fulfil its mandate.

To make matters worse, the ICC Appeals Chamber reversed the previous PTC I ruling refusing in February 2010 to confirm the genocide charges (Dagne, 2010, p. 8). Former Prosecutor Moreno Ocampo thus requested the PTC I issue another arrest warrant to include these charges. This was granted on 12 July 2010 (ICC-PTC I, 12.07.2010), and al-Bashir was ultimately charged with genocide (by killing, by causing serious bodily or mental harm, and by deliberately inflicting on each target group conditions of life calculated

to bring about the group's physical destruction)[21]. This second charge generated even greater uproar among academics and policy makers – particularly in the AU. In fact, the genocide charges increased the support for President al-Bashir further, as most NGO reports and academic articles deny the genocide charges based on the apparent lack of criminal intent to commit genocide (Babiker, 2010, p. 83; Ssenyonjo, 2010, pp. 218–219). Instead, they claim that the intent of the attacks was merely to counter the rebellion, and not to partly or fully destroy a group of the Sudanese population based on ethnic, racial, religious or national grounds (Babiker, 2010, p. 83). Consequently, instead of deterring al-Bashir from the commission of future crimes and providing incentives for a peaceful solution of the conflict, the ICC has arguably made the prospects for lasting peace worse, particularly with the genocide charges.

The fourth ICC arrest warrant issued on 1 March 2012 against Abdel Raheem Muhammad Hussein, former Minister of the interior, former Sudanese President's Special Representative in Darfur, and current Minister of National Defense did not help matters. He was charged as an indirect co-perpetrator with crimes against humanity and war crimes. Any remaining hope for cooperation from Khartoum has vanished thanks to the lack of commitment from the international community, especially, al-Bashir's new-found supporters.

The Darfur Peace Negotiations

As mentioned above, the Abuja Peace Negotiations were held in 2006, and concluded in a partial peace agreement, the DPA. The agreement was not comprehensive as only one of the rebel groups – the SLM/A – signed it, while the JEM refused as it disagreed with the power-sharing propositions (International Crisis Group, 2014; Taber, 2008, pp. 186–187). Since then, the non-signatory rebel groups have fought the 'traitors' who agreed to the DPA (Bechtold, 2009, p. 155). In March 2009, the government and the JEM sat once again at the negotiating table; this time in Doha. Interestingly, as Qatar – unlike Nigeria – is not party to the Rome Statute, it would seem that this was a (if not the) reason the parties changed the venue of the negotiations. These negotiations seemed to have potential, as the Sudanese government and the JEM had signed a framework agreement in February 2010 (Dagne, 2010, p. 11). The parties had already agreed to a

[21] See article 6 of the Rome Statute (in appendix).

ceasefire, participation of the JEM in government, release of prisoners of war, and compensation to refugees and the displaced population (Dagne, 2010, pp. 11–12).

However, while the government had expressed its apparent commitment to the negotiations, the JEM refused to participate shortly after the second ICC arrest warrant was issued against al-Bashir. This was mainly due to the fact that the government of Sudan launched a major military offensive against rebel groups in February 2010 (Dagne, 2010, pp. 11–12). It seems likely that the timing of the military strike and the decision by the PTC I was no coincidence, and that al-Bashir intentionally jeopardized the negotiations in order to prevent the ICC Prosecutor from requesting the genocide warrant. The JEM condemned the attack and claimed that it "was no longer interested in talking with a criminal" (Bechtold, 2009, pp. 155, 159). The events appear to align with H1 as the not-indicted side obtained a legitimate justification to refuse negotiations. Apparently, the United States' support for the ICC prosecution of al-Bashir drove the JEM to believe that they could strike a better deal, particularly as they were aware that the United States had put pressure on the Sudanese government during the CPA negotiations by backing the SPLM/A in South Sudan (Bechtold, 2009, p. 155). It would seem that negotiations do not have a prominent place in the JEM's list of priorities, and that it hopes to stall the conflict until the ICC or the United States bring down al-Bashir's regime (Bechtold, 2009, p. 155). This was confirmed by the JEM's renewed rejection of the DPA in 2011.

Summary of Findings

During the 2009 Doha Peace Talks, the government and the JEM agreed to the DPA and initially showed signs negotiating in good faith. However, the government showed its lack of commitment soon afterwards by violating the ceasefire and attacking rebel groups. For its part, the JEM appeared to be waiting for an excuse to withdraw from the negotiations. These factors seem to indicate a failure of the negotiations. For this thesis, the real question is whether the absence of a self-referral (H1) or the ICC intervention – mainly in the form of arrest warrants – directed against al-Bashir (H2) played a part in this failure.

Intuitively, the absence of the self-referral would mean that cooperation from the government of the situation country is unlikely. Indeed, the UNSC-referral imposed the

jurisdiction of the ICC on Darfur in the face of al-Bashir's denial of all charges. Al-Bashir then repeatedly refused to cooperate with the ICC. Theoretically, UNSC-referrals make it difficult for presidents such as al-Bashir to manipulate the ICC as Ugandan President Museveni did by occurring against the will of the government in question. However, the ICC's dependency on state cooperation gave al-Bashir and his supporters the ability to ridicule and ignore the ICC. In addition, the absence of a self-referral did not impede the creation of a perception of ICC bias and subjectivity. Al-Bashir is convinced that the ICC is a Western institution, rather than an independent body, and a number of other leaders hold the same view. This has led to al-Bashir's distrust of the ICC and complicated negotiations to jeopardizing their eventual success. This seems to support the underlying assumption of H1, as it suggests that [perceived] ICC bias creates a disincentive for the indicted side to negotiate. However, since it was the absence of a self-referral that led to this bias in the first place, there is ultimately little evidence in favor of H1.

As outlined above, arrest warrants in particular are expected to bring the indictee to the negotiating table by generating international pressure and isolation, before then becoming the main obstacle to a negotiated agreement. This, however, did not occur as anticipated in the case of Darfur. Although the arrest warrants did promote the failure of the negotiations (as predicted by H2), this was for different reasons than the one forecast by the theoretical framework. Here, the arrest warrants provided al-Bashir with a network of allies. Indeed, the support from the AU and the Arab League towards al-Bashir created a degree of safe haven, allowing him to effectively ignore the ICC arrest warrants issued against him. This meant that al-Bashir was given very few incentives to negotiate, let alone to take negotiations seriously. In fact, the arrest warrants induced further non-cooperation on the part of Sudan, and encouraged al-Bashir to continuously resort to violence, putting peace negotiations on hold. This series of events aligns with H2 as the arrest warrants seem to have promoted the failure of the negotiations. The ICC's intervention probably would not have had the same effect if it had been directed at someone other than a key negotiator.

It seems that the JEM used the ICC as an excuse to withdraw from negotiations, yet its underlying rationale remains largely unknown. Without the ICC's intervention, the JEM would probably have found a different excuse for their withdrawal. This does not

provide sufficient evidence to support H2, as there seem to be other (unknown) factors in the process that played a more prominent role in the failure of these negotiations.

Consequently, the Darfur case study provides little support for H1 as the absence of a self-referral still led to the failure of the negotiations, and strong support for H2 as the arrest warrants against a key negotiator (al-Bashir) seem to promote the failure of the negotiations. However, it is important to note that the evidence supporting H2 followed a different rationale than the one provided in the theoretical framework, mainly due to the mostly unanticipated creation of a network of allies.

Cross-Case Comparison and Analysis

The two case studies demonstrate some similarities as well as differences. Neither the 2006 Juba Peace Talks nor the 2009 Doha Peace Negotiations concluded in a peace agreement, and the signs of a lack of negotiating in good faith (particularly the return to violence) ultimately led to the failure of the negotiations in both cases.

The analysis of the ICC's intervention undertaken after a self-referral (H1), or the absence of such, led to interesting and somewhat contradictory results. For instance, both the Ugandan self-referral *and* the UNSC-referral in Darfur generated criticism of the ICC and calls of bias and subjectivity. This seems surprising for two reasons. First, while there is strong evidence of the Ugandan self-referral having taken place as a result of targeted strategic manipulation, the UNSC-referral was issued without the consent of the Sudanese government, thus rendering manipulation of the ICC less likely. Second, only one side of the conflict was ultimately indicted in both cases, despite the different degrees of influence of the two governments over the ICC. This second point can be explained by the ICC's dependence on state cooperation. On the one hand, in Uganda the ICC did not want to lose its friendly relationship with Museveni, so it seemed to avoid taking action against the Ugandan government. On the other hand, in Darfur the relationship with al-Bashir was never cordial. In fact, al-Bashir's threats of non-cooperation made the implementation of the arrest warrants particularly difficult, and the lack of international support for the ICC did not leave the ICC with many practical ways to obtain al-Bashir's cooperation.

In both cases, the perception of ICC bias led to similar and negotiation-undermining results. In Uganda, the parties' mutual distrust was intensified. In Darfur, accusing ICC of lacking independence allowed al-Bashir to continue to resort to violence and prolong the conflict. However, it is important to note that the link between the perception of ICC bias and the failure of the negotiations is not particularly strong in the Ugandan case study.

In this sense, the two case studies do not provide equal support for H1. On the one hand, there seems to be evidence in favor of H1 in Uganda, as the self-referral complicated the negotiations by generating perceived ICC bias and fueling mutual distrust between the negotiating parties. On the other, H1 finds little support in Darfur, as the *absence* of a self-referral also promoted violence over negotiations. This indicates that a self-referral does promote the failure of negotiations, yet its absence does not lead to successful negotiations.

The analysis of ICC intervention – particularly in the form of arrest warrants – directed against a key negotiator (H2) also concluded with contradicting results. In Uganda, the arrest warrants (together with the resulting international pressure) increased the LRA's isolation and helped drive it to the negotiating table. However, as predicted by the theoretical framework, they soon became a key obstacle to success at the Juba peace talks. This did not happen in Darfur. Instead, the arrest warrants incited support for al-Bashir from other – particularly African – states, and al-Bashir was thus able to travel and continue his duties as President of Sudan without much impediment. Consequently, the ICC intervention generated very few incentives for al-Bashir to negotiate or to take the ICC seriously.

Although the two case studies follow a different rationale and display diverging dynamics, they both show support for H2; the ICC interventions against Kony and al-Bashir ultimately promoted the failure of the negotiations. The different rationale can be explained by the divergent reactions of the international community. In the Ugandan case study, declining support from other states – particularly neighboring countries such as Sudan – isolated one party and created new incentives for a negotiated solution. In Darfur, the degree of international support for al-Bashir's prosecution was insufficient and his network of allies made isolation unlikely, if not impossible. This indicates that in cases

where international support for ICC intervention is weak (or strong), the incentives to genuinely negotiate are likely to be equally weak (or strong). ICC intervention *alone* does not seem to be sufficient to bring indicted parties to the negotiating table. Instead, there is also a need for external pressure to raise the relative cost of fighting over negotiating a peaceful solution. Nonetheless, as the Ugandan case shows, ICC arrest warrants will most likely constitute a decisive obstacle for the success of negotiations, no matter the degree of international support towards the ICC. Unless the ICC decides to withdraw them (a highly unlikely event), indicted parties will most likely avoid signing a peace agreement.

Consequently, despite the different rationale behind the key negotiators' actions, both case studies show strong evidence in support of H2 – ICC intervention against key negotiators promotes the failure of peace negotiations.

Of course, these findings do not discard that other conflict-related factors can and do play a role. Every individual conflict is different, and portrays a diverse combination of dynamics that may alter the 'rules of the game'. For instance, in conflicts where grievances run particularly deep, conflict resolution might require the use of methods that are more compatible with traditional values. The fact that 'justice' was sought in Uganda, for example, might not have addressed the specific views of that society, and may have complicated negotiations. Another possible factor may be the lack of a perceived mutually hurting stalemate in both Uganda and Darfur, which some would argue indicates the prematurity of negotiations. Neither the LRA nor the JEM took the negotiations seriously, as they most likely used them to recover, rebuild, regroup, and rearm. Indeed, the fact that the JEM in particular seemed uninterested in negotiating in the first place shows that the arrest warrants were probably only seen as a convenient cover. Unfortunately, negotiations happen mostly behind the scenes and in an informal setting, which means that there will always be factors that remain unknown to the public.

Conclusion

By taking a rational choice institutionalist approach, two conditions were identified under which ICC interventions in ongoing civil conflicts promote the success or failure of peace negotiations. Specifically, these include the intervention directed against a key negotiator (H2) and, to a lesser degree, the voluntarily referral of a situation by the government of the conflicted state to the ICC (H1).

The analysis of the case studies displays unequal support for H1, and strong evidence in favor of H2. This means that a self-referral will see peace negotiations more likely to fail. However, the absence of a self-referral does not automatically lead to success. This suggests that there are other forms of referral or different intervening factors that may lead to a similar outcome. Consequently, the impact of the self-referral on the success or failure of the negotiations is not as strong and generalizable as the Ugandan case study might be taken to indicate. Additionally, both case studies agree that when the ICC intervenes against a key negotiator, peace negotiations are more likely to fail. The ICC simply cannot disregard political aspects, including the level of international support for its intervention and the status of peace negotiations, if it expects to fulfil its mandate of ending impunity and to do so while promoting peace.

These findings further reinforce the argument that law should not be seen in isolation from politics. The ICC's reliance on state cooperation is a strong reminder of this reality. The pursuit of the ambitious mandate of ending impunity is likely to be jeopardized if the ICC blindly and indiscriminately follows the letter and the spirit of the law. In such cases, the ICC can be manipulated, ridiculed, and rendered ineffective if it does not proceed with caution. Therefore, the findings support the general necessity for an open discussion on the relationship between peace – and particularly the role of peace negotiations – and justice.

The peace versus justice debate correctly emphasizes that there is not only one clear answer to the puzzle, but multiple possible approaches and combinations. However, all the different arguments of the debate agree on one thing: that the ICC, as an international organization, matters, and that its ambitious pursuit of justice can at times ultimately clash with another fundamental value and social necessity: durable peace. This thesis contributes

to the debate by emphasizing that political realities surrounding the ICC should actively be taken into account by the ICC when considering intervention in an ongoing conflict. In this sense, I agree with Gegout (2013) and Clark (2011) that the achievement of international justice is an important mandate, yet it is only viable when all factors of the individual conflict are taken into account. This approach disagrees with Kersten (2011), Sriram (2007) and Grono and O'Brien (2008), as it implies that if these factors are not considered there may well be justice but no peace.

Authors such as Grono and O'Brien (2008) and Rodman (2012) promote the prosecution of alleged perpetrators of international crimes despite the probable prolongation of the conflict, and thus wrongly hold to the notion that the ICC is – or at least should strive to be – purely a 'judicial' institution free from politics. Admittedly, it is critical for the ICC to be as impartial and independent as possible when rendering its judgments. However, the political reality is that the ICC is dependent on state-cooperation for the fulfilment of its mandate, and this renders such arguments incomplete and potentially harmful. This thesis supports the notion that justice should not come at the cost of peace, unless the particular dynamics of the conflict clearly necessitate justice in order for peace to be possible.

While this thesis addresses important issues and its findings may be generalizable to future ICC situations, it faces two main limitations. The first one refers to the difficulty in gathering evidence. Very often, the most important dynamics within negotiation processes – such as the agreement of concessions by the parties – occur behind the scenes and off the record. Unfortunately, completely overcoming this limitation is impossible. However, many reliable reports and articles by authors who have been able to conduct such research are available and were used in the analysis above. Additionally, limited cases from which to choose restrict analysis further. The fact that the ICC will most likely continue to intervene in ongoing conflicts almost guarantees future case studies, which can be analyzed and compared in greater detail to examine whether the ICC as in any way changed its approach.

The second limitation relates to the selection of independent variables. By focusing on ICC-related factors, other conflict-specific dynamics and their potential impact on peace negotiation outcomes have not been taken into account. The complexity of each individual conflict and the number of intervening factors would have shifted the focus from the

ICC's impact and extended and further complicated the analysis to the point its scope would have become unmanageable. Consequently, these factors have been acknowledged and controlled-for, but the paper has kept its focus on ICC intervention. The combination of conflict-related and ICC factors is, however, an interesting path for future research on the subject.

Another interesting focus for future research is whether the type of crime the indictees are charged with (whether with genocide, crimes against humanity, and/or war crimes) alters the potential impact of ICC intervention on the outcome of peace negotiations. For instance, the degree of gravity of the crime might alter the reaction of other/allied states and/or the victims. Furthermore, the fact that ICC arrest warrants can at times constitute the most significant obstacle for peace negotiations (as was seen in Uganda) is disconcerting, as it implies that ICC intervention will most likely always impede negotiations. Future research into the relationship between international justice and amnesties, or the extent to which the ICC is not bound by governments' decision to grant amnesties, might be useful for ICC decision-making.

Finally, due to this thesis' timely and spatial limitations, the analysis has had to be restricted to one theoretical approach (rational choice institutionalism). A similar study using a different theoretical approach (e.g. a realist approach crediting states for ICC action) might provide a distinct and useful insight to the effects of ICC action.

This paper does not argue that the ICC should *not* intervene in ongoing conflicts, only that it should do so with a higher degree of caution and awareness of the impact of its actions. The potential characterizations as a 'tool of states' or an 'obstacle for peace negotiations' is not something the ICC should risk. Ending impunity for the gravest international crimes is an important – though ambitious – mandate and should not be jeopardized due to recklessness or legalistic stubbornness. Following the law is indeed an essential element of a judicial institution; however, wilful blindness to crucial political realities might destroy everything the ICC has worked for and do greater damage than good.

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Appendix: Relevant Rome Statute Articles

Article 1: The Court

An International Criminal Court ('the Court') is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.

Article 4: Legal Status and Powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.

2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

Article 5: Crimes Within the Jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:
(a) The crime of genocide;
(b) Crimes against humanity;
(c) War crimes;
(d) The crime of aggression.

2. The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

Article 6: Genocide

For the purpose of this Statute, 'genocide' means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

Article 7: Crimes Against Humanity

1. For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

2. For the purpose of paragraph 1:

(a) 'Attack directed against any civilian population' means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
(b) 'Extermination' includes the intentional infliction of conditions of life, inter alia the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;
(c) 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
(d) 'Deportation or forcible transfer of population' means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
(e) 'Torture' means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions; (f) 'Forced pregnancy' means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
(g) 'Persecution' means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
(h) 'The crime of apartheid' means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime

of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;

(i) 'Enforced disappearance of persons' means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

3. For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above.

Article 8: War Crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.

2. For the purpose of this Statute, 'war crimes' means:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(i) Wilful killing;

(ii) Torture or inhuman treatment, including biological experiments;

(iii) Wilfully causing great suffering, or serious injury to body or health;

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;

(vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;

(vii) Unlawful deportation or transfer or unlawful confinement;

(viii) Taking of hostages.

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;
(vi) Killing or wounding a combatant who, having laid down his arms or having no longer means of defense, has surrendered at discretion;
(vii) Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;
(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(x) Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xi) Killing or wounding treacherously individuals belonging to the hostile nation or army;
(xii) Declaring that no quarter will be given;
(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
(xiv) Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;
(xv) Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;
(xvi) Pillaging a town or place, even when taken by assault;
(xvii) Employing poison or poisoned weapons;
(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;
(xix) Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;
(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;
(xxi) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(xxii) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;
(xxiii) Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;

(xxiv) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions;
(xxvi) Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.
(c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause:
(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
(ii) Committing outrages upon personal dignity, in particular humiliating and degrading treatment;
(iii) Taking of hostages;
(iv) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable.
(d) Paragraph 2 (c) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.
(e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts:
(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
(ii) Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;
(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;
(iv) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;
(v) Pillaging a town or place, even when taken by assault;
(vi) Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;
(vii) Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;
(viii) Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;
(ix) Killing or wounding treacherously a combatant adversary;

(x) Declaring that no quarter will be given;
(xi) Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;
(xii) Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;
(f) Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

3. Nothing in paragraph 2 (c) and (e) shall affect the responsibility of a Government to maintain or re-establish law and order in the State or to defend the unity and territorial integrity of the State, by all legitimate means.

Article 11: Jurisdiction *Ratione Temporis*

1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.

2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3.

Article 12: Preconditions to the Exercise of Jurisdiction

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.

2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
(a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
(b) The State of which the person accused of the crime is a national.

3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Article 13: Exercise of Jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

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

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

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Article 15: Prosecutor

1. The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.

2. The Prosecutor shall analyze the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.

3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.

4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.

5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.

6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Article 16: Deferral of Investigation or Prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 17: Issues of Admissibility

1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under article 20, paragraph 3;

(d) The case is not of sufficient gravity to justify further action by the Court.

2. In order to determine unwillingness in a particular case, the Court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

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

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

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

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.

Article 25: Individual Criminal Responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.

2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
(ii) Be made in the knowledge of the intention of the group to commit the crime;
(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
(f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

4. No provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.

Article 27: Irrelevance of Official Capacity

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

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

Article 42: The Office of the Prosecutor

1. The Office of the Prosecutor shall act independently as a separate organ of the Court. It shall be responsible for receiving referrals and any substantiated information on crimes within the jurisdiction of the Court, for examining them and for conducting investigations and prosecutions before the Court. A member of the Office shall not seek or act on instructions from any external source.

2. The Office shall be headed by the Prosecutor. The Prosecutor shall have full authority over the management and administration of the Office, including the staff, facilities and other resources thereof. The Prosecutor shall be assisted by one or more Deputy Prosecutors, who shall be entitled to carry out any of the acts required of the Prosecutor under this Statute. The Prosecutor and the Deputy Prosecutors shall be of different nationalities. They shall serve on a full-time basis.

3. The Prosecutor and the Deputy Prosecutors shall be persons of high moral character, be highly competent in and have extensive practical experience in the

prosecution or trial of criminal cases. They shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

4. The Prosecutor shall be elected by secret ballot by an absolute majority of the members of the Assembly of States Parties. The Deputy Prosecutors shall be elected in the same way from a list of candidates provided by the Prosecutor. The Prosecutor shall nominate three candidates for each position of Deputy Prosecutor to be filled. Unless a shorter term is decided upon at the time of their election, the Prosecutor and the Deputy Prosecutors shall hold office for a term of nine years and shall not be eligible for re-election.

5. Neither the Prosecutor nor a Deputy Prosecutor shall engage in any activity which is likely to interfere with his or her prosecutorial functions or to affect confidence in his or her independence. They shall not engage in any other occupation of a professional nature.

6. The Presidency may excuse the Prosecutor or a Deputy Prosecutor, at his or her request, from acting in a particular case.

7. Neither the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground. They shall be disqualified from a case in accordance with this paragraph if, inter alia, they have previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted.

8. Any question as to the disqualification of the Prosecutor or a Deputy Prosecutor shall be decided by the Appeals Chamber.

(a) The person being investigated or prosecuted may at any time request the disqualification of the Prosecutor or a Deputy Prosecutor on the grounds set out in this article;

(b) The Prosecutor or the Deputy Prosecutor, as appropriate, shall be entitled to present his or her comments on the matter.

9. The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.