Assessing the Impact of the International Criminal Court on National Judicial Systems: Operationalising the Responsibility to Protect

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1. Introduction

Safeguarding human rights is an importance that cannot be overstated, especially when protecting vulnerable populations from atrocious actions. The International Criminal Court (ICC) and the Responsibility to Protect (R2P) doctrine are two crucial mechanisms in this effort. The ICC and R2P, although inherently different, share an important common aim: to prevent and address severe human rights violations. Nevertheless, due to their reliance on state cooperation, they face significant challenges related to enforcement and execution. The ICC, established by the Rome Statute, seeks to prosecute individuals for the most serious international crimes in cases where national courts are unwilling or unable to do so (ICC, 2021). R2P, on the other hand, is a global political commitment endorsed by all member states of the United Nations at the 2005 World Summit to prevent mass atrocities and protect populations at risk (United Nations General Assembly [UNGA], 2005). There is a paucity of empirical research examining the effect of the ICC's intervention on domestic courts and the further impact these have on operationalising R2P, which is covered by this investigation. This thesis examines how the ICC can help operationalize R2P through its impact on domestic judicial courts.

The societal importance of this research topic is multifaceted. For starters, both the ICC and the R2P doctrine have dealt with execution problems. Although they are inherently different, they both require states to execute their bidding. This research can aid the clarification of the roles and relationships of the ICC and R2P. In particular, understanding the ICC's role in the operationalisation of R2P could further clarify and outline the ways in which these two institutions can aid each other. Furthermore, a proper understanding of this relationship can help determine whether the ICC can be used as a tool of states invoking R2P in order to operationalise its pillars. This thesis can also provide valuable insight into the current state of global justice mechanisms, and how effective these currently are at holding the perpetrators of grave crimes and atrocities accountable. Finally, it might aid in suggesting some possible future directions for the ICC and R2P, and how to implement their principles globally.

This thesis will commence by providing an overview of the current literature on the influence of international courts on domestic courts, the effectiveness of the ICC's complementarity principle, and the ICC's connection to the Responsibility to Protect principle. From this, a research gap will be identified that leads to the research question under investigation in this thesis. Then, the concepts and theory relevant for this research, R2P, impact, complementarity and neoliberal institutionalism, will be discussed. Additionally, choices and justification for the research design, case selection, data sources and method of analysis will be explained. This is followed by a process-tracing analysis of the ICC's involvement in the cases of Kenya and Colombia. Lastly, in the conclusion the findings of this research will be discussed, as well as its limitations and suggestions for future research.

2. Literature Review

The following section will examine the existing literature relevant to the research question, by dividing it into three different sections. The first two components will elaborate on both the influence of the ICC on domestic courts and the effectiveness of the complementarity principle as a whole. Finally, the third component will focus on the relationship and overlap between the ICC and R2P. The first two sections are key to the investigation of my research question, considering that they encompass the causal mechanisms that are found in between the cause and outcomes of the analysis itself. A more extensive explanation of the causal mechanisms is found below.

2.1. Influence of the International Criminal Court on Domestic Courts

The International Criminal Court, along with other contemporary international courts, face multiple challenges in regard with their relationship to domestic courts. Many influential actors have, over time, challenged the legitimacy of these institutions, and resisted cooperating with them. These obstacles have hindered the capacity of international criminal courts such as the ICC, and limited their influence on local

norms and actors. Domestic courts are of huge importance to international courts, since these tend to be less expensive to operate, enjoy more legitimacy, and have the capacity to prosecute significantly more individuals than international courts. This helps them to facilitate more underlying changes of norms and values domestically (Shany, 2013, p. 433).

This focus on domestic courts is an intrinsic part of the Rome Statute, the founding treaty of the ICC, through the principle of complementarity, which is one of the most important aspects of the Court (Ellis, 2002, p. 7). Shany (2013, p. 436) argues that the exercise of jurisdiction by international courts can lead to domestic prosecutions, and international investigations could produce information that would be helpful in any eventual domestic hearings. The idea of external jurisdiction is not free of problems, according to Shany (2013, p. 437). International jurisdiction might lead to states using it as an excuse, to avoid addressing atrocities. The high number of war crime related prosecutions in Bosnia, Serbia and Croatia by the International Criminal Tribunal for the Former Yugoslavia (ICTY), ICC involvement in the Democratic Republic of Congo (DRC), and the threat of ICC involvement in Colombia all go to show that local investigations and prosecutions increase with the aid of international courts (Shany, 2013, p. 439). On the other hand, the courts themselves can at times have a negative effect, where the international court's intervention led to an almost complete block of atrocity-related prosecutions, or at times the courts can also have no effect, as was the case with the ICC in Sudan (Shany, 2013, p. 440). The author then goes on to discuss how international criminal courts can encourage and facilitate both institutional and legal reforms at a domestic level, whether it is through a "preemptive reform" to avoid future intervention, or simply a reform based on the lessons learned from the court itself (Shany, 2013, pp. 440-442). Ellis (2002, p. 9) adds to this idea, reaffirming the concept that states will hold firm control over their domestic prosecutions, and will likely act both aggressively and fairly within their own courts, to avoid triggering ICC jurisdiction.

This being said, the relationship between international courts and domestic courts are not free of structural problems. Early on, international courts did not consider the possible spillover effect that their involvement could have on local courts, and they did not base their internal procedures on the framework created by domestic courts. This meant that at times, international courts were isolated, and not truly involved in the country where the atrocities were committed. The ICC tackled this issue with their "positive complementarity" principle, which included the domestic courts in the proceedings (Shany, 2013, pp. 444-446). This inclusion essentially means that parties member to the Rome Statute have responsibilities to the Court, and the ICC will not overstep their boundaries and erode their sovereignty (Ellis, 2002). Nonetheless, the Court's ability to tackle countries that are in disapproval over their jurisdiction is still severely limited (Shany, 2013, pp. 444-446). Additionally, international courts such as the ICC tend to lack the necessary resources to credibly engage, or threaten to engage, with a large number of criminal prosecutions, which in turn leads to less preemptive prosecutions initiated by legal courts (Shany, 2013, pp. 447-448). Wierda (2019, p. 123) presents a similar view, since he also believes that the ICC, due to its limited resources, is unlikely to effect significant change in domestic national courts. Also, perceptions of legitimacy are an obstacle in the influence of the ICC on domestic courts. In countries such as Uganda or the DRC, perceptions of the Court being biassed by key members of their domestic legal system hampered the speed and efficiency of the cooperation between them (Shany, 2013, p. 450).

One of the bigger challenges that the Court faces is its own admissibility criteria. The Court is allowed to investigate cases where the home country shows inaction, but considering the situation that most states find themselves in when their case is referred to the ICC, there is considerable leeway for admissibility within the Court. Moreover, once the Court opens an investigation, it is almost impossible for individual states to regain the right to try the case in its own territory again, meaning that, in essence, the ICC competes with national jurisdictions on for cases (Wierda, 2019, p. 101). This feeling of competition between the ICC and national courts is only furthered by the idea that a case becomes inadmissible to the

ICC only when domestic courts are building trials that involve the same person being prosecuted for the same behaviour than the ICC is intending to prosecute. This is known as the "same person same conduct" principle (Wierda, 2019, p. 102). It is important to note, though, that even when cases leave the domestic jurisdiction of a state, there is a possibility that most of the mid and low-level perpetrators are tried by domestic courts, which challenges Wierda's (2019) conception of case competition (Van der Wilt, 2013, p. 208) The principle in question leads to prosecutors in transition countries being forced to build complex cases which not only mirror the ICC's charges, but their mode of liability. Wierda (2019, p. 102) then argues that if the objective of the ICC is to address impunity, then offenders being tried under national law should be sufficient. Another interesting influence that the ICC has had on domestic courts lands on domestic laws. In order for any state to truly benefit from the Court's jurisdiction, states need domestic laws that cover the same category of crimes as those under ICC authority. Despite this, states are still free to implement the treaty obligations in whichever way they choose (Ellis, 2002, p. 9).

2.2. The Effectiveness of the Complementarity Principle

The complementarity principle of the ICC is among its most important tenets, although it is not explicitly defined within its statute (El Zeidy, 2002, p. 896). This principle, in simple terms, gives the ICC an essential yet limited role, in which it is allowed to investigate and prosecute the most serious crimes, but only if the state where these crimes take place are either unwilling or unable to fulfil these duties themselves (Dicker & Duffy, 1999, p. 54). One of complementarity's biggest successes has been breaching the gap between sovereignty and inaction, which has historically been the main cause for impunity. The ICC's complementarity principle has allowed the Court to intervene only in cases of dire need, hence respecting a state's inherent right to sovereignty (Stigen, 2008, p. 479). This principle has also encouraged states to align their own national legislations with the Rome Statute's standards, in order to avoid any possible interventions by the ICC (Stigen, 2008, p. 473). Stigen (2008, p. 478) does note that in order for the ICC and all of its principles to be effective, they have to carry out successful

interventions, in order to further their credibility and legitimacy. The idea of shared responsibility is the core element of the complementarity principle, and within this innovation lies the effectiveness of the concept. It united domestic and international jurisdiction through the common bond of guaranteeing the respect of international justice, without establishing primacy of one court over another (Stahn, 2011, pp. 237-238). This author argues that the effectiveness of complementarity is also evidenced in its ability to provide states with incentives, in order to reach compliance (Stahn, 2011, p. 250). This "threat-based side of complementarity" has shown fruit in cases such as Uganda and Sudan, where domestic matters were influenced by the ICC through its complementarity principle (Stahn, 2011, p. 255). This is in accordance with the findings of Ellis (2002), in the previous section.

Despite its victories, complementarity has not exclusively been a successful principle. Stahn (2011, p. 252) argues that the ICC operates under a model of "classical" complementarity, which he defines as a system based on the assumption that complementarity is a concept based on threats, in which both international and domestic courts operate, although in different layers of jurisdiction. This being said, he believes that this model of complementarity hinders the effectiveness of the model and the ICC as a whole, since it locks them into a static position. In other words, the ICC is unable to play an active role in crisis management and conflict resolution through the model of classical complementarity (Stahn, 2011, p. 255). Wierda (2019, p. 109) brings forth another negative perspective regarding the effectiveness of complementarity. He believes that the principle could have a distorting effect, meaning that due to the narrow focus that complementarity provides, this principle can lead to the Court centering itself around a limited number of cases, while ignoring the general context. Wierda (2019, p. 110) goes as far as to argue that the Court as a whole is not free of the problems that national courts face, and because of this, the model of complementarity that is often talked about turns into a model of parallelism. Through the introduction of a separate concept, the author argues that both the ICC and national courts tend to operate simultaneously, yet without the hierarchy that the concept of complementarity implies. The ICC and national courts sharing the same impediments means that whatever is stopping national courts from

functioning correctly, will eventually stop the ICC as well, even when its jurisdiction is triggered through complementarity (Wierda, 2019, p. 110).

Despite this, the effectiveness of complementarity has not been linear throughout the existence of the ICC. During the early years of the Court, Nichols (2015, pp. 38-39) found that it encouraged states to relinquish their control of certain cases, so that it could solicit its first cases. He finds no evidence that the ICC, or more specifically the Office of the Prosecutor (OTP), was encouraging or assisting domestic prosecutions at the time. This means that initially, the concept of complementarity was not effective, due to the Court's actions.

2.3. Cooperation Between the International Criminal Court and the Responsibility to Protect Principle

While the ICC is one of the tools available to the international community to protect human rights, it is not the only one. R2P, on the other hand, is a principle that aims at preventing heinous crimes, and it overlaps with the ICC. According to Schiff (2016, p. 302), both the Rome Statute and the three pillars behind R2P acknowledge the existence of some sort of international community which shares common values, and entails certain obligations. The author then argues that the ICC and R2P are institutions that can be considered normatively complementary, considering their international commitment to preventing and responding to atrocities, yet the coordination and cooperation between them is highly problematic. Despite this, the ICC's positive complementarity principle and R2P overlap when it comes to their prevention aspect. They both attempt to strengthen civil society, improve the rule of law, and reduce the general social polarisations that could eventually birth atrocities (Schiff, 2016, p. 302). He also argues that the ICC cannot back R2P in terms of deterrence, since the limitations the ICC has are well known. Not only does it lack the "fearsome" reputation it would need in order to effectively deter crimes, but mobilisation against the ICC by states within the African Union (AU) likely reduces the legitimacy of the institution, as well as its deterrence capacities (Schiff, 2016, p. 308). Rim (2022, p. 89) brings forth an

argument that agrees with Schiff (2016). He argues that the idea of the ICC as a strong contributor to the prevention of atrocity crimes has mainly been based more on the context of domestic criminal law as opposed to international law. This means that because of the lack of certainty surrounding possible punishment by the Court, the deterrent effect of the ICC could be hampered.

Another area of overlap between the ICC and R2P is its impact on the prevention of atrocities. Considering the nature of the ICC as an institution, the greatest preventative impact that it can have relies on its principle of complementarity, by enhancing national legal systems and therefore helping states fulfil the second pillar of R2P (Rim, 2022, p. 90). The overlap, according to Rim (2022, pp. 91-92), does not end there. The ICC also has the ability to strengthen the third pillar of R2P, through international criminal prosecution as a form of non-military intervention. He further argues that even the threat of prosecution by the ICC can be deterrent enough, additionally enacting R2P. Finally, he contends that the reconstruction phase of a conflict is the most important stage for R2P implementation, and the one where both institutions can work in the most effective manner. This is because criminal prosecution remains the chief way of resolving conflicts innate to past human rights violations, and through this process, the ICC could function as a transitional justice mechanism, implementing the core values of the statutes that created both institutions (Rim, 2022, p. 95). Contarino and Lucent (2009, pp. 560-561), on the other hand, argue that empowering the ICC to determine when a government has failed its R2P obligations could possibly enhance R2P enforcement, by reducing opportunistic interventions and improving the credibility of the United Nations Security Council (UNSC), through a depoliticisation of R2P determinations. Currently, the UNSC alone determines what falls under a R2P violation, which tends to lead to both delays and inconsistencies. The prospect of integrating the ICC's juridical process could provide a legal basis for identifying breachers, quelling unauthorised military actions, and fostering the birth of a robust international legal framework (Contarino & Lucent, 2009, pp. 566-567). Thus, the ICC could complement the UNSC. which in turn would provide a juridical foundation for R2P interventions, all the while not

only maintaining the UNSC's enforcement authority, but enhancing the relationship between the ICC and R2P.

Although previous literature has looked into the theoretical relationship and normative complementarity between the ICC and R2P, there are insufficient empirical studies examining how the ICC's intervention have directly impacted national judicial systems, and how this, in turn, has operationalised R2P. This existing research gap leads to the following research question:

In what ways has the International Criminal Court contributed to the operationalisation of the Responsibility to Protect through its impact on national judicial systems?

3. Theoretical and Conceptual Framework

In order to properly understand the implications of the question being researched, some concepts and theories have to be thoroughly explained. The following section will discuss the concepts R2P, impact, and the principle of complementarity, as well as the theory of neoliberal institutionalism.

3.1 The Responsibility to Protect (R2P)

The concept of the Responsibility to Protect came to be in 2001, created by the International Commission on Intervention and State Sovereignty (ICISS). It was devised as a tool of global political commitment to prevent the four key crimes: war crimes, genocide, ethnic cleansing, and crimes against humanity (UNGA, 2005). The doctrine was born in the context of the international community's response to multiple humanitarian crises that occurred in the 1990s, such as the Rwandan genocide or the Srebrenica massacre. R2P itself is centred around the idea that sovereign states have a responsibility to protect its populations from the aforementioned key crimes, but it is divided into three separate sections, or "pillars".

Pillar one is defined as the state's enduring responsibility to protect their populations, nationals or not from the four key crimes. This is a responsibility that as per the 2002 World Summit Outcome, lies first and foremost with the state, since according to Ban Ki-moon, former UN Secretary General, the responsibility to protect is a matter of State responsibility, and the protection of population is a defining attribute of sovereignty and statehood in the twenty-first century (UNGA, 2009).

Pillar two, on the other hand, is based on the idea that the international community has a responsibility to assist states in fulfilling their primary responsibilities, through providing the means, support, or general encouragement. Said encouragement can take shape in four different manners: by encouraging states to meet their responsibilities, by helping them to exercise said responsibility, through enhancing their general capacity to protect, and by assisting states "under stress, before crises and conflicts break out" (UNGA, 2009). Besides these measures, pillar two could also encompass military assistance for a non-coercive purpose, despite common misunderstandings and narrow visions of the R2P principle as a whole.

Pillar three on the other hand, is one of the more controversial aspects of the R2P doctrine. This section affirms that the international community has the responsibility to employ appropriate diplomatic, humanitarian, and other peaceful means, if a state is "manifestly failing" to protect their populations from the four key crimes. The UNSC is prepared to take collective action, either peaceful or non-peaceful, should peaceful means be inadequate, if national authorities are manifestly failing at protecting their population (UNGA, 2005). Some of the instruments at the disposal of the UN include targeted sanctions, such as travel or financial transfer, and they range to military deployment (UNGA, 2009).

3. 2 Impact

One of the key elements of the question that needs to be defined is the word "impact", as it can be perceived as very open ended. For the sake of this research, I will be using the Cambridge English

Dictionary's definition of the word: the strong effect or influence something has on a situation, person, or in this case, institution (Cambridge Dictionary, n.d.). I will consider influence as any action that the ICC undertakes that leads to a change in the way domestic courts intervene, act, or prosecute international criminals, or any effect they have on enhancing the capacity of domestic courts to carry out the foregoing tasks.

3.3 Principle of Complementarity

The principle of complementarity is one of the cornerstones of the International Criminal Court, and as such, has been defined multiple times. One of the most relevant was brought forth by Luis Moreno Ocampo, the former prosecutor of the ICC. He argues that complementarity is a principle that has two dimensions: admissibility and positive complementarity. The first dimension, more known as the admissibility test, essentially entails an assessment of the relevant existing national proceedings, and their genuineness, regarding one of the four key crimes that the ICC holds jurisdiction over. This assessment is based on the criteria specified in Article 17 (1)(a)-(c) of the Rome Statute (ICC, 2002). The results of this examination determine whether the Court will involve itself in the case, and take over proceedings from national courts. This first dimension poses complementarity as a litmus test that decides whether a specific case is relevant to the ICC. (Moreno-Ocampo, 2011, pp. 23-24). Positive complementarity, on the other hand, is a provision stating that upon request, the Court may cooperate with and provide assistance to states conducting an investigation into, or trial, in respect to a crime that falls under the jurisdiction of the ICC, or one that constitutes a serious violation of the laws of said state. Positive complementarity, Ocampo argues, implies a horizontal relationship with states, one that does not attempt to introduce the Court a function of assessing or reforming the functionings of domestic judiciaries.

3.4 Neoliberal Institutionalism

International institutions and the way they affect other actors, such as states, is an idea that has been analysed through multiple political theories, yet one of the most prominent ones is known as neoliberal

institutionalism (NLI). This theory is based on the study of international relations, but with a focus on the cooperative role of institutions (Badie, Schlosser & Morlino, 2011, p. 3). The fundamental idea behind this theory is that international cooperation is both possible and achievable through the creation and maintenance of international institutions, whether these are formal (like the UN or the European Union) or informal, such as the general regime that surrounds capitalist free trade. NLI argues that both formal and informal institutions have the potential to establish long lasting relationships between states, through iterated interaction, the diffusion of information, by championing transparency, and by attempting to reduce free-riding. One of the main tenets behind NLI is institutions playing a key role, through the mitigation of the effects of anarchy, and by making the realisation of absolute gains a possibility. When taking into account both of these elements, the possibility of international cooperation becomes significantly more likely.

Taking all of this into account, it is critical to understand how a neoliberal institutionalist framework is the best possible lens to use when investigating the research question posed above. To do so, we first need to recognise how international institutions can impact state behaviour. Said effect can be measured through Botcheva and Martin's (2001) divergence and convergence criteria. They explain convergence to be a situation in which states recognise that they have significant kindred externalities, giving them strong incentives to align their behaviours. Institutions facilitate this type of behaviour, through measures such as monitoring compliance, enforcing agreed upon rules, and providing information. On the other hand, divergence implies states having less shared externalities, which leads to less incentives to align behaviours. In these situations, institutions can still affect state behaviours through indirect manners, such as creating aspirational goals, through setting moral and ethical pressure upon states, and facilitating voluntary compliance (Botcheva & Martin, 2001, pp. 4-10). Understanding these two dynamics helps grasp the influence that international institutions can have on states and their behaviour through the promotion of convergence, especially when externalities are significant.

4. Methodology

The upcoming section will examine and substantiate the choices made during the process of selecting cases and research design, as well as elaborate on the process undertaken to obtain the relevant sources used.

4.1 Research Design & Case Selection

In order to appropriately examine the Court's contribution to the operationalisation of R2P through its impact on national judicial systems, a small-N study research design will be employed. This specific type of qualitative research is fitting to answer the research question, considering it allows a comprehensive and contextually rich exploration of the variables, and becomes the perfect environment for the method of analysis chosen (Halperin & Heath, 2020, pp. 167-168). This specific kind of research design falls under confirmatory research, which operates as a process of investigating a hypothesis, through a method of evidence testing (Halperin & Heath, 2020, p. 156).

Due to the relatively recent nature of both the ICC and the R2P principle, the number of cases that could have been chosen for this study were limited. The cases that were chosen shared a series of common criteria, which made them ideal for this study. These case studies were composed by the following countries: Kenya and Colombia. These two cases all encompass a broad spectrum of conflict situations, ranging from internal conflicts and post-election violence, to recurring cycles of mass atrocities. The involvement of the Court has prompted changes that will be further elaborated on in the analysis section, which highlight its complementarity function. The examination of these cases will provide the insight necessary to determine whether the ICC has contributed to the operationalisation of R2P principles, through a nuanced understanding of how international justice organisations can impact national legal frameworks.

4.2 Hypothesis

This section will present a hypothesis that aims to explore the research question posed above and both the literature reviewed and the theoretical framework will serve as the pillars of the hypothesis outlined below. Botcheva and Martin's (2001) argument involving the use of neoliberal institutionalism to understand how international institutions, such as the ICC, influence state behaviour through mechanisms such as compliance, deterrence, and capacity building is a theoretical backing for the idea at heart of the hypothesis. Furthermore, the influence of the ICC on domestic laws is highlighted by Ellis (2009, p. 9) and Stigen (2008, p. 479) who argue that due to the principle of complementarity, and in order to avoid ICC intervention, states will often reform their legal frameworks to align with the Rome Statute. This logic leads to the following hypothesis:

H: The ICC's involvement leads to significant legislative reforms in national judicial systems aimed at aligning domestic laws with international criminal justice standards, which are parallel to the tenets of the R2P principle.

4.3 Data Sources

The data used in this study falls mainly under the category of secondary sources, despite the occasional use of primary sources. The primary sources used include treaties, such as the Rome Statute, or official UN documents, such as the World Summit Outcome Document or the report of the Secretary General regarding the implementation of the R2P. These sources are predominantly used to explain the functionings of the ICC or R2P, as well as their chief elements. The secondary sources cited in this investigation are used to answer the research question, as considering the nature of the aforementioned, primary sources were most often not the appropriate tools necessary to tackle it. The secondary sources were selected using the Leiden University database, Google Scholar, and the references of the articles I collected. Finding said sources was a task that heavily depended on the usage of some keywords and

sentences, such as “how did the ICC influence the national judicial system of …”, or “what is the role of the ICC in…”. My main criteria for the inclusion of sources was reading both the abstract and conclusion of each article, which quickly determined its relevance to my research question. All of the secondary sources I used were published by reputable journals or universities, which ensured their reliability and credibility. Nevertheless, I encountered challenges during this process, a highlight of these being the lack of courses for certain case studies like the CAR. Many of the sources relating to this case were in French, language I do not speak, which further complicated the data collection process. Despite these challenges, the sources selected have provided me with a comprehensive basis for the analysis in the following section

4.4 Method of Analysis

To analyse the literature obtained, I will employ the method of process tracing. Process tracing allows for a detailed examination of causal mechanisms, which is essential in understanding how the ICC’s actions have influenced national systems, and how this, in turn, operationalises R2P. The detailed, in depth analysis that this method provides, paired with its provision of contextual understandings helps identify mechanisms that are key in explaining the influence between the two variables being studied. The method is defined by Vennesson (2008, p. 231) as “a procedure for identifying steps in a causal process leading to the outcome of a given dependent variable of a particular case in a particular historical context”, and it has different types. The kind of theory-testing that will be employed in this analysis is known as theory-testing process tracing, and it is used when both the causes and outcomes of a case are known. This specific variant allows researchers to make inferences about whether a causal mechanism, or the process that links causes and outcomes, is operating as hypothesised (Beach & Pedersen, 2019, p. 245).

5. Analysis

In the following sections, I will conduct an in-depth analysis of the two selected cases –Kenya and Colombia– to explore the impact the ICC has had on the operationalisation of R2P, through its impact on domestic judicial systems.

5.1 Kenya

5.1.1 Kenyan Case Context

In December of 2002, the Kenya African National Union (KANU) was defeated at the polls by the National Rainbow Coalition (NARC). This was the first time since its independence from Great Britain in 1963 that KANU had seen defeat, which was seen with optimism by the general public (Wanyeki, 2012, pp. 2-3). This optimism quickly faded as internal conflict within NARC surfaced, and through an eventual rejection of a new constitution, the political rifts were highlighted. The 2007 elections that followed marked a significant deterioration in the political stability of the country, and once the Party of National Unity (PNU) was declared winner, violence erupted nationwide (Wanyeki, 2012, pp. 3-5). The bloodshed was of unprecedented proportions, and mainly fueled by ethnic tensions, led by the fierce clash of the Kikuyu, Luo, and Kalenjin groups. The response to this violence by the Kenyan government was the creation of the Kenya National Dialogue and Reconciliation agreement, established by the Commission of Inquiry into Post-Election Violence (CIPEV). This commission found that violence was spontaneous in some areas, yet premeditated in others, and it often involved societal elites such as business leaders and politicians. In response to these findings, the CIPEV recommended establishing a Special Tribunal with a mandate to prosecute the perpetrators of the violence, yet parliamentary opposition and a general lack of political will led to the failure of the tribunal (Wanyeki, 2012, pp. 5-7).

5.1.2 ICC Intervention in Kenya

Considering Kenya's status as a party to the Rome Statute, this is when the ICC's OTP intervened, and undertook a preliminary examination of the situation. The Court quickly confirmed its jurisdiction over the case, due to the government's lack of domestic prosecution of the crimes. Despite some level of governmental cooperation with the ICC, the OTP proceeded with its investigations, eventually leading to formal charges being raised against six individuals, for crimes against humanity (Wanyeki, 2012, pp. 10-15). The Kenyan government was at times very vocal against the Court's intervention, and they even lobbied the African Union (AU) for support to deter the ICC, yet this did not work, and essentially ended in political embarrassment for them both (Wanyeki, 2012, p. 14).

The ICC's intervention created certain theoretical causal mechanisms through which the ICC is hypothesised to influence national judicial systems, yet the Court did not achieve as much as it might have hoped. The involvement of the OTP led Kenyans to believe that accountability would be possible, and that the ICC would be the best avenue to achieve it. Despite this, the expectations set on the ICC were too high, and the Court, in hindsight, did not live up to them. This made full restorative justice highly unlikely, and the Court had almost no effect on restorative justice as a whole, due to their inability to provide reparations to the victims (Wanyeki, 2012, pp. 15-16). Said inability to achieve both restorative justice and the expectations of accountability show the gap between the ICC's intentions and its practical outcomes.

One of the key theoretical causal mechanisms in this section is the idea of the ICC's impact being deterrence on future violence. The Court's intervention leading to an effect of deterrence seemed unclear at the time of intervention, yet instigation of political violence was generally restrained. The argument gains strength with the passage of time though, since the 2013 elections that followed saw no violence, despite a troubled history (Nichols, 2015, p. 252). This was in line with the expectations of the ICC's

prosecutor at the time, Luis Moreno Ocampo, who believed that future violence would cease as an effect of this intervention (Sriram & Brown, 2012, p. 239). Furthermore, even the Attorney General of Kenya admitted that the Rome Statute, and the ICC as a whole act as deterrents for him and anyone else in a position of power, furthering the effect of the Court (Nichols, 2015, p. 252).

Another relevant theoretical causal mechanism was the ICC bringing forth changes to Kenya's rule of law, at different levels. Most notably, these changes came in the judiciary, at the level of adjudication, and they were seen in the judicial appointments in 2011 (Sriram & Brown, 2012, p. 238). These judicial appointments added momentum to an already established process of judicial reform, despite the somewhat questionable motivations of some of them (Wanyeki, 2012, p. 17; Sriram & Brown, 2012, p. 238). A clear observable implication of this mechanism was the Kenyan government's will to follow through with international ICC warrants, such as the warrant issued against Omar Al-Bashir. Moreover, the ICC's involvement in Kenya pushed the government to engage with international bodies, further upholding standards of international law in the country. This was considered a victory for the rule of law in Kenya, as it was starting to evolve to international standards (Wanyeki, 2012, p. 17). In line with the previously mentioned expectations set upon the ICC, we can acknowledge that their intervention led to demands for legal accountability domestically, and resulted in general discourse about accountability (Kendall, 2014, p. 27). This publicity, in turn, created a higher interest in demand for accountability, influenced national debates, pressured national politicians, and even led to the government embracing certain international norms it arguably would not have otherwise (Sriram & Brown, 2012, p. 238).

The analysis aligns itself with the main premise brought forth in the hypothesis section, as the ICC's involvement led to reforms within the national judicial system, and also led to other significant developments in the general rule of law, which fulfil international criminal justice standards. Despite this, certain limitations of the interventions are noted, although their overall effect does not take away from the positive consequences of the involvement.

5.1.3 Contribution to the Operationalisation of R2P

As mentioned in the introduction, the ICC and R2P are institutions that share goals, yet do not necessarily work in unison towards these. The Court's impact in Kenya led to changes in the way the government operated, with the introduction of reforms, the appointment of new justices, and although it is debated, a deterrent effect that lasted until after the next election cycle (Wanyeki, 2012; Nichols, 2015). In order to understand how these effects can operationalise the R2P principle, we need to acknowledge how each pillar could have benefitted from this intervention. The first pillar of R2P is inherent to each individual state, and considering the ICC only intervenes, or threatens to intervene once a state is unwilling or unable to protect its population and prosecute the perpetrators of heinous crimes, this pillar will stay unaffected by any kind of ICC intervention. The second pillar of this principle, on the other hand, can see the most benefit from the Court's intervention. The ICC took on a role parallel to the main idea behind pillar two, one where the international community steps in to assist states in fulfilling their primary responsibilities. This contribution, although important, was indirect, considering that by completing their main responsibilities, the ICC propelled Kenya towards judicial and legislative reform. Additionally, the Court's involvement arguably served as a future deterrent for further violence, and brought forth a general desire for accountability that also led to a change in political attitudes of the elites. Despite the benefits that the ICC could bring to the operationalisation of R2P's second pillar, the same pattern does not necessarily repeat itself for the third. This is because the last pillar involves collective action by the UNSC, which in turn requires some sort of enforcement mechanism, which the ICC lacks. This absence means that the Court cannot force states to do its bidding, and it requires some level of cooperation to have any sort of effect upon a nation's government.

5.2 Colombia

5.2.1 Colombian Case Context

The origins of the Colombian case study can be traced as far back as the late 1940s, with the death of liberal leader Jorge Gaitán triggering the formation of guerrilla groups around the country. This prompted a period of political violence known as "La Violencia", which gave way to the creation of the Revolutionary Armed Forces of Colombia (FARC) in 1964. Since then, violence within the country saw periods of heightened intensity, although there were several attempted peace processes throughout the years. These attempts were at times close to success, yet it took over 50 years to reach a peace treaty, which was finalised in 2016. The late 1990s saw an increase in violence, with an increase in armed attacks, and even the murders of three United States (U.S.) missionaries in 1999. With kidnappings at an all-time high in the year 2000, the Colombian government launched a U.S.-backed program, known as Plan Colombia, which gave them around 500 million U.S. dollars per annum to revitalise its military and combat crime. This took place in the context of Álvaro Úribe's presidential election, and Colombia's ratification of the Rome Statute, both in August of 2002 (Gonzalez & Uribe, 2014). Following his election, Úribe escalated the conflict with FARC by cracking down on active Colombian guerrillas, which saw a general increase in violations of human rights (Rincón, Sanchez Bautista & Pugh, 2019, pp. 567-568).

5.2.2 ICC Intervention in Colombia

Ratifying the Rome Statute meant that armed groups within Colombia were pressured to disarm and demobilise, yet it also prevented the granting of amnesties by the government. This supposed complications in the peace negotiations, something that placed the Colombian government in a complicated position. They chose to suspend the ICC's jurisdiction over war crimes for seven years, as per Article 124 of the Statute (ICC, 2021).

Two years after Colombia`s ratification of the Rome Statute, the OTP opened a preliminary examination regarding their case. Moreno-Ocampo intended to delay initial action on the case, and trigger reform in domestic institutions, to ensure that the hovering threat of intervention would lead to compliance with international norms (Urueña, 2017, p.107). This approach acted as the key theoretical causal mechanism, and it was noticeably effective. Its cogency was seen through the response of the Colombian government to ICC pressures, such as the implementation of law 1719, which guaranteed justice for victims of sexual violence. This law was passed following ICC reports of concerns on the scarcity of procedures regarding the prosecution of these crimes (Rincón et al., 2019, p. 576). This effect could also be considered as deterrence, since the preliminary examination carried out by the ICC constrained government agency, and fear of ICC scrutiny influenced their decisions (Bocchesse, 2020, pp. 158-160). Aksenova (2015, pp. 5-6) further argues that in this scenario, the ICC implemented a "carrot and stick" approach, where the "carrot", or incentive, was the degree of objectivity that the Court introduces to the peace negotiations, while the "stick" was considered to be its maintained authority to initiate formal investigations on the state. A pattern was also seen when the Court expressed concern over possible suspended sentences (Rincón et al., 2019, p. 577), or when the Colombian government attempted to institute clauses in possible peace treaties that were not up to international law standards (Urueña, 2017, p. 122).

In both of these cases, the outcome was influenced by ICC concerns, and the government was quick to implement change. It is widely believed that as a result of the preliminary examination launched by the OTP, the ICC instituted an understanding of justice that the Colombian government brought to negotiations, and shaped the eventual ratified treaty (Björkdahl & Warvsten, 2021, p. 648; Rincón et al., 2019, p. 578; Aksenova, 2015, p. 6). Evidence has shown that the OTP had significant influence over the reforms that took place in the Colombian judiciary, despite the complex interaction they at times shared (Urueña, 2017, pp. 106-113). Despite this influence, this convoluted relationship did not always result in the ICC prevailing, as the Colombian government occasionally put up resistance. This is exemplified by the Legal Framework for Peace (LFP) of 2012, which opened up the possibility of suspended sentences

for criminals that were not considered the "main perpetrators" (Urueña, 2017, p. 117; Aksenova, 2015, pp. 7-8). The ICC expressed their dissatisfaction, pointing out that any impunity gap left by the government would be grounds for a full intervention, yet the Colombian government pushed back. An agreement was eventually reached, with the judicial body of the government assuring the OTP that suspended sentences would never be on the table for the "most responsible" (Urueña, 2017, p. 117). Finally, another theoretical causal mechanism is found within a symbolic component of the ICC. Non-governmental organisations (NGO) eased the entrance of the Court into the country, and its presence advanced their cause, as they utilised it as a tool to pressure the government (Bocchesse, 2020, pp. 164-165).

5.2.3 Contribution to the Operationalisation of R2P

The analysis for the contribution to the operationalisation of R2P by the ICC in the Colombia case will be undertaken in a similar manner to the analysis for the Kenyan case, outlined in a previous section. With a main focus on the second pillar of the R2P principle, results seem to show that the ICC can once again provide an indirect effect on the mandate of R2P. The lack of a direct intervention in Colombia makes it a unique case, since just the threat of intervention was enough to spur change in the domestic judicial system of the country. The approach chosen by Moreno-Ocampo was new for its time, and it shows how the negative reputation a country can obtain after ICC involvement in their affairs can lead to the alignment of domestic norms with the required international criterions. In theory, if this method was to be repeated by the ICC, they could pressure any state into changing their laws, thus instituting the main idea behind the second pillar of R2P: the international community stepping in to assist a state in fulfilling their primary responsibilities. It is critical to note, though, that Colombia already had a strong judiciary capacity before the preliminary examination, and this helped the relationship between the government and the ICC lead to a fruitful outcome (Bocchese, 2020, pp. 165-167). Therefore, it is essential to acknowledge that the success of this indirect approach by the ICC in Colombia may not be universally replicable, due to the nature of the relationship between the Court and Colombia.

6. Conclusion

This investigation answers the research question "In what ways has the International Criminal Court contributed to the operationalisation of the Responsibility to Protect through its impact on national judicial systems?", through a process-tracing based analysis of the ICC's intervention in Kenya and Colombia. The findings suggest that the Court's function of prosecuting individuals for the most atrocious crimes, and closing the existing impunity gap, inherently helps operationalise the second pillar of R2P, due the influence it has over domestic national courts. This influence takes place because of the complementarity principle of the ICC, which drives reforms within domestic courts, enabling them to undertake the tasks outlined in the second pillar of R2P, and could even eliminate the necessity of non-peaceful interventions by states under the banner of R2P. Similar mechanisms that highlight the previous findings were found in the intervention of the ICC within Kenya and Colombia. These results underscore the pivotal role of the ICC in reinforcing national judicial systems to uphold international justice and protect populations from grave crimes.

In this thesis, several limitations must be acknowledged. The first limitation of this research is related to its sample size. This being a small-N study, the generalisability of the findings is possibly restricted, as the selected cases under analysis may not be fully representative of the diverse contexts in which the ICC has operated. Furthermore, the research focuses on a specific time frame and geographical locations, therefore the global extent of the ICC's impact on domestic judicial systems is not fully captured. Nevertheless, the two cases that are studied in this research represent two diverse situations that fall under the mandate of the Court, yet their context varies significantly. The ICC intervened in both of these countries, albeit to different extents, and drew on similar mechanisms to affect its national judicial systems and bring their rule of law closer to international standards.

It is suggested that future research is conducted using a larger and more diverse sample of case studies. Additionally, it could be beneficial to include primary data sources, such as interviews with relevant experts and professionals in the field, or to conduct fieldwork. This could overall enhance the validity and generalisability of the findings. Despite its limitations, this research offers valuable insights into the role of the International Criminal Court in operationalising R2P through its influence on national judicial systems and lays important groundwork to explore this topic further in the field of international law and human rights.

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