

## **The International Criminal Court's Role in Preventing War Crimes**

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### **Abstract**

This paper discusses the International Criminal Court's (ICC) effectiveness at deterring war crimes and the difficulties at play for an international court such as the ICC. There have been several purpose-specific predecessors to the ICC; however, this court is the first genuinely international court of its nature. Thus, there are many problems, such as a lack of international cooperation from influential nations such as the United States. This paper examines how the ICC prevents and prosecutes war crimes. However, this paper also highlights some of the shortcomings and the total lack of care with respect to human rights that the United States practices in their war practices. This paper concludes that the ICC has the capability of fulfilling its purpose; however, it will continue to be a losing battle as long as actors such as the United States continue to resist their authority. Until the ICC has more widespread adoption from all nations, especially those that are particularly influential internationally, we will continue to see the commission of war crimes.

### **The International Criminal Court's Role in Preventing War Crimes**

The focus of this paper is centered around war crimes and determining what role the International Criminal Court (ICC) plays in deterring these crimes. War crimes are defined as cruel actions that violate international laws during an armed conflict.<sup>1</sup> For example, war crimes would include abusing civilians, destroying buildings and infrastructure not necessary for the war, and killing hostages. As I will discuss in greater depth later in my paper, war crimes and the international courts trying war crimes have plagued our world for a millennium, from the book *International Law* which first conventionalized the idea of war crimes in 1912, to the infamous

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<sup>1</sup> *War Crimes*, BLACK'S LAW DICTIONARY (11 ed. 2019).

atrocities perpetrated by the Nazi Regime during the second world war.<sup>2</sup> I set out to answer through writing this paper if the ICC effectively deters war crimes and if the Court can effectively prosecute them when they are committed. I find this question worth analyzing because of the recent events in our world history. The United States is famously responsible for numerous uncharged war crimes in the global war against terror.<sup>3</sup> Russia has been accused of committing war crimes against Ukraine during its invasion, leading both the ICC and the United States Department of State to launch their own independent investigations.<sup>4</sup> In this paper, I argue that the ICC is unable to serve its purpose of deterring nations and individuals from committing war crimes due to push back from powerful countries such as the United States. I first explain the history and organizational structure of the Court. Then I turn to an in-depth analysis of the Katanga case where an individual was tried and convicted of war crimes in order to highlight a scenario where the ICC was able to bring justice. I follow this example with an empirical analysis of the ICC's effectiveness at deterring war crimes in member nations. I then conclude by looking at the United States' relative hostility towards the ICC and their apparent immunity to prosecution.

### **Overview of the International Criminal Court**

After World War II, the international community was shocked by the countless war crimes, acts of genocide, and crimes against humanity perpetrated by Adolf Hitler and his Nazi Party. The international community and the newly formed United Nations (U.N.) created the first

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<sup>2</sup> LASSA OPPENHEIM, INTERNATIONAL LAW (1912), [https://hdl.handle.net/2027/uc1.\\$b50510](https://hdl.handle.net/2027/uc1.$b50510); *The Nuremberg Trials*, NAT'L WWII MUSEUM, <https://www.nationalww2museum.org/war/topics/nuremberg-trials> (last visited May 21, 2022).

<sup>3</sup> David J. Scheffer, *The ICC's Probe into Atrocities in Afghanistan: What to Know*, COUNS. ON FOREIGN REL., March 6, 2020, <https://www.cfr.org/article/iccs-probe-atrocities-afghanistan-what-know>.

<sup>4</sup> *Situation in Ukraine*, INT'L CRIM. CT. (Mar. 2, 2022), <https://www.icc-cpi.int/ukraine>; Daphne Psaedakis, *U.S. Launches Program to Capture, Analyze Evidence of Russian War Crimes in Ukraine*, REUTERS, May 17, 2022, <https://www.reuters.com/world/us-launches-new-program-collect-evidence-russian-war-crimes-ukraine-2022-05-17/>.

inception of the ICC, called the Nürnberg Tribunal.<sup>5</sup> This tribunal's sole purpose was to prosecute Nazis for their war crimes. However, it was not until 1948 that the U.N. officially recognized the need for an International Criminal Court that is not limited in its ability only to prosecute crimes committed concerning a specific event, such as the Holocaust. The General Assembly of the U.N. passed Resolution 260, which outlines a need for prevention and punishment for the crime of genocide.<sup>6</sup> After 1948, the U.N. took another 50 years to establish the ICC on July 17, 1998.<sup>7</sup> In those 50 years, the world saw notable deadly events such as the Indochina War, the Malayan Emergency, the Korean War, the Vietnam War, the Bangladesh Liberation War, the Civil war in Afghanistan, and Uganda, to name a few. In total, millions of individuals lost their lives due to the war crimes committed during these 50 years before the international community finally created the ICC.

Switching attention to the Court's structure, the ICC was established to combat atrocities that some nations may be unwilling or unable to prosecute. These crimes include genocide, war crimes, crimes against humanity, and crimes of aggression.<sup>8</sup> Structurally, the ICC is a separate entity from the U.N. and operates under its own individual agreements with Nations. Access to the court is restricted to nations that have ratified the Rome Statute of the International Criminal Court.<sup>9</sup> The only way to bring a case in front of the ICC is for the situation to be referred to it by a member nation or for the court to exercise its jurisdictional powers if the problem is happening within the borders of a member nation.<sup>10</sup> Alternatively, cases can also be referred to the court by

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<sup>5</sup> *The Nuremberg Trials*, *Supra* note 2.

<sup>6</sup> G.A. Res. 260 A (III, Dec. 9, 1948), [https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1\\_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf).

<sup>7</sup> Rome Statute of the International Criminal Court art. 128, Jul. 17, 1998, 2187 U.N.T.S. 3, <https://treaties.un.org/doc/Treaties/1998/07/19980717%2006-33%20PM/volume-2187-I-38544-English.pdf>.

<sup>8</sup> *Id.* art. 5.

<sup>9</sup> *Id.* art. 1.

<sup>10</sup> *Id.* art. 13-15.

the U.N.'s Security Council.<sup>11</sup> Unlike a traditional court wielding a government's police power to enforce its rulings, the ICC relies on the cooperation from its member states to implement their rulings, aid with investigations, and for the U.N.'s Security Council to step in if needed.

In the ICC, 18 judges are elected by the member nations to serve a nine-year term, and they are not eligible for reelection.<sup>12</sup> The election rules stipulate that 1/3 of the judge positions are up for election every three years. Additionally, each judge must be from a different member nation. The judges are supposed to be completely independent of the rest of the international community and not engage in other functions. However, many countries, including the United States, have interfered with ICC investigations, and ICC judges have been moonlighting as arbitrators reporting that they do not get paid enough.<sup>13</sup> Most nations will have a trial court, an appellate court, and possibly a high court in most judicial structures. The ICC, however, has a pre-trial chamber, a trial chamber, and an appellate chamber.<sup>14</sup> These chambers function like the different "courts" of the trial. So, for example, an individual accused of committing war crimes, after the investigation, would first face the pre-trial chamber where pre-trial motions and other administrative decisions will be made. Secondly, the defendant would face the trial chamber where the actual trial would be held. Lastly, if the defendant or prosecutor wished to appeal, they would appeal to the appellate chamber within the ICC. The only body the ICC reports to is the member nations of the Rome Statute and the Rome Statute itself.<sup>15</sup>

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<sup>11</sup> *Id.* art. 13.

<sup>12</sup> *Id.* art. 36.

<sup>13</sup> *International Criminal Court Officials Sanctioned by US*, BBC, Sep. 2, 2020, <https://www.bbc.com/news/world-us-canada-54003527>; Marlise Simons, *The Hague's Lofty Judicial Halls, Judges Wrangle Over Pay*, N.Y. TIMES, Jan. 20, 2019, <https://www.nytimes.com/2019/01/20/world/europe/hague-judges-pay.html>.

<sup>14</sup> Rome Statute of the International Criminal Court, *Supra* note 7, at art. 39.

<sup>15</sup> *Id.* art. 1.

### Analysis of the Effectiveness of War Crime Deterrence

An infamous case in the ICC's history is the case of *Prosecutor v. Katanga*.<sup>16</sup> Germain Katanga was the leader of the Patriotic Resistance Force, a resistance group opposing the Democratic Republic of the Congo. Katanga was accused and convicted of war crimes and crimes against humanity. He murdered civilian populations, destroyed property, and pillaged villages. Additionally, he was accused of abducting, sexually enslaving, and physically abusing women. However, the prosecution failed to prove these claims, and he was acquitted. While it is undisputedly good that Katanga was arrested and sentenced for his crimes, an arrest warrant was not signed until 2007, 4 years after his crimes. He was not sentenced until 2014, 11 years after his crimes. The victims did not receive retribution until 2018, 15 years after his crimes. While the ICC eventually brought this man to justice, it was only after four years of investigating and another seven years of litigation for him to be sentenced. For reference, in King County (a county in Washington State), the average aggravated murder trial lasts about three years and four months, half the time of the ICC trial and much less than it took for the proceeding retribution trial.<sup>17</sup> So, what does this timeline mean for the effectiveness of the ICC at deterring war crimes? It means that it can take years before the ICC is able to do anything to intervene in a situation. However, this delay is by design. The purpose of the ICC is to investigate and try individuals, not to stop them in their tracks, that responsibility falls to the U.N.'s Security Council.

According to a 2018 study analyzing member states of the Rome Statute, member nations commit fewer human rights violations than those nations that are not members.<sup>18</sup> In fact,

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<sup>16</sup> *Prosecutor v. Katanga*, ICC-01/04-01/07-3436-tENG, Judgment pursuant to article 74 of the Statute (Mar. 7, 2014), [https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015\\_04025.PDF](https://www.icc-cpi.int/sites/default/files/CourtRecords/CR2015_04025.PDF).

<sup>17</sup> See, *Trial Proceedings: Length and Costs*, WASH. CTS., <https://www.courts.wa.gov/newsinfo/index.cfm?fa=newsinfo.displayContent&theFile=content/deathPenalty/trial> (last visited June 1, 2022).

<sup>18</sup> Benjamin J. Appel, *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?*, 62(1) J. CONFLICT RESOL. 3, at 4 (2018), <https://www.jstor.org/stable/48597287>.

according to the study, ICC members are, on average, about 22% less likely to commit a violation of human rights. Interestingly, when a list of the world's most powerful militaries is compared to the list of member nations of the ICC, the topmost powerful militaries: the United States, Russia, China, and India, are notably absent.<sup>19</sup> Despite these nations not being parties to the ICC, it can still be influential in their decision-making processes. A research paper written by Laurence Helfer and Erik Voeten analyzing international courts and their effects concluded that international courts might not have direct authority to influence change; however, they have significant influence over those that do have influence.<sup>20</sup> According to Mayerfeld, The U.S. isn't against the international enforcement of human rights, but they would prefer that the enforcement of dealt through the U.N.'s Security Council.<sup>21</sup> I would argue that a balance has already been struck with the explanation given previously. The ICC acts as a court unable to stop human rights violations, but the U.N.'s Security Council has the ability to stop human rights violations but not try them.

The U.S. is among the most influential of nations with significant international influence. The U.S. works hard to project an outward appearance of being a moral and righteous nation. However, despite this appearance, they are not a member of the ICC. In fact, the U.S. has been quite hostile to the ICC, to the point that congress in 2002, under the Bush Administration, passed a law making it illegal for the U.S. to cooperate with the ICC in any way.<sup>22</sup> This hostility has allowed the U.S. to operate with relative impunity from the ICC due to the number of

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<sup>19</sup> Martin Armstrong, *The World's Most Powerful Militaries*, STATISTA (2022), <https://www.statista.com/chart/20418/most-powerful-militaries/> (last visited June 4, 2022); *The States Parties to the Rome Statute*, INT'L CRIM. CT., <https://asp.icc-cpi.int/states-parties> (last visited June 4, 2022).

<sup>20</sup> Laurence R. Helfer and Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights of Europe*, 68 INT'L ORG. 77, at 80 (2014).

<sup>21</sup> Jamie Mayerfeld, *Who Shall Be Judge?: The United States, the International Criminal Court, and the Global Enforcement of Human Rights*, 25(1) HUM. RTS. Q. 93, at 128 (2003).

<sup>22</sup> 22 U.S.C.A § 7423 (West 2002).

resources that would be required to prosecute a case against them. In addition to having relative impunity from the ICC, the U.S. is also one of the five permanent members of the U.N.'s Security Council, allowing them also to exercise immunity from international interference.<sup>23</sup> In fact, as pointed out by Robert Johansen in *The Impact of US Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes against Humanity*, the U.N.'s Security Council's forces are excepted from ICC overview in large part due to the U.S.<sup>24</sup> A perfect example of the U.S.'s ability to escape prosecution is a 2020 investigation into the war crimes committed by Afghan, Taliban, and U.S. forces by the ICC.

The ICC specifically called out the U.S. military and their Central Intelligence Agency's use of secret detention facilities, torture, cruel treatment, rape, and other forms of sexual violence.<sup>25</sup> Michael Pompeo, the then U.S. Secretary of State under then-President Donald Trump, went on record declaring that "there are no substantial reasons to believe that the opening of an investigation would not serve the interests of justice, taking into account the gravity of the crimes and the interests of victims."<sup>26</sup> In other words, the victims of the U.S.'s war crimes are, ipso facto, heinous criminals and deserve their punishment. The investigation was a show of force for the ICC and international human rights justice; however, this minor victory was short-lived as the ICC withdrew its investigation into the U.S. just six months later.<sup>27</sup> The Intercept points out that this deprioritization comes after years of interference from the U.S. and results from a lack of resources at the ICC's disposal. However, Afghanistan is leading its investigation

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<sup>23</sup> United Nations Charter, Jun. 26, 1945, <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>.

<sup>24</sup> Robert C. Johansen, *The Impact of US Policy toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes against Humanity*, 28 HUM. RTS. Q., 301, at 306 (2006), <https://www.jstor.org/stable/20072739>.

<sup>25</sup> David J. Scheffer, *Supra* note 3.

<sup>26</sup> 'Unanimous' ICC gives go-ahead to prove Afghanistan alleged war crimes, UN NEWS, Mar. 5, 2020, <https://news.un.org/en/story/2020/03/1058741>.

<sup>27</sup> Alice Speri, *How the U.S. Derailed an Effort to Prosecute its Crimes in Afghanistan*, INTERCEPT, Oct. 5, 2021, <https://theintercept.com/2021/10/05/afghanistan-icc-war-crimes/>.



into crimes committed by the US, including allegations of extrajudicial killings, killing civilians, and torture. This case shows the U.S.'s ability to undermine the ICC's authority and jeopardizes the ICC's ability to be an international court of justice. In fact, the ICC has only been able to hold smaller countries accountable. Nations such as China, Russia, and the United States, have remained outside of the ICC's jurisdiction due to their unwillingness to sign the Rome Statute. Very recently, the ice block that protects these nations has started to erode with Russia now facing war crimes investigations from both the ICC and the U.S.<sup>28</sup> However, China is notable as it has escaped being investigated by the ICC.<sup>i</sup>

### **Conclusion**

The ICC is not a perfect organization, but it is the only one of its kind. Despite the Court's difficulty in prosecuting crimes in a timely manner, it has shown its ability to do so in cooperating nations. More recently, however, this court has made clear to the world that it cannot police nations that do not wish to be policed, which ultimately is the biggest problem of the ICC. The U.S., China, Russia, and other holdouts will continue to commit war crimes and other human rights violations without international interference because these nations choose to be above the law. Following the law should not be an optional endeavor for those that wish to be policed. Laws are rules for everyone to follow. Until the ICC has the ability to prosecute all nations equally, it will continue to struggle to be an effective institution on the international stage. Human Rights Watch also supported this take, saying that the ICC is still a work in progress and needs international support to send a strong and unified message.<sup>29</sup> (2766/3000 Words)

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<sup>28</sup> *Situation in Ukraine*, *Supra* note 4.

<sup>29</sup> *Q&A: The International Criminal Court and the United States*, HUM. RTS. WATCH, (Mar. 15, 2019), <https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states>.

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<sup>i</sup> While China was escaped being investigated, China isn’t innocent when it comes to war crimes or human rights violations. Most notably, China has been accused of committing a genocide against its Muslim population. While Javier C. Hernández from the N.Y. Times reported on December 15<sup>th</sup> of 2020 that the ICC did look at the situation, they declined to investigate the case, leaving China able to freely commit genocide free of international intervention.