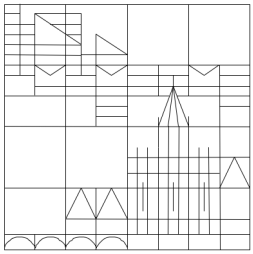

Universität Konstanz
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Bachelorarbeit

PEACE VERSUS JUSTICE –
ASPECTS OF ICC PROSECUTIONS DURING ONGOING CONFLICT

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"That four great nations, flushed with victory and stung by injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."

Justice Robert Jackson at the Nuremberg tribunals (in Bass 2000, p. 2)

List of Abbreviations

AMIS	African Union Mission in Sudan
CAR	Central African Republic
DPA	Darfur Peace Agreement
DRC	Democratic Republic of the Congo
FAO	United Nations Food and Agricultural Organization
ICC	International Criminal Court
ICG	International Crisis Group
ICID	International Commission of Inquiry on Darfur
ICJ	International Court of Justice
ICTJ	International Center for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced People
ILC	International Law Commission
IMT	International Military Tribunal
IR	International Relations
JEM	Justice and Equality Movement
LRA	Lord's Resistance Army
MONUC	United Nations Mission in the Democratic Republic of Congo
NRA	National Resistance Army
OTP	Office of the Prosecutor
PrepComm	Preparatory Committee on the Establishment of an International Criminal Court
SLA	Sudan Liberation Army
UN	United Nations
UPDA	Uganda People's Democratic Army
UPDF	Uganda People's Defense Force

1. Introduction[1]

On 17 July 1998, the states gathered at the Rome Conference adopted the Rome Statute of the International Criminal Court[2] (ICC or 'Court'). This day marked the beginning of a new era in international law and has had far reaching implications for the conduct of international relations (IR). The Court became operational and has had jurisdiction since 1 July 2002 and has since taken on four cases. The ICC is a permanent institution and all of the conflicts where it is active are still ongoing. The declared goal of the ICC is to put an end to impunity and to bring perpetrators of the worst crimes known to international law to justice, regardless of their status. In situations where the ICC is involved, mediators do not have the option of offering amnesties as an incentive for the successful conclusion of peace negotiations. This has led to a polarization of the aims of 'peace' and of 'justice'. In the so-called 'peace versus justice debate' proponents and opponents of the ICC have exchanged heated arguments over the merits of international criminal prosecutions. In particular critics of the ICC have made emotional appeals and accused the ICC of being an immediate impediment for the successful conclusion of peace negotiations. A growing number of scholars, policy makers, mediators and NGO-advocates, however, stress the positive contributions the ICC has made to the cause of peace. To investigate these claims is the core motivation for this paper.

1.1 Objective and Research Strategy

The ICC poses a new conceptual challenge, because it is the first permanent international war crimes tribunal, which will regularly be active during ongoing conflict. Since all of the conflicts where the Court is currently involved are still ongoing and not a single trial has begun, a comparative case study aimed at drawing causal inferences about the contribution of the ICC to peace processes is not yet possible at this stage. However, first empirical observations and the 'peace versus justice debate' are indicative of the fact that the Court exercises significant influence on peace processes, today. Insufficient data can thus be no justification to refrain from tackling the issue of whether the ICC supports or disrupts peace processes.

[1] I would like to thank Prof. Dr. Wolfgang Seibel and Prof. Dr. Katharina Holzinger for their trust and support, Stefan Barriga and Christian Wenaweser for introducing me to the world of the ICC and for help with this project, Noah Weisbord and Wasana Punyasena for advice on the survey, all of the survey participants, and Miriam Schive who helped me every step of the way.

[2] I will use the terms International Criminal Court, ICC, and 'Court' interchangeably throughout the paper.

The first objective of this study is to conceptualize the peace versus justice debate from the point of view of international relations (IR) theory. This will delineate areas for future research, including through case studies and quantitative methods, once a number of cases has been concluded. Secondly, the study is intended to serve as a point of departure for future research on the ICC's influence on peace processes. To this end a set of new hypotheses will be suggested on the basis of a survey, which was conducted among a group of select experts.

1.2 Relevance

A large part of the peace versus justice debate has been between legal scholars, diplomats and, importantly, NGO representatives. So far there has been little involvement of IR scholars, conflict researchers, and political scientists.

IR theory and political science have a long tradition of studying the causes of peace and war. The two main paradigms of IR theory, liberalism and realism, make widely diverging assumptions about the role of institutions in the maintenance of international peace and security and interstate cooperation in general. Liberalists are generally hopeful that international institutions help to ensure peace, while realists maintain that states remain primarily self-interested and do not see merit in vesting international institutions with authority to influence interstate relations. Accordingly, liberalists tend to support war crimes tribunals and realists reject them.

Beyond these tentative assumptions, IR and political science scholars have contributed little to the ongoing debate on the merits of war crimes tribunals for peace. The existing studies by IR scholars on the ICC have largely focused on its inception and its influence on the conduct of international politics. Few studies have systematically addressed the question of whether international criminal tribunals generally support peace processes and even fewer attempts have been made at analyzing the role of the ICC in this regard, specifically. This study seeks to make a contribution towards filling this theoretical gap and focuses on the implications of pursuing justice during ongoing conflict in particular.

1.3 State of the art

Large parts of the literature on the problematic of peace and justice are primarily descriptive. Many of these publications are provided by NGOs, think tanks and research institutes. The International Crisis Group (ICG) and the International Center for

Transitional Justice (ICTJ), to name but two of the most important organizations, have provided very insightful and useful analyses (c.f. Grono 2006, Grono, Flintoft 2007, Grono, O'Brien 2008, Wierda, Seils 2005, Wierda et al. 2007). The Royal African Society recently published a volume edited by Nicholas Waddel and Phil Clark (2008), which contains a number of essays that address the role of the ICC from a variety of perspectives. Furthermore, a number of papers presented at the conference "Building a Future on Peace and Justice", which was held in Nuremberg, Germany, in 2007, dealt with the issues of peace and justice and highlighted the disagreements between various experts on this topic (c.f. Baldo, 2007, Okello, 2007, Seils 2007, Sriram 2007).

There have also been a few more analytical/scientific approaches towards the study of peace and justice. A number of PhD dissertations in Germany, for instance, have tackled the issue of peace and justice and tried to investigate the contributions of courts to the cause of peace. Schneider (2003) conducted a historical case study of the International Court of Justice (ICJ) and investigated its contributions to the peaceful resolution of conflicts. Nitsche (2007) conducted case studies of the ICC's most important predecessors, the International Military Tribunal in Nuremberg (IMT) and the International Criminal Tribunals for the Former Yugoslavia and for Rwanda (ICTY and ICTR), aimed at devising a framework of how the ICC might support peace processes in the future. Lie, Binningsbø, and Gates (2007) provide one of the few quantitative studies on the influence of post-conflict justice on the duration of peace. Their dataset of post-justice mechanisms includes trials, purges, reparation to victims, and truth commissions before 31 December 2003. It does not include the ICC. Their main finding is that while post-conflict justice mechanisms may contribute to peace duration, the peace duration depends most directly on how the conflict was terminated.

In sum there is an abundance of descriptive publications on the ICC's influence on peace processes and a shortage of scientific analyses, which address the ICC's present-day influence specifically. With the exception of Schneider (2003), the abovementioned scientific studies do not explicitly build on the different schools of IR theory, but develop their own theoretical frameworks.

This study attempts to make a small contribution to future research on the ICC's role in peace processes from the perspective of IR theory. That is why various definitions of crucial terms are being presented, IR theories and their implications for war crimes tribunals are being discussed, and an overview of the ICC and the ongoing situations is given. One of the publications used to this end is that of Bass (2000), which, apart from

historic case studies of the most important war crimes tribunals until the 1990s, provides an overview of the views of liberalism and realism on war crimes tribunals. Moghalu (2006) and Ralph (2007) detail the implications of the international society approach for the ICC. Indispensable for the discussion about the definition of the term 'peace' is the work by Galtung (1985). Elster (2004), Mani (2002), and Pankhurst (1999) provide useful points of reference for the discussion of the terms 'justice' and 'reconciliation'. Articles from the *American Journal of International of International Law* are particularly helpful for a better understanding of the ICC and its history (c.f. Akhavan 2005, Arsanjani, Reisman 2005, Kaul 2005, Meron 2006).

While a large amount of information about the cases can be derived from the descriptive literature mentioned above, a few other sources are useful for an in-depth understanding of the cases. Allen (2006) provides a comprehensive overview of the conflict in Uganda and assesses the contribution of the ICC to the peace process there. More information about the Uganda can also be found in Branch (2007) and Akhavan (2005). The details of the Darfur situation are described in Grono (2006), Happold (2006), Williams (2006), (Bah, Johnstone 2007) and de Waal (2008). More information on the conflict in the Democratic Republic of the Congo (DRC) is contained in reports of the International Crisis Group (2003 and 2006) and in Clark (2008).

1.4 Methods

Strong interest in the ICC and its possible contributions to peace processes rather than a preference for any particular research methodology led to this analysis of the ICC. In light of the lack of data to conduct a full-blown case study, the goal of this study is to derive new hypotheses about how the ICC influences peace processes to guide future research. In cases where the availability of data is extremely scarce, experts are an important source of information. George and Bennett (2004, p. 19) point out the strengths of conducting fieldwork, such as asking experts about their opinion, in developing theories and hypotheses. That is why an expert survey was developed on the basis of rival working hypotheses. The results of the expert survey will be analyzed in light of existing IR theories with a view to deriving new hypotheses.

1.5 Structure

Section 2 is comprised of three subsections, which elaborate the most important definitions, theories, and the working hypotheses, give background information about the

history and the functioning of the ICC, and provide an overview of the cases where the ICC is active. Section 3 presents the expert survey and the set of new hypotheses derived from the results of the expert survey. Finally, section 4 contains the summary and conclusions.

2. Theory and Overview of the Cases

This comprehensive chapter will present important theoretical, historical, legal, empirical as well as practical information necessary to understand the implications of pursuing justice during ongoing conflict. Section 2.1 will provide definitions of crucial terms and outline a theoretical framework and working hypotheses to guide the analysis. In section 2.2, important milestones of the history and evolution of international humanitarian law as well as international criminal prosecutions will be addressed and the most important aspects of the Rome Statute of the International Criminal Court will be explained. Lastly, section 2.3, an overview of the cases in which the ICC is active, shall further inform the reader and enable him or her to evaluate the results of the expert survey, which will be presented in the third section.

2.1 Definitions, Theory and Hypotheses

2.1.1 Definitions

In the peace versus justice debate, the two terms 'peace' and 'justice' are often presented as dichotomous or mutually exclusive, that is, the presence of one leading to the absence of the other. Following, I will provide a brief overview of some definitions of peace and justice in order to delineate the terms' interrelatedness and provide points of reference which will allow the reader to form his or her own opinion.

2.1.1.1 Peace

Some of the most important works on the definition of 'peace' and in the field of peace research in general have been authored by Norwegian social scientist Johan Galtung. His elaboration and specification of the term 'peace' and what it comprises will serve as the basis for this short overview. Galtung distinguishes between negative and positive peace. The negative interpretation of peace alone, which comprises the "absence of violence", in his view, is too a narrow conception of peace (Galtung 1985, p. 145). Instead he suggests that another (normative) dimension of peace, 'positive peace', exists, which is built around the ideas of harmony, cooperation, and integration (Galtung 1985, p. 145). The 'positive peace' approach requires that the underlying cause of conflict be removed (Lie, Binningsbø & Gates 2007, p. 3). Galtung subsequently expanded the concept of positive and negative peace to include the related ideas of structural and direct violence.

He defines structural violence as "unintended harm done to human beings, as a process, working slowly as the way misery in general, and hunger in particular, erode and finally kill human beings" (Galtung 1985, p. 145). The consequences of direct violence, i.e. intentional infliction of harm, on the other hand, are immediately visible and/or tangible: the person is hurt or dead (Galtung 1985, p. 146). Hence, a negative peace is marked by the absence of direct violence and positive peace exists in the absence of structural violence, which, according to Galtung's definition, can have extremely negative effects over time. In order to achieve all aspects of peace, a comprehensive strategy aimed at ending both direct (through peace keeping) and structural violence (through peace building) is necessary[3] (Galtung 1985, p. 151).

In the discussion of post-conflict reconstruction the term 'sustainable peace' is often used. A 'sustainable peace' is attributed to a comprehensive post-conflict strategy: "a long-term approach that will address the structural causes of conflict and foster institutions that will promote the kinds of distributive and procedural justice that have been shown to make violent conflict less likely" (Peck 1998, p. 15). The concept of sustainable peace is thus directly linked to the notion of positive peace as defined by Galtung. Proponents of post-conflict justice claim that justice mechanisms can deliver a sustainable peace and that preoccupation with ending a conflict immediately may fail to bring positive, i.e. sustainable, peace. Neglecting the underlying root causes and the "obsession" with negotiations "risks exclusive investment in short-term responses to violence" (Simpson 2008, pp. 74-5). The disagreement over whether it is more important to bring negative peace in the short-term or a positive/sustainable peace in the long term lies at the core of the "peace versus justice" debate.

2.1.1.2 Justice

In much of the debate on peace and justice, the term 'justice' and related concepts such as 'reconciliation' and 'accountability' are rarely made explicit or clearly defined. For this reason, this section attempts to offer various perspectives on the meaning and scope of these terms in the context of post-conflict situations. Justice, in the most basic understanding, means "impartial rules, impartially applied" (Brown 2002, p. 9). Beyond this minimal definition and analogous to the discourse about negative and positive peace,

[3] Accordingly, Galtung suggests that a comprehensive, holistic approach to peace *research* is only possible through the combination of the two dimensions of peace: "peace studies as a discipline should cover both, thereby expanding the field of study from prevention and control of war to the study of peaceful relations in general (Galtung 1985, p. 145).

one can distinguish between narrow and comprehensive perspectives on justice[4]. The narrow perspective is more concerned with procedure and institutions, whereas, the comprehensive perspective is more outcome-oriented and closely linked to the positive peace ideal described by Galtung[5].

Jon Elster (2004) conceptualizes the institutions of justice along a continuum of "pure political justice" on one end and "purely legal justice" on the other. Political justice[6] "occurs when the executive branch of the new government (or an occupying power) unilaterally and without the possibility of appeal designates the wrongdoers and decides what shall be done with them" (Elster 2004, p. 84). Purely legal justice, on the other hand, is based on unambiguous laws, a judiciary insulated from other branches of government, unbiased judges and jurors, and an adherence to the principles of due process (Elster 2004, pp. 86-8). Finally, he suggests that there can also be "private justice", i.e. revenge carried out by individuals against individuals, often substituting or preempting legal justice (Elster 2004, p. 97). Elster's perspective is thus helpful in exposing procedural-institutional strengths and weaknesses of judicial and extra-judicial processes, but does not delineate an overall post-conflict justice framework for building peace.

Rama Mani (2002) seeks to fill this gap by addressing all dimensions of justice in an integrated manner, which, in her view, is necessary in order to achieve positive and sustainable peace. One of her main arguments is that "injustice is not just a *consequence* of conflict, but is also often a *symptom* and *cause* of conflict" (Mani 2002, p. 5). She distinguishes between three dimensions of justice, which partly overlap with the definition by Elster: legal justice, rectificatory justice, and distributive justice (Mani 2002, pp. 5-6). Legal justice, according to Mani, refers to the rule of law and the functioning of state institutions. Rectificatory justice addresses "the direct human consequences of conflict in the form of injustices inflicted upon people including gross human rights abuses, war crimes and crimes against humanity" (Mani 2002, p. 5). Rectificatory justice includes both retributive justice in the form of trials as well as alternative mechanisms such as truth commissions (Mani 2002, pp. 87-126). Elster's abovementioned definitions of political, legal and private justice describe the continuum of how *retributive* justice might be

[4] I refrain from applying the modifiers 'positive' and 'negative' in my discussion of the term justice, both to avoid any confusion between the definitions of peace and justice and any normative connotation.

[5] Both of these perspectives are important in their own right, as they point out the importance of certain legal standards as well as of a comprehensive peace building strategy that does not apply any one measure in isolation.

[6] Political justice is closely related to the term 'victors' justice'. This term implies that justice merely serves the political ends of the victorious power, which humiliates the defeated enemy in show trials where the verdict is a "foregone conclusion" (Elster 2004, pp. 85-6).

executed. The last dimension of justice, according to Mani, is distributive justice[7], which "entails addressing the underlying causes of conflict, which often lie in real or perceived socio-economic, political or cultural injustice" (Mani 2002, p. 8).

Far removed from these theoretical-philosophical definitions, in present day peace negotiations the term 'justice' is used interchangeably with the term 'accountability'[8]. Those in favor of accountability mechanisms associate the term justice with a few core objectives that help ensure a sustainable peace: retribution, purging disruptive/threatening leaders, deterrence, establishment of an accurate historical record, institutionalization of human rights norms, de-legitimization of main perpetrators, internationalization of the negotiation context, and limiting the issues for negotiation, i.e. excluding amnesties (Grono, Flintoft 2007, p. 3, Wierda, Seils 2005, p. 19). The belief in the positive effects of post-conflict justice is closely related to the liberal paradigm of international relations, which I will address in the next section.

Another important piece in the puzzle of post-conflict recovery is reconciliation. Reconciliation has a range of different meanings, all of which relate to domestic societal processes of overcoming a previous grievance and replacing it with an acceptable status quo[9] (c.f. Pankhurst 1999, p. 240). Important building blocks for reconciling a war-torn society are mutual forgiveness and revelations of truth (Pankhurst 1999, p. 241). Sometimes, local actors view retributive justice as an immediate impediment towards reconciliation and lobby against criminal prosecution so that peace negotiations can succeed (Grono, Flintoft 2007, p. 4).

Overall, post-conflict societies are faced with the difficult tasks of ending violence, holding perpetrators accountable and healing the society as a whole in order to make peace sustainable. The next section will give an overview of various theoretical perspectives on

[7] A vast amount of scholarly work exists on conceptions of distributive justice, which cannot be addressed here due to a lack of space. Particularly influential have been works by John Rawls (Rawls 1999, pp. 113-20, for an introduction see Brown 2002, pp. 174-9).

[8] Today's synonymous use of justice and accountability is also reflected in the definition of justice proposed by the UN Secretary General in 2004: "For the United Nations, "justice" is an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well-being of society at large. It is a concept rooted in all national cultures and traditions and, while its administration usually implies formal judicial mechanisms, traditional dispute resolution mechanisms are equally relevant." (United Nations 2004, p. 4).

[9] All in all Pankhurst distinguishes between five different meanings of the term "reconciliation": 1. To become friendly with (someone) after estrangement or to re-establish friendly relations between (two or more people); 2. To settle (a quarrel); 3. To make (oneself or one another) no longer opposed to something; 4. To cause to acquiesce in something unpleasant; 5. To make (two apparently conflicting things) compatible or consistent with each other (Pankhurst 1999, p. 240).

the contribution of post-conflict justice and criminal prosecutions in particular towards achieving this goal.

2.1.2 Theories

This section will take a look at the main paradigms of international relations, liberalism and realism, and will connect their beliefs about world politics to the realm of international war crimes tribunals, based in particular on the work by Gary J. Bass (2000). As an alternative to these contradicting views, the international society approach as coined by scholars of the 'English School' will be presented and discussed. The theoretical overview is cursory and limited to the basic assumptions of each approach – main emphasis will be on the implications of the theories on war crimes tribunals and their contribution to peace and security.

2.1.2.1 Neorealism

The first paradigm of international relations, which I will consider here, is that of neorealism, which is skeptical about interstate cooperation in general and suspicious of international criminal prosecution in particular. The founding work of the neorealist strand of international relations (IR) theory is Kenneth Waltz's *Theory of International Politics* [10] (Brown 2005, p. 41). Waltz posits that the international system can only be understood via systemic theories (Brown 2005, p. 42). In this regard he distinguishes between hierarchical systems, characterized by clear lines of authority, and anarchical systems, where units[11] similar in nature but dramatically different in capabilities conduct relations with one another (Brown 2005, p. 42). Contrary to hierarchically organized national politics, which are characterized by authority, administration, and law, Waltz views the international system as an anarchy – a political realm dominated by power struggles (Waltz 1979, pp. 112-13, in Bass 2000, p. 11). In absence of a world government with global authority and enforcement mechanisms, the international system resembles a self-help system, where states are obliged to look after their own security in order to ensure their survival (Brown 2005, p. 42). The focus on security also explains why states are focused on relative power gains – ensuring an advantage in terms of military strength increases security in an anarchic international system without cooperation (Mearsheimer 1994, p. 12). As a result of states' attempts to improve their relative power position within the international system,

[10] (Waltz 1979)
[11] The term "unit" implies that states are rational unitary actors.

Waltz expects the emergence of a *balance of power,* where only two 'poles' (i.e. states) can seriously threaten each other's survival (Brown 2005, p. 43). While the world has moved beyond the bipolar system of the Cold War, realists remain generally unconvinced of the utility of international cooperation and institutions. In fact, realists believe they hardly matter at all:

> "Realists maintain that institutions are basically a reflection of the distribution of power in the world. They are based on the self-interested calculations of the great powers, and they have no independent effect on state behavior. Realists therefore believe that institutions are not an important cause of peace" (Mearsheimer 1994, p. 7).

The general lack of trust in international institutions and international law is also reflected by realists' judgment of international war crimes tribunals. "To realists, a war crimes tribunal is simply something that the countries that decisively win a war inflict on the helpless country that loses it. It is punishment, revenge, spectacle – anything but justice" (Bass 2000, p. 11). The danger of such 'victors' justice', in the eyes of realists, has very negative effects on ongoing conflicts as well as postwar efforts to build sustainable peace (Bass 2000, p. 285). There are two main realist criticisms of international war crimes tribunals: The first relates to the danger of statesmen [and from a present day perspective also non-state actors such as militia leaders, rebel leaders, etc.] not giving up the fight until they have exhausted every means of resistance for fear of being tried as a war criminal in case of their defeat, thus perpetuating war (Aron 1966, p. 111, in Bass 2000, p. 285). The second major criticism is about the danger of a nationalist backlash across the society of the defeated state, which would render efforts at restoring a peaceful postwar order futile (Bass 2000, p. 286).

2.1.2.2 Liberalism

Liberal and neoliberal institutionalist IR scholars on the other hand do not share this bleak vision of international politics and are more optimistic both about international cooperation as well as the merits of international criminal prosecutions for a sustainable peace. I will briefly discuss and trace the origins of two variants of modern liberal theory, neoliberal institutionalism and liberal theory as defined by Moravscik (1997). Neoliberal institutionalism can be seen as the result of the academic discourse between liberalists and

realists. Important proponents of neoliberal institutionalism[12] are Robert Keohane, Robert Axelrod and Arthur Stein[13] (Leonard 2005, p. 8). While they share the [realist] belief that the international system is anarchical in nature, they are convinced that "as far as (…) complementary interests exist, cooperation among states is possible and this cooperation often occurs under the auspices of international institutions in order to diminish cheating, create iterativeness, and reduce the cost of transactions" (Leonard 2005, p. 9). And, contrary to the realist view, neoliberal institutionalism assumes that, in pursuing their interests, states primarily seek *absolute* gains from cooperation and are indifferent to the gains achieved by others (Powell 1991, p. 1303). "There is a clear parallel here with liberal trade theory, where the fact that parties will gain unequally from trade that reflects comparative advantage is deemed less important than the fact that they will gain something" (Brown 2005, p. 46). The neoliberal claim that cooperation is possible, is supported by empirical evidence, i.e. states do cooperate in an extensive, growing network of international institutions (Brown 2005, p. 47).

Apart from the issue of cooperation and institutions, liberal theory has "a long tradition of seeing domestic politics as crucially important for foreign policy" (Bass 2000, p. 15). Immanuel Kant[14], for example, stressed the importance of republican constitutions for "perpetual peace" (Bass 2000, p. 17). Proponents of 'liberal internationalism' in the post World War I period – among them Woodrow Wilson – believed that if all regimes were national and liberal-democratic, there would be no war (Brown 2005, p. 21). A recent derivation of Kant's theory, the 'democratic peace' theory suggests: "Even though liberal states have become involved in numerous wars with nonliberal states, constitutionally secure liberal states have yet to engage in war with one another" (Doyle 1983, p. 213). The focus on the importance of domestic structures also served as the foundation of the "nonideological and nonutopian" modern liberal international relations theory (Moravcsik 1997, p. 513). While neorealists focus on the configuration of capabilities and neoliberal institutionalists stress the importance of the configuration of information and institutions, modern liberalist thinkers highlight the explanatory power of the configuration of state preferences (Moravcsik 1997, p. 513). "Liberal IR theory elaborates the insight that state-society relations – the relationship of states to the domestic and transnational social context

[12] Historic predecessors of neoliberal institutionalism include functionalist integration theory in the 1940s and early 1950s, neofunctionalist regional integration theory in the 1950s and 1960s, and interdependence theory in the 1970s (Grieco 1988, p. 486).
[13] For an overview of their main arguments see (Axelrod 1984, Axelrod, Keohane 1985, Keohane 1984, Keohane 1989, Stein 1982).
[14] (Written in 1795, for a full version of the text see Kant 1939)

in which they are embedded – have a fundamental impact on state behavior in world politics" (Moravcsik 1997, p. 513).

In an important work that builds on the theoretical foundations of liberalism, Gary J. Bass (*Stay the Hand of Vengeance,* 2000) chronicles the history of international war crimes tribunals and elaborates a liberal framework of war crimes tribunals, which he terms 'legalism'. This refers to the "principally held idea" of some decision makers who believe that it is right for war criminals to be put on trial (Bass 2000, p. 7). Recognizing the merits of cooperation in international institutions, as set out by neoliberal institutionalists, Bass locates himself among the theorists of democratic peace, and argues:

> "Democratic peace theorists believe that some combination of liberal institutions and norms combines to make democratic states behave radically different from other states on the fundamental question of international relations – whether to go to war. My argument is related to the democratic peace school: I argue that liberal ideas make liberal states take up the cause of international justice, treating their humbled foes in a way utterly divorced from the methods practiced by illiberal states" (Bass 2000, pp. 17-8).

This paragraph addresses two key issues: first, the importance of liberal ideas and secondly, that international institutions, including war crimes tribunals, are an important part of a possible democratic peace order. Bass refers to the importance of liberal ideas as a possible explanation of why war crimes tribunals occur at all. However, liberal states do not always support international war crimes tribunals. Instead, even liberal states tend be selfish and are more likely to seek justice for war crimes committed against their own citizens and generally reluctant to put their own soldiers at risk in order to arrest war criminals (Bass 2000, p. 8). That is why "[l]iberals need to ask why liberal states so often fail to pursue war crimes tribunals, and realists need to ask why war crimes tribunals happen at all" (Bass 2000, p. 28). The answer to this question, in Bass's view, "is that the pursuit of war criminals can only be explained with reference to domestic political norms in liberal states" (Bass 2000, p. 35). Liberal states' behavior is grounded in a commitment to the rule of law, universal rights and legalism[15], which leads them to occasionally support

[15] Legalism, here, is defined as inextricably linked to the application of rights of due process, even across borders – international war crimes tribunals must follow strict rules and ensure a free and fair trial (Bass 2000).

war crimes tribunals and generally treat war criminals in a way which realism cannot explain[16] (Bass 2000, pp. 12-6 and p. 20).

Aware that the effects of war crimes tribunals may not automatically be positive, Bass discusses the arguments in favor of international criminal prosecution, typically brought forward by liberalists (Bass 2000, p. 285). Liberalists maintain that the benefits of war crimes tribunals outweigh the risks (Bass 2000, p. 286). Specifically, they are convinced "that international war crimes tribunals build up a sturdy peace by, first, purging threatening enemy leaders; second, deterring war criminals; third, rehabilitating former enemy countries; fourth, placing the blame for atrocities on individuals rather than on whole ethnic groups; fifth, establishing the truth about wartime atrocities" (Bass 2000, p. 286). While not subscribing to every aspect of these arguments, Bass maintains that at a minimum "[i]nternational tribunals are better than the usual alternative, which is simple vengeance by the aggrieved parties. It is not that these complicated and often muddled trials are too noble to question, it is that other options would be worse" (Bass 2000, p. 285).

2.1.2.3 International Society Approach

The concept of the 'international society' was developed by a group of scholars, who form the English School[17]. The English School applies a pluralistic methodology, combining various currents of international relations theory, namely realism, rationalism and revolutionism and the related concepts of the international system, international society, and world society, in one theoretical approach (Ralph 2007, p. 4). The main arguments of the English School are contained in Hedley Bull's *The Anarchical Society*[18] (Brown 2005, p. 51). He posits that the international society resembles a society of states that have established institutions of cooperation as a result of shared values, have no overall sovereign, and remain primarily self-interested (Moghalu 2006, p. 8). Instead of an

[16] Bass refutes the realist view on war crimes tribunals based on five anomalies that confound realism: 1. There is empirical evidence of victorious liberals who saw their foes as war criminals deserving of just punishment. 2. It seems that some norms of domestic politics occasionally spill over into the international realm. A country's norms can be so sincerely held that it will put its *own* soldiers and leaders on trial even in times of national upheaval. 3. Sometimes states pursue justice for victims who are not citizens of the victor states. 4. War crimes tribunals seem to make an impact even in the absence of a military victory – suggesting that norms may have a certain independent power even when not fully backed up by states. 5. Critically, not all victors' justice is the same. The kind of justice one gets depends on the nature of the conquering state, i.e. liberal state more likely to use *bona fide* trial and totalitarian states prefer show trials (Bass 2000, pp. 12-6).

[17] These scholars came mostly from three universities in England (the London School of Economics, Oxford and Cambridge). The most prominent members are Martin Wight, Hedley Bull, Adam Watson, R. J. Vincent, James Mayall, Robert Jackson, and more recently Tim Dunne and N. J. Wheeler (Brown 2005, p. 05).

[18] ("The Anarchical Society", Bull 1977)

international *system,* a non-normative pattern of regularities as suggested by realists, states "form a *society,* a norm-governed relationship whose members accept that they have at least limited responsibilities towards one another and to the society as a whole" (Brown 2005, 51). These norms and rules of an international society are reflected by the traditional practices of international law and diplomacy (Brown 2005, 51). At the core of the research agenda of the English School lie distinctions between different *types* of societies such as the international and the world society (Ralph 2007).

> "What distinguishes international society from world society is the kind of values that are held in common. Where moral *diversity* underpins international society, world society rests on a common conception of *humanity*" (Ralph 2007, p. 17).

A number of scholars have explored the inception of the ICC and its significance for international relations from the perspective of the English School (Moghalu 2006, cf. Ralph 2007). These studies have focused in particular on the fierce opposition to the ICC by a number of governments, in particular that of the United States, which, in their view, can be explained by a preference for an *international* rather than a *world society*. According to Ralph (2007, p. 21), "the United States defends the society of states against the vision of world society articulated in the Rome Statute." This unwillingness to accept a world society is linked to the reluctance of (predominantly powerful) states to give up sovereignty through a globalized system of international criminal justice (Moghalu 2006, p. 172). Theorists of the English School, given the current state of international society, can thus be seen as highly skeptical about the ICC's chances of success in fulfilling its mandate. In the absence of shared norms and a common vision about what kind of a system/society/community should govern interstate relations, the English School does not lend hope to the cause of effective international war crimes tribunals.

The views of the three theoretical schools on the issues of interstate cooperation and international war crimes tribunals, which I discussed in this section, are summarized in Table 1.

Table 1

PARADIGM → / *VIEWS ON* ↓	**LIBERALISM**	**REALISM**	**INTERNATIONAL SOCIETY APPROACH**
COOPERATION, INSTITUTIONS	Cooperation possible and desired, international institutions can lead to peace.	Anarchic international system of self-interested states. International institutions are a reflection of the distribution of power and are not a cause of peace.	Anarchic international *society* of self-interested states, which are constrained by a system of norms. Cooperation is possible when states share norms.
WAR CRIMES TRIBUNALS	*Legalism:* Domestic norms and values are applied to war criminals in international tribunals.	*Victors' Justice:* Victorious power takes advantage of superior position and subjects the losing party to political trials.	States preference of sovereignty makes it difficult to establish powerful war crimes tribunals. When states share norms, they may pursue justice in the form of war crimes tribunals.
↳EFFECTS	*Positive:* - Purging leaders; - Deterrence; - Rehabilitation of groups; - Putting blame on individuals not groups; - Establishing the truth; - At *minimum,* tribunals are better than revenge.	*Negative:* - Danger of national backlash - Danger of perpetuating war – leaders that know they will face criminal charges in case of their defeat will be reluctant to give up the fight.	*Contingent:* - Success or failure of international war crimes tribunals depends on political support by states that share a common vision of an international or a world society.

Source: own – derived from the descriptions of the various theories above.

2.1.3 Peace versus Justice Debate

While the international society approach seems to have greatest predictive power for the behavior of some states towards the International Criminal Court based on their preferred concept of interstate relations, much of the current debate about the merits of the ICC for the cause of peace fits into the theoretical framework of liberalism and/or realism. This section will provide readers with a short overview of the most common arguments frequently heard in the so-called "peace versus justice debate" surrounding the work of the ICC. As will be shown later, impunity is not an option under the Rome Statute of the International Criminal Court. Therefore, "the most obvious impact of the ICC in the issue of justice and peace is that making peace with parties who are suspected of having committed war crimes, crimes against humanity or genocide is harder because such parties can no longer exchange a cessation of violence for impunity" (Seils 2007, p.1). Given this

constraint on possible 'winsets[19]' of peace negotiations, the core problem addressed by both critics as well as proponents of the ICC are the effects of indicting war criminals while a conflict is still ongoing. Does it bolster or hinder the related peace processes, will violence end sooner or later – in short: are the effects of the ICC and of war crimes tribunals in general *positive* or *negative?*

As was mentioned in the section on 'justice', proponents of accountability mechanisms identify a few core factors of how tribunals like the ICC may positively influence peace processes[20] (D'Amato 1994, p. 503, Grono, Flintoft 2007, p. 3, Wierda, Seils 2005, p. 19). A direct positive influence of ICC indictments has been observed in Uganda, where the ICC's presence increased pressure on rebels to negotiate, cut off foreign support, refocused the attention of the international community, and embedded accountability in the peace process (Grono, O'Brien 2008, O'Brien 2007). Directly in line with the liberal arguments elaborated above, justice is seen as a "vital component in the complex mix of measures needed to bring lasting solutions" (Seils 2007, p. 1). Furthermore, some warn that in the absence of justice there will simply be revenge (Goldstone 1998, Bass 2000).

However, it is also acknowledged that tensions may arise from ICC investigations during ongoing conflicts (Sriram 2007, p. 3). Even proponents of international war crimes tribunals realize that they might not always be appropriate: "When politics is linked to law, crucial flexibility is lost – potentially with catastrophic results" (Bass 2000). One (realist) argument commonly brought forward by critics of the ICC is that its arrest warrants serve as a disincentive for indicted war criminals to negotiate or to end violence, as leaders fear to be arrested (Sriram 2007). Another major criticism relates to the fact that the ICC is active while conflicts are still ongoing. Instead of disrupting a fragile peace process and unnecessarily delaying the peaceful resolution of a conflict, justice should be postponed to a later stage (Okello 2007, p. 2).

Finally, the ICC's ability to influence peace processes in any way crucially depends on the behavior of states. International criminal prosecutions need to be backed up by genuine and comprehensive support by states: "Postmortem justice without a corresponding commitment of military, political, and economic resources significantly

[19] I borrow this term from the book *Veto players : how political institutions work* (Tsebelis 2002). "Winsets" refer to the set of alternatives to the status quo, which all negotiation parties could agree to.

[20] Those include retribution, purging disruptive/threatening leaders, deterrence, establishment of an accurate historical record, institutionalization of human rights norms, de-legitimization of main perpetrators, internationalization of the negotiation context, and limiting the issues for negotiation, i.e. excluding amnesties.

dilutes the message of accountability and undermines its long-term viability in preventing crimes" (Akhavan 2001, p. 30). While not criticizing the ICC as such, some also highlight the possibility of states having a preference for trials, because they are cheaper than an intervention. They warn that moral hazard may arise when states decide on trials as a cheap, convenient, but ultimately meaningless *substitute* for humanitarian interventions (Smith 2002, p. 175). The international society approach seems to offer a promising theoretical lens for analyzing and explaining such state behavior: Cooperation is possible, provided that states share norms. However, they remain primarily egoistic – as will be shown in the discussion of the ICC's first cases in African countries, where this egoism is expressed by a lack of vital (western) national interest at stake – and often fail to back up the efforts by the ICC, which they endorse, with related politico-military efforts.

2.1.4 Working Hypotheses

The aim of this study is to derive new hypotheses about the nature of the ICC's influence on peace processes. It thus stops short of a full empirical analysis of the situations, where the ICC is active. A case study aimed at drawing causal inferences about how the ICC affects peace processes is not yet feasible in light of the fact that all of the conflicts are still ongoing and that no trial has been concluded. Instead an expert survey shall give indication of how the ICC has affected the peace processes in practice so far. In the preceding sections I have presented definitions, theories as well as the current debate relating to questions of peace, justice, and the International Criminal Court. This information provides the framework for the core working hypotheses, which were instrumental for the construction of the questions of the expert survey, which will be discussed in detail in Chapter 3. The purpose of the working hypotheses is to tightly link the survey questions to related hypotheses, which in turn are based on the different theories, which I described in Section 2.1.2

The discourse between the theories of realism and liberalism and their contradicting predictions about the merits of international criminal prosecutions inspired rival working hypotheses. As was shown in Section 2.1.2.2, liberal theory is generally supportive of the notion that institutions and international cooperation are an important cause of peace. Liberalists also identify many factors that influence how international war crimes tribunals may support peace processes and can help ensure a *sustainable peace.* "Working hypothesis one" (WH-1) is in line with the liberal paradigm of international relations theory and amounts to the following:

WH-1: The impact of ICC prosecutions on peace processes is positive.

Realists and their modern cousins, the neorealists, are generally doubtful about the merits of international institutions and international criminal tribunals in particular. Realists view them as mechanisms of *victors' justice,* which powerful winners of a war use to humiliate their defeated enemy. Instead of bringing a sustainable long-term peace, realists see war crimes tribunals as an immediate obstacle to ending violence at all in the short term. Based on the realist paradigm of international relations theory, therefore, working hypothesis two (WH-2) posits the following:

WH-2: The impact of ICC prosecutions on peace processes is negative.

These two very basic assumptions provided the background for the development of the expert survey, which seeks to derive more sophisticated hypotheses about the ways in which the ICC influences peace processes. No separate working hypothesis was derived from the international society approach. Instead it will guide the analysis of the expert survey as an alternative to the opposing views of liberalism and realism and might serve as the basis for the development of more nuanced hypotheses about the relationship of peace and justice. The remainder of Chapter 2 will be devoted to an overview of the ICC and the cases where it is active. This information will help linking theory and practice and will allow a fuller understanding of the implications of the results of the expert survey, which will be addressed in detail in Section 3.

2.2 The International Criminal Court

This section will provide a brief overview of the history of war crimes tribunals, highlight the most important milestones towards the creation of the International Criminal Court (ICC) and delineate the complex set of provisions that govern the circumstances of how the ICC can go about its work. The evolution of international humanitarian law will also be reflected whenever relevant for the ICC. Finally, the crimes over which the Court has jurisdiction will be discussed.

2.2.1 History

The International Criminal Court was by far not the first international war crimes tribunal. Its creation cannot be understood without analyzing the characteristics of some of the historic precedents (Nitsche 2007, p. 77). There have been various examples in history, which demonstrate that war crimes tribunals in fact are a fairly regular occurrence in international relations (Bass 2000, p. 5). In Bass' view there were at least seven other times where states confronted issues of international justice. Those include the treason trials of 'Bonapartists' in 1815, efforts to bring to justice German war criminals after World War I, the abortive prosecution of some of the 'Young Turk' perpetrators after the Armenian genocide, the International Military Tribunals (IMT) in Nuremberg and Tokyo set up after World War II, and the two more recent cases of the tribunals for Yugoslavia (ICTY) and Rwanda (ICTR). As will be shown below, the Nuremberg tribunals and the ICTY were of particular significance for the successful realization of the ICC at the end of the 20th century. Nuremberg was essential in establishing and advancing many of the norms and definitions in international law and the practice of international criminal prosecutions (Moghalu 2006, Nitsche 2007). The ICTY deserves particular mention, as it was the first war crimes tribunal that was established as a peace mechanism (Goldstone 1998).

2.2.1.1 The International Military Tribunal

Faced with atrocities of unprecedented scale and gravity, the Nuremberg charter contained groundbreaking novelties that went far beyond the established principles of customary international law (Nitsche 2007, pp. 101-2). According to Moghalu (2006), the Nuremberg tribunals' legacy paved the way for the creation of the ICC. He identifies major developments that occurred during the Nuremberg trials and some, which the IMT proceedings subsequently triggered. At Nuremberg, crimes against humanity were prosecuted for the first time. This was both a reflection of the enormity of the crimes committed against the civilian populations as well as of the desire of the victorious allies to shift the focus away from war crimes, for which they could have been accused as well[21] (Meron 2006, p. 560). In the long-term, however, the most important achievement was that it was later established as a principle in international law that crimes against humanity could be prosecuted regardless of whether they were committed in war or peace time

[21] According to Meron the frequent high-altitude bombing campaigns of German cities by the allied air forces, which inflicted a very high number of casualties upon the civilian population, could have been subject to war crimes charges and were thus keenly avoided by the prosecutors at the Nuremberg trials.

(Moghalu 2006, p. 31). In absence of a definition, the crime of genocide could not be tried at the IMT. This gap in international law was quickly filled, when the United Nations General Assembly adopted the Genocide Convention in 1948 (Meron 2006, p. 565). The wording of the convention remains unchallenged to this day and was used for the definition of the crime of genocide in the Rome Statute of the ICC (Leonard 2005, p. 51). Aside from advancing these two very crucial definitions of crimes, the IMT extended criminal liability for violations of international humanitarian law to individuals (rather than states) and determined that heads of states and government could be tried for the worst crimes according to international humanitarian law, thus seriously amending the principle of sovereign immunity (Meron 2006, p. 32).

The IMT's impartiality has been challenged and labeled "victors' justice" on the basis that the victorious allies imposed these trials on their defeated enemy Germany. While this is true, the argument cannot discount the overall significance and achievements of the IMT. According to Nitsche (2007, p. 107), the fact that the international community chose to grant their enemies a fair trial even though they had committed crimes on an unprecedented scale – instead of executing them summarily – underlined the moral high ground of the Allies. Furthermore, Nuremberg is seen as the most important historic precedent highlighting the positive potential of war crimes tribunals: "If the job is done well, as after World War II, it may lay the foundation for a durable peacetime order" (Bass 2000, p. 6).

2.2.1.2 International Criminal Tribunal for the Former Yugoslavia

The first truly international tribunals that were not set up by occupying and victorious powers were the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) almost a half-century after the IMT had been concluded (Meron 2006, p. 559). These *ad hoc* tribunals were established pursuant to UN Security Council resolutions 827 (creating the ICTY, United Nations 1993) and 955 (creating the ICTR, United Nations 1994) and are, therefore, funded and staffed under the supervision of the UN Security Council and the UN General Assembly. As mentioned above, the ICTY set an important precedent for the establishment of the ICC. Without going into the details of the tribunal and the Balkan wars, which go beyond the scope of this paper, a few of the core novelties and achievements of the ICTY need to be addressed. In Yugoslavia, former ICTY chief prosecutor Richard J. Goldstone

noted that the decision to "send in the lawyers" had an immediate bearing on both the conflict as well as on the practice of international law in general:

> "Most significant, however, and at the heart of the controversy surrounding its establishment, is the fact that the ICTY was set up as a mechanism for the restoration of peace while the conflict continued to rage in the former Yugoslavia. This set the ICTY apart conceptually from the only other multinational precedents – the Nuremberg and Tokyo tribunals – which were set up after WWII as a *consequence* of peace" (Goldstone 1998, p. 196).

This new arrangement meant that the activities of the international prosecutor, who by definition should only be concerned with bringing perpetrators to justice, had immediate political and potentially even military ramifications. The UN Security Council as the international body, which is responsible for the maintenance of international peace and security had thus officially recognized the importance of justice and accountability for durable peace. Beyond this recognition, the ICTY also manifested the establishment of a new concept of war crimes tribunals. Arsanjani, Reisman (2005, p. 385), point out in this context that the war crimes tribunals of Nuremberg, Tokyo, the ICTY, and ultimately the ICC belong to different analytical categories. While the World War II examples can be called *ex post* tribunals, the ICTY and especially the ICC are what Arsanjani and Reisman call *ex ante* tribunals. It was a political decision by a political body to set up the ICTY while the Balkan conflict was still ongoing. The ICC, however, by virtue of being a permanent institution, will always be faced with the difficult task of balancing "the interests of justice" with the "interests of peace".

2.2.1.3 Establishing the ICC

The period after WWII was marked by efforts to establish a standing international criminal court. The success of Nuremberg led many to believe that it would not be long before such a court would become reality (Moghalu 2006, p. 127). The international community's commitment to international law was also reflected in Article 13 (1)(a) of the UN charter, which commits the UN to foster the development and codification of international law (United Nations 1946). During the immediate postwar period of the late 1940s and early 1950s, the International Law Commission (ILC) explored concrete options for the establishment of an international criminal court and was tasked to advance international criminal law by drafting an international penal code based on the IMT statute

(Nitsche 2007, p. 111). The growing momentum towards founding a permanent war crimes tribunal came to a halt over the growing tensions between the opposing blocks of the East and the West. In 1957, the development of international criminal law and international criminal prosecution reached a dead-end when the UN General Assembly tied the continuation of the ILC's work on an international penal code to the prior definition of the crime of aggression, which was not feasible in light of the overall geopolitical situation (Nitsche 2007, p. 112). The East-West antagonism had instilled a profound reluctance among most of the permanent members of the Security Council to give up *any* degree of national sovereignty to an international criminal court.

What followed was a period of thirty years of stagnation in the development and institutionalization of international criminal law (Nitsche 2007, p 114). It was not before 1989 when the small Caribbean island state of Trinidad and Tobago, which faced tremendous challenges in dealing with narcotic drug traffickers, submitted the request to create a permanent international criminal court that the international community seriously continued the process of establishing the ICC (Moghalu 2006, p. 128). The movement in favor of a permanent court grew much stronger in light of the formation of the previously mentioned war crimes tribunals for Yugoslavia and Rwanda, ICTY and ICTR. Those tribunals, it was soon acknowledged, had some serious disadvantages. Their ad hoc nature led to accusations of selective- or politically motivated justice, a lack of rapid response and cost-inefficiency (Leonard 2005, pp. 46-47).

The 1990s marked a rapid acceleration of the work on setting up the ICC and witnessed the successful conclusion of the 1998 Rome Conference, where the Rome Statute of the International Criminal Court was negotiated and adopted. These final steps were set in motion when the UN General Assembly in 1992 decided to let the ILC continue its work on an international penal code and to develop a draft statute for an international criminal court (Biegi 2004, p. 106). The ILC concluded its work only two years later and was able to present its draft statute in 1994. In 1995, the UN General Assembly launched the Preparatory Committee on the Establishment of an International Criminal Court (PrepComm), which continued the work of the ILC and called for an international conference to finalize the details of the ICC (Moghalu 2006, p. 128).

The *United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* (hereinafter "Rome Conference") took place between 15 June and 17 July 1998 on the premises of the United Nations Food and Agricultural Organization (FAO) in Rome. This conference was a tremendous challenge

not only because of the unprecedented number of participants[22] but also because of the extremely contentious subject matter, which had to be negotiated[23]. Against all odds, the final breakthrough was achieved on 17 July 1998, when the Rome Statute was adopted by a majority of 120 in favor, only 7 against and 21 abstentions[24] (Kaul 2005, 370). According to Moghalu (2006, p. 129), the final version of the Rome Statute represents a compromise and can be seen as the product of "a major conceptual battle in international relation between visions of a cosmopolitan world society and those of international society that favor interstate cooperation, but one predicated on sovereignty." Only four years after the adoption, the Rome Statute entered into force after the threshold of 60 ratifications, as set out in Article 126,[25] had been passed in April and the ICC finally became operational on 1 July 2002 (Moghalu 2006, 128). This was a big surprise as nobody had anticipated that the Rome Statute could become the fastest successfully ratified multilateral treaty ever (Kaul 2005, p. 370).

2.2.2 Mandate

As indicated above, the Rome Statute is a compromise, which accommodates various geopolitical currents. The result is a complex set of rules and provisions that strike a balance between an independent prosecutor necessary for a powerful court on the one hand and political control and sovereignty of States Parties on the other. Furthermore, the Rome Statute is both a treaty that constitutes a new international institution as well as a criminal code, embodying a highly articulated set of rules on criminal procedure (Arsanjani, Reisman 2005, p. 389). The following section will shed light on some of the Court's particulars, will delineate when and under which circumstances the ICC may exercise jurisdiction and which crimes it can prosecute. Without attempting to cover every

[22] More than 5.000 delegates, representing 162 countries, 17 international organizations, 14 UN-specialized agencies as well as literally hundreds of non-governmental organizations took part in the five weeks of frantic negotiations (Nitsche 2007, p. 132).
[23] The draft, which PrepComm submitted to the Rome Conference, included more than 1.400 brackets indicating an objection by a participating delegation (Biegi 2004, p. 106).
[24] The USA had requested a non-recorded vote, however, it is widely believed that the delegations of China, Iraq, Israel, Libya, Qatar, the USA, and Yemen opposed the Rome Statute and that the States of the Arab League, India, Iran, Mexico, Singapore, Sri Lanka, Sudan, Trinidad and Tobago (because of the omission of drug related crimes), and Turkey abstained (Biegi 2004, p. 107).
[25] Articles cited without further details on the source are those of the Rome Statute as adopted on 17 July 1998 (for a full version of the Rome Statute see "Selected Basic Documents Related to the International Criminal Court", ICC 2005b).

aspect of its 128 Articles, references to the relevant provisions of the Rome Statute will be made wherever possible[26].

2.2.2.1 Nature of the Court

Article 1 of the Rome Statute explains the ICC's role as the following:

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

Further, Article 5 of the Preamble stressed the determination of the signatory nations to put an end to impunity for the worst crimes of concern for the international community. These two Articles hint to some of the most important features of the Court. The ICC is intended to play a complementary role with regard to national jurisdictions. It is thus intended as a court of last resort, which ensures that the worst crimes will not go unpunished, should the national judicial system of a State Party be "unwilling or unable genuinely to carry out an investigation or prosecution" (Wierda, Seils 2005, p.3). Furthermore, as specified in Articles 25 and 27, the Court will try individuals rather than states, *irrespective* of their official capacities. This means that the Court's jurisdiction can override the immunity afforded to heads of state and government. However, Article 1 also contains a clear gravity threshold. The drafters of the Rome Statute ensured that ICC jurisdiction, with all of its implications for the sovereignty of the ICC States Parties, is only justified when the "most serious crimes of international concern" have been committed. But, once they have been committed, under the Rome Statute, prosecution is not optional; impunity cannot be granted under any circumstances.

[26] Overall, the Rome Statute contains 128 Articles, which are divided into 13 different parts, detailing different aspects of the court. The parts, which this section will refer to the most are Part 1 – Establishment of the Court, Part 2 – Jurisdiction, Admissibility and Applicable Law, Part 3 – General Principles of Criminal Law, Part 5 – Investigation and Prosecution, Part 9 – International Cooperation and Judicial Assistance, and Part 10 - Enforcement. Part 4 – Composition and Administration of the Court, due to a lack of space, will not be addressed in detail. It should be noted, however, that the Court is composed of the Presidency (a Judge, who has overall responsibility for the functioning of the Court), an Appeals Division, a Trial Division, and a Pre-Trial Division (small groups of judges in charge of the various stages of the trials), the Office of the Prosecutor (responsible for both investigations and prosecutions), and the Registry (administrative backbone of the Court with far reaching responsibilities for the assistance of victims and witnesses). The other parts of the Statute are: Part 6 – The Trial, Part 7 – Penalties, Part 8 – Appeal and Revision, Part 11 – The Assembly of States Parties, Part 12 – Financing, Part 13 – Final Clauses.

In sharp contrast to its predecessors, the ICC is not a post-conflict justice mechanism installed by victorious powers or a Security Council resolution with Chapter VII[27] authority, but the result of negotiated treaty between sovereign states in times of peace. But being a treaty-based international institution also has far reaching implications for both how the Court operates as well as its relations with member states. The legal framework of how exactly the ICC can exercise its authority will be presented in the next sections.

2.2.2.2 The Crimes

Article 5 states that the Court's jurisdiction is limited to "the most serious crimes". Those crimes include the crime of genocide (Article 5 (a)), crimes against humanity (Article 5 (b)), war crimes (Article 5(c)), and the crime of aggression (Article 5(d)). The Rome Statute substantiated none of these crimes or their definitions. Instead, they are all based on legal precedent and established international law (Leonard 2005, p. 53). This reflects that the ICC is not trying to initiate a new form of international law, but simply trying to uphold and institutionalize existing legal precedent (Leonard 2005, p. 54).

Article 6: The Crime of Genocide:

The crime of genocide is defined in Article 6 as "acts with intent to destroy, in whole or in part, a national ethnical, racial or religious group." Genocide was a well-established norm of customary international law and the possibility to revert to the agreed language of the 1948 genocide convention greatly facilitated the deliberations at the Rome Conference (Nitsche 2007, p. 153).

Article 7: Crimes Against Humanity

Article 7(1) contains a detailed list of acts[28], which are considered crimes against humanity "when committed as part of a widespread or systematic attack directed against any civilian population". This very comprehensive definition reflects the growth in customary international law since earlier definitions in the Statutes of the ICTY and the ICTR (Wierda, Seils 2005, p. 4). Article 7(2) provides extensive definitions and

[27] Chapter VII of the UN Charter – *Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression* – is the highest level of decision-making authority the UN Security Council can apply. Article 42 even vests the Security Council with authority to use force, provided that all other measures are inadequate, to maintain or restore international peace and security (United Nations 1946).

[28] Those acts include murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment in violation of international law, torture, sex crimes, persecution of any identifiable group, enforced disappearances of persons, apartheid, and other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or to physical health.

qualifications of what the "acts" mentioned in paragraph 1 mean and extends jurisdiction over crimes against humanity committed in times of peace and/or by non-state actors (Akhavan 2005, p. 412).

Article 8: War Crimes

Article 8 is by far the longest and most elaborate provision in the Rome Statute (Nitsche 2007, p. 154). It is divided into two parts. Article 8(2)(a) and (b) enumerate the crimes over which the Court has jurisdiction in case of an international armed conflict and Article 8(2)(c) and (d) specify which acts constitute war crimes "in the case of an armed conflict not of an international nature." The definitions of war crimes are derived largely from the 1949 Geneva Conventions and the 1907 Hague Convention (Leonard 2005, p. 52).

Article 5(1)(d): The Crime of Aggression

According to Article 5(1)(d) the Court shall have jurisdiction over the crime of aggression once a definition has been agreed upon as described in Article 5(2). The crime of aggression is a highly contentious issue[29], which is why many experts are of the opinion that it will not be possible to reach consensus on a definition in the foreseeable future (Biegi 2004, pp. 116-17, Nitsche 2007, p. 153, Wierda, Seils 2005, p. 4). "Many states consider the concept too political, and lacking in the required customary law underpinnings" (Meron 2006, p. 566). However, a working group led by the Government of Liechtenstein has continued the work on a definition of the crime of aggression over the last years and is drafting one or several proposals, which the States Parties will consider at the first review conference of the Rome Statute.

2.2.2.3. Jurisdiction

The ICC has jurisdiction over the most serious crimes, as discussed above. Article 11 restricts the jurisdiction of the ICC to crimes, which have been committed after the entry into force of the Rome Statute, in line with the principle of jurisdiction *ratione temporis.* Furthermore, the Court does not have global or universal jurisdiction, but

[29] One of the core problems is the determination that an act of aggression has taken place, which according to the UN Charter is the exclusive prerogative of the UN Security Council (Biegi 2004, p. 116). Whether or not a prior determination of the act of aggression by the UN Security Council should be a prerequisite for ICC jurisdiction over the crime of aggression, divides those countries that favor a strong court and those in favor of a politically controlled court.

because it is a treaty-based international institution, it is binding first and foremost to its States Parties and their citizens. Article 12(2)(a) and (b) specifically limit the exercise of jurisdiction by the ICC to those cases where a crime has been committed on the territory of a State Party or if "the person accused of the crime is a national" of a State Party. Non-States Parties can, however, voluntarily accept ICC jurisdiction under Article 12(3)[30].

The balance between an independent prosecutor and political control is also reflected in the ways in which ICC investigations can be triggered. These "trigger mechanisms" are mentioned in Article 13. The first option is a referral of a situation by a State Party in line with Articles 13(a) and 14. Article 13(b) also vests the UN Security Council acting under Chapter VII of the UN Charter with authority to refer a situation in which one or more of the crimes mentioned in Article 5 "appear to have been committed." Lastly, Articles 13(c) and 15 allow for *proprio motu*[31] investigations of the prosecutor. This enables the prosecutor to initiate investigations in respect of the crimes for which the ICC has jurisdiction. In order to avoid a politicization of the Court, *proprio motu* investigations, are subject to the authorization of the Pre-Trial Chamber (Nitsche 2007, p. 146). A further safe-guard is contained in Article 16, which allows the UN Security Council acting under Chapter VII of the Charter to defer any investigation or prosecution by the ICC for a renewable period of 12 months. There is thus a system of checks and balances between the prosecutor and the Security Council (Wierda, Seils 2005, p. 3).

It was mentioned before that the Court is not intended to be a replacement for national jurisdictions, but serves as a complementary mechanism of international justice aimed at ending impunity. That is why Article 17 explicitly regulates issues of admissibility. Article 17(1) states that a case is inadmissible where "the case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is *unwilling or unable genuinely*[32] to carry out the investigation or prosecution." The basic assumption of the drafters of the Rome Statute was that states would be *unwilling* to accept ICC prosecution. That is why it came as a surprise that Uganda and the Democratic Republic of the Congo *voluntarily invited* the Court to investigate and prosecute crimes, which had been committed on their territory (Arsanjani, Reisman 2005, p. 386). When a state voluntarily participates in the Court's activities, it of course greatly facilitates the

[30] The American delegation at the Rome Conference had pushed for an even narrower version of Article 12. On top of the consent of the country where the crime had been committed, it requested that the consent of the home country of the perpetrator be included as another prerequisite (Moghalu 2006, p. 141). This proposal was rejected.
[31] Latin – "on his own accord"
[32] Emphasis added

work of the prosecutor (Kaul 2005, p. 375). However, the legality of this practice was widely discussed, as it was not clear that a state with a functioning national judicial system that is willing to prosecute the crimes could simply transfer the burden to bring the perpetrators to justice to the ICC[33].

Finally, Article 53 circumscribes in detail how the prosecutor can initiate an investigation, once it is triggered. This article vests the prosecutor with a considerable amount of prosecutorial discretion, because according to Article 53(1)(c), the prosecutor has to determine whether an investigation serves "the interest of justice." Hans-Peter Kaul (2005, p. 375) points out that "[a]s the prosecutor operates in the context of ongoing conflicts, often at the same time as peace negotiations are taking place, purely legal considerations may not always be the sole basis for deciding whether or not to prosecute."

2.2.2.4 Enforcement and Cooperation

The Court's relationship with member states needs to be addressed in order to understand what challenges it faces in carrying out its duties. Without the States Parties' cooperation, the Court is probably unable to fulfill its mandate (Leonard 2005, p. 61). The Court has no exclusive enforcement capabilities, which is why States Parties are obliged to "cooperate fully" with the Court (Article 86). While not retaining the term 'order', as used by the ICTY in accordance with its far-reaching mandate conferred upon it by the Security Council, the ICC through Article 87(1)(a) has the authority to make 'requests' to the States Parties, which can be considered binding (Zhou 2006, p. 211). If a State Party fails to meet its obligations to cooperate, the Court under Article 87(7) has the authority to refer the matter to the assembly of States Parties or to the UN Security Council for enforcement measures (Zhou 2006, p. 212). Such non-cooperation can pose serious problems. When states are 'unwilling' to prosecute the crimes, they are most likely also unwilling to cooperate with the ICC in any way (e.g. Darfur). This is what some label the "operational paradox" of the ICC (Wierda et al. 2007, p. 9). In another departure from ICTY practice, the Court, according to Article 87(6) merely has the non-binding option to 'ask' international organizations to cooperate. This seriously weakens the ICC vis-à-vis international organizations and peacekeeping missions already on the ground in requesting assistance for the enforcement of its mandate, particular with regard to arresting indicted

[33] For a discussion of the various arguments and an articulate justification in favor of this practice see Arsanjani, Reisman (2005, pp. 386-89) and Akhavan (2005, p. 413-15). Akhavan points out that Uganda's willingness to confront the LRA was directly linked to the availability of the ICC.

criminals (Zhou 2006, p. 215). Those and other practical and ultimately political obstacles of the ICC will be highlighted in the discussion of the cases in the next section.

2.3 Cases

At present the ICC has ongoing investigations in four African countries – in the Central African Republic (CAR), the Democratic Republic of the Congo (DRC), Sudan, and Uganda. In all of the cases, except for the CAR-case, the investigations have progressed to the stage where the first indictments and arrest warrants have been issued. In the DRC-case, three arrests have been made and first trials are scheduled to begin this year. In the following section I will give a brief overview of the conflicts, the peace processes, the referrals, i.e. how the ICC's activity was triggered, and the investigations in the DRC, Sudan, and Uganda. All of these conflicts are ongoing and the ICC's involvement, in some cases more, in others less, has been hotly debated. The CAR-case will not be discussed, because the investigations have just begun and no arrest warrants have been issued. In the absence of concrete actions by the ICC, it is unlikely to find any direct influence of the prosecutions on the peace process. The case, therefore, was excluded from this overview as well as from the questions in the expert survey. Since all of the conflicts, which I will address here, are extremely complex, have multiple root causes, can be seen as civil wars, but also often have had regional participation and consequences, this overview can only provide the most basic information about core events.

2.3.1 Uganda[34]

The conflict in Uganda as the first case of the ICC has been the subject of much international debate and controversy over how to reconcile the goals of peace and justice and the proper involvement of the ICC. The conflict between the rebels of the Lord's Resistance Army (LRA) and the Uganda People's Defense Force (UPDF) of the Government of Uganda erupted in the 1980s and, at the time of this writing, is going through a crucial phase, where a resolution of the conflict seems possible. The ICC has played a decisive role in this latest phase of the conflict and has stirred up international attention, support and criticism vis-à-vis its work. Overall, the ICC's involvement in Uganda caused the most controversy in comparison to the other cases where it is active. Increasingly, there have been groups who condemn both the pursuit of justice and the ICC

[34] For a comprehensive introduction see (Akhavan 2005, Branch 2007, Otim, Wierda 2008, and in particular, Allen 2006).

as the vehicle to this aim as reckless (Wierda et al. 2007, p. 16). This section will, therefore, trace the roots of the conflict as well as discuss the peace process and the ICC's involvement.

2.3.1.1 Conflict background / Peace Process

After Uganda became independent in 1962 – marking the end of British colonial rule, which had *established and exacerbated* tribal and ethnic divisions among the Ugandan population – Uganda witnessed a period of political upheavals, guerilla wars and dictatorships (Allen 2006, pp. 25-9). The conflict in Northern Uganda began when in 1986 Yoweri Museveni rose to power after his National Resistance Army (NRA) had overthrown the dictatorship of Tito Okello (Akhavan 2005, p. 406). Okello had become president just a few months before, when a group of aggrieved Acholi[35] soldiers seized power and ousted the regime of the previous dictator Milton Obote (Allen 2006, p. 30). Robbed of their victory and mistrustful of Museveni's intentions, many of these Acholi soldiers retreated to their homelands in Northern Uganda and joined armed anti-government military factions[36] that would later become the LRA (Allen 2006, pp. 30-6). These groups were supported and partly funded by the Government of Sudan, which was hostile towards Museveni (Akhavan 2005, p. 406).

The development of the conflict between Acholi factions and forces loyal to Museveni, up to this point, followed fairly predictable patterns (Allen 2006, p. 30). But the conflict took an unanticipated turn when, all of a sudden, spirit mediums emerged as military commanders (Allen 2006, p. 31). "The result of this volatile mix was an unlikely, Faustian alliance between the Islamist government of Sudan and a nominally "Christian" insurgency (the LRA[37]) against Uganda's NRM government" (Akhavan 2005, p. 406). Initially led by self-proclaimed prophetess Alice Lakwena, Joseph Kony, who also claimed to possess supernatural powers, soon became the lead figure of the LRA (Akhavan 2005, p. 406). After a failed mediation effort in 1994, led by young Ugandan minister Betty Bigombe, the LRA's attacks against the civilian population in Northern Uganda grew more and more violent (Allen 2006, p. 49). Since then, the LRA has fought ruthlessly and became infamous for massacres, maimings, and the forced recruitment of thousands of

[35] "The name Acholi may have been derived by British officials from the word 'black' in the Lwo language" (a language spoken by some Ugandan groups) (Allen 2006, p. 26).
[36] One of these groups was the Uganda People's Democratic Army (UPDA).
[37] The goal of the LRA was to overthrow the NRM government and "to install the Ten Commandments" in Uganda (Akhavan 2005, p. 407).

Acholi, in particular of children (Branch 2007, p. 180). These crimes have terrorized and severely traumatized the civilian population in Northern Uganda. They have caused great suffering both for the victims as well as for many of the perpetrators that were often innocent and vulnerable child soldiers, who were forced to commit these heinous acts by their LRA commanders (Akhavan 2005, p. 407).

The government forces', renamed Uganda People's Defense Force (UPDF), counterinsurgency strategy focused largely on trying to crush the LRA militarily (Branch 2007, p. 181). In order to be able to distinguish LRA supporters from the general population, the UPDF gradually herded large parts of the Acholi population into camps leading to hundreds of thousands of internally displaced people (IDP) and causing great suffering to the affected civilian population[38] (Branch 2007, p. 181). Since the year 2000, various initiatives aimed at ending the conflict with the LRA have been undertaken. One of them was the Amnesty Act of 2000, which granted LRA fighters that chose to demobilize, amnesties. (Otim, Wierda 2008, p. 22). This policy failed, however, to bring about a comprehensive demobilization and the LRA continued to commit large-scale atrocities against the civilian population (Otim, Wierda 2008, p. 22).

After the Government of Uganda decided to refer the case of the LRA to the ICC – the details of the referral will be addressed in the next section – the conflict in Uganda, for the first time, received widespread international attention and the dynamics of the peace process were profoundly changed. Before the ICC announced the first arrest warrants in early 2005, Betty Bigombe started another round of peace talks with the LRA in late 2004 (Allen 2006, p. 78). During this time, the ICC maintained a "low profile" cautious not to disrupt a fragile peace process (Wierda et al. 2007, p. 5). When these mediation efforts failed, the fighting erupted again in April 2005 (Allen 2006, p. 82). This led the ICC to push forward with the prosecutions and to issue its first five arrest warrants against the senior leadership of the LRA in October 2005 (Wierda et al. 2007, p. 5).

The current format of peace talks, the "Juba peace talks", was initiated in the summer of 2006 by Riek Machar, Vice President of the Government of Southern Sudan (Wierda et al. 2007, p. 5). In these talks, the ICC has played a key role from the beginning: "The arrest warrants had already been issued, and senior leaders from the Lord's Resistance Army (LRA) maintained from an early stage that the ICC arrest warrants are

[38] In these camps the living conditions and protection from LRA attacks were very poor, leading to one of the highest mortality rates in the world, that some viewed the actions or rather inaction of the Ugandan government and the UPDF as war crimes, crimes against humanity or even genocide (Branch 2007, pp. 181-2).

the most important obstacle to the success of the peace talks" (Wierda et al. 2007, pp. 5-6). This triggered a widespread debate about various options, such as pursuing peace first and justice later, calling upon the Security Council to defer the prosecutions, and led a large group to see the ICC as an immediate impediment towards peace (Otim, Wierda 2008, pp. 22-4). Others observed a direct positive influence of the ICC indictments: The ICC's presence increased pressure on rebels to negotiate, cut off foreign support, refocused the attention of the international community, and embedded accountability in the peace process (Grono, O'Brien 2008, O'Brien 2007). Views of the affected populations on the ICC have been mixed. According to a poll in 2005 a majority of people was in favor of hard punishments by the ICC (Pham et al. 2005). A repetition of the same poll in 2007 indicated a desperate thirst for peace – the results had reversed and people were in favor of "softer" methods, hoping that those would convince the LRA to end its fight[39] (Pham et al. 2007).

At the time of this writing, there are indications and hopes that the LRA will sign a peace deal with the Government of Uganda ending the conflict, which has lasted for 22 years. However, the LRA continues to tie its consent to the peace deal to the ICC lifting its arrest warrants for LRA leaders – something the ICC cannot do unless Uganda itself pursues the crimes under the complementarity regime of Article 17 – for the moment, many doubts remain about the possibility of a peaceful resolution (BBC News 2008).

2.3.1.2 Referral

On 16 December 2003, the Government of Uganda referred the situation concerning Northern Uganda to the ICC (ICC 2005a). In line with Articles 13(a) and 14, Uganda, a State Party, thus triggered the ICC investigations. A feeling of having exhausted all available options and certain strategic considerations convinced the Government of Uganda to call upon the ICC: It was believed that the ICC referral would engage the international community, and exclude indicted ICC leaders from the previously passed amnesty legislation; furthermore, the international trials were seen as a depoliticized venue

[39] In 2005 at a time when 27 percent knew of the ICC, a survey, entitled "Forgotten Voices", found that 66 percent of the respondents were in favor of hard punishment through trials and imprisonment (Pham et al. 2005). When the survey was repeated in 2007, the picture had changed significantly, reflecting a desperate thirst for peace in the Ugandan population. 60 percent of respondents knew of the ICC, 54 percent of the respondents preferred forgiveness, reconciliation, and reintegration of LRA leaders or their confession and apologies, while 41 percent still preferred the tougher punishments such as trials and imprisonment (Pham et al. 2007).

for justice – the ICC could become a tool of national reconciliation (Akhavan 2005, p. 410).

2.3.1.3 Investigations and Indictments

The investigations in Uganda were officially launched on 28 July 2004 (ICC 2005a). The Court has jurisdiction over the crimes, which were committed after 1 July 2002. After the prosecutor filed an application for arrest warrants for crimes against humanity and war crimes against five senior commanders of the Lord's Resistance Army, Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen, in May 2005, the Pre-Trial Chamber II issued arrest warrants under seal on 8 July 2005, which were unsealed and publicized on 13 October 2005 (ICC 2005a). Even though the ICC has a mandate to prosecute all crimes, which were committed in Northern Uganda – including those allegedly committed by the UPDF – no arrest warrants have been filed against UPDF leaders, because the prosecutor chose to prosecute the *graver* LRA crimes first (ICC 2005c). None of the arrest warrants have been executed so far, but the number of arrest warrants has gone down to three, because two indictees, Raska Lukwiya and Vincent Otto, have been killed (ICC 2008).

2.3.2 Democratic Republic of the Congo

The prosecutor had singled out the DRC as a situation where the ICC might get involved, early on (ICC 2007a). Arguably one of the worst conflicts in the history of the African continent, the prosecutor faces an extremely difficult and hostile environment in the DRC, rendering its work extremely difficult and making it completely dependent on support by the Government of the DRC and the United Nations Mission in the Democratic Republic of Congo (MONUC) (Clark 2008, p. 40). The DRC is of particular relevance for the ICC, because first arrests warrants have been executed and trials are scheduled to begin in 2008 (ICC 2007b). Investigations, for the time being, are focused on the Ituri region of the DRC, which is located in the Eastern part of the DRC close to the border with Uganda and Rwanda. This overview focuses on the conflict root causes; going into the details of this infinitely complex regionalized conflict is beyond the scope of this paper.

2.3.2.1 Conflict background / Peace Process

Similar to many other conflicts on the African continent, particularly in Rwanda and Uganda, the conflict in Ituri, which broke out in 1999, can be linked to ethnic divisions

and grievances, which were created and exacerbated under European colonial rule (ICG 2003, p. 2). The conflict broke out between two rival ethnic groups, the Hema and the Lendu, which occupy an extremely fertile and resource rich region (ICG 2003, p. 2). The Hema had been systematically favored by the colonial powers, while the Lendu people were marginalized and subjugated (ICG 2003, p. 2). Even after independence, the Lendu communities continued to be highly disadvantaged (ICG 2003, p. 3). Land-based communal grievances and individual greed for power and resources led to several low-intensity conflicts between Hema and Lendu in 1966, 1973, 1990, and 1997 (ICG 2003, p. 3). The region's wealth in resources[40], however, caused the conflict to become much more violent, particularly after the Government of Uganda became involved (ICG 2003, p. 3). The "divide-and-rule" tactics employed by the Ugandan authorities, which at various times supported, manipulated and subsequently abandoned virtually all of the Congolese rebel groups involved in the fighting in Ituri caused the violence to spiral out of control (ICG 2003, p. 3). Uganda's main interest was related to natural resources – Ugandan generals were involved in exploiting gold and timber and in the coffee trade (ICG 2003, p. 4). Furthermore, the government of Rwanda and the DRC also got involved, supporting various militias, turning the Ituri conflict into a full-scale proxy war between the Governments of Uganda, Rwanda, and the DRC's central Government in Kinshasa (ICG 2003, p. 3). In sum, the conflict developed in three stages: "The progression was from land-based communal violence, to land-related operations of ethnic cleansing, to repeated acts of genocide by both Hema and Lendu" (ICG 2003, p. 6). As a result of the fighting in Ituri since 1999, between five and six hundred thousand people have been internally displaced and up to sixty thousand people have died (Arsanjani, Reisman 2005, p. 397).

In the years after 1999, several peace deals were signed (in Lusaka in 1999 and in Sun City in 2002), and the United Nations Mission in the Democratic Republic of Congo (MONUC) was created and subsequently equipped with a tougher mandate and more troops. As a result, the national armies of Uganda and Rwanda retreated, but continued to exercise influence via their proxies, the ICC opened an investigation in 2004, and government authority passed from Laurent Kabila, who was assassinated, to an interim government until formal elections took place in 2006 – certainly an important success (ICG 2006). Despite all of these efforts, however, a comprehensive and sustainable peace remains elusive.

[40] Ituri is believed to have the largest gold reserves in the world and oil has been discovered too in recent years (ICG 2003, p. 2, p. 4).

2.3.2.2 Referral

The chief prosecutor of the ICC, in 2003, invited the DRC to refer the cases of mass crimes to the ICC (Clark 2008, p. 39). Increased international and local pressure[41] finally led President Kabila of the DRC to refer the situation to the ICC on 3 March 2004 in line with Articles 13(a) and 14 (Clark 2008, p. 39).

2.3.2.3 Investigations and Indictments

The prosecutor decided to open an investigation into the situation in the DRC on 23 June 2004 (ICC 2006). After almost two years of investigations, on 17 March 2006, the Pre-Trial Chamber I made public the arrest warrant against former warlord Thomas Lubanga Dyilo, who was immediately transferred from custody in the DRC to The Hague (ICC 2006). Subsequently there have been two more arrests. On 18 October 2007, the arrest warrant against Germain Katanga was unsealed, followed by his transfer to The Hague (ICC 2008). Finally, on 7 February 2008, the arrest warrant against Mathieu Ngudjolo Chui was unsealed, leading to his immediate surrender to the ICC by the DRC authorities (ICC 2008). As mentioned before, the trial against Thomas Lubanga, the ICC's first ever, is scheduled to begin in 2008 (ICC 2007b).

The challenges of prosecuting the war crimes in the DRC are daunting, leaving the prosecutor no option but to adopt an opportunistic rather than a comprehensive prosecutorial strategy (Arsanjani, Reisman 2005, Clark 2008). According to Clark (2008, pp. 40-1), this approach has caused four main problems: First, focusing the investigations on the Ituri region, where the DRC Government was involved the least, ensures its continued vital support. However, it risks giving the DRC population the impression that its government perpetrators might escape with impunity. Second, the judiciary in the Ituri region has been reformed substantially, leading to criticisms why the ICC did not focus its efforts on regions where the judiciary is still in shambles. Third, failure to acknowledge the involvement of the governments of Rwanda and Uganda, i.e. the *international* nature of the conflict, which could lead to arrest warrants of leaders in those countries, is hard to understand given the overwhelming historical evidence to the contrary. Fourth, by choosing an efficient prosecutorial strategy allowing for a speedy trial, pushing only

[41] The lobbying efforts of a strong Congolese grassroots movement consisting of churches, civil society organizations and community based associations "were instrumental in bringing about the DRC's ratification of the Rome Statute and the referral of the situation in the country to the Court" (Baldo 2007, p. 3).

minimal charges against Lubanga, the prosecutor did not adequately take into account the needs of the affected populations.

2.3.3 Darfur Region of Sudan

The situation in Darfur is special because it is the first situation, which has been referred to the ICC by the UN Security Council, which was made possible by the US' abstention – one of the ICC's most fierce and outspoken opponents of the ICC up to that point. The Security Council, acting under Chapter VII of the UN Charter, gave the Court powers to prosecute crimes, which have been committed in Darfur despite the fact that Sudan is not a States Party to the Rome Statute. The ICC, however, has only been one of many measures and institutions, which were brought into play by the international community in order to put pressure on the Khartoum Government about the violence in Darfur. The almost complete lack of cooperation by the Government of Sudan and the continued lack of support by the international community, including from those states, which originally sponsored the referral, have prevented meaningful progress in the Darfur investigations.

2.3.3.1 Conflict background / Peace Process

In the post-independence period – prior to the outbreak of the Darfur conflict – Sudan experienced numerous center-periphery conflicts and the formation of some of the Darfur rebel groups can be traced back to these struggles (Williams 2006, p. 174). Essentially another center-periphery conflict, the longstanding economic and political marginalization and a feeling of being left out of the North-South peace talks triggered the outbreak of violence in Darfur in 2003[42] (Bah, Johnstone 2007, p. 2). It is likely that Darfur's rebels mobilized to ensure that their grievances against the Khartoum government were considered as part of the wider peace negotiations between the North and the South going on at the time (Williams 2006, p. 175).

Initially led by the Sudan Liberation Army (SLA), the Darfur uprising was soon joined by the Justice and Equality Movement (JEM), causing serious concern to the Government of Sudan (Bah, Johnstone 2007, p. 2). In response, the Government of Sudan

[42] The grievances of the Darfur population were fourfold: First, land rights played a crucial role. Accelerating land degradation led to a lack of arable land and stirred up increasingly violent land-related disputes. Secondly, Darfur's poor systems of law and order deprived the region of mechanisms to resolve disputes peacefully. Third, Islamist ideology also played a role. Fourth, and most importantly, being left out of the ongoing peace negotiations between the North and the South served as a kind of "eye-opener" for the people of Darfur and led them to take up arms (above paragraph derived from Williams 2006, pp. 174-5).

mounted a fierce counterinsurgency sending the proxy Janjaweed militias to stop the rebels (Grono 2006, p. 624). The ethnic-cleansing campaign of the Janjaweed was supported by the government with well-coordinated air strikes and joint ground operations (Grono 2006, p. 624). The government's strategy was to "drain the swamp" by forcibly displacing civilians from their villages, thereby denying the rebels sanctuary in much of Darfur (Grono 2006, p. 624). The atrocities committed against the civilian population "included widespread rape and the wholesale burning and looting of villages and poisoning wells (de Waal 2008, p. 29). Overall, the fighting has lead to more than 200.000 casualties, many due to conflict-related disease and malnutrition and over two million people have been displaced from their homes (Bah, Johnstone 2007, p. 3).

While the *responsibility to protect*[43] the population rests with the Government of Sudan, the international community was also subject to much criticism, because of its failure to take drastic measures to stop the violence in Darfur. Far from inactive, the international community reacted on three levels, diplomatic, military, and judicial. The African Union played a central role in many of these activities and received broad international support for its actions.

The AU deployed a small peacekeeping mission, the African Union Mission in Sudan (AMIS), which, despite gradual increases up to 7.000 uniformed personnel, remained largely unable to provide protection for the population of Darfur due to insufficient resources (Williams 2006, p. 179). Furthermore, in June of 2004, the AU launched the Abuja peace process, which led to the adoption of the Darfur Peace Agreement (DPA) in 2006 (Bah, Johnstone 2007, p. 3). The agreement was not accepted by all rebel parties and did not lead to a decline in violence. Instead it was used as a justification by the Government of Sudan for renewed attacks on non-signatories and their civilian support base (Bah, Johnstone 2007, p. 3). In a renewed effort in 2006, the Security Council approved the deployment of a larger UN-AU hybrid mission (United Nations 2006). To this day the hybrid mission is not fully operational and crimes continue to be committed in Darfur.

Finally, the international community increased the pressure on Sudan and took legal action by referring the situation to the ICC in 2005. Following the recommendation

[43] In 2005, the UN General Assembly, after several years of international discourse, agreed on a new norm of international relations, the "Responsibility to Protect" (R2P) principle. According to this norm the primary responsibility to protect any population rests with the national government of the country in question. However, should the national government be unwilling or unable to protect its own people, the international community is believed to have a mandate for a humanitarian intervention.

of the International Commission of Inquiry on Darfur (ICID), which it had previously established, the Security Council in resolution 1593 decided to "refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court" (United Nations 2005). Despite the fact that first arrest warrants have been issued, the ICC has so far failed to fulfill its mandate due to Sudan's rejectionist attitude towards the Court and a lack of active support by States Parties and the Security Council to enforce the ICC's decisions (de Waal 2008, p. 33).

Overall, "progress on international cooperation, peacekeeping and humanitarian action has been extremely modest, and on peacemaking has been almost nonexistent" (de Waal 2008, p. 33). At the time of this writing, peace and justice in Darfur are still distant. Violence continues to spread throughout Darfur with attacks by the Sudanese military against the civilian population during the months of January and February 2008 "following deliberate patterns" (Mail & Guardian 2008).

2.3.3.2 Referral

On 31 March 2005, the UN Security Council in resolution 1593 decided to refer the situation concerning Darfur to the prosecutor of the International Criminal Court (United Nations 2005). The decision by the Security Council to invoke its authorities under Article 13(b) of the Rome Statute came after two months of hesitation by the US administration – previously one of the ICC's biggest critics – and marked a significant departure from its openly hostile stance towards the ICC in the years before (Kaul 2005, p. 380). This resolution forced Sudan – a non-State Party – to accept the Court's jurisdiction. However, it is also important to note the serious restrictions on the Court's authority, which the resolution contains. While containing binding provisions for the Government of Sudan to cooperate with the Court, the resolution explicitly excludes other non-States Parties from this duty and merely "urges international organizations to fully cooperate" with the Court (Happold 2006, p. 230). Furthermore, the resolution contains provisions that are intended to provide immunity from ICC prosecution for UN peacekeepers (Happold 2006, p. 230). The ICC's coercively imposed jurisdiction has serious implications for its operations. Contrasting both the DRC and Uganda situations, the Government of Sudan views the ICC as a foreign imposed threat and refuses to cooperate with it, defying the provisions of resolution 1593 (de Waal 2008, p. 32).

2.3.3.3 Investigations and Indictments

Following resolution 1593, the prosecutor decided to open an investigation into the situation in Darfur on 6 June 2005 (ICC 2008). Trying to stop the ICC investigations from going forward, the Government set up its own national "Special Criminal Court for Events in Darfur" (Baldo 2007, p. 1). The ICC determined, however, that the Special Court was not pursuing the potential cases that the prosecutor was considering and continued its investigations (de Waal 2008, p. 30). On 25 April 2007, the Pre-Trial Chamber I issued warrants of arrest for Mr. Ahmad Muhammad Haroun ("Ahmad Haroun") and Mr. Ali Muhammad Ali Abd-al-Rahman ("Ali Kushayb") (ICC 2008). So far Sudan has not surrendered either one of them, but instead chose to give Ahmad Haroun an influential ministerial post (de Waal 2008, p. 30). While the ICC is not believed to have had a negative effect on the peace process, which suffered mostly from the polarization and estrangement between Sudan and the international community, investigations and ICC-related activities had to proceed very carefully: The prosecutor had to avoid driving Sudan into complete isolation thus further endangering the peace processes in the South and in Darfur; the prosecutor accepted that UN peacekeepers will not be able to execute arrest warrants so that the deployment of the AU-UN hybrid mission would not be endangered; the Darfur Peace Agreement (DPA) deliberately excluded the issue of accountability – which were dealt with separate of the DPA – in order to facilitate negotiations (de Waal 2008, pp. 31-35).

3. Analysis

This section will present the results of the expert survey, which was conducted via an online survey and telephone interviews. First, the applied methods will be discussed and the survey, including the questions asked and an overview of the group of participants, will be introduced. In a second step, the results will be structured and analyzed with a view to identifying trends and patterns. Finally, on the basis of the results and the working hypotheses, a set of new hypotheses about the ICC and the relationship of peace and justice will be proposed.

In this context it is important to note a few basic facts about the survey. The survey does not try to *test* the working hypotheses, which were mentioned in section 2.1.4, but, instead, is intended to serve as the basis for deriving new and/or more refined hypotheses about the nature of the relationship of peace and justice. The participants of the survey do not represent a random sample, as required for statistical analyses, but were deliberately chosen. Overall, the survey and ultimately the paper will hopefully contribute to the ongoing academic as well as political discussion of peace and justice and will serve as a point of departure for future research, rather than providing conclusive answers.

3.1 The Survey

This section will provide a brief overview of how the survey was conducted, which questions were asked and who participated.

3.1.1 Methodology

Stated goal of this paper is to derive one or more hypotheses about how the ICC influences peace processes. A hypothesis can be understood as statements that postulate a relationship between at least two variables (Schnell 2005, p. 53). As was shown in section 2.1.2 some theories and hypotheses about the influence of international war crimes tribunals on peace processes already exist. But the ICC, being a permanent *ex ante* tribunal, as defined by Arsanjani and Reisman (2005), poses a new conceptual challenge to the existing host of theories. That is why this study tries to explore new hypotheses, which can help explain how the ICC influences peace processes. In order to generate this knowledge, an expert survey was chosen as the main research methodology. The main strength of case studies is in those areas where other methods such as statistical analyses or formal models are weak (George, Bennett 2005, p. 19). One of their greatest strength lies

in theory development (George, Bennett 2005, p. 19). The expert survey cannot be compared to a full-scale case study, but some of the same benefits typical of case studies also apply to the expert survey:

> "Case studies have powerful advantages in the heuristic identification of new variables and hypotheses through the study of deviant or outlier cases and in the course of field work – such as archival research and interviews with participants, area experts, and historians" (George, Bennett 2005, p. 19).

The latter part of this paragraph shows that "field work", including interviews with experts, can contribute to the discovery of new variables and hypotheses. This is the goal of the expert survey. The evidence gathered in the survey, which will contribute to finding new hypotheses, cannot be used to test these hypotheses, as "using the same evidence to create and test a theory also exacerbates risks of confirmation bias, a cognitive bias towards confirming one's own theories" (George, Bennett 2005, p. 111). Instead, the hypotheses should be used as the starting point for future research based on different and more comprehensive data.

3.1.2 Questions

All in all, the survey consisted of five substantive questions to the experts. Two of the questions were closed questions[44], where participants were asked to rank a set of measures in accordance with their perceived importance of the measure. Participants were asked to rank all measures in a strictly descending order, i.e. participants could assign exactly one rank per measure. The aim was to identify the most important measures based on the frequency of the selection of certain answer choices**.** Three of the questions were open questions, where participants could answer in the form of free written responses of up to three hundred words. In responding to the open questions, participants were asked to consider the situations where the ICC has been involved so far and to link their theoretical considerations about the influence of the ICC during ongoing conflicts to empirical evidence of how the ICC has affected the conflicts and related peace processes in question. As a result, it was hoped, that it will be possible to hypothesize the contribution of the ICC to peace processes as well as to see more clearly which of the theoretical assumptions are backed up by empirical evidence.

The first closed question was directly derived from the peace versus justice debate and the diverse set of measures, which have been suggested to support, control or steer the

[44] For a discussion of the merits and shortcomings of open and closed questions see Schnell (2005, pp. 330-3).

ICC in order to enhance its capabilities of supporting peace processes. It thus tried to include a wide spectrum of views inviting diverse answers. The goal was to identify which measures are most important in order to achieve sustained peace by means of the ICC and to explore whether one can detect particular answer patterns reflecting divergences of views between different respondents. The second closed question was based on the five positive effects of how international war crimes tribunals may support the achievement of a just and sustainable peace, as posited by liberal theory (c.f. Bass 2000). The aim was to find out, whether experts could determine which of the effects is most important in order to achieve the goal of a sustained peace.

The open questions were derived from the working hypotheses (WH-1 and WH-2). The first open question invited participants to identify the ways and/or factors through which the ICC has supported peace processes in accordance with WH-1. The second open question referred to the opposite, i.e. how the ICC has disrupted peace processes, and was derived directly from the rival WH-2. Lastly, the third open question asked participants to suggest measures to improve the ICC's capability to support peace processes in the future. This question was not based on theoretical considerations, but was intended to identify possible areas of improvement and concrete policy proposals to ensure that the ICC supports rather than disrupts peace processes.

3.1.3 Participants and Turnout

Of a total of 38 experts, who were asked to participate in the survey, 19 experts agreed to participate in the study. In order to ensure a wide range of opinions on the question of peace and justice, experts from various sectors were contacted. The experts included ICC officials, senior UN officials, a former mediator of one of the conflicts, diplomats, academics, and various international NGO representatives as well as local NGO representatives from the DRC and Uganda. The turnout was exactly 50% and a fairly even number of participants from each of the various groups of experts contacted, participated in the survey. 18 of the participants answered the questions via an online platform and one telephone interview was conducted. 14 of the participants in the online survey completed the full survey, including open questions; four participants limited their answers to the closed questions.

A substantial number of the participants hold official positions that do not allow them to publicly state their views on such contentious issues as the role of the ICC in peace processes. The views – all of which are contained verbatim in the appendix – therefore

represent the personal opinions of the participants. Furthermore, a large number of participants did not agree to be quoted or mentioned *by name* at all. For the sake of coherence I, therefore, refrain from personally identifying any of the participants by name. This, however, does not affect the analysis, which is not based on the personality of the respondents, but on the substance of their arguments, which are all contained in the appendix and in the results matrix.

3.2 The Results

In this section I will first discuss the results of the closed questions on the basis of the rankings, the average ratings and rank profiles[45] and analyze the results of the open questions on the basis of the results matrix, which is included in section 3.2.3.

3.2.1 Closed Questions

Question 1 was aimed at identifying concrete measures of how the ICC can support rather than disrupt peace processes. With the exception of the factor 'support from member states', the results do not lend unequivocal support to any single measure in particular. Almost all of the items have been ranked top to bottom, with a few exceptions.

QUESTION 1:

Which of the following practical and political measures/factors is most important in order for the International Criminal Court (ICC) to support peace processes rather than disrupt them?

1: most important - 7: least important

Answer Options	1	2	3	4	5	6	7	Rating Average	Response Count
Timing of Indictments	2	3	2	5	0	6	0	3.9	18
Sequencing	2	0	0	0	4	3	9	5.7	18
Security Council Support	2	3	4	3	3	2	1	3.7	18
Support from UN Peace Missions	0	2	4	4	4	1	3	4.4	18
Support from Member States	7	3	2	1	3	0	2	2.9	18
Credible Threat	2	4	3	2	2	3	2	3.8	18
Local Outreach	3	3	3	3	2	3	1	3.6	18

[45] The rank profiles were generated using the statistics software R.

Support from member states is identified across almost all of the participants to be the most important factor for the ICC to be effective in supporting peace. This implies that the ICC can only be supportive of peace processes when it is able to fulfill its mandate, which, in turn depends to a large degree on the cooperation and the support by the Court's States Parties. An absolute majority of participants rejected the idea of sequencing peace and justice, i.e. to first secure peace and to deal with justice issues later. However, the other item relating to temporal aspects of pursuing justice, 'timing of indictments', led to widely diverging answers. One group, as with 'sequencing', is clearly opposed, while a substantial amount of people is in favor. The notion that aspects of timing and of politically controlling the Court may be crucial in order to secure peace processes is further supported by the substantial support the item 'security council support' received. As described above, the Security Council can delay as well as trigger prosecutions in accordance with Articles 13(b) and 16. 'Local outreach' is the item, which received the second-highest average rating. 'Credible threat', caused by successful arrests and trials, and 'support from UN peace missions' seem to be residual categories where no clear pattern emerges. In figure 1, contained in the appendix, the rank profiles of each individual participant are shown. Different colors have been used to distinguish clusters of similar rank profiles. As a result we can interpret that one group seems to be in favor of political control of the Court and of delaying justice if necessary (marked green), while the other group clearly rejects this and favors an independent Court solely occupied with fulfilling its mandate (marked red). The mean rating could not provide this information. Apparently opinions vary between experts, which seem to fall into different camps. Participants also suggested a number of other measures to support peace processes, which are contained in the appendix. No clear pattern emerged.

Question 2, dealing only with positive aspects rather than policy prescriptions, was much less contentious. As with question 1, all of the items were ranked top to bottom, reflecting a lack of general consensus. 'Deterring war criminals', 'purging threatening leaders', and 'establishing the truth', in this order, were seen as most important by a large cluster of respondents, as can be seen in figure 2 in the annex showing the individual rank profiles and as shown by their respective rankings. 'Rehabilitating renegade states' and 'putting blame on individuals, not groups' were not regarded to be as important as the other effects. One aspect, which was not included in this list of positive effects, which was derived from Bass (2000), was the rehabilitation of victims. A number of participants

stressed the importance of addressing the concerns of victims indicating a possible item for extending the list of positive factors listed by Bass.

QUESTION 2:

Of the following effects of war crimes tribunals, which do you deem to be most important or most helpful in order to achieve a just and sustainable peace in practice?

1: most important - 5: least important

Answer Options	1	2	3	4	5	Rating Average	Response Count
Purging threatening leaders	7	3	2	2	4	2.6	18
Deterring War Criminals	4	7	4	2	1	2.4	18
Rehabilitating Renegade States	3	1	2	5	7	3.7	18
Putting Blame on Individuals, Not Groups	1	3	4	7	3	3.4	18
Establishing the Truth (Comprehensive account of what actually happened)	3	4	6	2	3	2.9	18

3.2.2 Open Questions

All of the free responses are contained verbatim in the appendix. Furthermore, the results matrix in section 3.2.3 contains all substantive information, which I will discuss and refer to in this section. The results matrix consists of four separate tables. The first summarizes the results of question 3. The second and third table follow the same logic for question 4 and question 5. All of the information contained in the results matrix is drawn directly from the free responses of participants. Participants were asked to make theoretical assumptions and, ideally, to back up their claims with empirical evidence. That is why the tables have two main columns. The left column contains the theoretical assumptions or recommendations and alternative views, respectively, while the right column presents the corresponding empirical observations. Furthermore, a summary table presents diverging, alternative, and critical views with regard to the three open questions, brought forward by participants. While the results matrix displays the results in an easily accessible way, which speaks for itself, a discussion of the findings seems useful in any case.

At the outset, it can be said that, similar to the closed questions, strongly held views of a group of participants have led to clearly diverging answer patterns. Before going into the details of the analysis I will briefly discuss this group and its line of reasoning. In short, one might call their opinion the ‘lawyer’s perspective’. This group simply does not believe that the ICC should play an active role in peace processes, which are not covered by the

ICC's judicial mandate. This group views the legal and political processes as completely separate and warns that the Court's entanglement in the short-lived politics of peace negotiations will only serve to endanger the Court's independence and ultimately its credibility.

Question 3 was intended to identify ways and factors through which the ICC positively influences peace processes. When looking at the results contained in the matrix, three main supportive factors have been hypothesized. First, participants suggested that the ICC might support peace processes by putting pressure on the parties to a conflict to participate in peace negotiations. Peace negotiations provide a forum for those subject to these pressures to pursue and protect their interests. The ICC is thus a supportive factor that enables peace negotiations to take place at all. Strong empirical evidence seems to support this claim. In Uganda, it is now widely believed that the LRA only returned to negotiations hoping to address the "threat" of ICC arrest warrants. Secondly, it is believed that the existence and activity of the ICC can lead to the inclusion of accountability mechanisms in peace negotiations. This ensures that grievances of victims and justice are addressed early on, but also creates an avenue towards national reconciliation. Such processes have been observed in Uganda, where in particular traditional as well as national accountability mechanisms will likely be a part of a final peace deal. Third, participants attribute a deterrent effect to the ICC's work, which will get even stronger after the first trials have been concluded successfully. Such deterrent effects have been reported in the DRC. The first arrests have led some Congolese militia leaders to reform their methods of warfare in order to avoid committing crimes under the Rome Statute. Others have also seen the decision by the Government of Sudan to finally allow the deployment of UNAMID as indicative of the deterrent effect of the ICC. Deterrence is of particular relevance, because it relates to the prevention of *future* crimes, whereas the first two (i.e. pressure, and inclusion of accountability) relate to the behavior of negotiating parties in a peace process *after* the crimes have been committed. Furthermore, in a phone interview, one expert highlighted the role of victims and the importance of addressing justice to ensure a sustainable peace. If justice is not served, people will eventually take up arms to avenge past injustices themselves. The expert pointed out that while the population in Uganda, at the moment, might have a preference for ending the violence in the short-term, even at the expense of the ICC punishments, their desire for justice will eventually prevail. Justice must be addressed. Adherents of the 'lawyer's perspective' point out with regard to question 1 that it is the role of the UN Security Council alone to support peace processes.

Question 4 deals with the potentially negative effects of ICC prosecutions during ongoing conflict. Tellingly, none of the participants provided any empirical evidence of the ICC actually disrupting peace processes. This is in line with a large number of respondents who simply rejected the notion of the ICC as being a disruptive factor. This result might be due to the inherent selection bias of this expert survey, but cannot easily be dismissed either. Some of the participants, however, conceived of certain circumstances, which might cause the Court to disrupt rather than bolster peace processes. The first refers to the timing of the arrest warrants. If a would-be signatory of a peace deal is indicted as a war criminal on the eve of signing a peace treaty, this might hinder the finalization of such a treaty. The likelihood of such a scenario will decrease over time, as the ICC becomes a more established institution. Another view describes the special circumstance of when arrest warrants and peace negotiations coincide in a situation where the indictees are involved in ongoing conflict, are aware and concerned about the arrest warrants and end up using the arrest warrants as a bargaining chip. Furthermore, failure to ensure the speedy conclusion of trials and investigations will weaken the deterrent effect and a perceived or actual politicization of the Court will undermine its credibility and potential to support peace processes. The main criticisms with regard to question 2 amount to a rejection of the whole peace versus justice debate. According to this view, the ICC does not disrupt peace processes at all, but is used as a scapegoat to divert from failing political processes. For example in Uganda many previous attempts to make peace with the LRA had failed before the ICC became involved. And in Sudan, the obstruction in the process of deploying UNAMID started long before the ICC issued arrest warrants. To attribute exclusive responsibility for the failure of a peace process or to view the ICC as the only obstacle towards the conclusion of a peace deal does not seem warranted, given these previous experiences.

Finally, question 5 inquired about concrete measures enabling the ICC to support peace processes in the future. The question specifically suggested that one way forward could be a combined approach of peace and justice processes working closely together to ensure the achievement of peace. Here, the great divergence of opinions again became very clear. The adherents of the ‘lawyer’s perspective’, that do not believe that the ICC should play a role in peace processes, of course also rejected the notion of improving the ICC’s capabilities of doing so in the future. The more ferocious critics view such steps as “neither lawful nor desirable”. The more moderate critics point out that while it is certainly desirable to achieve support of peace processes as a by-product of the Court’s work, it is

not the Court's mandate or main function to support peace processes. Beyond these criticisms, a range of other approaches has been suggested. In general, a 'case-sensitive approach' will ensure that measures will be adapted to the requirements of particular situations. Furthermore, it has been suggested to pursue a 'parallel-approach'. Peace and judicial processes proceed independently and in parallel, both being mindful not to disrupt each other. Others suggested a direct collaboration between the Court and conflict mediators, who should ensure that accountability is dealt with from an early stage of the peace process in line with the 'combined approach'. Those in favor of political control of the Court have proposed to give the UN Security Council an active role in managing the ICC's work, focusing primarily on the goal of achieving peace. It was also noted that when the opportunity arises national prosecutions should be supported in line with the complementarity regime of Article 17. Finally, participants have stressed the importance of the speedy conclusion of trials and of state party cooperation as well as the cooperation of UN and AU peacekeeping missions in enforcing the Court's decisions.

3.2.3 Results Matrix

Results Matrix:		
	Theoretical Assumptions	**Empirical Observations**
QUESTION 3: ICC SUPPORTS PEACE PROCESSES?	• ICC Arrest warrants put **pressure** on parties to a conflict to participate in peace negotiations. → ICC may bring pressure to bear that can (1) sever links with prior suppliers of either arms or money (2) delimit political options for those subject to arrest warrants (3) delimit options of escape	• The **LRA** returned to the peace negotiations because of the ICC arrest warrants. This was directly linked to the expectation of the LRA leaders that they could work out some amnesty/alternative justice with the Uganda Government. • Where the Security Council could not agree on intervention in **Darfur**, a lesser form of intervention was to refer the case to the Prosecutor. It means the international community feels that it is doing something.
	• The presence of the ICC can lead to the inclusion of **accountability** within a peace process with the aim of challenging ICC arrest warrants. This may **bolster national accountability** efforts.	• This is what happened in **Uganda**: The LRA challenged the ICC arrest warrants. As a result, accountability was addressed as a part of the peace process and a final peace deal will likely involve national accountability mechanisms.
	• The ICC has a **deterrent** effect on would-be war criminals. • The deterrent effect will **get stronger over time** when first trials have been concluded.	• In the case of the **DRC**, the arrest and surrender of some Congolese militia to the ICC has "scared off" some militia leaders who are now trying to reform their methods of warfare in order to avoid committing international crimes under ICC jurisdiction. For example militia leader Gen. Nkunda allegedly has stopped recruiting child soldiers and demobilized the ones previously recruited. • In **Sudan** the possibility of arrest remains real, a fact which will likely deter future crimes. The agreement for the deployment of UNAMID, which came after the referral of the situation to the ICC, may in fact be an indication that the Government of Sudan is keen on ending the commission of crimes.
	• ICC supports a **sustainable peace.** → If justice is not addressed, communities will be divided, and people will take the law into their own hands, i.e. take revenge[46].	• In **Uganda,** people are desperately longing for peace, but the desire for peace, however, will be replaced with a desire for justice[43].
	• **Support for international peace and security is a stated goal of international justice.**	• In the **Uganda** case, there can be no question that the action taken by the ICC led to a peace process deserving of that

[46] Quote taken from transcript of phone interview. The transcript was not contained in the appendix, because it does not fit in with the answer patterns to the three questions, but rather served an overall informative purpose.

	→ PP 3 of the Rome Statute: crimes dealt with by the Statue threaten international peace and security *Conceptually, the work of the ICC is thus inherently and by its very nature supportive of peace in general and peace processes more specifically.*	name and that the ICC made therefore a clear and direct contribution to it.

	Theoretical Assumptions	Empirical Observations
QUESTION 4: ICC DISRUPTS PEACE PROCESSES?	• In the short term – as long as the ICC is not well known – very **bad timing** of indictments or prosecutorial activities could seriously disrupt peace processes. → Mainly a **transitory problem**, as the ICC is a young institution. In the long run more likely to PREVENT violent conflict.	*No empirical observations of the ICC disrupting peace processes reported by survey participants.*
	• ICC may disrupt peace process when those subject to arrest warrants are involved in **ongoing conflict,** when they are **aware and concerned** about the arrest warrants, and when the arrest warrants are used as a **bargaining tool** in ceasefire negotiations.	
	• **Slow trials and investigations** may weaken deterrent effect and lead to resumed violence and may destabilize the peace process.	
	• **Politicization** of the Court's work and ignoring political sensibilities	

	Recommendations	Empirical Observations
? QUESTION 5: HOW TO IMPROVE ICC SUPPORT TO PEACE PROCESSES IN THE FUTURE? CAN A COMBINED APPROACH BE IMPLEMENTED?	• A **"case-sensitive" approach** is necessary: measures must vary from one situation to another.	
	• **Parallel approach:** Peace processes and the ICC need not be in close cohorts. Instead, each should fulfill their respective mandate, both being mindful of the need to secure peace while not sacrificing justice.	• At **Juba**, the fact that the ICC was involved inspired local actors to think seriously about accountability and about what would suffice for a complementarity challenge. The Court, in turn, took several steps to be sensitive to the peace process in terms of timing of arrest warrants, a low profile for contact with people on the ground, etc.
	• **Combined approach:** To achieve durable peace, justice must be an essential component of peace negotiations. → The combined approach can be achieved if the UN and other mediators can develop guidelines for peace negotiations, wherein justice for grave crimes is included as a necessity and not an option.	
	• The **Security Council** should take a more active role in controlling the ICC – i.e. referring cases, but also deferring them if the ceasefire negotiations hold alternative reconciliation measures.	
	• The **complementarity** principle should be taken seriously: When national accountability mechanisms are available, they should be used. → Bottom line: Amnesty not an option for the worst crimes – there are several ways to achieve this goal. •	
	• Ensure **State Party cooperation** to enforce mandates and **speedy trials.**	• In the **Uganda** situation, press reports have indicated that the local communities seem to have lost confidence in the ability of the ICC to deliver justice due in part to the long duration of outstanding warrants of arrest.
	• The **UN or AU peacekeeping mission** must have justice in their mandate.	

Critical and Alternative Views		
Question	**Alternative views**	**Empirical Observations**
On **Question 3** (ICC supports peace processes)	• It is **not the role of the ICC to support peace processes**: It endangers independence, instead it is the task of the UN Security Council to support peace processes. The imminence of a sustainable cease-fire would be the only justification for the Security Council to exercise its authority (Art. 16) to halt proceedings by the ICC • There is **no dichotomy between peace and justice**: Prosecuting those guilty of the most serious crimes is crucial to attaining true peace.	
On **Question 4** (ICC disrupts peace processes)	• The **ICC does not disrupt peace processes.** Peace negotiations often fail for reasons unrelated to the ICC → But ICC often used a **scapegoat**. → The debate about the ICC disrupting peace processes is a non-debate to **divert from failing political processes** to achieve peace.	• In **Uganda** several previous peace initiatives had failed before the ICC had come into the picture. • In **Sudan,** the ICC cannot be blamed for the Government's reluctance to allow the deployment of UNAMID – obstruction started long before the ICC issued arrest warrants – "there is **no peace process**."
On **Question 5** (The Future?)	• **Separate approach:** The ICC can best support peace processes by staying out of the political arena wherever possible, so that it does not run the risk of appearing to favor political compromise at the cost of its own judicial independence.	
	• Combined approach **neither lawful nor desirable.** The Court is bound by its Statute and cannot be involved in plea-bargaining for political considerations. → UN Charter assigns this role [maintenance of intl. peace and security] to the Security Council. • It is **neither the function nor the mandate of the** ICC to support peace processes. • **Peace process:** political in nature and scope. **Judicial process:** is an entirely different process and should be planned organized and implemented outside the political process.	

3.3 New Hypotheses

In this section a set of new and more refined hypotheses about the influence of ICC prosecutions on peace processes will be presented, which were derived on the basis of the expert survey. Before addressing the new hypotheses, recurring to the existing theories and assumptions and to re-evaluate them in light of the results of the survey is necessary.

Realists are skeptical about war crimes tribunals and see them as an impediment rather than a cause of peace. That is why question 4, which was derived from the realist WH-2, inquired about the negative influence of the ICC on peace processes. Participants did not support any of their hypothesized assumptions with empirical evidence and most of the participants rejected the question outright. Realism, at least from the perspective of this small sample of experts, does not seem to be a viable approach to explain the impact of the ICC on peace processes.

The first closed question has shown the importance of cooperation and support by member states for the success of the ICC. Hinting at one of the biggest dilemmas of the Court rather than explaining how the ICC may successfully support peace processes, the international society approach offers one possible explanation of this result. States remain egoistic and may not cooperate with the Court even if they believe that the norms, which the ICC represents, are important. Cases like Darfur and the objections of some states with regard to the ICC's encroachment upon their national sovereignty, as discussed by Moghalu (2006) and Ralph (2007), seem to lend support to this view. This result does not imply that the ICC has a negative influence on peace processes, but delineates the contextual challenges for the ICC in fulfilling its mandate.

Finally, two questions (questions 2 and 3) dealt with the implications of liberal theory for war crimes tribunals. Question 2 addressed the hypothesized positive contributions of war crimes tribunals to a sustainable peace as set out by Bass (2000). Deterrence was identified to be the most important effect of international war crimes tribunals. The importance of the deterrent effect of war crimes tribunals was confirmed and further elaborated in some of the free responses. In the DRC, there are indications that the ICC supported the prevention of crimes. There has thus been a 'within-case-deterrence' through the ICC, which has led participants in the conflict to change their behavior. A number of participants suggested that rehabilitation of victims should be added to the list of positive effects of war crimes tribunals as proposed by liberal theory in question 2. In a phone interview, one participant also mentioned the concerns of victims. While sometimes

they might prefer to forsake justice in order to stop hostilities in the short-term, eventually they will want to see justice be done. If justice is not addressed there will be revenge. This was also the core lesson of Bass (2000), who argued that while war crimes tribunals may not be uniformly supportive of peace processes, they are the best option available. Finally, participants mentioned the importance of the ICC supporting peace processes by putting pressure on the parties to a conflict to negotiate. This is a direct contradiction of the realist claim that looming trials will prolong conflict.

As a result of these observations and theoretical considerations, I suggest four new hypotheses. In the formulation of the hypotheses I tried to ensure that they could be wrong, that they are falsifiable, and that they are concrete as suggested in *"Designing Social Inquiry"*[47] (King, Keohane & Verba 1994, p. 19). That is why I specify independent and dependent variables that spell out how the hypotheses could be tested in practice.

The first hypothesis is derived from the international society approach and its implications on the support from states. States are often reluctant to support the ICC if their national interest is not at stake. States that are unwilling to prosecute crimes under the Rome Statute tend to be reluctant to cooperate with the ICC. That is why I suggest the following hypothesis:

H1: In the absence of third-party enforcement mechanisms, the ICC's ability to fulfill is mandate will be greatest in case of a state self-referral.

The independent variable is the type of trigger mechanism, a self-referral by a state, the intervening variable 'third-party enforcement mechanisms'[48] can be measured by the availability of a peacekeeping mission or a coalition of States Parties with the mandate and the capabilities to enforce the Court's decisions, and the dependent variable 'ICC's ability to fulfill its mandate' can be measured by the number of successful arrests, trials, and convictions. If one assumes that when able to fulfill its mandate the ICC will support the achievement of a sustainable peace, as posited by liberalism, the hypothesis can be modified:

H1a: In the absence of third-party enforcement mechanisms, the ICC's ability to support peace processes will be greatest in case of a state self-referral.

[47] A theory or hypothesis can be wrong if we can answer the question: What evidence would convince us that we are wrong? A theory is falsifiable if it is able of generating as many observable implications as possible. Concrete hypotheses are stated precisely, make specific predictions and can be shown more easily to be wrong and therefore better (King, Keohane & Verba 1994, pp. 19-20).

[48] I determine that the variable 'third-party enforcement mechanism' is an intervening variable because the availability or absence of an external enforcement mechanism directly influences the importance of the independent variable, i.e. the trigger mechanism.

The second hypothesis is a modification of the assumptions on war crimes tribunals made by liberal theory. Liberal theory posits that war crimes tribunals deter future crimes. Survey participants observed 'within-case deterrence' for example in the DRC. That is why the second hypothesis suggests the following:

H2: A credible threat by the ICC will deter the commission of war crimes[49] *during ongoing conflict.*

The independent variable 'credible threat' can be measured by the number of successful arrests and convictions. The dependent variable 'deterrence' can be measured by the reduction in the rate of crimes committed punishable under the Rome Statute.

The third hypothesis contradicts realism, which attributes the threat of arrest warrants to prolonged war. Instead it posits that:

H3: Pressure exercised by the ICC supports peace processes.

The independent variable 'pressure' can be measured and conceptualized by the number of arrest warrants and/or the reduction of flows of finances and arms, the reduction of political options, and the restriction of options of escape and free movement. The dependent variable 'peace processes' could be measured by the number and the success of mediation efforts after the arrest warrants have been issued.

The fourth and last hypothesis is a concretization of Bass' assumption that in the absence of justice, there will simply be revenge. Participants pointed out the importance of war crimes tribunals with regard to rehabilitating victims and noted that even in Uganda, where people are currently calling for justice to be compromised for the sake of immediate peace, justice will have to be addressed eventually in order to avoid revenge. Accordingly, hypothesis four suggests the following about the role of justice in post-conflict societies:

H4: Failure to address grave crimes through the ICC or national accountability mechanisms will lead to shorter peace duration.

The independent variable can be measured by the number of trials and convictions. The dependent variable 'peace duration' could be operationalized by the number of days without violence, in line with the negative interpretation of peace.

[49] 'War crimes', here, indicate all crimes punishable under the Rome Statute.

4. Summary and Conclusions

In this paper, I have tried to make a contribution to the study of war crimes tribunals and their influence on peace processes from the perspective of IR theory. The goal was to conceptualize the peace versus justice debate from a theoretical point of view and to suggest new and refined hypotheses for future research.

I have presented different theoretical approaches that make diverging and partly contradicting assumptions about the merit of international war crimes tribunals for the cause of peace. Liberalism is hopeful about the merits of international war crimes tribunals for peace while Realism is opposed to war crimes tribunals. On the basis of the theories I have formulated rival working hypotheses, which guided the construction of an expert survey. Furthermore, the international society approach was suggested as an alternative theoretical lens.

Section 3.3 contains a detailed summary of how the results of the survey relate to the different theories. That is why it shall suffice to briefly touch upon the main findings. The expert survey has shown that some of the assumptions of the different paradigms of IR theory are also reflected by the answers of participants. Realism, however, did not seem to be a viable approach to explain how the ICC has influenced peace processes. Participants have pointed out the great importance of cooperation by states. In this context, the international society approach seems particularly useful to explain the circumstances, which govern states' decisions to support or neglect the Court. Finally, participants have made many observations that conform to the assumptions made by liberal theory.

As a result, a few suggestions of how the ICC may influence peace processes emerged. I argue that, absent an outside enforcement mechanism, the ICC will be more likely to be able to fulfill its mandate in case of a state self-referral. Assuming that when able to fulfill its mandate the ICC supports peace processes, this also means that ICC support to peace processes will be greatest in case of a state self-referral. Moreover, I posit that the ICC leads to 'within-case deterrence' expressed by a reduction in the rates of crimes punishable under the Rome Statute. The analysis also suggested that pressure exercised through ICC arrest warrants will lead to a higher number and more successful peace mediation efforts. Lastly, I suggest a concretization of the claim that war crimes tribunals replace simple revenge, which was made by a number of scholars. If impunity prevails and crimes punishable under the Rome Statute are not addressed, the duration of peace can be expected to be shorter.

In section 3, I have already pointed out the methodological shortcomings of an expert survey. It is worthwhile to briefly discuss the issue of methodology again here. The group of experts for the survey was *chosen*, and the survey is, therefore, affected by the problem of selection bias. This, however, was a conscious decision, fully cognizant of the fact that the results of the survey would not be suitable for generalizations. The possibility to generalize results was compromised for the purpose of deriving hypotheses, which are grounded in empirical evidence and based on the collective wisdom of a group of experts. In line with what has been suggested by George and Bennett (2004) on the merits of case studies and "field work" for the purpose of theory development, the expert survey helped me to gather information and identify variables, which were instrumental for the formulation of new hypotheses. These new hypotheses will face their ultimate test in the future application in studies, which follow the formal rules of comparative quantitative and qualitative analyses.

While beyond the scope of this paper, it would have been interesting to invite the experts to participate in a second round of the survey after circulating the results matrix and the hypotheses. Such an iterative approach could potentially lead to gradually improved hypotheses. This would be a particularly interesting option for the preparation of a conference where experts could address and further refine the issues distilled in a results matrix and a set of new hypotheses. It thus seems to be worthwhile to consider methods like an expert survey when case studies or quantitative analyses are not yet feasible or reasonable due to insufficient data. Expert surveys offer a way to identify important factors and variables and can thus make a contribution to the improvement of and an increase in knowledge about evolving policies and institutions.

All in all, when looking at the results of the survey as well as the empirical evidence, I am hopeful about the possibility that a functioning ICC will support rather than disrupt peace processes. This year marks the beginning of the first trials before the ICC. The ICC's mandate is to bring criminals to justice. Beyond influencing peace processes, the ICC will have to prove that it can deliver and meet the high legal, political, and moral expectations concerning its ability to bring justice to situations where, in the past, perpetrators often escaped with impunity. In the future, the cooperation and support extended by States Parties, the UN Security Council and peacekeeping missions, to a large degree, will determine how successful the Court can be in fulfilling its mandate and ultimately to contribute to peace.

APPENDIX:

Survey Results:

QUESTION 1:

Which of the following practical and political measures/factors is most important in order for the International Criminal Court (ICC) to support peace processes rather than disrupt them?

1: most important - 7: least important

Answer Options	1	2	3	4	5	6	7	Rating Average	Response Count
Timing of Indictments	2	3	2	5	0	6	0	3.9	18
Sequencing	2	0	0	0	4	3	9	5.7	18
Security Council Support	2	3	4	3	3	2	1	3.7	18
Support from UN Peace Missions	0	2	4	4	4	1	3	4.4	18
Support from Member States	7	3	2	1	3	0	2	2.9	18
Credible Threat	2	4	3	2	2	3	2	3.8	18
Local Outreach	3	3	3	3	2	3	1	3.6	18

Please add any other measures you deem crucial that were omitted in the rating scale above.	
1.	Competence of the Prosecutors; Speed of the trials; prompt administration of justice; Do not overburden the indictment – charges are illustrative rather than comprehensive.
2.	The understanding by the persons in the ceasefire negotiations that they are targeted and are the subject of the arrest warrant. If they do not know, then it is not an issue in the negotiations.
3.	ICC arrest warrants during a peace process can incentivize a state to attempt to exercise complementarity as happened in Uganda.
4.	1.Views of victims and the affected communities; 2. Active support by local authorities, traditional, religious and Civil leaders; 3.Domestic legal framework to support the work of the court
5.	Support from the UN Secretariat especially OLA and DPA to clarify the role of ICC as reinforcing the peace processes rather than building a perception that ICC undermines peace efforts.
6.	Timeliness of judicial process, i.e. justice delayed is justice denied; Equitable approach, i.e. cases should not be selected - or avoided- in line with political priorities of key global players
7.	THE CHOICE OF CASES MUST TAKE INTO ACCOUNT THE LEVEL OF THREAT TO THE PEACE INITIATIVES (knowing that the Court was created to try leaders or the key role players).
8.	Protection of victims and witnesses; Ensuring in situ trial

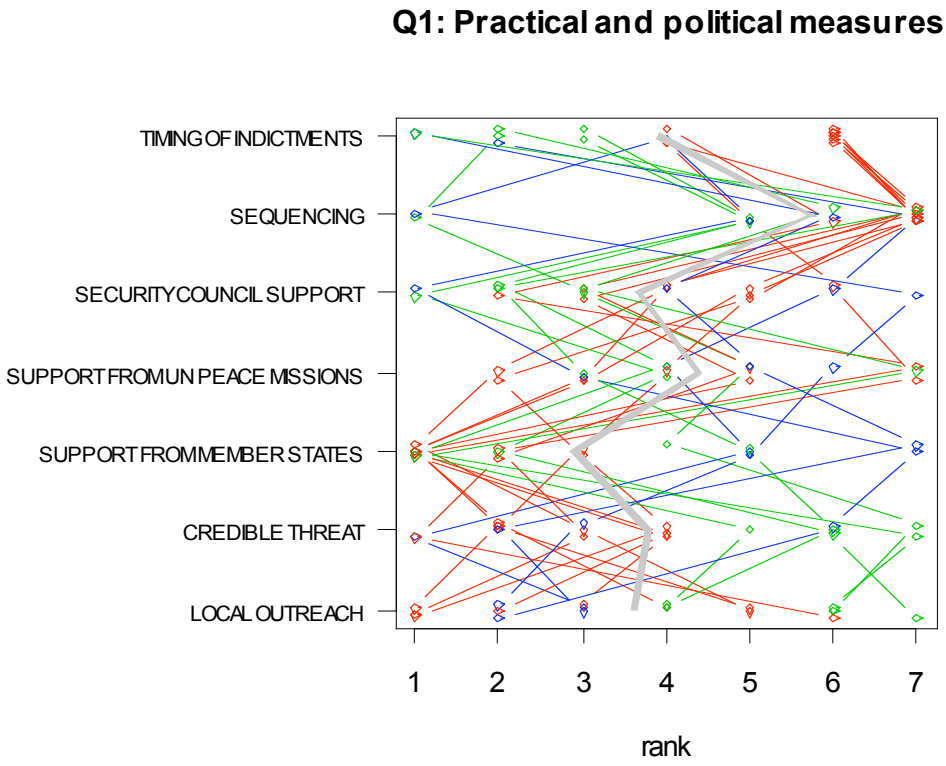

Figure 1: Relative importance of practical and political measures, displayed as rank profiles for each individual. The importance of the items has been ranked from 1 (most important) to 7 (unimportant). Clusters of similar rank-profiles are displayed using same colour or line-type respectively. The mean ranks are displayed as thick grey line.

QUESTION 2:

Of the following effects of war crimes tribunals, which do you deem to be most important or most helpful in order to achieve a just and sustainable peace in practice?

1: most important - 5: least important

Answer Options	1	2	3	4	5	Rating Average	Response Count
Purging threatening leaders	7	3	2	2	4	2.6	18
Deterring War Criminals	4	7	4	2	1	2.4	18
Rehabilitating Renegade States	3	1	2	5	7	3.7	18
Putting Blame on Individuals, Not Groups	1	3	4	7	3	3.4	18
Establishing the Truth (Comprehensive account of what actually happened)	3	4	6	2	3	2.9	18

Please add any other measures you deem crucial that were omitted in the rating scale above.	
1.	Compensating and rehabilitating victims
2.	War crimes trials can contribute to reaffirming norms.
3.	Establishing a culture of accountability; creating a sense of justice among victims
4.	Transparency of all action and highest levels of accountability
5.	Rehabilitation of victims

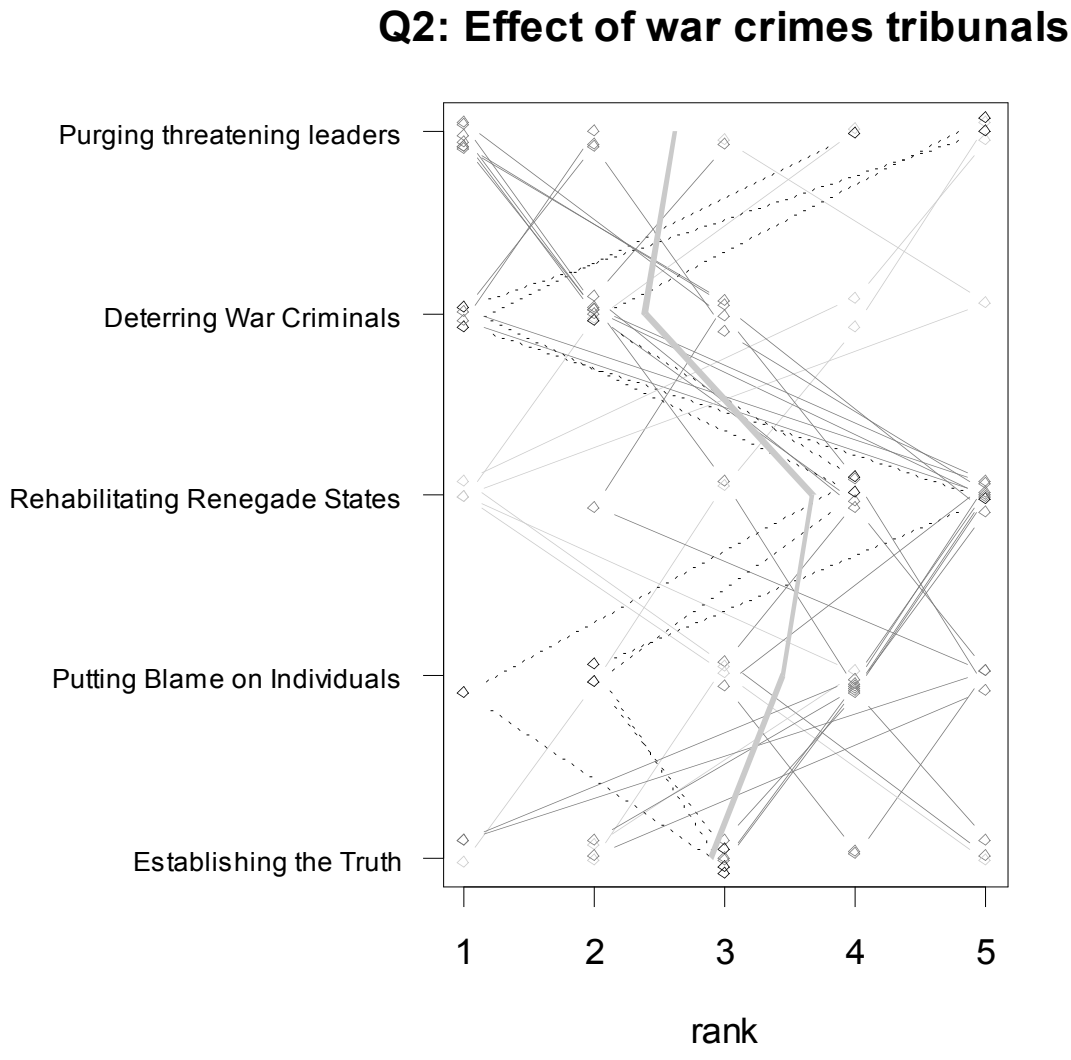

Figure 2: Relative importance of the effects of war crime tribunals, displayed as rank profiles for each individual. The importance of the items has been ranked from 1 (most important) to 5 (unimportant). Clusters of similar rank-profiles are displayed using same colour or line-type respectively. The mean ranks are displayed as thick grey line.

QUESTION 3:

What are the most important factors that cause the ICC to support peace processes?	
1.	I do not believe it is the role of the ICC, per se, to support peace processes, as such processes are clearly political and will undoubtedly call for compromises, which could impact the ICC's ability to maintain its independence. However, in order for the ICC to be able to pursue investigations, it must be sensitive to not disrupting processes "on the ground" which may pave the way for peaceful settlement of disputes.
2.	The ICC's work puts pressure on actors participating in conflicts. It can thus be one of the factors that makes them re-consider their strategies and goals and be an incentive to end hostilities and participate in the peace process. This deterrent effect will grow over time, as the ICC is a permanent institution that will try individuals whose crimes may have led to success in the short term, but who will one day be held accountable for their past crimes. The ICC's ability to end impunity in a few select cases with respect to a few select and prominent individuals will have a wide deterrent effect beyond the cases concerned. Of course there are many other factors which may override the deterrent effect of the ICC, but the ICC remains one crucial element, whether sufficient in a particular case or not.
3.	The ICC is not in the business of supporting peace processes. That is up to the Security Council pursuant to the UN Charter. The imminence of a sustainable cease-fire would be the only justification for the Security Council to exercise its authority (Art. 16) to halt proceedings by the ICC.
4.	I do not see a dichotomy between peace and justice in modern international practice. Prosecuting those guilty of he most serious crimes is crucial to attaining true peace.
5.	The ICC can be an important part of the international community's tools for pressuring a rogue state. For example, where the Security Council could not agree on intervention in Darfur, a lesser form of intervention was to refer the case to the Prosecutor. It means that the international community feels that it is doing something. Also the prospect of individual punishment holds a very strong deterrent value although that is a very difficult issue to prove in mathematical terms.
6.	The relationship between the ICC and peace processes is highly complex. The threat of action by the ICC may bring pressure to bear that can (1) sever links with prior suppliers of either arms or money (2) delimit political options for those subject to arrest warrants (3) delimit options of escape. All of these may be incentives to negotiating a conclusion to the conflict. The presence of the ICC can also lead to the inclusion of accountability within a peace process with the aim of challenging ICC arrest warrants. This is what has happened in Uganda. This can be a positive effect, as it may lead to the bolstering of national accountability efforts.
7.	As indicated in the question, it is too early to answer these questions strictly from an ICC perspective because the experience is so limited still / has not reached a stage that allows for any conclusions. So answers rely on the current state of affairs, but also on the experience made by ad hoc tribunals. Support for international peace and security is a stated goal of international justice. Pp 3 of the Rome Statute makes it clear that the crimes dealt with by the Statue threaten peace and security and the ad hoc tribunals, established under chapter VII of the UN Charter, are based on the same premise. Conceptually, the work of the ICC is thus inherently and by its very nature supportive of peace in general and peace processes more specifically. In the Uganda case, there can be no question that the action taken by the ICC led to a peace process deserving of that name and that the ICC made therefore a clear and direct contribution to it.
8.	According to reports we received from outside parties (UN, NGOs, others) the threat of a well functioning Court (incl. cooperation from States) was a factor in bringing the LRA to the negotiations table and to convince rebel leaders in several situations to restrain themselves. Consequently I would argue that a well functioning, credible Court, which is able to further a culture of accountability, will enhance the chances for sustained peace.
9.	- The threat of arrest and international judicial action is a catalyst for peace processes. It has been widely acknowledged that the issuance of ICC arrest warrants for top LRA leadership gave

	momentum to the peace negotiations. It is the threat of ICC that kept LRA on the negotiating table in the expectation that they could work out some amnesty/alternative justice with the Uganda Government. This fact has been acknowledged by the Uganda Government in their various statements to the ICC ASP, as well as some civil society organizations such as Human Rights Watch and some based in Northern Uganda. - ICC has a deterrent effect on would be criminals. In the case of DRC some UN sources in the field have reported that the arrest and surrender of some Congolese militia to ICC has "scared" off some militia leaders who are now trying to reform their methods of warfare in order to avoid committing international crimes under ICC jurisdiction. In a recent press interview one militia leader Gen. Nkunda is reported (in relation to possible investigation by ICC) to have stated that he has since stopped recruiting child soldiers and that the ones previously recruited were demobilized. - In relation to the Sudan, even though the GoS has publicly stated it does not recognize ICC jurisdiction, some sources close to the Government have indicated that the GoS is in fact "very scared" of the ICC, particularly because they know the arrest warrants will not go away. The possibility of arrest remains real, a fact which will likely deter future crimes. The agreement for the deployment of UNAMID, which came after the referral of the situation in Darfur to ICC, may in fact be an indication that the GoS is keen on ending the commission of crimes.
10.	ICC support to peace processes in Darfur and Northern Uganda is, at best, "mixed" and seems to follow very different approaches. In addition, one must differentiate between ICC plying an active role or being "used" as one element of orchestrating a peace process. In the case of Darfur ICC action has, at least so far, not supported the peace process, a situation not questioned or critically raised by the managers of the political process, the UN and AU Special Envoys. Also, since the "accused" is primarily a Government, it seems that the ICC process is managed differently, compared to Uganda. In the case of Northern Uganda, the UN Special Envoy has made strategic use of the ICC indictments and, in fact, has used the indictments as part of his overall strategic negotiation approach. Again, the ICC has indicted the LRA Leadership, not GoU Leadership, in my view a major shortcoming.
11.	Peace and justice are mutually influencing. Safety of civilians is a duty of the ICC. Justice relates to the prevention of crime as well as responsibility afterwards.
12.	Conclusive trials above the arrest warrants and transfer of suspects to the ICC; Outreach; "In situ" Trial.
13.	The fear of ICC influence the involvement and the enthusiasm of senior leaders of army group to integrate the peace process talk and demobilization process
14.	Justice is an integral part of sustainable peace - arrest warrants / prosecutions allow the most responsible culprits for crimes to be taken out of the peace negotiations/ come to the negotiating table

QUESTION 4:

What are the most important factors that cause the ICC to disrupt peace processes?	
1.	Adherence to the ICC's clear mandate to investigate and, in appropriate cases, prosecute perpetrators of crimes within the jurisdiction of the ICC.
2.	Very bad timing of indictments or prosecutorial activities could seriously disrupt peace processes, especially during the early years of the Court when actors in conflict do not yet know what to expect from the Court. e.g. Indicting high-profile criminals on the eve of the signing of a peace agreement could obviously anger the persons concerned to a degree that would make them re-consider the deal. The role of the ICC in a peace process as an independent, international actor which is not a negotiating party must be clear to all parties concerned from an early stage on. This is obviously mainly a transitory problem, as the ICC is a young

	institution. In the long run, having the ICC as an effective international Court looming over the head of criminals can only be a useful deterrent and PREVENT violent conflict.
3.	Where the peace negotiations are in the hands of the criminal suspects, the threat of their arrest by the ICC will not encourage them to accept peace terms that presages their early personal surrender to the court. There is a strong temptation on the part of diplomats involved in peace negotiations to offer immunity to key suspects as a reward for their cooperation. The ICC cannot be bound by such implied or covert promises. Without justice there will be no permanent peace since the cries for revenge will e enhanced and the respect for the court and its competence will be lost.
4.	I do not see the ICC as disruptive. The preise of this question is wrong.
5.	1. Those subject to arrest warrants are still fighting and the conflict has not concluded 2. Those subject to arrest warrants are aware and concerned about them 3. The arrest warrants are used as a bargaining tool in ceasefire negotiations (the perpetrators seek immunity and the negotiators cannot give it)
6.	ICC arrest warrants themselves can become part of the contested issues during the negotiations, and those subject to arrest warrants may demand their removal as a precondition to a negotiated settlement. Ultimate settlement of the peace process could be delayed as a result or even abandoned. There could be security issues in relation to potential witnesses or others who have been in contact with the ICC.
7.	The work of the ICC can be considered an obstacle in cases where a person indicted by the ICC is, at the same time, an interlocutor in / party to peace talks. ¨While it is clear that this can be a sensitive issue, it also must be pointed out that the ICC only has jurisdiction over the most serious crimes and thus crimes for which there can be no amnesties in any case.
8.	I have yet to see any evidence that any of the Court's actions have a negative impact on an ongoing peace process.
9.	- ICC does not disrupt peace processes. This is a fallacy born out of a lack of understanding of the judicial role of the ICC. This perception is of course being fuelled by alleged criminals who often use ICC as a blackmail tool to demand amnesty before signing a peace agreement. Peace negotiations fail for various reasons totally unrelated to ICC - for instance in Northern Uganda, even before ICC came into the picture, several previous attempts at peace had failed. Similarly in the case of the Sudan, it has often been said that the GoS is not cooperating with the UN for the deployment of UNAMID due to the outstanding ICC arrest warrants, yet the lack of cooperation by the GoS on the deployment of UNAMID started long before the issuance of the arrest warrants. ICC just happens to be a convenient scapegoat.
10.	There is no conclusive empirical evidence that the ICC has disrupted the peace process, neither in Darfur nor in Uganda. In the case of Darfur, there is no peace process, in the case of Uganda, the final outcome of the Juba negotiations will not be peace in Northern Uganda but the dissolving of the LRA and a political-judicial process to satisfy ICC requirements, at least in a formal sense. The debate about ICC disrupting peace processes is, in my view, a non-debate to divert from failing political processes to achieve peace.
11.	State is unwilling or unable to hold perpetrators within their territory to account. Negotiation is a tactic used by one of the parties to the conflict to make time to regroup and resume hostilities. Massive crimes are ongoing or increasing during the negotiations.
12.	- The ignorance of political sensibilities; - limitation of the trial process (the long time trial process may be seen as a new form of tribute

	to impunity).
13.	The fact that the ICC took time to investigate and to deliver warrant make that some army group of perpetrator think that they are not concern on ICC procedure and destabilize the peace process
14.	- Timing of warrants / prosecutions may lead to further violence - politicization of the Court's work to be seen as an agent disrupting a peace process

QUESTION 5:

What measures would you suggest to improve the ICC's ability to support peace processes in the future? Is the "Combined Approach", whereby peace and justice work together, the best way forward in order to ensure that the ICC plays a positive role in peace processes? How could the "Combined Approach" be implemented?	
1.	The ICC, I believe, can best support peace processes by staying out of the political arena wherever possible, so that it does not run the risk of appearing to favor political compromise at the cost of its own judicial independence.
2.	This obviously must vary from one situation to another. But in general terms improving knowledge about the Court in situations countries is an important factor. One other important consideration would be to take the complementarity principle seriously. If there is a reasonable accountability mechanism possible in the situation country and if it is the wish of the national actors to use that mechanism, it should be yielded to - provided it lives up to the standards of the Rome Statute. The main message of the ICC should be that there can be no amnesty for the worst crimes - and that this goal can be achieved in several ways.
3.	A combined approach is neither lawful nor desirable. The Court is bound by its Statute and cannot be involved in plea-bargaining for political considerations. The UN Charter assigns that role to the Security Council, which presumably will take into considerations the nature of the charges being considered. A Council that ignores the UN Charter obligations to respect international law, which includes the Statute of the ICC, will foul its own nest and lose all credibility.
4.	I am with you on the "combined" approach, but that also entails having the rest of the international community -- typically acting through the Security Council or the General Assembly -- on the same page. Sometimes the ASP could provide the necessary "community" support -- but it does not have the ultimate possibility of military power, the threat (or actual use) of which may sometimes be necessary.
5.	The security council take a more active role in controlling the ICC - i.e. referring cases, but also deferring them if the ceasefire negotiations hold alternative reconciliation measures. that way the international community can make a balance between the two and the ICC is not the only reconciliation method
6.	I am more in favor of the parallel approach. I do not think that the ICC and peace processes need to be in close cohorts. Instead, each should fulfill their respective mandate, both being mindful of the need to secure peace while not sacrificing justice. Again Uganda could possibly provide a good example in years to come. At Juba, the fact that the ICC was involved inspired local actors to think seriously about accountability and about what would suffice for a complementarity challenge. The Court, in turn, took several steps to be sensitive to the peace process in terms of timing of arrest warrants, a low profile for contact with people on the ground, etc. All these factors highlight some of the complexities, and approaches may not always be complementary, but can proceed in parallel.
7.	It is important to keep in mind the supporting peace processes is not a function of the ICC, while it certainly desirable to achieve such support as a result of the work done by the ICC. The Court cannot become a political. Therefore, the potential of the combined approach needs to be explored to its fullest.
8.	See my earlier response to Q5. The best bet is to fulfill the states' ambition set out in the Rome Statute. A well functioning Court will inevitably contribute to sustained peace.

	Meanwhile, please remember that it is NOT the Court's mandate to support peace processes. The Court is first and foremost an instrument of justice. The Statute does allow for certain flexibility, for ex. in Art. 16 or Art. 53(1)(c), but if you blur the Court's clear mandate for justice you will weaken the institution and ultimately its potential to further sustainable peace.
9.	- The Combined approach is the best. To achieve durable peace, justice must be an essential component of peace negotiations. Mediators should make this point very clear at the outset of any peace negotiations, instead of presenting justice as an option that can be dispensed with in the interest of peace. - The combined approach can be achieved if the UN and other mediators can develop guidelines for peace negotiations, wherein justice for grave crimes is included as a necessity and not an option. - The ICC needs to strengthen its outreach programme to convince communities/victims of crimes that justice is essential to sustainable peace. - The enforcement arm of the ICC needs to be strengthened to build confidence in the judicial process. In the Uganda situation press reports have indicated that the local communities seem to have lost confidence in the ability of ICC to deliver justice due in part to the long duration of outstanding warrants of arrest. ICC has to be seen to be effective in delivering justice. The enforcement challenge can however only be overcome through the cooperation of States and international organizations.
10.	I strongly oppose the "combined approach". Peace processes are political in nature and scope, their objective is to negotiate primarily power sharing and security arrangements which are achieved through the application of force, either military, also against civilian population, or the creation of a humanitarian crisis which forces the opponent to change the means applied in the struggle for domination. A Judicial process to "create justice" is an entirely different process and should be planned, organized and implemented outside the political process.
11.	Justice should be the default position and ways should be found to guarantee the safety of the civilian population without amnesty or this will embolden armed groups to increase violence against the civilian population to bully out an amnesty.
12.	- Taking into consideration the impact of the political sensibilities as a result of the conflict; - Reduce the long time trial process; - Target the key role players leaders.
13.	To open immediately investigation where and when there is allegation of crimes and others violations In all Peace talks ensure the participant that no agreement can be against the provision of ICC The state parties on ICC must execute the mandate without invoqued peace process The ICC,can take few time to negotiator adopte principle that soustain justice fist and peace after The UN or AU peace keeping mission must have justice in their mandate
14.	- Court's work should be integrated with the Security Council's / other peace efforts - Court's work cannot be seen as an element outside of peace efforts / should not be seen as able to turn on and off

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