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Evaluating the International Criminal Court's performance: an empirical study of the court's deterrence effects in Darfur, Sudan

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Abstract

The International Criminal Court (ICC), among other international organisations, has come under criticism for performing badly or even aggravating the situation on the ground where it intervenes. But empirical studies measuring the court's performance are still scarce, the expectations too high, and the evidence inconclusive.

This dissertation studies the ICC's performance empirically based on one performance indicator, deterrence. Deterrence refers to a reduction in civilian fatalities by action of the court. The dissertation also proposes a new theory of international support by which the strength of ICC deterrence is influenced by the level of international support for the court at that time of the investigations.

The analysis is based on the ICC situation in Darfur, Sudan – a region that experienced a particularly bloody, protracted ethnic conflict and the subject of the first UN Security Council referral to the court. This dissertation applies a mixed methods research design. The quantitative analysis uses negative binomial regression to test the effect of six ICC interventions on daily civilian fatalities in Darfur. The qualitative analysis uses process tracing to examine whether international support influenced ICC deterrence effects.

I find that the ICC did exercise deterrence effects at the beginning of the conflict. A strong commitment to the court by the international community, in particular by members of the UN Security Council, enhanced ICC deterrence by raising the perceived likelihood of prosecution. However, the court's deterrence potential is much lower for the first arrest warrants in Darfur, where militia leaders and senior government officials, including President Al-Bashir were indicted. The analysis of the Darfur situation suggests that ICC arrest warrants exercise a negative deterrent effect, increasing civilian fatalities, absent international support for their enforcement. Those findings have, *inter alia*, practical implications whereby, upon validation by further studies of other ICC situations, they may be used to guide the strategy of the ICC prosecutor.

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Evaluating the International Criminal Court's performance: an empirical study of the court's deterrence effects in Darfur, Sudan

The International Criminal Court (ICC) is among the international organisations (IOs) which have been criticised for performing badly, or even worsening the problem they are trying to solve (Robinson, 2015; Tiemessen, 2016; Köchler, 2017). Inaugurated in 2002 and equipped with the ambitious mandate to end impunity for atrocity crimes (Moreno-Ocampo, 2008), the court came into force during a time that witnessed a more general proliferation of IOs (Union of International Associations, 2004). Since then, IOs have become crucial actors in global governance and exercise increasing levels of authority vis-à-vis states (Zürn, 2013). Yet, despite IO's growing importance, scholarship on their performance remains scarce (Gutner & Thompson). This dissertation intends to make a contribution to the underdeveloped body of literature on IO performance by evaluating the performance of the ICC.

How can we judge the court's performance to date? The ICC has been adjudicating on cases of genocide, crimes against humanity and war crimes (collectively: atrocities) for almost two decades and is currently endorsed by 122 state parties (ICC, 2020). As of March 2020, the *Den Haag* based court has eight ongoing preliminary examinations and thirteen investigations, while having issued thirty-four arrest warrants or summons to appear in twenty-seven cases (ICC, 2020). Still, critics point to its weak track record for actually executing warrants for those responsible for atrocity crimes (Hatcher-Moore, 2017). As of March 2020, thirteen defendants are still at large, the court has acquitted three and convicted only four individuals (ICC, 2020). The ICC, lacking its own police force, often faces the dilemma of seeking to arrest government officials who naturally have no interest in their own surrender. The court has further been criticised of being too political (Nouwen & Werner, 2011), being instrumentalised by governments (Branch, 2007), and reflecting the double standards of international criminal

justice (Bosco, 2014). The biggest criticism of the court's performance so far, along the lines of the so-called peace vs justice debate, is that the ICC's intervention in ongoing conflicts may prolong fighting and reduce chances of peaceful resolution (see Akhavan, 2009).

To be sure, some of these criticisms are warranted. The overarching goal of ending impunity for all perpetrators of atrocities remains elusive given the political context the ICC operates in. But as with any evaluation of IO performance, there is a need to be realistic about what international criminal tribunals can and cannot do. For example, as a judicial institution with limited international support, we *cannot* expect the ICC to end conflict in war-torn societies as many still see the court's role (e.g. Greig & Meernik, 2014; Wegner, 2015; Duursma, 2020). We *can*, however, expect the ICC to make a positive contribution to the international criminal justice system, the central actor of which it has become (Mills, 2012; Scheffer, 2016). One such contribution would be to 'improve the possibility of deterring the most egregious human rights violations and war crimes' (Jo et al, 2018, p. 194). The expectation towards the court to reduce the commission of crimes within its jurisdiction is in line with the narrowly defined legal mandate of the ICC as stipulated in the court's founding document, the Rome Statute of the International Criminal Court (UN General Assembly, 1998; henceforth: Rome Statute) and will be used in this dissertation as an indicator of ICC performance. The analysis focuses on deterrence in the context of the ICC investigations in Darfur, Sudan. Darfur was the first UN Security Council referral to the court and involved a complex ethnic conflict, thus providing for a particularly strict test for deterrence. I furthermore develop and test a theory of international support whereby ICC deterrence effects are influenced by the level of international support during specific points of the investigation.

The structure of this dissertation is as follows. The next section reviews the relevant literature, including scholarship on IO performance, ICC performance indicators and ICC deterrence. The following research questions are established:

- *Research question one:* Did the ICC have a significant effect on the level of atrocities committed at different stages of the investigation in Darfur, Sudan?
- *Research question two:* To what extent has international support for the court contributed to/hindered ICC deterrence effects at different stages of the investigation in Darfur, Sudan?

Thereafter, I outline my theoretical argument which is twofold: first, that the ICC can deter would-be perpetrators by intervening in an ongoing conflict, and second, that the strength of deterrence is influenced by the current level of international support for the court. Deterrence is operationalised as a reduction in civilian fatalities following action by the court. The methodology section outlines and defends the use of a mixed methods research design. For the quantitative analysis, I estimate three negative binomial regression models to assess the effect of ICC actions on daily civilian fatalities. For the qualitative analysis, I use process tracing to test the novel theory of international support. Subsequently, I provide a brief background on the conflict in Darfur and present the analyses' findings. I find that the ICC did exercise deterrence effects at the beginning of the investigation. However, the models predict a significant increase in civilian fatalities for the first arrest warrants issued in Darfur. The novel theory of international support partly explains those fluctuations in deterrence as major international powers, who were initially supportive, did little to ensure that arrest warrants would be enforced. Finally, the conclusion summarises the findings, limitations and contributions. While the results of this empirical study are generalizable only to other UN Security Council referrals, of which just Libya qualifies, so far, this dissertation lays the groundwork for further systematic ICC performance evaluations in future empirical studies.

2. Literature review

2.1. Performance of International Organisations

Despite international organisations' growing role in global politics and governance, research on their performance remains a niche in the international relations literature (Gutner & Thompson, 2010; Lall, 2017). However, a better understanding of IO performance is vital for their survival, in particular if we believe that 'good performance' (Gutner & Thompson, 2010) or 'output legitimacy' (Scharpf, 1999; Steffek, 2015) remains the key source for IOs to obtain international support and fulfil their objectives.

Understanding performance as both the manner by which something gets done and the outcome of that process allows us to break IO performance into two categories: process and outcome performance (Gutner & Thompson, 2010). Evaluating process performance requires looking inside the organisation, including the choices key actors within the IO make (Gutner & Thompson, 2010). On the other hand, evaluating outcome performance means judging to what extent the IO made progress towards solving the problem it is mandated to solve (Gutner & Thompson, 2010). Importantly, outcome performance must be distinguished from *output* performance; the former refers to the tangible effects of IO action, the latter refers to the policy output of an organisation (Tallberg et al, 2016). Of course, the assumption is for process and outcome performance to be empirically related as highly skilled and efficient individuals can normally complete tasks more effectively (Gutner & Thompson, 2010). Both process and outcome performance may be influenced by external factors, most notably 'the propensity of states to use IOs to advance narrow national interests' (Lall, 2017, p. 248).

2.2. Evaluating ICC performance

The categories of IO performance, process and outcome performance, are also relevant for the evaluation of international courts. Process performance, in the context of international courts, relates to judicial procedures and their adherence to standards, fairness and efficiency

(Squatrino et al, 2018). Outcome performance refers to the attainment of substantive goals by action of an international court (Squatrino et al, 2018).

There are many ways one could judge the ICC's process and outcome performance. As to process performance, scholarship has focused, *inter alia*, on the level of dynamism and flexibility of the ICC's investigative practices (Whiting, 2014), practices of client representation before the court (Khan & Shaw, 2014) and 'stigmatization practices' by the court (Mégret, 2014). As to outcome performance, the court has been evaluated on the basis of its contribution to justice (Goodman & Jinks, 2003), its influence on domestic criminal law (Jo et al, 2018), its contribution to substantive international law (Hayashi, 2018), on its normative value (Bass, 2000), with regard to its capacity to offer societal atonement (Bikundo, 2012) and based on its perceived legitimacy in the eyes of local victims (Wemmers, 2009; Moffet, 2015). While these are all valid contributions to a growing body of literature, I hold that they carry the danger of falsely looking for evaluation criteria 'beyond the intentions of the creators' of the court (proposed in Squatrino et al, 2018, p. 8). Doing so, I argue, would stretch the ICC's narrowly defined legal mandate and ends up attributing unreasonable expectations to a legal institution with little political authority. Instead, the preamble of the Rome Statute sets out the objectives which the ICC can be reasonably judged against, in line with the expectations of states who drafted the statute.

A reading of the preamble reveals the envisioned aim for the court to reduce the perpetration of crimes within its jurisdiction:

“Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”

(preamble, Rome Statute of the International Criminal Court, UN General Assembly (1998); emphasis and italics added)

The ability of the ICC to contribute to the prevention of future crimes within its jurisdiction, in other words, deterrence, will serve as an indicator for the court's performance. Deterrence is an outcome performance indicator because it relates to the attainment of a substantive goal of the court, namely, to stop potential future perpetrators from committing grave human rights abuses. Of course, deterrence could also be studied by looking at the impact of the process of the investigative practices of the ICC (e.g. how evidence is collected in the field) on atrocities. However, given my non-legal background, focusing on deterrence as outcome performance is more feasible. Also, data for measuring outcome performance is more accessible than data on process performance.

2.3. ICC Deterrence

Deterrence concepts and theoretical assumptions

There are several relevant types of deterrence in the context of the ICC. *General deterrence* relates to the potentially global effect the ICC can have to discourage criminal activity by instilling fear of punishment (Bosco, 2011). Payam Akhavan is particularly hopeful of general deterrence effects through which the ICC may support a 'socio-pedagogical stigmatization of crime through judicial process, leading to the reinforcement of habitual lawfulness' (Akhavan, 2009, p. 628). *Specific deterrence*, i.e. 'the discouragement of subsequent criminal activity by those who have been punished' (Bosco, 2011, p. 170) is of lesser relevance here as the court has convicted few to date. *Targeted deterrence*, or 'attempts by the court to deter specific individuals or groups' (Bosco, 2011, p. 170) is more relevant in the context of the ICC's practices. For example, the court may issue arrest warrants strategically in an attempt to deescalate the commission of specific crimes by specific individuals (Bosco, 2011). Jo and Simmons (2016) differentiate between *prosecutorial deterrence*, arising from the direct threat of prosecution, and *social deterrence*, arising indirectly through the stigmatization of perpetrators in the international community as a result

of ICC proceedings. According to Colvin & Orchard (2019), the ICC's prosecutorial deterrence effect is amplified by its recent decision in the Bangladesh/Myanmar preliminary examination to extend the court's jurisdiction for cross-border crimes such as forced deportation. Moreover, the ICC's complementarity regime requires state parties to the Rome Statute to try those who commit atrocities domestically (Jo et al, 2018). Therefore, we should expect prosecutorial deterrence to be stronger for ICC members than for non-ratifying states because perpetrators would have to fear prosecution in either the national or international arena (Meernik, 2015). The forms of deterrence discussed above should be distinguished from the broader notion of *prevention* which includes non-legal means such as moral disapprobation of crimes in global society, contributing to a reduction in atrocities (Bosco, 2011).

There are two important theoretical assumptions for deterrence to work. One is that future offenders make rational cost-benefit calculations when considering committing atrocities (Buitelaar, 2016). Evidence that human rights abusers are acting rationally may be seen in attempts 'to conceal their crimes by burying bodies, wearing masks, or setting up complex command structures to provide a degree of deniability' (Dietrich, 2014, p. 7). The second necessary factor for successful deterrence is for the perceived threat of legal punishment to act as a significant disincentive to committing the atrocity crime (Buitelaar, 2016). According to Buitelaar (2016, p. 7), the threat of prosecution depends on the perception of three elements of the court's proceedings, viz. 'punishment certainty', 'severity' and 'celerity (swiftness)'. For illustration: if the threat of ICC prosecution is perceived as unlikely, the immediate benefits of committing atrocities, such as gaining/maintaining power (Rodman, 2008), feelings of superiority (Alvarez, 2008) or material gain (Buitelaar, 2016), may outweigh the costs.

Empirical scholarship on ICC deterrence

Empirical studies on ICC deterrence effects do not normally specify the type of deterrence but treat deterrence as an overarching category of the above concepts. The existing empirical evidence on the ICC's deterrence effects is relatively scarce and mixed. Affirming potential deterrent effects, Jo & Simmons (2016) find cross-situation evidence that the ICC can deter some governments, as well as those rebel groups who seek legitimacy. Their analysis of eight ICC situations uncovers another pattern where governments who are more dependent on international aid and who have ratified the ICC statute, are more likely to be deterred than other governments (Jo & Simmons, 2016). The available evidence as to the deterrent effect of specific ICC actions is inconclusive, as well. Appel (2018) finds that mere ratification of the Rome Statute decreases human rights abuses by governments through screening and constraining effects on ratifying governments. However, the author's analysis of ICC deterrence effects is not limited to crimes within the ICC's jurisdiction and for example includes political imprisonment; which unless undertaken in a systematic and widespread manner, would not fall within the subject-matter jurisdiction of the court (see Cryer et al, 2019). Meernik's (2015) findings on deterrence effects from ICC treaty ratification are similarly affirmative. However, the author's results that 'those nations that are committed to the rule of law at home and abroad are much less likely to become subject to an ICC investigation' (Meernik, 2015, p. 335) are hardly surprising and of little analytical value given the ICC's complementarity regime where the court only prosecutes individuals not adequately tried in domestic systems. Akhavan (2009) claims that the ICC deterred atrocities in Côte-D'Ivoire, Uganda and Sudan, even short of successfully executing arrest warrants. He cites, among other factors, 'the mere threat of prosecution', 'political isolation and military decline that result from being stigmatized as an international fugitive' and 'the consequent search for a scapegoat' (Akhavan, 2009, p. 652) as reasons why the ICC could exercise deterrent effects. Rodman

(2008) takes a more critical stance; drawing on the experience of the international criminal tribunal in Bosnia, he finds that the ICC fails to deter perpetrators in situations such as Sudan where the government is implicated in the crimes. Furthermore, Cronin-Furman's (2013) analysis suggests that the deterrent effect differs according to the rank of perpetrators in their regime. Accordingly, the ICC's failure to prosecute high profile cases in the past diminishes the perceived prosecutorial threat for those higher up the chain of command (Cronin-Furman, 2013).

In general, empirical studies on ICC deterrence analysing multiple situations suffer from a range of methodological problems (see for a detailed list: Rudolf, 2016). The most important problem in this regard is that large-n studies of multiple ICC situations fail to take into account the complexity of each conflict situation, and hence are particularly prone to problems of endogeneity (Jo et al, 2018). A plausible way to mitigate for the complexity of situations is to focus on the ICC's deterrent effects in single situations. Hillebrecht (2016) makes an excellent contribution in that respect by looking at the court's deterrent effects in the situation in Libya, controlling for other variables than ICC actions. She finds that 'the ICC can have a moderate dampening effect on civilian casualties, particularly at the beginning of the conflict' (Hillebrecht, 2016, p. 618). However, the author acknowledges that Libya was a favourable situation for the ICC to exercise deterrent effects since the court was 'backed by other international actors' and 'demonstrated its intentions to bring a case to trial in a timely manner' (Hillebrecht, 2016, p. 625). Moreover, Jo et al (2018) produce similar results in their analysis of the ICC's intervention in Uganda. Notably though, their analysis is focused on the deterrence potential of the ICC towards rebel groups, namely the Lord's Resistance Army in Uganda, and not deterrence of government officials (Jo et al, 2018).

Given the lack of conclusive evidence on the existence of ICC deterrence effects in individual situations, there remains an important gap in the literature specifying whether the court can deter perpetrators by intervening in a conflict. This dissertation aims to contribute to that area by studying ICC deterrence effects as a result of the action taken by the court in Darfur, Sudan. Sudan remarkably differs from the situations of Libya and Uganda reviewed above, for two reasons. One, unlikely in Libya, in Sudan the ICC received less international support to enforce its mandate in a timely and efficient manner (Nouwen, 2013). Two, unlike in Uganda where the ICC focused on rebels, the Sudanese government has no natural interest to cooperate with the court because they are the subject of the investigations (Rodman, 2008). Focusing on Sudan thus provides for a stricter test for ICC deterrence effects; if we can observe ICC deterrence effects in such an unfavourable situation, there is a good possibility that they apply in more favourable situations, as well. To the end of assessing deterrent effects in a complex ICC investigation, the following research question guides the first part of the analysis in this dissertation:

Research question one: Did the ICC have a significant effect on the level of atrocities committed at different stages of the investigation in Darfur, Sudan?

Causal mechanism underlying deterrence effects

Another, much understudied aspect of ICC investigations, is the causal mechanism underlying ICC deterrence effects. In a purely domestic context, it is generally acknowledged that deterrence can be influenced by third parties at critical junctures during an investigation (Dietrich, 2014). This is equally relevant in the international criminal law context, and even more so in situations which have been referred to the ICC by the UN Security Council because the court relies on sustained political pressure by Security Council members for the

enforcement of its mandate (Bosco, 2014). Along similar lines, Appel (2018, p. 22) suggests ‘that the international community can strengthen the effectiveness of the Court [with regard to deterrence] by increasing the domestic and international costs that accompany ICC involvement in situations’. Illustrative of potential confounding effects of third-party action on ICC deterrence at critical junctures, Peskin & Boduszynski (2016) argue that the NATO military intervention strengthened deterrence effects by way of changing perpetrators’ cost-benefit calculations of committing atrocities. According to Ku & Nzeblibe (2006), the availability and application of non-legal sanctions can also have an influence on ICC deterrence. Where a perpetrator is considered politically indispensable, hence unlikely to be subject to other sanctions, the ICC can exercise a stronger deterrent effect (Ku & Nzeblibe, 2006). Indeed, on the basis of the scholarship reviewed above, it may be useful to view ICC deterrence as adding another layer to a more comprehensive crime prevention system with the ability to deter some more but not all future perpetrators (Holtermann, 2010).

There remains a gap in the literature to detail the causal mechanism underlying ICC deterrence effects. The first step involves developing what Shaffer & Ginsburg (2012, p. 1) call ‘conditional international law theory’, i.e. producing mid-range theory concerning the conditions under which the ICC can deter atrocities in specific situations. The next section of this dissertation theorises that international support for the ICC influences deterrence effects at different stages of an ICC investigation. Once more, the focus of the empirical analysis is on the situation of Darfur, Sudan. Given that Darfur, as the first UN Security Council referral, ‘has forced states to confront their multiple interests and responsibilities in light of global power dynamics’ (Mills, 2012, p. 407), it is particularly appropriate to studying international ICC support in the context of deterrence effects.

To the end of testing this novel theory of international support, the second part of this dissertation is guided by the following research question:

Research question two: To what extent has international support for the court contributed to/hindered ICC deterrence effects at different stages of the investigation in Darfur, Sudan?

3. Theoretical argument

The theoretical argument of this dissertation is twofold: one, that the ICC can exercise deterrence effects on potential perpetrators by intervening in a situation and that the strength of the deterrence effect differs at different stages of the investigation; two, that the strength of ICC deterrence effects at each stage is furthermore influenced by the level of international support for the court.

Turning back to Buitelaar's (2016) theoretical assumptions for criminal deterrence to work, I theorise that the ICC can indeed exercise deterrence effects by intervening in a conflict. Firstly, there is reason to believe that perpetrators in ICC situations are rational actors. Based on his first-hand experience of assisting previous international criminal tribunals, Akhavan highlights that 'leaders may be desperate, erratic, or even psychotic, but incitement to violence is usually aimed at the acquisition and sustained exercise of power' (Akhavan, 2001, p. 12). Kenya is a good example of an ICC situation where the accused committed atrocities to affirm their grip to power following the elections. Second, ICC deterrence effects change during an investigation as the perception of the ICC's 'punishment certainty', 'severity' and 'celerity (swiftness)' (Buitelaar, 2016, p. 7) changes, as well. More concrete ICC actions such as arrest

warrants would increase the perceived certainty of punishment for perpetrators and the subsequent deterrent effect *vis-à-vis* more passive actions such as the opening of an investigation. While the severity of punishment (the sentence) is decided at the trial stage, a swifter investigation would also signal to perpetrators that they are more likely to face justice. The ICC situation in Libya is illustrative of fluctuations in the strength of deterrence as deterrence effects were stronger at the start of the investigations (Hillebrecht, 2016), where the ICC prosecution moved more swiftly.

Building on previous scholarship, I theorise that the ICC's deterrence effect is influenced by international support at different stages of an investigation. On a most basic level, scholars generally agree that the court relies upon the international community, e.g. the UN security council, states, civil society and other INGOs, for legitimacy, resources and enforcement (Bosco, 2014; Luban, 2013; Vinjamuri, 2016; Tiemessen, 2014). These are all vital components of an ICC investigation with deterrent potential. For example, when local NGOs provide evidence to the court and liaison with witnesses, such as in Kenya (Hansen & Sriram, 2015), perpetrators of atrocities are more likely to be prosecuted based on the evidence provided. Similarly, the UN Security Council can strongly influence ICC deterrence effects. For instance, pursuant to Article 16 of the Rome Statute, the Security Council can defer an investigation for a period of twelve months which would completely undermine the ICC's deterrence potential. But even short of a deferral which has not happened to date, diplomatic perceptions by states of the usefulness of ICC proceedings alter deterrence levels during an investigation (Peskin & Boduszinsky, 2016). The ICC prosecutor himself appears to be convinced of the importance to maintain international support to effectively deter potential perpetrators: "A new model to control violence is being tested. It [Darfur] is a test of our [the international community's] commitment to use the law to prevent atrocities" (Moreno-Ocampo, 2008, p. 223).

4. Methodology

This dissertation follows a mixed methods research design. Quantitative methods, namely negative binomial regression, are used to analyse the ICC's deterrence effects at different points during the investigation. Qualitative methods, namely process tracing, serve to examine the influence of international support on ICC deterrence at different stages of the investigation. The present research design is a 'sequential design' (Small, 2011, p. 67) where the quantitative data is collected and analysed first, followed by a collection of qualitative data and subsequent analysis thereof. For the evaluation of the outcome performance of the ICC in terms of deterrence effects, the present mixed methods design helps to 'improve the specification of causal models' (Squatro, 2018, p. 398). As such, the quantitative element tests whether causal deterrence effects exist at all, while the qualitative element helps to specify the causal mechanism underlying them. The mixed methods research design therefore enhances the dissertation's potential to 'deal with complex phenomena and situations', such as the Darfur conflict, and serves the goal of 'explaining findings generated by the quantitative analysis' (Robson & McCarthan, 2016, p. 179).

Quantitative methodology

The quantitative part of the analysis draws on the Armed Conflict Location and Event Dataset (ACLED), available for download from acleddata.com (Raleigh et al, 2010). ACLED records daily event count data for conflict, specifying the number of fatalities, civilian and non-civilian, for each conflict event. The figures are obtained through triangulation of local, regional and international news sources by the ACLED team (Hillebrecht, 2016). I obtain the ACLED dataset for Sudan for the period from 31 March 2004 until 1 March 2013. While the ICC's situation in Darfur, Sudan is still ongoing, the timeframe reflects the ICC's most active phase of investigation where we might reasonable expect ICC deterrence effects. The chosen

timeframe includes a year prior and after the period of active investigation to be able to control for the effect of the beginning and end of the ICC's active intervention. While the ICC investigation focuses on the Western Darfur region, given the presence of the ICC in the capital Khartoum, the deterrent effect can be reasonably expected to apply beyond Darfur in the rest of the country. However, the dataset excludes South Sudan, an independent state since 9 July 2011, given the ICC's focus on crimes committed on the territory of the Republic of Sudan.

Dependent variable

Measuring atrocities during conflict is inherently difficult because atrocity is a legal classification developed post-hoc/post-mortem (Hillebrecht, 2016). Of the many types of violence included in the ACLED dataset, the closest proxy of crimes within the jurisdiction of the ICC is 'violence against civilians'. For the dependent variable, I aggregate the daily amount of fatalities for violence against civilians events. This is because I am not interested in the effect of the ICC on the occurrence of violence against civilian events as such, but in the observed variation in civilian mortality when such events (inevitably) happen. The mean for the dependent variable, *daily civilian fatalities*, is 11.95 with a standard deviation of 35.92 for 919 observations (N).

Independent variable

I add to the data from the ACLED dataset by creating the independent variable *ICC action*, representing the key interventions by the ICC during the situation in Darfur, Sudan. Those are included as six dummy variables, summarised in table 1 below. Representing ICC actions as discrete interventions rather than a series of linked actions risks disregarding the potential aggregate effect of successive interventions (Hillebrecht, 2016). On the other hand, treating them as discrete events is useful as it allows us to better understand fluctuations of estimated deterrent effects for different ICC actions which is the objective of this dissertation.

Table 1: Summary of independent variables, ICC action

Independent variable	Start Date	ICC actor	Sudan actor	Description
UN Security Council referral	31 March 2005	UN Security Council	Government of Sudan and other parties to the conflict	UN Security Council refers the situation to ICC in Resolution 1593
ICC opens investigation	1 June 2005	ICC Prosecutor	Government of Sudan and other parties to the conflict	ICC Prosecutor Moreno-Ocampo decides to open an investigation into the atrocities allegedly committed in Darfur, Sudan, finding the situation admissible
Harun and Kushayb arrest warrants	27 April 2007	Pre-Trial chamber I (PTC I)	Mr. Harun, Minister of State for the Interior of the Government of Sudan; Mr. Kushayb, commander of Janjaweed militia	PTC I issues arrest warrants for Mr. Harun and Mr. Kushayb on multiple counts of war crimes and crimes against humanity
First Al-Bashir arrest warrant	4 March 2009	Pre-Trial Chamber I (PTC I)	Mr. Al-Bashir, President of the Republic of Sudan, 1989 - 2019	PTC I issues first arrest warrant for Mr. Al-Bashir on multiple counts of war crimes and crimes against humanity
Second Al-Bashir arrest warrant	12 July 2010	Pre-Trial Chamber I (PTC I)	Mr. Al-Bashir, President of the Republic of Sudan, 1989 - 2019	PTC I issues second arrest warrant for Mr. Al-Bashir on multiple counts of war crimes, crimes against humanity and genocide
Hussein arrest warrant	1 March 2012	Pre-Trial Chamber II (PTC II)	Mr. Hussein, serving minister of national defence, former Minister of the Interior	PTC II issues arrest warrant for Mr. Hussein on multiple counts of war crimes and crimes against humanity

I estimate three models which differ according to the length of treatment assigned to each independent variable, ICC action. For model one, I code each independent variable as 0 prior to the start date of each ICC action and as 1 for the 90 days following the action. For model two, I recode to 0 after 120 days. For model three, I do so after 150 days. The chosen length of treatment effects, 90, 120 and 150 days respectively, is somewhat arbitrary; it could well be that certain ICC actions exercise a longer deterrent effect than others or that deterrence is more short-term than 90 days. Such could only be estimated through extensive qualitative research on specific ICC actions which is not feasible in the context of this dissertation. On the other hand, estimating three different models allows for comparison of results which is beneficial to a better estimation of deterrence effects.

Controls

To improve the models, I include two controls as further explanatory variables. One, I use *daily non-civilian fatalities* from the original ACLED dataset as a proxy for the overall intensity of conflict. If conflict intensifies, we might expect higher levels of civilian fatalities, irrespective of ICC action. Two, I include a measure for *daily global news coverage* of the conflict in Sudan. This is to correct for reporting bias, i.e. ‘the media’s tendency to systematically underreport or overreport certain types of events’ (Baum & Zhukov, 2015, p. 384). Furthermore, in line with Jo & Simmons’ (2016) theory on social deterrence, we may expect that the more the conflict is in the spotlight of the international (media) community, the more restrained the conflicting parties are with regard to violence against civilians. I obtain the data on news coverage of the Sudan conflict via a search of the Nexis news database. I narrow the search for news items on the Nexis database using the following parameters: “Sudan”, “violence”, “civilian(s)”, “search period: 31 March 2004 – 1 March 2013). I then calculate the daily total of news reports for each of the 919 days of conflict from the original ACLED dataset.

Model specification

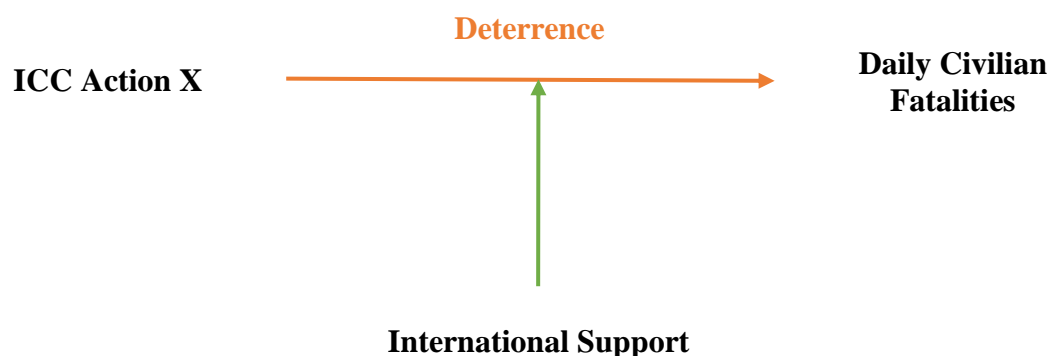
Based on the dependent variable ‘daily civilian fatalities’, the independent variables ‘ICC action’ and the control variables, ‘daily non-civilian fatalities’ and ‘daily news coverage’, I estimate three negative binomial regression models. Each model, as noted above, assigns a different length of treatment to the independent variable. A Poisson regression could be fitting for the analysis as the dependent variable is count data. Here, however, negative binomial regression is more appropriate because it takes into account the overdispersion of the dependent variable (Cameron & Trivedi, 2013). In the present dataset, the independent variable ‘daily civilian fatalities’ is over dispersed, because the conditional variance greatly exceeds the conditional mean. A limitation of the estimated negative binomial regression models (and of regression analyses more generally) is that they suffer from the danger of reverse causality. It may not be the ICC actions causing a change in civilian fatalities but rather that the ICC takes action *because* violence against civilians has, for example, increased. Similarly, the UN Security Council would only refer a situation to the ICC when its members consider a conflict serious enough to warrant ICC prosecution. In the context of this dissertation, I am unable to control for all possible reverse causality factors. Hence, based on the quantitative analysis alone, we cannot infer a deterministic causal effect of the ICC’s actions on civilian fatalities.

Qualitative methodology

The qualitative element of this dissertation relies on ICC reports, government of Sudan press releases, local and international media articles, NGO reports and academic papers. Process tracing will be used to examine the novel theory of international support for the ICC, i.e. to analyse whether international support influenced ICC deterrence effects at the different stages of the investigation in Darfur. Process tracing may be defined as ‘tracing causal mechanisms using detailed, within-case empirical analysis of how a causal process plays out in an actual case’ (Beach, 2017, p. 1). In the context of research question two, both the

descriptive and causal elements of process tracing are relevant. First, the descriptive component seeks to describe the level of international support at each of the six key interventions by the ICC, from the UN Security Council referral to the Hussein indictment. Second, the causal element analyses changes in the level of international support in relation to changes in the strength of deterrence effects over time, while also considering alternative explanations. Here, the hypothesis is that international support *interacts* with deterrence (Pennings et al, 2006), meaning that the effect of ICC action on civilian fatalities (deterrence) depends on the level of international support for the ICC at that time of the investigation. The hypothesised causal mechanism is depicted in figure 1 below.

Figure 1: Hypothesised causal mechanism for ICC deterrence



The qualitative analysis also considers counterfactuals, assessing what the observed deterrent effect would have been, had the level of international support been higher/lower/non-existent. Once more, it should be noted that the analysis is probabilistic, not deterministic. Given the complexity of ICC situations, there are likely to be multiple unobserved variables proprietary to each ICC action influencing deterrence at any given stage of an investigation. Therefore, process tracing, in the context of ICC deterrence in single situations, ‘is not conducive to the development of ... generalizable theories’ (Checkel, 2005, p. 17) and more in line with Shaffer & Ginsburg’s (2012, p. 1) notion of ‘conditional international law theory’. Future research should test the novel international support theory in other ICC situations.

5. The ICC investigations in the situation in Darfur, Sudan

5.1 Background

Violence in Sudan reaches back much further than the start of the ICC investigations. After Sudan gained independence from the United Kingdom in 1956, the country suffered through two civil wars for most of the remainder of the 20th century (World Without Genocide, 2013). Its early 21st century was equally bloody as a new war started to emerge in the Darfuri region in Western Sudan. The Darfur conflict is thought to have started in early 2003 over economic tensions between African farmers and Arab herders over arable land (Rodman, 2008). In February 2003, to protest the region's economic and political exclusion from Sudan's North-South peace agreement, two rebel groups, the Sudanese Liberation Army and the Justice and Equality movement, started waging attacks on government installations (Rodman, 2008). To retaliate, the Sudanese government responded with a dual counter-insurgency campaign, 'bombing entire villages that it considered militarily and politically supportive of the rebels' and mobilising tribal *Janjaweed* militias on the ground (Nouwen, 2013, p. 262). The conflict was not seen as a human rights priority until the spring of 2004 when the UN began to accuse the Sudanese government and the *Janjaweed* of multiple counts of genocide, among other international crimes, against the local non-Arab population (Rodman, 2008). The underlying goal of the systematic bombings and raids of villages had been to create a homogenous pan-Arab state (World Without Genocide, 2013). According to the ICC prosecutor, the *Janjaweed* under the government's instruction 'slaughtered thousands of people, and more than 2.5 million Darfuris have been forced out of their homes and live in camps' (Moreno-Ocampo, 2008, p. 221). Rebel forces in Sudan were also accused of international law violations, including violence against civilians, 'but there was not a systematic and widespread pattern to these violations' (Schiff, 2008, p. 229), which excludes their crimes from ICC jurisdiction.

Table 2 below summarises the distribution of civilian fatalities from attacks by year for the whole period of analysis.

Table 2: Civilian fatalities for ‘violence against civilians’ conflict events by year, Sudan, 31 March 2004 – 1 March 2013

Year/time period	Civilian fatalities
2004 (from 31 March 2004)	3,253
2005	779
2006	916
2007	1,148
2008	839
2009	1,542
2010	271
2011	2,010
2012	173
2013 (until 1 March 2013)	52
Total: 31 March 2004 – 1 March 2013	10,983

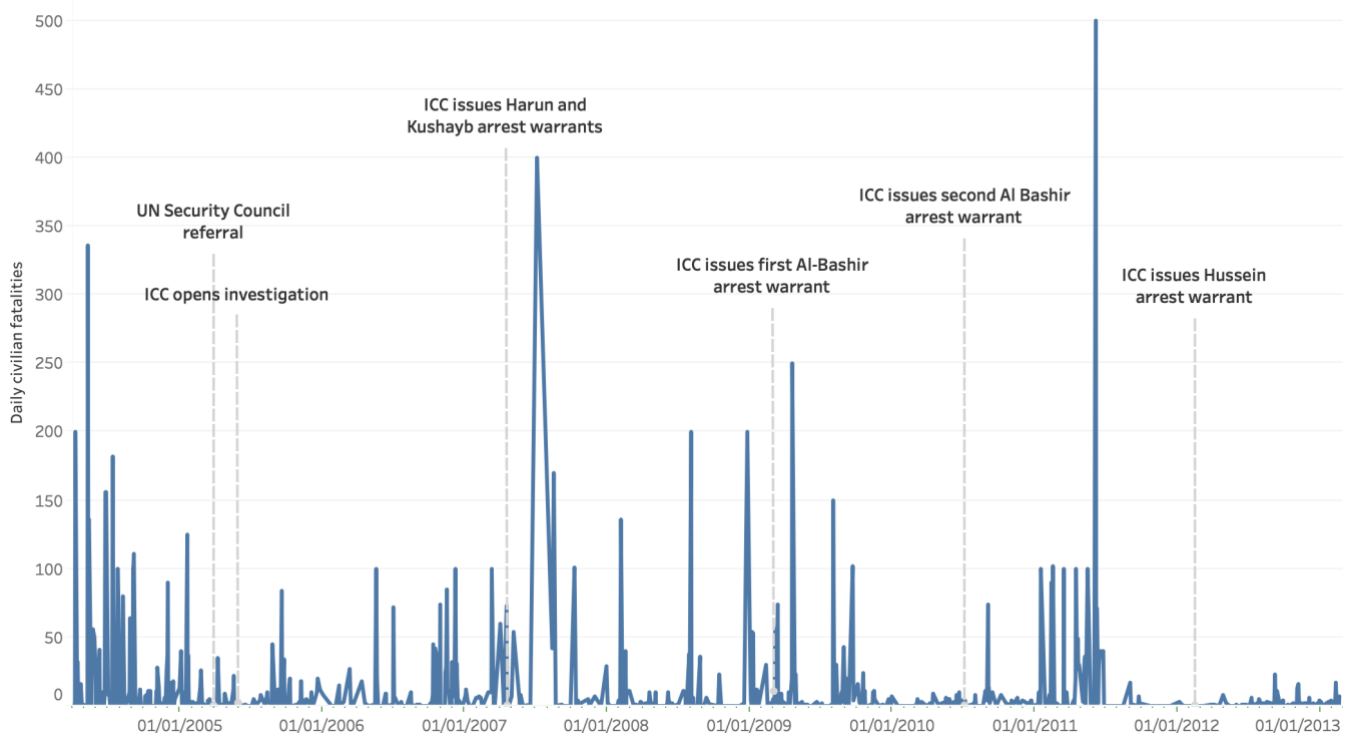
Source: Armed Conflict Location and Event Dataset (ACLED), acleddata.com (Raleigh et al, 2010)

Because Sudan is not a state party to the ICC, the conflict parties could only be taken to *Den Haag* upon (unanimous) referral of the situation by the UN Security Council, acting under Chapter VII of the Charter of the United Nations (Rome Statute, Article 13b). Despite the magnitude and scale of alleged human rights abuses, there continued to be serious opposition in the Security Council towards passing a resolution because such would explicitly implicate the Al-Bashir government in the atrocities committed in Darfur (Rodman, 2008). Opposition was strongest from China and Russia who were allegedly supplying Sudan with arms and military equipment (Amnesty International, 2007). The required resolution (Resolution 1593) for referral to the ICC eventually passed on 31 March 2005 with eleven affirmative votes and four abstentions, including from China and the US (Cryer, 2006). The US is assumed to have abstained because of an ideological opposition towards the ICC rather than based on political allegiance to the Al-Bashir regime (Cryer, 2006).

The focus of the ongoing ICC proceedings is on alleged genocide, war crimes and crimes against humanity in the Darfur region since 1 July 2002, the entry into force of the Rome Statute (ICC, 2020). Of the five indicted suspects who are still alive, only Ali Kushayb has voluntarily surrendered to the court on 9 June 2020 (Al Jazeera, 2020), after being wanted by the ICC for thirteen years. The other subjects remain fugitives. The indicted Sudanese head of state and government, Omar Al-Bashir, has visited several ICC members, including Kenya, without being arrested despite member states' legal obligation to enforce arrest warrants (Roach, 2013). However, following Al-Bashir's removal from power by the military in 2019, the new government of Sudan has agreed that the ex-president must face the ICC once a broader peace deal would be implemented (BBC News, 2020).

Figure 2 below summarises daily civilian fatalities in Sudan, for the whole period of analysis, highlighting the start date of the six interventions by the ICC.

Figure 2: Daily civilian fatalities for 'violence against civilians' conflict events, Sudan, 31 March 2004 - 1 March 2013; annotated: start date of ICC actions



5.2 Quantitative analysis

Table 3: Negative binomial regression results, dependent variable: daily civilian fatalities

Variable	Model 1 (90 days)		Model 2 (120 days)		Model 3 (150 days)	
	β	Exp (β)	β	Exp (β)	β	Exp (β)
<i>UN Security Council referral</i>	-1.061** (.4726)	.346	-1.064** (.4686)	.345	-1.092** (.4685)	.336
<i>ICC opens investigation</i>	-.834 (.5419)	.434	-.384 (.3980)	.681	-.468 (.3634)	.627
<i>Harun and Khashayb arrest warrants</i>	1.709** (.7901)	5.523	1.759*** (.6692)	5.806	1.420** (.5752)	4.139
<i>First Al-Bashir arrest warrant</i>	.643* (.3705)	1.902	.540 (.3505)	1.716	.497 (.3199)	1.643
<i>Second Al Bashir arrest warrant</i>	-.275 (.7031)	.759	-.522 (.4629)	.593	-.605 (.4376)	.546
<i>Hussein arrest warrant</i>	-2.376*** (.7031)	.093	-2.928*** (.5049)	.054	-2.476*** (.4006)	0.084
<i>Non-civilian fatalities</i>	.006 (.0045)	1.006	.006 (.0044)	1.006	.006	1.006
<i>News coverage</i>	.022 (.0199)	1.022	.025 (.0201)	1.025	.022	1.022
<i>Constant</i>	2.358*** (.0973)		2.359*** (.0994)		2.390*** (.1018)	
<i>Negative Binomial</i>	4.907 (.2536)		4.808 (.2492)		4.796 (.2487)	
<i>Likelihood ratio Chi2</i>	27.812***		43.994***		45.793***	

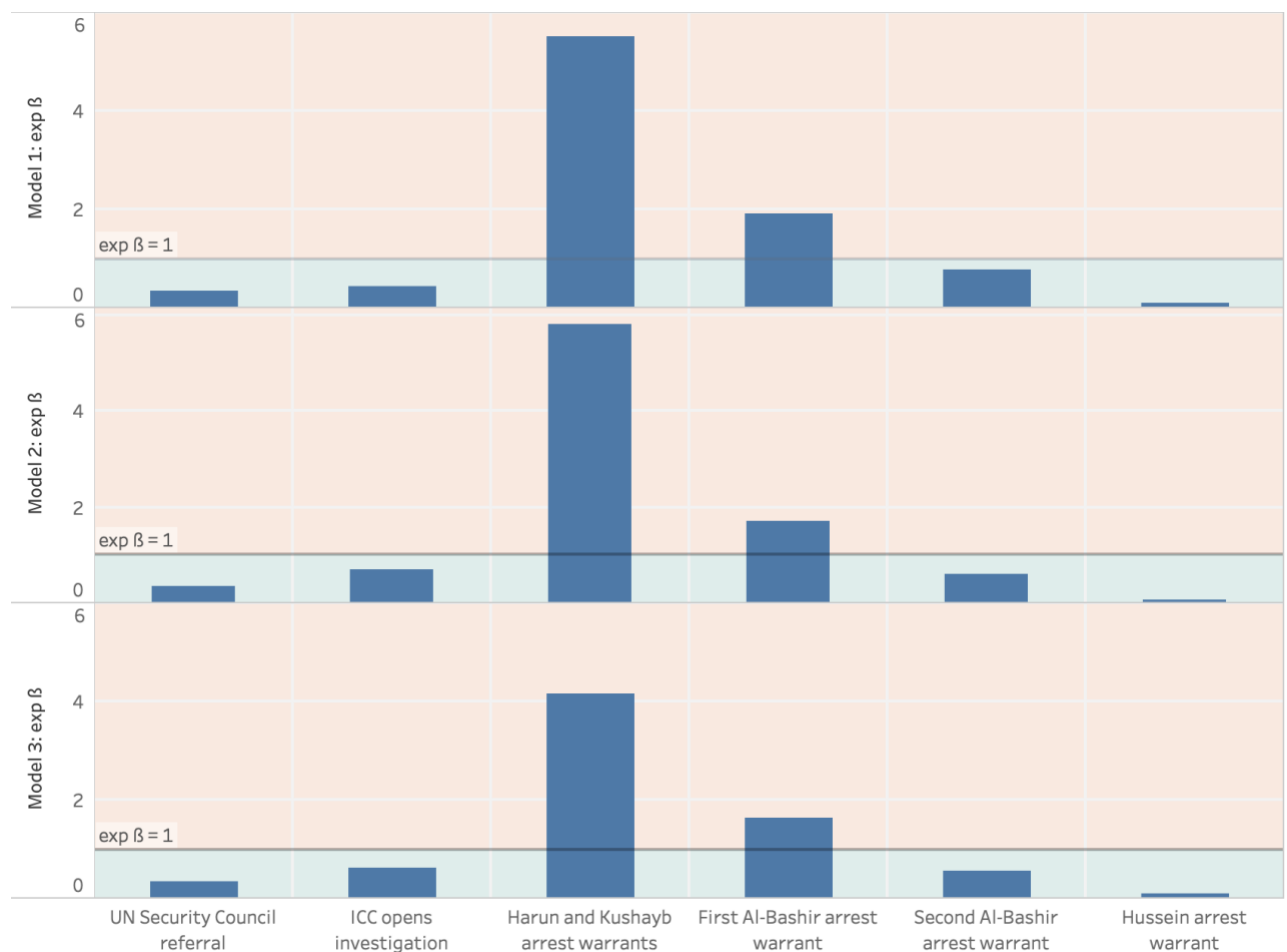
Note: * $p < 0.1$; ** $p < 0.05$; *** $p < 0.01$, two-tailed test

The results from the negative binomial regression analysis in table 3 indicate that the ICC had a deterrent effect at the beginning of the conflict, but which greatly decreases with regard to the first arrest warrants in the situation in Darfur, Sudan.

The UN Security Council referral is associated with a decrease in civilian fatalities across all three models, controlling for the other variables, and statistically significant. As such, the models predict almost three times lower civilian fatalities for the period following the referral. The deterrent effect is expected to be weaker, although not statistically significant, for the second ICC action, the opening of the investigation. Interestingly, the first arrest warrants for Harun and Kushayb are associated with large increases in civilian fatalities and are statistically significant across the three models. The predicted civilian fatalities, holding other variables constant, are at least four times higher for the period following the arrest warrants in the Harun and Kushayb case than for other periods. The first arrest warrant for president Al-Bashir follows a similar pattern, although the effect is weaker and not statistically significant across all models. The second arrest warrant for Al-Bashir is, in fact, associated with a slight decrease in civilian fatalities, holding the other variables constant. The arrest warrant for Mr. Hussein is associated with the largest decrease in civilian fatalities, controlling for the other variables, and statistically significant across all models. As such, the expected civilian fatalities for the period following the Hussein arrest warrant are estimated at just 8.4% the level for other periods. However, the results for the Hussein arrest warrant should be read with caution, given that the conflict had reduced greatly in intensity (see figure 2), most likely for other factors than ICC actions, uncontrolled for in the models. The control variables, non-civilian fatalities and news coverage, are almost perfectly correlated with civilian fatalities across the three models, albeit not statistically significant.

Figure 3 summarises the estimated effects for ICC actions on daily civilian fatalities from the three models, holding the control variables constant. The baseline, i.e. no negative or positive deterrent effect is represented by the reference line ($\exp \beta = 1$). Observations below the reference line in the light blue shaded area indicate that the ICC is estimated to have had a positive deterrent effect (reduction in fatalities following the ICC action). Observations above the reference line in the light red shaded area indicate that the ICC is estimated to have had a negative deterrent effect (increase in fatalities following the ICC action). The models thus predict that the ICC had a positive deterrent effect for the UN Security Council referral, the opening of the investigation, the second Al-Bashir arrest warrant and the Hussein arrest warrant. The models predict a negative ICC deterrent effect for the Harun and Kushayb arrest warrants and the first Al-Bashir arrest warrant.

Figure 3: Estimated effect of ICC actions on civilian fatalities, controlling for other variables



5.3 Qualitative analysis

This section uses process tracing to assess the effect of international support for ICC prosecutions on the exercise of deterrence effects in Darfur, Sudan during each stage of the investigations. The six stages, or ICC actions, are ordered chronologically to allow the analysis to consider fluctuations in international support and the influence of such on ICC deterrence.

31 March 2005: UN Security Council referral

The UN Security Council referred the situation in Darfur, Sudan to the ICC in Resolution 1593 on 31 March 2005 with eleven affirmative votes and abstentions from the US, China, Algeria and Brazil (Cryer, 2006). At this point, the international community seemed highly committed towards supporting a legal solution involving the ICC in Darfur. Louise Arbour, at the time UN High Commissioner for Human Rights, notes that ‘the Council’s decision to act in the face of evidence of significant and widespread human rights violations was, particularly in the West, largely applauded’ (Arbour, 2014, p. 196). Even the US, who had been a particular staunch opponent to the ICC, had agreed not to veto the Security Council resolution, a particularly strong sign that the ICC was almost universally seen as a useful tool towards reducing violence in Darfur (Cryer, 2006). Moreover, UN Secretary-General Annan vocally supported the court, emphasising that the Sudanese government, all parties to the Darfur conflict, and all other states and regional/international bodies ought to fully cooperate with and provide assistance to the ICC (Tanagho & Hermina, 2009).

The high level of international support for the ICC enhanced the court’s deterrence effects following the UN Security Council referral. On a most basic level, had the situation not been referred due to a veto by China, Russia or another permanent member, leaders in Darfur would have continued to enjoy *de facto* immunity from prosecution. The ICC would therefore have no deterrent effect as there would be no threat of prosecution. Furthermore, while the

referral itself establishes the *possibility* that Sudanese leaders would be tried through granting the court jurisdiction over Sudan, commitment by powerful states to supporting the ICC would have greatly raised the perceived *certainty* of prosecution, a key success factor for ICC deterrence (Buitelaar, 2016). The fact that China, Sudan's closest international ally, had chosen not to veto the resolution may have signalled to Sudanese leaders that there was a real chance they would be targeted and prosecuted by the ICC which enhanced the ICC's deterrent potential.

1 June 2005: ICC opens investigation

On 1 June 2005, the ICC prosecutor Moreno-Ocampo formally opened investigations in Darfur (ICC, 2005), finding the situation admissible under the Rome Statute on the basis of evidence implicating the government in the commission of atrocities including mass killings, systematic rape and the burning of family homes (Tanagho & Hermina, 2009). Most of the international community viewed the latest developments positively as there was a hope that the mere presence of ICC investigators on the ground in Sudan could contribute to deterrence through an 'atmosphere in which the costs of abuse are more apparent to the perpetrators of violence against civilians' (Bosco, 2011, p. 189). To be sure, the UN took other actions which could be seen as complementary to the ICC's proceedings. First, in April 2006, the UN Security Council adopted resolution 1672 demanding that its members adopt sanctions against four high-ranking Sudanese officials (Cassese, 2006). Second, in August 2006, the UN Security Council passed resolution 1706 authorising UN peacekeepers to be deployed in Darfur (Tanagho & Hermina, 2009). Subsequently blocked by the Sudanese regime, the parties eventually settled for an AU/UN hybrid operation in Darfur (Tanagho & Hermina, 2009). Most of the international community still favoured a legal solution to Darfur, but increasingly the ICC came under criticism for acting too cautiously in Sudan (Cassese, 2006). There are accounts signalling a general lack of clear communication between Moreno-Ocampo and the

Security Council about his strategy (Cassese, 2006) and the prosecutor's failure to request formal Sudanese cooperation for the investigations meant that the UN Security Council could do little to press for Sudan's compliance (Schiff, 2008).

The ICC's decision to formally open an investigation was received positively by the international community, a factor that contributed positively to deterrence effects. In the Darfur situation, cooperation between the UN-led Commission of Inquiry and the Office of the Prosecutor produced a list of 51 suspects, which Moreno-Ocampo received just prior to opening the investigation (Cassese, 2006). Al-Bashir had been aware of this and it would be quite unreasonable to think his name would not be on the list. Hence, due to the close cooperation between the UN and the ICC, the threat of prosecution for Al-Bashir and other government officials had been high, enhancing ICC deterrence. Conversely, in the absence of the work of the Commission of Inquiry, the ICC would have taken significantly longer to identify potential subjects, thereby reducing its deterrent effect. However, cracks in the UN-ICC relationship started to show in 2006 as senior UN officials publicly expressed their disappointment with the conduct of the investigation (Cassese, 2006). The UN Security Council started 'to fill the vacuum left by a judicial body [the ICC]' (Cassese, 2006, p. 440) which Al-Bashir would have perceived as a sign of weakness of the ICC. This plausibly explains why the overall ICC deterrence effects were weaker at this stage than with the referral.

27 April 2007: Harun and Kushayb arrest warrants

On 27 April 2007, the ICC Pre-Trial Chamber I issued arrest warrants for Ahmed Mohamed Harun and Ali Mohamed Abdel Rahman 'Kushayb' (De Waal, 2008) for charges of crimes against humanity and war crimes (ICC, 2007). In response, the government of Sudan further hardened its stance of non-cooperation (Mills, 2012) and Harun was appointed by Al-Bashir to head an inquiry into human rights abuses in Darfur in a blatant act of mockery (De

Waal, 2008). Importantly, the first two arrest warrants in the Darfur situation changed the ICC's role in the eyes of the international community. The court which had been a useful diplomatic bargaining chip as a passive threat, now more than ever relied on active support from states to enforce the warrants. The dilemma was that the ICC could not arrest the suspects on its own, while any foreign intervention by major powers to arrest the indicted could be construed by the government of Sudan as an attempt of coercive regime change (Nouwen, 2013). Western governments, instead of pressuring Sudan themselves, were secretly hoping that China could convince its African ally to hand the suspects over to the ICC (De Waal, 2008). Such hopes proved to be unfounded. Instead, China and Qatar actively worked to block a UN Security Council statement which would have called for the arrest of the two indicted persons (Sudan Tribune, 2007).

While the situation's first arrest warrants may be seen as a major step for the ICC, especially given the difficulties of non-cooperation from Sudan, the international community's lack of support in enforcement reduced the court's deterrence effects. The court essentially loses its deterrent potential where the international community helps to illustrate its limited enforcement capacity on the territory of sovereign states (Nerland, 2008). There were furthermore signs that China could be willing to use its veto powers in the Security Council, should Western governments intend to send troops to arrest Sudanese ICC suspects (Jopson, 2008). Had such a resolution passed, the deterrent potential of the ICC would have been significantly higher because of the increased probability of arrest. In summary, the low amount of pressure on Sudan by Western states and the UN Security Council to hand over Harun and Kushayb, plus China's likely veto in the case of a resolution, plausibly explains why the ICC deterrence effects were low for the first arrest warrants.

4 March 2009: First Al-Bashir arrest warrant

Sudan's president Al-Bashir would become the first sitting head of state to be indicted by the ICC (McMillan & Mickler, 2013). The ICC's Pre-trial Chamber I issued an arrest warrant for Sudanese president Omar Al-Bashir on 4 March 2009 for charges of war crimes and crimes against humanity (ICC, 2009). In immediate response to the indictment, Al-Bashir began framing the ICC as an imperialistic tool of Western governments (Roach, 2013) and retaliated by expelling more than a dozen humanitarian aid organisations (Akhavan, 2009). This left 'more than a million people without access to food, water and healthcare services' (Akhavan, 2009, p. 648). Not only did the expulsion of humanitarian workers contribute to excess civilian fatalities in Darfur (OCHA, 2009), Al-Bashir's move also continued to highlight to Western governments the costs attached to an aggressive ICC prosecutorial strategy in Darfur. Western donor countries now essentially had to choose between supporting the ICC or pushing Sudan to accept the assistance of international aid agencies (Akhavan, 2009). Overall, the Security Council appeared to side with the latter option as it appealed to Al-Bashir to reverse the expulsion in an unofficial statement, while making no reference to compliance with the ICC arrest warrant (Worsnip, 2009). China called out the ICC and expressed "grave concerns and misgivings" on the decision to indict Al-Bashir (Buckley, 2008). Similarly, the Arab League stressed its solidarity with Sudan and publicly rejected the ICC's arrest warrants (BBC News, 2009). The African Union who had requested a twelve month deferral of the situation in Darfur by the Security Council, which the Council had ignored (Mills, 2012), went so far as to indicate that its members would refuse to comply with its obligation under Article 98 of the Rome statute to arrest Al-Bashir (African Union, 2009).

The ICC had fallen out of favour with most of the international community which diminished the potential deterrent effect an arrest warrant against Al-Bashir would have. While the warrant is a laudable effort by the ICC to close the impunity gap, without international

backing or a coordinated plan for its enforcement, indicting Al-Bashir did not have the intended effect of curbing violence in Darfur. Instead, the arrest warrant for Al-Bashir served to ruin the credibility of the ICC in the eyes of the African Union and the Arab league (Hussein, 2009), and to an extent, the West who favoured providing aid over pursuing criminal justice. Had there been support from neighbouring states, chances to apprehend and thus to deter Al-Bashir (with regard to targeted deterrence, see Bosco, 2011, p. 170) would have been higher. In summary, the near total falling out of the ICC with its international supporters significantly reduced the chances of Al-Bashir's arrest and thus reduced the potential deterrent effect of an arrest warrant against the Sudanese president.

12 July 2010: Second Al-Bashir arrest warrant

Despite the growing concern of the international community that the prosecutorial strategy of the ICC was having a negative impact in Darfur (Barnes, 2011), the ICC issued an updated second arrest warrant for Al-Bashir on 12 July 2010, this time including genocide charges (ICC, 2010). While rebel groups hailed the second indictment "a victory", a senior minister in the Al-Bashir government labelled the arrest warrant "of no concern to us" (BBC News, 2010). In the period immediately following the second arrest warrant, there was no notable change in attitude from the international community. The African Union, once more, instructed all its members not to comply with any requests to arrest Al-Bashir (Barnes, 2011). Al-Bashir was invited to travel to Chad and Kenya, who are both ICC signatories, which he did on 21 July and 28 August 2010 respectively, without being apprehended (Barnes, 2011). While the ICC had notified the Security Council of Al-Bashir's intentions to travel to ICC state parties, the Council did not take any action with respect to the two state's failure to cooperate with the arrest warrant (Ayeni & Olong, 2017). The EU reportedly sent a delegation to attend Al-Bashir's presidential inauguration, just two months before his second indictment (Sudan Tribune, 2010). China continued to maintain good relations with Al-Bashir and allowed its ally

to visit in June 2011 without arrest (Higgins, 2011). However, China's warm relationship with Sudan had always been conditional on the latter's supply of oil, which was now being endangered by the looming secession of South Sudan where roughly 75% of the country's oil reserves are located (Higgins, 2011).

At this stage, there was no general change in the level of support for the court from most of the international community which could explain why the second arrest warrant exercised much lower deterrent effects than previous actions. However, China's changing diplomatic considerations based on oil may well have contributed to ICC deterrence. Accordingly, now-eroded support from one of the Security Council's permanent members increased the threat of prosecution for Al-Bashir because he could be sure of China's veto any more in the Security Council with regard to resolutions demanding his arrest. In summary, while most states' attitudes towards the ICC investigations remained the same, China's decreasing reliance on Al-Bashir for oil reasonably explains some of the increase in the strength of ICC deterrence effects *vis-à-vis* his first arrest warrant.

1 March 2012: Hussein arrest warrant

On 1 March 2012, the ICC Pre-Trial Chamber I issued a warrant of arrest for Abdel Raheem Muhammad Hussein, then Minister of the Interior, for crimes against humanity and war crimes allegedly committed in Darfur (ICC, 2012a). The government of Sudan responded by calling the arrest warrant "unjustifiable" and "an outcome of lobbying by anti-Sudan groups in the US" (CNN, 2012). Hussein was able to travel to Chad, an ICC member state, from 25 to 26 April without being arrested (CICC, 2020). But the international community seemed slightly more committed to the ICC than previously. For example, Human Rights Watch called on the Chadian government to detain Hussein, mirroring earlier expressions of concern by the EU (Tribune Business News, 2013). Furthermore, the UN Security Council adopted Resolution

2035 (2012) demanding an end to violence against civilians while strengthening the UN-AU joint mission (UNAMID) in Darfur. However, the ICC prosecutor stressed that UNAMID should not be authorised the arrest Hussein or any others (ICC, 2012b), wary that this could, again, escalate violence. Despite the short-lived strengthened commitment by the international community towards the ICC immediately following the Hussein arrest warrant, the support later diminished again, to the point where the new ICC prosecutor Bensouda had no choice but to briefly halt the investigations in 2014 (BBC News, 2014).

The temporary resurgence in support for the ICC following the Hussein arrest warrant contributed to the ICC's deterrence effects at that stage. Note that oil-rich South Sudan had seceded from the Republic of Sudan on 9 July 2011, reducing China's commitment to supporting the Sudanese regime. The resulting threat of Hussein's arrest by way of foreign intervention was higher than, for example, Harun and Kushayb. While it is reasonable to suggest that the increased threat of prosecution due to China's position translated into higher ICC deterrence effects, it does not, on its own, explain why the deterrent effect of the ICC was significantly stronger for the Hussein arrest warrant than Al-Bashir's second arrest warrant where China had held the same position. The alternative explanation that the conflict had reduced greatly in intensity (see figure 2) which would overstate the observed ICC's deterrent effect, seems more appropriate than the theory of international support being tested here.

6. Conclusion

Returning to the original, guiding question of this dissertation, how has the ICC performed in the situation in Darfur, Sudan?

This dissertation has evaluated the court's performance in Darfur based on an indicator of outcome performance: deterrence effects. Deterrence is operationalised as a reduction in civilian fatalities following specific actions by the ICC. The quantitative analysis demonstrates that the ICC did exercise deterrence effects, particularly at the beginning of the investigation. The first ICC actions, the UN Security Council referral and the opening of the investigation, are associated with significantly lower civilian fatalities. The qualitative analysis adds that support from the international community for the ICC, most notably a close cooperation between the Security Council and the court, contributed to the strong deterrence effects. However, contrary to my theoretical expectations, the first arrest warrants in the Darfur situation, for Harun and Kushayb, as well as for Al-Bashir, are shown to have a negative deterrent effect whereby civilian fatalities drastically increase following the ICC intervention. The qualitative analysis indicates that the international community's failure to enforce the warrants or pressurise the Sudanese government, hindered potential ICC deterrence effects. While states are not granted any powers under the Rome Statute to arrest those indicted by the ICC on the perpetrators' sovereign territory, more concrete action by the UN Security Council calling for arrests could have strengthened the ICC arrest warrants' deterrence effects. Towards the end of the investigations, the ICC exercised stronger deterrent effects as China became less supportive of the Sudanese government. However, the quantitative findings may overstate the ICC deterrent effect as the conflict had reduced greatly in intensity, most likely for other reasons than ICC action or changes in international support.

Holtermann (2010, p. 290) rightly stresses that the court cannot and must not deter all human rights abuses, it only needs to ‘deter enough perpetrators to justify its costs’. I argue that in Darfur, the ICC has achieved that objective. The court has made a potential difference to thousands of civilians in war-torn Darfur in the early stages of its intervention, signalling that the Sudanese government would be tried. But the ICC cannot deter acting as a lone wolf, especially where the government being investigated is actively restricting the investigations such as in Sudan. Arrest warrants, in particular, appear to be bad deterrents, unless the international community commits to their enforcement. While acknowledging that the Rome Statute, by design, honours state sovereignty over third party enforcement of arrest warrants, I hold that political solutions need to accompany ICC investigations if they are to be successful. Only then will the ICC be perceived as a credible threat and has the potential to alter the behaviour of future war criminals.

This dissertation suffers from certain limitations. Some of those have been discussed throughout, including the narrow scope of focusing on only one outcome performance indicator, the danger of reverse causality for the quantitative analysis and the inability to consider all alternative explanations for the qualitative analysis. Also, the trade-off with the multi-method research should be noted; while the breadth of analysis increases, its depth necessarily decreases. As this dissertation is a piece of ‘evaluation research’ (Robson & McCartan, 2016, p. 190), the choice of multiple strategies is justified as providing a more complete evaluation based on the empirical reality of the situation in Darfur. The research thus has high internal validity, but it does suffer from external validity problems (Bleijenbergh et al, 2011). We can only reasonably generalise its findings to situations where the ICC intervenes in an ongoing conflict, and where the UN Security Council has triggered the court’s jurisdiction - of which only Libya qualifies, so far. Future research ought to test the existence of deterrence effects in other ICC situations. Also, the conditional theory of international support influencing

deterrence developed in this dissertation should be tested in future ICC interventions through more qualitative studies.

Notwithstanding its limitations, this dissertation makes a contribution to several areas of scholarship. One, it contributes to the literature on IO performance through an in-depth, mixed methods analysis of the performance of a specific IO. This mixed methods research design could well be used to evaluate the performance of other IOs, as well, albeit with unique criteria. Two, this dissertation makes a practical contribution to the body of ICC scholarship by specifying at which stage and under which condition of international support, the ICC can exercise the strongest deterrence effects. Should the findings around arrest warrants being bad deterrents be validated in other ICC situations, they may well be used to guide the strategy of the ICC prosecutor with regard to the timing of her actions. For instance, arrest warrants may be issued more strategically when international support is high, to ensure that they achieve deterrence effects. Third, this dissertation makes a contribution to conflict studies by analysing how deterrence operates in the protracted conflict in the Western Darfur region of Sudan. Future research should more closely study how deterrence is influenced by local factors proprietary to the conflict, such as the nature of the conflict, the types of actors involved and the conflict parties' respective chances of winning.

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