

The International Criminal Court's Preliminary Examinations as Deterrence of International Crimes

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Abstract

The purpose of this thesis is to show that, within the workings of the International Criminal Court, it is the preliminary examinations which have the most potential for deterring individuals from committing international crimes. It has been common within studies on international criminal courts and tribunals to locate deterrence within the judgments of these courts and tribunals, i.e. the sentencing and punishment. Thus, these scholars believe that it is the judgments which will deter international crimes. However, by analyzing the workings, structure and practices of the International Criminal Court, especially the preliminary examinations, this thesis shows that it is in fact the preliminary examinations that have the greatest potential for deterrence. The preliminary examinations' potential for deterrence is based on complementarity, positive complementarity and the fact that it is uncertain who will be targeted with an arrest warrant during this stage. The principle of complementarity may push some states towards pursuing their own proceedings, in order to avoid further involvement from the International Criminal Court. Positive complementarity encourages states to undertake their own proceedings, thorough various activities. This can strengthen the judicial system of the state. Positive complementarity can also help states internalize norms of proper behavior, due to the interaction between the Office of the Prosecutor and various actors within the state, especially civil society. Another vital element of the preliminary examinations which strengthens the deterrence potential is the fact that at this stage, it is quite uncertain who will be targeted, which can deter actors in on-going armed conflicts. Studying and locating the deterrence potential of the International Criminal Court is an important task, seeing as deterrence is one of the main goals of the International Criminal Court, as seen in the Rome Statute. By locating the deterrence potential, the Court or the OTP can pursue policies in relation to this, which may in fact improve the deterrence impact.

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1. Introduction

The establishment of the International Criminal Court (ICC or Court) was an absolutely groundbreaking event, which occurred after decades of discussion over the need for a permanent international criminal court and the possibility of having one. While the purpose of the Court was to try and prosecute those individuals with the most responsibility for the most atrocious crimes, one can argue that an even bigger aim of the Court was that of deterrence, that is deterring individuals from committing international crimes. While there are various rationales for prosecuting individuals who commit these types of crimes, numerous actors within the field of international criminal justice, including those who work for the Court, have in fact heralded deterrence. Deterrence has become one of the main rationales for creating international criminal courts and tribunals. When signing the Rome Statute of the International Criminal Court (Rome Statute or Statute), various state leaders were also very positive of the deterrence capability of the Court, and alongside human rights organizations, these leaders celebrated the prospects of finally bringing an end to impunity for international crimes through the creation of the ICC. Since then, numerous scholars, member states, employees of the ICC and the ICC itself in numerous documents have viewed deterrence as a goal or objective of the Court and emphasized the importance of deterrence within the Court. The aim of deterrence is even mentioned in the preamble of the Rome Statute as it states that state parties are “*determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*”.

However, the goals regarding the Court being able to have a deterrence impact on international crimes have had difficulty meeting the expectations of many. Attempts to justify the ICC on deterrence grounds have also been met with widespread skepticism and counterarguments. One of the main arguments against the deterrence impact has been the ongoing widespread atrocity crimes committed in numerous states, instigated by various actors including government forces, state-sponsored militias, rebel groups and terrorists organizations. While this argument is simplistic, it is also common. Another argument against the deterrence potential of the Court has been the lack of cases brought before the Court. Thus, a quite negative view of the deterrence ability of the Court has been developed.

A lot of the scholarship on deterrence and the ICC tend to perpetuate this negative view of the deterrence ability of the Court, through various studies. However, this is due to the fact that most of this literature is asking the wrong questions or focusing on the wrong elements. A lot of this literature attempts to locate the deterrence ability of the Court in its judgments. The same can be said for international criminal courts and tribunals in general. Thus, it is the sentencing and the punishment which these scholars believe will deter individuals from committing international crimes. By locating deterrence in the judgments, it is no wonder that scholars argue that the Court cannot deter international crimes, as it is not the judgments that actually have the potential to deter international crimes. This thesis argues that when it comes to the Court, it is in fact the preliminary examinations, the stage before the investigation, which has the most potential for deterring international crimes. This thesis will demonstrate this argument by showing how the specific workings, practice and structure of the preliminary examinations will ultimately have the most potential for deterrence. Thus this thesis will analyze the workings, practice and structure of the Court, specifically that of the preliminary examinations, in order to show why the preliminary examinations bear the greatest potential for deterrence. This thesis will also look at various other stages of the Court's stages, such as the investigations and arrest warrants, as it will argue why these stages do not have a deterrence potential or not as great a deterrence potential as preliminary examinations. However, the main focus will be that of the preliminary examinations. This thesis is by no means looking to prove that deterrence in the preliminary examinations work or that preliminary examinations do in fact deter. Nor is the thesis looking to prove that the Court can deter international crimes. However, this thesis will show how it is in fact the preliminary examinations that have the most potential to deter international crimes. Locating where in the Court there is most potential for deterrence is an important task. As mentioned above, deterrence is absolutely central within the Court. Since deterrence plays such an important role within the Court, it is vital to study and locate the deterrence potential within the Court, in order to improve or further this deterrence potential. If one locates where within the Court or what within the Court actually deters, the Court or the Office of the Prosecutor (OTP or Office) can pursue policies in relation to this, which may in fact improve the deterrence impact.

The preliminary examinations are a stage of the Court's work and the stage before a potential investigation. The Office conducts preliminary examinations on various situations which come

to the attention of the OTP, with the one of the main purposes being to assess the available information in order to determine whether or not a full investigation should be opened in the specific situation. The OTP will assess the available information in terms of jurisdiction, admissibility and the interest of justice. Traditionally, the purpose of preliminary examinations has been whether or not an investigation should be opened. While this is still an important part of the preliminary examinations, this is not necessarily the only impact they can have anymore. The OTP, itself, has stated that the preliminary examinations have other purposes, specifically highlighting that of deterrence.¹ In both the Strategic Plan for 2016-2018, as well as its Policy Paper on Preliminary Examinations, the OTP has mentioned the importance of preliminary examinations in regard to deterrence.² While the OTP does not claim that the preliminary examinations have the most potential for deterrence (neither the OTP nor the ICC states what they believe has the greatest deterrence potential), the Office does argue that they can contribute to the ICC's overarching goal of deterrence.³

The preliminary examinations' strong potential for deterring international crimes is mainly grounded in the notion of complementarity and positive complementarity. Complementarity, which is mentioned in the Rome Statute, is the notion that the ICC can only prosecute an individual if the domestic authorities have not already or are in the process of genuinely prosecuting said individual. Positive complementarity is a policy of the Office, where the OTP actively encourages states to undertake their own criminal proceedings, through various activities. Thus, complementarity and positive complementarity have the possibility of making states prosecute their own citizens, which in turn can lead to an overall higher degree of deterrence. This type of deterrence of the Court involves the state in a higher degree, where the legal action to be taken actually lies with the state. Preliminary examinations' potential for deterrence also lies in the impact that they may have on both furthering norms of proper behavior as well as strengthening the rule of law in specific states under preliminary examinations. Another vital element of the preliminary examinations which strengthens the deterrence potential is the fact that at this stage, it is quite uncertain who will be targeted, which

¹ It should be noted, that the OTP will never commence a preliminary examination merely for deterrence reasons.

² Office of the Prosecutor "Policy Paper on Preliminary Examinations" (2013), The Hague: The International Criminal Court, para. 100 (hereinafter 'OTP Policy Paper 2013'); Office of the Prosecutor, "Strategic Plan | 2016-2018" (2015), The Hague: The International Criminal Court, para. 54 (hereinafter 'Strategic Plan 2016-2018').

³ OTP Policy Paper 2013, para. 16.

can deter actors in on-going armed conflicts. Thus, it is the process of preliminary examinations which is important for deterrence.

In general, as an activity of the Court, preliminary examinations have been quite neglected both in the Rome Statute, as well as in studies done on the Court. The research done on the activities of the Court has generally focused on other aspects such as the investigations, the trials or the judgments. This is highly problematic, as preliminary examinations are gaining more and more importance within the workings of the Court, which the OTP itself recognizes as seen above. When the preliminary examinations have received scholarly attention, scholars for the most part have taken a more traditional or orthodox approach to them; where they are mentioned in relation to investigations and where their only purpose is to determine whether or not an investigation should be opened or not. This literature often portrays the preliminary examinations as a “legal checklist”. Many scholars do not mention the other purposes preliminary examinations may have. Some scholars have attempted to highlight these other purposes and the other impacts that preliminary examinations have.⁴ Carsten Stahn has even developed a more unorthodox approach to the preliminary examinations, based on documents published by the OTP. This approach, which Carsten Stahn has dubbed the ‘consequentialist approach’⁵, argues that the preliminary examinations can have a number of other rationales than just whether or not an investigation should be open. These rationales include positive complementarity and prevention. This thesis agrees with the ‘consequentialist approach’, as it attaches greater importance to the preliminary examinations, than just being a way in which to determine whether or not an investigation should be opened. This thesis should in fact be viewed as part of furthering the unorthodox approach of preliminary examinations and adding to the small, albeit growing literature on this topic.

⁴ Examples of studies focusing on preliminary examinations include: Carsten Stahn, “Damned If You Do, Damned If You Don’t: Challenges and Critiques of ICC Preliminary Examinations” *Journal of International Criminal Justice*, vol. 15, no. 3 (2017); Anni Pies “Towards the ‘Golden Hour’? A Critical Exploration of the Length of Preliminary Examinations”, *Journal of international Criminal Justice*, vol. 15, no. 3 (2017); Thomas Obel Hansen “The Policy Paper on Preliminary Examinations: Ending Impunity Through ‘Positive Complementarity’?” Transitional Justice Institute Research Paper, vol. 17, no. 1 (2017); Louise Chappell, Rosemary Grey and Emily Waller “The Gender Justice Shadow of Complementarity: Lessons Learned from the International Criminal Court’s Preliminary Examinations in Guinea and Colombia,” *The International Journal of Transitional Justice*, vol. 7 (2013); David Bosco, “Discretion and state influence at the International Criminal Court: the Prosecutor’s preliminary examinations,” *American Journal of International Law*, vol. 111, no. 2 (2017).

⁵ Not all scholars use the term ‘consequentialists’, but their ideas are similar in nature.

This thesis is moving away from the general trends of scholarship on deterrence and ICC, as this type of scholarship is riddled with problems. First of all, scholars have attempted to measure or prove the deterrence impact of the Court. Scholars of empirical studies have attempted to study the actual deterrence impact of the Court by attempting to isolate the variable of ICC ratification or ICC action (most often ICC investigations or ICC trials), from other variables in situations where international crimes or extreme human rights violations are being committed or have been committed, in order to show whether or not there is an increase or decrease in the crimes, due to the intervention of the Court. The results of these studies are very mixed. Some studies argue that their research shows that the Court does have a deterrence effect, with differing degree depending on the study, while other scholars state that their research shows that the Court in fact has no deterrence effect.⁶ Thus, based on their research, scholars will have different opinions on whether or not the ICC can in fact deter international crimes. However, it should be noted that proving or measuring deterrence, as many studies on the Court and deterrence have done, is highly problematic, as it is extremely difficult, if not almost impossible. How can one measure whether or not the fact that a person was convicted of an international crime, stopped other individuals from committing the same crime or a crime of similar nature? First of all, when one attempts to measure deterrence, one is actually measuring something that by its very nature does not happen and it is nearly impossible to measure something that does not happen, as one is in fact attempting to prove a negative.

Second of all, there is the issue of causality. Demonstrating causation between international criminal courts and tribunals, including the ICC, and international crimes is very difficult. The issue with attempting to prove causality is that multiple variables can contribute to the increase or decrease in international crimes. Thus, the increase or decrease in international crimes in a given situation can be due to a vast number of variables and not just the involvement of the ICC. Attempting to isolate the precise impact of international criminal courts and tribunals, such as the ICC, would demand an in-depth examination on how numerous variables have affected individual's decision, which is very difficult.

⁶ Examples of studies include: Hyeran Jo and Beth A. Simmons, "Can the International Criminal Court Deter Atrocity?" *International Organization*, vol. 70, no. 3 (2016); Benjamin J. Appel, "In the Shadow of International Criminal Court: Does the ICC Deter Human Rights Violations?" *Journal of Conflict Resolution*, vol. 62, no. 1 (2018); Julian Ku and Jide Nzelibe, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" *Washington University Law Review*, vol. 84, no. 4 (2006).

A lot of the literature on the ICC, and other international criminal courts and tribunals, and deterrence has been about attempting to apply deterrence theory from the national level to international criminal courts and tribunals, including whether or not this in fact is even possible. This type of literature mainly focuses on the judgments of the various courts or tribunals as deterrence. However, there are some scholars who have attempted to develop other approaches to deterrence by including norms and culture, as well as complementarity and positive complementarity.

There are some scholars who, similar to the purpose of this paper, have attempted to locate where the deterrence potential lies within the Court. However, this scholarship is very limited, as the main focus of studying deterrence and the Court has been proving or measuring deterrence, as mentioned above. These studies argue that it is the investigations, the judgments or the mere presence of the Court that actually deters or has the potential to deter international crimes. It should be noted that this literature is both quite limited, but also quite basic as the studies are not particularly in-depth studies, as the element of locating the deterrence potential of the Court is not the main purpose of these studies. Even though the OTP has stated itself that the preliminary examinations can have an important role in terms of deterrence, scholars have still overlooked the potential they can have in terms of deterrence. This is most likely related to the fact that preliminary examinations have often been neglected when studying the Court and generally seen as having another purpose.

Within this study, where the purpose is to show that within the Court it is the preliminary examinations that have the most potential to deter international crime, there are some elements which need clarification. Preliminary examinations was explained above, however deterrence and international crimes also need to be clarified. Deterrence may have various definitions, but in this thesis, the definition of deterrence has been inspired from a study published by the International Nuremberg Principles Academy: “the capacity of prosecutions or the work of the tribunals more broadly, including their mere existence, to elicit forbearance from committing further crimes on the part of those prosecuted, the ‘similarly minded’, and the general public.”⁷ This definition fits the purpose of this paper, seeing as many definitions will focus almost only

⁷ Jennifer Schense and Linda Carter, “Two Steps Forward, One Step Back: The Deterrence Effect of International Criminal Tribunals” *Published by International Nuremberg Principles Academy* (2016), 2.

on the prosecutions, which does not suit this thesis. Furthermore, international crimes (or atrocity crimes, which is sometimes also used in this thesis) are the crimes mentioned in Article 5 of the Rome Statute: crime of genocide, crimes against humanity and war crimes. While Article 5 does also cover the crime of aggression, it is not included in this thesis, when the term international crime is used. This is due to the fact that the ICC will not be able to exercise its jurisdiction over crimes of aggression until 17 July 2018.⁸ Furthermore, it should be noted that the term atrocity crimes only refers to crime of genocide, crimes against humanity and war crimes and does not include the crime of aggression.⁹

The thesis will proceed as follows: Chapter 2 will focus on the Court, specifically the preliminary examinations. Here the focus will be on the workings of preliminary examinations, including the trigger mechanisms and the Article 53 (1) factors, the four phases of preliminary examinations and an overview of the current preliminary examinations. This chapter will conclude with the introduction of a more unorthodox approach to preliminary examinations. Chapter 3 will give a review of the literature on deterrence and international criminal courts and tribunals. First deterrence theory on a national level will be discussed, followed by an introduction to the development of modern international criminal justice, focusing inter alia on the change from focusing primarily on the punitive to including the notion of deterrence. Next, various ways in which the literature states that international criminal courts and tribunals, including the Court, can deter, will be examined. These ways include deterrence through cost-benefit analysis (based on classic deterrence theory), deterrence through norms, deterrence through complementarity and positive complementarity and deterrence through the workings of the ICC. Chapter 4 is the analysis chapter of this thesis. First, the way in which the analysis will be conducted is introduced. This will be followed by the various ways in which the preliminary examinations have the potential to deter individuals from committing international crimes, including through complementarity, through positive complementarity, norms, the rule of law and the fact that it is quite uncertain during preliminary examinations who will be targeted with an arrest warrant. Chapter 5 will then give some recommendations as to how the Court and the

⁸ International Criminal Court Press Release, “Assembly activates Court’s jurisdiction over crime of aggression,” 15 December 2017, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>).

⁹ United Nations, “A Framework of Analysis for Atrocity Crimes: A tool for prevention,” (2014), (available at: http://www.un.org/en/genocideprevention/documents/publications-and-resources/Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf).

OTP can uphold the deterrence potential of the preliminary examinations. Chapter 6 will give concluding remarks.

2. The International Criminal Court's Preliminary Examinations

The Rome Statute was adopted in 1998 and established the Court. However, it was not until 2002, after the necessary 60 state ratifications, that the Court was formally created. The Court was established as a permanent autonomous court with the mandate to investigate, prosecute and try the individuals who allegedly are most responsible for committing the most serious crimes in the international community. As mentioned above, and which will be elaborated on further down, the Court was also created in order to deter individuals from committing these serious crimes. The Court is a court of last resort, which seeks to complement national courts, not replace them. As of May 2018, 123 states have ratified the Rome Statute. Also as of May 2018, 26 cases have been brought before the Court, 32 arrest warrants have been issued, 4 individuals have been sentenced and 15 suspects are at large.¹⁰ The OTP is currently undertaking 11 investigations and 10 preliminary examinations are currently in process.¹¹

Preliminary examinations are conducted by the Office with the main purpose being to determine whether a situation meets the legal criteria established by the Rome Statute to warrant a formal investigation by the OTP into said situation.¹² In order to determine such, the OTP conducts a preliminary examination of all communications and situations that come to its attention, based on the statutory criteria and the information available. While the term preliminary examination has become standard when it comes to describing the work of the Court, the term is only mentioned once in the Rome Statute.¹³ In fact, the specific workings of preliminary examinations are quite unaddressed in the Rome Statute. The lack of attention on preliminary examinations in the Rome Statute could be due to the fact that drafters did not believe that preliminary examinations would be of that much importance. However, preliminary examinations are of great importance and are a vital and crucial part of the Court. The Office has attempted to address the issue of lack of information on the specific workings of preliminary examinations, by developing the Policy Paper on Preliminary Examinations in 2013. This report describes the OTP's policy and practice when conducting preliminary examinations.

¹⁰ International Criminal Court, "The Court Today," 23 April 2018, (available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>).

¹¹ International Criminal Court, "The Court Today," 23 April 2018, (available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/TheCourtTodayEng.pdf>).

¹² OTP Policy Paper 2013, paras. 1-2.

¹³ In Article 15 (6).

This chapter will focus on preliminary examinations, giving an overview of the most important elements in relation to them, including the workings of preliminary examinations, current preliminary examinations and an unorthodox approach to preliminary examinations.

2.1 The workings of Preliminary Examinations

The following section will explain the workings of preliminary examinations, including how preliminary examinations are started, the Article 53(1) factors and the four phases of preliminary examinations.

2.1.1 Trigger Mechanisms

There are various ways in which the Court's jurisdiction can be triggered, i.e. various ways in which a preliminary examination can be initiated. First, as mentioned in Article 13 (a)¹⁴ and Article 14, a state party can refer a situation to the Prosecutor in which one or more crimes within the jurisdiction of the Court appears to have been committed. This also includes self-referrals, where states refer situations where crimes may have been committed within their own territory or by their own nationals. A non-party state can specifically request the court to investigate its own territory or nationals and thus accept the Court's jurisdiction.

Second, a situation, in which one or more of the crimes appears to have been committed, can also be referred to the Prosecutor by the United Nations Security Council (UNSC), acting under Chapter VII of the United Nations Charter, as stated in Article 13 (b). Pursuant to Article 12 (2), the UNSC has the power to refer situations in non-party states to the Court, which it did with the situation in Libya and the situation in Darfur.

Third, as stated in Article 13 (c), the Court may also exercise jurisdiction, when the Prosecutor has initiated an investigation of crimes mentioned in Article 5, in accordance with Article 15. Article 15 (1) states that the Prosecutor may initiate investigations *proprio motu* on the basis of information received through communications on crimes within the jurisdiction of the Court, as was the case in the situation in Kenya. The Prosecutor may seek 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

¹⁴ All Articles in this section are from the Rome Statute, unless otherwise specified.

of the Court, pursuant to Article 15 (2). As mentioned in Article 15 (3), if the Prosecutor deems there is a reasonable basis to proceed with an investigation, the Prosecutor must submit a request for authorization of an investigation, alongside any supporting material collected, to the Pre-Trial Chamber, who then decides if there is reasonable basis to proceed with an investigation. This is only the case in *proprio motu* triggered situations.

2.1.2 Article 53 (1) Factors

Once a situation has been referred to the OTP, in one of the three ways just mentioned, the Prosecutor must conduct a preliminary examination, in order to decide whether or not to open an investigation into a certain situation. Article 53 (1) states several legal criteria, which must be assessed during the preliminary examination in order to determine if an investigation should be opened. It is important to note, that the criteria mentioned in Article 53 (1) apply regardless of the just mentioned trigger mechanism.

2.1.2.1 Jurisdiction

Based on the information available to the OTP, there must be reasonable basis to believe that the alleged crime is within the jurisdiction of the Court; namely subject-matter jurisdiction, temporal jurisdiction and either territorial or personal jurisdiction. When a state becomes party to the Rome Statute it accepts the jurisdiction of the Court. As stated in Article 5 (1) of the Rome Statute, the subject-matter jurisdiction of the ICC extends to the following four crimes (a) the crime of genocide, as defined in Article 6, (b) crimes against humanity, as defined in article 7, (c) war crimes, as defined in article 8 and (d) the crime of aggression, which the ICC will exercise jurisdiction over from 17 July 2018.¹⁵ Thus, for the Court to have subject-matter jurisdiction, one of the four above mentioned crimes has to have been committed.

Furthermore, according to Article 11, the Court only has temporal jurisdiction over crimes committed after the Rome Statute was put into force, which was 1 July 2002. If a state has become party to the Statute after its entry into force, the Court can only exercise jurisdiction with respect to crimes committed after the state has become party to the Statute, unless that state

¹⁵ International Criminal Court Press Release, “Assembly activates Court’s jurisdiction over crime of aggression,” 15 December 2017, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=pr1350>).

has made a declaration under Article 12 (3), accepting the jurisdiction of the Court retrospectively, but only from 1 July 2002.

Moreover, the Court can only exercise jurisdiction in situations where the alleged crime is committed in the territory of a state party (territorial jurisdiction) or if the alleged perpetrator is a national of a state party (personal jurisdiction), as mentioned in Article 12 (2). Both are not necessary. However, this is not the case if the situation has been referred to the OTP by the UNSC acting under Chapter VII, as mentioned above. They can refer any situation regardless of whether the state is a party to the Rome Statute. Furthermore, according to Article 12 (3), a non-party state can specifically request the Court to investigate its own territory or nationals and will thus lodge a declaration accepting the exercise of jurisdiction by the Court.

To sum up, for the Court to have jurisdiction over a specific situation one or more of the following crimes must have been committed: crime of genocide, war crimes, crimes against humanity or crimes of aggression, the crime must be committed after 1 July 2002 or after the state became party to the Statute and the crime has to be committed either on the territory of a state party or by a state party's national, unless the UNSC has referred the situation.

2.1.2.2 Admissibility

As mentioned in Article 53 (1) (b) the OTP must consider whether or not the “case is or would be admissible under Article 17”. As set out in the Article, admissibility requires an assessment of both complementarity and gravity. However, at the stage of preliminary examination there is no ‘case’ yet. According to the Court’s 2013 Policy Paper on Preliminary Examinations, the consideration of admissibility will take into account potential cases, which may be identified in the course of the preliminary examination and that would likely arise from an investigation into the situation.¹⁶

In terms of complementarity, according to Article 17 (1), a case is inadmissible if it is already in the process of being investigated or prosecuted by a state which has jurisdiction, if the case has been investigated by a state that has jurisdiction and the state has decided not to prosecute or if the individual in question has already been tried for the conduct, by a state which has

¹⁶ OTP Policy Paper 2013, para. 4.

jurisdiction. However, as also stated in Article 17 (1), if the state is unable or unwilling to genuinely carry out the investigation or the decision of whether or not to prosecute is resulted from an unwillingness or inability to genuinely prosecute, the situation is admissible before the Court. Thus, the absence of genuine national proceedings is enough to make the case admissible before the Court, in regard to complementarity. Article 17 (2) lists various considerations for the OTP when assessing unwillingness to investigate or prosecute genuinely in the context of a particular case: (a) the proceedings were or are being undertaken for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC jurisdiction, (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, and (c) the proceedings were or are not conducted independently or impartially and in a manner consistent with an intent to bring the person concerned to justice. According to Article 17 (3), when assessing the inability of a state to genuinely investigate or prosecute, the OTP will consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to collect the necessary evidence and testimony, unable to obtain the accused, or is otherwise unable to carry out its proceedings.

Gravity is also mentioned in Article 17, as it states that a case is admissible if it is of sufficient gravity. While the Rome Statute does not specify how it calculates gravity, the Court's 2013 Policy Paper on Preliminary Examination and the Regulations of the Office of the Prosecutor do attempt to clarify this, as they offer more information on the factor of gravity. First of all, the OTP's assessment of gravity includes both quantitative and qualitative considerations.¹⁷ Several other factors are also given, in order to guide the OTP's assessment of gravity. These factors include scale, nature, manner of commission of the crimes and the crimes' impact.¹⁸ The scale of crimes may be assessed in light of the number of direct and indirect victims, the extent of the damage caused by the crimes, specifically the bodily or psychological harm caused to the victims, or the crimes' geographical or temporal spread.¹⁹ The nature of the crimes refers to the specific elements of such offences.²⁰ When it comes to the manner of commission of the crimes, they should be assessed in regard to the means employed to execute the crime, the degree of

¹⁷ OTP Policy Paper 2013, para 61.

¹⁸ International Criminal Court, "Regulations of the Office of the Prosecutor" (2009), The Hague: The International Criminal Court, regulation 29(2).

¹⁹ OTP Policy Paper 2013, para 62.

²⁰ OTP Policy Paper 2013, para 63.

participation and intent of the perpetrator, the extent to which the crimes were systematic or resulted from the abuse of power and elements of particular cruelty.²¹ When assessing the impact of crimes, they may be done so in light of the suffering endured by the victims, the terror which has been instilled because of the crime or the social, economic and environmental damage inflicted on the affected communities.²² However, while the Court has attempted to clarify certain elements in regard to gravity, the topic is still highly debated among scholars.²³ Due the scope of this paper, a review of this literature will not be conducted.

2.1.2.3 Interest of Justice

Once the requirements of jurisdiction and admissibility have been met, the interests of justice are considered. According to 53 (1)(c), there must be no substantial reasons to believe that an investigation would not serve the interests of justice. The OTP is not required to establish that an investigation serves the interest of justice; rather, the OTP will proceed with an investigation, unless there are specific circumstances which provide substantial reasons to believe that the interests of justice are not served by an investigation at that specific time.²⁴ Article 53 also mentions that the OTP has a specific obligation to take into account the interests of victims before starting an investigation or prosecution.

2.1.3 Four Phases of Preliminary Examinations

During the preliminary examination, the OTP has the task of filtering those situations that warrant an investigation from those that do not, based on the factors set out in Article 53 (1). In order to do so, the OTP has established a filtering process, consisting of four sequential phases, which mirror the requirements mentioned in Article 53 (1).

Phase 1 consists of an initial assessment of all information on the alleged crimes received under Article 15 ('communications'). The purpose here is to analyze and verify the seriousness of the

²¹ OTP Policy Paper 2013, para 64.

²² OTP Policy Paper 2013, para 65.

²³ Examples include: Marco Longobardo, "Everything Is Relative, Even Gravity: Remarks on the Assessment of Gravity in ICC Preliminary Examinations, and the *Mavi Marmara* Affair," *Journal of International Criminal Justice*, vol.14, no. 4, (2016); Ignaz Stegmiller, "The Gravity Threshold under the ICC Statute: Gravity Back and Forth in Lubanga and Ntaganda," *International Criminal Law Review*, vol. 9, no. 3 (2009); Anni Poes, "Discretion and the Gravity of Situations at the International Criminal Court," *International Criminal Law Review*, vol. 17, no. 5, (2017).

²⁴ Office of the Prosecutor, "Policy Paper on the Interest of Justice" (2007), The Hague: The International Criminal Court, 3.

information received, as well as filter out information on crimes, which are outside of the Court's jurisdiction and identify those that are within the Court's jurisdiction.²⁵ Specifically, the first phase distinguishes between communications relating to: a) matters which are obviously outside the Court's jurisdiction; b) a situation already under preliminary examination; c) a situation already under investigation or forming the basis of a prosecution; or d) matters which are neither outside the jurisdiction of the Court nor related to situations already under preliminary examination or investigation or forming the basis of a prosecution, and therefore warrant further analysis.²⁶

Phase 2 is the formal opening of the preliminary examination of a specific situation. During phase 2, analyses is conducted of all Article 15 communications which were not rejected in phase 1, as well as information arising from *inter alia* referrals by a state party or by the United Nations Security Council.²⁷ This phase focuses on whether the preconditions to the exercise of jurisdiction under Article 12 are met, as well as if there is reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction.²⁸ Phase 2 includes both a factual and a legal assessment of the crimes allegedly committed in the situation, in order to identify potential cases falling within the jurisdiction of the Court and leads to the submission of an 'Article 5 report' to the Prosecutor.²⁹

Phase 3 focuses on admissibility of the potential cases, in regard to complementarity and gravity, as mentioned above, thus whether or not the potential cases are admissible before the Court.³⁰ Furthermore, during this phase, the OTP will continue to collect information on subject-matter jurisdiction, especially when new or ongoing crimes are alleged to have been committed within the situation.³¹

Phase 4 assesses the interest of justice. Based on the available information, phase 4 results in the development of an 'Article 53(1) report', which thus provides the basis for the OTP to

²⁵ OTP Policy Paper 2013, paras. 77-78.

²⁶ OTP Policy Paper 2013, para. 78.

²⁷ OTP Policy Paper 2013, para. 80.

²⁸ OTP Policy Paper 2013, para. 80.

²⁹ OTP Policy Paper 2013, para. 81.

³⁰ OTP Policy Paper 2013, para. 82.

³¹ OTP Policy Paper 2013, para. 82.

determine whether to initiate an investigation in accordance with Article 53 (1).³² The ‘Article 53 (1) report’ indicates an initial legal characterization of the alleged crimes, as well as includes a statement of facts indicating, at a minimum, the places of the alleged commission of the crimes; the time or time period of the alleged commission of the crimes and the persons involved, if identified, or a description of the persons or groups involved.³³ The identification of facts is preliminary and is not binding for the purpose of future investigations.³⁴

At the stage of preliminary examinations, the OTP does not have investigative powers, other than for the purpose of receiving testimony.³⁵ Also, the OTP cannot invoke the various forms of cooperation specified in part 9 of the Rome Statute.³⁶ The OTP can send requests for information to various reliable sources, as well as field missions to the territory concerned in order to consult with competent national authorities, the affected communities and other relevant stakeholders.³⁷ The OTP also makes sure that states and other relevant parties have the opportunity to provide information they deem appropriate in the situation, before the OTP decides on whether to initiate an investigation.³⁸ Furthermore, there is no legal framework in terms of the overall time limit on preliminary examinations, nor a time limit for the specific abovementioned phases. This is a deliberate decision by the drafters of the Statute according to the OTP, as it ensures that the analysis is adjusted to the specific features of each situation.³⁹ There is quite a vast difference between the length of the preliminary examinations, ranging between one week for the situation in Libya and 14 years, and still ongoing, for the preliminary examination in Columbia.

Depending on the facts and circumstance of each situation, the OTP may either a) decline to initiate an investigation, when the information fails to satisfy the factors in Article 53 (1) (a)-(c); b) continue to collect information on crimes and relevant national proceedings, in order to establish an adequate factual and legal basis to provide a determination; or c) initiate the

³² OTP Policy Paper 2013, para. 83.

³³ OTP Policy Paper 2013, para. 83.

³⁴ OTP Policy Paper 2013, para. 84.

³⁵ OTP Policy Paper 2013, para. 85.

³⁶ OTP Policy Paper 2013, para. 85.

³⁷ OTP Policy Paper 2013, para. 85.

³⁸ OTP Policy Paper 2013, para. 13.

³⁹ OTP Policy Paper 2013, para. 89.

investigation.⁴⁰ However, as mentioned above, if the trigger mechanism of a given situation has been *proprio motu*, the Pre Trial Chamber must authorize the Prosecutors request to open an investigation.

If the Prosecutor, after conducting a preliminary examination, determines that based on the available information there is no reasonable basis for an investigation, the Office will inform those who have provided the information and make its decision public. The OTP has decided not to proceed with an investigation after the preliminary examinations in the situations of Honduras, the Registered Vessels of Comoros, Greece and Cambodia, the Republic of Korea and Venezuela. The Pre-Trial Chamber may review a decision by the prosecutor not to proceed with an investigation, when the trigger mechanism has been a referral by a state or the UNSC. It should be noted that according to Article 15 (6), the OTP can reopen a preliminary examination, which has been concluded, following the submission of further information to the OTP. This was the case with the situation in Iraq/UK; the situation was reopened in 2014, after it has been concluded in 2006.⁴¹

The OTP values transparency during the stages of preliminary examination and regularly reports on its preliminary examination activities. The Office makes public the commencement of a preliminary examination and provides regular updates on the preliminary examinations. The Office publicizes its activities in various ways, including through the early interaction with various stakeholders, public statements, periodic reports and information on high level visits to relevant states.⁴² Since 2012, the OTP has published a detailed report on its preliminary examination activities once a year. These reports contain legal and factual analysis of the jurisdictional parameters, the nature of the conflict in question and the alleged crimes committed. Furthermore, the OTP has adopted a policy of issuing reports to substantiate the Prosecutor's decision to close a preliminary examination or to proceed with an investigation.⁴³

⁴⁰ OTP Policy Paper 2013, para. 14.

⁴¹ Statement by the Prosecutor, "Prosecutor of the International Criminal Court, Fatou Bensouda, re-opens the preliminary examination of the situation in Iraq," 13 May 2014, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=otp-statement-iraq-13-05-2014>).

⁴² OTP Policy Paper 2013, para. 95.

⁴³ OTP Policy Paper 2013, para. 97.

2.2 Current Preliminary Examinations

As of writing, the OTP currently has ten ongoing preliminary examinations. Currently it is monitoring situations in Afghanistan, Colombia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine, the Philippines, Ukraine and Venezuela. The following section will give a brief overview of these current preliminary examinations.

2.2.1 Phase 2 Preliminary Examinations - Jurisdiction

The OTP started a preliminary examination in Gabon in 2016, based off of communications it had received from the Gabonese government.⁴⁴ This preliminary examination focuses on alleged crimes potentially falling within the ICC's jurisdiction committed in Gabon since May 2016, including those allegedly committed in the context of the presidential elections held on 27 August 2016.⁴⁵ The alleged crimes include killings and injuries of civilians, enforced disappearance, deprivation of liberty, torture, sexual violence and incitement to commit genocide.⁴⁶

In January 2015, the government of Palestine lodged a declaration under the Rome Statute, accepting the Court's jurisdiction over alleged crimes committed in the occupied Palestinian territory since 2014.⁴⁷ Shortly thereafter, the OTP opened a preliminary examination into the situation.⁴⁸

The preliminary examination of the situation in the Ukraine was announced in April 2014, after the Ukraine lodged a declaration under Article 12(3) of the Rome Statute, accepting the jurisdiction of the Court.⁴⁹ The preliminary examination initially focused on alleged crimes against humanity committed in the context of the "Maidan" protests, however following a new Article 12(3) declaration, the OTP has decided to extend the scope of the existing preliminary examination to include any alleged crimes committed on the territory of Ukraine, including

⁴⁴ Office of the Prosecutor, "Report on Preliminary Examination Activities 2017" (2017), The Hague: The International Criminal Court, paras. 24-25 (hereinafter 'Report on Preliminary Examination Activities 2017').

⁴⁵ Report on Preliminary Examination Activities 2017, para. 35.

⁴⁶ Report on Preliminary Examination Activities 2017, paras. 37-44. All of the crimes at this point are alleged crimes, as the purpose of this stage is to verify the subject-matter jurisdiction.

⁴⁷ Report on Preliminary Examination Activities 2017, para. 53.

⁴⁸ Report on Preliminary Examination Activities 2017, para. 51.

⁴⁹ Report on Preliminary Examination Activities 2017, paras. 80-81.

Eastern Ukraine and Crimea, from February 2014 and onwards.⁵⁰ The alleged crimes include disappearances, killings, torture, forced conscription of Crimeans into the Russian armed forces, destruction of civilian objects and sexual and gender-based crimes.⁵¹

2.2.2 Phase 3 Preliminary Examinations - Admissibility

The preliminary examination in Columbia was opened in June 2004, after the OTP received numerous communications.⁵² The Office has determined that there is reasonable basis to believe that both crimes against humanity under article 7 have been committed since 1 November 2002 and that war crimes under article 8 have been committed since 1 November, conducted by various different actors within the context of the armed conflict between Government forces, paramilitary armed groups and rebel armed groups.⁵³

In 2009, the OTP announced its preliminary examination in Guinea, after receiving numerous communications, after the protest in Conakry on the 28 September 2009.⁵⁴ The Office has determined that there is reasonable basis to believe that crimes against humanity under article 7 have been committed in the context of the protests in Conakry.⁵⁵

The OTP is also conducting a preliminary examination into the situation of what the OTP has determined are war crimes committed by nationals of the United Kingdom in the context of the Iraq conflict and occupation from 2003 to 2008.⁵⁶ Iraq is not party to the Rome Statute and therefore not member of the ICC, which means that the ICC may not exercise jurisdiction over Iraqi nationals or Iraqi territory.⁵⁷ However, the UK is party to the Rome Statute and therefore the Court may exercise jurisdiction over UK nationals committing international crimes in Iraq.⁵⁸ The preliminary examination was initially terminated in February 2006 and was then re-opened in May 2014, after new information was received.⁵⁹

⁵⁰ Report on Preliminary Examination Activities 2017, paras. 81-82.

⁵¹ Report on Preliminary Examination Activities 2017, paras. 97-110. All of the crimes at this point are alleged crimes, as the purpose of this stage is to verify the subject-matter jurisdiction.

⁵² Report on Preliminary Examination Activities 2017, para. 121.

⁵³ Report on Preliminary Examination Activities 2017, paras. 124, 127, 128.

⁵⁴ Report on Preliminary Examination Activities 2017, paras. 156, 158.

⁵⁵ Report on Preliminary Examination Activities 2017, para. 162.

⁵⁶ Report on Preliminary Examination Activities 2017, para. 194.

⁵⁷ Report on Preliminary Examination Activities 2017, para. 175.

⁵⁸ Report on Preliminary Examination Activities 2017, para. 176.

⁵⁹ Report on Preliminary Examination Activities 2017, para. 174.

The preliminary examination of the situation in Nigeria was made public in November 2010 and focuses on what the OTP has determined are war crimes and crimes against humanity committed in the context of the armed conflict between Boko Haram and the Nigerian security forces and crimes against humanity.⁶⁰

2.2.3 New Preliminary Examinations

The preliminary examinations in the Philippines and Venezuela are the most recent ones and were both announced in February 2018.⁶¹ The focus of the preliminary examination in the Philippines is the alleged crimes committed in the context of the “war on drugs” campaign launched by the government.⁶² The preliminary examination in Venezuela will focus on the alleged crimes committed since April 2017, in the context of demonstrations and related political unrest.⁶³

2.2.4 Completed Preliminary Examinations

The focus of the preliminary examination in Afghanistan, which was opened in 2006 by the Prosecutor, is on the crimes against humanity and war crimes committed in Afghanistan since 1 May 2003.⁶⁴ The preliminary examination is looking at crimes committed by *inter alia* the Taliban, the Afghan National Security Force, members of the United States (US) armed forces and the US Central Intelligence Agency.⁶⁵ In November 2017, the Prosecutor requested judicial authorization to commence an investigation into the situation and is still waiting for a response.⁶⁶

⁶⁰ Report on Preliminary Examination Activities 2017, paras. 204, 212, 213.

⁶¹ Statement by the Prosecutor “Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela,” 8 February 2018, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>).

⁶² Statement by the Prosecutor “Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela,” 8 February 2018, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>).

⁶³ Statement by the Prosecutor “Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela,” 8 February 2018, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>).

⁶⁴ Report on Preliminary Examination Activities 2017, paras. 230, 241.

⁶⁵ Report on Preliminary Examination Activities 2017, para. 241.

⁶⁶ Report on Preliminary Examination Activities 2017, para. 233.

2.3 Unorthodox Approach to Preliminary Examinations

As mentioned in the beginning of this section, preliminary examinations were established with the purpose of determining whether a situation meets the legal criteria established by the Rome Statute to warrant a formal investigation by the OTP into said situation. This is reiterated in the OTP's Strategic Plan for 2016-2018, as it states that the preliminary examinations are critical to the Office in its determination of whether or not to open an investigation.⁶⁷ This is also mentioned in the OTP's Policy Paper on Preliminary Examinations.⁶⁸ However, these documents also highlight another purpose of preliminary examinations. The Strategic Plan states that preliminary examinations have the potential to obviate ICC interventions through prevention and complementarity.⁶⁹ The Prosecutor believes that preliminary examinations can contribute to the ICC's overarching goal of ending impunity through encouraging genuine national proceedings and the prevention of crimes.⁷⁰ The Strategic Plan also states that preliminary examinations can also help deter actual or would-be perpetrators of crimes through the threat of international prosecutions.⁷¹ Furthermore, the OTP's Policy Paper on Preliminary Examinations states that a significant part of the Office's efforts at the preliminary examination stage is directed towards encouraging states to carry out their primary responsibility to investigate and prosecute international crimes.⁷² Thus, one can clearly see that the OTP has high expectations for preliminary examinations. Not only are they to function as determining whether or not an investigation should be opened, but they may also have both a preventive and complementarity effect, according to the OTP.

However, while the OTP has publicly stated these goals of the preliminary examination, they have still received little attention by scholars. Carsten Stahn is one scholar who has decided to dedicate some of his writing to preliminary examinations. He has developed two different approaches to preliminary examinations, based on the above mentioned information coming from the OTP; the 'gateway approach' and the 'consequentialists approach'. The 'gateway approach' is what Stahn, argues is a more narrow approach to preliminary examinations and more investigation-centric, as the purpose of the preliminary examinations, is to determine

⁶⁷ Strategic Plan 2016-2018, para. 54.

⁶⁸ OTP Policy Paper 2013, para. 2.

⁶⁹ Strategic Plan 2016-2018, para. 55.

⁷⁰ Strategic Plan 2016-2018, para. 55.

⁷¹ Strategic Plan 2016-2018, para. 55.

⁷² OTP Policy Paper 2013, para. 100.

whether or not an investigation should be opened in a given situation.⁷³ This is more of the orthodox understanding of preliminary examinations and is also in line with what scholars normally write about the preliminary examinations, as well as what is written about them in the Rome Statute. The ‘consequentialist approach’ is somewhat broader than the ‘gateway approach’. The ‘consequentialist approach’ implies that there is a certain virtue in the conduct of a preliminary examination, irrespective of whether or not it leads to an ICC investigation.⁷⁴ This approach argues that preliminary examinations can have a number of other rationales, than just whether or not an investigation in a given situation should be opened.⁷⁵ According to this approach, preliminary examinations can have two other rationales, ‘positive complementarity’ and ‘prevention’.⁷⁶ According to Stahn, preliminary examinations can also play an important role for other accountability mechanisms. Stahn states that human rights mechanisms may rely on the information and finding of the ICC in the preliminary examination stage, in order to corroborate their own sources, information or documentation of violations.⁷⁷ Within this approach, preliminary examinations can also function as a “watchdog” of the OTP, as they both monitor, as well as put pressure on states, similar to various human rights institutions.⁷⁸ Thus, Stahn states that preliminary examinations may have extrajudicial and social rationales.⁷⁹ Furthermore, in this approach the Prosecutor can be seen to have political leverage during the preliminary examinations, which she can use as a catalyst to influence accountability approaches by other actors.⁸⁰ According to Stahn, in this approach, preliminary examinations are neither a classical instrument of criminal procedure, nor a human rights instrument.⁸¹ Some scholars do support the ideas of this approach however; they do not use the term ‘consequentialist approach’.⁸² This understanding of preliminary examinations is more controversial to numerous other scholars, than the more orthodox approach to preliminary examinations.

⁷³ Stahn, *supra* note 4, 418.

⁷⁴ Stahn, *supra* note 4, 419.

⁷⁵ Stahn, *supra* note 4, 419.

⁷⁶ Stahn, *supra* note 4, 419.

⁷⁷ Stahn, *supra* note 4, 420.

⁷⁸ Stahn, *supra* note 4, 420.

⁷⁹ Stahn, *supra* note 4, 420.

⁸⁰ Stahn, *supra* note 4, 420.

⁸¹ Stahn, *supra* note 4, 420.

⁸² Mark Kerstin “New Paper Alert! Casting a Larger Shadow – Pre-Meditated Madness, the International Criminal Court, and Preliminary Examinations,” *Justice in Conflict*, 28 August 2017, (available at: <https://justiceinconflict.org/2017/08/28/new-paper-alert-casting-a-larger-shadow-pre-meditated-madness-the-international-criminal-court-and-preliminary-examinations/#comment-82485>); Poes *supra* note 4; Hansen *supra* note 4.

As seen in this chapter preliminary examinations are an intricate stage of the Court's work. Not only do they determine whether or not an investigation should be opened, but they also play a vital role for deterrence. The latter is what will be explored in this thesis.

3. Deterrence and the International Criminal Court

Classic deterrence theory, which has its roots in Enlightenment philosophy and the works of both Jeremy Bentham and Cesar Beccaria, has traditionally focused more on deterrence at the national level.⁸³ This is seen throughout the majority of scholarly literature on deterrence, which focuses primarily on the national level. This is most likely due to the fact that deterrence is linked to the criminal justice system, which has until not too recently been situated at the national level. However, a shift has developed, as more attention is being given to deterrence at the international level, which is connected to the creation of various international criminal justice mechanisms, specifically courts and tribunals. Thus, deterrence has found its way into the international level; into the realm of international criminal law and international criminal justice. Here the idea has been that one of the purposes of international criminal courts and tribunals is to deter individuals from committing international crimes.⁸⁴

This chapter will focus on deterrence and the international criminal courts and tribunals, specifically the ICC. First classic deterrence theory at the national level will be examined. Next, the focus will be moved to the international level, where the development of international criminal courts and tribunals will be addressed, including how the focus has gone from mainly punitive to also including aims of deterrence. This will be then followed by a review of the different ways in which scholars argue that international criminal courts and tribunals can or cannot deter international crimes, with some special focus on the ICC.

3.1 Deterrence Theory

Broadly defined, deterrence within classic deterrence theory is the ability of a legal system to discourage or prevent certain conduct through the threats of punishment or other expression of disapproval.⁸⁵ Deterrence as an aim of criminal law means discouraging future crime by

⁸³ Raymond Paternoster, "How much do we really know about criminal deterrence?" *Journal of Criminal Law & Criminology*, vol. 100, no. 3 (2010), 767.

⁸⁴ Kate Cronin-Furman, "Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity," *International Journal of Transitional Justice*, vol. 7 no. 3 (2013), 434.

⁸⁵ Payam Akhavan, "Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal," *Human Rights Quarterly*, vol. 20, no. 4 (1998), 741.

effectively punishing crimes already committed.⁸⁶ According to various scholars on deterrence theory, a well-designed criminal justice system will deter individuals from committing crime.⁸⁷ The assumption that the prosecution and punishment of perpetrators in international criminal courts and tribunals can deter international crimes not yet committed, has its roots in theories on legal deterrence on the national level.⁸⁸ This section will look at deterrence theory on the national level.

3.1.1 Two Types of Deterrence

In the literature on deterrence theory, scholars have overall distinguished between two types of deterrence; specific deterrence and general deterrence. Specific deterrence entails that an individual who has been punished for crimes committed will want to avoid suffering a similar fate again and will therefore not commit the same crime again.⁸⁹ Thus the individual is deterred from committing a crime again, as he or she does not want to be punished again. This type of deterrence is more individual focused, as it looks at the individual wanting to avoid punishment again. General deterrence puts the emphasis on the society, as this theory stipulates that by punishing the single perpetrator, the society will generally be deterred from committing crimes to avoid the likelihood of being punished.⁹⁰ Thus, punishing the single perpetrator will deter other individuals in the society from committing crime.

3.1.2 Deterrence as a Cost-Benefit Analysis and Legal Sanctions

Most deterrence theory at the domestic level is rooted in economic models of human rationality and thus imposes a rational choice economic analysis to the study of criminal law, as it assumes that individuals are self-interested, rational actors who wish to maximize their utility and choose

⁸⁶ Guido Acquaviva, "International criminal courts and tribunals as actors of general deterrence? Perceptions and misperceptions," *International Review of the Red Cross*, vol. 96 (2014), 786.

⁸⁷ Yvonne Dutton and Tessa Alleblas, "Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya," *St. John's Law Review*, vol. 91, no. 1 (2017), 110.

⁸⁸ Tom Buitelaar, "The ICC and the Prevention of Atrocities: Criminological Perspectives," *Human Rights Review*, vol. 17, no. 3 (2016), 288.

⁸⁹ Martin Mennecke, "Punishing Genocidaires: A Deterrent Effect or Not?" *Human Rights Review*, vol. 8, no. 4 (2007), 320; John Dietrich, "The Limited Prospects of Deterrence by the International Criminal Court: Lessons from Domestic Experience," *International Social Science Review*, vol. 88, no. 3 (2014), 6.

⁹⁰ Dutton and Alleblas, *supra* note 87, 110; Chris Jenks, "Moral touchstone, not general deterrence: The role of international criminal justice in fostering compliance with international humanitarian law," *International Review of the Red Cross*, vol. 96 (2014), 777.

the course of action, which will produce the greatest benefits at the lowest costs.⁹¹ Thus, proponents of this theory believe that individuals will make decisions rationally after weighing the benefits against the costs. This model argues that would-be criminals weigh the potential benefits of committing a crime against the potential costs of being punished for these crimes.⁹² These scholars predict that individuals will refrain from committing crimes, when the costs of being punished outweigh the benefits of committing the crime.⁹³

When it comes to deterrence as a cost-benefit analysis, scholars often focus on legal sanctions as costs. Legal sanctions are the possible punishments imposed by the criminal justice system, such as fines, prison sentences and capital punishment.⁹⁴ In attempting to deter crime, lawmakers will often focus on increasing the expected costs, such as increasing the chance of punishment or the amount of punishment, as a way of impacting this cost-benefit analysis.⁹⁵ Scholars, who are supportive of this approach, have identified three factors of the potential punishment, which they believe are important for legal deterrence; the punishment's certainty, the punishment's severity and the punishment's swiftness.⁹⁶ Numerous scholars state that the most important of these factors is the certainty of punishment; offenders are more likely to be deterred from committing a crime when there is a higher degree of certainty that they will be punished.⁹⁷ These same scholars argue that that the severity of the punishment is not actually that important.⁹⁸ However, there are some scholars who do weigh all three factors equally.⁹⁹ Buitelaar, on the other hand, completely disagrees with the entire line of reasoning, as he argues that there is no strong empirical evidence to support the claim that these three factors are the most important for legal deterrence.¹⁰⁰ He states that it is not the objective properties of legal sanctions that matter, but

⁹¹ Geoff Dancy, "Searching for Deterrence at the International Criminal Court," *International Criminal Law Review*, vol. 17, no. 4 (2017), 629; Dutton and Alleblas, *supra* note 87, 110.

⁹² Dancy, *supra* note 91, 5.

⁹³ Dutton and Alleblas, *supra* note 87, 110.

⁹⁴ Dutton and Alleblas, *supra* note 87, 111; Buitelaar, *supra* note 88, 288.

⁹⁵ Buitelaar, *supra* note 88, 288; Dietrich, *supra* note 89, 13.

⁹⁶ Christopher W. Mullins and Dawn L. Rothe, "The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment," *International Criminal Law Review*, vol. 10, no. 5 (2010), 773; Dutton and Alleblas, *supra* note 87, 111; Dancy, *supra* note 91, 630.

⁹⁷ Dancy, *supra* note 91, 630; Dutton and Alleblas, *supra* note 87, 111; Jenks, *supra* note 90, 78; Mark A. Drumbl, "Collective Violence and Individual Punishment: The Criminality of Mass Atrocity", *Northwestern University Law Review*, vol. 9 (2005), 590.

⁹⁸ Dancy, *supra* note 91, 630; Dutton and Alleblas, *supra* note 87, 111; Jenks, *supra* note 90, 78; Drumbl, *supra* note 97, 590.

⁹⁹ Jo and Simmons, *supra* note 6, 446.

¹⁰⁰ Buitelaar, *supra* note 88, 289.

rather how the potential criminal perceives them.¹⁰¹ He argues that different individuals will respond to legal sanctions differently.¹⁰²

3.1.3 Extralegal Sanctions

Legal sanctions are not the only types of sanctions in the literature on deterrence theory. Extralegal sanctions also called social sanctions or social deterrence, move away from the legal punishments and refer to the various informal costs society may impose on one who is charged with or convicted of a crime.¹⁰³ These social consequences can range from the psychic costs and consequence of stigmatization to the more material costs and consequences of being shunned from profitable relationships.¹⁰⁴ A common social cost is that it is harder to get a job, as many people do not want to hire a former criminal. Buitelaar argues for two categories of extralegal sanctions; social censure and self-disapproval.¹⁰⁵ Social censure includes social isolation, loss of impersonal contacts (as Jo and Simmons also mention), or a lowering of community respect, but also more violent forms such as corporal punishment or death.¹⁰⁶ Self disapproval is defined as the “personal dissonance from having violated an internalized behavioral norm”.¹⁰⁷

The threat of extralegal sanctions has a significant impact on people’s behavior. Some scholars as well as experimental research suggest that these types of sanctions play a larger role in deterring the general population from committing crime, than the threat of legal sanctions.¹⁰⁸ Moreover, according to Tittle et al. there is evidence which shows that effects of extralegal sanction threats are increased when the rule of law or the trust in and legitimacy of legal sanction mechanisms are generally weak.¹⁰⁹ When legal sanctioning mechanisms are not seen as legitimate and therefore not seen as proper restrictions of behavior, extralegal sanctioning

¹⁰¹ Buitelaar, *supra* note 88, 289.

¹⁰² Buitelaar, *supra* note 88, 289.

¹⁰³ Dutton and Alleblas, *supra* note 87, 111.

¹⁰⁴ Jo and Simmons, *supra* note, 6, 446.

¹⁰⁵ Buitelaar, *supra* note 88, 290.

¹⁰⁶ Buitelaar, *supra* note 88, 290.

¹⁰⁷ Daniel S. Nagin and Greg Pogarsky “Integrating Celerity, Impulsivity, and Extralegal Sanction Threats Into a Model of General Deterrence: Theory and Evidence,” *Criminology*, vol. 39, no. 4 (2001), 869.

¹⁰⁸ Jo and Simmons, *supra* note 6, 450; Buitelaar, *supra* note 88, 291.

¹⁰⁹ Charles R. Tittle, Ekaterina V. Botchkovar and Olena Antonaccio, “Criminal Contemplation, National Context, and Deterrence,” *Journal of Quantitative Criminology*, vol. 27, no. 2 (2011), 225.

mechanisms become vital in controlling crime.¹¹⁰ In situations like these, potential offenders will have to be deterred by social disapproval as well as social and moral norms.

However, it is important to note that whether or not the extralegal sanctions prevent crimes depends on whether or not the internalized group norm rejects or promotes crime.¹¹¹ In some social groups, crime can lead to social censure and self-disapproval, while in others it does not. For example, in gangs or terrorist organizations, crime is often considered more common and acceptable. Furthermore, some scholars argue that extralegal sanctions only work as deterrence in communities, where crime is relatively rare and considered morally unacceptable.¹¹² Extralegal sanctions depend on its effectiveness on the expression of clear standards of behavior.¹¹³

In conclusion, deterrence theory at the national level is based on the assumption that individuals are rational and will conduct a cost-benefit analysis before choosing to commit a crime. On the cost side, they will assess both the legal sanctions and the extralegal sanctions.

3.2 Development of Modern International Criminal Justice: From Punitive to Deterrence

The first development of modern international criminal courts and tribunals is often cited as being the Nuremberg Trials after World War II (1945-1946), which was quickly followed by the Tokyo Trials (1946).¹¹⁴ These tribunals were created in order to try and punish the perpetrators of crimes against peace, war crimes and crimes against humanity committed during the war.¹¹⁵ For many scholars of international law, the Nuremberg Trials have had great influence on the establishment of international criminal law, as well as establishing crucial precedents for

¹¹⁰ Buitelaar, *supra* note 88, 291.

¹¹¹ Buitelaar, *supra* note 88, 291.

¹¹² Dutton and Alleblas, *supra* note 87, 113.

¹¹³ Jo and Simmons, *supra* note 6, 450.

¹¹⁴ Sang-Hyun Song, "International Criminal Court-Centred Justice and Its Challenges," *Melbourne Journal of International Law*, vol. 17, no. 1 (2016), 2.

¹¹⁵ United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945 (available at: <https://www.legal-tools.org/doc/64ffdd/pdf/>); *The International Military Tribunal for the Far East Charter*, 19 January 1946 (available at: http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf).

prosecuting individuals of international crimes in international courts and tribunals, instead of domestic ones.¹¹⁶

Progress on the development of international criminal justice stalled somewhat during the Cold War, albeit minor events such as the adoption of the Geneva Conventions of 1949. However, the development gained new momentum in the 1990s, when the UNSC, acting under Chapter VII of the UN Charter, established the ad hoc international criminal tribunals for the former Yugoslavia (the ICTY) in 1993 and Rwanda (the ICTR) in 1994. The ICTY had jurisdiction over grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, the crime of genocide and crimes against humanity in the territory of the former Socialist Federal Republic of Yugoslavia.¹¹⁷ The ICTR had jurisdiction over the crime of genocide, crimes against humanity and violations of Article 3 common to the Geneva Conventions and of Additional Protocol II committed in Rwanda, or by Rwandan nationals in neighboring states.¹¹⁸ Thus, both tribunals' jurisdiction was somewhat limited in terms of territory. Moreover, both tribunals had primacy over national courts.¹¹⁹ The formal closure of the ICTR was in December 2015 and in December 2017 for the ICTY.¹²⁰

Several other international tribunals and hybrid courts have been established, such as the Special Court for Sierra Leone in 2002 and the Special Tribunal for Lebanon in 2009. However, most groundbreaking was the establishment of the International Criminal Court. In 1998 the Rome Statute was adopted and in 2002 after the necessary 60 state ratifications, the Court was

¹¹⁶ Ku and Nzelibe, *supra* note 6, 784; Aaron Fichtelberg, "Fair Trials and International Courts: A Critical Evaluation of the Nuremberg Legacy," *Criminal Justice Ethics, Criminal Justice*, vol. 28, no. 1 (2009), 5.

¹¹⁷ UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993, (available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

¹¹⁸ UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, (available at: http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf).

¹¹⁹ UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, (available at: http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf); UN Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002)*, 25 May 1993, (available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

¹²⁰ Human Rights Watch, "Rwanda: International Tribunal Closing Its Doors," 23 December 2015, (available at: <https://www.hrw.org/news/2015/12/23/rwanda-international-tribunal-closing-its-doors>); International Criminal Tribunal for the Former Yugoslavia, "ICTY marks official closure with moving Ceremony in The Hague," 27 December 2017, (available at: <http://www.icty.org/en/press/icty-marks-official-closure-with-moving-ceremony-in-the-hague>).

formally created. The establishment of a permanent court had been in talks for years. Already in 1948, did the United Nations General Assembly (UNGA) pass resolution 260 (III), which requested the International Law Commission to study the desirability and the possibility of establishing a permanent international criminal court.¹²¹ The Court was established as a permanent autonomous court with the mandate to investigate, prosecute and try the individuals who are allegedly most responsible for committing the most serious crimes in the international community. However, the objective of deterrence also played a key role in the establishment of the Court, as seen in the preamble of the Rome Statute. The Statute states that state parties are “*determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes*”.

The idea that international criminal courts and tribunals can and should have a deterrent impact is a relatively new idea.¹²² During the Nuremberg Trials and the Tokyo Trials, the purpose was on retribution of crimes already committed; thus the prosecution and punishment of those most responsible for the crimes committed during the war.¹²³ Deterrence was not mentioned directly or indirectly in either one of the establishing charters.¹²⁴ This punitive nature of international criminal tribunals continued up to and through the creation of the ICTY and ICTR, according to numerous scholars.¹²⁵ This is also seen in the two UNSC resolutions creating the two tribunals, as well as their statute, as there is no clear language indicating that the establishment of these ad hoc tribunals was also to serve the purpose of prevention or deterrence, as is the case with the Rome Statute, as seen above.¹²⁶ However, in various studies done on the ICTY and ICTR,

¹²¹ United Nations General Assembly Resolution 260 (III), *The Prevention and Punishment of the Crime of Genocide*, 9 December 1948, B.

¹²² Cronin-Furman, *supra* note 84, 436; Drumbl, *supra* note 97, 560.

¹²³ Cronin-Furman, *supra* note 84, 436.

¹²⁴ United Nations, *Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ("London Agreement")*, 8 August 1945 (available at: <https://www.legal-tools.org/doc/64ffdd/pdf/>); *The International Military Tribunal for the Far East Charter*, 19 January 1946 (available at: http://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.3_1946%20Tokyo%20Charter.pdf).

¹²⁵ Cronin-Furman, *supra* note 84, 436.

¹²⁶ UN Security Council, *Security Council resolution 827 (1993) [International Criminal Tribunal for the former Yugoslavia (ICTY)]*, 25 May 1993, S/RES/827(1993) (available at: http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf); UN Security Council, *Security Council resolution 955 (1994) [Establishment of the International Criminal Tribunal for Rwanda]*, 8 November 1994, S/RES/955 (1994) (available at: http://www.unmict.org/specials/ict-r-remembers/docs/res955-1994_en.pdf); UN Security Council, *Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006)*, 8 November 1994, (available at: http://unictr.unmict.org/sites/unictr.org/files/legal-library/100131_Statute_en_fr_0.pdf); UN Security Council, *Statute of the International Criminal Tribunal for the*

scholars argue that while deterrence may not have played a role in the creation of the tribunals, it did gain more importance once the tribunals were up and functioning. They illustrate this by showing how numerous judgments in both the ICTY and the ICTR state that retribution and general deterrence are of equal importance when it comes to the purpose of sentencing and in some cases, deterrence was argued to be even more important than retribution.¹²⁷ However, it was not until the establishment of the Court that deterrence played a more explicit role, as seen in the Rome Statute.

Deterrence has been a key feature of the conversation about the role of the ICC, and about international criminal justice more generally. There are those, both scholars and states, who are skeptical of the Court's deterrent effect. They dispute that international criminal courts and tribunals, including the Court, can actually have a deterrent effect through its threat of punishment and actual punishment.¹²⁸ They will often refer to the ongoing international crimes being committed, to show that deterrence by international criminal courts and tribunals does not work, as well as the lack of cases brought before the ICC.

However, there are those who support the statement that the Court can have a deterring impact on international crimes, including individuals who work or have worked for the Court.¹²⁹ Philippe Kirsch, the Court's first president, has supported the idea that the Court can have a deterrent effect on atrocity crimes.¹³⁰ Throughout his tenure as the first Prosecutor of the Court, Luis Moreno-Ocampo has reiterated his belief that the Court can have a preventive effect on atrocity crimes and that deterrence is part of the aim of the Court.¹³¹ When signing the Rome Statute, various states also expressed optimism about the Court having the potential to deter

Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, (available at http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

¹²⁷ Drumbl, *supra* note 97, 561; Padraig McAuliffe, "Suspended disbelief: the curious endurance of the deterrence rationale in international criminal law," *New Zealand Journal of Public and International Law*, vol. 10, no. 2 (2012), 229; Mennecke, *supra* note 89, 332.

¹²⁸ Dutton and Alleblas, *supra* note 87, 114.

¹²⁹ Buitelaar, *supra* note 88, 289.

¹³⁰ Global Research "Living up to the Legacy of Nuremberg: Interview with International Criminal Court (ICC) President Philippe Kirsch," 13 December 2005, (available at: <http://www.globalresearch.ca/living-up-to-the-legacy-of-nuremberg/1479>). Philippe Kirsch is also cited in numerous articles as having stated: "By putting potential perpetrators on notice that they may be tried before the Court, the ICC is intended to contribute to the deterrence of these crimes" in an interview.

¹³¹ Joint Statement of the Prosecutors of the International Criminal Court, the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone, 27 November 2004, (available at: <http://www.iccnw.org/documents/JointDeclarationProsecutors26Nov04.pdf>).

individuals from committing international crimes.¹³² Numerous international law scholars also cite deterrence and the prevention of future crimes as justification for the creation of or reliance on the Court.¹³³

3.3 How can International Criminal Courts and Tribunals Deter International Crimes

Within the literature on deterrence and international criminal courts and tribunals, including the ICC, various types of deterrence are discussed. This paper has identified four overarching mechanisms; deterrence through cost-benefit analysis (based on classic deterrence theory), deterrence through norms, deterrence through complementarity and positive complementarity and deterrence through the workings of the ICC. Each type of deterrence argues for a certain way in which international crimes can be deterred by international criminal courts and tribunals. Some of the mechanisms are more general, while others are more ICC-centric.

3.3.1 Deterrence Theory at the International Level as Deterrence

In the literature on deterrence and international courts and tribunals, a common trend has been to apply classic deterrence theory on a national level, as explained above, to the international criminal courts and tribunals.¹³⁴ Thus, deterrence theory on the national level is applied to the international level. Classic deterrence theory on the national level suggests that perpetrators are rational and will therefore perform a cost-benefit analysis before committing a crime. On the cost side, they will look at the possible legal sanction, specifically the chances of punishment, and extralegal, in order to determine whether he or she will gain more from committing the crime.

On an international level then, this theory would state that perpetrators of international crimes are rational individuals, who will conduct a cost-benefit analysis of the consequences of them committing the crime, where on the cost side they will focus on the legal sanctions, such as being punished at an international criminal court or tribunal. In the scholarship on applying

¹³² CICC Secretariat, "ICC Update 13th edition," 21 September 2000, (available at: <http://www.iccnw.org/documents/iccupdate13.pdf>); CICC Secretariat, "ICC Update 14th edition," 18 October 2000, (available at: <http://www.iccnw.org/documents/iccupdate14.pdf>): both documents exemplify various state leaders or other politicians commenting positively on the potential deterrence effect of the ICC. The states include: Canada, Argentina, Bulgaria, Liechtenstein, Georgia, Iceland and Mali.

¹³³ Buitelaar, *supra* note 88, 286; Dutton and Alleblas, *supra* note 87, 113.

¹³⁴ Cronin-Furman, *supra* note 84, 439.

national deterrence theory to the international level, in terms of the cost-benefit analysis, little attention is actually given to that of extralegal sanctions. In this type of deterrence, the deterrence impact is located within the judgments; specifically the punishment of the crime.

However, there is an ongoing debate as to whether or not classic deterrence theory works on the international level. Several authors express doubt that deterrence from national criminal law can be applied to international criminal law, which is often in relation to the cost-benefit analysis. First of all, some scholars highly doubt that perpetrators of international crimes will actually engage in a cost-benefit analysis, before making a decision to commit an international crime.¹³⁵

Furthermore, there is the debate of perpetrator rationality; whether or not perpetrators of atrocity crimes at the international level can be considered rational. Numerous scholars argue that perpetrators of genocides, war crimes and crimes against humanity are extremely irrational and are motivated by bloodlust, religious fervor or ancient ethnic hatred.¹³⁶ International legal scholars who support this view state that individuals who commit these crimes are unlikely to behave as rational actors who are deterred by the risk of punishment.¹³⁷ Drumbl states that the assumption that the ordinary common criminal has a certain degree of perpetrator rationality does not fit those perpetrators who commit international crimes.¹³⁸ Numerous scholars including Holtermann would, however, disagree with this assumption, as he argues that a perpetrator's decision to commit atrocity crimes can be understood as part of a wider rational strategy and that for the perpetrator himself, his actions seem like the only rational thing to do.¹³⁹ Aukerman would agree with this statement, as she argues that some individuals, who commit these international crimes, do make rational decisions.¹⁴⁰ Dietrich states that on the international level, most potential criminals are rational, as their crimes, such as genocide are calculated policy

¹³⁵ Buitelaar, *supra* note 88, 293.

¹³⁶ Cronin-Furman, *supra* note 84, 439.

¹³⁷ Cronin-Furman, *supra* note 84, 439; Mullins and Rothe, *supra* note 96, 783.

¹³⁸ Mark A. Drumbl, (2007) *Atrocity, Punishment, and International Law*. Cambridge: Cambridge University Press, 171.

¹³⁹ Jakob von Holderstein Holtermann, "A "Slice of Cheese"—a Deterrence-Based Argument for the International Criminal Court," *Human Rights Review*, vol. 11, no. 3 (2010), 305.

¹⁴⁰ Miriam J. Aukerman, "Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice," *Harvard Human Rights Journal*, vol. 15 (2002), 68.

choices and not random actions.¹⁴¹ In relation to this, some perpetrators may in fact find their actions morally justifiable or even necessary.¹⁴²

Another line of debate has focused on the cost side of the cost-benefit calculus at the international level. Numerous scholars argue that even if perpetrators who commit international crimes are rational and do engage in a cost-benefit analysis, they will probably view the risk of prosecution as slight, as criminal prosecution for genocide, war crimes and crimes against humanity are quite rare.¹⁴³ In his study on the ICTY, Wippman states that the number of individuals who were sentenced is minuscule relative to the number of individuals responsible for international humanitarian law violations.¹⁴⁴ According to Meron, among others, deterrence at the international level fails, because prosecutions for these types of crimes are so rare that criminals do not believe that they are likely to be prosecuted and punished.¹⁴⁵ As mentioned above, it is the certainty of punishment that is most likely to produce deterrence, according to deterrence theory. However, international criminal courts and tribunals cannot offer such certainty for punishment. Scholars argue that this is also the case with the ICC. Punishment at the ICC is far from certain, which is seen in the few arrest warrants and guilty verdicts at the Court.¹⁴⁶ Cronin-Furman argues that while the risk of being brought before a court is marginally greater than before the existence of the ICC, it is still small and not likely to play a significant role the potential offender's calculus.¹⁴⁷ This can be due to the fact that the Court does not have the resources to conduct trials on every communication they receive and therefore only conduct a limited number of trials.¹⁴⁸ Due to this, the threat of arrest for most perpetrators is very small. Furthermore, many academics also argue that due to the absence of an international criminal police force, the individual's chance of being arrested and prosecuted is slim, which is also a critique associated with the ICC.¹⁴⁹ As there is no police force to apprehend suspects, ICC is dependent on the state's willingness to cooperate with the Court. Thus, if one were to support that perpetrators conduct a rational cost-benefit analysis before committing a crime at the

¹⁴¹ Dietrich, *supra* note 89, 7.

¹⁴² Drumbl, *supra* note 138, 169.

¹⁴³ David Wippman, "Atrocities, Deterrence, and the Limits of International Justice," *Fordham International Law Journal*, vol. 23 (1999), 476; Cronin-Furman, *supra* note 84, 443.

¹⁴⁴ Wippman, *supra* note 143, 476.

¹⁴⁵ Theodor Meron, "From Nuremberg to the Hague," *Military Law Review*, vol. 149 (1995), 110.

¹⁴⁶ Dancy, *supra* note 91, 630.

¹⁴⁷ Cronin-Furman, *supra* note 84, 443.

¹⁴⁸ Dietrich, *supra* note 89, 16.

¹⁴⁹ Dutton and Alleblas, *supra* note 87, 116;

international level, not much weight will be on the cost side, as experience shows that prosecution for international crimes are rare.

The best approach to deterring, according to Meron, is to increase the probability of prosecution through more national and international trials as a way of making punishment more likely.¹⁵⁰ However, this approach is full of difficulties, such as the lack of resources for international courts.

In this type of deterrence it becomes clear that what deters is the punishment. It is the threat of, fear of or the actual punishment that will deter individuals from committing atrocity crimes. Thus the deterrence impact is located within the punishment of the crime.

It does become clear why many scholars are not supportive of applying classic deterrence theory from the national level to the international level, as a way of deterrence. There are various issues related to this, such as the whether or not perpetrators of international crimes actually engage in a cost-benefit analysis, whether or not actors committing international crimes can be considered rational and the fact that punishment is not certain in international criminal courts and tribunals. Due to these obvious issues, it seems as though many scholars have automatically been negative of international criminal courts' and tribunals' deterrence potential, including that of the ICC. The main problem is that these scholars attempt to locate the deterrence ability within the judgments of the courts and tribunals, i.e. the punishment. However, the deterrence ability should instead be located elsewhere.

It is important to note that this is not the only type of deterrence; numerous scholars have just chosen to not give a lot of attention to these other types and the impact that they might have, when assessing the deterrence potential of international courts and tribunals, including that of the ICC. Thus, these scholars are often basing their view that international criminal courts and tribunals lack a deterrent impact on only one type of deterrence. This thesis will, however, highlight these other types of deterrence in the following sections.

¹⁵⁰ Meron, *supra* note 145, 110.

3.3.2 Deterrence through Norms

One of the other ways in which scholars have chosen to view deterrence, is through norms and culture; how these can deter international crimes. While this type of deterrence has yet to receive a lot of scholarly attention in comparison to the deterrence theory at the international level, it is a vital form of deterrence and therefore will be mentioned here. There are some similarities between these norms and the extralegal sanctions mentioned above; however, the norms mentioned here are not necessarily in relation to any cost-benefit analysis.

Numerous scholars of international criminal justice believe that atrocity crimes are facilitated by what they call a “culture of impunity”.¹⁵¹ What they mean by this is that there exists a culture in some societies where individuals believe that they can do what they want, without facing any consequences for their actions. These scholars argue that in order to stop these atrocity crimes, this culture of impunity must be ended.¹⁵² In order to change this culture, norms of proper behavior in regard to international crimes and human rights abuses must be internalized, as these norms will be able to alter individual’s perceptions of what acceptable behavior is.¹⁵³ Thus, there must be created a normative environment where the international crimes and human rights abuses are considered unacceptable and are no longer tolerated.¹⁵⁴

Akhavan has especially been vocal about deterrence through norms. He argues that even if prosecutions do fail to deter guilty individuals from committing future crimes, prosecutions will nonetheless reinforce international norms, as well as contribute to the establishment of a political culture that considers committing atrocity crimes as unacceptable.¹⁵⁵ Akhavan believes that the international criminal justice system, including the criminal courts and tribunals, will act to prevent atrocities by instilling a culture where atrocity crimes are no longer considered accepted; thus, replacing a culture of impunity with a culture of compliance or a culture of accountability.¹⁵⁶ Acquaviva has a similar point, as he states that the deterrence effect of international criminal courts and tribunals, including the ICC, is that they can deter future

¹⁵¹ Sheri Rosenberg, “The Relationship between the International Criminal Court and the Prevention of Mass Atrocities,” *Genocide Prevention Now*, issue 12 (2012), 3.

¹⁵² Rosenberg, *supra* note 151, 3.

¹⁵³ Michael J. Gilligan “Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime,” *International Organizations*, vol. 60, no. 4 (2006), 940.

¹⁵⁴ Rosenberg, *supra* note 151, 1.

¹⁵⁵ Akhavan, *supra* note 85, 815.

¹⁵⁶ Mennecke, *supra* note 89, 328.

atrocities by ending a culture where offenders escape prosecution for committing humanitarian atrocities.¹⁵⁷ Akhavan also states that publicly vindicating human rights norms may help prevent future international crimes through the power of moral example to transform behavior.¹⁵⁸ In relation to this, Starr argues that the rhetoric on human rights norms by international criminal courts and tribunals may help shape these international norms, even when actual enforcement of these rights fall short.¹⁵⁹

Furthermore, in his work on ICTY, Akhavan argues that over time, international criminal justice will create “unconscious inhibitions against crime” or “a condition of habitual lawfulness” in society, so that committing international crimes will not be considered an option, even when the potential criminal has no risk of being caught.¹⁶⁰ He furthermore argues that there is no need to punish a large number of perpetrators to achieve deterrence, as he states that the punishment of important individuals becomes an instrument through which respect for the rule of law is instilled into the popular conscious.¹⁶¹ Thus, Akhavan still relies on some form of punishment, though minimal in terms of amount. Other scholars specifically state that punishment is not necessary at all for deterrence through norms.¹⁶²

In regards to the Court, Song states that its greatest potential to have a significant preventive effect is by establishing a system of norms that outlaw atrocities.¹⁶³ He states that what is needed is a system of fully internalized legal and social norms that make the crimes mentioned in the Rome Statute not only punishable, but simply unacceptable in societies everywhere.¹⁶⁴ He, furthermore, states that by promoting adherence to legal norms of fundamental importance to the global community, the ICC can play an important role in regard to deterrence.¹⁶⁵ In relation to this, Marshall states that the Court will have an impact on changing norms and the way we

¹⁵⁷ Acquaviva, *supra* note 86, 792.

¹⁵⁸ Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *The American Journal of International Law*, vol. 95, no. 1 (2001), 10.

¹⁵⁹ Sonja Starr, “Rethinking “Effective Remedies”: Remedial Deterrence in International Courts,” *New York University Law Review*, vol. 83, no. 3 (2008), 736.

¹⁶⁰ Akhavan, *supra* note 85, 746

¹⁶¹ Akhavan, *supra* note 85, 746.

¹⁶² Gilligan, *supra* note 153, 940.

¹⁶³ Song, *supra* note 114, 8.

¹⁶⁴ Song, *supra* note 114, 8.

¹⁶⁵ Song, *supra* note 114, 15.

think about international criminal law and accountability, due to its mere existence.¹⁶⁶ Furthermore, it is argued that when it comes to the Court and deterrence, the ICC can contribute to deterrence as it can counter the norms prevalent in situations where international crimes are occurring, by explicitly and actively challenging them, with its own norms.¹⁶⁷ Thus the Court can contribute to deterrence through the internalization of norms.¹⁶⁸

Thus, international criminal courts and tribunals can deter atrocities, as they foster conditions for the emergence of a political culture where such atrocity crimes are no longer acceptable as well as help internalize norms of what acceptable behavior is.

Acquaviva focuses on a network of international criminal justice mechanisms, when arguing for deterrence through norms. He, first of all, argues that attempting to ascribe or judge deterrence in the context of single international criminal court or tribunal rests on a fundamental misunderstanding.¹⁶⁹ He believes that each institution does not have enough “strength” on their own to effectively function as deterrents of international crimes. Instead one should look at the international criminal institutions as parts of a network of intertwined, mutually reinforcing agencies dedicated to protecting and strengthening the rule of law, helping internalize norms of proper behavior and pursuing individual criminal responsibility for international crimes and gross human rights violations.¹⁷⁰ The international criminal courts and tribunals can, alongside other institutions, increase awareness of the rules for the protection of human dignity among the general public, foster compliance with the rule of law, help internalize norms of proper behavior and can therefore lead to general deterrence.¹⁷¹ Thus, according to Acquaviva, the ICC should not be seen as being able to deter future atrocities on its own. Rather, the Court should be seen as one of the principal instruments at the disposal of the international community to entrench the awareness that committing international crimes has consequences and that military and political leaders should not expect impunity.¹⁷² Furthermore, Acquaviva argues that the effectiveness of international criminal courts and tribunals in regard to deterrence, should be assessed in a more

¹⁶⁶ Katharine A. Marshall, “Prevention and Complementarity in the International Criminal Court: A Positive Approach,” *Human Rights Brief*, vol. 17, no. 2 (2010), 21.

¹⁶⁷ Buitelaar, *supra* note 88, 298.

¹⁶⁸ Buitelaar, *supra* note 88, 298.

¹⁶⁹ Acquaviva, *supra* note 86, 786.

¹⁷⁰ Acquaviva, *supra* note 86, 786.

¹⁷¹ Acquaviva, *supra* note 86, 786.

¹⁷² Acquaviva, *supra* note 86, 790.

holistic way; as the ability to foster behavioral changes and reinforce the legal ban on prohibited conduct, even when it stems from other legal or social instruments and not directly from an ICC judgment.¹⁷³

3.3.3 Deterrence, Complementarity and Positive Complementarity

It is vital to highlight complementarity and positive complementarity, when discussing deterrence in relation to the Court. It should be noted that the principles of complementarity and positive complementarity are only mentioned in relation to the Court and not other international criminal courts or tribunals, as the majority of this literature focuses on the Court. This is due to the fact that complementarity is an important principle of the Court, which many other international criminal courts and tribunals do not adhere to, as the majority of these courts and tribunals have primacy over the national courts, such as the ICTY, the ICTR (as mentioned above) the Special Tribunal for Lebanon¹⁷⁴ and the Special Court for Sierra Leone.¹⁷⁵ Therefore the principle of complementarity has little relevance here.

Complementarity is mentioned in Article 17 of the Rome Statute, which states that the Court has jurisdiction when the state is unable or unwilling to genuinely investigate and prosecute a crime. Thus, simplified, the ICC will step in when national courts fail to act. If the state that has jurisdiction is investigating and/or prosecuting the case genuinely, the ICC cannot exercise its jurisdiction.

According to numerous scholars, the possibility of an international prosecution by the Court can create incentives that make states more willing to investigate and prosecute international crimes themselves.¹⁷⁶ The principle of complementarity may encourage states to pursue genuine domestic prosecutions of the international crime, so they will not trigger the jurisdiction of the Court over the case and call the attention of the international community.¹⁷⁷ So, the Office's leverage over national authorities to press for domestic proceedings can be significant. The ICC

¹⁷³ Acquaviva, *supra* note 86, 792.

¹⁷⁴ Statute of the Special Tribunal for Lebanon, 20 March 2009, (available at: https://www.stl-tsl.org/images/RPE/RPE_EN_February_2012.pdf), Article 4(1).

¹⁷⁵ Statute of the Special Court for Sierra Leone, 16 January 2002, (available at: <http://www.rscsl.org/Documents/scsl-statute.pdf>), Article 8(2)

¹⁷⁶ William W. Burke-White, "Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice," *Harvard International Law Journal*, vol. 49, no. 1 (2008), 58.

¹⁷⁷ Rosenberg, *supra* note 151, 6.

may in fact increase the deterrence potential of national courts, in regards to international crimes, due to complementarity. If the Court can enhance deterrence at the domestic level, then only assessing the deterrence impact of the Court's investigations and prosecution fails to capture the total deterrent impact of the Court. Luis Moreno-Ocampo, the first Prosecutor of the Court, has even stated several times that an absence of trials at the Court, due to the regular functioning of national courts, would signal a major success for the ICC.¹⁷⁸

Furthermore, states genuinely investigating and prosecuting their own cases when possible, can also result in the Court not having to undertake prosecutions of at least some cases, allowing the Court to maximize its resources, as it can focus exclusively on the cases, which warrant an international response, as there is no available domestic alternative.¹⁷⁹ This could perhaps mean more prosecutions from the OTP.

The ICC has attempted to further this view of complementarity, by pursuing a strategy of what they call "positive complementarity". Positive complementarity takes its starting point in complementarity as mentioned above, but the Court will take active steps in order to encourage domestic proceedings of crimes within the Court's jurisdiction.¹⁸⁰ While there has been confusion on the definition of positive complementarity, the 2009-12 Prosecutorial Strategy has settled on the following definition: 'The positive approach to complementarity means that the Office will encourage genuine national proceedings where possible, including in situation countries, relying on its various networks of cooperation, but without involving the Office directly in capacity building or financial or technical assistance'.¹⁸¹ While pursuing the policy of positive complementarity, the OTP will cooperate and consult with various actors, including national authorities as well as with intergovernmental and non-governmental organizations. Thus, positive complementarity gives the Court a more proactive policy of cooperation, aimed at

¹⁷⁸ Luis Moreno-Ocampo, "Statement to the Assembly of States Parties to the Rome Statute of the International Criminal Court," 22 April 2003, (available at: <http://www.iccnw.org/documents/MorenoOcampo22Apr03eng.pdf>).

¹⁷⁹ Burke-White, *supra* note 176, 57; Patrícia Pinto Soares, "Positive Complementarity and the Law Enforcement Network: Drawing Lessons from the Ad Hoc Tribunals' Completion Strategy," *Israel Law Review*, vol. 46, no. 3 (2013), 321.

¹⁸⁰ The Office of the Prosecutor, "Prosecutorial Strategy 2009-2012" (2009), The Hague: The International Criminal Court, para. 16 (hereinafter 'OTP Prosecutorial Strategy').

¹⁸¹ OTP Prosecutorial Strategy, para. 16.

promoting genuine national proceedings.¹⁸² Through positive complementarity the ICC has the potential to contribute to the effective functioning of domestic judiciaries.¹⁸³

Some scholars have attempted to examine whether or not there is a legal mandate for the policy of positive complementarity. These scholars state that there is nothing within the Rome Statute which prohibits positive complementarity as a policy of the OTP.¹⁸⁴ Some scholars also refer to various Articles within the Rome Statute, to show that positive complementarity actually has some basis within the Rome Statute, citing articles such as 15, 18, 53, 59, 83, 88 and 89; which are mainly Articles which support communications and consultations between the Court and states.¹⁸⁵

While the term “positive complementarity” does appear in the OTP’s Policy on Preliminary Examinations, the OTP’s Strategic Plan of 2016-2016 and its Prosecutorial Strategy, the Office prefers to avoid using the term to describe its activities to encourage states to undertake their own national proceedings, as the term may be interpreted to indicate that the OTP applies this as a “policy” in every situation.¹⁸⁶ This is seen in the press releases, public statements and the various reports on the current preliminary examinations. The OTP or Prosecutor never states that “positive complementarity” is being pursued.

While positive complementarity, as a strategy by the OTP is likely to have the same impact as complementarity as mentioned above, it will also have other impacts related to deterrence. According to Marshall, adopting a strategy of positive complementarity and increasing both pressure and communication between the Court and state parties can foster a greater respect for the rule of law both domestically and internationally.¹⁸⁷ The ultimate goal of positive complementarity is to strengthen the domestic institutions and foster respect for the rule of law and governmental institutions, which will have a significant impact on the prevention of future

¹⁸² Justine Tiller, “The ICC Prosecutor and Positive Complementarity: Strengthening the Rule of Law?” *International Criminal Law Review*, vol. 13, no. 3 (2013), 508.

¹⁸³ William W. Burke-White, “Implementing a Policy of Positive Complementarity in the Rome System of Justice,” *Criminal Law Forum*, vol. 19, no. 1 (2005), 61.

¹⁸⁴ Burke-White, *supra* note 183, 64.

¹⁸⁵ Schesne and Carter, *supra* note 7, 13.

¹⁸⁶ Human Rights Watch, “Pressure Point: The ICC’s Impact on National Justice Lessons from Colombia, Georgia, Guinea, and the United Kingdom,” May 2018, (available at: https://www.hrw.org/sites/default/files/report_pdf/ij0418_web_0.pdf).

¹⁸⁷ Marshall, *supra* note 166, 25.

international crimes.¹⁸⁸ Positive complementarity can enhance the Courts deterrent impact through the building of the deterrent potential of national courts. This type deterrence can have a long-term impact.

Thus, to summarize, complementarity refers to the legal regime related to the assessment of admissibility, as set out in Article 17 of the Rome Statute, which states that the ICC can only exercise jurisdiction when the national authorities are unable or unwilling to genuinely pursue the persons and crimes subject to an ICC investigation. Positive complementarity refers to the more active steps taken by the Office, with the goal of promoting accountability at the domestic level, through national proceedings. In the case of both, the legal action, which is the actual investigation and punishment, is located at the national level and both shift the burden of accountability back to national governments.

3.3.4 The Court's Work as Deterrence

The next section will look more specifically at the Court and the work of the Court, and how various scholars argue that it is this which deters individuals from committing international crimes.

Meernik is especially positive regarding the Court's deterrence ability, as he argues that the Court does have the potential to deter international crimes.¹⁸⁹ He suggests that the Court has a significant potential deterrent function, as it possesses substantial power to investigate and prosecute violations of international law.¹⁹⁰ According to Meernik, the Court has the exceptional ability to reach the internal affairs, in order to investigate international crimes which have been committed, which creates a greater risk for state leaders who can be held accountable for violations of relevant international law.¹⁹¹ Meernik also argues that the Court has a deterring impact, as its investigations and prosecutions carries with it, not only the threat of punishment or actual punishment for those accused, but can also lead to international condemnation and

¹⁸⁸ Marshall, *supra* note 166, 22, 26.

¹⁸⁹ James Meernik, "The International Criminal Court and the Deterrence of Human Rights Atrocities," *Civil Wars*, vol. 17, no. 3 (2015), 320.

¹⁹⁰ Meernik, *supra* note 189, 319.

¹⁹¹ Meernik, *supra* note 189, 320.

isolation for the nation.¹⁹² As seen here, Meernik focuses on the investigations and punishment as the way in which the Court will deter individuals from committing international crimes.

Furthermore, Meernik also argues that state leaders may also face naming and shaming campaigns by human rights organizations, sanctions and travel restrictions by powerful members of the international community.¹⁹³ However, in this statement, Meernik is not specific of what stage of the Courts work this can occur or if it is in all stages. Malu has a similar position as Meernik, as he states that the ICC's ability and power to name and shame is important for the deterrence of political leaders, as most leaders will not want to be publicly shamed by the ICC, as this type of action can negatively impact their image, both domestically and internationally.¹⁹⁴ As with Meernik, Malu does not specify when this naming and shaming is most likely to occur.

Some scholars argue that the permanent presence of the Court, is what deters. Malu states that the permanent status of the Court and the possibility of intervention by the Court is a factor that future perpetrators of international crimes will take into consideration when making decisions, which can in fact deter these perpetrators.¹⁹⁵ Dutton and Alleblas argue that the ICC's permanence alone adds a threat that should translate to greater deterrence.¹⁹⁶

Dancy focuses on the mere ratification of the Rome Statute, as he argues that this can have some deterring effect.¹⁹⁷ He states that as the Court is the most recognizable legal institution focused on international crimes, being in the crosshairs of the ICC can be utterly embarrassing for ratifying states.¹⁹⁸ Rome-ratifying states will want to avoid such negative scrutiny at all costs.¹⁹⁹ Dancy argues that many state leaders do worry about the legitimacy of their rule and how they are viewed in the international society.²⁰⁰ Ratifying the Rome Statute can, therefore, change norm-violating behavior, according to Dancy, as due to ratification of the Rome Statute, there is

¹⁹² Meernik, *supra* note 189, 325.

¹⁹³ Meernik, *supra* note 189, 325.

¹⁹⁴ Linus Nnabuike Malu, "The International Criminal Court and Conflict Prevention: Reflections on the Impact of the Court on Deterrence in Kenya," *International Journal of Peace Studies*, vol. 21, no. 2 (2016), 9.

¹⁹⁵ Malu, *supra* note 194, 1.

¹⁹⁶ Dutton and Alleblas, *supra* note 87, 120.

¹⁹⁷ Dancy, *supra* note 91, 634.

¹⁹⁸ Dancy, *supra* note 91, 634.

¹⁹⁹ Dancy, *supra* note 91, 634.

²⁰⁰ Dancy, *supra* note 91, 635.

a fear of stigmatization, which can have deterring effects on states.²⁰¹ Dancy, furthermore, argues that actual involvement in a state's situation, through the investigations, can have deterring effects, as here there is no longer a threat or fear of stigmatization, but actual stigmatization through the Court's publicity of its work.²⁰² He argues that investigations by the ICC can turn states into outcasts in the international scene, as they are no longer part of the moral community of good actors.²⁰³ Thus, according to Dancy, the ratification of the Rome Statute and the investigations are what in fact deters actors from committing international crimes, due to the fear of stigmatization or actual full-blown stigmatization.

However, Dancy actually argues that in terms of deterrence, the Court is more influential for what it is, than for what it does.²⁰⁴ He states that the Court is a standard-bearer and through focal stigmatization, the Court can influence self-conscious state and rebel leaders.²⁰⁵ Similar to Dancy's argument, Dutton and Alleblas argue that the Court has strong enforcement powers to credibly signal a threat of prosecution.²⁰⁶

Gilligan takes another position, as he focuses on asylum, as he argues that the Court may deter leaders from committing atrocity crimes, due to the Court's position on asylum. As the Court actively discourages offering asylum to indicted leaders according to Gilligan, state leaders will have fewer options for seeking asylum abroad.²⁰⁷ As there are fewer asylum options, leaders may choose to surrender and hence may be deterred from continuing committing international crimes.²⁰⁸

As seen here, in regard to the different ways in which the Court can deter international crimes, scholars focus on the Court's investigations or investigative powers, the permanent presence of the Court, its ability to name and shame, the ratification of the Rome Statute and the Court's position on asylum.

²⁰¹ Dancy, *supra* note 91, 634.

²⁰² Dancy, *supra* note 91, 635.

²⁰³ Dancy, *supra* note 91, 636.

²⁰⁴ Dancy, *supra* note 91, 655.

²⁰⁵ Dancy, *supra* note 91, 655.

²⁰⁶ Dutton and Alleblas, *supra* note 87, 120.

²⁰⁷ Gilligan, *supra* note 153, 937.

²⁰⁸ Gilligan, *supra* note 153, 937.

3.4 What is Missing in the Literature?

As seen throughout this chapter, there are various ways in which deterrence within international criminal courts and tribunals is viewed by scholars. While the typical way has been to apply classic deterrence theory to the international level, there are various issues associated with this, such as whether perpetrators of international crimes can be considered rational and that there is not enough weight on the cost side, within the cost-benefit analysis. Furthermore, another issue with this type of deterrence is that the deterrence here is located in the judgments, i.e. the sentences and punishment, which is not a useful way of viewing deterrence. However, scholars have developed other approaches as to how international criminal courts and tribunals can deter, focusing on complementarity, positive complementarity, norms, culture and networks of international criminal justice mechanisms. While few scholars do still link judgments together with norms, as a way of deterrence, these approaches give a lot less significance to the judgments as a way of deterrence and focus more on other aspects.

In the last section, one can see how some scholars have focused more specifically on the Court and how the Court itself deters international crimes. These scholars have focused on the workings of the Court, as well as the permanent presence and mere existence of the Court, as the way in which it can deter atrocity crimes. In terms of the workings of the Court, these scholars argue that it is mainly the investigations that can deter, as they state that it is the investigative powers of the Court or the threat of an investigation, which produces a deterrence impact. However, these studies are not very in depth in terms of why it is exactly these elements of the Court that can deter, which is most likely due to the fact that it is not the main purpose of these studies.

These studies have left out a vital part of the Court's work. Preliminary examinations are not included in the studies on how the ICC can deter, which is highly problematic. By leaving out the preliminary examinations in these studies, scholars are missing out on studying a vital aspect of the Court and its potential for deterrence. Leaving out preliminary examinations in studies on the ICC is somewhat common. When preliminary examinations are mentioned, little attention is given to them, as they are often just mentioned in relation to whether or not an investigation should be opened. However, preliminary examinations can have other purposes, including that of deterrence, which this thesis will show in the next chapter.

4. Preliminary Examination's Potential for Deterrence

The analysis chapter of this thesis will show the reader that within the ICC, it is the preliminary examinations that have the largest potential for deterring individuals from committing international crimes. This will be done by analyzing the structure, work and activities of the Court, especially that of the preliminary examinations. Furthermore, various documents of the Court will also be used, specifically policy documents and strategy documents, as well as other ICC material. The practices of the Court, as well as the OTP will also be included in order to show the argument of this thesis. In order to show how the preliminary examinations have the most potential for deterring international crimes, the Court's other stages of work will also be analyzed, when relevant, in order to show how they do not have as much deterrence potential as the preliminary examinations. Most attention will be given to the investigations, due to the fact that it is the next stage of the Court's work, but also because the investigative stage is often argued by some scholars as being able to deter international crimes. Less attention will be given to the trials and punishments, seeing as scholars have scrutinized this topic, as seen in the literature review of this thesis. However, due to the scope of the paper, the main focus will be on the preliminary examinations.

This thesis is by no means stating that preliminary examinations are the only way in which the Court can deter international crimes nor is it saying that other stages within the Court's work or activities do not have the potential to deter international crimes. Other stages could possibly also have a deterrence potential. However, what this thesis is stating and which it will show in this chapter is the preliminary examinations have the most potential for deterrence within the workings of the Court.

It is important to note, that this thesis is not attempting to measure or prove deterrence. This thesis is not about proving that deterrence during the preliminary examinations actually occurs or works or even if the Court can in fact deter international crimes. As mentioned above, attempting to prove that the Court can deter individuals from committing international crimes is very difficult due to the fact that one would have to prove a negative and because of the issues with proving causation. Instead, this thesis is about showing how preliminary examinations have the largest potential for deterrence. This thesis is also looking at the *potential* of the preliminary examinations, as by stating that preliminary examinations deter the most, is an argument in

which one would practically have to prove deterrence. This thesis is instead looking at the potential preliminary examinations have for deterrence based on the workings and activities of this stage. Thus, this thesis is a theoretical study.

4.1 (Positive) Complementarity

One of the main ways in which the preliminary examinations can contribute to deterrence is through the principle of complementarity and policy of positive complementarity. Complementarity is mentioned in the Rome Statute as one of the various Article 53 (1) factors needed to be assessed in the preliminary examination phase in order to determine if an investigation should be opened or not, and is thus a vital principle within the ICC. However, the principle also plays a vital role in terms of deterrence, which will be exemplified below. Positive complementarity, while not mentioned in the in Rome Statute, has become an important policy within the work of the OTP, especially during preliminary examinations. Both complementarity and positive complementarity can contribute to deterrence.

4.1.1 Complementarity during Preliminary Examinations

As mentioned above, complementarity states that the Court only has jurisdiction when the state is unable or unwilling to genuinely investigate and prosecute a crime. This is due to the fact that the Court is a court of last resort. So, the Prosecutor will only act in the absence of genuine national proceedings. Seeing as the Prosecutor will only have jurisdiction if states do not undertake their own proceedings, national authorities can avoid an investigation by the ICC and the following possible consequences, by undertaking genuine investigations and prosecutions in the domestic courts of these international crimes. Thus, if there is a risk of increased ICC involvement, states may choose to prosecute the international crimes themselves, in order to avoid the further involvement of the ICC and the scrutiny that comes with it.

Here, the element of publicity within the preliminary examinations plays a vital role. A natural function of the preliminary examinations is that they function as a monitoring device. As the OTP does not have any investigative powers at this stage, it monitors the situation by collecting open sourced information. As this information is opened sourced a lot of it is also made public. In general, the OTP is very public regarding the preliminary examinations, or it at least attempts to be when possible. First of all, states who are under preliminary examination are notified of

such decisions by the OTP, so states will always know quite early in the process, that they are under a preliminary examination. Furthermore, the decision to open a new preliminary examination is made public to the entire international society, by the Prosecutor. As seen with the two newest preliminary examinations in the Philippines and Venezuela, these were both made public on the ICC's webpage.²⁰⁹ The commencement of these two preliminary examinations has also been mentioned in various online media outlets, including the national media of the two states, international media, various international governmental organizations, such as the UN and international non-governmental organization, such as Human Rights Watch and Amnesty.²¹⁰ Thus, news of a new preliminary examination is very public. Furthermore, the OTP annually publishes a report on the current preliminary examinations, which entails overviews of the various situations under preliminary examination, which includes the situations' procedural history, preliminary jurisdiction, contextual background, alleged crimes, subject matter jurisdiction, admissibility assessment, and OTP activities.²¹¹ The Prosecutor also tries to be very public about its various activities and visits during this stage, as seen in the Report on Preliminary Examinations and the OTP's weekly briefings.²¹² Practice shows that the OTP will for the most part publicly announce when it is conducting a visit to a state under preliminary examination, including who the OTP intends on meeting as well as the purpose of the visit.²¹³ The OTP will also issue public statements, periodic reports, as well as situation-specific reports when choosing to close a preliminary examination or when choosing to proceed with an investigation of a certain situation.²¹⁴ In general, the Prosecutor is very public and transparent about its activities during the phase of preliminary examinations.²¹⁵ Transparency is in fact one of the policy objectives mentioned in the OTP's Policy Paper on Preliminary

²⁰⁹ Statement by the Prosecutor "Statement of the Prosecutor of the International Criminal Court, Mrs Fatou Bensouda, on opening Preliminary Examinations into the situations in the Philippines and in Venezuela," 8 February 2018, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=180208-otp-stat>).

²¹⁰ Based on a review of online media sources writing about the two preliminary examinations.

²¹¹ Report on Preliminary Activities 2017. The topics may vary depending on the phase of the preliminary examination.

²¹² Office of the Prosecutor, "Weekly Briefings 16-22 February Issue 25," February 2010, (available at: <https://www.icc-cpi.int/NR/rdonlyres/7105B39A-2F30-43FF-9222-D7349BF15502/282732/OTPWBENG.pdf>).

²¹³ Statement by the Prosecutor, "Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of her visit to Colombia (10-13 September 2017)," 13 September 2017, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=170913-otp-stat-colombia>).

²¹⁴ OTP Policy Paper 2013, para. 22.

²¹⁵ However, it should be noted that while the OTP is public regarding numerous aspects of the preliminary examinations it is not public regarding how it chooses to start *proprio motu* triggered preliminary examinations. Due to the scope of this paper this discussion will not be had here.

Examinations, as the OTP states that transparency will promote a better understanding of the process.²¹⁶

This publicity surrounding the preliminary examinations plays such an important role in terms of complementarity. First of all, the fact that the state is notified that the OTP is undertaking a preliminary examination is key for states to commence their own genuine proceedings. If the state does not know that it is under a preliminary examination, there is nothing pushing it towards conducting its own genuine national proceedings and the element of preliminary examinations as leverage does not work. Furthermore, the fact that the Prosecutor publicly announces its decision to open a preliminary examination plays a huge in terms of complementarity, as the publicity can in fact be very shameful for many actors. The fact that a preliminary examination is being undertaken in a specific state can either show that the state (i.e. the government) is or has been committing atrocity crimes or that it does not have the capacity or ability to stop and/or punish the non-governmental actors from committing international crimes. Either way, this can be shameful for states, as it puts them in the group of “bad states”, as they are either committing atrocity crimes or cannot control their territory. These states may, knowing they are operating in the shadow of the Court due to the preliminary examination, choose to genuinely prosecute the international crimes themselves as a way of “saving face” and showing the international community that they should be viewed as “good states”. What we see here is similar to the naming and shaming campaigns one sees in some human rights institutions, as these institutions will name states or individuals who have poor human rights records, in order to shame them into changing their behavior. However, during the preliminary examinations, it should be noted that the OTP will not name any specific names of individuals; the “naming” in preliminary examinations is the naming of states, not individuals. States may also choose to prosecute themselves, in order to avoid further attention and scrutiny from the ICC, as a preliminary examination indicates that there is a possibility of further ICC involvement.

There are some states under preliminary examination, who have attempted to investigate and prosecute domestically. The Columbian authorities have carried out a significant number of investigations and prosecutions against mid and low-level members of the Colombian Army,

²¹⁶ OTP Policy Paper 2013, para. 22.

FARC-EP and ELN armed groups, and members of paramilitary armed groups. The judgments include convictions against perpetrators of false positives killings, forced displacement, sexual and gender based crimes, conscription or use of child soldiers, forced displacement and abduction.²¹⁷ There have been some instances of high-level rebel commanders being convicted.²¹⁸ Important to mention is also the “Justice and Peace Law” that the Colombian parliament passed in 2005, aimed at demobilizing various paramilitary groups.²¹⁹

In the situation of Guinea, in 2010, the Conakry Appeals Court General Prosecutor appointed three Guinean investigative judges (“panel of judges”) to conduct a national investigation into the 28 September 2009 events.²²⁰ As of February 2017, the panel of judges has indicted 14 individuals for the acts of violence committed on 28 September 2009, including Moussa Dadis Camara, the former Head of State.²²¹ Furthermore, Guinea has adopted relevant legislative reforms, such as the incorporation of Rome Statute provisions into its new penal code.²²²

In the situation of Nigeria, with respect to the crimes committed by Boko Haram, the Attorney-General has conducted proceedings of a number of low-level Boko Haram members, and continues to do so.²²³ Four judges have reportedly been assigned to try these cases. A first phase of proceedings addressing 575 detainees has reportedly concluded, leading to 45 convictions and sentences between 3 and 31 years in jail and 468 acquittals due to the lack of relevant information.²²⁴ In regard to crimes committed by the Nigerian security forces, the ‘Special Board of Inquiry’ (SBI) has been created, which is mandated to investigate allegations of human rights violations against the Nigerian Security Forces, including in the context of its operations against Boko Haram in north-eastern Nigeria.²²⁵ While, the SBI found that the delayed trials of Boko Haram detainees resulting in some cases of deaths in custody constitute a denial of the

²¹⁷ Report on Preliminary Examination Activities 2017, para. 130.

²¹⁸ Report on Preliminary Examination Activities 2017, para. 139.

²¹⁹ The Center for Justice & Accountability, “Colombia: The Justice and Peace Law” (2016), (available at: <https://cja.org/where-we-work/colombia/related-resources/colombia-the-justice-and-peace-law/>).

²²⁰ Report on Preliminary Examination Activities 2017, para. 163.

²²¹ Report on Preliminary Examination Activities 2017, para. 164.

²²² Office of the Prosecutor, “Report on Preliminary Examination Activities 2016” (2016), The Hague: The International Criminal Court, para. 272 (hereinafter ‘Report on Preliminary Examination Activities 2016’).

²²³ Report on Preliminary Examination Activities 2017, para. 216.

²²⁴ Report on Preliminary Examination Activities 2017, para. 217.

²²⁵ Report on Preliminary Examination Activities 2017, paras. 218, 219.

detainees' right to a fair trial, the SBI has not found any of arbitrary arrests or extra judicial executions of detainees in any of the documents reviewed.²²⁶

As seen here, some states have attempted to conduct their own national proceedings, while the OTP has conducted preliminary examinations in the states. However, this thesis is not saying that it is because of preliminary examinations that the states have chosen to conduct these national proceedings, as that is not the focus of this paper, due to the issue of proving causality. Here the thesis is just exemplifying how states are not necessarily passive during these preliminary examinations, as they do attempt to undertake national proceedings.

4.1.2 Complementarity during Investigation

While the notion of complementarity is a key part of preliminary examinations, it plays less of a role during the investigations. The OTP does still monitor whether or not states under investigation are undertaking their own genuine national proceedings, as seen in various statements by the Office.²²⁷ However, it is during the preliminary examinations that the OTP will be more attentive towards whether the state is pursuing its own proceedings, due to the third phase of preliminary examinations, where the focus is on admissibility (gravity and complementarity), which is also often the longest phase. Some states will attempt to pursue their own national proceedings,²²⁸ during investigations; however, this will most likely occur during the stage of preliminary examinations.

First of all, there is the element of how long a preliminary examination lasts in contrast to how long it takes to issue the first arrest warrant once the investigation has been opened. If one looks at the time in which preliminary examinations generally last in comparison to the time in which an investigation is started until the first arrest warrant or summon is issued, it speaks in favor of states pursuing their own national proceedings during the preliminary examination phase.

²²⁶ Report on Preliminary Examination Activities 2017, para. 219.

²²⁷ Statement by the Prosecutor, "Statement of ICC Prosecutor, Mrs Fatou Bensouda, on the occasion of the opening of the trial against Amadou Haya Sanogo and other suspects before the Malian judicial system: "Complementarity is central to the Rome Statute system", 1 December 2016, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=161201-otp-stat-mali>).

²²⁸ Statement by the Prosecutor, "Statement of ICC Prosecutor, Mrs Fatou Bensouda, on the occasion of the opening of the trial against Amadou Haya Sanogo and other suspects before the Malian judicial system: "Complementarity is central to the Rome Statute system", 1 December 2016, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=161201-otp-stat-mali>).

Preliminary examinations, on average, last longer than that of the time for an investigation to have been started to the first arrest warrant or summon. If one looks at the current preliminary examinations²²⁹, one can see that they on average last approx. 6.75 years.²³⁰ However, it should be said that the average length of the preliminary examinations, which currently are in the investigative phase or trial phase, were of somewhat shorter length. The average length of the time in which an investigation has been opened to the time the first arrest warrant has been issued is approx. 1.6 years.²³¹ This is including the three investigations of the situations in Georgia, Burundi and CAR II, which have yet to issue arrest warrants. Due to this vast difference in time, states which are under preliminary examination have a better opportunity, seeing as there is more time, to initiate genuine domestic investigations and prosecutions, than in the investigation stage, seeing as the OTP is quicker to issue the first arrest warrant. This could also be related to why situations are often in phase 3, which focuses on admissibility the longest, as the OTP wants to give the state in question a chance to actually attempt to undertake its own national proceedings.²³² Thus, at the investigation stage, of what we have seen so far of the Court's work, there is little time to actually attempt to start these domestic proceedings, seeing as they do take time. It should be said that this trend in length of preliminary examination and investigations could of course change.

Furthermore, seeing as the preliminary examinations are the first stage of ICC involvement, states may be more likely to pursue their own genuine proceedings early on, in an attempt to altogether avoid an investigation and what comes with it, as most states would not want an the OTP to pursue an investigation in their state, due to the scrutiny that comes along with it. States may in fact feel less inclined or encouraged to start their own national proceedings once the OTP has started an investigation, as states may not see a point in starting their own investigations. Furthermore, there is not the same type of incentive during the investigation stage, as there is during the preliminary examinations. The preliminary examinations can be terminated, which is a normal function of them. However, once an investigation has started,

²²⁹ The preliminary examinations in the Philippines and Venezuela have not been included here, due to the fact that they were opened in February 2018.

²³⁰ Based on the date of opening a preliminary examination. Taken from Report on Preliminary Examination Activities 2017.

²³¹ Based on information taken from the ICC's webpage on the various cases under investigation.

²³² A review of the reports on the Preliminary Activities shows that most situations are in phase 3 the longest.

there is more pressure on the Prosecutor to issue arrest warrants. Thus, there is not the same type of incentive during the investigation stage as there is during preliminary examinations.

Once an arrest warrant has been issued, some states may also still attempt to undertake their own national proceedings, as in the situation of Mali, though not of the specific individual(s) which the ICC has issued arrest warrants for.²³³ However, due to many of the same reasons as mentioned above in regard to investigations, such as lack of incentive and feeling less encouraged and inclined as the OTP has already exercised its jurisdiction, states will be less likely to pursue their own investigations once an arrest warrant has been issued.

It is however, important to note that there is no preliminary examination which has been terminated based on the fact that the state has undertaken national proceedings. This does not mean, however, that this cannot happen in the future. Furthermore, even if the state is choosing to undertake national proceedings during the preliminary examinations, the OTP can still choose to open an investigation. This could be due to the fact that while the state in question is targeting individuals of a lower level, as seen above, the ICC only targets those most responsible²³⁴, such as rebel leaders or heads of state, which may be more difficult for the state to do or may not be in the interest of the state. However, a review of the ICC's cases shows that it also seems to be difficult for the ICC to go after those who are most responsible.²³⁵ Even though, the OTP chooses to open investigations into a situation, where the state has undertaken national proceedings it does not take away from the deterrence potential of the preliminary examination, as the national proceedings may have deterred some individuals of lower levels, which were investigated and tried in national proceedings.

²³³ Statement by the Prosecutor, "Statement of ICC Prosecutor, Mrs Fatou Bensouda, on the occasion of the opening of the trial against Amadou Haya Sanogo and other suspects before the Malian judicial system: "Complementarity is central to the Rome Statute system", 1 December 2016, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=161201-otp-stat-mali>).

²³⁴ International Criminal Court "Understanding the International Criminal Court", May 2011, (available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>).

²³⁵ While the ICC does only go after the those individuals it claims are most responsible for international crimes, it has hard time putting them on trial as not all states or individuals will cooperate with the Court, which is seen in the number of fugitives of the Court.

4.1.3 Positive Complementarity during Preliminary Examinations

As mentioned above, positive complementarity gives the OTP a more active role when it comes to complementarity, as the OTP will actively encourage the state to undertake domestic proceedings, in various ways. This is most pronounced during the stage of preliminary examinations.

Positive complementarity is high on the priority list for the OTP and is mentioned in numerous OTP documents. In the OTP's Policy Paper on Preliminary Examinations it states that a significant part of the OTP's efforts at the preliminary examination stage is directed towards encouraging states to carry out their primary responsibility to investigate and prosecute international crimes²³⁶, i.e. positive complementarity. In the OTP's Strategic Plan of 2016-2018, it also states that one of the sub-goals is to further encourage national proceedings at the preliminary examination stages.²³⁷ Furthermore, Fatou Bensouda, the current Prosecutor, has also expressed the importance of preliminary examinations contributing to positive complementarity. She states that the preliminary examination phase "allows various actors to have the opportunity to take action". She, furthermore, states that the preliminary examination phase "is one of the most remarkable efficiency tools we have at our disposal as it encourages national prosecutions".²³⁸ It is clear that positive complementarity is an important goal during the preliminary examinations, according to the OTP.

Various documents of the OTP include positive complementarity and how it can be achieved and what it entails. In the Prosecutorial Strategy, the OTP states that the approach to positive complementarity includes, a) providing information collected by the OTP to national judiciaries and sharing databases of non-confidential materials or crime patterns, b) calling upon lawyers and experts to participate in OTP investigative and prosecutorial activities and inviting them to participate in the Office's network of law enforcement agencies; c) providing information about the judicial work of the Office to those involved in political mediation, thus allowing them to support national/regional activities which complement the Office's work; and d) acting as a catalyst with development organizations and donors' conferences to promote support for

²³⁶ OTP Policy Paper 2013, para. 100.

²³⁷ Strategic Plan 2016-2018, para. 55.

²³⁸ Fatou Bensouda, "Reflections from the International Criminal Court Prosecutor," *Case Western Reserve Journal of International Law*, vol. 45, no. 1, (2012), 508.

relevant accountability efforts.²³⁹ In the OTP Strategic Plan, the OTP also mentions ways in which it can contribute to complementarity through the normal execution of its mandate. This includes a) the sharing of its expertise in international criminal law, investigations or witness protection upon request; b) the inclusion, where appropriate, of national investigators or prosecutors into its tram for the duration of an investigation; or c) the participation in the coordination of national and ICC investigations.²⁴⁰ These activities mentioned in the two documents are in fact mentioned in regards to both investigations and preliminary examinations. In the OTP's Policy Paper on Preliminary Examinations, one also gets information as to how positive complementarity will be approached. However, in this case it is only mentioned in relation to preliminary examinations and not investigations. It states that the Office will engage with national jurisdictions only if does not risk tainting any possible future admissibility proceedings.²⁴¹ Furthermore, the document states that the OTP will monitor and report on its monitoring, send in-country missions, request information on proceedings, hold consultations with national authorities as well as with intergovernmental and non-governmental organizations, participate in awareness-raising activities on the ICC, exchange lessons learned and best practices to support domestic investigative and prosecutorial strategies, and assist relevant stakeholders in identifying pending impunity gaps and the scope for possible remedial measures.²⁴² As seen here, the activities which the Office pursues during positive complementarity do differ somewhat, depending on the document. However, one can say that it general positive complementarity includes cooperation and meetings with national judiciaries, governmental organizations and civil society, as well as sharing expertise, information and best practices with these actors, monitoring and raising awareness on the ICC.

In the reports on the preliminary examinations activities, we see examples of how the OTP interacts with the state in question. In Columbia, the OTP has held consultations with the Columbian authorities exchanging views on the Special Jurisdiction for Peace²⁴³, as well as held numerous meetings with representatives of international organizations, international NGOs and Colombian civil society both in The Hague and Bogota.²⁴⁴ The Prosecutor, herself, also met

²³⁹ OTP Prosecutorial Strategy, para. 17.

²⁴⁰ Strategic Plan 2016-2018, para. 57.

²⁴¹ OTP Policy Paper 2013, para. 102.

²⁴² OTP Policy Paper 2013, para. 102.

²⁴³ A transitional justice tribunal.

²⁴⁴ Report on Preliminary Examination Activities 2017, para. 150.

with senior officials from the executive and the judiciary, including President Juan Manuel Santos, as well as with representatives of Colombian civil society.²⁴⁵ Furthermore, the Prosecutor published an op-ed entitled “The peace agreement in Colombia commands respect but also responsibility” in the Colombian magazine *Semana*.²⁴⁶

In Nigeria, the Prosecutor has met with the Acting President and relevant civil and military authorities, including the Minister of Foreign Affairs and the Minister of Defense and in a separate meetings, the Prosecutor discussed the situation in Nigeria with civil society organizations and listened to victims of alleged crimes.²⁴⁷ The Office has also presented the preliminary findings of its ongoing examination to Nigerian prosecuting authorities during capacity building workshops organized by international partners of Nigeria. In these workshops, experts on international crimes exchanged experiences with Nigerian professionals currently investigating and prosecuting crimes that could fall under ICC jurisdiction, such as prosecutors from the office of the Director of Public Prosecutions of the Federation and the Nigerian Army.²⁴⁸

In Guinea, the Office has conducted various missions, where its delegation has held meetings with the Minister of Justice, the panel of judges, the diplomatic community in Conakry, Guinean NGOs and victims’ legal representatives.²⁴⁹ The Office has also stayed informed on legislative developments that may have an impact on the conduct of proceedings. In this regard, the Office followed-up on the adoption of a new code of criminal procedure in July 2016, which introduced substantial changes in the conduct of criminal proceedings.²⁵⁰ In addition to this, the Office has remained engaged in continued dialogue with civil society organizations, victims’ legal representatives, UN representatives, including with the UN Team of Experts on the Rule of Law and Sexual Violence in Conflict, the EU, and other relevant states.²⁵¹ As part of its efforts to mobilize international support for the Guinea situation, the Office has held a number of

²⁴⁵ Report on Preliminary Examination Activities 2017, para. 152.

²⁴⁶ Report on Preliminary Examination Activities 2017, para. 150.

²⁴⁷ Report on Preliminary Examination Activities 2017, para. 224.

²⁴⁸ Report on Preliminary Examination Activities 2017, para. 226.

²⁴⁹ Report on Preliminary Examination Activities 2016, para. 278.

²⁵⁰ Report on Preliminary Examination Activities 2016, para. 279.

²⁵¹ Report on Preliminary Examination Activities 2016, para. 281.

consultations with relevant partners, such as during a roundtable held between the ICC and the EU in July 2016 in Brussels.²⁵²

As seen here, in practice, the OTP engages with the situation state in various ways, during the preliminary examinations. While the Office does not state when it pursues positive complementarity, as was mentioned above, one can state that based on the activities mentioned here, that it is positive complementarity.

Through the various activities just mentioned, positive complementarity can have a positive effect on states undertaking their own proceedings. Some states may not be prosecuting alleged perpetrators because they are unable to do so. This could be due to the fact that the state has a weak judicial system, or it could be because the state is not properly equipped to handle the type of trials of perpetrators of international crimes. While pursuing positive complementarity, the OTP will share its expertise, information collected by the OTP, its lessons learned and best practices with the state in question through meetings with the national authorities, as a way of assisting and preparing them for conducting these types of proceedings themselves. This can be highly beneficial to the state, as it can strengthen their domestic judicial system, making them more capable of undertaking these types of trials, also in the future. This in turn strengthens the deterrence potential of states' own judicial systems. However, for positive complementarity to have an effect on states pursuing domestic proceedings, there needs to be political will from the state to advance accountability for the crimes under ICC scrutiny. If this is limited, positive complementarity is not likely to succeed.

4.1.4 Positive Complementarity during Investigations

As seen above, it is not only during the preliminary examination stage that the OTP will attempt to pursue positive complementarity. In both the OTP's Strategic Plan of 2016-2018 and the OTP's Prosecutorial Strategy of 2009-2012, it is implied that positive complementarity can also be pursued during the investigative stage. However, neither of these documents state that positive complementarity is a goal of the investigations, as is the case with the preliminary examinations. While positive complementarity may also be mentioned in relation to

²⁵² Report on Preliminary Examination Activities 2016, para. 281.

investigations and therefore may also be pursued during the phase of investigation, this is more likely to happen and be successful in the preliminary examination stage.

First of all, as seen above, the OTP states that positive complementarity is an important goal in the preliminary examination stage. Due to this, a lot more attention seems to be given to positive complementarity during the preliminary examination, as seen in the OTP's Policy Paper on Preliminary Examinations. There is no document which mentions positive complementarity and investigations, without also mentioning preliminary examinations. However, the opposite cannot be said. Thus, one can therefore clearly assume that more attention is also given to positive complementary during the preliminary examination stage in practice and it therefore seems more likely that the OTP will pursue positive complementarity in the preliminary stage, than the investigative stage. Furthermore, seeing as positive complementarity is in fact a goal of preliminary examinations, it is likely that more attention will be given to it and that it will be pursued, in comparison to the investigation stage, where positive complementarity is not mentioned as a goal.

During preliminary examinations, states may also be more willing to cooperate with the Office while positive complementarity is pursued and attempt to pursue domestic proceedings, as they would want to avoid the Prosecutor opening an investigation. Thus, there is a sense of incentive here.

Furthermore, there is that of the length of preliminary examinations compared to that of investigations. As mentioned above, the length of preliminary examination is much longer than that of the beginning of investigation to the first arrest warrant or summon is issued. Therefore, in regard to positive complementarity, the OTP has more time to attempt to encourage the state to undertake genuine proceedings, alongside the above mentioned activities, as compared to during an investigation. This also supports the argument that positive complementarity is more likely to occur during the preliminary examinations.

As seen in this section, complementarity and positive complementarity play an important part in the preliminary examination's overall deterrence potential, as they can push states towards pursuing their own genuine national proceedings. In the case of complementarity, the leverage

of further ICC intervention can push states towards conducting their own investigation, in order to avoid the Court exercising its jurisdiction. With regard to positive complementarity, it will have the same impact as complementarity, but it will also strengthen the domestic judicial system. In both cases, however, the legal part of deterrence, i.e. the trial and sentencing, is located at the national level, and not the international.

4.2 The Rule of Law and Norms of Proper Behavior

Preliminary examination's potential to deter international crimes, is not only based on states undertaking their own investigations, as seen above. Strengthening the rule of law and helping states internalize norms of proper behavior, in regard to international crimes and human rights are also two vital ways in which the preliminary examinations have the potential to deter international crimes. These two elements are vital, seeing as they can have a long-lasting effect on deterrence.

Positive complementarity is one way in which preliminary examinations have the potential to contribute to this type of deterrence. While the primary goal of positive complementarity is to encourage states to undertake their own proceedings, the activities during this can actually also strengthen the domestic judicial system in general as the OTP will share its expertise, its lessons learned and best practices with the state in question, as a way of assisting and preparing them for conducting proceedings, themselves. By strengthening the domestic judicial system, this can in fact strengthen the rule of law and the respect for the rule of law, domestically. Strengthening the rule of law can deter, as international crimes are more likely to happen in states which have a weaker rule of law.

During the stage of preliminary examination, the OTP will cooperate with numerous other actors situated in the situation state, which can also have the potential to enhance deterrence. The cooperation is often done via the numerous visits the OTP partakes in as she will meet with various different actors. The purposes of the visits are to collect further information, clarify existing information, attempt to further cooperation between the OTP and the state in question and exchange lessons learned and best practices with the national authorities. During these visits, the OTP will often times meet with civil society and non-governmental organizations in order to discuss possible solutions to various challenges due to the situation in the specific

states, such as various security concerns.²⁵³ During the visits, the OTP will also receive updates on whether or not national proceedings are being held. As mentioned above, during the preliminary examinations while pursuing positive complementarity, the OTP will also hold consultations with national authorities as well as with intergovernmental and non-governmental organizations. Thus we see how there is a large amount of cooperation between the OTP and various other actors, especially civil society in the stage of preliminary examinations. By this massive amount of cooperation and interaction with other actors, including civil society, the norms of proper behavior in regard to international crimes and human rights can be strengthened, due to the fact that the OTP can actively engage with these different actors about matters of international crimes and human rights. Furthermore, by internalizing these norms of proper behavior, i.e. that it is wrong to commit international crimes or human rights abuses, a new culture is also being created where these types of crimes are considered completely unacceptable. The cooperation during the stage of preliminary examinations assists in creating this culture.

The opening of a preliminary examination, which becomes public, can also advance both awareness and scrutiny about the alleged crimes, both nationally and internationally. This can help create a debate and discussion about accountability, which may have a long lasting impact on the rule of law. The preliminary examinations do not only highlight the international crimes allegedly occurring, but can emphasize the seriousness of the abuses and crimes. Returning to the ideas of networks, introduced by Acquaviva, preliminary examinations can play an important role in this network as their publicity may activate advocacy groups, academia and lawyers, both nationally and internationally, which may help sustain pressure on national decision-makers to address the international crimes and as well as their causes. Preliminary examinations as part of a network, is also seen in the intense cooperation there is during this stage, with various different actors often in the situation country. Preliminary examinations are expanding this network through cooperation with different actors. The stronger the cooperation is, the stronger the network will become, which will better the prospective for deterrence.

²⁵³ Statement by the Prosecutor, “Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the conclusion of her visit to Colombia (10-13 September 2017),” 13 September 2017, (available at: <https://www.icc-cpi.int/Pages/item.aspx?name=170913-otp-stat-colombia>); Office of the Prosecutor, “Weekly Briefings 16-22 February Issue 25,” February 2010, (available at: <https://www.icc-cpi.int/NR/rdonlyres/7105B39A-2F30-43FF-9222-D7349BF15502/282732/OTPBENG.pdf>).

4.2.1 Rule of Law and Norms of Proper Behavior in other Stages

Some scholars argue that the positive impact on the rule of law domestically is only triggered at the investigation stage and not at the preliminary examination stage. They believe that preliminary examinations do not carry any high costs for states since the Court is not empowered to do much more than to collect information at this stage.²⁵⁴ This is true; at the preliminary examination stage, the Court does not have investigative powers and the main task of the OTP is to collect open sourced information about the situation in question. However, preliminary examination's strength in terms of deterrence, is not based on any investigative powers. In terms of the rule of law and helping internalize norms of proper behavior in regard to international crimes and human rights, the strength of preliminary examinations lies in their massive interaction and cooperation with other actors, which will have more of an impact than the investigative powers of the ICC. Actively engaging with domestic actors, is more likely to have a positive impact on the rule of law and norms of proper behavior, than investigating the crimes, as there is more involvement from domestic actors of the state, which is important in order for norms of proper behavior and the rule of law to be strengthened.

Furthermore, some scholars will argue that the judgments can have an impact on both the rule of law and on the internalization of norms of proper behavior. As mentioned in section 3.3.3 of this thesis, they believe that the prosecutions will reinforce applicable international norms and that through the punishment of important individuals, respect for the rule of law will be instilled into the popular conscious. Furthermore, these scholars argue that the judgments can be seen as a way of expressing the ideas of the Court, which in turn could affect the norms of individuals. This could very well be the case. The judgments and punishments may affect both norms of proper behavior and the rule of law; however, this impact will not be as strong as that of the preliminary examinations. This is due the high level of interaction with between domestic actors, especially civil society and the OTP, during this stage.

4.3 Uncertain who will be Targeted

When it comes to the deterrence potential of the preliminary examinations, another element which should be mentioned is the fact that it is often unknown or uncertain who exactly will

²⁵⁴ Geoff Dancy and Florencia Montal, "Unintended Positive Complementarity: Why International Criminal Court Investigations Increase Domestic Human Rights Prosecutions," *American Journal of International Law*, vol. 111, no. 3 (2017), 13.

essentially be targeted by the ICC with an arrest warrant. This can have a deterring impact on international crimes.

During the preliminary examination stage the strategic imperatives and incentives of actors are significantly different from those that exist once the OTP proceeds to the stage of investigation, as there is a lack of clarity regarding who, if anyone, the ICC will target. As seen in many of the reports on preliminary examination activities, the OTP looks at numerous actors involved in the situation. For example, in the report from 2017, we see how in the situation in Afghanistan, the report mentions international crimes committed by the Taliban and affiliated groups, the Afghan National Security Forces and members of the US armed forces and of the CIA.²⁵⁵ The same can be said for the situation in Nigeria. In its report, the OTP mentions both alleged crimes committed by Boko Haram, but also by the Nigerian Security Forces.²⁵⁶ Thus, numerous actors on different sides of the conflict are often included in the preliminary examination.

At the preliminary examination stage, parties to an armed conflict cannot know with complete certainty who exactly the ICC will choose to target in an investigation or an arrest warrant. When reviewing the cases of the ICC, one can see that the OTP has targeted both heads of states as well as non-governmental actors/rebels.²⁵⁷ However, some scholars do argue that there is a trend of the ICC targeting non-governmental actors/rebels following self-referrals and the ICC targeting government actors following UNSC resolution.²⁵⁸ This, for the most part seems to hold true. This is seen, for example, in the case of the self-referrals of Uganda, which only targeted non-governmental actors/rebels, as well as the situation in the DRC, for the most part. In the two situations based on UNSC referrals, Libya and Sudan, it was also primarily governmental actors who ended up being targeted by the ICC.²⁵⁹ However, one cannot be sure whether this trend will continue. Also, there is no trend yet on *proprio motu* situations, as there has only been one *proprio motu* case where arrest warrants have been issued so far, which is the case of Kenya.

²⁵⁵ Report on Preliminary Examination Activities 2017, para. 256.

²⁵⁶ Report on Preliminary Examination Activities 2017, paras. 211, 214.

²⁵⁷ Examples of state actors include Jean-Pierre Bemba, former Vice President of the DRC; Omar al-Bashir, President of Sudan. Examples of non-governmental actors/ include Thomas Lubanga Dyilo, rebel from DRC; Joseph Kony, Leader of the Lord's Resistance Army in Uganda.

²⁵⁸ Mark Kerstin "New Paper Alert! Casting a Larger Shadow – Pre-Meditated Madness, the International Criminal Court, and Preliminary Examinations," *Justice in Conflict*, 28 August 2017 (available at: <https://justiceinconflict.org/2017/08/28/new-paper-alert-casting-a-larger-shadow-pre-meditated-madness-the-international-criminal-court-and-preliminary-examinations/#comment-82485>).

²⁵⁹ The only one who was not a governmental actor was Abdallah Banda.

However, there does seem to be a trend of opening *proprio motu* investigations, as seen in the situation of Georgia, Burundi and perhaps also Afghanistan, depending on whether or not the Pre-Trial Chamber choose to authorize an investigation.

During the preliminary examination stage, actors will rarely know who exactly will end up being targeted by the OTP. This high level of uncertainty, unpredictability and flexibility plays an important role when it comes to deterrence. If the crimes of various different groups involved in a situation are being mentioned in the preliminary examination they cannot know who in fact will be the target of an ICC investigation or arrest warrants. As mentioned above, preliminary examinations mention various different groups and will never state who exactly will be investigated or be issued an arrest warrant. Where deterrence comes in the picture is that, these groups can choose to cease committing their crimes, in an attempt to avoid further ICC action, such as investigation or arrest warrants. If they choose to do so, it is well within the Prosecutor's discretion not to proceed with an investigation, which the Prosecutor could do in reference to the interests of justice (phase 4) or, if an investigation is chosen to be initiated, the Prosecutor can choose not to target the actors who ceased committing international crimes. The Prosecutor could in fact reward those actors for "good behavior". While, to this day, the Prosecutor has not decided to terminate a preliminary examination based on the interest of justice, only four preliminary examinations have in fact been terminated. Therefore, there it is possible that this could happen. Thus, the deterrence potential here lies in the fact that during the preliminary examination phase, it is uncertain and unknown who will be targeted with an investigation or arrest warrants, which may make some actors mentioned in the preliminary examinations cease committing international crimes. However, this is only the case for situations where there are different groups of actors committing atrocity crimes at the same time. If only one group, e.g. only one group of rebels or only the government, is committing crimes, it is obvious who would be the target of a potential investigation.

During the investigation stage, it is often more certain who in fact will be targeted with an arrest warrant. This due to the fact that, again, the time it takes for an investigation to commence to the first arrest warrant is issued is quite short, compared to that of the preliminary examinations.

Once the arrest warrants have been issued for the specific actors, there is little which can deter the targets of the arrests warrant, seeing as arrest warrants cannot be revoked. The ICC's arrest

warrants only expire with an acquittal, conviction or death of the accused. Thus, at this stage there is little incentive for the specific actor(s) to stop committing international crimes. Some may want to argue that once an arrest warrant has been issued, the actor will be deterred due to the fact that it will not be in a position to commit atrocity crimes. However, this is by no means the case. Just because an arrest warrant has been issued does not necessarily mean that these individuals will stop their actions, as actors who have been issued arrest warrants can choose to continue committing international crimes. This is due to the fact that the issue of an arrest warrant does not mean that the actor is automatically removed from its position of power or brought before the ICC. The ICC has no police force and is therefore dependent on the state's cooperation, which can at times be very difficult. Either the state may not be able to apprehend the suspect, as with the case with Joseph Kony in Uganda, or the state may refuse cooperation with the ICC, as seen in Darfur, Sudan. As seen in the situation in Darfur, Sudan, the arrest warrant against President Omar al-Bashir in 2009 has not removed him from his position as president. It has also not stopped him from allegedly committing crimes, as the Sudanese government allegedly used chemical weapons, killing and maiming hundreds of civilians, including children in 2016.²⁶⁰ While an extreme case, it does show that an arrest warrant will not necessarily or automatically deter actors from committing international crimes. There are of course some actors who are deterred due to the fact that they choose to cooperate and are therefore in ICC custody, and therefore cannot continue committing atrocity crimes. However, the point being made here is that an arrest warrant does not automatically equal deterrence of the actor.

We see here, that the fact that it is unknown during the preliminary examination who will be targeted with an investigation and arrest warrant, may make actors cease committing international crimes, in an attempt to avoid an investigation by the OTP or avoid being the targeted of an arrest warrant.

4.4 Who can be Deterred?

The question of what type of actors in fact is deterred by preliminary examinations is an important one to ask. Due to the various ways in which preliminary examinations have the

²⁶⁰Amnesty International” Sudan: Credible evidence of the use of chemical weapons to kill and maim hundreds of civilians including children in Darfur revealed,” 29 September 2016 (available: <https://www.amnesty.org/en/latest/news/2016/09/sudan-credible-evidence-chemical-weapons-darfur-revealed/>).

potential to deter international crimes, various different actors will also be deterred. First of all, the preliminary examinations can deter those who are already committing international crimes, i.e. stop them from committing further crimes, due to the element of uncertainty in the preliminary examinations. As mentioned above, it is often very uncertain in the preliminary examination stage who in fact will be targeted, which may lead to some actors to stop committing international crimes in hope of not being targeted with an investigation or trial. However, this type of deterrence only works on actors who are in situations in which the international crimes are actively occurring such as the current situation in Nigeria²⁶¹ or the current situation in Afghanistan.²⁶² This type of deterrence would not work in situations where the crimes are no longer being committed, as the aspect of leverage would not work in the same way, such as the situation in Guinea, which is focusing on specific events, which happened on 28 September 2009.²⁶³ Thus, actors in the midst of committing international can be deterred.

In the case of complementarity and positive complementarity, these can deter in various ways and will therefore deter various actors. First of all, one of the ideas of complementarity and positive complementary is that states will choose to pursue their own genuine domestic proceedings (in the case for positive complementarity: the OTP will also actively encourage the state to pursue its own genuine domestic proceedings), in order to avoid potentially being targeted by the ICC, as they would want to avoid the negative attention, as well as an investigation by the Court. Complementarity and positive complementarity can thus deter those who are in the midst of committing crimes, seeing as they may end up being targets in domestic investigations or trials. Furthermore, as positive complementarity also has the potential to strengthen the domestic judicial system, this can deter future individuals within the state from committing crimes, as there is a larger chance of an individual being punished for it, due to the strengthened domestic judicial system. So, individuals currently committing crimes can be deterred, as well as individuals who have yet to commit a crime.

Seeing as positive complementarity also can have a positive effect on norms of proper behavior in regard to the international crimes, this could in fact deter individuals who are not currently

²⁶¹ Report on Preliminary Activities 2017, para. 208.

²⁶² Human Rights Watch “Afghanistan - Events of 2017” (2017) (available at: <https://www.hrw.org/world-report/2018/country-chapters/afghanistan>).

²⁶³ Report on Preliminary Activities 2017, para. 158.

committing crimes. This is due to the fact that these positive complementarity during preliminary examinations help internalize and strengthen norms of proper behavior, which may deter individuals from potentially committing future international crimes, as these norms help create a culture where committing these types of international crimes is not acceptable and considered morally wrong. Furthermore, positive complementarity can also help strengthen the rule of law, which in turn can deter those who have not yet committed crimes.

Another important aspect to include here is if it is individuals of high power, such as state leaders, politicians, rebel leaders, opposition leaders, military leaders, which will be deterred or if it is the lower levels, whom are partaking in committing the international crime, such as rebel members, members of the opposition, supporters of the government, soldiers, which will be deterred. While the preliminary examinations may not specify who exactly it will target, as mentioned above, the Office of the Prosecutor's prosecutorial policy is to focus on those individuals who bear the greatest responsibility for the alleged crimes.²⁶⁴ This means that it is individuals of a high position which the ICC targets. Thus, there is some indication of who will be targeted, as it will not be anyone of a lower level, which is also seen throughout the work of the Court.²⁶⁵ However, just because it is those most responsible for the crimes, who will be targeted with an arrest warrant, does not mean that other lower level actors are not involved. Some scholars will argue that these lower-level actors cannot be deterred, as there is no chance of the Court targeting them with an investigation, arrest warrant and trial. However, the fault here is again that they are locating the deterrence potential of the Court in the wrong elements. Here the deterrence is again located in the judgments. However, individuals of lower-level who have committed international crimes can be deterred by preliminary examinations. The strengthening of the rule of law, as well as norms of proper behavior can affect both individuals of a higher level, as well as individuals of a lower level.

Furthermore, through positive complementarity during the preliminary examination phase, the state's judicial court system can be strengthened, as mentioned above. This could in turn deter

²⁶⁴ International Criminal Court "Understanding the International Criminal Court," May 2011 (available at: <https://www.icc-cpi.int/iccdocs/PIDS/publications/UICCEng.pdf>).

²⁶⁵ The Court has only issued arrest warrants against individuals of high positions such as state leaders, politicians and rebel leaders.

both individuals of a high position as well as individuals of low positions, as it is more certain that they will be punished for their crimes.

Preliminary examinations have the potential to deter both individuals who are currently committing crimes, as well as individuals who have not yet committed crimes. Thus, there is both a specific and a general deterrence ability of the preliminary examinations.

4.5 Concluding Remarks on Analysis

The analysis chapter of this section has shown why the preliminary examinations have the most potential for deterrence within the Court. A large part of this is due to complementarity and positive complementarity. The principle of complementarity can work as leverage over state, who will choose to genuinely prosecute their own nationals, in order to avoid the further attention of the OTP and the Court. Through positive complementarity, the OTP will actively encourage states to undertake their own preliminary examinations. In regard to complementarity and positive complementarity as a way of deterring international crimes, the legal component of deterrence, i.e. the trial and punishment, is located at the domestic level. Positive complementarity will also have the potential to deter future international crimes from being committed, as positive complementarity will also strengthen the rule of law and norms of proper behavior, through the cooperation and interaction between the OTP and a state's national authorities and civil society. Thus, preliminary examinations have an important role in the network of international criminal justice mechanisms, due to the interaction with other actors. The fact that it is uncertain who will be targeted with an investigation during the preliminary examinations can also deter some actors. This may stop some actor from committing crimes, as they could be 'rewarded' by the not being targeted by the Prosecutor in a potential investigation.

5. Recommendations

This thesis has shown that within the Court it is the preliminary examinations that have the most potential for deterrence. However, this does not mean that preliminary examinations are without flaws in this respect and that there are not some ways in which they can be improved. Furthermore, there are also some specific things that the OTP should be extra aware of, in order to make sure the deterrence potential does not decrease.

One of the possible issues in relation to deterrence and preliminary examinations is that of time. As mentioned throughout this paper, there is no set time limit on preliminary examinations, which means that there has been a vast difference in time on the various preliminary examinations, which the OTP has undertaken. There are some positive aspects of there being no fixed time limit, such as that there becomes no rush for the OTP when conducting preliminary examinations and as mentioned above, it gives states time to undertake their own genuine proceedings. However, the lack of policy in regard to the time limit can also be problematic in terms of states undertaking their own genuine proceedings. If preliminary examinations last too long, the leverage of a possible investigation by the Court may wane and states could become desensitized to impending ICC action. This could mean that states' incentive to conduct their own genuine proceedings may also in fact wane over time. This may result in states not conducting any genuine proceedings of their own. This is problematic, as it would mean that the deterrence potential would also decline.

In order to avoid this, the OTP should develop a clear strategy, in terms of the time frame of preliminary examinations. This does not mean that there has to be fixed time limit, as this would most likely be unrealistic, however, some general guidelines would be important to have. An approximate timetable could be developed for the duration of the preliminary examination, which could give a sense of how long each phase should typically last. This does not necessarily have to be public, as publicizing it may affect the leverage ability of the OTP. In relation to this, factors that are likely to slow down a preliminary examination should also be identified, as well as various ways in which these factors should be dealt with.

Furthermore, a clear policy on positive complementarity is needed. As seen above in the three different documents mentioning positive complementarity, the activities of this policy are not all the same. There is some overlap, but there are also some elements that are mentioned in one document, which are not mentioned in others. This can make pursuing positive complementarity quite difficult for the Office, as there seems not to be a completely clear policy or strategy. In relation to this, if one looks at the definition of positive complementarity found in the Office's Prosecutorial Strategy in it states that the Office will not be directly involved in capacity building or financial or technical assistance.²⁶⁶ However, it is not exactly clear what is meant by capacity building or financial or technical assistance and it does seem to contradict some of the activities that positive complementarity includes as mentioned above. Therefore a clear policy when pursuing positive complementarity during preliminary examinations is needed in order to make clear what the OTP does and does not do during positive complementarity. This will also make it easier for the Office to pursue it, as there will be a clear policy.

In relation to creating a clear policy on positive complementarity, an element which the OTP should keep in mind is that of a consistent approach versus a tailored approach, when pursuing positive complementarity. A consistent approach would mean that the OTP treats all the situations in which it is pursuing positive complementarity in a consistent manner, meaning that the OTP will treat all situations the same. A tailored approach would mean that that when the OTP pursues positive complementarity, the activities will differ depending on the situation. For example some situations may receive more or less visits or meetings with civil society. A tailored approach may also mean that some situations would receive more attention. There are problems with both approaches. If the tailored approach, which is more inconsistent, is pursued, it could perhaps weaken the OTP's leverage by conveying that only certain situations are likely to lead to an ICC investigation. This inconsistency may also open the OTP up to criticism that its interest in a given situation is motivated by political factors. This could tarnish the legitimacy and the credibility of the OTP and the ICC. However, seeing as the situations of preliminary examinations are so objectively different, a consistent approach for all situations, could also lead to positive complementarity not working properly. Therefore, when developing a policy on positive complementarity, the OTP must find the right balance between a consistent approach and a tailored approach, in order for positive complementarity to be successful.

²⁶⁶ OTP Prosecutorial Strategy, para. 16.

Another recommendation is related to that of civil society. Cooperation and engagement between civil society is very important for the deterrence potential of the preliminary examinations. By interacting with civil society, the OTP can help internalize norms of proper behavior in the situation state and civil society can help put pressure on their governments to undertake genuine national proceedings. Due to this, the Office should develop some guidelines based on best practices of the Court and the OTP in regard to interacting with civil society. Guidelines would be relevant on the various types of interaction with civil society, as well as locating the most relevant types of actors within civil society. This could strengthen and further the cooperation and interaction between the OTP and civil society, which could also have a positive impact on the deterrence potential of the preliminary examinations.

6. Conclusion

This thesis has argued that it is the preliminary examinations within the Court, which have the most potential for deterring international crimes. This argument is overall based on the principle of complementarity, the policy of positive complementarity and the fact that during preliminary examinations it is uncertain who will be targeted with an arrest warrant, which all contribute to the overall deterrence potential of the preliminary examinations. When states are under preliminary examination, the principle of complementarity will make it more likely that they will conduct their own genuine national proceedings in order to avoid an ICC investigation and the scrutiny that comes with it. Furthermore, the fact that the OTP attempts to be very public in regard to its preliminary examinations is vital for complementarity to function, as the publicity surrounding a state under preliminary examinations can be quite shameful for states, as the international community may consider them as “bad states”. In order to change this image, states may pursue their own national proceedings. States pursuing their own national proceedings are most likely to occur during the stage of preliminary examinations, than any of the following stages of the Court’s work. This is first of all due to the fact that once an ICC investigation has commenced, there is less incentive for the state to pursue their own proceedings. Furthermore, seeing as preliminary examinations last longer than the time it takes for an investigation to start and the first arrest warrant is issued, states will have more time to pursue their own genuine proceedings.

Positive complementarity also contributes to the deterrence potential of the preliminary examinations. Positive complementarity during the preliminary examination stage will encourage states to undertake their own national proceedings. Not only will this have the same effect as complementarity, i.e. states undertaking their own genuine national proceedings, but positive complementarity is also a way in which preliminary examinations can improve the state’s judicial system. Furthermore, positive complementarity can have a positive impact on norms of proper behavior in regard to human rights and international crimes, as well as the rule of law. These two elements are highly relevant for deterrence, as it helps create a culture, where committing international crimes is considered completely unacceptable, which in turn can create a long-term deterrence impact. Positive complementarity can have such an effect due to the cooperation and interaction between the OTP and the various actors within the state, especially

civil society during this time. Positive complementarity is most likely to occur during the stage of preliminary examinations, than in the stage of investigations, as positive complementarity is seen as a goal of preliminary examinations. Seeing as positive complementarity is in fact a goal of preliminary examinations, it is likely that more attention will be given to it and that it will be pursued, in comparison to the investigation stage, where positive complementarity is not mentioned as a goal.

The potential for deterrence in the preliminary examination phase is also based on the notion that it is quite uncertain in this phase who exactly will be the target of an arrest warrant. During preliminary examinations, the OTP often looks at several different actors, if it is relevant for the situation, which may deter some of these actors as they may cease committing crimes in attempt to avoid the OTP opening an investigation, or to avoid being the target of an arrest warrant, which could be well with the discretion of the Prosecutor. Thus, states may be “rewarded” for stopping their crimes. However, this would only work in situations, where the crimes are being committed, while the preliminary examination is being conducted.

This thesis has also focused on what type of actors can be deterred by these preliminary examinations. This thesis argues that it is first of all actors within the situation state, which can be deterred. Furthermore, actors in the midst of committing crimes can be deterred, due to both the element of uncertainty, as well as the states pursuing their own genuine proceedings. Furthermore, preliminary examinations can also have a deterrence impact on individuals who have not yet committed an international crime, due to the strengthening of the domestic judicial system and the rule of law and respect for it, as well as helping internalize norms of proper behavior.

It should be noted that while in theory the preliminary examinations have the potential to deter, the likelihood of success will often vary from situation to situation. No two situations will ever be the same and therefore one cannot be sure that just because preliminary examinations have deterred individuals from committing international crimes in one situation, means that it will happen in another situation. The likelihood of success will also depend on factors outside of the OTP’s control, such as the level of cooperation from the situation state, the state’s attitude towards the ICC, the type and gravity of crimes being committed, the actors involved in the

crimes and the political situation of the state. These factors will also be different, depending on the situation. One could argue that as a lot of deterrence potential of the preliminary relies on cooperation between the state and the OTP, that states who are more positive of the Court, may be more open to working with the ICC and therefore the deterrence impact may be more likely to occur. However, the opposite case could perhaps also be made. States, who are less positive with the Court, may have more incentive to pursue proceedings of their own, as they want nothing to do with the Court.

While this thesis argues that it is preliminary examinations, which have the greatest potential for deterrence, it should be made very clear that this thesis is by no means against the other stages of the Court's work, such as the investigations and sentencing or does it argue that these investigations are not important. While they may not be the stage of the Court's work, which has the most potential for deterring individuals from committing crimes, according to this paper, they still do play a vital role within this potential for deterrence. The threat of a potential investigation and/or sentencing by the ICC has value for the deterrence potential of the preliminary examinations, as it is part of the leverage that the OTP has over the state.

Locating and studying the deterrence potential of the ICC is vital, seeing as deterrence is one of the main goals of the ICC, as well as one the main reasons for creating these international criminal courts and tribunals. By locating and studying the deterrence potential of the Court, policies, such as the recommendations mention above, can be realized, which then can be pursued, in order to maintain or improve the deterrence potential of the Court.

This thesis has contributed to the literature on deterrence and international criminal courts and tribunals in various ways. First of all, this thesis has exemplified the importance of preliminary examinations, when it comes to deterrence, as well as their ability to deter individuals from committing international crimes, as it has argued that it is the preliminary examinations, which have the greatest potential for deterrence. This has also shown that, as the 'consequentialist approach' states, preliminary examinations do have other rationales than just whether or not an investigation should be opened. Thus this thesis is also adding to the small, but growing literature on the 'consequentialist approach' to preliminary examinations.

Furthermore, as this thesis shows that it is preliminary examinations which have the most potential for deterrence, it is at the same time emphasizing that the judgments, i.e. punishment of international criminal courts and tribunals are not that important for the deterrence of international crimes. While many scholars believe that deterrence is located within the judgments, i.e. the punishment, this thesis has shown that this is not necessarily the case. Thus, this thesis shows that one does not need to focus on the judgments, when it comes to deterrence, as there are other ways in which deterrence may possibly be achieved. By showing that it is the preliminary examinations and not the judgments or investigation of the Court which have the most potential to deter international crimes, this thesis is also showing a new way of viewing the Court's deterrence ability.

While this thesis is focusing on deterrence within the Court, it is still relevant for international criminal courts and tribunals in general. This paper recognizes that not all international criminal courts and tribunals will have the phase of preliminary examinations, or something similar, or the element of complementarity or positive complementarity, due to the principle of primacy which most international criminal courts and tribunals follow. However, the impact that the cooperation and interaction that the OTP has with various actors, especially civil society during positive complementarity, may have on both the norms of proper behavior and the domestic rule of law can also be relevant for other international criminal courts and tribunals. Thus, this thesis highlights the importance of focusing on the norms of proper behavior and the domestic rule of law, as a way of deterrence. This is relevant for all international criminal courts and tribunals, not only the Court, as other international criminal courts and tribunals can pursue deterrence by attempting to strengthen the rule of law, as well as furthering norms of proper behavior.

During the duration of writing this thesis, the author has recognized various elements regarding preliminary examinations which could require further research. When assessing the lengths of the preliminary examinations, the author noticed that the current preliminary examinations are much longer than the ones which are now in the investigative stage. Thus, an idea for further research could be why there is such a difference, focusing specifically on whether this is a specific strategy of the Prosecutor and whether it is related to the possible other rationales, Stahn speaks about.

Furthermore, as mentioned briefly above, the deterrence potential of preliminary examinations will depend on the state, due to the numerous factors just mentioned. Thus, another idea for further research would be to study how the deterrence impact of preliminary examinations may change depending on the state, and to study which types of states this impact may be strongest. Thus, while this study has located the deterrence potential, as well as what type of individuals who can be deterred, another study could be more state-centric and attempt to focus more on the state.

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