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OVERVIEW

The Journal of International Criminal Law (*JICL)* is a scientific, online, peer-reviewed journal, first edited in 2020 by Prof. Dr. Heybatollah Najandimanesh, mainly focusing on international criminal law issues.

Since 2023 JICL has been co-managed by Prof. Dr. Anna Oriolo as General Editor and published semiannually in collaboration with the International and European Criminal Law Observatory (IECLO) staff.

JICL Boards are powered by academics, scholars and higher education experts from a variety of colleges, universities, and institutions from all over the world, active in the fields of criminal law and criminal justice at the international, regional, and national level.

The aims of the JICL, *inter alia*, are as follow:

- to promote international peace and justice through scientific research and pubblication;
- to foster study of international criminal law in a spirit of partnership and cooperation with the researchers from different countries;
- to encourage multi-perspectives of international criminal law; and
- to support young researchers to study and disseminate international criminal law.

Due to the serious interdependence among political sciences, philosophy, criminal law, criminology, ethics and human rights, the scopes of JICL are focused on international criminal law, but not limited to it. In particular, the Journal welcomes high-quality submissions of manuscripts, essays, editorial comments, current developments, and book reviews by scholars and practitioners from around the world addressing both traditional and emerging themes, topics such as

- the substantive and procedural aspects of international criminal law;
- the jurisprudence of international criminal courts/tribunals;
- mutual effects of public international law, international relations, and international criminal law;
- relevant case-law from national criminal jurisdictions;
- criminal law and international human rights;
- European Union or EU criminal law (which includes financial violations and transnational crimes);
- domestic policy that affects international criminal law and international criminal justice;
- new technologies and international criminal justice;
- different country-specific approaches toward international criminal law and international criminal justice;
- historical accounts that address the international, regional, and national levels; and

- holistic research that makes use of political science, sociology, criminology, philosophy of law, ethics, and other disciplines that can inform the knowledge basis for scholarly dialogue.

The dynamic evolution of international criminal law, as an area that intersects various branches and levels of law and other disciplines, requires careful examination and interpretation. The need to scrutinize the origins, nature, and purpose of international criminal law is also evident in the light of its interdisciplinary characteristics. International criminal law norms and practices are shaped by various factors that further challenge any claims about the law's distinctiveness. The crime vocabulary too may reflect interdisciplinary synergies that draw on domains that often have been separated from law, according to legal doctrine. Talk about "ecocide" is just one example of such a trend that necessitates a rigorous analysis of law *per se* as well as open-minded assessment informed by other sources, *e.g.*, political science, philosophy, and ethics. Yet other emerging developments concern international criminal justice, especially through innovative contributions to enforcement strategies and restorative justice.

The tensions that arise from a description of preferences and priorities made it appropriate to create, improve and disseminate the JICL as a platform for research and dialogue across different cultures, in particular, as a consequence of the United Nations push for universal imperatives, *e.g.*, the fight against impunity for crimes of global concern (core international crimes, transboundary crimes, and transnational organized crimes).

ARTICLES

International Crimes and Justice: Insights on the International Courts' Decisions on the Situation in Ukraine

by Francesco Foccillo[*]

ABSTRACT: The situation that has unfolded in Ukraine since 2014 have had consequences in international relations and has also been brought before international tribunals, i.e., the International Court of Justice, the European Court of Human Rights, the Court of Justice of the European Union, and the International Criminal Court, the later issuing arrest warrants against Vladimir Putin and Maria L'vova-Belova. Moving from the historical background of the Russian-Ukrainian crisis, this paper aims to analyse the international reactions to it, focusing on the "judicial" responses and in particular on the ICC investigation and arrest warrants paying close attention to their public availability. The objective of this work is, with the limitations present due in the analysis of events that still have to unfold completely, both on the field and in the courtrooms, to understand what effect these judicial proceedings can have on the Russian Federation's diplomatic, international, and economic relations.

KEYWORDS: Aggression; Human Rights; International Criminal Court; Russia-Ukraine Conflict; Terrorism; Warrant of Arrest.

I. The Conflict in Ukraine: From the Maidan Revolution to the 2022 Escalation

On December 1, 1991, the Ukrainian electorate confirmed the Act of Declaration of Independence of the Ukraine, adopted on August 24, 1991,[1] confirming the newly found independence of Ukraine from the USSR.[2] Ukraine's relations with Russia would see an important shift twenty years after its independence, in a process started by the Euromaidan protests. The Euromaidan[3] protest movement started on November 21, 2013, after President Viktor Fedorovych Yanukovych's[4] decision to delay Ukraine's signing of the European Union

DOUBLE BLIND PEER REVIEWED ARTICLE

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[1] PAUL ROBERT MAGOCSI, A HISTORY OF UKRAINE: THE LAND AND ITS PEOPLES (2010), at 722-723.

[2] A journalistic report of the results of the Ukrainian independence referendum can be found in Paolo Valentino, *Sepolta a Kiev l'Unione di Gorbaciov*, CORRIERE DELLA SERA (Dec. 3, 1991)

[3] The name Euromaidan is a blend word that comes from the blending of *Euro*pe and *Maidan* Nezaležnosti (the Ukrainian name of Kyiv's Independence Square, where the protests began). Jim Heintz, *Ukraine's Euromaidan: What's in a name?*, ASSOCIATED PRESS (Dec. 2, 2013), https://apnews.com/general-news-c920a5f8b5c343f4b888a36bad899091.

[4] The patronymic, in this case *Fedorovych*, is used in official documents in both Ukrainian and Russian. In this work it will be used in the first instance in which a person whose name is in either Russian or Ukrainian is cited. In Ukrainian law patronymics are regulated by article 28 para. 1 of the Ukrainian Civil Code.

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Association Agreement[5] after having promised to do so,[6] shifting his policies from pro-European to pro-Russian and sparking the protests that evolved into the Revolution of Dignity. On February 23, 2014, the Revolution of Dignity (also known as the Maidan Revolution)[7] ended with the creation of an *interim* government headed by Arseniy Petrovych Yatsenyuk, which succeeded the one headed by Mykola Yanovych Azarov. On February 22, 2014, President Yanukovych fled the country,[8] and a new presidential election was held on May 25,[9] which was won by Petro Oleksiiovych Poroshenko.[10] It is important to underline that this election was not held in all of Ukraine, with the majority Russophone regions of Crimea, Donetsk and Lugansk (Donetsk and Lugansk are collectively known as *Donbas*) not taking part in these elections.[11]

As cited before, the elections did not take place in these regions because the Euromaidan protest movement and Revolution of Dignity found opposition there. Indeed, in response to the protests, on March 1st, 2014, the Russian Council authorised the use of armed forces in Ukraine, specifically in Crimea, which hosts the Sevastopol Naval Base,[12] that had been leased by Russia from Ukraine in 1997 after the signing of the Partition Treaty on the Status and Conditions of the Black Sea Fleet.[13] The annexation of Crimea by separatist armed units and the so-called *little green men* (Russian forces in unmarked uniforms)[14] was rubberstamped by a referendum held on March 16th 2014,[15] the subsequent declaration of independence by the Crimean Parliament, and its application to join Russia;[16] Russia formally annexed Crimea on March 21, 2014.[17] In the Donbas, in response to the Euromaidan Revolution, pro-Russian protesters

[5] European Union, Republic of Ukraine, Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, (June 27, 2014), OJ L 161, 29.5.2014, at 3–2137. The agreement was signed on March the 21st, 2014 (Preamble, Article 1, Titles 1, 2 and VII), and on June the 27th, 2014. It entered into effect on September 1st, 2017, upon the ratification by all signatories. The agreement was deposited at the Council of Europe Union-General Secretariat. See Sergio Cantone, *Cronaca di una rivoluzione improbabile*, in 2014(4) LIMES 117 (2014).

[6] Serhiy Kvit, *The Ideology of the Euromaidan*, in 1(1) CONTEMPORARY UKRAINE: A CASE OF EUROMAIDAN 27 (2014).

[7] *Supra*, note 3.

[8] The fall of President Yanukovych is analysed in detail in Thomas Ambrosio, *The fall of Yanukovych: structural and political constraints to implementing authoritarian learning*, in 33(2) EAST EUROPEAN POLITICS 184 (2017).

[9] Yuriy Shevda, Joung Ho Park, *Ukraine's revolution of dignity: The dynamics of Euromaidan*, in 7(1) JOURNAL OF EURASIAN STUDIES 85 (2016).

[10] Central Election Commission, *On the results of the presidential elections of Ukraine*, CVK.GOV.UA (June 1, 2014), https://www.cvk.gov.ua/wp-content/uploads/2018/10/protokol_cvk_25052014.pdf.

[11] OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, UKRAINE EARLY PRESIDENTIAL ELECTION 25 MAY 2014 OSCE/ODIHR ELECTION OBSERVATION MISSION FINAL REPORT (May 25, 2014), https://www.osce.org/odihr/elections/ukraine/120549.

[12] Jure Vidmar, *The Annexation of Crimea and the Boundaries of the Will of the People*, in 16(3) GERMAN LAW JOURNAL 365 (2015).

[13] The Naval Base was leased after the short-lived Republic of Crimea's Constitution was abolished by the Ukrainian Parliament in 1995. Spencer Kimball, *Bound by treaty*, DEUTSCHE WELLE (Nov. 3, 2014), https://www.dw.com/en/bound-by-treaty-russia-ukraine-and-crimea/a-17487632.

[14] Mark Galeotti, *'Hybrid War' and 'Little Green Men': How It Works, and How It Doesn't*, in UKRAINE AND RUSSIA: PEOPLE, POLITICS, PROPAGANDA AND PERSPECTIVES (Agnieszka Pikulicka-Wilczewska, Richard Sakwa eds., 2015), at 85-86. In Russia the *little green men* are referred to as *polite people*, to which, on May the 7th, 2015, a monument was erected in Belgorosk, as reported in Daisy Sinclair, *Russia Unveils Monument To 'Polite People' Behind Crimean Invasion*, RADIOFREEEUROPE RADIO LIBERTY (May 6, 2015), https://www.rferl.org/a/russia-monument-polite-people-crimea-invasion/27000320.html.

[15] An analysis of the highly contested legality of the 2014 Crimean Referendum is found in Christian Marxsen, *The Crimea Crisis – An International Law Perspective*, in 74(2) ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT (HEIDELBERG JOURNAL OF INTERNATIONAL LAW) 367 (2014).

[16] Jure Vidmar, *The Annexation of Crimea*, *op. cit.*

[17] *Id.*

occupied, before being removed by the Security Service, the Donetsk Regional State Administration Building.[18] The pro-Russian protests continued in April,[19] with pro-Russian militants fighting Ukrainian government forces in several cities in the region between April 12 and April 14,[20] and with the declarations of independence of the Donetsk People's Republic[21] and of the Luhansk People's Republic[22] in the same month.

The separatist republic in the Donbas and Ukraine fought until 2022, despite the signing of two memoranda that should have laid the groundwork for peace: the Minsk agreement[23] on September 5, 2014, and the Minsk II agreement[24] on February 12, 2015, which "served the immediate needs of the various parties but established a roadmap for the future which could not actually be followed".[25] Russia continued to intervene in the conflict justifying its involvement with concerns for Russian speakers in Ukraine.[26] Russian involvement would increase in 2021 with two Russian military build-ups near the border between March and April, and with a second build-up between October 2021 and February 2022.[27] The second Russian military build-up was the prelude to the full-scale Russian invasion of Ukraine, called *special military operation* by Russian authorities, announced by Putin and enacted by the Russian military on February 24, 2022.[28] Russia had previously recognized the Donbas republics on February 22, 2022.[29]

During the conflict, on September 29, 2022, after holding referendums (deemed as illegitimate by the OSCE),[30] the Russian Federation formally annexed the Donetsk, Kherson, Luhansk and Zaporizhzhia oblasts,[31] with the United Nations Secretary General António

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[18] Charlie D'Agata, *Ukrainian city of Donetsk epitomizes country's crisis*, CBS EVENING NEWS (Mar. 6, 2014), https://www.cbsnews.com/news/ukrainian-city-of-donetsk-epitomizes-countrys-crisis/.

[19] Alec Luhn, *East Ukraine protesters joined by miners on the barricades*, THE GUARDIAN (Apr. 13, 2014), https://www.theguardian.com/world/2014/apr/12/east-ukraine-protesters-miners-donetsk-russia.

[20] MICHAEL KOFMAN, KATYA MIGACHEVA *et al.*, LESSONS FROM RUSSIA'S OPERATIONS IN CRIMEA AND EASTERN EUROPE (2017), at 43.

[21] *Ukraine crisis: Protesters declare Donetsk 'republic'*, BBC (Apr. 7, 2014), https://www.bbc.com/news/world-europe-26919928.

[22] *Separatists Declare 'People's Republic' In Ukraine's Luhansk*, RADIOFREEEUROPE RADIOLIBERTY (Apr. 28, 2014), https://www.rferl.org/a/separatists-declare-luhansk-peoples-republic/25364894.html.

[23] Officially known as the *Protocol on the results of consultations of the Trilateral Contact Group with respect to the joint steps aimed at the implementation of the Peace Plan of the President of Ukraine, P. Poroshenko, and the initiatives of the President of Russia, V. Putin*.

[24] Officially known as the *Package of Measures for the Implementation of the Minsk Agreements*.

[25] PAUL D'ANIERI, UKRAINE AND RUSSIA: FROM CIVILIZED DIVORCE TO UNCIVIL WAR (2023), at 240.

[26] Volodymyr Kulyk, *National Identity in Ukraine: Impact of Euromaidan and the War*, in 68(4) EUROPE-ASIA STUDIES 588 (2016).

[27] Simon Shuster, *The Untold Story of the Ukraine Crisis*, TIME (Feb. 2, 2022), https://time.com/magazine/europe/6144693/february-14th-2022-vol-199-no-5-europe/.

[28] The expression *special military operation* comes from Vladimir Putin's "On conducting a special military operation" televised address of February the 24th, 2022. The use of the term *invasion* in Russia was prohibited by Russian Federal Laws no.31-FZ and no.32-FZ of March the 4th, 2022. For a timeline of the events of February 23rd and 24th 2022 and the reactions to them see Jessie Yeung, Adam Renton, *et al.*, *Russia attacks Ukraine*, CNN INTERNATIONAL (Feb. 24, 2022), https://edition.cnn.com/europe/live-news/ukraine-russia-news-02-23-22/index.html.

[29] *Ukraine crisis: Russia orders troops into rebel-held regions*, BBC.COM (Feb. 22, 2022), https://www.bbc.com/news/world-europe-60468237. Alongside Russia only the Democratic People's Republic of Korea, the Syrian Arab Republic, and the *non-internationally recognized* Republic of Abkhazia ever recognized these republics.

[30] *OSCE heads condemn plan to hold illegal "referenda" in occupied territories of Ukraine*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Sept. 20, 2022), https://www.osce.org/chairmanship/526432.

[31] Russia annexed these oblasts even though it did not control the entirety of their territories. The only country to accept the results of the referendums was the Democratic People's Republic of Korea.

Gutierres[32] stating that "any annexation of a State's territory by another State resulting from the threat or use of force is a violation of the Principles of the UN Charter and international law".[33] The motivations given by Russian officials for its Special Military Operation, especially by President Putin, are too many to list here, we can see as examples: NATO's expansion in the former territory of the Warsaw Pact[34] (the West's "broken promise" made to Michail Sergeevič Gorbačëv in 1990),[35] the "denazification" and demilitarisation of Ukraine,[36] the "historical unity of Russian and Ukrainians"[37] and the aforementioned safeguard of Russian speakers. The Russian Orthodox Church has endorsed the invasion seeing the Special Military Operation as a "Holy War"[38] in which Russia is defending "the single spiritual space of Holy Russia".[39]

The list of given motivations is not, by any means, complete, and the analysis of the reasons that Russia has given to justify the invasion is out of the scope of this work, especially given that "*es bien sabido que las intenciones declaradas no siempre concuerdan con las obras realizadas*",[40] but, in order to tackle matters that are directly related to the conflict between Ukraine and the Russian Federations, these motivations given by Russian officials, especially by its Head of State, can help us to see the reasons behind Russia's actions, and to better understand the actions of the Russian Federation, including the ones investigated by the International Criminal Court (ICC), that have brought to the accusations against Putin and L'vova-Belova.

II. The Economic Sanctions against State and Non-State Actors Involved in the Russian Aggression of Ukraine

The sanctions against Russia include travel bans, asset freezes, unavailability of funds, and other measures, with economic sanctions being the most studied in the literature.[41] Economic sanctions have been a staple of international relations for thousands of years, with the first recorded ones dating back to 432 B.C., when Pericles prohibited the import and the selling of

[32] Secretary-General of the United Nations from 2017 onwards; Prime Minister of Portugal from 1995 to 2002; United Nations High Commissioner for Refugees from 2005 to 2015.

[33] *Ukraine: UN Secretary-General condemns Russia annexation plan*, UNITED NATIONS (Sept. 29, 2022), https://news.un.org/en/story/2022/09/1129047.

[34] The States that were formally in the Warsaw Pact (either as independent states, as Socialist Republics in Czechoslovakia, or as Socialist Republics in the USSR) and that have subsequently joined NATO are: Albania (Albania left the Warsaw Pact in 1968), Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, and Slovakia.

[35] Giorgio Cella, *La Russia è in Ucraina per tornare impero*, in 2022(3) LIMES 101, at 103.

[36] *Decision taken on denazification, demilitarization of Ukraine — Putin*, TASS RUSSIAN AGENCY (Feb. 24, 2022).

[37] VLADIMIR PUTIN, ON THE HISTORICAL UNITY OF RUSSIANS AND UKRAINIANS (July 12, 2021).

[38] As cited in Brian Mefford, *Russian Orthodox Church declares "Holy War" against Ukraine and West*, ATLANTIC COUNCIL (Apr. 9, 2024), https://www.atlanticcouncil.org/blogs/ukrainealert/russian-orthodox-church-declares-holy-war-against-ukraine-and-west/.

[39] *Id.* The autocephalous nature of the national orthodox churches, especially in those of the former USSR, and their general identification with their respective national governments is discussed in Giovanni Filoramo, *Cristianesimo*, in MANUALE DI STORIA DELLE RELIGIONI (Giovanni Filoramo, Marcello Massenzio *et al.* ed., 1998), at 207, 222.

[40] MARINA FERNÁNDEZ LAGUNILLA, LA LENGUA EN LA COMUNICACIÓN POLÍTICA I: EL DISCURSO DEL PODER (1999), at 79.

[41] The European Council keeps on its website, a page that gives an overview of the European Union's sanctions against Russia. The European Council, *EU Sanctions against Russia*, CONSILIUM.EUROPA.EU, https://www.consilium.europa.eu/en/policies/sanctions-against-russia/#military-aggression.

products originating from Megara, as a retaliation after the kidnapping of three women.[42] The use of sanctions has increased after World War II, including sanctions imposed by the United Nations, with the countries of western Europe, often alongside the United States, playing the most active role in the intergovernmental coalitions that have imposed a large fraction of the sanctions seen since the 1990s,[43] with those, paraphrasing the famous Marx's quote, having been referred to as a spectre haunting the world.[44] This role of "western European" countries has remained present in the case of the economic sanctions against Russia, that have been imposed by the European Union and by the United States in response to the 2014 Russian annexation of Crimea, especially on its oil sector.[45]

On March 6, 2014, with Executive Order 13660, entitled "Blocking Property of Certain Persons Contributing to the Situation in Ukraine"[46] the President of the United States Barack Obama,[47] finding "that the actions and policies of persons including persons who have asserted governmental authority in the Crimean region […] constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and I hereby declare a national emergency to deal with that threat",[48] ordered that "all property and interests in property that are in the United States […] are blocked and may not be […] dealt with".[49] The Council of the European Union, with Council Decision 2014/145/CFSP of March 17, 2014, mandated that "Member States shall take the necessary measures to prevent the entry into, or transit through, their territories of the natural persons responsible for actions which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, and of natural persons associated with them",[50] this Decision brought, on March 17 2014, Council Regulation 269/2014,[51] which implemented Decision 2014/145/CFSP.[52] The European Union, through its Global Human Rights Sanctions Regime, has also imposed sanctions on Russian individuals for their role in the conflict in Ukraine.[53]

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[42] Jean-Marc Thouvenin, *History of implementation of sanctions*, in ECONOMIC SANCTIONS IN INTERNATIONAL LAW AND PRACTICE (Masahiko Asada, ed., 2019), at 85.

[43] Lance Davis, Stanley Engerman, *Sanctions: Neither War nor Peace*, in 17(2) JOURNAL OF ECONOMIC PERSPECTIVES (2003) 187-197, at 189-190.

[44] Lorenzo Bernardini, *La funzione "servente" della giustizia penale nell'*enforcement *delle sanzioni economiche dell'UE*, in CRIMINALITÀ TRANSNAZIONALE (Anna Oriolo, *et al* eds., 2024), at 80.

[45] Daniel Fjærtoft, Indra Overland, *Financial Sanctions Impact Russian Oil, Equipment Export Ban's Effects* Limited, in 113(8) OIL AND GAS JOURNAL (2015) 66.

[46] Executive Office of the President, Blocking Property of Certain Persons Contributing to the Situation in Ukraine – Executive Order 13660 (Mar. 6, 2014).

[47] Barack Hussein Obama II, President of the United States of America from 2009 to 2017.

[48] Executive Order 13660, *supra* note 46.

[49] *Id.*, Section 1.

[50] Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, L 78/16, in OFFICIAL JOURNAL OF THE EUROPEAN UNION (Mar. 17, 2014), art.1.

[51] Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, L 78/6, in OFFICIAL JOURNAL OF THE EUROPEAN UNION (Mar. 17, 2014), para. 12.

[52] On the European Union's sanctions see Lorenzo Bernardini, *La funzione "servente" della giustizia penale*, *op. cit*.

[53] Council Decision (CFSP) 2020/1999 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses (Document 02020D1999-20240722) (Dec. 7, 2020). It is important to specify that the EU Global Human Rights Sanctions Regime does not apply only to Russian nationals.

Even though sanctions against Russia had already been imposed in 2014,[54] the 2022 escalation of the conflict brought with it a series of responses from governments, international organizations, and other entities.[55] The reactions to the invasion and the sanctions against Russia are too numerous to be enumerated in the present work, so a few of the earliest ones will be listed to paint the general picture of the situation.

In the immediate aftermath of Russia's actions in February 2022, the Association of South-East Asian Nations (ASEAN) called for restraint;[56] the African Union, through its *at-the-time* Chair Macky Sall[57] and the Chairperson of the African Union Commission Moussa Faki Mahamati,[58] expressed its concern and urged "the two Parties to establish an immediate ceasefire and to open political negotiations without delay";[59] the General Secretariat of the Organization of American States (OAS) condemned the escalation of the conflict and stated that "Russian aggression constitutes a crime against international peace";[60] and the OECD strongly condemned the "the launch by President Putin of a military operation".[61] The Council of the European Union agreed on a first package of sanctions on February 23, 2022.[62] The following day the members of the European Council condemned "in the strongest possible terms Russia's unprecedented military aggression against Ukraine",[63] declaring that "the EU stands firmly by Ukraine and its people as they face this war. The EU will provide further political, financial and humanitarian assistance".[64] NATO also condemned "in the strongest

[54] As discussed in Niccolò Locatelli, Alberto De Sanctis, *La battaglia per l'Ucraina, nel contesto*, LIMES ONLINE (May 2, 2014), https://www.limesonline.com/background/la-battaglia-per-l-ucraina-nel-contesto-14669680/.
[55] Scott R. Anderson, Zachary Badore, *et al.*, *The World Reacts to Russia's Invasion of Ukraine*, LAWFARE (Feb. 24, 2022), https://www.lawfaremedia.org/article/world-reacts-russias-invasion-ukraine.
[56] Reuters, *ASEAN Urges Maximum Restraint, De-escalation of Russia-Ukraine Tensions - Draft Statement*, VOICE OF AMERICA (Feb. 24, 2022).
[57] Prime Minister of Senegal from 2004 to 2007, President of Senegal from 2012 to 2024, and Chair of the African Union from 2022 to 2023.
[58] Prime Minister of Chad from 2003 to 2005, and Chair of the African Union Commission from 2008 to 2017 and from 2017 to the time of writing.
[59] African Union, *Statement from Chair of the African Union, H.E President Macky Sall and Chairperson of the AU Commission H.E Moussa Faki Mahamat, on the situation in Ukraine*, AFRICAN UNION (Feb. 24, 2022), https://au.int/en/pressreleases/20220224/african-union-statement-situation-ukraine.
[60] General Secretariat of the Organization of American States, *Statement from the OAS General Secretariat on the Russian Attack on Ukraine*, ORGANIZATION OF AMERICAN STATES (Feb. 24, 2022), https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-008/22.
[61] OSCE Chairperson, OSCE Secretary General, *Joint statement by OSCE Chairman-in-Office Rau and Secretary General Schmid on Russia's launch of a military operation in Ukraine*, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Feb. 24, 2022), https://www.osce.org/chairpersonship/512890.
[62] Council of the EU, *EU adopts package of sanctions in response to Russian recognition of the non-government controlled areas of the Donetsk and Luhansk oblasts of Ukraine and sending of troops into the region*, COUNCIL OF THE EUROPEAN UNION (Feb. 23, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/02/23/russian-recognition-of-the-non-government-controlled-areas-of-the-donetsk-and-luhansk-oblasts-of-ukraine-as-independent-entities-eu-adopts-package-of-sanctions/. The European Union has since expanded its sanctions against the Russian Federation and its statements condemning Russia's military actions. The consilium.europa.eu website keeps a page on its website dedicated to the timeline of the European Union's response to the situation: *Timeline – EU response to Russia's war of aggression against Ukraine*, CONSILIUM.EUROPA.EU (the page was created on Feb. 23, 2022, and it's still being updated at the time of writing).
[63] European Council, *Joint statement by the members of the European Council*, EUROPEAN COUNCIL (Feb. 24, 2022), https://www.consilium.europa.eu/en/press/press-releases/2022/02/24/joint-statement-by-the-members-of-the-european-council/.
[64] *Id.*

possible terms Russia's horrifying attack on Ukraine",[65] urging Russia "in the strongest terms to turn back from the path of violence and aggression it has chosen"[66] and that "Russia's leaders must bear full responsibility for the consequences of their actions".[67] The day after that statement the NATO Heads of State and Government also issued a statement calling the situation "the gravest threat to Euro-Atlantic security in decades",[68] condemning "in the strongest possible terms Russia's full-scale invasion of Ukraine, enabled by Belarus"[69] and that NATO "will draw all the necessary consequences for NATO's deterrence and defence posture".[70] The G7[71] published a statement condemning the "large-scale military aggression by the Russian Federation against the territorial integrity, sovereignty and independence of Ukraine",[72] being united in their "support for the people of Ukraine and its democratically elected government",[73] and calling "on other states not to follow Russia's illegal decision to recognize the proclaimed independence of these entities".[74] The G7 has reiterated its condemnation of "Russia's illegal, unjustifiable, and unprovoked full-scale invasion"[75] of Ukraine, reaffirming ever since its "unwavering support for Ukraine".[76] The United Nations General Assembly adopted, on March 2, 2022, Resolution A/RES/ES-11/1 that condemned the "24 February 2022 declaration by the Russian Federation of a 'special military operation' in Ukraine"[77] and requesting it to withdraw from the Ukrainian territory. The Committee of Ministers of the Council of Europe, with Resolution CM/Res(2022)2, excluded Russia on March 16, 2022, after the Parliamentary Assembly adopted an opinion on the matter.[78]

Not only international organizations, but also States have commented on the situation; for brevity's sake we will only describe the United States of America's, the People's Republic of China's, and the Republic of India's reactions to the escalation of the conflict. The United States of America's President Joe Biden[79] condemned the attack on February 23, 2022, calling

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[65] North Atlantic Council, *Statement by the North Atlantic Council on Russia's attack on Ukraine*, NORTH ATLANTIC TREATY ORGANIZATION (Feb. 24, 2022), https://www.nato.int/cps/en/natohq/official_texts_192404.htm.
[66] *Id.*
[67] *Id.*
[68] North Atlantic Treaty Organization, *Statement by NATO Heads of State and Government on Russia's attack on Ukraine*, NORTH ATLANTIC TREATY ORGANIZATION (Feb. 25, 2022), https://www.nato.int/cps/en/natohq/official_texts_192489.htm.
[69] *Id.*
[70] *Id.*
[71] The Russian Federation was part of the grouping from 1997 to 2014, when it was suspended due to its annexation of Crimea; it officially left it in 2017. During Russia's presence the Grouping was called G8.
[72] G7, *G7 Leaders' Statement on the invasion of Ukraine by armed forces of the Russian Federation* (Feb. 24, 2022).
[73] *Id.*
[74] *Id.*
[75] G7, *G7 Leaders' Statement 24 February 2024*, (Feb. 24, 2024), https://www.g7italy.it/wp-content/uploads/G7-Leaders-Statement.pdf.
[76] *Id.*
[77] United Nations General Assembly, Resolution A/RES/ES-11/1 (Mar. 2, 2022). The voting on the Resolution saw 141 votes in favour, 35 abstentions, 12 absences, and 5 votes against (by the Syrian Arab Republic, the Democratic People's Republic of Korea, the State of Eritrea, the Republic of Belarus, and the Russian Federation itself).
[78] Parliamentary Assembly of the Council of Europe, Consequences of the Russian Federation's aggression against Ukraine Opinion 300 (200) (Mar. 15, 2022). The Council of Europe was founded with the 1949 Treaty of London. Ukraine joined it on November 9, 1995; Russia joined it on February 28, 1996.
[79] Joseph Robinette Biden Jr., 46th President of the United States, from 2021 to 2025, and 47th Vice President of the United States from 2009 to 2017.

Russia's actions "unprovoked and unjustified"[80] and holding that "Russia alone is responsible for the death and destruction this attack will bring, and the United States and its Allies and partners will respond in a united and decisive way".[81] The day after this statement President Biden, after a phone call with Volodymir Zelensky, "condemned this unprovoked and unjustified attack by Russian military forces",[82] and that "the United States and our Allies and partners will be imposing severe sanctions on Russia".[83] On March 1, 2022, President Biden's 2022 State of the Union Address focused heavily on the Russia-Ukraine war.[84] The People's Republic of China's (PRC) aligned its rhetoric to Russia's, blaming the USA and NATO for the escalation, because "the overexpansion of NATO in eastern Europe militarized the region and precipitated Russia's special military operation",[85] but it also, through its Foreign Minister Wang Yi,[86] told senior European officials that China respects countries' sovereignty, including Ukraine's, whilst also justifying Russia's concerns about NATO's expansion.[87] The Republic of India has opted for a neutral stance on the situation with its officials steering clear of blaming Russia,[88] calling for restraint in the region.[89] Generally speaking the countries which have vocally condemned the Russian actions in Ukraine are present in Russia's *unfriendly countries list*, which are the countries that have imposed or joined sanctions against Russia.[90]

Speaking of sanctions, after the escalation of the conflict in Ukraine the United States sanctioned Vladimir Putin and Sergej Viktorovič Lavrov[91] on February 25, 2022,[92] and Joe

[80] Joseph Robinette Biden Jr., *Statement by President Biden on Russia's Unprovoked and Unjustified Attack on Ukraine*, THE WHITE HOUSE (Feb. 23, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/23/statement-by-president-biden-on-russias-unprovoked-and-unjustified-attack-on-ukraine/.
[81] *Id.*
[82] Joseph Robinette Biden Jr, *Statement by President Joe Biden on Phone Call with President Volodymyr Zelenskyy of Ukraine*, THE WHITE HOUSE (Feb. 24, 2022), https://it.usembassy.gov/statement-by-president-joe-biden-on-phone-call-with-president-volodymyr-zelenskyy-of-ukraine/.
[83] *Id.*
[84] Joseph Robinette Biden Jr, *2022 State of the Union Address*, in 168(37) CONGRESSIONAL RECORD – SENATE (Mar. 1, 2022).
[85] Sheena Chestnut Greitnes, *China's Response to War in Ukraine*, in 62(5-6) ASIAN SURVEY 751 (2022) at 755.
[86] Minister of Foreign Affairs of the PRC from 2013 to 2022 and from 2023 onwards.
[87] *China says it respects Ukraine's sovereignty and Russia's security concerns*, REUTERS (Feb. 25, 2022), https://www.reuters.com/world/europe/china-says-it-respects-ukraines-sovereignty-russias-security-concerns-2022-02-25/. On the matter at hand see also Camille Bourgeois-Fortin, Darren Choi, Sean Jake, *China and Russia's invasion of Ukraine: Initial responses and implications*, THE CHINA INSTITUTE OF THE UNIVERSITY OF ALBERTA (Mar. 7, 2022).
[88] Chloe Cornish, Benjamin Parkin, *India sticks with Russia after Vladimir Putin's invasion of Ukraine*, FINANCIAL TIMES (Mar. 1, 2022), https://www.ft.com/content/6c52b083-d38a-40c9-9e23-2747c913065f.
[89] Siladitya Ray, *Why India Is Trying To Sit On The Fence In The Russia-Ukraine Conflict*, FORBES (Feb. 23, 2022), https://www.forbes.com/sites/siladityaray/2022/02/23/why-india-is-trying-to-sit-on-the-fence-in-the-russia-ukraine-conflict/.
[90] This list includes: the Republic of Albania, the Principality of Andorra, the Commonwealth of Australia, the Commonwealth of The Bahamas, Canada, Iceland, Japan, the Principality of Liechtenstein, the Federated States of Micronesia, the Principality of Monaco, Montenegro, New Zealand, the Republic of North Macedonia, the Kingdom of Norway, the Republic of San Marino, the Republic of Singapore, the Republic of Korea, the Swiss Confederation, the Republic of China (which Russia sees as a rebel region of the PRC), Ukraine, the United Kingdom of Great Britain and Northern Ireland, the United States of America, and the European Union, with all of its member States.
[91] Minister of Foreign Affairs of the Russian Federation since 2004.
[92] *U.S. Treasury Imposes Sanctions on Russian Federation President Vladimir Putin and Minister of Foreign Affairs Sergei Lavrov*, U.S. DEPARTMENT OF THE TREASURY (Feb. 25, 2022), https://home.treasury.gov/news/press-releases/jy0610.

Biden tightened the sanctions imposed since 2014, with Executive order 14024,[93] issued on February 21, 2022, which was followed three days later by the U.S. Treasury's Office of Foreign Assets Control.[94] On March 1, 2022 the European Union, United Kingdom, Canada and United States also agreed to remove Russian banks from the Society for Worldwide Interbank Financial Telecommunication's (SWIFT) bank messaging system, in compliance with EU Council Regulation 2022/345.[95] The sanctions discussed above have been tightened and amended in the years after the escalation of the conflict. As discussed *supra*, the 2022 escalation of the conflict brought an escalation of the sanctions against the Russian Federation, Russian individuals, and Russian companies, brought forward mainly by the European Union and the United States of America, but also by other States, e.g. the Swiss Confederation, which adopted the European Union's sanctions on March 4, 2022,[96] and the United Kingdom.[97] The European Union's aforementioned sanctions have been extended until, at the time of writing, July 31, 2025. The council adopted its first package of sanctions on February 23, 2022 with Council Regulation 2022/259.[98] The Council of the European Union adopted new sanctions packages through the conflict; on June 27, 2024, the European Council meeting's conclusions welcomed the adoption of the EU's fourteenth package of sanctions;[99] already in April 2024 in the European Union's member states an unprecedented number of sanctions were in place,[100] due to the situation in Ukraine making the EU's autonomous restrictive measures become fundamental in the EU's response to it.[101] The latest measure adopted by the European Union, at the time of writing, has been the Council's decision to not accept Russian documents issued in Ukraine and Georgia.[102]

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[93] Executive Office of the President, Executive Order 14024 Executive Order on Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to Continued Russian Efforts to Undermine the Sovereignty and Territorial Integrity of Ukraine (Feb. 21, 2022).

[94] Office of Foreign Assets Control, Directive 2 under E.O. 14024, *"Prohibitions Related to Correspondent or Payable-Through Accounts and Processing of Transactions Involving Certain Foreign Financial Institutions" (the "Russia-related CAPTA Directive")* (Feb. 24, 2022).

[95] *An update to our message for the Swift Community*, SWIFT (Mar. 20, 2022), https://www.swift.com/news-events/news/message-swift-community. Not all Russian banks were disconnected from Swift, most notably Gazprombank was not sanctioned. Sberbank, partly owned by Gazprom, was sanctioned and then removed from the SWIFT sanctions on May 31st, 2022, as discussed in: Michael Brüggemann, André Lippert, *et al*, *EU authorized new sanctions against Russia*, LEXOLOGY (Oct. 31, 2022).

[96] Schweizerische Bundesrat – Conseil fédéral Suisse – Consiglio federale svizzero, Verordnung über Massnahmen im Zusammenhang mit der Situation in der Ukraine vom 4. März 2022 – Ordonnance instituant des mesures en lien avec la situation en Ukraine du 4 mars 2022 – Ordinanza che istituisce provvedimenti in relazione alla situazione in Ucraina del 4 marzo 2022 – 946.231.176.72 (Mar. 4, 2022).

[97] The United Kingdom was still in the European Union when the 2014 sanctions were established. The Statutory Instrument 2019 No. 885 The Russia (Sanctions) (EU Exit) Regulations 2019 of April 10th, 2019, and its subsequent amended versions regulate the United Kingdom's stance on sanctions towards Russia.

[98] Council of the European Union, Council Regulation (EU) 2022/259 of 23 February 2022 amending Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, LI 42/1, 65 OFFICIAL JOURNAL OF THE EUROPEAN UNION (Feb. 23, 2022).

[99] General Secretariat of the European Council, European Council meeting (27 June 2024) – Conclusions EUCO 15/24 (June 27, 2024).

[100] On the European Union's sanctions see Lorenzo Bernardini, *La funzione "servente" della giustizia penale*, *op. cit.*, at 83.

[101] *Id*. at 85.

[102] Council of the European Union, *Council adopts decision not to accept Russian documents issued in Ukraine and Georgia*, CONSILIUM.EUROPA.EU (Dec. 8, 2024), https://www.consilium.europa.eu/en/press/press-releases/2022/12/08/council-adopts-decision-not-to-accept-russian-documents-issued-in-ukraine-and-georgia/.

Sanctions against Russia also hit seemingly non-related areas, such as motorsport and association football. In motorsport the Fédération Internationale de l'Automobile (FIA)'s World Motor Sport Council banned Russian and Belarusian national teams from participating in international competitions, and mandated drivers, individual competitors, and officials to participate only in individual and neutral capacity,[103] and Haas F1 Team parted ways with its Russian title sponsor Uralkali and with Russian driver Nikita Dmitrievič Mazepin[104] with Nikita Mazepin being sanctioned himself and, owner of Uralkali and father of Nikita, Dmitrij Arkadievich Mazepin also being sanctioned.[105] The Fédération Internationale de Football Association (FIFA) and the Union of European Football Associations (UEFA) banned Russia's national teams and clubs from their competitions, including the 2022 FIFA World Cup.[106]

These sanctions against Russia have become a key policy tool in response to the Russian actions in Ukraine, generating, ever since their first implementation in 2014, a debate about their effectiveness.[107] Timofeev, in 2022, described these sanctions' effects as a confirmation of the ineffectiveness of sanctions as a political tool if the target country "is a major power determined to achieve its goals",[108] even though Russia "will have to pay as a result"[109] of these sanctions, with others finding that the target country and the ones imposing these sanctions are both hit, with the target country bearing the biggest economic loss, and others pointing out that the extensive integration of Russia in world markets and its economic size and political/military power make it "less vulnerable to economic coercion".[110]

III. State Responsibility, Human Rights Violations and International Crimes in the Russia-Ukraine Conflict

A. The European Court of Human Rights Rulings on the Alleged Offences against Minorities in Ukraine

The events that have unfolded since 2014, made their way in international court rooms. Before the European Court of Human Rights (ECtHR) Ukraine claimed that Russia, having exercised effective control over Crimea, has adopted administrative practices that violate the European

[103] FIA Regulatory & Governance Department, FIA Circular: Revised measures due to Russian invasion of Ukraine (Feb. 10, 2023). Russians with double citizenship could participate under their non-Russian citizenship, such as Israeli-Russian driver Robert Michajlovič Švarcman who started racing under the Israeli flag in 2022.
[104] *Haas part ways with Nikita Mazepin 'with immediate effect'*, FORMULA1.COM (Mar. 5, 2022), https://www.formula1.com/en/latest/article/breaking-haas-to-part-ways-with-nikita-mazepin-with-immediate-effect.nmmqyclyJjFNkPJjQyiyF.
[105] Nikita and Dmitrij Mazepin were hit by the first wave of 2022 sanctions. On March 20, 2024, the European Court of Justice, with its Judgment in Case T-743/22, lifted the European Union's sanctions on Nikita Mazepin.
[106] *FIFA/UEFA suspend Russian clubs and national teams from all competitions* in FIFA.COM (Feb. 28, 2022), https://inside.fifa.com/tournaments/mens/worldcup/qatar2022/media-releases/fifa-uefa-suspend-russian-clubs-and-national-teams-from-all-competitions. The Russian Federation organized the prior 2018 FIFA World Cup.
[107] Iana Dreyer, Nicu Popescu, *Do sanctions against Russia work?*, in 2014 EUROPEAN UNION INSTITUTE FOR SECURITY STUDIES (2014), at 1.
[108] Ivan N. Timofeev, *Sanctions on Russia: A New Chapter*, in 20(4) RUSSIA IN GLOBAL AFFAIRS 103 (2022), at 115.
[109] *Id*.
[110] Jeffrey J. Schott, *Economic sanctions against Russia: How effective? How durable?*, in 23(3)PIETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (Apr. 2023), at 12.

Convention on Human Rights.[111] On March 13, 2014 and August 26, 2015 Ukraine lodged two applications that, in 2018, were joined in Application 20958/14, in which Ukraine submitted that: Russia had "presided over an administrative practice in violation of both the substantive and procedural limbs of Article 2 of the Convention, construed in harmony with the applicable rules of IHL, namely the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977",[112] alleging disappearances of ethnic Ukrainians and Tatars,[113] and of opponents of the Russian "occupation",[114] in violation of: Article 2 of the European Convention on Human Rights (ECHR); of Articles 3 and 5 of the ECHR alleging that "there was sufficient evidence of an administrative practice of inhuman and degrading treatment, torture and arbitrary deprivation of liberty";[115] of Article 6 § 1 of the ECHR alleging that "as from 27 February 2014 onwards, the court system in Crimea could not be considered to have been 'established by law'";[116] that there was an administrative practice regarding the impossibility of opting out of Russian citizenship, arbitrary raids of private dwellings of perceived opponents of the Russian "occupation", and the transfer of "convicts" to the territory of the Russian Federation, in violation of Article 6 § 1 of the ECHR;[117] the "alleged existence of an administrative practice of harassment and intimidation of religious leaders not conforming to the Russian Orthodox faith" and "arbitrary raids of places of worship and confiscation of religious property",[118] in violation of Article 9 of the ECHR; of Article 10, with the alleged existence of an "administrative practice of 'suppression' of non-Russian media, including the closure of Ukrainian and Tatar television stations";[119] of Article 11 with the prohibition of "public gatherings and manifestations of support for Ukraine or the Crimean Tatar community, as well as intimidation and arbitrary detention of organisers of demonstrations";[120] "the expropriation without compensation of the property of civilians and private enterprises",[121] in violation of Article 1 of Protocol no. 1 to the ECHR; of Article 2 of Protocol No. 1 to the ECHR with the "suppression of the Ukrainian language in schools and persecution of Ukrainian-speaking children at school";[122] of para. 1 of Article 2 of Protocol No. 4 to the ECHR with the "restrictions on the freedom of movement between Crimea and mainland Ukraine";[123] and of Article 14 of the ECHR due to the "discriminatory treatment of the Crimean Tatar population".[124]

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[111] European Court of Human Rights, Information Note on the Court's case-law 247 Ukraine v. Russia (*re* Crimea) (dec.) [GC] – Applications nos. 20958/14 and 38334/18 (Dec. 16, 2020).
[112] European Court of Human Rights' Grand Chamber, Judgement on the Case of Ukraine v. Russia (*re* Crimea) (*Applications nos. 20958/14 and 38334/18)* (June 25, 2024), para. 951.
[113] The Tartars, or Tatars, are a Turkic ethnic group that appeared in Crimea in the 13th and 14th centuries. ALAN W. FISHER, THE CRIMEAN TATARS (1987).
[114] European Court of Human Rights' Grand Chamber, Judgement on the Case of Ukraine v. Russia (*re* Crimea), *supra* note 112, para. 952.
[115] *Id.*, para. 976.
[116] *Id.*, para. 1000.
[117] *Id.*, para. 1023.
[118] *Id.*, para. 1054. On the topic of national orthodox churches' autocephaly and their connection with national governments see *supra* note 39.
[119] *Id.*, para. 1078.
[120] *Id.*, para. 1105.
[121] *Id.*, para. 1129.
[122] *Id.*, para. 1152.
[123] *Id.*, para. 1166.
[124] *Id.*, para. 1176. On the Crimean Tatars see note 113 *supra*.

In Application no. 38334/18, lodged on August 10, 2018, Ukraine accused Russia of perpetrating "unlawful deprivation of liberty, prosecution, ill-treatment and convictions of Ukrainians for their thoughts, expression of opinions, political stance and/or pro-Ukrainian activity"[125] using Russian legislation, of the deportation of Crimean Tatars and Ukrainian activists to Russia by the Donbass republics, and of detention, torture, and sentencing by Russian courts for committing fabricated crimes.[126]

In its Judgment of June 24, 2024, the Grand Chamber of the ECtHR found that Russia had exercised extraterritorial jurisdiction over Crimea[127] and that it had violated multiple dispositions of ECHR, namely, the ECtHR found Russia responsible of violations of Articles 6 and 8 complained in both applications,[128] of Articles 2, 3, 8, 9, 10, and 11 of the ECHR, of Articles 1 and 2 of Protocol no. 1, and of Articles 2 and 14 of Protocol no. 4 complained in application no. 20958/14,[129] and of Articles 3, 5, 7, 10, 11, and 18 complained in application 38334/18.[130] The ECtHR held that Russia "must take every measure to secure, as soon as possible, the safe return of the relevant prisoners transferred from Crimea to penal facilities located on the territory of the Russian Federation".[131] This judgment, in the view of some commentators, "will be the basis for deciding many hundreds of 'Crimean' individual cases pending before the ECtHR" and for other cases brought before the Court by Ukraine against Russia, which will, most likely, be successful.[132] It has to be noted that, since September 16, 2022, Russia ceased to be a Party to the European Convention on Human Rights,[133] with 17450 applications against it pending before the ECtHR and 2129 judgments and decisions yet to be fully implemented at the time.[134] In spite of this, the ECtHR is still competent to deal with applications against Russia lodged before September 16, 2022,[135] even though their enforcement by Russia is not ensured, as Dzehtsiarou also points out.[136]

B. Terrorism Financing and Racial Discriminations in the Russia-Ukraine Conflict before the International Court of Justice

[125] *Id.*, para. 387.
[126] On the admissibility of the applications see Agata Kleczkowska, *Where Is the European Court of Human Rights Heading? Comments on the Grand Chamber Admissibility Decision in Ukraine v. Russia (Re Crimea) (Applications No. 20958/14 and 38334/18)*, in 10(2) POLISH REVIEW OF INTERNATIONAL AND EUROPEAN LAW 135 (2022).
[127] European Court of Human Rights' Grand Chamber, Judgement on the Case of Ukraine v. Russia (*re* Crimea), *supra* note 112, para. 864.
[128] *Id.*, at 340.
[129] *Id.*, at 340-341.
[130] *Id.*, at 342.
[131] *Id.*, at 343
[132] Kanstantsin Dzehtsiarou, *Ukraine v Russia (re Crimea): the European Court of Human Rights Goes 'All-in'*, EJIL: TALK! (June 27, 2024), https://www.ejiltalk.org/ukraine-v-russia-re-crimea-the-european-court-of-human-rights-goes-all-in/.
[133] Committee of Ministers of the Council of Europe, *Russia ceases to be a Party to the European Convention on Human Rights on 16 September 2022*, COUNCIL OF EUROPE (Mar. 23, 2022), https://www.coe.int/en/web/portal/-/russia-ceases-to-be-a-party-to-the-european-convention-of-human-rights-on-16-september-2022.
[134] Council of Europe, *Russia ceases to be party to the European Convention on Human Rights*, COUNCIL OF EUROPE (Sept. 16, 2022).
[135] European Court of Human Rights, Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights (Mar. 22, 2022).
[136] Kanstantsin Dzehtsiarou, *Ukraine v Russia*, *op. cit.*

On January 16, 2017, Ukraine, through its Deputy Foreign Minister Olena Zerkal, requested provisional measures of protection to the International Court of Justice (ICJ),[137] accusing the Russian Federation of violating the International Convention for the Suppression of the Financing of Terrorism (Terrorism Financing Convention) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). The alleged violations include the alleged supply by Russia of "heavy weaponry and other critical support to illegal armed groups, knowing that these groups are engaged in acts of terrorism against civilians",[138] going against in its obligations under the Terrorism Financing Convention "not just by its failure to prevent or investigate the financing of terrorism but also by its direct sponsorship of terrorism";[139] and not following the CERD by using "its control over the Crimean peninsula to impose a policy of Russian ethnic dominance, pursuing the cultural erasure of non-Russian communities through a systematic and ongoing campaign of discrimination".[140] The ICJ announced its provisional measures on April 19, 2017,[141] in which it concluded that the conditions required to indicate provisional measures in respect of CERD were met[142] and that Russia "must refrain […] from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis".[143] "In addition, the Russian Federation must ensure the availability of education in the Ukrainian language",[144] and the ICJ indicated that "both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve".[145] On November 8, 2019, the ICJ released its preliminary objections, which rejected all of the preliminary objections raised by Russia and found that it had jurisdiction to adjudicate on the matters at hand.[146] The ICJ delivered its judgment on January 31, 2024, and found that Russia had not violated Article 8 para. 1,[147] Article 10 para. 1,[148] Article 12 para. 1,[149] and Article 18 para. 1 of the ICSTF,[150] and that it had violated Article 9 para. 1 of the Terrorism Financing Convention by repeatedly failing to identify several of the alleged offenders accused of financing terrorism.[151] The Court did "not consider it necessary or appropriate to grant any of the other forms of relief requested by Ukraine"[152] in regards to the violations of the Terrorism

[137] Olena Zerkal, Request for the Indication of Provisional Measures of Protection Submitted by Ukraine (Jan. 16, 2017).
[138] *Id*, para. 2.
[139] *Id.*
[140] *Id.*, para. 3.
[141] International Court of Justice, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation) Request for the Indication of Provisional Measures - Order Of 19 April 2017 (Apr. 19, 2017).
[142] *Id.*, para. 99.
[143] The Mejlis of the Crimean Tartar Peoples is the highest representative body of the Crimean Tatars. It has been banned by the Russian Federation on April the 26th 2016, as reported in: Crimean Tatar Elected Body Banned in Russia, HUMAN RIGHTS WATCH (Sep. 29, 2016).
[144] International Court of Justice, Application of the International, *supra,* note 141., para. 102.
[145] *Id.*, para. 106.
[146] International Court of Justice, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all Forms of Racial Discrimination (Ukraine v. Russian Federation) Judgment of 8 November 2019 (Nov. 8, 2019).
[147] *Id*., para. 98.
[148] *Id.*, para.120.
[149] *Id.*, para. 131.
[150] *Id.*, para. 146.
[151] *Id.*, paras. 100-111, 147.
[152] *Id.*, para. 150

Financing Convention. Regarding the alleged violations of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),[153] the ICJ found that Russia had violated Article 4 of the CERD by engaging in "law enforcement measures that discriminate against persons of Crimean Tatar origin based on their ethnic origin",[154] and of Article 2 para. 1 (*a*) and Article 5 (*e*) (v) of the CERD "by the way in which it has implemented its educational system in Crimea after 2014 with regard to school education in the Ukrainian language",[155] with the ICJ considering Russia required to ensure the teaching of the Ukrainian language with "due regard to the needs and reasonable expectations of children and parents of Ukrainian ethnic origin".[156] The ICJ also found that Russia violated its obligations under para. 106 (1) (*a*) of the 2017 Order by maintaining limitations on the Mejlis and its obligations under para. 106 (2) of the 2017 Order by not refraining "from any action which might aggravate or extend the dispute between the Parties or make it more difficult to resolve".[157] As anticipated by Marchuk in January 2017, Ukraine found more success in its claims under the CERD, claims that Georgia launched against Russia before the ICJ after the 2008 Russo-Georgian War, which did not reach the merits stage,[158] even though the judgment has been described by Marchuck herself as "a sobering experience for those who followed the case closely, as the vast majority of Ukraine's claims were rejected".[159]

On February 25, 2022, Ukraine filed a second application before the ICJ instituting proceedings against Russia "in a dispute concerning the interpretation, application or fulfilment of the Convention on the Prevention and Punishment of the Crime of Genocide"[160] submitting an urgent request for the indication of provisional measures.[161] On March 16, the ICJ indicated the aforementioned provisional measures, which included the immediate suspension of the military operations in Ukraine by Russia, the assurance by Russia that any armed units supported or directed by it stop the military operations in Ukraine and that both Russia and Ukraine shall refrain from further escalatory actions that might "aggravate or extend the dispute

[153] The International Convention on the Elimination of All Forms of Racial Discrimination adopted by the United Nations General Assembly on December the 21st 1965 and has entered into force on January the 4th 1969. The Russian Federation signed it on March the 7th 1966 and ratified it on February the 4th 1969 (both signing and ratification were performed by the USSR). Ukraine signed the convention on March the 7th 1966 and ratified it on March the 7th 1969 (as the Ukrainian SSR).

[154] International Court of Justice, Application of the International Convention, *supra* note 146, para. 244

[155] *Id.*, para. 370.

[156] *Id.*, para. 373.

[157] International Court of Justice, Application of the International Convention, *supra* note 146, para. 404.

[158] Iryna Marchuk, *Ukraine Takes Russia to the International Court of Justice: Will It Work?*, EJIL: TALK! (Jan. 26, 2017), https://www.ejiltalk.org/ukraine-takes-russia-to-the-international-court-of-justice-will-it-work/.

[159] Iryna Marchuk, *Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in Ukraine v Russia (CERD and ICSFT)*, EJIL: TALK! (Feb. 22, 2024), https://www.ejiltalk.org/unfulfilled-promises-of-the-icj-litigation-for-ukraine-analysis-of-the-icj-judgment-in-ukraine-v-russia-cerd-and-icsft/.

[160] The Convention on the Prevention and Punishment of the Crime of Genocide, also known as the Genocide Convention, was signed on December the 9th, 1948 and came into effect on January the 12th, 1951, with the Secretary-General of the United Nations as its depositary. Russia signed it on December the 16th, 1949 and deposited its ratification on May the 3rd 1954 (both signing, and ratification were performed by the USSR, of which the Russian Federation is the successor as recognized by the international community). Ukraine signed it on December the 16th 1949 and deposited its ratification on November the 15th 1954 (as the Ukrainian SSR). The International Court of Justice has jurisdiction on the matter ex art. 9 of the Genocide Convention, which states that "disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

[161] International Court of Justice, Request for the indication of provisional measures submitted by Ukraine (Feb. 27, 2022).

before the Court or make it more difficult to resolve".[162] At the time of writing the ICJ has not yet delivered its judgment on this case.

C. The Court of Justice of the European Union's Decision on the Legitimacy of the Restrictive Measures against Russian Aggression

The sanctions adopted by the Council of the European Union did not go unchallenged before the courts, with the Court of Justice of the European Union (CJEU) tackling the prohibition of legal advisory services to either the Russian Government of Russian entities, bodies, or legal persons, with certain exceptions, originally established by Council Regulation (EU) No 833/2014,[163] and then amended by Council Regulations 2022/1904 (Oct. 6, 2022),[164] 2022/2474 (Dec. 16, 2022),[165] and 2023/427 (Feb. 25, 2023). These provisions brought the Ordre néerlandais des advocats du barreau de Bruxelles (hereinafter *Ordre of Bruxelles*), the Ordre des avocats à la cour de Paris (hereinafter *Ordre of Paris*), and the Association Avocats Ensemble (ACE) to bring forward proceedings before the General Court of the European Union, seeking their annulment. According to those parties, this prohibition infringes the fundamental rights that guarantee access to legal advice, professional secrecy and independence of lawyers, the values of the rule of law and the proportionality and legal certainty. The jurisdiction of the CJEU on the case is based on Article 263 of the TFEU, which states that "The Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties".

More specifically the action brought by the Ordre de Bruxelles, in Case T-797/22[166] sought to annul Article 1(12) of Regulation 2022/1904, "in so far as they replace and amend"[167] Regulation (EU) No 833/2014, alleging the infringement of the rights to privacy and access to justice provided for in articles 7 and 47 respectively, of the Charter of Fundamental Rights of the European Union, "in that the general prohibition on the provision of legal advisory services constitutes interference with the right of every litigant to seek legal advice from his or her lawyer, and with the principle of professional secrecy and the principle of the independence of

[162] International Court of Justice, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) Request for the indication of provisional measures (Mar. 16, 2022).
[163] Specifically, by its Article 5, which states that "It shall be prohibited to directly or indirectly purchase, sell, provide brokering or assistance in the issuance of, or otherwise deal with transferable securities and money-market instruments with a maturity exceeding 90 days, issued after 1 August 2014 by: (a) a major credit institution or other major institution having an explicit mandate to promote competitiveness of the Russian economy, its diversification and encouragement of investment, established in Russia with over 50 % public ownership or control as of 1 August 2014, as listed in Annex III; or (b) a legal person, entity or body established outside the Union whose proprietary rights are owned for more than 50% by an entity listed in Annex III; or (c) a legal person, entity or body acting on behalf or at the direction of an entity referred to in point (b) of this paragraph or listed in Annex III."
[164] Article 1(12) stated that "It shall be prohibited to provide, directly or indirectly, architectural and engineering services, legal advisory services and IT consultancy services to: (a) the Government of Russia; or (b) legal persons, entities or bodies established in Russia."
[165] The wording of Article 1(12) is the same as in Regulation 2022/1904.
[166] Action brought on 26 December 2022 — Ordre néerlandais des avocats du barreau de Bruxelles and Others v Council (Case T-797/22) (2023/C 63/79), in C63/61 OFFICIAL JOURNAL OF THE EUROPEAN UNION (Feb. 20, 2023).
[167] *Id*.

the lawyer",[168] the principle of proportionality, and the principle of legal certainty.[169] The rationale of the action brought by the *Ordre of Paris*, in Case T-798/22,[170] was the same, requesting the annulment of Article 1(12) of Council Regulation (EU) 2022/1904 and of article 1(13) of Council Regulation (EU) 2022/2474, alleging that those provisions infringe Articles 7 and 47 of the Charter of Fundamental Rights of the European Union. The action brought by ACE, in Case T-828/22,[171] too asked for the annulment of Article 1(12), alleging infringement of article 47 of the Charter of Fundamental Rights of the European Union and of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The CJEU made its judgments public on the three cases on October 2, 2024.[172] In regards to Case 797/22[173] the CJEU rejected the case because it "has not found there to be any interference, on account of the prohibition at issue, with the right to be advised, defended and represented by a lawyer in order to receive legal advice"[174] because "Article 7 of the Charter does not guarantee a right of access to a lawyer, be it in judicial proceedings or in a non-contentious context, the prohibition at issue cannot constitute interference with a right deriving from that article",[175] rejecting the complaint regarding the independence of lawyers,[176] stating that "even if there were interference with the independence of lawyers, it would be justified and proportionate",[177] establishing that the provisions in question pose no undermining of the rule of law,[178] and rejecting the alleged breach of the principle of legal certainty.[179] Cases T-798/22[180] and Case T-828/22[181] were rejected as well. The CJEU justified its judgments recalling that the provisions in question do "not concern legal advisory services provided in connection with judicial, administrative or arbitral proceedings", reminding that "legal advice provided to natural persons […] does not fall within the scope of the prohibition", and that the provisions put in question by the cases brought to it do not interfere with the protection of the professional secrecy of lawyers, with the independence of lawyers, and with rule of law.[182] In its sentence regarding Case T-797/22 the Grand Chamber of the EU General Court specified that the "the prohibition at issue meets, in an appropriate and consistent manner, the objective of further increasing the pressure exerted on the Russian Federation to end its war of aggression against Ukraine and cannot, in any event, be regarded as being manifestly inappropriate having

[168] *Id.*
[169] *Id.*
[170] Action brought on 28 December 2022 — Ordre des avocats à la cour de Paris and Couturier v Council (Case T-798/22) (2023/C 63/80), in C63/61 OFFICIAL JOURNAL OF THE EUROPEAN UNION (Feb. 20, 2023).
[171] Action brought on 23 December 2022 — ACE v Council (Case T-828/22) (2023/C 71/49), in C71/37 OFFICIAL JOURNAL OF THE EUROPEAN UNION (Feb. 27, 2023).
[172] The interrelation of these three cases can be seen in the publishing of one single press release by the CJEU on these cases. Court of Justice of the European Union, *Restrictive measures in response to the war in Ukraine: the prohibition on providing legal advisory services to the Russian Government and to entities established in Russia is valid* (*Press Release No 155/24)*, COURT OF JUSTICE OF THE EUROPEAN UNION (Oct. 2, 2024).
[173] Court of Justice of the European Union, Judgment of the General Court (Grand Chamber) (ECLI:EU:T:2024:670) (Oct. 2, 2024).
[174] *Id.*, para. 66.
[175] *Id.*, para. 64.
[176] *Id.*, paras. 133-136.
[177] *Id.*, para. 135.
[178] *Id.*, paras. 169-171.
[179] *Id.*, para. 210.
[180] Court of Justice of the European Union, Judgment of the General Court (Grande Chambre) (ECLI:EU:T:2024:671) (Oct. 2, 2024), para. 127.
[181] Court of Justice of the European Union, Judgment of the General Court (Grande Chambre) (ECLI:EU:T:2024:672) (Oct. 2, 2024), para. 112.
[182] Court of Justice of the European Union, *Restrictive measures*, *supra* note 172.

regard to that objective",[183] that "the adoption of restrictive measures must make it possible to 'increas[e] the costs of Russia's actions to undermine Ukraine's territorial integrity, sovereignty and independence and to promot[e] a peaceful settlement of the crisis'",[184] confirming the political reasoning behind the restrictive measures adopted by the European Union. At the time of writing there are no publicly available records about any appeal against these decisions. The EU General Court found the legitimacy of the Council Regulation 2022/1904 on the fact that it does not prohibit legal advisory services in case of existing or probable litigation, but only in cases that do not fall under the protections guaranteed by articles 7 and 47 of the EU Charter of Fundamental Rights,[185] since article 7 does not "guarantee a right to access to a lawyer, be it in judicial proceedings or in a non-contentious context".[186] The Grand Chamber has also pointed out that the prohibition "relates only to legal services provided to the Russian Government and to legal persons, entities and bodies established in Russia",[187] leaving legal advice provided to natural persons outside the scope of the prohibition at hand. On the alleged interference with the independence of lawyers and of the values of the rule of law the Grand Chamber has argued that the independence of lawyers "may be subject to restrictions justified by objectives of general interest pursued by the European Union",[188] and that, on the alleged breach of the principle of proportionality, "the prohibition at issue meets, in an appropriate and consistent manner, the objective of further increasing the pressure exerted on the Russian Federation to end its war of aggression against Ukraine and cannot […] be regarded as manifestly inappropriate having regard to that objective".[189]

In the perspective indicated by the EU Court ruling, the objective of countering the Russian aggression against Ukraine, prevails over other interests and rights also protected by EU law, to the point of legitimizing any restrictions.

IV. Individual Responsibility and the International Criminal Court's Investigation and Proceeding on the Situation in Ukraine

A. The Alleged War Crimes in Prejudice of Ukrainian Children

On the matter of the Situation in Ukraine the ICC Prosecutor Karim Ahmad Khan[190] stated, on February 25, 2022, that, following Ukraine's 2015 declaration accepting the ICC's jurisdiction,[191] his office "may exercise its jurisdiction over and investigate any act of genocide, crime against humanity or war crime committed within the territory of Ukraine since 20 February 2014 onwards".[192] On February 28, 2022, just four days after the beginning of

[183] Court of Justice of the European Union, *Judgment of the General Court*, *supra* note 173, para. 176.
[184] *Id.*, para. 196.
[185] *Id.*, para. 49.
[186] *Id.*, para. 64.
[187] *Id.*, para. 102.
[188] *Id.*, para. 132.
[189] *Id.*, para. 176.
[190] Referred to as "Karim A.A. Khan QC" in ICC documentation.
[191] Pavio Klimkin, *Letter to Mr. Herman von Hebel*, in INTERNATIONAL CRIMINAL COURT (Sep. 8, 2015).
[192] Karim Ahmad Khan, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have been closely following recent developments in and around Ukraine with increasing concern."*, INTERNATIONAL CRIMINAL COURT (Feb. 25, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-been-closely-following.

Russia's "special military operation",[193] Karim Ahmad Khan, announced his decision "to proceed with opening an investigation into the Situation in Ukraine, as rapidly as possible", announcing the decision to open an investigation into the situation, after being "satisfied that there is a reasonable basis to believe that both alleged war crimes and crimes against humanity have been committed in Ukraine in relation to the events already assessed during the preliminary examination by the Office",[194] later announcing that an active investigation was underway.[195] Subsequently, on March 2, 2022, the Presidency of the ICC assigned the case to Pre-Trial Chamber II,[196] which notified the receipt of referrals and initiated the investigation on March 7, 2022.[197] In 2022 ICC Prosecutor Karim Ahmad Khan visited Ukraine multiple times, during one of his visits, on March 16, he transmitted a formal request to the Russian Federation to discuss the situation, seeing the active engagement of Russia in the investigation as essential.[198] In April the Office of the Prosecutor joined the Joint Investigation Team (JIT) on the crimes committed in Ukraine; ever since then the JIT's efficacy has been recognized as effective[199] the first collaboration between the ICC and the Joint Investigation Team.[200]

The findings of the investigations in Ukraine brought, on March 17, 2023, the issuing of a press release entitled *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, in which the Court made public the issuing of warrants of arrest for Vladimir Vladimirovich Putin (whom has and will also be referred to as Vladimir Putin or Putin) and Maria Alekseyeva L'vova-Belova (whom will also be referred to as Marija L'vova-Belova or L'vova-Belova).[201] The press statement states the accusations against the defendants and the Pre-Trial Chamber II's belief that "each suspect bears responsibility for the war crime of unlawful deportation of population and that of unlawful transfer of population from occupied areas of Ukraine to the Russian Federation, in prejudice of Ukrainian children".[202]

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[193] Vladimir Vladimirovič Putin, *Address by the President of the Russian Federation*, OFFICIAL INTERNET RESOURCES OF THE PRESIDENT OF RUSSIA (Feb. 24, 2022).

[194] Karim Ahmad Khan, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: "I have decided to proceed with opening an investigation."*, INTERNATIONAL CRIMINAL COURT (Feb. 28, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-i-have-decided-proceed-opening.

[195] Karim Ahmad Khan, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation*, INTERNATIONAL CRIMINAL COURT (Mar. 2, 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-situation-ukraine-receipt-referrals-39-states.

[196] Presidency of the International Criminal Court, *Decision assigning the situation in Ukraine to Pre-Trial Chamber II No.: ICC-01/22-1* (Mar. 2, 2022).

[197] Pre-Trial Chamber II, Notification on receipt of referrals and on initiation of investigation No.: ICC-01/22.

[198] Karim Ahmad Khan, *Statement of ICC Prosecutor, Karim A.A. Khan QC, on his visits to Ukraine and Poland: "Engagement with all actors critical for effective, independent investigations."*, INTERNATIONAL CRIMINAL COURT (Mar. 16, 2022), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-qc-his-visits-ukraine-and-poland-engagement-all-actors.

[199] Domenico Albanese, *Il ruolo di Eurojust nelle indagini sui crimini internazionali commessi in Ucraina,* in CRIMINALITÀ TRANSNAZIONALE E UNIONE EUROPEA (Anna Oriolo *et al.*, ed., 2024), at 251.

[200] Paolo Bargiacchi, *Il contributo di Eurojust al perseguimento dei crimini internazionali commessi in Ucraina*, in 2023(2) EU-WEB LEGAL ESSAYS. GLOBAL & INTERNATIONAL PERSPECTIVES 14 (2023), at 21.

[201] International Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova*, INTERNATIONAL CRIMINAL COURT (Mar. 17, 2023), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-vladimir-vladimirovich-putin-and.

[202] *Id.*

More precisely, the accusations against both Vladimir Putin and Marija L'vova-Belova involve the alleged unlawful transfer of children from occupied areas of Ukraine to the Russian Federation,[203] under Article 8 (2)(a)(vii) of the Rome Statute, which states that the "unlawful deportation or transfer or unlawful confinement" constitutes a war crime under the Rome Statute, and under and 8 (2)(b)(viii), which states that the "the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" constitutes a serious violation of the laws and customs applicable in international armed conflict, of the Statute, and that both bear individual criminal responsibility "for having committed the acts directly, jointly with others and/or through others", under Article 25 (3)(a) of the Statute. Vladimir Putin is also being accused for "his failure to exercise control properly over civilian and military subordinates who committed the acts, or allowed for their commission, and who were under his effective authority and control, pursuant to superior responsibility",[204] under Article 28 (b) of the Statute, which states that "a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where […] the crimes concerned activities that were within the effective responsibility and control of the superior".

The alleged responsibilities of the defendants arise from their respective roles in the Russian Federation's government during the timeframe under investigation, i.e. from February 24, 2022, onwards, with Vladimir Putin being the President of the Russian Federation since May 7, 2012, and Marija L'vova-Belova being the Children's Rights Commissioner for the President of Russia since October 27, 2021. It is reasonable to assume that their respective roles put them in a situation in which Article 25 (3) and Article 25 (3)(b) of the Statute, that mandate that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person […] orders, solicits or induces the commission of such a crime which in fact occurs or is attempted", are applicable to them.

B. Warrants of Arrest of the International Criminal Court and their Public Availability

In the Rome Statute the issuing of arrest warrants is regulated in Article 58. The first paragraph of Article 58 states that the Pre-Trial Chamber shall issue a warrant of arrest, after the examination of the application and of the evidence submitted by the Prosecutor if "there are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court", and if the arrest of the person appears necessary under the conditions prescribed in art. 58 para. 1(b). The third paragraph of the Article indicates the required contents of warrants of arrest, which are: "the name of the person and any other relevant identifying information; a specific reference to the crimes within the jurisdiction of the Court for which the person's arrest is sought, and a concise statement of the facts which are alleged to constitute those crimes", with the effect of and the amendment of the warrant being specified in paras. 4 and 5.

The public availability of warrants of arrest, which is not found in the case analysed in this work, is not specifically cited in the Rome Statute. The public availability of case records is, however, present at Rule 15 para. 1 of the Rules of Procedure and Evidence of the Court, that requires that "the Registrar shall keep a database containing all the particulars of each case

[203] *Id.*
[204] *Id.*

brought before the Court, subject to any order of a judge or Chamber providing for the non-disclosure of any document or information, and to the protection of sensitive personal data. Information on the database shall be available to the public in the working languages of the Court",[205] *document*s that, under regulation 22 of the Regulations of the Court, "shall include any motion, application, request, response, reply, observation, representation and any other submission in a form capable of delivering a written record to the Court",[206] a definition under which warrants of arrest do not fall, even though their existence is often revealed to the public after their issuance.

The warrants of arrest issued by the Pre-Trial Chamber can be made publicly available on the ICC website, under their cases' respective *Court records and transcripts* sections, alongside other records, and transcripts which are required to be publicly available by the aforementioned regulation 22 of the Regulations of the Court. As a matter of fact, public notice of the warrants of arrest are often available, independently of the state of the proceedings against the defendants, as is possible to confirm on the ICC's website, the public availability of warrants of arrest can be seen in the cases of: defendants whose cases have been closed, such as in the case of former Libyan Head of State Muammar Mohammed Abu Minyar Gaddafi;[207] for defendants still at large, like Vladimir Putin and Marija L'vova-Belova, such as in the case of former President of Sudan Omar Hassan Ahmad al-Bashir;[208] for defendants in ICC custody, such as in the case of Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud;[209] for defendants that have been acquitted, such as in the case of former President of the Ivory Coast Laurent Koudou Gbagbo;[210] and for defendants that have been convicted by the Court, such as in the case of Thomas Lubanga Dyilo,[211] who, on March 17, 2006 became the first person arrested under a warrant issued by the ICC[212] and later sentenced to fourteen years in prison on March 14, 2012 becoming the first person convicted and sentenced by the Court.[213]

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[205] International Criminal Court, Rules of Procedure and Evidence, rule 15 para. 1.

[206] International Criminal Court, Regulations of the Court, regulation 22.

[207] His case was terminated "because of the charged circumstances caused by his death", as specified in Pre-Trial Chamber I, *Situation in Libya in the case of* The Prosecutor v. Muammar Mohammed Abu Minyar Gaddafi, Saif al-Islam Gaddafi and Abdullah al-Senussi *Decision to Terminate the Case Against Muammar Mohammed Abu Minyar Gaddafi No.: ICC-01/11-01/11* (Nov. 22, 2011), at 3-4. The warrant of arrest in Gaddafi's case is available at Pre-Trial Chamber I, *Warrant of Arrest for Muammar Mohammed Abu Minyar Gaddafi No: ICC-01/11-01/11-2*.

[208] In his case the Pre-Trial Chamber I issued a first warrant on March the 4th 2009 but, after an appeal it had to issue a second warrant on July 12th, 2010. Pre-Trial Chamber I, *Warrant of Arrest for Omar Hassan Ahmad Al Bashir No: ICC-02/05-01/09-1* (Mar. 4, 2009). Pre-Trial Chamber I, Second Warrant of Arrest for Omar Hassan Ahmad Al Bashir No.: ICC-02/05-01/09-95 (July 12, 2010).

[209] Described by the ICC website as "Alleged member of Ansar Eddine and de facto chief of Islamic police". Pre-Trial Chamber I, *Warrant of Arrest for Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud No.: ICC-01/12-01/18-2-tENG* (Mar. 27, 2018). Al Hassan has been sentenced to ten years of imprisonment by Trial Chamber X of the ICC on November 20, 2024.

[210] Pre-Trial Chamber III, *Warrant Of Arrest For Laurent Koudou Gbagbo No.: ICC-02/11-01/11-1* (Nov. 23, 2011).

[211] Former President of the Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (UPC/FPLC).
Pre-Trial Chamber I, Warrant of Arrest No.: ICC-01/04-01/06-2-tEN (Feb. 10, 2006).

[212] Amnesty International, *La première arrestation de la Cour pénale internationale doit être suivie par d'autres à travers le pays*, in BULLETIN D'INFORMATION 069/2006 (Mar. 20, 2006).

[213] International Criminal Court, *ICC First verdict: Thomas Lubanga guilty of conscripting and enlisting children under the age of 15 and using them to participate in hostilities*, INTERNATIONAL CRIMINAL COURT (Mar. 14, 2012), https://www.icc-cpi.int/news/icc-first-verdict-thomas-lubanga-guilty-conscripting-and-enlisting-children-under-age-15-and.

The warrants of arrest issued by the ICC, unlike other documents, are considered "secret in order to protect victims and witnesses and also to safeguard the investigation",[214] with this also being the case with the ones against Vadimir Putin and Marija L'vova-Belova,[215] however, despite the secrecy of the warrants themselves, the ICC publicized their issuing, as it often does, because "the public awareness of the warrants may contribute to the prevention of the further commission of crimes".[216] This justification can also be seen in the case of the other warrants of arrest issued in the context of the Russia-Ukraine conflict, with the cases of Sergey Ivanovich Kobylash, Viktor Nikolayevich Sokolov, Sergei Kuzhugetovich Shoigu, and Valery Vasilyevich Gerasimov. In the case of the warrants against Sergey Kobylash and Viktor Sokolov the Chamber "considers that public awareness of the warrants may contribute to the prevention of the further commission of crimes",[217] and in the case of the warrants against Sergei Kuzhugetovich Shoigu and Valery Gerasimov it stated that "the Chamber considered that public awareness of the warrants may contribute to the prevention of the further commission of crimes".[218] As it is noticeable it is not only the reasoning behind the public notice of the warrants same, but the sentences in which this reasoning is explained are *verbatim* the same. So, it is reasonable to conclude that the reasoning behind the public availability of these statements might be seen as a tactic of publicity and strengthening through transparency, a choice that, in the eyes of the Pre-Trial Chamber, could show the dedication of the Court to the fight against war crimes and other violations of the Rome Statute, with the objective to deter others from committing them and to strengthen the public standing of the Court. The results of this choice by the International Criminal Court are not yet clear but what is possible to infer is that it might have brought more attention to its actions.

Compared to other cases, even in the Situation of Ukraine, the public availability of the notice is stronger in the case of the arrest warrants against Putin and L'vova-Belova, for which a video entitled *ICC arrest warrants in the situation of Ukraine: Statement by President Piotr Hofmański* is available on the ICC's official YouTube channel, called *IntlCriminalCourt*,[219] in which the ICC President Piotr Hofmański talks about the accusations and reiterates the desire to make the warrants' "existence public in the interest of justice and to prevent the commission of future crimes",[220] no video has been published by the ICC in regards to the other warrants issued in the context of the Russia-Ukraine conflict. The video, as of October 1, 2024, has amassed more than sixty-thousand views, being the second most viewed video with audio in English in the IntlCriminalCourt YouTube channel. Data from Google Trends,[221] a service

[214] *See supra* note 201 and corresponding text.
[215] Lorenzo Roccatagliata, *La Corte Penale Internazionale emette un mandato di arresto nei confronti di Vladimir Putin per crimini di guerra in Ucraina*, GIURISPRUDENZA PENALE (Mar. 17, 2023), https://www.giurisprudenzapenale.com/2023/03/17/la-corte-penale-internazionale-emette-il-mandato-di-arresto-nei-confronti-di-vladimir-putin/.
[216] *Id.*
[217] International Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov*, INTERNATIONAL CRIMINAL COURT (Mar. 5, 2024), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-ivanovich-kobylash-and.
[218] International Criminal Court, *Situation in Ukraine: ICC judges issue arrest warrants against Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov*, INTERNATIONAL CRIMINAL COURT (July 25, 2024), https://www.icc-cpi.int/news/situation-ukraine-icc-judges-issue-arrest-warrants-against-sergei-kuzhugetovich-shoigu-and.
[219] International Criminal Court, *ICC arrest warrants in the situation of Ukraine: Statement by President Piotr Hofmański*, INTLCRIMINALCOURT YOUTUBE CHANNEL (Mar. 17, 2023), https://www.youtube.com/watch?v=FbKhCAaRLfc&ab_channel=IntlCriminalCourt.
[220] *Id.*
[221] In Google Trends the data available starts on January 1st, 2004.

which tracks the quantity of searches on Google regarding specific topics, shows, in March 2023, the month in which the warrants of arrest against Putin and L'vova-Belova were issued, an unprecedented peak of interest in the "International Criminal Court" in Google searches, surpassed only in May 2024, the month in which the Prosecutor Karim Ahmad Khan, in the context of the Situation in Gaza, filed applications for warrants of arrest against Yahya Sinwar,[222] Mohammed Diab Ibrahim al-Masri,[223] Ismail Haniyeh,[224] Benjamin Netanyahu,[225] and Yoav Gallant;[226] applications for which a video on the IntlCriminalCourt YouTube Channel also exists.[227]

C. The Reactions to the ICC Warrants of Arrest and the Limitations to Travel for Vladimir Putin

The issuing of the warrants brought with it the reactions of Russian officials, former President of the Russian Federation Dmitry Medvedev compared the warrant to toilet paper[228] and Kremlin Press Secretary and Kremlin Deputy Chief of Staff Dmitry Peskov said that any of the court's decisions were "null and void",[229] saying on Telegram that "we do not recognize this court, we do not recognize the jurisdiction of this court. This is how we treat this".[230] Marija L'vova-Belova herself was quoted as saying "it is great that the international community has appreciated the work to help the children of our country, that we do not leave them in war zones, that we take them out, we create good conditions for them, that we surround them with loving, caring people".[231] From the Ukrainian side President Volodymyr Zelensky called it a "historic decision, from which historic responsibility will begin",[232] and Prosecutor General Andriy Kostin said that the decision was "historic for Ukraine".[233] The reactions outside of Russia and Ukraine were mixed, with the President of Serbia Aleksandar Vučić criticizing the warrant

[222] Head of the Islamic Resistance Movement ("Hamas") in the Gaza Strip at the time of the alleged conduct. He was killed on October 16, 2024, in Rafah.
[223] Commander-in-Chief of the military wing of Hamas, known as the *Al-Qassam Brigades* at the time of the alleged conduct.
[224] Head of Hamas Political Bureau at the time of the alleged conduct. He was killed in Teheran on July 31st, 2024.
[225] Prime Minister of Israel at the time of the alleged conduct.
[226] Minister of Defence of Israel at the time of the alleged conduct. Karim Ahmad Khan, *Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine*, INTERNATIONAL CRIMINAL COURT (May 20, 2024), https://www.icc-cpi.int/news/statement-icc-prosecutor-karim-aa-khan-kc-applications-arrest-warrants-situation-state.
[227] International Criminal Court, *ICC Prosecutor Khan on application for arrest warrants in the situation in the State of Palestine*, INTLCRIMINALCOURT YOUTUBE CHANNEL (May 20, 2024), *ICC Prosecutor Khan on application for arrest warrants in the situation in the State of Palestine*. With approximately 120000 views it is, as of December 1st, 2024, the video in English with the most views on the IntlCriminalCourt YouTube Channel.
[228] As quoted in Antoinette Radford, Frank Gardner, *Putin arrest warrant issued over war crime allegations*, BBC.COM (Mar. 18, 2023), https://www.bbc.com/news/world-europe-64992727.
[229] *Id.*
[230] As quoted in Henry Austin, Phil McCausland, *International Criminal Court issues arrest warrant for Putin over alleged Ukraine war crimes*, NBC NEWS (Mar. 17, 2023), https://www.nbcnews.com/news/world/arrest-warrant-putin-international-criminal-court-ukraine-war-crimes-rcna75471.
[231] Mike Corder, Raf Casert, *International court issues war crimes warrant for Putin*, AP NEWS (Mar. 18, 2023), https://apnews.com/article/icc-putin-war-crimes-ukraine-9857eb68d827340394960eccf0589253.
[232] *Id.*
[233] A. Radford, F. Gardner, *Putin*, *op. cit.*

saying that it would prolong the war,[234] the High Representative of the European Union for Foreign Affairs Josep Borrell stating that "The EU sees the decision by the ICC as a beginning of the process of accountability and holding Russian leaders to account for the crimes and atrocities they are ordering, enabling or committing in Ukraine",[235] and the President of the United States of America Joe Biden said that the warrant was justified,[236] and that it "makes a good point".[237]

The arrest warrant has, due to his role, been problematic for Vladimir Putin's travels abroad, an essential part in the work of any head of state, even though, already in March 2023, Adil Ahmad Haque was quoted as saying "So Putin might go to China, Syria, Iran, his ... few allies, but he just won't travel to the rest of the world and won't travel to ICC member states who he believes would ... arrest him".[238] Ever since March 17, 2023, Vladimir Putin has not ceased his travels abroad, however he had, up until September 2, 2024, only visited countries that had not ratified the Rome Statute of the International Criminal Court.

In the case of travel to States that have ratified the Rome Statute, Article 89(1) of the Statute states that "The Court may transmit a request for the arrest and surrender of a person […] to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person. States Parties shall […] comply with requests for arrest and surrender", and Article 86 states that "States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court". The warrant was cited by, at the time, President of South Africa Matamela Cyril Ramaphosa as the reason for Putin's absence at the 15th BRICS summit held in Johannesburg, South Africa, between the 22nd and 24th of August 2023.[239] The decision came after Ramaphosa asked the ICC permission to not arrest Putin, "because to do so would amount to a declaration of war".[240] Mongolia, on September 2, 2024, became the first State party to the Rome Statute to host Vladimir Putin. Before the visit Ukraine urged Mongolia to arrest Putin, and an ICC spokesperson told the BBC that Mongolia has the obligation to abide by ICC regulations,[241] *ex* art. 86 and 89 (1) of the Statute, however, despite the warrant Putin was not arrested during his visit, with Ukraine Foreign Ministry spokesperson at the time Heorhiy Tykhyi stating that Mongolia had delt "a

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[234] RFE/RL's Balkan Service, *Serbian President Says ICC Arrest Warrant For Putin Will Prolong The War*, RADIOFREEEUROPE RADIOLIBERTY (Mar. 19, 2023), https://www.rferl.org/a/serbia-president-icc-arrest-warrant-putin-war/32325143.html.

[235] EEAS Press Team, *Russia/Ukraine: Statement by the High Representative following the ICC decision concerning the arrest warrant against President Putin*, EUROPEAN UNION EXTERNAL ACTION (Mar. 19, 2023), https://www.eeas.europa.eu/eeas/russiaukraine-statement-high-representative-following-icc-decision-concerning-arrest-warrant-against_en.

[236] Jeff Mason, Simon Lewis, *Biden says Putin committed war crimes, calls charges justified*, REUTERS (Mar. 18, 2023), https://www.reuters.com/world/europe/us-says-no-doubt-russia-is-committing-war-crimes-ukraine-after-icc-issues-putin-2023-03-17/. It is important to remind that the United States of America is not a State party to the Rome Statute.

[237] Kathryn Armstrong, Antoinette Radford, Frank Gardner, *Putin arrest warrant: Biden welcomes ICC's war crimes charges*, BBC.COM (Mar. 18, 2023), https://www.bbc.com/news/world-europe-64998165.

[238] Mike Corder, Raf Casert, *International court*, *op. cit.*

[239] Redazione ANSA, *Putin non andrà al vertice Brics in Sudafrica*, ANSA (July 19, 2023), https://www.ansa.it/sito/notizie/mondo/2023/07/19/putin-non-andra-al-vertice-brics-in-sudafrica_b5bf658f-864a-497f-8504-4336dc0ddeae.html.

[240] Carien Du Plessis, *South Africa asks ICC to exempt it from Putin arrest to avoid war with Russia*, REUTERS (July 18, 2023), https://www.reuters.com/article/world/south-africa-asks-icc-to-exempt-it-from-putin-arrest-to-avoid-war-with-russia-idUSKBN2YY1E6/.

[241] Sofia Ferreira Santos, *Ukraine calls on Mongolia to arrest Putin ahead of visit*, BBC.COM (Aug. 30, 2024), https://www.bbc.com/news/articles/c0e852r50x7o.

heavy blow to the International Criminal Court and the system of criminal law".[242] Pre-Trial Chamber II entered a "finding on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin", in which it lamented Mongolia's failure to arrest Putin, referring the matter to the Assembly of State Parties.[243] Mongolia requested, under Article 82(3) of the Rome Statute, to "grant suspensive effect" to the Pre-Trial Chamber II's decision,[244] but this request was rejected by the Appeals Chamber.[245]

V. Conclusions

The relations between Russia and Ukraine have a long and troubled history. The 2014 conflict brought with it sanctions, which have been increased in 2022 onwards, and have made international commerce for the Russian Federation more difficult, alongside condemnations of the escalation, especially from the so-called Western countries. Part of the European Union's sanctions have been challenged before the CJUE, which confirmed the reasoning behind these sanctions, which is the diminishing of Russia's actions in Ukraine. The ECtHR condemned some actions of the Russian Federation in regard to its treatment of ethnic Ukrainians and Tatars, as the ICJ also did, finding that Russia had violated the CERD. The ICC's prosecutor started the procedure to initiate investigations on the situation in Ukraine in the immediate aftermath of the 2022 escalation of the conflict. The ICC's investigations started on March 7, 2022, and it has issued several warrants of arrest against Russian officials, with the most noteworthy one being the one issued against Vladimir Putin. The arrest warrant, criticised heavily by Russian authorities and endorsed by "western" ones, has brought, alongside an unprecedented, until now, attention to the ICC's actions, as its most notable issue to President Putin, difficulties in his travels abroad, limiting him to travel to States that have not ratified the Rome Statute, a limitation which has seen the exception of his visit to Mongolia, a which has put into question the obligation to arrest individuals brought by the issuing of the warrant, potentially putting into question the International Criminal Court's potential for effective action in bringing to trial individuals accused of international crimes.
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[242] Reuters, *Putin gets lavish welcome in Mongolia despite ICC warrant*, REUTERS (Sep. 3, 2024), https://www.reuters.com/world/putin-gets-lavish-welcome-mongolia-despite-icc-warrant-2024-09-03/.
[243] Pre-Trial Chamber II, Finding under article 87(7) of the Rome Statute on the non-compliance by Mongolia with the request by the Court to cooperate in the arrest and surrender of Vladimir Vladimirovich Putin and referral to the Assembly of States Parties, No: ICC-01/22 (Oct. 24, 2024).
[244] Mongolia, Urgent request for Suspensive Effect", No.: ICC-01/22-94-Anx (Nov. 1, 2024).
[245] The Appeals Chamber, Prosecution response to Mongolia's "Urgent request for suspensive effect", No.: ICC-01/22 (Nov. 6, 2024).

Yakuza: Japan's Underground Society in 21st Century

*by Yufei Lin**

ABSTRACT: This article mainly introduces Japan's organized crime situation in 21st century, based on statistics, it analyzes how Japan's organized crime function in a special mechanism. It also discusses about the characteristics of crime organization in Japan, and how Japan's deterrence policy works for this social problem. In the end this article gives a hypothesis of social model of essentiality of organized crime in Japan.

KEYWORDS: Illicit Economics; Japan; Mafia; Sociology; Transnational Organized Crime.

I. Introduction

Since mafia has been declined sharply in the 20th century, people believe that it is an issue of past today. It is true that most of states have wined their battle with mafia in the second past of 20th century, but one will be surprised to find that this organization continue to exist in a considerable scale after 2000 in Japan where a democratic system is constituted completely. And it is even shock that this Japanese mafia, which is named as *Yakuza*[1] below, developing dramatically in a short period of mere fifty years and become one of the most influential organized crimes in the world.

The proliferation of *Yakuza* has been noticed long even crossing the ocean to the English authors. Among them the most significant publication is "*Yakuza: Japan's Criminal Underworld*" by David E. Kaplan and Alec Dubro. This book edited in 1981 introduces the origin and the history of *Yakuza* before 1980s.[2] With the enactment of *Boryokudanin niyoru huto na koi no boshi to unikansuru no horitsu* [Act on Prevention of Unjust Acts by Organized Crime Group Members] (as *Botaiho* below), the year of 1992 is considered as a monument of *Yakuza*'s development. Hill in his book talks about some impacts of this act, but 21st century has a more significant change.[3] This article is mostly based on the situation of the Japanese mafia after 21st century when not only *Botaiho* has an influence but also a shift of the whole social system has forced *Yakuza* to downsize.

Unfortunately, few English authors keep an eye on *Yakuza* in the latest year, but many Japanese authors pay a long-term attention on these organizations. Author Mizokuchi A. published a series of books since 1970s. These publications involve details of *Yakuza*'s life and evolvement, especially for *Yamakuchi* Group. Suzuki Tomohiko, who used to be editor of a commentary magazine, also engage in research of Japanese mafia after 21st century, and he also carries out interviews directly towards current *Yakuza*'s members, which reflects an authentic attitude of this group today. These publications help this article refined in detail and provide a different view.

DOUBLE BLIND PEER REVIEWED ARTICLE

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[1] *Yakuza* is in long-term specially designated Japanese mafia in public context, it is said that this word originated from card game. Japanese police use the word "*Boryokudan*" (Violent Group) officially, members of *Yakuza* call themselves as "*Gokudo*".

[2] DAVID E. KAPLAN, ALEC DUBRO, YAKUZA JAPAN'S CRIMINAL UNDERWORLD (1981).

[3] PETER B.E. HILL, THE JAPANESE MAFIA: YAKUZA, LAW AND THE STATE (2003).

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This article is also following a series of research on the function of mafia. In this area, one of the most influential authors is Diego Gambetta. Gambetta in his paper creatively initiate the argument that the mafia produce and sell trust.[4] This argument has totally changed the mind of analysis of the mafia, before that author like Schelling[5] and Buchannan[6] used to consider them as total criminal of extortion. Gambetta's paper firstly motived later authors to analyze this phenomenon in a more neutral aspect, rather than apply simply the traditional theory of other crime.

Beyond that research in the criminology domain, economics authors also recommend a series of results of the mafia. G. Fiorentini and S. Peltzman published the book "*The Economics of Organized Crime*" which introduce a string of economic model of the mafia.[7] Based on their theoretical model and ample resource of data recorded by the Japan Police, this article examines most of their conclusions. A more concrete understanding of the mechanism of mafia can be established because in many cases, it is not only the tradition and spirit which play a role in the behavior of the mafia member, those actions frequently are also strongly supported by a deep economic motivation.

Further, benefit from the previous research of the Sicilia mafia, this article also make some comparisons of these two different but identical organizations. Henner Hess in his book introduces the origin, spirit, and branch of the Sicilia mafia.[8] Some phenomena can be discovered in both regions, and some are totally different because of the culture background from their own homeland.

A mix methodology is applied on this research. Firstly, the documentary research method is mainly used on the introduction of the origin, history, and some of the criminal situation in the very early years. This method is used based on a range of official reports, newspapers, social survey, and scholar publications. Secondly, the quantitative method, primarily the analysis of the statistics, is mainly used for research of *Yakuza*'s criminal situation on the past two decades. The collection of the data is largely depended on the white paper and other official report of Japanese Police. As a staple method for this article, the analysis of statistics will be carried out in both descriptive and inferential ways. Finally, on a very small scale of the quantitative research, this article also recommends some results from the economic scholars, which constitute an interdisciplinary method which improve the richness of this article.

This article will be unfold dividing in five chapters. The first chapter demonstrates the constitution of *Yakuza* and its scope of business in this century. The second chapter further to detail of the illegal market, representatively the drug-dealing business. This chapter analyzes their business mode and competitive relation, which concludes an interesting discovery that how mafia works as an efficient company in the illegal market. The third chapter introduces the *Yakuza* in legal market, which includes a traditional type of revenue for all mafia: the protection fee. Chapter III talks about what is the essential of the protection fee, concludes it is a kind of extortion rather than service. Then, this part also has a look at how this revenue function today. The fourth chapter talks about the *Yakuza*'s future in the clash of new deterrence policy and other crisis. High deterrence level, crush by other organized crimes and other reasons triggered unprecedented crisis for *Yakuza*, this chapter try to assume of how this will evolve in the future.

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[4] Diego Gambetta, *Fragments of an economic theory of the mafia*, (29)1 European Journal of Sociology / Archives Europeennes de Sociologie (1988), at 127 - 145.

[5] Thomas C. Schelling, *What Is the Business of Organized Crime?*, 40(4) Autumn, the American Scholar (1971), at 643-652.

[6] James M. Buchanan, *A defense of organized crime?* in The economics of crime (19890), at 395-409.

[7] Gianluca Fiorentini, Sam Peltzman, The Economics of Organized Crime (1997).

[8] Henner Hess, Mafia and Mafiosi: The Structure Of Power (1973).

Chapter V is a general conclusion of *Yakuza*'s role, the core idea differs from the previous studies which consider mafia as an individual social participator. Rather, motivated by sociology study, this article raises a new perspective to analyze mafia as a field where different capital transfer.

Finally, to clarify definition of different terms used in this article in linguistics, it follows Metropolitan Police Department's translation of "gang" to uniquely refer single designated organization. To shorten and simplify the text, the word *Yakuza* is used to generally refer to all gang members. Other forms of organization like secondary groups in Yakuza or other organized crime are referred to as "group" which meaning is dependent on the context.

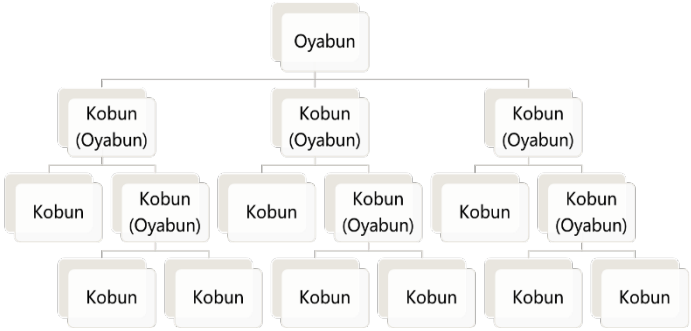
II. Constitution and Deterrence

A. Modernization of Hierarchy

1. Removal of Consanguinity Model

Chapter I mentions *Yakuza* was initiated by traditional consanguinity model of "*Oyabun-Kobun*". The *Oyabun* model has a strong color of ancient Asia's patriarchy, which absolutely prohibit any dissenting of juniors and has a clear rule of succession. A traditional *Oyabun* model manifests as:

Graph 1.1 Traditional *Oyabun* model in *Yakuza*



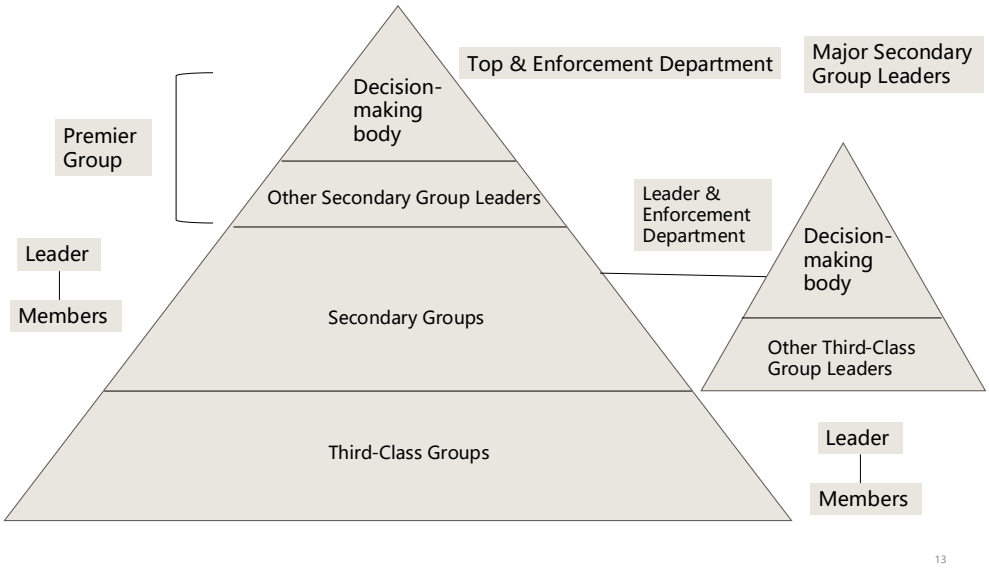
Graph 1.1 shows how *Yakuza* proliferate in the 20th century. Ideally, as long as an inferior members have capacity to recruit new members as his "*Kobun*", he creates a layer of group for the whole system. In this simple situation the first *Oyabun-Kobun* is considered as the premier group of a single mafia, and the second *Oyabun-Kobun* is the secondary one, similarly for the third-class and fourth-class and so on. All major mafias are similar unions of many secondary groups, but it does not mean they are loose in regulation, for example, an expulsion of member should be respected by any other groups in a single mafia, in other words this person should never be accepted by another group. Therefore, a special role of "*Shatei*", which means junior brother participates more for the purpose of Union. The power scheme demonstrates as:

Graph 1.2 *Oyabun-Kobun* model of late 20th century in *Yakuza*

This evolved model accompanied with a collective policy strongly crushed the ancient *Oyabun* model. Firstly, dictatorship of the top was reduced in some extent by the existence of *Shatei*, because latter are all powerful leader of secondary groups. By the end of 20th century, none of the major *Yakuza*'s top has capacity to make decisions only by himself as what Taoka Kazuo used to do in the 3rd generation of *Yamakuchi*.[9] Secondly, as discussed below, originally a *Wakagashira* should respect *Shatei* as a generation of *Oyabun*, but actually they are competitors of both allocation of power and succession. In the past only members in *Kobun* generation have right to be successor, but this mind has changed totally and a group of *Shatei*, who are usually leaders of powerful secondary groups, become eligible potential successors.[10] In addition, minds of members push a revolution of traditional model. For younger generations, Yakuza is more like a business rather than a family, maintaining such a consanguinity model is ridiculous for them. Even in those mafia still designate their positions as "Wakagashira" or "Wakaganaka", these terms has differed so far from its original sense.

[9] By comparison, an authoritarianism control is still possible in those minor mafias.
[10] A typical example is the 5th generation of *Yamakuchi* in 1988. The 5th top of *Yamakuchi*, Watanabe Yoshinori, was in the place of *Oyabun* generation on the point of succession, while his main competitor Nakanishi Kazuo was a Shatei of 4th top of *Yamakuchi*. Both competitors were considered as eligible successors on the eye of other *Yamakuchi* members.

Graph 1.3 Modern hierarchy in *Yakuza*



As Graph 1.3 shows, modern *Yakuza* scheme manifests a pyramid model. The emergence of enforcement department enforces the collective decision-making mechanism, though the top still represents the supreme power of one single mafia, he cannot spoil this privilege because the enforcement department has ability to prevail his sovereignty. A typical example is in 2005 the enforcement department were not content with the control of the 5th top Watanabe, consequently they united to force him to dismiss the position, and the sovereignty of *Yamakuchi* was in a trusteeship of enforcement department before new mandate of the 6th top.

Here the inner problem of *Yakuza*'s hierarchy is explicit: the abandon of traditional model removes a clear rule of succession, and the powerful enforcement department aggravates this situation. Hitherto succession becomes a war in major mafias, and the next part will discuss how they try to overcome this obstacle.

2. Succession

Although *Yakuza* was developed for only seventy years, the top of each mafia has been changed frequently in its history: as for the three major mafias, *Yamakuchi* has been in 6th generation since 2006, while *Sumiyoshi* and *Inagawa* transferred to 9th and 6th in the recent years. As mentioned above, both *Yamakuchi* and *Inagawa* have endured conflict of succession which trigger separation of some secondary groups, in 21st century this conflict become even more critical.

Last part of this chapter discusses the collapse of traditional model which eradicates thoroughly "succession right" in current *Yakuza* system, but here it does not mean that the power of potential successor is the only factor to determine the top. Hess in his research in assignment of Sicilian mafia suggests that these standards include ability of force and creating fear, battle with state, recognition of other leaders and the subjected.[11] This article finds similar criteria in the first one and the third, but it seems like battle with state is replaced by other contribution in *Yakuza*.

[11] HESS, *supra* note 8, at 46.

For the first criteria, however, this ability is simplified today for only to create fear. The exercise of force is always not important. For example, a powerful leader was not content with the 4th generation of *Yamakuchi* in 1985, and he separated with 7,000 members to battle with 4th generation *Yamakuchi*, though his troop was considered more powerful, he finally lost this war. Mizokuchi believes that "imagine to force" is the core of capacity in modern *Yakuza*, which is originated from the true violence practice, but also influenced by organization and time.[12] Similar story happens in recent years, the separation of Kobe *Yamakuchi* on the very beginning proves to be more effective in crime,[13] but in the recent years some secondary groups returned to 6th generation *Yamakuchi* which decrease its scale to less than 800 members today.

When Hess considered battle with state as one of the factors of assignment, he must also take it as a contribution for all mafia members, and this also happens in *Yakuza*. A competitive successor must prove he has made contributions for the whole mafia. Usually, this contribution has to touch the core interest, a mere revenue providing is not enough: for instance, when 5th top of *Yamakuchi* was in conflict, the most powerful leader at that time was Takumi Masaru, who is known as the richest "Economic *Yakuza*" in *Yamakuchi*,[14] but he was not considered as an eligible competitor. One of the reasons is that he and his group made few contributions in the separation battle between 1984-1989.[15] However, traditionally a clash with police or other public organs would not be considered as a contribution, rather, *Yakuza*'s virtue encourage members to surrender themselves if they manslaughter the police.[16]

As for the recognition of other leaders, one of the most important is a designation from the former top. But this designation is in a very sensitive meaning, especially when potential competitors consider this is a biased choice. For example, in 2005, *Inagawa* conflicted with succession of two competitors: *Inagawa* Hideki, who is the son of the 3rd top of *Inagawa* and grandson of the creator of *Inagawa*; and his competitor Tsunoda Yoshio, a leader of secondary group. Finally, the creator of *Inagawa* made a judgement to choose the latter instead of his own grandson, one of the reasons is to evade criticism of bias which is easy to trigger separation. Additionally, there are situations where former tops have no chance to make such a designation, both the 4th and 5th generation of *Yamakuchi* was born in the sudden death of the former top.

But designation is still an effective tool to assure a smooth succession, which is considered as one of the most important issues in *Yakuza* because they are more fragile today. An attempt of *Yamakuchi* is to pursue a unipolar control of one core secondary group, which can kill two birds of one stone: on the one hand it assures the power transfer to the person which the top prefers, on the other hand it creates a powerful support for his current sovereignty. Similar solution is also adopted by *Inagawa*, where it goes further for a bilateral-tops system: when a successor come to the place of the top, the former top does not retire and keeps a minimum control to guarantee the succession. However, the side effect of unipolar approach is that it may cause an increasing deterrence because the police will think these core groups are too powerful

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[12] Atsushi Mizoguchi, Document Godaime no Yamakuchi Gumi [Document Fifth Generation of Yamakuchi Group] (Kodansha Ltd, 2011), at 49.

[13] By comparison, in the year of 2016, Kobe *Yamakuchi* had a share of 14.1% of all *Yakuza* members while it constituted 18.7% of all crimes, 6th generation *Yamakuchi* had a share of 30.2% while it constituted 30.6% of all crimes.

[14] It is said that Takumi group earned for over 200 billions JPY for *Yamakuchi.*

[15] Some commentators tend to believe that Takumi in 1990s was essential top of *Yamakuchi*., but this proves even more concrete for conclusion here, that even a leader equipped with sufficient power will be challenged of his legitimate of succession right if he does not contribute enough.

[16] In the battle of 1985-1989, a group leader, Anto Miki, was suspected to manslaughter a policeman during the conflict. His boss encouraged him to admit the crime. He finally got an imprisonment of 20 years in 1991.

to be tolerated. In 2009, Japan police raise a slogan of "*Kodo* Clan Desolation Project",[17] which is the first time that police specially aim on a secondary group in *Yakuza*. Here *Kodo* Clan is the core secondary group of *Yamakuchi* from which both the current 6th top and potential successor originated.

Last but not least, in a multipolar system, recognition of other members is a decisive factor of succession. Certainly, this recognition is based on objective elements like power and contribution as discussed above, but here a more subjective element is how he will exercise his power in the future. A recognition may require from members in the same mafia, for instance, the 5th top of *Yamakuchi*, Watanabe Yoshinori, was able to get his place because of support from the most powerful secondary group leader Takumi Masaru, because Takumi believed that Watanebe would promote policy which favors economic *Yakuza* as himself. Between different mafia, if they keep a friendship in a long-term, this outside support will make a significance to manifest that a mafia admit legitimate of one successor in another mafia. For example, 6th top of *Inagawa* initiated a brother hood with a potential successor of *Yamakuchi* in 2006. Also, a formal succession ritual will invite leaders in other mafias as witnesses.

B. Change of Population Structure: Prepared Members

Part B of this chapter desires to track the constitution of bottom members in 21st century. Although this group is totally anonymous, since they are main participators of crimes, clues are detected from the statistics of criminals. On the official report of Japan, 20 crimes are emphasized as a single column to calculate because they are either highly related to the *Yakuza*'s nature, or they are exercised frequently by *Yakuza* members.[18] To classify these 20 crimes, most of them can be attributed to at least three main categories which manifest an evident characteristic: first is the crime of violence, this includes homicide, arson, forcible sexual intercourse, assault, injury; the second is the crime against property, mainly the theft and the fraud; third is the crime involving both violence and property, usually it happens by using violence to exercise an unlawful act against property, which contains extortion, intimidation and robbery.

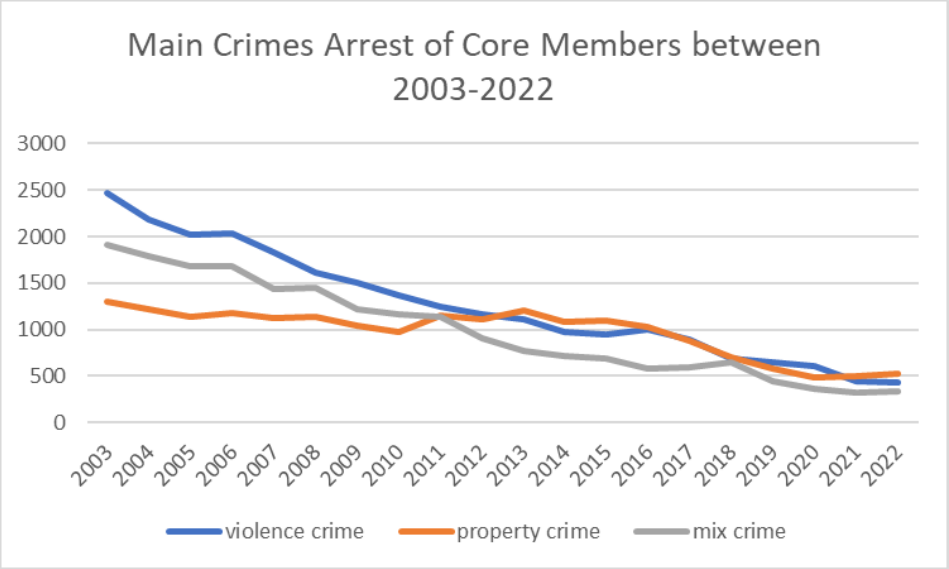
1. General Trend of Traditional Crime

Through the classification above, the trend of these three types of crime shows an obvious variation:

[17] Metropolitan Police Department (MPD), *White book: 2013*, NATIONAL POLICE AGENCY (Nov. 27, 2023), https://www.npa.go.jp/hakusyo/h25/index.html3.

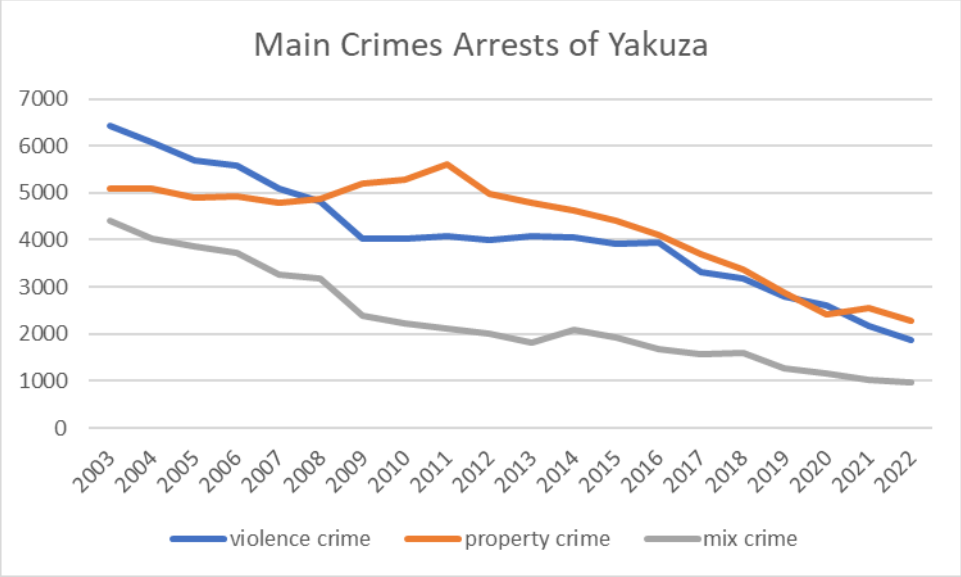
[18] These twenty crimes are: 1.Homicide (Art.99); 2. Robbery (Art.236); 3. Arson (Art.108); 4. Forcible Sexual Intercourse (Art.177); 5. Unlawful Assembly with Weapons (Art.208); 6. Assault (Art.208); 7. Injury (Art.204); 8. Intimidation (Art.222); 9. Extortion (Art.249); 10. Theft (Art.235); 11. Fraud (Art.246); 12. Embezzlement (Art.252); 13. Counterfeit of Imperial or State Documents (Art.154); 14. Gambling (Art.185); 15. Distribution of Obscene Objects (Art.175); 16. Obstructing or Compelling Performance of Public Duty (Art.95); 17. Harboring of Criminals (Art.103);18. Intimidation of Witnesses (Art.105); 17. Unlawful Capture and Confinement (Art.220); 18. Damage to Credibility; Obstruction of Business (Art.233); 19. Damage to Property (Art.261); 20. Violence behavior. Last one is not a crime in the Penal code but regulated in Law on Punishment of Violent Acts, but it is calculated in the column of Penal Code arrest on the official report.

Graph 1.4 Main Crimes Arrest of all *Yakuza* Members between 2003-2022[19]



Graph 1.4 reveals a salient peak in property crime between 2008-2014, which is abnormal in the situation that the scale of *Yakuza* continuously narrows in the past two decades, while the violence crime and mix crime demonstrate a steady declination which basically reflects the tendence of *Yakuza*. On the other hand, this peak does not appear in the situation of the core *Yakuza* members:

Graph 1.5 Main Crimes Arrest of Core Members between 2003-2022[20]



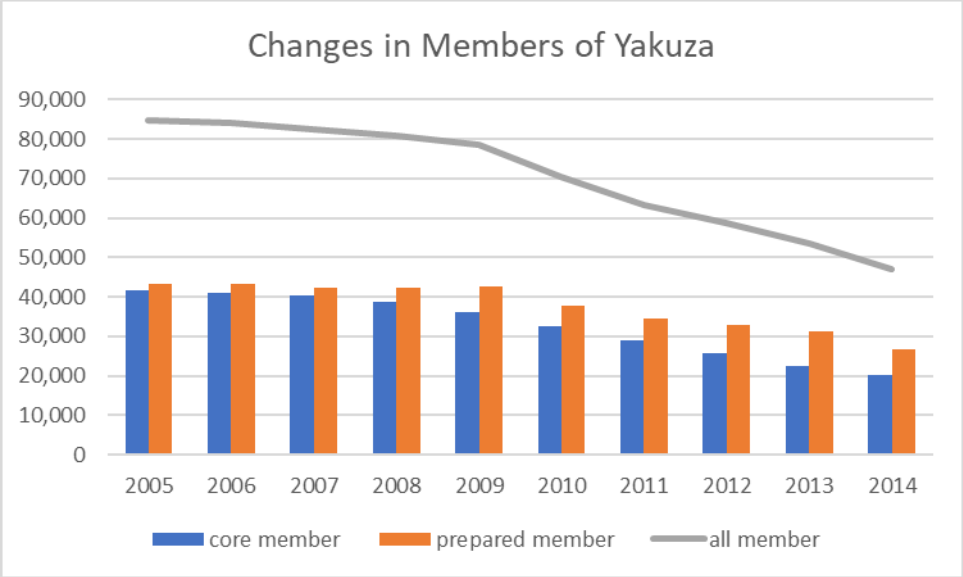
Graph 1.5 shows a continuous reduction of arrest of core *Yakuza* members, which highlight the idea that the abnormal peak is mainly contributed to those prepared members of *Yakuza*. A strong convincing explanation for the peak is the financial crisis in 2008, by this year Japan's real GDP fell 1.3% in Q2, 2.3% in Q3, and 4.9% in 2009 Q1.[21] Although research has found

[19] MPD, *Annuel Crime: 2003-2022,* NATIONAL POLICE AGENCY (Nov. 27, 2023), https://www.npa.go.jp/publications/statistics/sousa/year.html.
[20] *Id.*
[21] *Quarterly Estimates of GDP – Release Archive – 2008,* CABINET OFFICE OF JAPAN (Nov. 27, 2023), https://www.esri.cao.go.jp/jp/sna/data/data_list/sokuhou/files/2008/toukei_2008.html.

that benefit from the lifelong employment system the unemployment rate is not as influential in Japan as in other countries,[22] it should be reminded that those who are motivated joining *Yakuza* is always not provided with a stable career. In research by Japanese police, 60% of the interviewee have more than two jobs before they join *Yakuza*. Interviewer considers this implies that they are not suitable for ordinary work.[23]

Therefore, it can be well imagined that many workers in a highly replaceable position endured a tough time after 2008, which create a strong incentive to joining *Yakuza*. Hill also founds this connection is strongly economic determined, because during the recession the seceders have little hope to get an alternative work outside *Yakuza*.[24] This also explains why only crime against property has a sharp increase: because these new members have only a limit capacity of exercising crime which enables them to exercise simple crime like fraud and theft. Last question to be identified in this part is why this trend is not reflected in the population of *Yakuza* in certain years. Generally, the number of the *Yakuza* member has a stable decline which is not logical for the fact of such an increase.

Graph 1.6 Changes in Members of *Yakuza* between 2005-2014[25]



One may conclude that calculation on the official report is not compatible with the reality. Nevertheless, this divergence may not deem to a negligence of Japanese police. On the one hand, as analyzed above these prepared members mainly exercise in simple crime as fraud and theft, which infers that even being arrested, the penalty will be slight as a month imprisonment or an amount of fine. Therefore, in property crime a prepare member can be arrested for more than one times in a single year. On the other hand, Graph 2.6 still indicates a minimum tendency that prepared members gradually occupy an increasing share of all members. But in most situation, it is literally hard to identify a prepared member: they do not have tattoo like core members, participate rarely in internal issue of *Yakuza*, and are less bound with those mafia customs. In addition, there is few grounds left for the support from core *Yakuza* member. It has

[22] M. Kawai, S. Takagi, *Why was Japan Hit So Hard by the Global Financial Crisis?*, ADBI WORKING PAPER 153. TOKYO: ASIAN DEVELOPMENT BANK INSTITUTE (Nov. 27, 2023), http://www.adbi.org/working-paper/2009/10/05/3343.japan.gfc/.
[23] MPD, *supra* note 19, at 21.
[24] HILL, *supra* note 3, at 234.
[25] MPD, *White book: 2005-2014,* NATIONAL POLICE AGENCY (Nov. 27, 2023), https://www.npa.go.jp/publications/whitepaper/index_keisatsu.html.

been concluded in the last two chapters that mafia always exercise their power by the use of violence, but this has little effectiveness in crime like theft or fraud. Here this article infers that *Yakuza* only support them in ex post facto by a laundry of the revenue or a temporary protection against police. Hence, the relation between prepared members and core members is hidden, invoking another obstacle for identification.

2. Influence of Prepared Members: Certain Groups Analysis

Conclusion of last paragraph clarifies that a scale including both core members and prepared members is not suitable for estimating the capacity of crime for each group, for the reason that the latter may not be calculated accurately. Following paragraphs tend to examine how these invisible prepared members influence a group's capacity of crime. As analysis in Chapter II, these statistics will be based on the main three major gangs, because their organizations are more stable and more representative.

Graph 1.7 Correlations between crimes and Number of Core Member of *Yamakuchi*[26]

Correlations of Yamakuchi					
		Violence Crime	Property Crime	Mix Crime	Number of Core Member
Violence Crime	Pearson Correlation	1	.947**	.987**	.946**
Property Crime	Pearson Correlation	.947**	1	.928**	.976**
Mix Crime	Pearson Correlation	.987**	.928**	1	.947**
Number of Core Member	Pearson Correlation	.946**	.976**	.947**	1
**. Correlation is significant at the 0.01 level (2-tailed).					

Graph 1.8 Correlations between crimes and Number of Core Member of *Sumiyoshi*[27]

Correlations of Sumiyoshi					
		Violence Crime	Property Crime	Mix Crime	Number of Core Member
Violence Crime	Pearson Correlation	1	0.436617302	.868**	.714**
Property Crime	Pearson Correlation	0.436617302	1	0.132440284	0.161944633
Mix Crime	Pearson Correlation	.868**	0.132440284	1	.787**
Number of Core Member	Pearson Correlation	.714**	0.161944633	.787**	1
**. Correlation is significant at the 0.01 level (2-tailed).					

[26] MPD, *supra* note 19.
[27] *Id.*

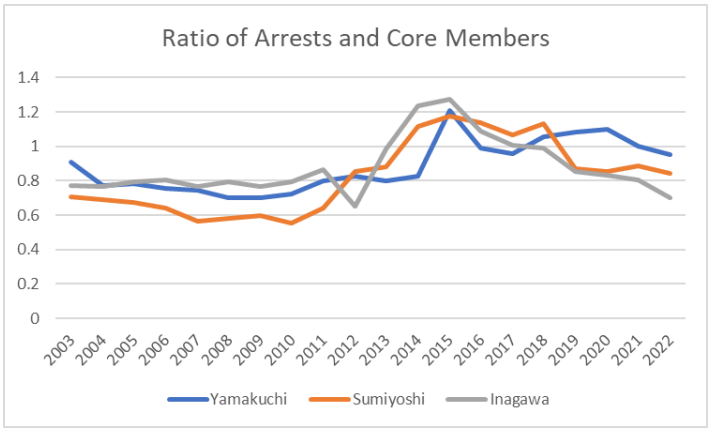
Graph 1.9 Correlations between crimes and Number of Core Member of *Inagawa*[28]

Correlations of Inagawa					
		Violence Crime	Property Crime	Mix Crime	Number of Core Member
Violence Crime	Pearson Correlation	1	.807**	.893**	.870**
Property Crime	Pearson Correlation	.807**	1	.613**	.696**
Mix Crime	Pearson Correlation	.893**	.613**	1	.889**
Number of Core Member	Pearson Correlation	.870**	.696**	.889**	1
**. Correlation is significant at the 0.01 level (2-tailed).					

Graph 1.7-1.9 shows a correlation between different crimes and number of Core Member of these three groups. According to this examination shows, all three groups indicate an evident correlation between violence crime, mix crime and the number of core members, and *Yamakuchi* has a significant stronger correlation compared to the other two groups. For the property crime, data from *Sumiyoshi* does not shows a significant correlation, by comparison *Yamakuchi* and *Inagawa* maintains a same level correlation in this area. If conclusion in the former paragraphs was right, it can be inferred that *Sumiyoshi* relies more on those invisible prepared members to exercise crimes against property, while in *Yamakuchi* and *Inagawa* more practice rely on core members.

Another proof for this conclusion is the average number of each member's participation. If it is assumed that core members of *Yakuza* are capable of practicing all these three crimes, ratio between arrest numbers and core members' number can represent the effectiveness of all crimes of that group. This ratio exceeds 1.0 in some years, which significantly reflects the participation of the prepared members. Although for some misdemeanors there is possibility for a single member to be arrested more than once in the same year, nevertheless it is rare.

Graph 1.10 Ratio of Arrests and Core Members in the three main gangs[29]



Graph 1.10 shows a sharp increase in this ratio around 2009 for *Sumiyoshi*. Before that its

[28] *Id.*
[29] *Id.*

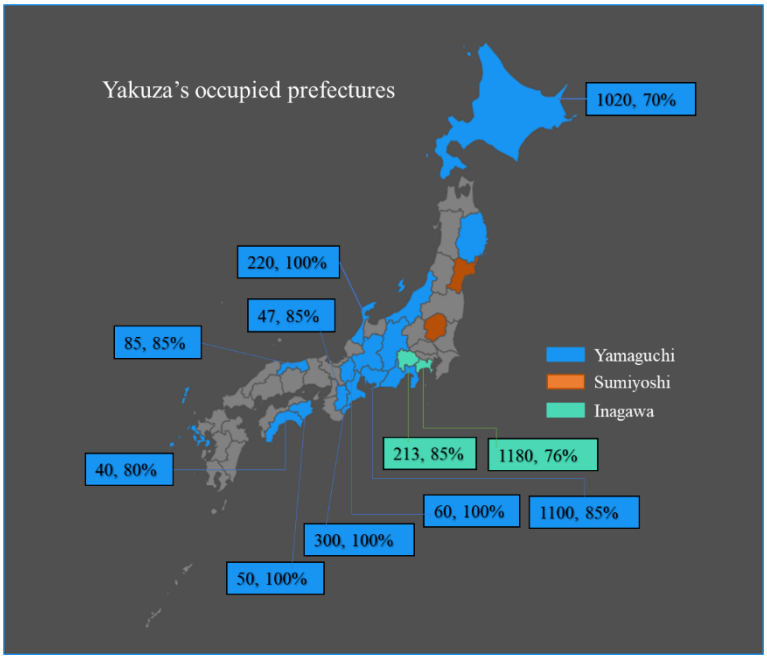
number is in significant inferior compared to both *Yamakuchi* and *Inagawa*. However, in the last decade it has improved to the same level of the other two groups, which strongly proves conclusion here: *Sumiyoshi* has a stronger attractiveness for prepared members especially after the financial crisis. This is a win-win game for both these new members and *Sumiyoshi*: the former are provided with a more appropriate accommodation where they are not required to engage in violent crime as in *Yamakuchi* or *Inagawa*, while *Sumiyoshi* finally compensates for its lack of capacity in crime.

C. Geographical Distribution

1. Recent Geographical Distribution

The scope of business is not fixable for *Yakuza*. Although they have a registration of general headquarters in official report, it does not mean that these groups practice more frequently in the site of registered place. As introduced in part B, scale of business is highly related to where their secondary groups locate, especially those grand ones. Discussion of succession mentioned the tendency of unipolar core secondary group in the recent years, which also manifests in geographical aspects. The centralization of *Yakuza*, especially those major mafias, has been enforced.

Graph 2.11 *Yakuza*'s occupied prefectures in 2020[30]



Graph 2.11 highlights those regions where the three major mafias occupy for over a half local *Yakuza* member and underlines those regions which *Yakuza* members have a powerful control for more than 70% share. Here some information is clearly dispatched: firstly, although influenced severely by the separation of Kobe *Yamakuchi*, the 6th generation *Yamakuchi* still shows breadth in geography. It seems like most influential region is prefectures in west area, where traditionally is sphere of *Yamakuchi*. Nevertheless, some prefectures which account for

[30] *Survey of smart flash: Latest survey on the power of Yakuza in 47 prefectures,* SMART FLESH (Nov. 27, 2023), https://smart-flash.jp/sociopolitics/110239/#google_vignette, at that time Kobe *Yamakuchi* also have an effective control of many prefectures, but since many groups have separated today, this graph does not calculate their situations.

less than 100 members are hardly to be considered as influential prefecture of *Yamakuchi*. But at least their revenue is various geographically compared with other groups. Secondly, centralization policy of *Inagawa* is obvious, in Kanagawa and Yamanashi two prefectures it assembles more than 80% of all *Inagawa* members. Finally, *Sumiyoshi* does not have a control for over 70% in any prefectures. But in 2020, its scope of business is still a little wider than *Inagawa*[31].

2. Centralization or expansion?

Theoretically, centralization helps for a formation of an oligopoly market, which may bring *Yakuza* an exceeding organization benefit for crime. For example, in 2019, only 64% of all arrests of *Yakuza* in *Kanagawa* allege *Inagawa* members,[32] which is nearly 12% lower than their population share. A reasoned explanation is the investment strategy in different situation. Firstly, in most cases these investments are all sunk costs, a single mafia seldom can transfer its reputation of violence to another area because there are other competitors ready to play the role of protector against an outsider. Therefore, a rational mafia tends to invest more in the region on which they believe they have a long-term being alive. Confidence of a predictable revenue makes *Yakuza* more willing to increase their investment of violence, which protect them to exercise those more lucrative crimes like drug dealing. Secondly, an investment in a competitive market will create a positive externality to other competitors, especially for those minor groups to be a free rider, which is not economic for major mafias. It is not clear whether there are other factors motivate *Inagawa* to promote this strategy, but at least it is benefit from economic aspect. In 2020, it is estimated that only 200 members of *Inagawa* are still domiciled in Tokyo where used to be their main offices situate.[33] In addition, their new foothold Kanagawa is still in the circle of Tokyo, it can be well imagined that *Inagawa* is still possible of exercising crimes in their hometown.

However, not all mafias tend to believe centralization is a good choice, a typical example is *Yamakuchi*. Over seventy years the geographical strategy *Yamakuchi* is an infinite expansion, in most of the region they get an impeccable success until they take steps to Tokyo. For a long time, mafias in Tokyo have reached a consensus "not allow *Yamakuchi* cross the *Shima* City".[34] But they succeed in first step in 21st century, by assimilating an individual gang called *Kokusui* Clan in 2006, they announced themselves finally reaching Tokyo, and today *Yamakuchi* is the second largest gangs in the capital. The investment for expansion of *Yamakuchi* is astonishing, it is hard to imagine how much they pay to promote a minor mafia risk to rip up a present agreement which is protected by powerful mafias like *Sumiyoshi* and *Inagawa*. Behind reason is tops of *Yamakuchi* believe expansion will enforce the imagine of violence because it is benefit from propaganda, and this will make easier for *Yamakuchi*'s member to extort.

This article does not want to judge this strategy is wise or not. Polo M. observed two contrary effects: the probability of military success decreases when mafias tend to recruit those members in distant but increases with the scope of the organization.[35] The former conclusion indicates that this expansion has brought *Yamakuchi* a heavy burden. *Yamakuchi* is the creator

[31] By comparison, in Tokyo, Chiba, Saitama *Sumiyoshi* manifest an effective influence for over 40%. But it does not reach to a control.
[32] *Security Situation,* KANAGAWA PREFECTURAL POLICE HEADQUARTERS (Nov. 27, 2023), https://www.pref.kanagawa.jp/documents/59373/boukei_chian020228.pdf.
[33] See, *supra* note 65.
[34] A city situated in *Mie* prefecture, which is considered a line of *Kanto* and *Kansei* regions.
[35] POLO, *supra* note 7, at 87-108.

of "Blog system" in *Yakuza*, which designates some major leaders as a charge person in certain areas, and they oversee a bond bridge between local secondary groups and the headquarter.[36] This proves a far distance between headquarter and low-class groups, and a fatal result is the separation of *Kobe Yamakuchi*. Losing places are centralized geographically in western part, indicating that headquarter has lost their control of this region.

It seems like in the 6th generation *Yamakuchi* has realized exaggerated expansion cost them so much, but as long as one day their aim is still to be the "national gang" as what Taoka desired in 1970s, this policy is hard to be abandoned. Instead, remedy for this cost is to enforce the centralization in secondary group, especially in core group, *Kodo* Clan. Most of *Kodo* Clan members only make business in *Nagoya*, today there is no other qualified competitors in the same city for them.

By the end of this part is worth to mention situation in Tokyo, which is perhaps the most profitable but also most dangerous place for *Yakuza* to carry in business, because the deterrence level in capital is always higher than other regions. On the survey of 2020, *Sumiyoshi* constitutes 45% of all *Yakuza* members in Tokyo, which is really closed to a literal control. However, this article believes that even one day *Sumiyoshi* constitutes more than a half or even 60%, it is hard to say it had controlled Tokyo, because Tokyo's *Yakuza* business is exercised in a very complicated way. On the internal aspect, there is a historical arrangement called "*Kanto* Fellowship" which distributes business to seven mafias in Tokyo,[37] which means even *Sumiyoshi* is the most powerful mafia in Tokyo, it must respect a collective decision. On the external aspect, there is other organized crime in Tokyo like semi-group. All in all, even in the underground world, *Yakuza* is not the only director in Tokyo.

II. Illegal Market: Empire of *Yakuza*

A. Yakuza as Enterprise: Wholesalers or Retailers?

1. Situation in Sale

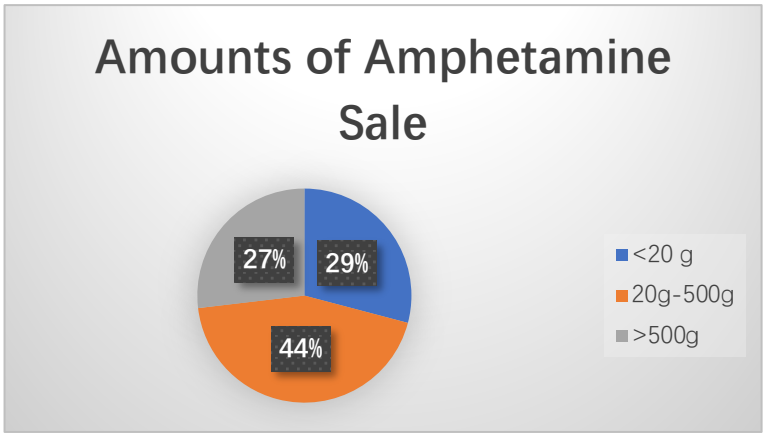
This article has a research of 137 cases of amphetamine involving participation of *Yakuza* members since 2017, which indicates that these cases are multiple in all procedures of business.[38] In the wholesale level, these cases are usually linked with foreigners: Actually, Japanese police observe these two groups have strong connections as early as 2005, and White Book of later years even account situation of foreign criminal as a part of mafia situation. Based on the official record, foreigners constitute about 10 percent of all arrested by drug-dealing, 90% were detected in the procedure of import of amphetamine.

Frequently, an addicted person only required 0.03g-0.1g amphetamine once, so a single retail will not exceed 10g in normal circumstances. Considering there might be requirements in the high-restricted country like Japan, this statistic extend the amount of 20g as a line for retail. For the same reason, an amount plus 500g is usually not possible a retail situation, because it will require a long time to sell all drugs, and during this period the risk of possession increase the cost of crime. However, for those between 20g and 500g, it remains a flexible possibility: some cases have a clear objective for retail, some are revealed during the procedure of resold, and others caught by possession do not show clear aims. And it is possible that in these cases

[36] S. YAMASHIRA, NEGOTIATION SKILLS LEARNED FROM THE YAKUZA (2003) at 228-229.
[37] These seven mafias include three major mafias as above, and other four mafias which practice frequently in Tokyo.
[38] These cases cover all kinds of amphetamine for business, including possession, sell, import, etc.

the business mode can be easily switched depending on the particular situation of possessors.

Graph 2.1 Amounts of Amphetamine in 137 *Yakuza* related cases[39]



Among 137 cases, 39 of them are totally retail-based, the tiniest case only involves a retail for 0.3g amphetamine, and 36 of them are in the whole-sale level, on which the biggest amount is a *Yamakuchi* leader related to an import of amphetamine from Hongkong for over 500 kilograms. Graph 3.1 indicates that *Yakuza* involve in amphetamine sale in a multiple way, it sometimes performs as retailor, sometimes as wholesaler.

For a single mafia, it is rare to see that it involves the whole stream of illegal business. Report of NDIC regards that in USA, the famous mafia La Cosa Nostra mostly engage in wholesale and distribution of drugs, but not retail.[40] On the contrary, Yiu on his research of Hongkong Triad Society think they are not capable of complete business in wholesale, for lack of resource to get in touch with those foreign providers.[41]

2. Cost-Benefit Analysis

If this business strategy is considered as rational, most profitable for mafia, it will be possible to do a simple cost-benefit analysis here to compare different strategies.

For the wholesalers of amphetamine, usually if they are not the importer of products (as mentioned above this procedure is usually finished by a cooperative foreigner), interest for the first sale is account to 450% in Japan.[42] It seems like a lucrative deal, but wholesalers bear a high risk of seizure: firstly, a wholesaler with 1 kg amphetamine have an investment of almost 1,000,000 JPY (about 66000 USD) which was not refundable if it is caught by police. Secondly, conditions of possession and transport requires a much higher demand than retail, on this procedure the wholesalers may have to hire one or two persons to help them.[43] In addition, resell should be finished in a more discreet way, because both of the parties may have been the target of police, which is a durable risk compared with a retail.

For a retailor, final price of drug provides a literally attractive profit for them. If there is no other middleman, the minimum interest rate reach to 676%, and in some cases it even

[39] *Organized Crime News: Yakuza Case Files*, YAKUZAN NEWS (Nov. 27, 2023), https://*Yakuza*news.jp/blog-entry-10277.html.
[40] *National Drug Threat Assessment 2009*, NATIONAL DRUG INTELLIGENCE CENTER (Nov. 27, 2023) https://www.justice.gov/archive/ndic/pubs31/31379/dtos.htm.
[41] YIU-KONG CHU, THE TRIADS AS BUSINESS (2000), at 113.
[42] MPD, *supra* note 19.
[43] Actually, some of them require their family to help, but this should also be considered as a cost.

extends to 966%.[44] In United State, at the same time, the interest rate of retailor is only about 300%. Amphetamine retail is a highly profitable business in Japan; even considering Japan's drug deterrence level is much higher than US, the risk is tolerable in such a profit: because amount involved is tiny enough, usually theses members will only face to a several month imprisonments, that is why some of them was willing to be arrested repeatedly for several times.

The cost-benefit analysis indicates that despite the pressure of a high-level surveillance, the retail is more lucrative than wholesale in Japan. So why *Yakuza* not choose to only practice retail business as Hongkong Triad Society?

3. Transactional Cost and Internalization

New institutional theory will not take cost-benefit analysis as simple as above: this is a model assumed that the transactional cost in drug-dealing is zero. However, this cannot be true in real world. As an illegal business demanding great confidentiality and anti-detection ability, conclusion is that transactional cost in drug-dealing may be very high. Therefore, *Yakuza* decides to internalize this expensive price by creating a whole procedure as an enterprise.

Williamson suggests three characteristics of transaction which influence price of cost: asset specificity, uncertainty, and frequency of transaction.[45] Based on this theory, a very high transaction cost is discovered in the illegal market. Firstly, illegal products are with the nature of non-marketability, and this nature should be more emphasized under a legal system which limit the drug-dealing seriously as Japan. When a *Yakuza* member lose their counterparty, these expensive products are not able to bargain in the legal market. Secondly, as mentioned above the surveillance of drug-dealing reduce the success rate of a certain business, transactional cost increase by the reason of possible fail cases. In addition, in the illegal market the information asymmetry is usually more serious than in a legal market, which cause a further distortion of price.

In a retail situation, this transactional cost can be covered by an even higher price of finality from the consumers, but if it comes to the wholesale level, it becomes the investment of mafia itself. When frequency of transaction reaches to some extent, enterprises will consider internalizing this procedure so that it reduces the transaction cost. Schelling also suggests that the organized crimes have an advantage over individual criminal that the former can make use of internalization to reduce the transactional costs.[46]

Rugman's conclusion on internalization is very closed to situation here: although his research is based on those multinational enterprises (MNE), in this circumstance it can be suggested that every single group represents a region. Rugman thinks that incentive from a foreign authority is less than fear of loss of advantage of monopoly knowledge for MNE,[47] same for *Yakuza*, a group is also precious their knowledge in the illegal market, such as the source of retail and specific information of a certain canton. Also, as to do a single business require some extent of investment of violation, it will be benefit from internalization from not to giving a positive externality to competitors.[48]

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[44] From the report of UNDOC in 2013, the wholesale price of amphetamine in Japan is in the range of 72,486 to 103,551 USD per kilo, while the street price that year is 70,000 Yen (about 700 USD) per gramme.

[45] Oliver E. Williamson, *The economics of organization: the transaction cost approach*, 87(3) AMERICAN JOURNAL OF SOCIOLOGY (1981), at 548-577.

[46] Schelling, *supra* note 5.

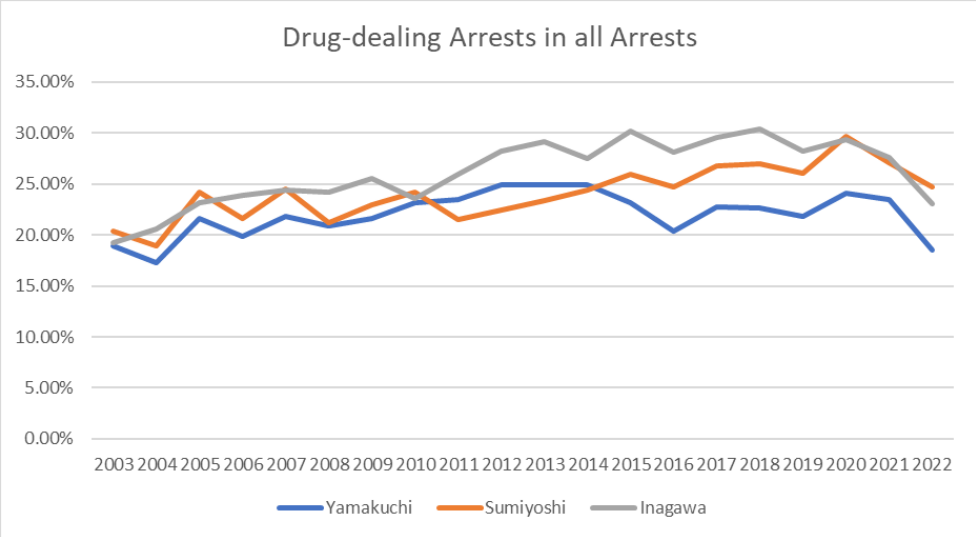
[47] Alan. M. Rugman, *A Test of Internalization Theory*, 2(4) MANAGERIAL AND DECISION ECONOMICS, MULTINATIONAL BUSINESS (1981), at 211-219.

[48] This is the assumption of a total competitive market, which may be not true from the situation of the three major groups as the following part talks. However, it may explain behavior of those minor groups.

This article believes that imagination of non-cooperation in drug dealing business is not conclusive. It is a misleading impression distorted by propaganda policy and surface regulation of *Yakuza*, for which they try to separate themselves with drug because this is a highly deterrence level area of police, and an active participation will ruin their credit towards police. A long-term and evidently deliberate negligence of drug dealing in *Yakuza* proves tops of groups do not really oppose this stable revenue.

However, not all groups are capable of internalization because of the limitations in scale or location. Internalization requires firstly sufficient people, for which some minor groups are not prepared. More importantly, as import is the most important part in drug-dealing, those mafias whose location is both import access and main retail scope benefit from their geographical advantages. On this aspect, Tokyo and Kanagawa naturally step forward in a short distance between import and retail, which is proved by the statistics that *Sumiyoshi* and *Inagawa* are superior than *Yamakuchi* in drug-dealing, because the latter locates most in cities which are not equipped with grand airports and harbors.

Graph 2.2 Ratio Drug-dealing Arrests in all Arrests of three gangs[49]



True cases shows that interest in drug-dealing business might differs more than this nuance in statistics. There is a third-class group in *Inagawa* whose leaders are all arrested by amphetamine import,[50] indicating that drug-dealing is the most important business for this group. Under the level of secondary group, the internalization is also evident: a member who was detected in amphetamine retail in 2020,[51] his source was traced to another import case which alleging another member in the same secondary group in 2019.[52] However, internalization is not absolute, when profit is acceptable, a re-selling between different mafias still co-exists. For mafias like *Yamakuchi* which is inferior in their location, if they want to share a place in this market, the most economical way might be buying products from these efficient sellers. *Kodo* Clan in 2016 was detected purchasing amphetamine from *Inagawa*, and

[49] MPD, *supra* note 19. More directly, the average ratio of drug-dealing arrests in all arrests is 22% for *Yamakuchi*, which is 24% and 26% each for *Sumiyoshi* and *Inagawa*.

[50] *Five people arrested by possession of methamphetamine with intent to sell, including the head of the Hiraguri clan*, YAKUZAN NEWS (Nov. 27, 2023), https://*Yakuza*news.jp/blog-entry-12478.html.

[51] *Inagawa-kai gang member arrested of selling methamphetamine in condominium base,* KUMIN NEWS (Nov. 27, 2023), https://kumin.news/yokohama/minami/articles/15196.

[52] *Gang member arrested on suspicion of possession of 7.2 million JPY worth of methamphetamine,* SANKEI NEWS (Nov. 27, 2023), https://www.sankei.com/article/20191209-ZYQK622GHJM2NBNZWFSXKHPV2E/.

coincidentally, their seller is that secondary group mentioned above.[53] Here it further proves that *Inagawa*'s secondary group are stronger in illegal market by the internalization.

This part concludes that those groups which makes internalization in drug-dealing are more powerful than those not. Thus, an argument will be inferred differently from Gambetta's theory: in the illegal market, *Yakuza* is not a consumer for their protection, rather, this protection is for the group's collective benefits as an investment of an enterprise.

B. Investment of Violence

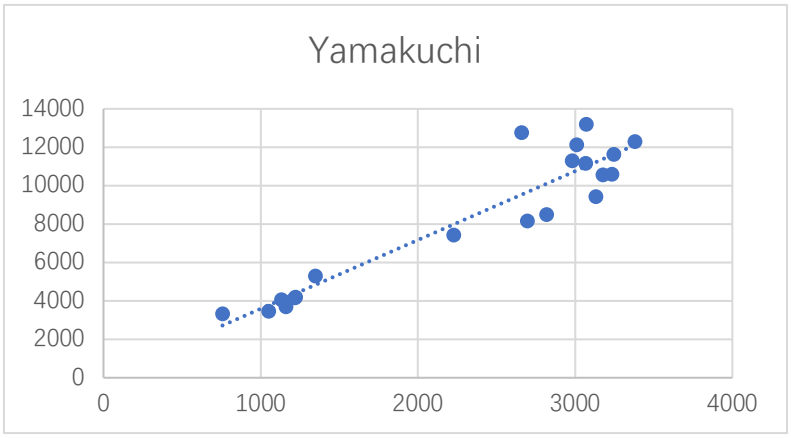
Previous part conclude that violence is a kind of investment rather than a commodity for a single group as a whole, which will lead a further analysis of the level of violence: if violence is a commodity, it will only be consumed when it is necessary, which is totally random in a certain period; however, things will be different if the violence is an investment. Here it will more be decided based on the strategy of each group, depending on their capacity, profitability, assessment of deterrence et cetera. Leaders of those groups can use their initiative to invest a suitable level of violence so that make themselves as the most competitive participant in the illegal market.

1. Level of Investment of Violence

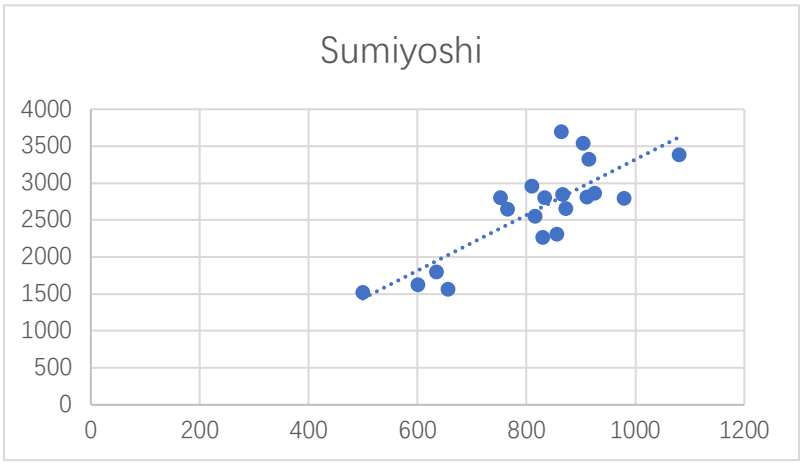
As graph 3.2 indicates, all three mafias have an increase in drug-dealing arrests rate in the past twenty years.[54] So, what is the motivation for this strategy? Some scholars will resort to the reduction of other crimes. Hill has a similar assumption that *Yakuza* tends to make more business of drug-dealing if other revenue of crime reduce,[55] because *Yakuza* is not a mafia of single pattern of illegal market, and it is able to make a profit in multiple measures. So the increase of investment may be due to the recession of other crimes. To exam whether this conclusion is convinced, this article makes a correlation analysis with the number of drug-dealing arrests and the number of other arrests between 2003-2023 (X represents other arrests number, Y represents the drug-dealing arrests number):

[53] *Raid on Kodo Clan headquarters on suspicion of Kodo Clan members buying stimulants over 40 times,* FUJI NEWS NETWORK (Nov. 27, 2023), http://www.fnn-news.com/news/headlines/articles/CONN00323074.html.
[54] By comparison in a more direct way, average of these three groups in the first decade is 21.35% (*Yamakuchi*), 22.17% (*Sumiyoshi*), 23.89% (*Inagawa*); and the average of the second decade is 22.65% (*Yamakuchi*), 25.97% (*Sumiyoshi*), 28.31% (*Inagawa*). All three groups have an increase in the last ten years.
[55] HILL, *supra* note 3, at 228.

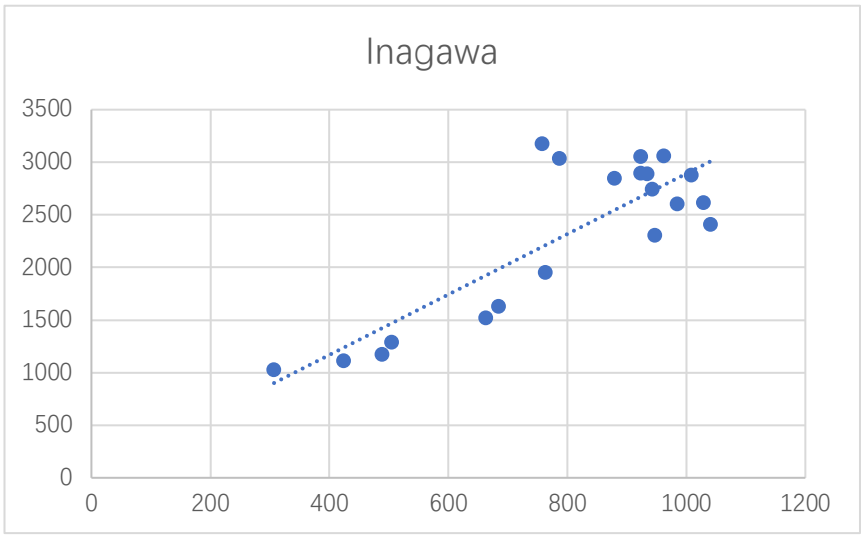
Graph 2.3 Correlations of Drug-dealing and Other Crimes of *Yamakuchi*[56]



Graph 2.4 Correlations of Drug-dealing and Other Crimes of *Sumiyoshi*[57]



Graph 2.5 Correlations of Drug-dealing and Other Crimes of *Inagawa*[58]



[56] MPD, *supra* note 19.
[57] *Id.*
[58] *Id.*

Graph 2.3-Graph 2.5 prove the significant correlation between drug-dealing and other crimes in a single group, however, this is a positive correlation for all the three groups, that when other crime increases, the drug-dealing cases incline simultaneously, which is the contrary of Hill's conclusion. Possible explanation for this might be a change of *Yakuza* in these twenty years: When Hill finished his book, *Yakuza* kept a strong influence in the Japan society, and their control of the illegal market still reached to prostitution business at that time.[59] By comparison, today it has lost such a multiple source of revenue, as a result the income of drug-dealing is not considered as a compensation, but the main revenue to maintain itself. Thus, a group tends to make more business of amphetamine as possible, there is not much choice for them to adapt their investment.

However, trend in Graph 3.2 is also different from Buchanan's research of criminal cartel, that if the deterrence level continues to remain in a relative degree, the members of this cartel will decide to reduce the investment of violence.[60] Buchanan's conclusion is based on the fact that, monopolist in a cartel have to consider the potential influence the increasing productivity may create to the marginal price of products. When the output increase, marginal revenue decline in an exceed degree, by this way, it is wiser for monopolist to reduce the productivity in the cartel market than in a competitive market.

Conclusion of this part is that neither Buchanan's conclusion nor Hill's assumption is parallel with the real situation of *Yakuza*. Although it is proved that their behaviors in the illegal market is related to other crimes, it seems like that is merely an objective proof of their capacity for exercising crime, illegal business and other crimes are not compensate for each other.

2. Conspiracy

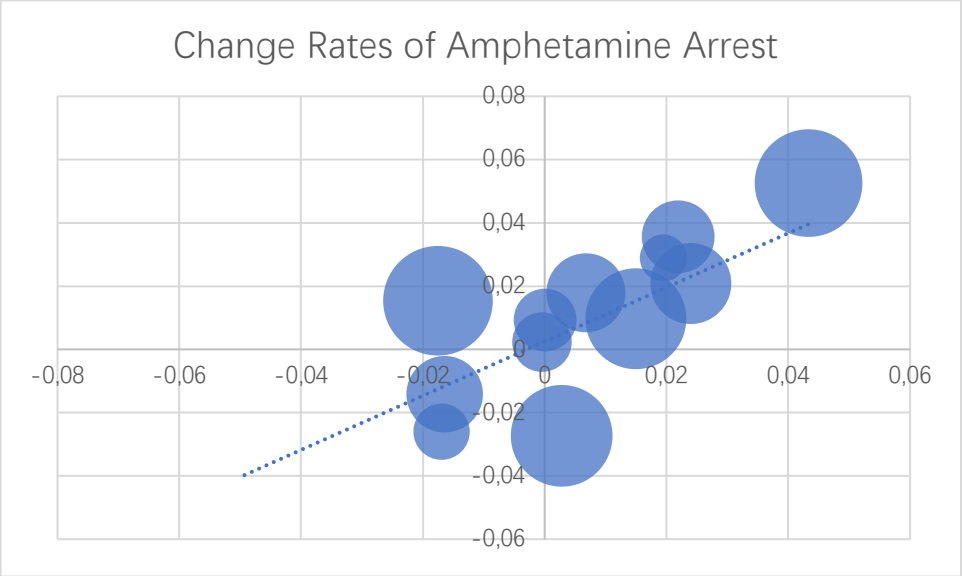
One factor resulting this consequence is the type of cartel. A cartel has specific arrangements of productivity like OPEC is highly different from a cartel involving in Cournot competition. In the latter situation, monopolists have shortage information from each other which they can only make strategy based on the prediction of productivity from another party. In the former situation, however, members of cartel can reach more objectives by creating a series of arrangements. Additionally, if there exists a long-term coordination, a temporary sacrifice will be considered as acceptable.

Therefore, the focus of this part is to discover whether there is a conspiracy in the illegal market, at least between these three major gangs. This is not to claim that the minor gangs do not attend in such an arrangement, on the contrary, they have both a strong possibility and motivation to engage in. But the data from these minor gangs is not so typical for using in statistics analysis, so the conclusion will only be made in the scope of the major gangs.

This article estimates the change of investment of violence in drug-dealing market by the annual fluctuation of the percentage of people arrested by amphetamine case in the whole number of arrested members. Assumption for this evaluation is a single gang in huge scale will tend to remain their business strategy in a certain period, so that this change will not be resulted from a diversion of business direction. Also, as the same explanation mentioned above, the deterrence level is be assumed as stable and equal for all these three gangs.

[59] In the year of 2003, 253 of a total 947 individuals involved violation of prostitution statute is considered as related to *Yakuza*, which shows a great change today.
[60] BUCHANAN, *supra* note 6.

Graph 2.6 Correlations of Change Rates of Amphetamine Arrests among *Yamakuchi*, *Sumiyoshi* and *Inagawa*[61]



Graph 2.6 shows a strong correlation between these three gangs, which infers that these gangs have a similar strategy of adaption in a same pace. These figures insist in a long period of two decades, thus this correlation is not an accidental factor, if it is assumed that this fluctuation is the consequence of positive choice rather than a negative impact, there is strong reason for us to believe that they achieve to some agreement in the cartel.

For the conspiracy situation, Florentini (1996) further refines Buchanan's conclusion by classifying situation in two categories: one is when deterrence is general to all illegal businessmen, another is when deterrence mainly focuses on those grand participators. He found that in the latter situation a cartel will enforce its investment of violence compared with a Cournot competition circumstance, that's because competitive monopolists will be more reluctant to increase investment which may cause a positive externality to their competitors.[62] Situation here is more like the former one: Japanese police has a long-term practice of designating drug dealing as a part of organized crime, which indicates a policy strategy emphasizing more in larger producers like *Yakuza*. In addition, chapter II discusses of geographical centralization among major gangs, which assures that retail business in drug-dealing will not cause many disputes between different gangs.

There are also examples to further support this conspiracy. Although in the previous part this article concluded that drug-dealing business is mainly carried out in the unit of one single group, it is easy to find a limited cooperation between different gangs, especially when investment is tremendous in some import case. *Sumiyoshi* and *Inagawa* is long-term considered not so friendly with each other because they are competitors in Tokyo market, however, members from these two gangs have been found cooperating in importing amphetamine in 2018.[63] If *Yakuza* gangs are monopolists in Cournot competition, there is few motivations for them to corporate together: by doing so each of them increase the output in the illegal market,

[61] MPD, *supra* note 19.

[62] FIORENTINI, *supra* note 7.

[63] *170 kg of methamphetamine inside machine parts import, shipped from one of the largest cartels in Mexico,* ASAHI NEWS (Nov. 27, 2023), https://www.asahi.com/articles/ASQ1T4WB0Q1TUTIL00M.html.

which reduce the marginal revenue for a unit of the product, which cause the result that the marginal cost is exceed the marginal revenue for both of these two producers. In Cournot competition the wise strategy for each monopolist is to independently control its scale of output to keep the marginal cost is equal to its revenue, thus such a cooperation is considered as non-profitable in business.

Also, a conspiracy evades the potential waste of investment in the illegal market. When deterrence is enforced, all organizations will increase their investment in violence under the fear of loss of power of the monopoly. However, while a conspiracy is achieved, this statute is assured by the framework of cartel, and the cartel can reflect to this increase of deterrence by a collective action which is more economic for each member.

It is convinced that at least between these three gangs some arrangements of investment are achieved in order to better control the total output in the illegal market. In addition, results in the previous part is also well explained by this conspiracy: the increase of the investment is motivated by a conspiracy cartel, this cartel makes efforts to maximize the profit, by reaching an equilibrium between marginal revenue and its cost. In the last twenty years, this strategy reflects an increase of investment. Mutual interest is prior to self-interest, so the possibility of a positive externality is acceptable for each member of the cartel.

C. *Yakuza* as an Efficient Entreprise

Previous research of mafia always emphasize that it is not an integral organization. However, research of this article in the illegal market rather defends a contrary opinion: in the illegal market, *Yakuza* is working as efficient as other enterprises: they smartly evade a high transactional cost by internalization, creating a cartel to control the productivity in order to maximize the profit.

However, this strategy is efficient not based on how intelligent *Yakuza* is, but a subtle interaction between *Yakuza*'s power and their economic interest. Gambetta's conclusion only views one aspect of this procedure, although he realized how mafia exerts their core power of violence to fulfill its interest, he ignored the importance of this interest so much that he describes it as a unilateral process. For other kinds of crimes this conclusion may be true, but it does not demonstrate the real situation of the core illegal market.

Conclusion here is not only the illegal business is supported by the power of *Yakuza*, on the contrary, this power is enforced by the revenue in the illegal market as a reward. On a survey between *Yakuza*'s members, when being questioned of their goals of life, leader's answer is "to make a great management in the future" and "to earn more money"; ordinary core member and pre-member's answer is "to obtain a revenue for life",[64] which is summarized by the researcher that "Today, accumulating great wealth or succeeding at an enterprise has become their only goal".[65] Lucrative business of mafia somehow becomes the origin of the power of *Yakuza*, not a consequence of their practice of violence.

The emphasis of the role of enterprise also indicates that there is little motivation for *Yakuza* to create an order in illegal market. In other word, they are not act as a "policy maker". On the one hand, gang as *Yamakuchi* claim itself as opposed to drug-dealing, it is ridiculous for them to reconcile for this issue. On the other hand, it is not acceptable for a leader of *Sumiyoshi* to respect an order from *Yamakuchi* in an arbitration of drug-dealing, even the latter claims a neutrality in the certain issue. In Gambetta 's word, that a player's referring is not credible if he

[64] MPD, *supra* note 19.
[65] *Id.*

has a vested interest.[66]

The power of *Yakuza* in the drug-dealing should be summarized as it maintains a stable scale of this illegal market and keeps a profitable price by a cartel which have the capacity to control the output of this market by a flexible and deliberate investment of violence. A same basic logic is also suitable for another illegal market, such as the private casino and other gambling career.

III: Legal Market

A. Extortion

This chapter aims to track other business of *Yakuza* outside the crime. As discussed above, this part includes illegal behaviors alleged to crimes, but it also involves some behaviors which do not constitute crime but constitute violation of normal social economic life which are not allowed under *Botaiho*.

1. General Trend of Injunction of *Yakuza*

This part follows the classification of these behaviors by *Botaiho*, Article 8 of *Botaiho* creates a list of 27 behaviors of *Yakuza* being regulated by this regulation. If a group or its members exercise an action on the list, Japanese police is authorized to give an injunction to this group. As an administrative method, to violate this injunction will cause an imprisonment of 1 year and a fine of 1 million JPY on maximum. This list covers majority of the issues *Yakuza* participates positively.[67] Among them, extortion is the traditional career of mafia, while some of the others do not indicate a significant influence from *Yakuza* today, for example the construction career.

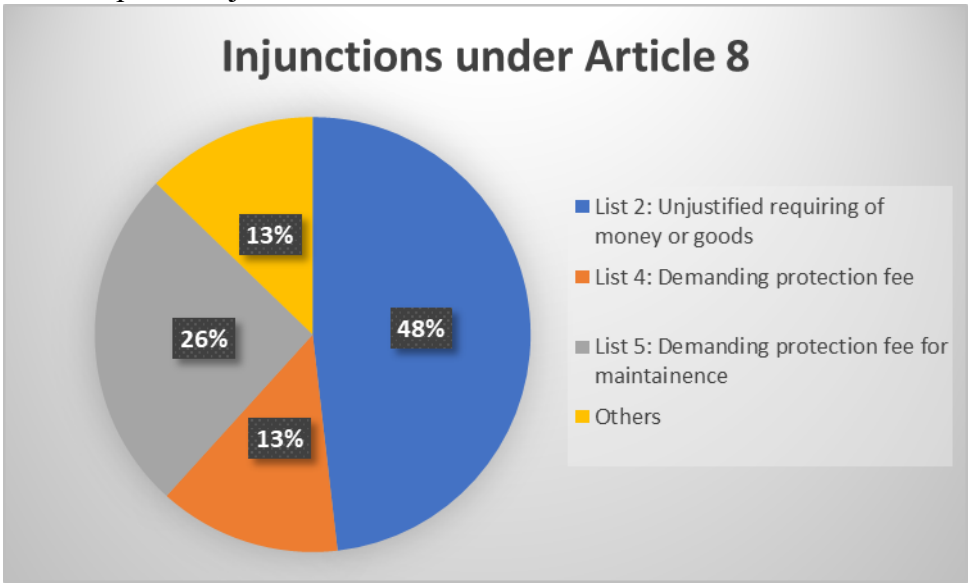
On the list of Article 8, extortion constitutes a major part of the injunction. Among 24,366 injunctions between 2003-2022, 21,254 issues are related with list 2, 4, 5. Following is the loans and refunds area, which constitutes 2324 cases.[68] It indicates that in the last twenty years *Yakuza*'s influence on other region is not sufficient, only 406 injunctions are related to other terms besides these two subjects.

[66] DIEGO GAMBETTA, THE SICILIAN MAFIA THE BUSINESS OF PRIVATE PROTECTION (1993), at 143.

[67] Detail of the composition of this list: 1. Take advantage of a person's weakness demanding money or goods; 2. Unjustified requiring of money or goods; 3. unjustified subcontracting; 4. demanding protection fee; 5. Demanding maintenance money; 6. Usury; 7. Unfair debt collection; 8. Unfair debt waiver demands; 9. Unfair loan demands; 10.Illegal financial instruments transaction; 11. Share buy-backs; 12. Illegal demanding the acceptance of deposits and savings; 13. *Jiage*; 14. Obstruction of auction; 15. Illegal house land housing land transactions; 16. Illegal leasing of residential land; 17. Illegal demanding construction work; 18. Illegal demand for use of facilities; Illegal intervention of settlement; 20. Take advantage of a person's illegal behavior demanding money or goods; 12. Illegal demands; 21. Illegal demand for permits and licenses; 22. Illegal demand for removal of permits and licenses; 23. Illegal participation in bidding; 24. Illegal bid exclusion demand; 25. Illegal bid rigging demand; 26. Illegal public contract exclusion demand; 27. Illegal public contract subcontracting or mediation demand.

[68] This article refers List 6, 7, 8, 9, 14 is highly related with loan and refund area.

Graph 3.1 Injunctions situation under Article 8 between 2003-2022[69]



Demanding money or goods takes a share of 48% of all injunctions, and nearly 40% appears in the name of protection fee.[70] Last year, despite a reduction in all group members decline to 22,400, there is 568 injunctions involving extortion signified by police.

This data is, nevertheless, incompatible with the result of questionnaire survey. In the survey by Organized crime department of Japan Police and National Center of Elimination of Violence, only 2% of enterprise interviewed admitted that they have been extorted in the last five years,[71] and in those careers which are considered as highly influenced by *Yakuza* this number is even lower in 1.3%.[72] By comparison, the administrative violence only constitutes a minority part of all injunctions, meanwhile 9.9% of interviewees from administrative institutions admitted that they have received such illegal demands from *Yakuza* members in the last five years.[73] This series of data reflects a disproportionate relation between official report and questionnaire survey according to different parties.

This variation shows a reluctance from private business to admit being the victim of *Yakuza*. It is hard to imagine that this is because they are still in the shadow of *Yakuza* today, considering both a reduction in the scale and an increasing aging trend of *Yakuza*. Although this can also be explained that they are facing the menace from *Yakuza*, nevertheless a more convincing data is collected from the administrative officials, which further proves that fear and scare is not the main reason for a denial of this claim.

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[69] MPD, *supra* note 19.

[70] There is subtle difference between protection fee in List 4 and List 5. Historically, List 4 as *Mekajime Ryo* in Japanese refers to money required when a shop starts to make business for an allowance from *Yakuza*; List 5 as *Yojinbodai* in Japanese refers to money required during management of a shop.

[71] *Questionnaire on cutting off relations with anti-social forces targeting companies, 2020*, NATIONAL CENTER FOR REMOVAL OF CRIMINAL ORGANIZATIONS (Nov. 27, 2023), https://www.zenboutsui.jp/_src/12913156/enq_2021.pdf?v=1519696946831.

[72] *Questionnaire for companies (in selected industries) on the blocking of relations with anti-social forces, 2021*, NATIONAL CENTER FOR REMOVAL OF CRIMINAL ORGANIZATIONS (Nov. 27, 2023), https://www.zenboutsui.jp/_src/15265011/enq_2022.pdf?v=1519696946831.

[73] *Questionnaire on violence targeted by the public administration, 2022*, NATIONAL CENTER FOR REMOVAL OF CRIMINAL ORGANIZATIONS (Nov. 27, 2023), https://www.zenboutsui.jp/_src/17035964/enq_2022_administration.pdf?v=1670470807760.

Here there are two explained reasons for this negative attitude. On the one hand, a lot of enterprise or shop owners are still relied on the service of *Yakuza* to continue their business. A secret business relationship between enterprise and *Yakuza* makes them not be able to admit their experience of extortion, or in another word, some of these enterprises or shop owners may from the heart not recognize this as an extortion, because they are benefit from the service of *Yakuza* in total. On the other hand, it should be reiterated in chapter II this article mentions the centralization management of major mafias, which make their influenced subjects in a smaller scale. If survey above does not reach to these regions, it is hard to consider it as representative.

It can assume that all the enterprises or shops which have amotivation to use violence is a potential individual criminal. Based on cost-benefit analysis, their benefit from crime will not exceed their cost under the circumstance that they exercise a crime on their own. However, because *Yakuza* can make an advantage of internalization of the transaction cost, price for a crime will be cheaper, and in some situation, it is lower than the benefits even plus with the extra cost paid to *Yakuza*, which provides some of the clients a motivation to exercise crime.

2. Protection Fee: Extortion or Not?

Another controversial argument is the essentiality of "protection fee" of mafia. *Botaiho*'s classification is so vague that even drawing a line theoretically between List 2 and List 4 and 5 is impossible. Here is a recent case:

A group leader of Yamakuchi received an injunction under the Article 8 in 6, September. He was said to engage in an extortion to a young lady in the name of repaying the loan and intimidating that if she did not pay the money, she will be sold to the prostitution.[74]

This case will fall in List 7 of unfair debt collection if applying *Botaiho*, there is an extortion between the *Yamakuchi* leader and the victim lady of paying money, because he use verbal violence to force her paying an amount of money which is not legally attributed to him. This is evident; however, what is more worth to mention is the relationship between *Yakuza* and that anonymous debtor. It is ignored there must be a concealed procedure, if this *Yamakuchi* leader truly received an invitation from a creditor to intervene in this certain loan procedure, it is logical that he will receive a payment from that creditor.

Here there is a misunderstanding that this is a "service" by mafia and the second procedure does not constitute an extortion. Gambetta strongly supports the idea that this procedure has no difference in economics from a big company to stress a government for certain policies.[75] To understand this scenario, it should be aware that this client does not need to maintain a long-term partnership with a single *Yakuza*. In a single region there are at least five or six gangs in competition market,[76] needless to say that even inside one gang there are competitions between different branches. For a long-term requirement client like usury company, ideally, he should be able to select a better one as he wishes. For a temporary demand, things will be even easier: as a rational person, he does not need to pay the protection fee because this relationship is totally illegal under the law. This is the primitive scenario of what should happen if the contract party is not a mafia.

However, he does pay this "unnecessary" fee and even tries to keep a long-term relationship

[74] *Four gang leaders arrested on suspicion of attempted extortion,* ASAHI TV (Nov. 27, 2023), https://news.yahoo.co.jp/articles/a7992105a992641a2c0ab92a74461921c1223f32.
[75] Gambetta, *supra* note 4, at 133.
[76] There are few exceptions as mentioned before, Nagoya and Kanagawa today are strongly controlled by each *Yamakuchi* and *Inagawa*, if single *Yakuza* is the monopoly provider in a certain market, this conclusion may be less convincing, but it is strong enough in most of situations.

with a single group. If it is agreed with Gambetta's conclusion, the only explanation will conclude that the service of protection is always best for this businessman, which is impossible. Thus, here it is easily inferred that this client is not voluntary to pay the mafia, what happens is that he is intimidated by the reputation of violence of mafia, even it is ambiguous, to pay the money. Schelling raise a similar comparison between organized crime and tax system,[77] emphasizes the importance of monopoly power for a systematic extortion. *Yakuza* and mafia in their nature has more characteristic in common with a compulsory state institution rather than a private enterprise in the legal market because this is not an autonomy contract. Back to statements above, it is concluded this absolutely constitutes an extortion because the client is pay under the illegal intimidation.

3. Unipolar and Conspiracy: Two Modes of Monopoly

Although all *Yakuza* are considered as monopolists in protection career, there are two different modes of protection fee business. As discussed in Chapter II, geographical distribution of *Yakuza* manifests that only some gangs are centralized in one certain region, while most of mafias are oligopoly suppliers co-existing in one single city.

These two modes result in different effects of investment and benefits. For the former one, as mentioned above, typical example is *Inagawa* in *Kanagawa* and *Kodo* Clan (*Yamakuchi*'s core secondary group) in *Nagoya*. Since they assure their control of this area, they will be more willing to pay for investment. Both *Kanagawa* and *Nagoya*'s police have scandal of corruption,[78] and for those just police who are not induced by money, they even dare to intimidate. It is announced that a special group of police which engaged in survey of *Kodo* Clan in 2010, receiving an anonymous letter with all their private information (domicile, phone number, family members, etc.) to menace them stop the investigation.[79]

These investments are compensated by an enormous benefit. Firstly, they are allowed to participate in some careers which in 21st century is strictly excluded with *Yakuza*, for example, the construction career. A construction company which participates in Japan's central international airport establishment is believed to have contact with *Kodo* Clan.[80] Needless to say in other career, the biggest entertainment company in *Nagoya*, was detected two times of illegal transfer of protection fee for 600 million JPY to *Kodo* Clan.[81] They are too powerful to be repelled, that all careers more or less are under the shadow of *Yakuza*. Secondly, unipolar monopoly even benefits from the deterrence level. In 2021, an *Inagawa* member stabbed a *Yamakuchi* member in a restaurant and the latter soon died. There were several witnesses of ordinary people on the present, and the culprit surrender himself at first, admitted that he did the crime. However, prosecutor in *Kanagawa* decide not to bring a lawsuit to all suspects later.[82] This article does not want to indicate that judicial system in *Kanagawa* is bribed by *Inagawa*, the reason for this decision may be very complicated, perhaps they think that a lawsuit will

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[77] Schelling, *supra* note 5.
[78] *Police officers bought with money by Kodo Clan, Betrayal of the Aichi Prefectural Police, deep in the dark 4* SANKEI NEWS (Oct. 2013); *Kanagawa police disciplined for leaking investigative information to gangs,* YOMIURI NEWS (Nov. 27, 2023), https://www.yomiuri.co.jp/national/20210910-OYT1T50175/.
[79] *Police menaced by group*, ASAHI NEWS (August 08, 2013).
[80] *The lights and shadows of Samix* (Nov. 27, 2023), https://megalodon.jp/ref/2012-0725-0121-55/www.gendaisangyojoho.co.jp/cgi-bin/backnumber.cgi?NO=661&BODY=12.
[81] *Nagoya "sex king" re-arrested on suspicion of fraudulent transfer of funds from Australia of 600 million JPY,* ASAHI NEWS (Nov. 27, 2023), https://www.asahi.com/articles/ASQ735V8WQ71OIPE01Q.html.
[82] *Five Inagawa members not prosecuted for the suspected murder of a Yamakuchi leade,* SANKEI NEWS (Nov. 27, 2023), https://www.sankei.com/article/20210715-OBCPERHSJVMS5BSNRAXPIQP2B4/.

enforce the tension between two mafias and brings more conflicts. Nonetheless, in a modern society, releasing a murderer without any cause is astonishing, no matter what consideration is here, the effect is that *Kanagawa* government makes a compromise to mafia.

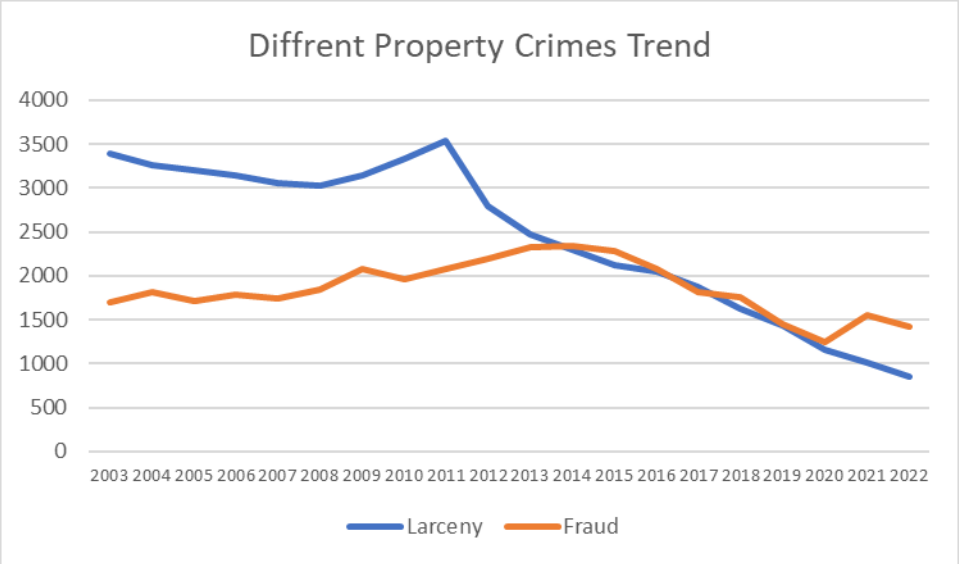
The latter mode of conspiracy monopoly is much smoother. By contrast, since a mafia is not confirmed with his sovereignty, it will balance carefully between cost and benefits. A typical example of conspiracy is Tokyo, as discussed in Chapter II, Tokyo is not attributed to any mafia. Nowadays, the clutch of Tokyo is arranged by *Kanto* friendship, which includes most gangs in Tokyo. Members in this group will sit down and assign each mafia's domain. Although different mafias are unfair in bargain, generally they will respect agreement of the union. And there even emerge an arrangement of lease, the minor group can lend some careers in their domain to another group, on the circumstance that they are not able to manage all business.[83] This creation makes a compromise ensures that those minor gangs will not be embezzled easily by stronger ones. But this arrangement cannot get disputes done once for all, as long as a certain group has a desire to expand, there will be a battle. After the battle, the new power structure will arrive at a new arrangement. Things come full circle.

B. Fraud

1. General Trend and Origin

As discussed in Chapter II, the crime number in these twenty years declined by a reduction of members except in property crimes. Chapter II has analyzed major practitioner of property crimes in *Yakuza*, another question is what kind of property crime increases recently? Here is a trend of two typical property crimes:

Graph 3.2 Different property crimes trend of all *Yakuza* between 2003-2022[84]



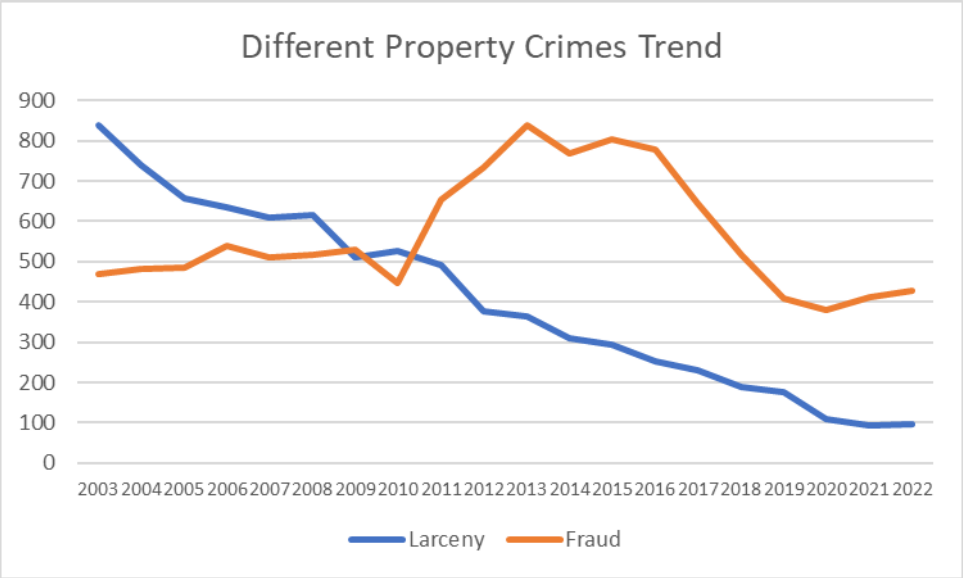
Graph 3.2 demonstrates that larceny has a short proliferation in around 2009, climbing to

[83] For example, *Ginza* in arrangement is the clutch of *Yamakuchi*, but they now rent some of their business to *Sumiyoshi*.
[84] MPD, *supra* note 19.

the summit in 2010 and then keeps a continuous decline. This trend is compatible with results in Chapter II, that the economic crisis promoted some new members to join *Yakuza* after 2008. By contrast, the fraud crimes are stable and even increase steadily before 2015, and in recent two years it exceeds number of larceny cases.

Regarding to situation of core members, the trend is even more interesting. As discussed in Chapter II, property cases are mostly exercised by prepared members or low-class members because it does not require much expertise of mafia. Statistics shows that in larceny cases this conclusion is true, but it seems core members contribute more in fraud crime, especially in the recent ten years:

Graph 3.3 Different property crimes trend of core *Yakuza* members between 2003-2022[85]



Some may suspect that whether fraud can be attributed to a mafia business because superficially it does not require any violence. In the past, when fraud was still considered as an individual crime, it is hard to say that an individual member practicing fraud is related to his identity of mafia. However, with the development of telegram technology, this view should be updated. Today nearly a half of the fraud cases are so-called "special fraud",[86] which refers to those perpetrators counterfeit others in distance (usually by telephone or postcard) to fabricate a situation, force victims to transfer money in their accounts. These crimes usually require a group to operate, because the procedure requires to proceed very fast so that the victims have no sufficient time to realize that they are in a lie and make a remedy. On this aspect, although fraud does not take an advantage of violence of *Yakuza*, *Yakuza* members are at least benefit from their organization strength.

In fact, many Japanese authors believe special fraud is originated from *Yakuza*.[87] According to this opinion, story begins with a powerful usury system of *Yamakuchi*, which is called "*Goryo* Clan", this group in summit controlled more than 1,000 usury companies. Kimura Yuuji defines it as "system finance" because "multiple stores in a same group share their client's information

[85] *Id.*
[86] In 2022, 17,570 of 37,928 in all fraud cases are recognized as special fraud.
[87] See, S. IKEDA, SPECIAL FRAUD BECOME UNDERGROUND BUSINESS, (Modern Theory), at 154; ATSUSHI MIZOGUCHI, GENDAI DAILY: FROM THE YAMAGUCHIGUMI GORYOKAI TO SPECIAL FRAUD SAGI NO TEIO [THE KING OF FRAUD], (Bungeishunju Ltd.), at 21.

to induce them make loans".[88] A common strategy is, when a client reaches a deadline for an amount of usury in company A, company B will positively provide him an amount to pay his last loan so that he does no need to scrimp and save in a short period, nevertheless the interest increases. *Goryo* Clan use such strategies, with the assistance of violence, creating a huge amount of revenue.[89]

Frankly speaking, to say *Goryo* Clan is the origin of special fraud is a little bit unfair because none of the case in *Goryo* Clan was detected as relating to special fraud. It is more appropriate to say that *Goryo* Clan's system finance inspired special fraud rather than an origin. The core of system finance is a cumulative management of plenty client's private information and thousands of small amounts loans. On the first aspect, this private information, pour in black market after *Goryo* Clan dissolved, which made special fraud group have easier access to select their victim. On another aspects, it provided for its successors a mature procedure of receiving and transferring these small loans in a most economical way. This procedure should be calculated carefully otherwise the cost of crime may easily exceed its benefits, because these loans usually are tiny in order not to create additional risk of non-returning. Same for special fraud, required money cannot be too high to alarm victims or exceed their capacity for payment.

How these usury companies shift to fraud group is still in a mist. However, a statement made by one of the successors of *Goryo* Clan[90] may get a glimpse of the light. Mizokuchi interviews him, questions on how his usury companies alleging special fraud. He admitted the fact, saying that "some managers hybrid their income from fraud with revenue in usury, to increase their returning rate for a promotion, and because this is a cohesive system you cannot identify each amount".[91] Like pyramid structure in *Yakuza*, as long as the system is not horizontal, promotion chance will motivate them to exercise in a more lucrative area. There is nothing new under the sun.

2. Mode of Special Fraud in *Yakuza*

It is concluded in last part that *Yakuza* take an advantage of expertise in organization to earn a market share in special fraud. This part aim to discover how they act in these new crimes. Firstly, a typical framework of special group will constitute three characters: caller, receiver, and director. Caller is the main character who contact directly with victim, and once he succeeds, director will announce receiver to revoke currency from ATM. Other ancillary characters may include recruiter, who is responsible to recruit new members (especially for receivers); tool man, who is in charge of buying instruments for fraud.

Statistics shows that *Yakuza* members are most participative in director's role, nearly half of the directors detected are *Yakuza* members while only 10% of callers and receivers.[92] This arrangement indicates that *Yakuza* is the biggest winner of special fraud, because usually directors are considered as the least risk. The most dangerous role is receiver, because most of ATMs are equipped with cameras today, which makes them easy to identify. Second is the caller,

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[88] Y. KIMURA, YAMI KINYU- JITSUTAI TO TAISAKU [BLACK FINANCE-FACTS AND SOLUTION] (2010), at 3.

[89] In 2004, Credit Suiss bank confiscated 57 millions dollars of Goryo-Kai's leader's account, which was at that time the highest amount in the history of the Zurich prosecution. *Sharing confiscated Yakuza funds* (Nov. 27, 2023), https://www.swissinfo.ch/eng/sharing-confiscated-*Yakuza*-funds/6596610.

[90] It is said that this person took over a part of Goryo-Kai's usury companies, though he is not a *Yamakuchi* members, in other words, his usury system is out of *Yakuza*'s scope. But he admitted that he maintains a contact with many *Yakuza* members.

[91] MIZOKUCHI, *supra* note 127, at 141.

[92] MPD, *White book: 2021, NATIONAL POLICE AGENCY* (Nov. 27, 2023), https://www.npa.go.jp/hakusyo/r03/index2.html.

it is inevitable to leave some track when they contact victims. The directors and other ancillary workers are safe in most cases. In fact, often after a series of cases police have chance to seize a clue of director in a group.[93]

Again, *Yakuza* prove their prestige in crime world, but why other members are agreed with this arrangement? Here this article finds two rational reasons for this assignment. Firstly, they are best investors of special fraud group. Although this is a profitable career, preliminary investment for a group is not a cheap price, necessary instrument contains one-off mobile phones, anonymous SIM cards, and especially various bank accounts for transfer. For individual participants, this is an unaffordable cost, while many groups of *Yakuza* are wealthy investors.

Secondly, despite an exercise of special fraud is not required with violence, management of this group otherwise require. Potential risk is members in special fraud groups are much easier to escape because they are not tied with any identities. Especially for receivers, they have great motivation to fled once they get a considerable amount of money. In this situation, *Yakuza*'s capacity for violence plays a role, to menace all members following the current assignment and supervise for a negotiable distribution. This menace is not virtual: last year, a *Sumiyoshi* member, who is also a leader of a special fraud group, imprisoned a caller who conspired to leave that group and misappropriated an amount of money.[94] Without such a powerful leader engaging, it can be imagined that most of the groups will split up after 2 or 3 times of crimes. This is also compatible with trend which Graph 4.3 indicates, that core members are more positive than prepared members in fraud cases, because this is not a simple property crime, but a work required violent competence. On this aspect, *Yakuza*'s participation encourages the long being alive of these groups.

C. Yakuza as a Powerful Sovereignty

To conclude the role of *Yakuza* in the legal world, it has more characteristics of protector than an enterprise. Previous research of mafia all agrees that mafia in some extent play the role of protector, but controversial opinions appear that how they play this role. Gambetta firstly consider that mafia is earning a reputation by the practice of violence in a sum-zero game,[95] which indicates that only a competition with other groups will prove a group's ability as protector. While Schelling as discussed above, suggests that what mafia does is to confirm themselves as monopolist protector in a certain region.[96] In research of Sicilian mafia, Gambetta partially agree with this idea that for a group to be a convincing assurer, it should at least possess the power of final decision to make sure that all other groups in the same region or in the same career will not intervene his monopoly power.[97] But this is still in an enterprise level which characterizes this relationship as in a monopolist's market. These two opinions deviate from whether mafia is required to prove itself among its competitors, it decides mafia exercise its power in a provider place or a sovereignty place. A state never proves itself of legitimate by comparison with other states, while an enterprise usually makes advertisement of comparative advantage with other enterprises.

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[93] For example, an *Inagawa* leader was arrested as director by a special fraud of 1.4 m JPY, but before this his group was assumed alleging in a series of special fraud cases which exceed over 390 m JPY. *390 million JPY damage confirmed, man arrested on suspicion of masterminding a special fraud group* THE SANKEI SHIMBUN (Nov. 27, 2023), https://www.sankei.com/article/20231107-D7O4ASVJJVOANDUX7PFAZ2XFHE/.

[94] *Gang members arrested for illegal imprisonment of special fraud group member,* LIVEDOOR NEWS (Nov. 27, 2023), https://news.livedoor.com/article/detail/22494997/.

[95] Gambetta, *supra* note 4.

[96] Schelling, *supra* note 5.

[97] Gambetta, *supra* note 67, at 145.

As analysis above, this article prefers more on Schelling's idea that by this way mafia has already exceed the behavior of monopoly companies. Gambetta's comparison with big companies to exert pressure on the government is not so convincing here, for it is incompatible with the basic logic of the power. In a democratic society, theoretically this pressure by grand enterprises is not exempted from a legitimate examination, by this way there will be a preliminary procedure to assess this pressure will in how much extent deviate from the legal requirements. However, the violence use of mafia is totally out of this scope: it is more like a power from the state, that its power is directly from use of violence, rather than recognition from its clients.

V: Yakuza's Future

Recession of *Yakuza* in this century is evident, from 2003 to 2022, *Yakuza* members reduce from 85,300 to 22,400.[98] This is contributed to Japan's deterrence policy, which finally takes seriously of proscription of *Yakuza* in this decade. It is also due to shock inside and outside: smash, aging, other organized crime competitors, etc. This chapter tends to analyze all pressures for *Yakuza* currently, part A examines the deterrence policy in Japan, part B discusses inside obstacles of their being-alive, and finally part C talks about potential competitors for *Yakuza*. On the same time, this article finds that *Yakuza* itself also act actively for survival, this is a long battle for all.

A. Deterrence Policy

1. Shift in 21st Century

One of the main problems of *Botaiho* is that it does not designate *Yakuza*'s existence is illegal, in other words, although they are strictly prohibited from unlawful acts like protection fee, they can make their business in the name of the mafia. This is rare in organized crime law, by comparison most of states directly point in their law that designated gangs are illegal in the essential, to prohibit originally the existence of mafia. The latter choice is rational, although it may be criticized on the ground of violation of freedom of violation, it eradicates the possibility that mafia benefit from their reputation, which is the core of their strength.

Regrettably, amendment of *Botaiho* does not textually change for this shortcoming. However, there are some preliminary attempts in this decade, trying to compensate this loophole which allows *Yakuza* continuously maintains reputation. This article finds two significant strategies: one is the employer's duty; another is special conduct of certain group.

According to amendment in 2008, article 31 of *Botaiho* says that if a designated gang member uses the power of his gang to misconduct and constitutes a tort claim, the representative of the gang is also liable for damages. There are several successful litigations requiring the top of gang to take the responsibility.[99] The aim of this provision, on the beginning might be compensating more for the victims rather than impairing *Yakuza*'s reputation, but it has an additional effect by the potential risk of enormous damage payment. To evade this risk as possible, it is wise for *Yakuza* not to use their name especially when it is unnecessary, for

[98] MPD, *supra* note 19.

[99] *Nagoya High Court orders compensation of JPY 7.51 million to Yamakuchi leader over protection money*, DAILY NEWS (Nov. 27, 2023), https://news.yahoo.co.jp/articles/98a60c35ca662ae95add869f8f8d237561860ffe.

instance, in a special fraud case, it is better not to leave any clue of their identity. Therefore, today *Yamakuchi*'s new members are not allowed to print logo of "*Yamakuchi*" in their name card.[100] And if it is possible, some new members are not even registered as *Yamakuchi* members, but under the guise of employee in front enterprise.[101]

Although by doing so the top of *Yakuza* releases a little pressure, side effect should not be ignored that the reputation of *Yakuza* will be harshly injured, because one of the most effective ways of establishing reputation is by repeatable practice. Without this practice, maintenance of reputation will only be completed in a much more expensive way of physical violence use, and this may cause another employer's duty claim, which is a vicious circle.

Another successful attempt is to a deterrence focus on those most dangerous gangs. Two specific group is typical, one is *Kudo* Clan, which is designated as "special dangerous" for ten years in official records, another is *Kodo* Clan, the core secondary group of *Yamakuchi*, in 2009 the current general director of Japan's police raises a program of "*Kodo* Clan desolation operation", and each year official white book leaves a special place for *Kodo* Clan, which is unprecedented for any other secondary group.

This designation is a compromise but efficient method. For *Kudo* Clan, their violent conducts are severe to the extent that no tolerance for leeway is granted.[102] For *Kodo* Clan, circumstance is more complicated: it is not so violent as to intolerable, but it is too powerful that even police will fear. Although it is considered that *Yakuza* in 21st century is a "control violence", on the view of local police like *Nagoya*, such a giant is still a thorny problem. Here, characteristics of special deterrence group are summarized: either is group which conduct viciously, either is group which is powerful.

2. Regulated Violence

When *Yakuza* is named as "regulated violence", it means that police have capacity to decide whether allowing their being-alive, and to what extent their conduct is tolerable. This indicates that police can have different levels of deterrence to different gangs. The deterrence level is largely dependent on violence contribution of crime.

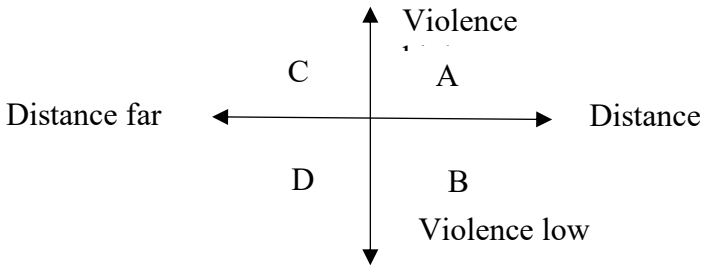
Police has no legal basis for desolation of all *Yakuza*, and no economic motivation for doing so. If *Yakuza*'s existence is in a foreseeable future, rational strategy is to select the best counter party rather than make an organizational derogation. Current gangs are more predictable and transparent. Celentani et Al. (1996) find an interesting situation of mafia that they are willing to exchange current interest for future profit, especially for future being-alive.[103] Therefore, government can adopt an optimal commitment strategy, to encourage gangs accept a very low pay-off of crime by declining the level of deterrence, and that is what Japan's police adopt.

Economic model above does not classify different crimes. This article believes that the pay-off here should not be misunderstood as pure economic revenue, but a contribution of violence, by which *Yakuza* can maintain and raise their reputation. Violence contributions are influenced by two factors: the proximity to ordinary people and violence degree itself. Both these two

[100] ATSUSHI MIZOGUCHI, YAMAKUCHI GUMI DORAN!! [YAMAKUCHI GROUP RIOT], (2015), at 103.
[101] *Id.*, at 107.
[102] Typical cases of Kudo Clan includes: throwing a Molotov cocktail at the house of Deputy Chief Cabinet Secretary Shinzo Abe in 2000, Yomiuri News, *Six gang members arrested for Molotov cocktail incident at the home of Abe's secretary-general*; 03 December 2003; Shooting police on the street in 2013, West Japan News, *Former police officer, shot and seriously injured in Kitakyushu, 19 April 2013;* Arson in shops which refuse to give protection fee in 2012, Daily News, *Growing momentum for the banning of violence among the government and citizens in Kitakyushu* (Nov. 27, 2023) https://gendai.media/articles/-/41088.
[103] CELENTANI *et al*., supra note 7, at 253-268.

factors are positive related, the closer the conduct to ordinary people, the higher degree of behavior, the more contribution it constitutes.

Graph 5.1 classifies four zones for all crimes by the decisive characteristics of deterrence level



Ideally, if a gang's behavior centers in zone A, they will face a high level of deterrence as Kudo Clan; instead, if they behave mostly crimes in zone D, as an exchange police will reward them for a loose regulation. On this perspective, the contribution of violence is inversely proportional to the deterrence level. Zone C includes vicious crimes inter-gangs, frequently happens in battles among them. These crimes in the past are in a very low deterrence level, as mentioned in Chapter IV, even in 2021 that prosecutors chose to give up suing murderer of gang battle.[104] However, considering the malicious result of "*Yama-Ichi* Battle"[105] in 1980s, in this century police increase a minimum level of deterrence for inter-gang battles, especially for *Yamakuchi* separation. After 2016, all separation part of *Yamakuchi* is designated as "special inter-gangs battle gang" on the official document,[106] and participants for this separation battle have no excuse to exempt from court. However, other inter-gang battles are still tolerated in a great extent.[107] Zone B contains crimes which touch the interest of ordinary people, typical one is special fraud. Traditionally, *Yakuza* infers little in this area because it is against their virtue, but as Chapter IV shows that today this is changed because of the lack of other revenue. This zone is also absolutely in a quiet high level of deterrence, but as it covers mostly property crime which does not constitute long-term sanctions, the direct impact for *Yakuza* is not so obvious. On the other hand, it also makes few engagements for violence contribution.

3. Plea Bargaining

In the last century, *Yakuza* was more like partner with police, but decline in this century makes them not capable of being fair negotiator with authority. Meanwhile, it is also true that police do not make every effort to prohibit their business, rather, they adopt various level of deterrence to encourage *Yakuza* not to exercise those crimes with high degree of violence and closed to ordinary people. From the aspect of police, it is more like a plea-bargaining model, from which *Yakuza* reduce its damage from arrest and police economizer cost in organized crime. Crimes inside *Yakuza* is usually hard to detect and sue, if both sides decide to solve problems by

[104] See Section B.
[105] *Yama-Ichi* battle happened in 1985-1994, originated from the succession problem of 4th top of *Yamakuchi*. In this battle, directly causes 29 deaths, and 4 injured cases of police and ordinary people. See, K. LIBOSHI, NEO YAMAKUCHI GUMI NO YABO [NEW YAMAKUCHI GROUP'S DREAM] (1994), at 91.
[106] Since 2020, including three ex-*Yamakuchi* gang: 6th generation of *Yamakuchi*, *Kobe Yamakuchi*, *Kizuna* Clan.
[107] For example, *Sumiyoshi* and *Inagawa* are in a battle in Tokyo since 2018, and there were many shooting threats, but none of them is revealed as arrested by police. See *The biggest violent incident broke out in the city center in 2020, Kabukicho scout hunting,* BUNSHUN, (Nov. 27, 2023), https://bunshun.jp/articles/-/42568?page=2.

themselves rather than depending on public organs, it will be difficult to cumulate sufficient proof for arrest or litigation. If *Yakuza* is provided with an award of admitting crime, they may change their mind to rely more on judicial system. Similarly, not all defendants can enjoy plea-bargaining, there are certain consideration when police decides whether to modify their deterrence level.

Other influenced factors are organizational ability of violence and cooperation will, which causes *Kodo* Clan as one of the most non-friendly groups on the side of police. Needless to prove the ability of *Kodo* Clan, in summit their population exceeds the number of police in *Nagoya*. Frequently, these grand gangs are positive for cooperation with police. *Inagawa* even invited local police to join their conference.[108] Traditionally, *Yamakuchi*'s cooperation level was a few inferiors compared with gangs in Tokyo, however at least before the 6th generation they were in a peace with the police. But since "*Kodo* Clan desolation operation" in 2009, this coordination has broken, the only choice remained is a state of alert.

Certainly, regional police will benefit from this model. However, police in national level will consider more about their reputation and social demands, when these additional damages are calculated, an original optimal commitment strategy may be imbalanced. Therefore, there is a conflict of interest between national police and regional police. *Nagoya* police is a typical example, in which there are two departments in charge of *Yakuza* issue: the fourth department keeps connection with *Yamakuchi*, even providing them some information as exchange, while the new second department is on the opposite side of *Yakuza*. This divided system is a compromise between region and state, but it does not make any effort, usually these two departments just make obstacles for each other. Another proof is geographical separation of deterrence: in the same year of his succession, the 6th top of *Yamakuchi* was imprisoned, which never happens to any top of gangs before. The whole procedure of arrest was proceeded by *Osaka* police, rather than *Nagoya* police.[109] Here, a reasoned guess is that if there was a choice, *Nagoya* police would be more tolerable to exchange a future cooperation with *Yamakuchi*.

In addition, because decisive element of state level policy is more political essentially, it is hard to estimate which voice will prevail in a certain point. This balance of conflict interest is dynamic and depended unilaterally by political pressure.

B. Other Obstacles

This part discusses other obstacles for *Yakuza* in this century, besides frequent battles and separations, there is two tendency which is thorny for *Yakuza*: one is aging, another is other organized crime.

1. Aging

As for this century aging is a social problem according to the whole Japan's society, this tendency seems to be also degraded for *Yakuza*. By the end of 2022, 11.6% of *Yakuza* members are over 70 years old. Although compared to 23.0% of all society[110] this number does not indicate a serious problem, an acceleration of aging in the last twenty years is astonishing.

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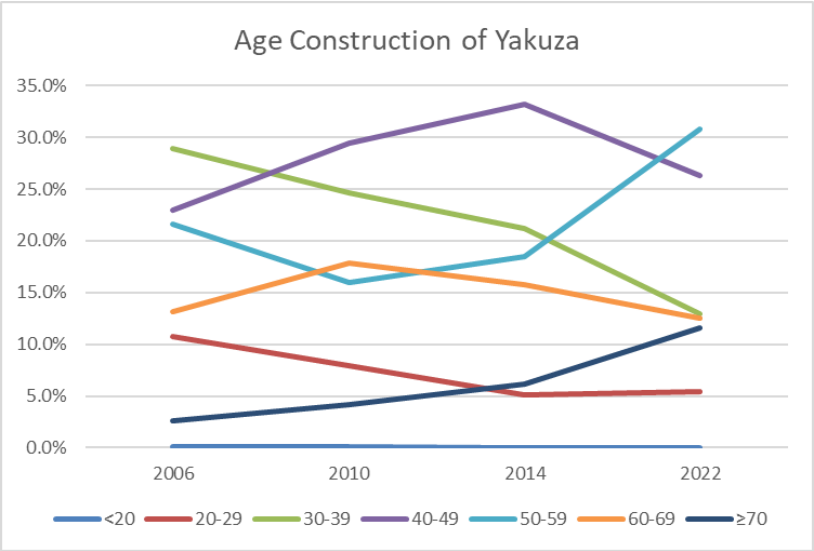
[108] Masahiro Ojima, *Legendary Maruboshi investigator known for all about the Yakuza,* BUNSHUN ONLINE (Nov. 27, 2023), https://bunshun.jp/articles/-/38937?page=2.

[109] Similarly, in 2010 when the top of *Yamakuchi* was still imprisoned, the surrogate top of *Yamakuchi* was arrested by Kyoto police. See, Agence France-Presse, *Japan arrests number two crime boss* (18 November 2010).

[110] Statistics bureau of Japan (Nov. 27, 2023), https://www.stat.go.jp/data/jinsui/new.html.

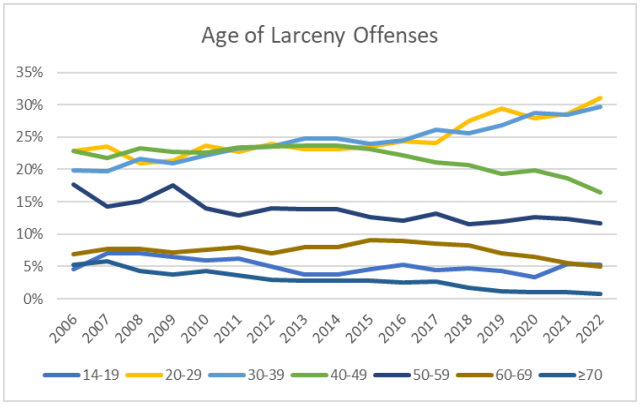
Graph 5.2 Age Construction of *Yakuza* between 2006-2022[111]

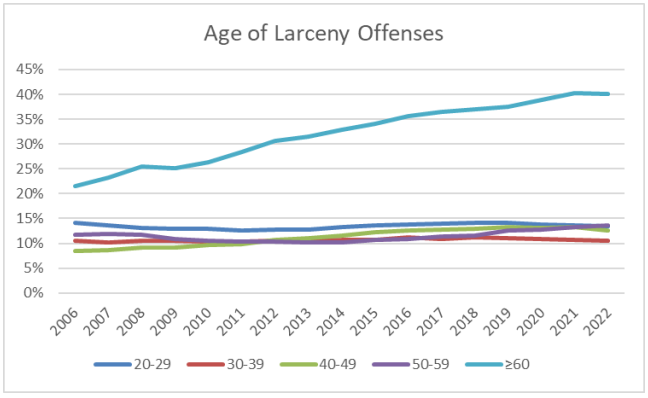


Graph 5.2 virtually indicates a change of age construction in the last 20 years. On the beginning of 2006, majority of *Yakuza* member is between 30-39, and last year it is the group of 50-59. Although in a total the definition of the middle class (between 20-59) does not change very much (84.3% to 75.4%), the aging tendency of *Yakuza* is also predictable. Firstly, adjacent generations reveal a highly related indication in different years, in other words, when a generation increases, its adjacent generation reduces. This infers a stable constitution of *Yakuza* where seceders are rare.

The potential impact of aging for *Yakuza* is more destructive than believe. On the one hand, all organized crimes are highly related with physical menace, and a reduction of violence ability accompanied by the age is doubtless. On the other hand, some may argue that this aging group can make use of their expertise for property crime, which this article discovers that is impossible. By comparison the aging construction of larceny in all society and in *Yakuza*, it is found that aging people in *Yakuza* is far inferior with larceny than general practicipators.

Graph 5.3 Comparison of Age Construction of Larceny Offenses between 2006-2022[112]





A reasoned explanation for Graph 5.3 is hierarchy of power and privilege of superior

[111] MPD, *supra* note 19.
[112] MPD, *supra* note 19.

requires elder people not to exercise those considered as inferior crimes, such as theft, which will impair their prestige in the hierarchy. It is concluded that this aging group is much less productive in all areas of crimes, which makes situation even worse.

Declination of attractiveness in *Yakuza* area is obvious. On the one hand, younger generation refused to traditional virtue of *Yakuza*, which push them to other organized crimes as discussed below, on the other hand, *Yakuza* is not so lucrative as the end of 20th century anymore. Hardship for new recruitment is true, but is that so cruel as statistics indicates above? This article finds two factors which may result an exaggeration to the truth.

Firstly, as mentioned in analysis of deterrence, a new trend for *Yakuza* is they do not register new members to escape possible employer duty.[113] Mizokuchi (2015 a) believes that a substitution is to arrange new members in their front enterprises as ordinary workers, only after he reach a certain leadership then he will formally be announced as member.[114] In other words, there might be a young group of members not calculated on the official document.

Secondly, an insufficient retirement system makes leaders reluctant to retire. Although grand gang like *Yamakuchi* create an arrangement for retired leaders,[115] this does not remove their worries. Cruelly when a leader leaves *Yamakuchi*, he is just a vulnerable and wealthy old man who have many secrets from his former members, and the latter will try to squeeze out all his money. That is why most of the leaders, though they are in disease or even in Alzheimer, refused to retire.[116]

Leaders of *Yamakuchi* do not surrender to overcome this problem. It is noticed that irregular expulsions of 6th generation of *Yamakuchi* increase sharply in the last decades, Mizokuchi (2015 b) believes that top of *Yamakuchi* use this strategy to promote metabolism.[117] Nonetheless, these attempts prove no significance: after all, the age of the current top himself is not persuasive to encourage other leaders to retire.[118] Aging is estimated to be a continuous problem for *Yakuza* in the future.

2. Other Organized Crimes

In recent years, it is noticed that other organized crimes proliferate and take *Yakuza*'s role in some extents. Besides special fraud group as analyzed in Chapter IV, some organizations appear similar characteristics with *Yakuza*: using violence and continuously make living of crime. These groups in 2013 are designated as quasi-gangs in police report,[119] while Mizokuchi calls them as "semi-gang".[120]

These quasi-gangs were considered as evolvement of organized crime in around 2010, among them the most famous is known as *Kanto* Unite and Chinese Dragon. The former is originated with so-called "old boys" in Tokyo's high school, while the latter is Chinese immigrant group. At that time, it was widely accepted that they will replace *Yakuza* in the future. Organizational advantages in quasi-gangs are obvious, firstly, nearly all quasi-gangs are flat

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[113] See, page 57 of this article.
[114] MIZOKUCHI, supra note 140, at 107.
[115] It is said that *Yamakuchi* require all secondary group leaders to donate 100,000 JPY to retired leader.
[116] In this year, a member of *Yamakuchi* beat his leader in public, for the reason that this leader refused to retire even after Alzheimer. See, *A subordinate gang leader was arrested on suspicion of assaulting his leader,* ASAHI NEWS (Nov. 27, 2023), https://www.asahi.com/articles/ASR8R65P2R8ROIPE00K.html.
[117] ATSUSHI MIZOGUCHI, YAKUZA HOKAI HANGURE BATSUKO [YAKUZA DESTROYS SEMI-GANG PROLIFERATES], (2015).
[118] By the year of 2023, he is 82 already.
[119] MPD, *supra* note 17.
[120] *Id.*

structures without hierarchy. This removes burden of the members to donate a membership fee to his leader. That is why all this group are constituted with younger generation: both *Kanto* Unite and Chinese Dragon are largely occupied with members in late 20s.[121] Secondly, they are free with virtue's limitation. Although Chapter IV discusses that today's *Yakuza* no longer follows traditional virtue of not injuring ordinary people, these groups seem crazier than *Yakuza*. Kanto Unite is considered as most positive participant in special fraud, in 2014 one of their members was arrested in a special fraud group for over 10 billion JPY.[122] A special fraud group leader in an interview believed that "they are one of the initiators of this career besides *Yakuza*".[123]

However, these groups do not reach expectations above to replace *Yakuza*. *Kanto* Unite was dissolved in 2013 because of a malicious injury case involving their leaders.[124] One of the founders of Chinese Dragon also admitted recently that this group is de facto disassembled.[125] Why do these semi-gangs not survive?

Although many commentators believed these groups are more violent than *Yakuza*, describing them as "even *Yakuza* will be afraid" group, this article contrarily believes their ability of violence is much inferior to *Yakuza*. The misunderstanding impression is constituted with the fact that they are more easily to resort to violence, by contrast today's *Yakuza* maintains a prudence before a physical menace. However, the weapons in their cases indicate that they are insufficient in violence: most of their famous cases are finished by knife, bar or even bare hand. Meanwhile in *Yakuza*'s battle even a small dispute causes shooting menace, and in most cases after police doing a survey of *Yakuza*'s office, they always leave with some concealed guns and bullets. As emphasized in Chapter II, an imagination of force is always prior to physical one, because the former is more formidable and more economic.

Consequently, today when tracing back history of these quasi-gangs, it is discovered that they never get rid of impact of *Yakuza* because they are inferior in force. In these series of cases, it is easily to find *Yakuza*'s shadow behind: some quasi-gangs even have to donate a protection fee to local *Yakuza* for a permission of their activity,[126] indicating that *Yakuza* is still the controller of underground society. When grand player like Kanto Unite and Chinese Dragon split up, this trend is more clear: small separate quasi-gangs have strong characteristic relation with certain gangs, which infers that they are not competitors against *Yakuza*, but their front representatives. It is reasonably inferred that some quasi-gangs are even supported in establishment by *Yakuza*, especially when their initiator are ex member of a certain gang. This fact combines with *Yakuza*'s new strategy of non-registration of new members, this article believes that some of the quasi-gangs today are essentially "front gangs" just as the role of "front enterprises" for *Yakuza*. Despite police designates some groups as "quasi-gangs", the legislation falls behinds: *Botaiho* does not regulate these quasi-gangs' members, inferring that they will not face additional punishment of organized crime. A new mode of *Yakuza*'s business described as "fluid-group" is in formation, according to police document.[127] It is convincingly

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[121] Noboru Hirosue, *The real semi-gangsters are not hard fighting*, PRESIDENT ONLINE (Nov. 27, 2023), https://president.jp/articles/-/44304?page=3.

[122] Kanagawa Shimbun*, Seven people arrested on suspicion of investment fraud of fictitious water source development, KANALOCO* (Nov. 27, 2023), https://www.kanaloco.jp/news/social/entry-52370.html.

[123] Daily Spa, *Unreported reality of the criminal organization semi-gangsters*, NIKKAN SPA (Nov. 27, 2023), https://nikkan-spa.jp/336850.

[124] *Homicide in a restaurant in a mixed-use building in Roppongi*, SANKEI NEWS (June 5, 2013).

[125] *Shocking revelation from a founding member: Chinese Dragon is now effectively disbanded,* FRIDAY DIGITAL (Nov. 27, 2023), https://friday.kodansha.co.jp/article/272035?page=1#goog_rewarded.

[126] Sankei News, *Minami semi-gross rip-off bar in Osaka* (January 3, 2019).

[127] MPD, *supra* note 19.

believed that quasi-gangs' emergence will make deterrence of *Yakuza* be more complicated in the future.

C. Going Underground

In recent years, more and more people believe that *Yakuza* will be designated as illegal organization in the future. Suzuki T. had a survey in 2016 of 100 *Yakuza* members of their situation and presumption of future, from which the result is surprisingly negative, that 71 of interviewees believed *Yakuza* will be thoroughly illegal in the future.[128] As a result, the topical issue of illegal organization is whether *Yakuza* will go underground to defend themselves, which is described as "mafia" in social network, indicating that they may conceal their names and organization as Sicilian mafia did.

As discussed above, some organizations as *Yamakuchi* have stepped out first. It is said that *Yamakuchi* regulate a "three not do" discipline: not tell anything to police, not visit with police, not allow police enter the office[129] (Mizokuchi, 2015 b). This is closer to virtue of Sicilian mafia, where an informer may even be punished to death.[130] But most of gangs still keep their old fashion, being a model cooperator with police, for example, when *Yamakuchi* was separated in 2016, *Sumiyoshi* was eager to engage in support separated organizations of *Yamakuchi* on the beginning, but they were required to "keep silence for *Yamakuchi* desolation project"[131] by police and respected this advice without hesitation (Mizokuchi, 2015 a).

On the perspective of *Yakuza*, getting rid of plea-bargaining model makes them return to a more profitable interest rate. The point of plea-bargaining model is that they are in the basis of good faith, police judges whether a gang is a good cooperator by essence rather than in superficial aspect. For *Yakuza*, as they do not lack lawyer's support, there remains many legal techniques to evade legal risk. For example, a newest method of *Yamakuchi* is called "false expulsion": in 2019 a leader of *Yamakuchi*'s separated organization was killed by a former *Yamakuchi* member, later *Yamakuchi* claimed that they had repelled this member in 2018.[132] These two people had not private dispute before, in other words it is not persuasive that a repelled member will make such a sacrifice for *Yamakuchi*. Therefore, nearly all police believed that this is "false expulsion", for removal of organizational responsibility in a murder case, but since the proof of expulsion is clear and the murderer insist denial, police have no better way.

From analysis above, another serious problem for police is that they may ignore the incompleteness of current legislation. In the past, the arrest rate is in an acceptable number, and the behavior of *Yakuza* is stable and predictable, all of these are mostly contributed to their plea-bargaining strategy rather than legislation. As we seen above, even for newest amendment as employer's duty, there are many legal loopholes for *Yakuza*. And when they decide to go underground, their good faith will fade into air together.

However, this article does not believe current tolerance for *Yakuza* will continuously exist for a long time. The more the democratic environment improve, the more pressure is pushed for desolation organized crime. The 2009 "*Kodo* Clan desolation project" is just the beginning, in the future this will be more put into schedule, until it finally illegalizes the existence of

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[128] Tomohiko Suzuki, *Summary survey of 100 active yakuza*, NEWS POST SEVEN (Nov. 27, 2023), https://www.news-postseven.com/archives/20161125_462028.html?DETAIL.
[129] MIZOKUCHI, *supra* note 157, at 161.
[130] HESS, *supra* note 8, at 102.
[131] MIZOKUCHI, *supra* note 140, at 93.
[132] *Man in shooting re-arrested on suspicion of murder* (Nov. 27, 2023), https://www.kobe-np.co.jp/rentoku/yamaguchigumi/201911/0012919525.shtml.

Yakuza, thus complete to push *Yakuza* to underground. On the perspective of *Yakuza*, if one day output of business is reduced to the extent that under the bottom line of their cost, they may also decide to go to underground. At that time, current mode of plea-bargaining will be replaced by a new higher deterrence strategy.

VI: Yakuza: A Disappearing Order

It is very interesting to discover *Yakuza*'s role in Japan's society. The final part of this article extends further than current situation to *Yakuza*'s past and future. In the first period between WWII to 1992, it is more like a semi-state order, which functions as a supplement of authority; in 21st century, its state characteristics disappeared gradually and transfer to a certain field of society; in the future, when the underground comes into truth, it will degrade to a certain role.

A. Past: A Semi-State Order

Max Weber's theory define state as "a polity that maintains a monopoly on the legitimate use of violence",[133] the essence of this definition is this power should be oligopoly, and legitimate by institution of law. In a narrow interpretation, *Yakuza* does not reach each of these standards: it never truly replaces government's role as Sicilian mafia, nor its behavior being allowed in democratic society. Nonetheless, it can also be considered that at least in some areas, the government did not maintain a monopoly of control of violence, and it made much compromise for *Yakuza*'s behavior in legal aspects. Therefore, it is better to describe in this period *Yakuza* had constituted a semi-state order.

Yakuza made a supplement of government's role in this period: Chapter I has discussed about post-war's vulnerability of Japanese police and complicated political impact, it is also astonishing that historically *Yakuza* was kind of symbiotic with authority. Although Sicilian mafias also emphasize impact of politics, it only reached to the extent of using violence to influence assignment of political participator (Hess, 1973).[134] None of mafia had so tight relation as *Yakuza* including a series of monetary and violent support. If we divide political part and police part of government, Siniawer believed that the former may be more willing to resort to outside violence experts as *Yakuza* rather than formal state's violence organs, to evade the criticism of exceeding use of police power.[135]

This twin relationship makes Japan more difficult to get rid of mafia compared to other states. On the one hand a historical cooperation makes politicians more tolerable with *Yakuza*, on the other hand, even government act cruelly to deny the past cooperation, *Yakuza* has extended deeply in every aspect of society. A simple organized crime only practices illegal issues, while powerful mafias reach every corner of society, no matter legal or not, indicating that removal of such an order inevitably influence other's life.

Compared with *Yakuza* and Sicilian mafia, it is concluded that in the summit the latter is more powerful, but the former is more complicated to deal with. Both mafias create a certain order in their sovereignty. Sicilia in a longtime is "weak in formal government machinery and facing hostility and mistrust towards all state organs (from residences)" (Hess, 1973),[136] while

[133] ERIKA CUDWORTH *ET AL.*, THE MODERN STATE: THEORIES AND IDEOLOGIES (2007), at 95.
[134] HESS, *supra* note 8, at 141.
[135] EIKO M. SINIAWER, RUFFIANS, YAKUZA, NATIONALISTS: THE VIOLENT POLITICS OF MODERN JAPAN, 1860-1960 (2015).
[136] HESS, *supra* note 8, at 14.

Japanese state's institution functioned normally in most of the situation. This decides variance of their order: Sicilian mafia established an almost state's control, but *Yakuza* did not. To refresh Sicilia's situation is difficult but the method is straightforward by reconstructing a state order to replace their control. In *Yakuza*'s situation, it is more complicated because the democratic system mostly functions well, in other words it is irrational to change all systems to solve the problem. Measures are taken step by step. Efforts for eradicating *Yakuza*'s impact in the early 21st century are attempts to remove this semi-state order, degrading *Yakuza* in identical provider of social order and assure State's monopoly use of violence.

B. Special Social Field

Removal of *Yakuza*'s semi-state order reached in a first success: as mentioned before, today *Yakuza* is merely a "regulated violence" under police's surveillance. But some elements of semi-state remain until today: although it has lost power to establish order outside, it maintains its order inside, and this order reach in a limited extend to society and be respected by police. This article believes currently *Yakuza* is a special social field in the context of sociology.

Bourdieu defines field as "a configuration of objective relations between positions. These positions are objectively defined",[137] in which the decision is dependent on the power structure of present situation and its relationship with other fields.[138] Not all organized crimes constitute a certain field, unless they establish a stable assignment of position, and that is what mafia differs from other organized crimes. As discussed in Chapter II, *Yakuza* has a completed institution of hierarchy, this objective position is respected by both inner members and outsiders: Japanese police's statistics also make classification of arrest according to statute of gangs.

If it is agreed that *Yakuza* is a special field in Japan's society context, it can be analyzed further of how this field influence individual members' practice which performing as organized crime later. Thus, this article abandons traditional thinking of an equation between mafia and organized crime: the former is an existence of field while the latter is the practice. Other two notions frequently discussed in practice forming procedure is habitus and capital. Habitus is defined as a stable system of norms of thought which is universally applicable for individual practice.[139] For example, when a person face with a dispute of others, the habitus of ordinary people is to negotiate or resort to judicial system; while a *Yakuza* member, especially when the offender is also attributed to gang, thinks that directly physical violence is the best way to solve problems. This system of norms is not totally subjective, by contrast it is highly dependent on the position of the practitioner: it may vary from hierarchical status, for example, a lower-class member's habitus maybe different from a leader's; other influences including gang's virtue, different gangs may maintain different attitudes towards one thing, this virtue is originated from behavior of individuals, but it also influences them later.

Another important notion is capital. Bourdieu classifies three categories of this as economic capital, cultural capital, and social capital.[140] The economic capital in mafia is needless to discuss, all their profitable business has capacity to bring them a continuous revenue. Social capital is also evident in *Yakuza*'s context, Chapter II discusses a lot of institutionalized relationships in *Yakuza*. Bourdieu believes that these networks is an investment for secure

[137] Pierre Bourdieu, *The Forms of Capital*, in HANDBOOK OF THEORY AND RESEARCH FOR THE SOCIOLOGY OF EDUCATION (1986), at 241-258.
[138] *Id.*
[139] PIERRE BOURDIEU, LE SENS PRATIQUE [THE LOGIC OF PRACTICE] (1980), at 53.
[140] BOURDIEU, *supra* note 138, at 248.

material or symbolic profits,[141] in our context, it demonstrates on material aspect as a legitimate of membership fee in gangs, and on symbolic aspect, as a prestige from upper class in hierarchical structure. Last cultural capital is perhaps mostly vague, because often *Yakuza* practice in a different way from what they claim they tends to do (for instance, *Yamakuchi* in a long-term claims itself as opposed to drug-dealing). And as analysis in former chapters, today more and more *Yakuza* breach their traditional esprit, indicating that some old cultural capital is gradually desolated in 21st century. Sociologist divides cultural capital in three forms: the embodied state, which is similar to habitus discussed above; the objectified state as cultural goods, and the institutionalized state. The cultural good of *Yakuza* is indicated mostly in linguistics, in Japanese many mots are specially used of *Yakuza*'s issue, just like *Yakuza* this word itself.[142]

The function of field is the conversion of different capitals. For example, an upper-class member converses his social capital of hierarchical prestige to receive membership fee as an economic capital; by contrast, a lower-class member improves his social capital by providing enough membership fee on time. Bourdieu reminds us of that other capital except economic has a high degree of uncertainty of transaction,[143] because it requires a time lag in addition. When a field has a safer rate of transaction conversion, individuals will tend to transfer more of their economic capital, and vice versa, in an unsafe situation they will keep more in their hand to evade an unpaid debt. That is why *Yakuza* in 21st century is more economic motivated: unforeseeable future of underground promotes individuals to give up those social and cultural capital.

From this path it is possible to hypothesize two situations of *Yakuza* in the future: if they go underground, no matter whether it is positive or compulsory, social and cultural capital will simultaneously decline to a minimum, on the one hand it is denied by official organ, on the other hand, there is no more economic capital being conversed. The situation of economic capital is uncertain: perhaps the police win by a high deterrence, perhaps *Yakuza* wins by their expertise in crime. If they maintain in plea-bargaining model, social and cultural capital will still reduce gradually, because doubt for future prohibit individuals to increase the investment; meanwhile, because they must follow police's advice, the economic revenue is predictably reduced for each year. This is impulse from outsiders. On the other hand, Cattani, Gino, Ferriani and Allison (2014) believes that incumbent of field, who have a vested interest in current situation, usually anticipate maintaining present configuration in order to assure their dominant position, while insurgents want more change. It is reasonably believed that those discriminated by traditional values, like drug-dealers, will be more supportive to go underground for a promotion of their status.

C. Change of Field

The last question of this article is whether in the future this field endure a structural destructive change. Although it is concluded in last paragraph that it has been reshaped in any time under the impact of inner power structure and outer influences, it is hard to predict whether this field will collapse in a specific point one day or it will just be reformed step by step.

Usually, a destructive change requires a radical crisis of the field, the most possible is a new

[141] *Id*., at 251.
[142] It is said that the mot *Yakuza* is originated from a situation in card game that is the worst of result, indicating that gang's members are all worst in the society; other words like *Shinogi*, only used to designate business of *Yakuza*, etc.
[143] BOURDIEU, *supra* note 138, at 256.

Act which designates *Yakuza*'s existence as illegitimate. This will promote a thorough change of field that *Yakuza* in traditional context may disappear. On the other hand, inner factors like discontent from insurgents are more difficult to make a same effect: to rebel a current distribution, some certain insurgents' grievances are not sufficient. If several drug-dealers want to get rid of *Yakuza*, this does not create crisis for its being alive, because remaining individuals still maintain this field. Only when most drug-dealers stand out together and opposed against *Yakuza*'s control of drug-dealing, this crisis may bring a structural change in this field. Fligstein considers that inner jockeying is highly dependent on unsettled conditions and a flat power structure of individuals.[144] However, the permissible of drug-dealing is believed in a long-term because it is the most profitable business, and there is no flat power structure between incumbents and insurgents, since groups which only rely on drug-dealing business is still rare. Besides drug-dealing, it is same in other areas, that it is not seen many disputes in structural level of distribution of *Yakuza* right now.

If both a new Act and inner crisis are not foreseeable in a due period, it is estimated that a destructive change will not happen shortly. However, last paragraph of part B discusses different capital situation in the future, and it is concluded that no matter what to choose, the conversion of capital will be largely reduced in the future. This may go to the extent that one day the field will lose its function of conversion, on this aspect, it can be considered that *Yakuza* in a traditional context de facto disappears. *Yakuza* will no longer be recognized as a special field, but a single role in the society as protectors, extortionists, or enterprises. They will no longer be named as themselves, but their behaviors.

[144] Neil Fligstein, *Understanding stability and change in fields*, 30 Research In Organizational Behavior (2013), at 44.

Justice Delayed: Unpacking Inefficiency in the International Criminal Court

by Sabba Salebaigi-Tse[*]

ABSTRACT: The International Criminal Court (ICC) was established with the noble objective of bringing the most heinous perpetrators of crimes, such as genocide, war crimes, and crimes against humanity, to justice. However, the ICC has encountered numerous challenges since its inception, leading to perceptions of inefficiency. This paper aims to explore the multifaceted reasons behind the ICC's perceived inefficiency, including financial constraints, political pressures, geographical limitations, and cultural factors. One significant limitation of the ICC is its restricted jurisdiction when dealing with accused individuals from non-member countries, despite having over 120 parties to the Rome Statute. These limitations have impeded the ICC's ability to effectively carry out its mandate and have raised doubts about its efficacy and value. This paper delves into various factors contributing to the ICC's inefficiency, including its funding mechanisms, external interferences, the process of evidence collection, and the impact of geographic and cultural differences on its efficiency. Furthermore, it examines notable case studies of delays in ICC proceedings, highlighting challenges encountered in prosecuting individuals such as Omar al-Bashir, Uhuru Kenyatta, Muammar Gaddafi, and Saif al-Islam Gaddafi. To provide context, a comparative analysis is conducted with other international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), to evaluate the ICC's efficiency. Finally, this paper proposes strategies for enhancing the ICC's operations and increasing its efficiency. By addressing these issues comprehensively, this research aims to foster a comprehensive understanding of the ICC's inefficiency while exploring potential avenues for improving its ability to effectively fulfill its mandate.

KEYWORDS: Al-Bashir; Evidence Impact; Financial Impact; Gaddafi; International Criminal Court; Kenyatta.

I. Introduction

The International Criminal Court (ICC) was established with the noble mission of bringing perpetrators of the most heinous crimes to justice, including genocide, war crimes, and crimes against humanity.[1] However, since its inception, the ICC has faced numerous challenges that have contributed to its perceived inefficiency.[2] The reasons behind such an opinion are complex and multifaceted, ranging from financial constraints to political pressures, geographical

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[1] Gwen P. Barnes, *The International Criminal Court's Ineffective Enforcement Mechanisms: The Indictment of President Omar Al Bashir*, 34(6) FORDHAM INT'L L J 1584 (2011), at 1584-1588.

[2] Stephen E. Smith, *Is the International Criminal Court Dying? An Examination of Symptoms*, 23 OREGON REV INT'L L 73 (2022), at 73-75.

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limitations, and cultural factors.[3] Despite having over 120 parties to the Rome Statue, the ICC's jurisdiction remains limited in instances where the accused is from a non-member countries.[4] These factors have not only hindered the ICC's ability to carry out its mandate effectively but also led to doubts about its efficacy and value.

There are various factors that contribute to the ICC's inefficiency, which this paper intends to explore. Such topics include how the ICC is funded, external interferences, the process of collecting evidence, and geographic and cultural differences that may affect the efficiency of the ICC. Additionally, this paper will examine case studies of notable delays in the ICC, including challenges faced in prosecuting Omar al-Bashir, Uhuru Kenyatta, Muammar Gaddafi, and Saif al-Islam Gaddafi. Comparisons will be made with other international criminal tribunals, such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwandan (ICTR), to determine how the ICC's efficiency stacks up in comparison. Finally, this paper will explore strategies for improving the ICC's operations and increasing efficiency. By exploring these issues, this paper intends to offer a comprehensive understanding of the ICC's inefficiency and potential ways to improve its ability to effectively achieve its mandate.

II. What Factors Contribute to the ICC's Inefficiency?

The sheer size and complexity of the ICC make it prone to encountering various challenges that can result in delays or the inefficient use of resources. However, a combination of factors that have accumulated over the past two decades have led to mounting criticism and doubts regarding the efficiency of the ICC. To fully comprehend the challenges that the ICC is currently grappling with, it is essential to take a comprehensive look at the various issues that have caused the court to stagnate. This includes scrutinizing how funding is allocated and utilized, the political and internal interference that impede the ICC's efficiency, and the socioeconomic factors, such as language, culture, and distance, that impact its operations. Only by examining these factors can we identify potential solutions to enhance the ICC's effectiveness in delivering justice to victims.

A. How Is The ICC Funded?

In its first ten years, the ICC spent approximately EUR 750 million.[5] The ICC receives funding from several sources, including member states, private individuals and organizations, and international organizations. The primary source of funding for the ICC comes from its member states.[6] The Rome Statute requires that member states contribute to the Court's budget based on their ability to pay. The largest funders of the ICC are large European economies, Japan,

[3] Douglas Guilfoyle, *Lacking Conviction: Is the International Criminal Court Broken? An Organisational Failure Analysis,* 20(2) MELBOURNE J INT'L L 401 (2019), at 401-420; Osvaldo Zavala, *The Budgetary Efficiency of the International Criminal Court,* 18(3) INT'L CRIM L REV 461 (2018), at 485

[4] Barnes*, supra* note 1, at 1592-1593; Smith*, supra* note 2, at 75; Sang-Hyun Song, *The International Criminal Court: International Criminal Justice for Asia and the World,* 1 APYIHL (2005), at 6; Megan A. Fairlie, *The Hidden Costs of Strategic Communications for the International Criminal Court*, 51 TEXAS INT'L L J 281 (2016), at 302.

[5] Jonathan O'Donohue, *Financing the International Criminal Court*, 13(1) INT'L CRIM L REV 269 (2013), at 269.

[6] ICC, Understanding the International Criminal Court, ICC-05-009/20 (2020), at 10.

South Korea, Australia, and Brazil.[7] In addition to member state contributions, the ICC also receives funding from private individuals and organizations. This can include philanthropic donations from individuals or grants from organizations that support the ICC's work.[8] The ICC also receives funding from international organizations, such as the United Nations.[9]

The budget of the ICC is determined through a three-step process.[10] The first step involves the Court proposing a budget for the upcoming year.[11] This proposal is then evaluated by an independent body called the Committee on Budget and Finance (CBF), which comprises 12 members. Civil society organizations are given the opportunity to contribute to the evaluation process during the CBF's annual session.[12] The final step involves the original budget proposal and the CBF's recommendations being examined by the Assembly of States Parties (ASP).[13] The ASP ultimately decides on the Court's budget through a voting process in which each country has one vote.[14] During treaty negotiations, it was suggested that the United Nations fund the Court but this proposal was abandoned due to opposition from the United States, Germany, and Japan, who are the United Nations' largest contributors.[15]

1. What Are the Main Expenditures of the ICC?

In 2002, the ICC's budget request was EUR 30,893,500, which was approved by the ASP.[16] By 2012, this budget had grown to an approved amount of EUR 108,800,000.[17] The majority of the ICC's budget is allocated towards the Court's core functions, which include the investigation and prosecution of international crimes as well as the support of victims and witnesses.[18] Other areas, such as the administration of the Court, the office of the prosecutor, and the defense teams, along with judges' salaries are also budgeted.[19] It is important to understand how much is being allocated for each of these. Judges' salaries and Court operational costs, for example, can be seen as constituting a large amount in comparison to other expenditures. There are 18 judges in three court rooms.[20] In 2003, the judges' annual salary was EUR 180,000 each, for a total of EUR 3,240,000.[21] This was 10.5% of their budget that year.

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[7] Awa Njoworia, Valerie Adamu, *Analyses of the Challenges Faced by the International Criminal Court in the Exercise of Its Jurisdiction,* 6(6) INT'L J L 98 (2020) at 101; Eric Wiebelhaus-Braham, Kristen Ainley, *The Evolution of Funding for the International Criminal Court: Budgets, Donors and Gender Justice,* 22(1) J HUMAN RIGHTS 31 (2023), at 33 .
[8] Adamu, *supra* note 7, at 101.
[9] *Id.*
[10] Braham, Ainley, *supra* note 7, at 33.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] O'Donohue, *supra* note 5, at 278.
[17] *Id.*
[18] *Id.*, at 280.
[19] Zavala, *supra* note 3, at 467.
[20] O'Donohue, *supra* note 5, at 286.
[21] ICC, United Nations, International Criminal Court, Assembly of States Parties, Second Session, Official Records: Part III: General Assembly, 2nd Session, 55th plenary meeting, Annex III, UN Doc. ICC-ASP/2/3/Add.1 (Sept. 22, 2003), at 198.

Some other key areas of expenditure for the ICC include costs associated with informing the public about the work of the Court and raising awareness of international justice issues.[22] Other expenses stem from travel expenses, secure computers and communication equipment, armored cars and vans, and helicopters to transport to countries where road transportation is difficult or unsafe.[23] Criticism surrounding the spending of the ICC includes the unbelievable cost associated with each trial (EUR 750 million).[24] However, it is essential to keep in mind that the expenses of the ICC go beyond just the trial proceedings. Failure by states to arrest and surrender suspects also incurs financial losses for the Court.[25]

2. How Does Finances Impact the ICC's Efficiency?

Funding challenges can have a significant impact on the ICC's ability to carry out its mandate.[26] Without sufficient funding, the ICC may not be able to effectively investigate and prosecute cases, and it may struggle to maintain its operations. For example, the ICC was forced to drop charges against Kenyan President Uhuru Kenyatta due a to lack of evidence, which was partially attributed to a lack of resources for the investigation.[27] Funding challenges can also impact the ICC's ability to provide support to victims and witnesses, as the ICC is responsible for outreach and victim support programs.[28] Intimidation, death threats, and bribes hinder the ICC's ability to carry out an investigation and collect evidence and may threaten more lives than it tries to protect.[29] If the ICC is unable to carry out its mandate effectively, it could lead to a loss of faith in the Court and undermine its credibility and legitimacy.[30] This could make it more difficult for the ICC to secure funding in the future, as member states may be hesitant to contribute if they do not believe the Court is operating effectively. Lack of resources can further impact the ICC's ability to attract and retain qualified staff, which is a challenge for the Office of the Prosecutors.[31]

3. Does Financial Reliance on Member States Impact the ICC's Efficiency?

The ICC's reliance on the financial contributions of its member states to operate can be unpredictable and insufficient to cover its expenses.[32] This funding structure can have several negative consequences for the ICC's effectiveness.[33] Most notable is how the ICC's budget

[22] Zavala, *supra* note 3, at 462-464.
[23] M. Cherif Bassiouni, *International Criminal Court: Observations and Issues before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, 13 NOUVELLES ÉTUDES PÉNALES 37 (1997), at 76-77.
[24] O'Donohue, *supra* note 5, at 296.
[25] *Id.*
[26] Braham, Ainley, *supra* note 7, at 31.
[27] Smith, *supra* note 2, at 81.
[28] O'Donohue, *supra* note 5, at 280; Stuart Ford, *How Much Money Does the ICC Need?*, in THE LAW AND PRACTICE OF INTERNATIONAL CRIMINAL COURT (Carsten Stahn ed., 2015) at 20.
[29] Susanne D. Mueller, *Kenya and the International Criminal Court (ICC): Politics, the Election and the Law,* 8(1) JOURNA OF L EASTERN AFRICAN STUDIES 25 (2014), at 33.
[30] Zavala, *supra* note 3, at 464.
[31] Song, *supra* note 4, at 3; O'Donohue, *supra* note 5, at 285.
[32] Adamu, *supra* note 7, at 101.
[33] Braham, Ainley, *supra* note 7, at 37.

constraints can hamper its ability to carry out investigations and prosecutions efficiently.[34] The Court's investigations can be complex, requiring significant resources and expertise to collect evidence and analyze it.[35] The ICC also has to conduct investigations in multiple countries and continents, which can add to the logistical and financial challenges. Limited funding can restrict the ICC's ability to hire staff, secure evidence, and carry out investigations, which can significantly slow down or even derail the proceedings.[36] Some defence attorneys argue that the ICC is prejudicial towards the defence, as their investigations are never funded in advance and are reimbursed with a delay of several months.[37] This results in grave out of pocket expenses for defence lawyers, which can hinder the quality of legal aid the perpetrator receives.[38]

Furthermore, the ICC's budget constraints can affect the quality of its proceedings. The ICC is a court of last resort, which means that it only intervenes when national authorities are unable or unwilling to carry out their obligations to investigate and prosecute international crimes.[39] As such, the ICC is expected to uphold the highest standards of due process and ensure that the accused receives a fair trial.[40] However, limited funding can affect the quality of legal representation for the accused, the availability of expert witnesses, and the overall quality of the proceedings, which can compromise the integrity of the ICC's decisions.[41]

The Court's reliance on voluntary contributions from member states can create the perception that it is beholden to powerful states and their interests.[42] This perception can lead to accusations of politicization or bias, which can undermine the credibility of the ICC's decisions.[43] Additionally, the ICC's funding structure can make it vulnerable to threats or retaliation from member states, which can compromise its independence and impartiality.[44] As such, the ICC's funding structure undermines its credibility and independence.[45]

Finally, the ICC's financial limitations can affect its ability to implement its sentences and enforce its decisions.[46] The ICC has no police force or military power to arrest suspects or carry out sentences.[47] Instead, the ICC relies on member states to arrest and surrender suspects and enforce its sentences.[48] Limited funding can make it challenging for the ICC to secure the cooperation of member states, which can lead to delays or failures in enforcing its decisions.[49]

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[34] Adamu, *supra* note 7, at 101; Jenia Iontcheva Turner, *Defense Perspectives on Fairness and Efficiency at the International Criminal Court*, in OXFORD HANDBOOK ON INTERNATIONAL CRIMINAL LAW (Kevin Jon Heller *et al*. eds., 2020), at 15.
[35] Song, *supra* note 4, at 3.
[36] Turner, *supra* note 34, at 15.
[37] *Id.*
[38] *Id.*
[39] Smith, *supra* note 2, at 78; Brendan Leanos, *Cooperative Justice: Understanding the Future of the International Criminal Court through Its Involvement in Libya*, 80 FORDHAM L REV 2267 (2012), at 2282.
[40] Annika Jones, *Non-Cooperation and the Efficiency of the International Criminal Court*, COOPERATION AND THE INTERNATIONAL CRIMINAL COURT: PERSPECTIVES FROM THEORY AND PRACTICE (Olympia Bekou, Daley Birkett eds., 2016), at 188.
[41] Adamu, *supra* note 7, at 101.
[42] Jones, *supra* note 40, at 9.
[43] *Id*.
[44] Mueller, *supra* note 28, at 29; O'Donohue, *supra* note 5, at 280.
[45] Jones, *supra* note 40, at 9.
[46] Hans-Peter Kaul, *The International Criminal Court: Current Challenges and Perspectives*, 6 WASH U GLOBAL STUD L REV 575 (2007), at 578.
[47] *Id*., at 579.
[48] *Id*., at 578; Adamu, *supra* note 7 at 102; Awn Al-Khasawneh, *Reflections on the Efficiency on the International Criminal Court,* ROMANIAN J INT'L L 13 (2012), at 15.
[49] Jones, *supra* note 40, at 11; Kaul, *supra* note 46, at 579; Adamu*, supra* note 7, at 103.

B. Does External Interference Impact the ICC's Efficiency?

Political pressure from powerful states and a lack of cooperation from states can create significant obstacles for the ICC to carry out its mandate, compromising its independence and credibility.[50]

The threats to the safety and security of ICC staff can affect their ability to carry out investigations and prosecutions in complex and dangerous environments, jeopardizing the success of their work.[51] This is particularly concerning, given that the ICC often operates in complex and dangerous environments. Therefore, ensuring the safety and security of ICC staff is essential for maintaining the integrity and effectiveness of the ICC.[52] The lack of public support and limited capacity of national justice systems can significantly impact the ICC's ability to gather evidence, secure witnesses, and carry out arrests.[53] Without the necessary funding and political will, the ICC may face delays or failures in its operations.

1. How Do Political Pressures Impact the ICC's Efficacy in Carrying Out Its Mandate?

The ICC is an international institution, and as such, it is subject to the politics of its member states.[54] The Court's decisions can be influenced by powerful states and their interests, which can compromise the independence and impartiality of the ICC.[55] Moreover, the ICC's prosecutors have significant discretion in deciding which cases to investigate and prosecute, which can lead to accusations of bias or politicization.[56] For example, the ICC's decision to investigate allegations of war crimes committed by Sudan's former President, Omar al-Bashir, on genocide charges was driven largely by the ICC's desire to make "a bold demonstration of the court's purpose".[57] States can also use their political influence to try to influence the outcome of trials before the ICC.[58] This can take the form of public statements or private communications with ICC judges or prosecutors, or through other means such as offering incentives or threats, which can compromise the fairness and impartiality of the ICC's proceedings and undermine its credibility.[59] States can exert diplomatic pressure to either encourage or discourage cooperation with the ICC, by threatening to impose sanctions or other penalties on states that assist the ICC or by offering incentives to states that refuse to cooperate.[60] This can make it challenging for the ICC to carry out investigations and prosecutions effectively and can compromise its independence and impartiality.[61]

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[50] Allen S. Weiner, *Prudent Politics: The International Criminal Court, International Relations, and Prosecutorial Independence,* 12 WASH U GLOBAL STUD L REV 545 (2013), at 547.
[51] Adamu*, supra* note 7, at 102.
[52] Kaul*, supra* note 46, at 579.
[53] *Id.*; Adamu, *supra* note 7, at 102-103.
[54] Weiner, *supra* note 50, at 549; Smith *, supra* note 2, at 88; Adamu*, supra* note 7, at 103.
[55] Weiner, *supra* note 50, at 549; Braham, Ainley*, supra* note 7, at 37.
[56] Weiner, *supra* note 50, at 549.
[57] *Id*.
[58] Jones, *supra* note 40, at 9.
[59] *Id*.
[60] *Id.*; Braham, Ainley*, supra* note 7, at 37.
[61] Adamu, *supra* note 7, at 103.

C. To What Extent Does the Collection of Evidence Impact the Efficiency of the ICC?

The ICC's ability to establish the guilt or innocence of suspects and support its findings and decisions depends on the collection and analysis of evidence.[62] However, meeting the complex legal and procedural requirements for evidence collection in trials held at the ICC can be a challenging, time-consuming, and resource-intensive process, particularly for cases involving crimes committed across multiple countries with different legal systems.[63] The cost of conducting investigations and collecting evidence can be high, and the ICC may need to prioritize its resources based on the cases it's pursuing.[64] Limited cooperation from some countries significantly undermines the ICC's ability to gather evidence and bring defendants to trial.[65] Some countries have refused to cooperate with the ICC, while others have been accused of failing to arrest suspects, leading to trial delays and reducing the ICC's efficiency in delivering justice.[66] Conflict zones or areas of instability are another example of the challenges that the ICC faces when collecting evidence, which further delay or impedes investigations.[67] Accessing crime scenes and witnesses can be difficult, either due to restricted areas or witnesses' reluctance to come forward due to fear of retaliation or other factors.[68] Inability to obtain critical evidence or testimony can further delay or hinder the ICC's investigation.[69]

D. To What Extent Do Geographic and Cultural Differences Affect the ICC's Efficiency?

The ICC's efficacy can be hindered by geographic and cultural barriers, as seen in its limited temporal jurisdiction and criticism from African leaders.[70] Non-member states fall outside the ICC's jurisdiction, resulting in accountability gaps and potential bias towards certain regions.[71] In recent years, the ICC has faced criticism for its narrow focus on African cases, which some argue is because the majority of the ICC member states are African.[72] African leaders have voiced concerns that the ICC is a neo-colonial institution imposed on Africa, further reinforced by the Court's location in the heart of Europe.[73] The trial of Dominic Ongwen, a former Lord's Resistance Army commander, was held in The Hague due to logistical and security reasons,

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[62] Barnes, *supra* note 1, at 1590; Jacob Katz Cogan, *The Problem of Obtaining Evidence for International Criminal Courts*, 22 HUM RT. Q 404 (2000), at 410.
[63] Kaul, *supra* note 46, at 578; Adamu, *supra* note 7, at 98; Marc Henzelin, Veijo Heiskanen, Guenael Mettraux, *Reparations to Victims before the International Criminal Court: Lessons from International Mass Claims Processes,* 17 CRIM L FORUM, (2006), at 317. 340-341.
[64] Henzelin, Heiskanen, Mettraux, *supra* note 63, at 341-342; Kaul, *supra* note 46, at 578.
[65] Michele Caianiello, *Law of Evidence at the International Criminal Court: Blending Accusatorial and Inquisitorial Models*, 36 N.C.J. INT'L L COM REG 287 (2011), at 299.
[66] *Id*.
[67] Kaul, *supra* note 46, at 578.
[68] *Id.*; Adamu, *supra* note 7, at 98.
[69] Adamu, *supra* note 7, at 98-99.
[70] Archangel Byaruhanga Rukooko, Jon Silverman, *The International Criminal Court and Africa: A Fractious Relationship Assessed,* 19 AFRICAN HUM RIGHTS L J 85 (2019), at 98
[71] CATHERINE S. NAMAKULA, LANGUAGE AND THE RIGHT TO FAIR HEARING IN INTERNATIONAL CRIMINAL TRIALS (2014), at 2
[72] Fairlie, *supra* note 4, at 313; Rukooko, Silverman, *supra* note 70, at 98; Smith, *supra* note 2, at 89; Lana Ljuboja, *Justice in an Uncooperative World: ICTY and ICTR Foreshadow ICC Ineffectiveness*, 32 HOUSE J INT'L L 767 (2010), at 785.
[73] Fairlie, *supra* note 4, at 313-314; Rukooko, Silverman, *supra* note 70, at 98; Smith, *supra* note 2, at 81; Ljuboja, *supra* note 72, at 786.

highlighting the challenges of holding ICC proceedings outside the region where the crimes were committed.[74]

Critics of the ICC often argue that for certain cultures involved with the Court, such as Africa, a retributive version of justice is less familiar than a reconciliatory one.[75] They believe that addressing the consequences of a conflict involves a more varied and complex approach than relying solely on the legal system's power.[76] For instance, in Northern Uganda, *mato oput*, a customary practice involving the sharing of bitter liquid and a slaughtered animal to seal reconciliation, has been promoted as a more culturally acceptable alternative to the ICC.[77] Other cultural differences arise in attitudes towards gender or sexual orientation, which can impact the interpretation of evidence related to sexual violence.[78] Moreover, the ICC's operation in multiple languages can create significant barriers to communication and understanding.[79] Translating and interpreting evidence and testimony can be time-consuming, costly, and may introduce errors or inconsistencies in the translation process.[80]

III. What Are Some Case Studies of Notable Delays in the ICC?

A closer examination of some of the notable delays in ICC cases can shed light on the various factors that contribute to the Court's inefficiency. The cases of Omar al-Bashir, Uhuru Kenyatta, Muammar Gaddafi and Saif al-Islam Gaddafi are just a few examples of high-profile cases that have faced significant delays. These cases are indicative of the challenges faced by the ICC in investigating and prosecuting international crimes, such as difficulties in gathering evidence, ensuring fair trials, and obtaining cooperation from states.[81]

A. What Were the Challenges Faced by the ICC in Prosecuting Omar al-Bashir?

The case of Omar al-Bashir is a primary example of a case with notable delay at the ICC. The case involves charges of war crimes, crimes against humanity, and genocide allegedly committed by the former president in the Darfur region of Sudan.[82] One significant reason for the delay in the trial was the lack of cooperation from the Sudanese government, which rejected the ICC's jurisdiction over the case and refused to surrender suspects to the Court.[83] The former President even traveled to Chad and Kenya after his second indictment, where neither country

[74] Rukooko, Silverman, *supra* note 70, at 98.
[75] *Id*., at 101; Abadir M. Ibrahim, *International Criminal Court in Light of Controlling Factors of the Effectiveness of International Human Rights Mechanisms*, 7 EYES ON THE ICC 157 (2010), at 189.
[76] Rukooko, Silverman, *supra* note 70, at 101.
[77] *Id*.
[78] Fairlie, *supra* note 4, at 302.
[79] Namakula, *supra* note 71, at 2; NANCY COMBS, FACT-FINDING WITHOUT FACTS: THE UNCERTAIN EVIDENTIARY FOUNDATIONS OF INTERNATIONAL CRIMINAL CONVICTIONS (2013), at 167; JOHN C. FLOYD, INTERNATIONAL INJUSTICE: RWANDA, GENOCIDE, COVER-UP: THE UNITED NATIONS MEDIA TRIAL (2005), at 143.
[80] Namakula, *supra* note 71, at 2; Joshua Karton, *Lost in Translation: International Criminal Tribunals and the legal implications of interpreted testimony*, 41(1) VANDERBILT J TRANSNATL L 1 (2008), at 1.
[81] Jones, *supra* note 40, at 3.
[82] Barnes, *supra* note 1, at 1608; Roza Pati, *The ICC and the Case of Sudan's Omar Al Bashir: Is Plea-Bargaining a Valid Option*, 15 U.C. DAVIS J INT'L L POLICY 265 (2009), at 266.
[83] Adamu, *supra* note 7, at 102; Jones, *supra* note 40 at 3; Pati, *supra* note 82, at 270-271; Emmanuel Sakarombe, *Challenges Facing the International Criminal in Trying to Accomplish Its Mission Focusing on Omar All Bashir's Prosecution*, 5(1) INT'L J L AND PUBLIC POLICY 8 (2023), at 8.

arrested al-Bashir, both claiming that it would have been detrimental to the Sudanese peace process.[84] The African Union and the Arab League also criticized the ICC's decision to indict a sitting head of state, and several African states threatened to withdraw from the ICC.[85] Another reason for delay is the complexity of the case, as the prosecution needs to present a significant amount of evidence to prove the charges beyond a reasonable doubt.[86] Additionally, the ICC needs to ensure that al-Bashir receives a fair trial, which requires significant resources and preparation.[87] The ICC's limited resources and the competing demands on its time and attention further contribute to the delay.[88]

In 2019, mass protests erupted across Sudan, calling for al-Bashir's ouster, and he was subsequently arrested and held in detention in Sudan.[89] In December 2019, the new Sudanese government announced that it would hand al-Bashir over to the ICC to face trial for his alleged crimes in Darfur.[90] However, the trial has been delayed due to logistical and legal challenges, as well as the COVID-19 pandemic.[91] In March 2021, the ICC held a hearing to determine whether al-Bashir should be transferred to the ICC, but the decision was delayed.[92] As of April 2023, the trial has not yet begun.

1. What Were the Challenges Faced by the ICC in Prosecuting Uhuru Kenyatta?

Another example of a case that faced significant delays and legal challenges is the case against Uhuru Kenyatta, the former President of Kenya, who was indicted by the ICC in 2011 for crimes against humanity related to post-election violence in 2007-2008.[93] Kenyatta faced accusations of leading and financing a group of supporters who carried out violent attacks on members of opposing ethnic groups, resulting in the deaths of more than 1,000 people and the displacement of hundreds of thousands of others.[94] Kenyatta was charged with crimes including murder, deportation, rape, persecution, and other inhumane acts.[95] However, the case against Kenyatta was withdrawn in 2014 due to insufficient evidence.[96] The ICC prosecutor stated that the Kenyan government had failed to cooperate fully with the investigation, hindering the Court's ability to build a strong case.[97]

The withdrawal of charges against Kenyatta was seen as a significant setback for the ICC and raised concerns about the Court's ability to hold leaders accountable for international crimes. The delays and legal challenges in the case were due to several reasons, including the difficulty of gathering evidence, protecting witnesses, and ensuring a fair trial.[98] Additionally, there were allegations of political interference in the case, with some Kenyan politicians

[84] Adamu, *supra* note 7, at 102; Jones, *supra* note 40, at 5; Barnes, *supra* note 1, at 1585.
[85] Jones, *supra* note 40, at 5.
[86] *Id*., at 6; Pati, *supra* note 82, at 324.
[87] Jones, *supra* note 40, at 6; Pati, *supra* note 82, at 312.
[88] Pati, *supra* note 82, at 304.
[89] Sakarombe, *supra* note 83, at 10.
[90] Smith, *supra* note 2, at 82; Jones, *supra* note 40, at 6.
[91] Smith, *supra* note 2, at 82.
[92] *Id*.
[93] *Id*., at 81.
[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id*.; Jones, *supra* note 40, at 6.
[98] Mueller, *supra* note 28, at 29.

accusing Western powers of attempting to undermine Kenyan sovereignty by targeting their leader.[99]

The Kenyatta case highlights the challenges faced by the ICC in investigating and prosecuting international crimes and underscores the need for greater cooperation and support from member states and other stakeholders to ensure that the ICC can carry out its mandate effectively. The failure of states to cooperate with the ICC's investigations, as seen in both the Kenyatta case and the al-Bashir's case, has had an obvious impact on the efficiency of the Court, contributing to a general sense of frustration with the slow pace of justice at the ICC and dissatisfaction with the small number of cases that the Court has seen through to completion.[100]

2. What Were the Challenges Faced by the ICC in Prosecuting Muammar Gaddafi and Saif al-Islam Gaddafi?

Muammar Gaddafi, the former leader of Libya, was overthrown in 2011 after a popular uprising and a NATO-led military intervention.[101] In the aftermath of his ouster, the ICC launched an investigation into alleged crimes committed during the conflict in Libya, including crimes against humanity.[102] Gaddafi was accused of orchestrating a brutal crackdown on anti-government protesters, including the use of lethal force against peaceful demonstrators.[103] The ICC issued arrest warrants for Gaddafi; however he was killed by rebel forces in October 2011 before he could be brought to trial.[104] The ICC also issued arrest warrants for Gaddafi's son, Saif al-Islam Gaddafi, who was captured by Libyan authorities in November 2011 and was initially held in detention in Libya.[105] However, the Libyan authorities refused to hand him over to the ICC and insisted on trying him in Libya.[106] The ICC issued a ruling in 2013 stating that Libya could hold a trial for Gaddafi but only if it could prove its ability to conduct a fair trial.[107] However, as the political and social climate in Libya deteriorated, Gaddafi was eventually released from detention in 2017.[108] The Gaddafi case illustrates the importance of strong cooperation and support from member states and other stakeholders to enable the ICC to carry out its mandate effectively, even in challenging and volatile contexts.

3. Do Delays in ICC Proceedings Share Common Themes?

The cases of al-Bashir, Kenyatta, and Gaddafi share several common themes, including the challenges of gathering sufficient evidence to support the charges, political interference, and resistance from member states. In all three cases, the ICC faced difficulties obtaining reliable

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[99] Jones, *supra* note 40, at 7; Marko Milanvoic, *Courting Failure: When are International Criminal Courts Likely to Be Believed by Local Audiences?*, in THE OXFORD HANDBOOK OF INTERNATIONAL CRIMINAL LAW (Kevin Jon Heller *et al.* eds., 2016), at 36.
[100] Jones, *supra* note 40, at 8.
[101] Leanos, *supra* note 39, at 2269.
[102] John J. Liolos, *Justice for Tyrants: International Criminal Court Warrants for Gaddafi Regime Crimes*, 35 BOSTON COLLEGE INT'L COMP L REV 589 (2012), at 589.
[103] Sara Kaufman, *Crimes against Humanity and International Human Rights Abuses*, 38 IELR 17 (2022), at 19.
[104] *Id.*; Leanos, *supra* note 39, at 2294; Liolos, *supra* note 102, at 591.
[105] Leanos, *supra* note 39, at 2296; Liolos, *supra* note 102, at 591.
[106] Leanos, *supra* note 39, at 2297.
[107] *Id.*
[108] Kaufman, *supra* note 104, at 19.

testimony and physical evidence, particularly in volatile and unstable situations where witnesses were afraid to come forward or were at risk of reprisals.[109] Another common theme was political interference and resistance from member states.[110] The ICC faced challenges from African countries in the al-Bashir and the Kenyatta case where governments accused the Court of interfering in their internal affairs.[111] In the Gaddafi case, the ICC faced difficulties in coordinating with the Libyan authorities and ensuring that Gaddafi received a fair trial.[112]

IV. How Do ICC Delays Compare to Other International Criminal Tribunals?

Although the ICC has faced notable delays in prosecuting cases, this is not an issue exclusive to this Court. Other international criminal tribunals have also encountered similar challenges, such as the ICTY and ICTR. Both courts have faced difficulties in areas such as witness protection, funding constraints, and political interference.[113] It is important to note that each international criminal tribunal operates under unique circumstances and faces its own set of challenges. Nevertheless, the problem of delays in prosecuting cases remains a common issue among these institutions. Despite the challenges, significant progress has been made in holding individuals accountable for the most serious international crimes.

A. How Does the Efficiency of the ICC compare to that of the ICTY?

The ICTY was established by the United Nations in 1993 to prosecute individuals responsible for serious international crimes committed during the conflicts in the former Yugoslavia in the 1990s.[114] The tribunal operated for more than two decades and prosecuted numerous high-ranking officials and military leaders for their roles in the atrocities committed during the conflict.[115] The ICTY encountered significant hurdles in its early years, primarily because it had to construct legal and procedural structures from the ground up, causing initial delays in its proceedings.[116] Despite these issues, the ICTY succeeded in prosecuting numerous high-profile cases and convicting several high-ranking officials and military leaders for their involvement in the atrocities committed during the conflict in the former Yugoslavia.[117]

The ICTY and ICC are two of the most prominent international criminal tribunals established to prosecute individuals for the most serious international crimes. While they differ in their legal frameworks and mandates, both have faced similar challenges in their efforts to hold perpetrators accountable.[118] The ICTY faced significant funding constraints throughout its existence, which affected its ability to carry out its mandate.[119] This led to delays in the early stages of the tribunal's proceedings, as well as challenges in terms of conducting investigations

[109] Liolos, *supra* note 102, at 596; Bassiouni, *supra* note 23, at 42.
[110] Kaufman, *supra* note 103, at 19; Liolos, *supra* note 102, at 596.
[111] Fairlie, *supra* note 4, at 313.
[112] Kaufman, *supra* note 103, at 19.
[113] O'Donohue, *supra* note 5, at 270.
[114] Bassiouni, *supra* note 23, at 42.
[115] *Id.*
[116] *Id.*; Cogan, *supra* note 62, at 410.
[117] Ford 2015, *supra* note 28, at 14.
[118] *Id.*
[119] Bassiouni, *supra* note 23, at 43; Stuart Ford, *Complexity and Efficiency at International Criminal Courts,* 29 EMORY INT'L L REV 1 (2014), at 3.

and gathering evidence.[120] In contrast, the ICC has a more stable funding structure, which has allowed it to conduct investigations and gather evidence more efficiently.[121] However, the ICC has faced challenges in terms of cooperation from states, particularly those that are not parties to the Rome Statute, which has hindered its ability to gather evidence and carry out investigations.[122]

The collection of evidence has been a challenge for both the courts, complicated by various of factors. The ICTY struggled with the destruction of evidence during the conflict in the former Yugoslavia, as well as the reluctance of witnesses to come forward and testify.[123] This led to delays and challenges in terms of gathering evidence and conducting investigations.[124] The ICC has faced similar hurdles in terms of gathering evidence, particularly in cases where states are unwilling to cooperate. Another common challenge is political interference, which has affected the tribunals' ability to operate effectively. The ICTY had to contend with political interference and pressure from various actors, including states, which affected its ability to carry out its mandate.[125] The tribunal also had to operate in a region that was still experiencing conflict and instability, which further complicated its work, similar to many of the ICC's cases.[126]

B. How Does the Efficiency of the ICC Compare to that of the ICTR?

The ICTR was established by the United Nations Security Council in 1994 to prosecute individuals responsible for the 1994 genocide in Rwanda.[127] The genocide resulted in the deaths of an estimated 700,000 people, primarily ethnic Tutsis, over the course of 100 days.[128] Like the ICC, the ICTR faced a number of challenges and inefficiencies throughout its existence, including significant delays in its proceedings due in part to the large number of individuals to be prosecuted and the complex nature of the crimes committed during the genocide, as well as funding issues that limited hindered the tribunal's ability to conduct its work effectively.[129] The ICTR also faced challenges in gathering evidence and conducting investigations, particularly in situations where witnesses were hesitant to testify or were in remote areas and faced political interference.[130]

Both the ICTR and the ICC have taken measures to improve efficiency and reduce delays in their proceedings. For example, the ICTR created several Chambers and Tribunals to handle different types of cases and made use of plea agreements and other mechanisms to encourage cooperation from accused individuals.[131] The ICC has also introduced procedural reforms and made efforts to improve cooperation with national authorities.[132]

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[120] Cogan, *supra* note 62, at 410; Bassiouni, *supra* note 23, at 43-44; Ford, *supra* note 119, at 3.
[121] Adamu, *supra* note 7, at 101.
[122] *Id*., at 102.
[123] Ford, *supra* note 28, at 19; Ljuboja, *supra* note 72, at 781.
[124] Ljuboja, *supra* note 72, at 781.
[125] Weiner, *supra* note 50, at 549.
[126] Gabrielė Chlevickatiė, Barbora Holá, Catrien Bijleveld, *Suspicious Minds? Empirical Analysis of Insider Witness Assessments at the ICTY, ICTR and ICC*, 20 EUROPEAN J OF CRIMINOLOGY 185 (2023), at 186.
[127] Bassiouni, *supra* note 23, at 43; Ljuboja, *supra* note 72, at 770.
[128] Lilian A. Barria, Steven D. Roper, *How Effective Are International Criminal Tribunals? An Analysis of the ICTY and the ICTR*, 9 THE INT J OF HUMAN RIGHTS 349 (2005), at 352.
[129] *Id*., at 359; Ljuboja, *supra* note 72, at 768.
[130] Barria, Roper, *supra* note 128, at 361; Chlevickatiė, Holá, Bijleveld, *supra* note 130, at 186.
[131] Ljuboja, *supra* note 72, at 770.
[132] Leanos, *supra* note 39, at 2286.

V. How Can the ICC Improve Its Operations and Increase Efficiency?

The ICC has implemented several measures to improve efficiency, such as adopting a completion strategy, a case management system, outreach initiatives, and resource allocation.[133] Despite the measures taken by the ICC to improve efficiency, there is still room for improvement. Structural reforms, such as clarifying the ICC's jurisdiction, and mandate, increasing cooperation with national authorities, empowering the prosecutor's role, reforming the composition and structure of the ICC, and expanding the use of alternative dispute resolution mechanisms, are all potential areas for improvement.[134] Addressing these issues could help streamline its proceedings and reduce delays, ultimately leading to more efficient and effective justice.

Procedural reforms are another way to improve the efficiency of the ICC. Simplifying pre-trial proceedings, reducing the length and complexity of trials, improving witness protection, enhancing communication with victims, and increasing transparency are all potential areas for reform.[135] By implementing these measures, the ICC can accelerate the speed and efficiency of its proceedings while still maintaining the integrity of the criminal justice process.

Greater cooperation from member states can also have a significant impact on the efficiency of the ICC.[136] Facilitating the arrest and surrender of suspects, improving the quality and quantity of evidence, increasing the availability of resources, and reducing political interference are all potential ways in which member states can support the work of the ICC. By providing greater support to the ICC, member states can help to ensure that the ICC is able to operate independently and effectively, which can in turn lead to more efficient and effective justice.[137] This can include providing funding and resources to the ICC, promoting greater understanding and support for the ICC's work, and advocating for stronger cooperation and accountability among member states.[138] By working together, the international community can help strengthen the ICC's ability to deliver justice in a timely and efficient manner.[139]

VI. Conclusion

Over the course of its existence, the ICC has faced significant delays in some of its most high-profile cases, and common themes suggest that there are systemic challenges to the ICC's ability to prosecute high-profile individuals accused of crimes against humanity. These challenges include difficulties in obtaining reliable evidence, political interference and resistance from member states, and a reliance on state parties to enforce arrest warrants and provide access to evidence and witnesses.[140] Overcoming these challenges would likely necessitate reforming the ICC's investigative and prosecutorial procedures, as well as

[133] O'Donohue, *supra* note 5, at 281.
[134] Zavala, *supra* note 3, at 486; Ibrahim, *supra* note 75, at 177; Bassiouni, *supra* note 23, at 45-46.
[135] Zavala, *supra* note 3, at 486; O'Donohue, *supra* note 5, at 286; Jones, *supra* note 40, at 18.
[136] Jones, *supra* note 40, at 16.
[137] Zavala, *supra* note 3 at 486; Ljuboja, *supra* note 72, at 804; Ibrahim, *supra* note 75, at 195.
[138] Barne, *supra* note 1, at 1618; Ibrahim, *supra* note 75, at 195; Jones, *supra* note 40, at 18.
[139] Bassiouni, *supra* note 23, at 44.
[140] Adamu, *supra* note 7, at 102; Jones, *supra* note 40, at 1.

bolstering cooperation and aid from member states. Furthermore, the ICC may need to adopt more stringent measures against member states that do not adequately contribute to its financial resources, in order to alleviate the financial strains that hinder the ICC's pursuit of justice. Additionally, strategies should be explored to minimize political interference and transcend cultural obstacles.

However, it is important to note that the delays observed in the three cases analyzed in this paper may not be indicative of the overall performance of the ICC. Other cases may have different factors contributing that were not accounted for in this research, which could result in longer or shorter delays. Moreover, cases with multiple defendants or crimes may require more resources and time to investigate and prosecute, thereby impacting the ICC's efficiency.

In order to comprehensively address the challenges faced by the ICC with regards to its efficiency, it is important to expand the scope of research beyond the identified themes in the paper. Other factors that may impact the Court's efficiency, such as the effectiveness of its internal management, the quality of its partnerships with other institutions and NGOS, and the availability of its resources, should be investigated further. Additionally, as delays have the potential to affect the Court's legitimacy and public perception, future research should place greater emphasis on studying the impact of delays on the ICC's reputation. This includes exploring how delays may affect the ICC's perceived fairness and impartiality and how this may influence the Court's ability to achieve its mission. It is also important to consider how global political developments and changing societal attitudes, especially in the post-COVID-19 era, may impact the ICC's effectiveness and efficiency. Ultimately, a comprehensive approach to research and analysis can inform better strategies by improving the ICC's efficiency and effectiveness in achieving its mandate.

The Armed Conflict in the Democratic Republic of the Congo and the International Criminal Court

by Nouredine Soudani[*]

ABSTRACT**:** The armed conflict in the Democratic Republic of Congo is considered one of the most deadly conflicts witnessed by the African continent in the late twentieth century, with more than 5 million casualties. It has seen some of the worst international crimes and serious violations of human rights and humanitarian law. Various internal and international factors and causes contributed to its outbreak. In the face of the national judiciary's inability to conduct independent investigations into the alleged crimes, the country's president requested the Prosecutor of the International Criminal Court to open an investigation into the situation in the Democratic Republic of Congo, as his country is a party to the Rome Statute. The Prosecutor responded by opening an investigation, which led to indictments against key war criminals, resulting in convictions being issued against them.

KEYWORDS: Armed Conflict; Conviction Rulings; International Crimes; Prosecutor; War Criminals.

I. Introduction

Over the past decades, the African continent has witnessed numerous wars and armed conflicts. One of the African countries that has experienced a particularly severe armed conflict, marked by the worst international crimes and serious human rights violations, is the Democratic Republic of Congo (DRC). The armed conflict there has resulted in more than 5 million casualties, making it the largest number of fatalities witnessed in the world since the end of World War II in 1945.

Based on that, the armed conflict in the Democratic Republic of Congo, which began in the late 1990s, is considered one of the largest and most dangerous armed conflicts to humanity not only in Africa, but also in the world in terms of scale and complexity. Several factors and reasons have contributed to the onset and escalation of this conflict. These include internal factors primarily related to power struggles and ethnic conflict among various tribes in the country, as well as international factors, especially the frequent interventions, particularly by regional countries like Rwanda, which had a military presence in the Democratic Republic of Congo.

The armed conflict in the Democratic Republic of Congo has led to the commission of crimes against humanity, war crimes, and numerous other serious violations of human rights. This has prompted calls for an investigation into the situation in the Democratic Republic of Congo by the International Criminal Court (ICC), of which the Democratic Republic of Congo is a party to its statute. Consequently, on April 19, 2004, the Congolese President requested the Prosecutor to open an investigation into the situation in the Democratic Republic of Congo, especially since the national judiciary was unable to conduct investigations and ensure fair trials

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for the accused. The Prosecutor responded by opening an investigation on June 23, 2004, which resulted in indictments against several officials and convictions being handed down against them.

Studying the armed conflict in the Democratic Republic of Congo is crucial due to its severe nature, which has resulted in the deaths of millions of civilians. This necessitates an examination of the nature of this conflict in terms of its causes and context. Furthermore, researching this topic is important in shedding light on the role played by the International Criminal Court in prosecuting war criminals and ensuring their punishment. The intervention of the International Criminal Court in the armed conflict in the Democratic Republic of Congo and its opening of an investigation is considered one of the most successful interventions by the Court compared to other cases it has investigated. This is evident through the execution of arrest warrants issued against major criminals and ensuring their appearance before.

The study focuses on the background of the armed conflict in the Democratic Republic of Congo? It explores how the International Criminal Court has contributed to ensuring the prosecution and punishment of Congolese war criminals, preventing them from escaping justice?

The study relied on three methodologies: the descriptive approach, used to narrate texts and legal judgments related to the study topic; the analytical approach, employed to analyze legal texts related to this subject; and the historical approach, utilized to identify historical milestones relevant to the study topic.

For addressing the problem and covering all aspects raised by this topic, it has been divided into two sections. The first section deals with the background of the armed conflict in the Democratic Republic of Congo. The second section delves into the role of the International Criminal Court in the armed conflict in the DRC.

II. The Background of the Armed Conflict in the Democratic Republic of Congo

The DRC is one of the most prominent examples in Africa that witnessed some of the most violent civil wars, especially in the eastern regions like Kivu. In the early 1990s, security breakdowns in the country took a dangerous turn, escalating notably around 1993, coinciding with the outbreak of the civil war in Rwanda. This had serious repercussions on the internal stability of the DRC. Following this, the wave of violence escalated into two civil wars: the first extended from 1996 to 1997, and the second from 1998 to 2003.[1]

The background of the armed conflict in Uganda can be attributed to several reasons that led to its outbreak. Therefore, it is important first to understand the factors that contributed to the existence of the armed conflict, and then address its outbreak and the physical violations of human rights committed within it.

A. Causes of Armed Conflict

The outbreak of armed conflict in the DRC is associated with internal and external factors, which can be summarized as follows.

[1] Fouzia Zeraouli, *Plunder, Booty, and Civil Wars in Sub-Saharan Africa: With Reference to the Case of the Democratic Republic of Congo*, 15(4) JOURNAL OF TRUTH IN HUMANITIES AND SOCIAL SCIENCES 170 (2015), at 170-171.

1. Internal Factors

- *The struggle for power*: the struggle for power in the DRC has been one of the main reasons behind the country's turmoil and the two civil wars that have inflicted suffering on the Congolese people since gaining independence from Belgium in 1960. The country has been caught in a vortex of power struggles, stemming from political violence that began with the police mutiny in 1960, the secession of the provinces of Katanga and Kasai, and the assassination of Patrice Lumumba. These events have been compounded by other rebellions, all rooted in the colonial policies enacted by Belgium.[2]

- *Ethnic conflicts*: ethnic conflicts are considered one of the main reasons for the occurrence of armed conflict in the DRC. These conflicts have been the primary cause of the two civil wars that the country has witnessed, fueled by animosity between various ethnic groups, which rulers have exploited. Looking back at the policies pursued by the presidents, we find that ethnic identity has been manipulated to manage various conflicts. Since the independence of the DRC, three presidents have ruled: Joseph Kasa-Vubu, Mobutu Sese Seko, and Laurent Kabila. All of them manipulated ethnic identity to govern their regimes. President Mobutu primarily pursued a policy of transforming the administration of the country into a private monarchy by appointing his relatives to all sensitive positions in the country. Moreover, there was no fairness in distributing the country's wealth among its citizens. As a result, ethnic groups opposing his policies emerged. This same policy was pursued by President Laurent Kabila, who also appointed members of his ethnic group, the Baluba, to key positions in the state. Other ethnic groups considered this a violation of their rights, leading to the outbreak of the Second Congo War from 1998 to 2003, which resulted in the assassination of President Laurent Kabila in 2001 and the assumption of power by his son, Joseph Kabila.[3]

2. External Factors

International interventions contributed to the outbreak of armed conflict in the DRC, with countries like Rwanda, Uganda, and Angola playing prominent roles in instigating the conflict. They provided military and political support to President Laurent Kabila to seize power. The intervention of these countries is primarily driven by a set of main objectives that each seeks to achieve. Uganda, sharing eastern borders with the DRC, played a significant role in the armed conflict. Some of Uganda's main objectives include:

- building a regional system controlled by the Tutsi ethnic minority through their control over the Great Lakes region, especially after the success of the Tutsi tribe in gaining power in both Rwanda and Burundi. These aspirations are primarily linked to the ongoing conflict in the DRC between government forces and opposition forces, particularly since Congolese Tutsi tribes in the east of the country have played a significant role in the internal conflict.

- the control over the resources and wealth of the DRC, especially gold, as Uganda's economy heavily relies on exporting this commodity to international markets.[4]

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[2] Rafik Boubchir, *Conflict in the Democratic Republic of the Congo: Characteristics and Motivations*, 3(1) ALGERIAN JOURNAL OF SECURITY AND DEVELOPMENT 185 (2013), at 186.
[3] *Id.*, at 187-188.
[4] Magda El-Gendi, Mohamed Kandil, *The Political Future of Uganda in East Africa*, 87 INTERNATIONAL POLITICS JOURNAL 127 (1999), at 129.

As for Rwanda, which is considered one of the key parties in the ongoing conflict in the DRC, its primary motivations for involvement in the armed conflict in the DRC revolve around securing its borders with the DRC from attacks by Hutu militias, particularly those operating from the Kivu province in eastern DRC.[5]

As for Burundi and Zimbabwe, their motivations for intervening in the armed conflict in the DRC do not differ significantly from those of Rwanda and Uganda. Burundi, like Rwanda, seeks to secure its borders with the DRC from attacks by Hutu militias, in addition to aiming to control the resources and natural wealth of the DRC. Zimbabwe, on the other hand, which entered the conflict alongside the Congolese government, is driven by the aspirations of Zimbabwe's president to play a regional role in the area.[6]

B. The Outbreak and Evolution of Armed Conflict in the Democratic Republic of the Congo

The outbreak of armed conflict in the DRC dates back to 1997, following elections in which Laurent Kabila emerged victorious and subsequently declared the country's independence.[7] Following their victory in 1997, Rwanda requested the withdrawal of Rwandan forces that remained in the DRC. This led to several cases of rebellion within the Congolese army, which escalated into movements aimed at overthrowing the government. The conflict quickly evolved into a regional dispute, with both Rwanda and Uganda providing support to the rebels, while the president received backing from Angola, Namibia, Chad, and Zimbabwe.[8]

Following this conflict, President Laurent Kabila was assassinated on January 16, 2001, by one of his guards. Authority was then transferred to General Joseph Kabila, who was given the powers of the head of state and commander-in-chief of the armed forces during a joint meeting held by ministers and senior military officers. Subsequently, members of the Congolese transitional parliament unanimously appointed General Joseph Kabila as President of the DRC. However, rebel groups and some elements of the Congolese political elite rejected Kabila's emergence as the head of state. On January 21, 2001, the presidents of Angola, Zimbabwe, and Namibia announced their commitment to maintain their military forces in the DRC to enhance the security of the population, government, foreign citizens, including United Nations personnel and non-governmental organizations. They urged all parties to the Lusaka Agreement to refrain from any offensive military action, encouraged all parties to seek a political solution to the conflict, and called on the United Nations to deploy additional military observers in the DRC.[9]

Following intensive consultations led by the neutral facilitator, Mr. Ketumile Masire, representatives of the government of the DRC and rebel movements agreed on a set of basic principles on May 4, 2001, in Lusaka to serve as a framework for dialogue among Congolese parties. In response to a call made by the President of the Congolese Liberation Front, Mr. Jean-Pierre Bemba, several civil society organizations, major political parties, the Congolese

[5] Boubchir, *supra* note 2, at 192.
[6] *Id.*, at 192-193.
[7] Mirna Adjami, Guy Mushiata, *The Impact of the Rome Statute and the International Criminal Court in the Democratic Republic of the Congo*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (2010), at 1.
[8] OMAR M. AL-MAKHZOUMI, INTERNATIONAL HUMANITARIAN LAW IN LIGHT OF THE INTERNATIONAL CRIMINAL COURT (2008), at 367-368.
[9] UNSC, Document No. S/2001/128, The Sixth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (Feb. 12, 2001), at 1-2.

Liberation Front, and rebel movements affiliated with the Congolese Rally for Democracy formed a group called the "Union of Congolese Forces Working for Respect for the Lusaka Agreement and the Establishment of Dialogue among Congolese".[10]

In a speech delivered by President Kabila on January 26, 2002, on the occasion of the first anniversary of his assumption of power, he reaffirmed his government's commitment to dialogue among Congolese parties and cooperation in the third phase of the mission's deployment. He emphasized the necessity of the withdrawal of Rwandan forces and announced that he had requested the Security Council to establish an international investigative committee to probe the nature of Rwandan armed groups in the DRC.[11]

Based on this, the Presidents of the DRC and Rwanda signed a peace agreement in Pretoria on July 30, 2002, regarding the withdrawal of Rwandan forces from the DRC and the dissolution of former Rwandan armed forces and Interahamwe forces present in the DRC. The main provisions of the agreement involve the commitment of the government of the DRC to continue the process of tracking and disarming Interahamwe forces and former Rwandan armed forces in the areas under its control. The DRC also agreed to cooperate with the United Nations Mission in the DRC and the Joint Military Committee, as well as any other force formed by the third party, to disarm former Rwandan armed forces and Interahamwe forces. In return, Rwanda pledged to withdraw its forces from the DRC once effective measures were agreed upon to address its security concerns.[12]

Furthermore, the Presidents of the DRC and Uganda signed an agreement on September 6, 2002, regarding the withdrawal of Ugandan forces from the DRC and cooperation and normalization of relations between the two countries. According to the agreement, the government of Uganda committed to continue withdrawing its forces from the DRC according to a mutually agreed-upon timetable. Ugandan forces, in particular, were required to immediately withdraw from Gbadolite, Beni, and surrounding areas. Uganda also reaffirmed its readiness to withdraw its forces from Bunia after establishing administrative authority in Ituri. Regarding the situation in Ituri, both parties agreed to establish, with the assistance of the mission, a joint reconciliation committee for Ituri comprising representatives from the governments of the DRC and Uganda, as well as various leaders in the region. After deciding on the establishment of a mechanism to uphold law and order, an administrative authority would be formed.[13]

As a result of intensive negotiations and international pressure, representatives of the participating elements in the joint dialogue between Congolese parties in Pretoria signed the Comprehensive and Inclusive Agreement on the Transition in the DRC on December 17, 2002. The agreement stipulated that elections would be held at the end of the transitional period, which would last for 24 months. During this period, Joseph Kabila would remain the head of state and commander-in-chief of the armed forces, with four vice presidents responsible for government committees, each consisting of ministers and deputy ministers. The government would comprise 36 ministers and 25 deputy ministers. Additionally, a parliament would be established consisting of two chambers: the National Assembly (whose president would be

[10] UNSC, Document No. S/2001/572, The Eighth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (June 8, 2001), at 3.
[11] UNSC, Document No. S/2002/169, The Tenth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (Feb. 15, 2002), at 2.
[12] UNSC, Document No. S/2002/1005, The Special Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (Sept. 10, 2002), at 1-2.
[13] *Id.*, at 3-4.

nominated by the Congolese Liberation Movement) and the Senate (whose president would be nominated by civil society).[14]

Despite the historical steps witnessed in the formation process of the transitional government in Kinshasa, fighting and conflict persist in Ituri and the eastern part of the DRC. The situation in Ituri has been particularly severe, with approximately 420 civilians killed in Bunia during clashes between Lendu and Hema militias since the departure of Ugandan forces in May 2003. Incidents of rape and looting have also escalated, with a significant number of minors among the victims. In the border areas between Uganda and Ituri, reports indicate 380 cases of human rights violations, including killings, forced disappearances, mutilations, looting, and property destruction.[15]

Following the successful presidential, national assembly, and provincial council elections in the DRC, the National Assembly was formed on September 22, 2006. President Joseph Kabila was inaugurated on December 6, 2006, officially concluding the transitional process. On December 30, 2006, President Kabila appointed Antoine Gizenga as Prime Minister, who announced the formation of his government on February 5, 2007.[16]

However, this did not prevent acts of violence, as the DRC witnessed a security crisis resulting in serious human rights violations. In March 2007, violent clashes in Kinshasa between government forces and the special security forces of former Vice President Bemba led to the deaths of hundreds of civilians and extensive property damage.[17]

Towards the end of 2007, clashes intensified in the North Kivu province between the Armed Forces of the DRC and the political-military group led by the defector Laurent Nkunda, known as the National Congress for the Defense of the People (CNDP). Various armed groups, including the Mai Mai and the Democratic Forces for the Liberation of Rwanda (FDLR), also participated in the fighting. Government military operations aimed at neutralizing Nkunda's forces failed to achieve their objectives despite initial successes. Between December 10 and 13, 2007, government forces lost all the territories they had gained from the National Congress for the Defense of the People.[18]

The armed conflict in northern DRC witnessed the largest number of casualties since the end of World War II, with approximately 5.4 million people killed between 1998 and August 2007.[19]

III. The Role of the International Criminal Court in the Armed Conflict in the Democratic Republic of the Congo

In light of the international crimes and serious violations of human rights and the rules of international humanitarian law witnessed in the DRC as a result of the armed conflict in the country, and considering the failure and inability of the national judiciary in the DRC to

[14] UNSC, Document No. S/2003/211, The Thirteenth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (Feb. 21, 2003), at 1-2.
[15] UNSC, Document No. S/2003/1098, The Fourteenth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (Nov. 17, 2003), at 1-2.
[16] UNSC, Document No. S/2007/156, The Twenty-Third Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (Mar. 20, 2007), at 1.
[17] UNSC, Document No. S/2007/671, The Twenty-Fourth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (Nov. 14, 2007), at 1.
[18] UNSC, Document No. S/2008/218, The Twenty-Fifth Report of the Secretary-General on the United Nations Mission in the Democratic Republic of the Congo (Apr. 2, 2008), at 2.
[19] Adjami, Mushiata, *supra* note 7, at 1.

investigate and ensure the prosecution of perpetrators of international crimes and violators of human rights, the situation in the DRC has been referred to the International Criminal Court, making it the second case to be referred to the International Criminal Court by States Parties to the Rome Statute after the situation in Uganda.

In order to understand the role played by the International Criminal Court in the armed conflict in the DRC, it is necessary first to delve into the referral of the situation in the DRC to the ICC, and then detail the judicial proceedings undertaken by the Court against perpetrators of international crimes.

A. Referral of the Situation in the Democratic Republic of the Congo to the International Criminal Court

On April 19, 2004, the President of the DRC sent a request to the Prosecutor of the International Criminal Court, asking for the Court's jurisdiction to investigate crimes committed in the DRC and to punish the perpetrators. The Prosecutor had been informed since March 2003 based on information received through non-governmental organizations about the situation in the DRC. It is worth noting that the DRC is a State Party to the Rome Statute of the International Criminal Court, which it signed on September 8, 2000, and deposited its instrument of ratification on April 11, 2001.[20]

Based on that, the Prosecutor of the International Criminal Court opened an investigation on June 23, 2004 regarding the situation in the DRC, particularly to consider allegations of committing crimes including rape, torture, forced displacement, and the forcible recruitment of children, which had been committed since July 1, 2002, the date of entry into force of the Rome Statute. The Prosecutor had gathered information and reports on these allegations in cooperation with some states and international governmental and non-governmental organizations such as Amnesty International.[21]

B. The International Criminal Court Has Taken Judicial Proceedings Against High-Ranking Congolese War Criminals

After conducting the necessary investigations, the International Criminal Court brought charges against the key individuals responsible for committing war crimes and crimes against humanity, namely:

a) *Thomas Lubanga Dyilo*: on January 12, 2006, the Prosecutor filed a request with the Pre-Trial Chamber for the issuance of an arrest warrant against Thomas Lubanga Dyilo. The Chamber responded on February 10, 2006, by issuing a sealed order for his arrest, accusing him of war crimes, specifically the forced recruitment of children under the age of 15 and their use in active participation in hostilities. The Court sent a request for arrest and surrender to the DRC, which handed him over to the Court on March 17, 2006. On the same day, the Pre-Trial Chamber lifted the secrecy of the arrest warrant.[22]

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[20] MUHAMMAD AL-SHIBLI AL-ATOUM, INTERNATIONAL COOPERATION WITH THE INTERNATIONAL CRIMINAL COURT AND ITS IMPACT ON ITS EFFECTIVENESS (2015), at 184.
[21] *Id.*, at 185.
[22] ICC, Document No. ICC-ASP/5/15, 5th Session, Report on the Activities of the International Criminal Court for the Year 2006 Source, Assembly of States Parties (Oct. 17, 2006), at 3.

On June 10, 2012, the First Instance Chamber issued its verdict against Thomas Lubanga Dyilo, sentencing him to 14 years in prison. On August 7, 2012, the decision regarding principles and procedures for reparations was issued, and the Court authorized a total of 114 victims to participate in this case.[23]

On October 3, 2012, both Lubanga and the Prosecutor appealed the verdict. However, on December 1, 2014, the Appeals Chamber affirmed Lubanga conviction and upheld the 14-year prison sentence, which became final. Compensation procedures are still under consideration. Following the Appeals Chamber's judgment on March 3, 2015, which amended the First Instance Chamber's order regarding reparations, the Trust Fund for Victims was requested to submit a draft plan for implementing collective reparations to the First Instance Chamber.[24]

A panel of three judges from the Appeals Chamber decided on September 22, 2015, not to reduce Lubanga sentence. At that time, he had served four and a half years of his sentence. However, on December 8, 2015, the Presidency took into consideration Lubanga preference to serve his sentence in his home country, the DRC, and designated it as the state of enforcement.[25] This is considered the first judgment issued by the International Criminal Court since its founding treaty entered into force on July 1, 2002.

On December 15, 2017, the Second Instance Chamber issued a decision determining Lubanga liability in collective reparations for damages amounting to $10 million. The Chamber concluded that out of 473 applications received by the Court, 425 met the requirements for benefiting from collective reparations for redress. However, additional evidence suggested the existence of hundreds, if not thousands, of other victims. On January 15, 2018, Lubanga defense, along with legal representatives of the victims seeking reparations, filed two appeals challenging the decision.[26]

On July 18, 2019, the Appeals Chamber upheld a decision to amend the ruling issued by the Second Instance Chamber, which determined Lubanga liability for collective reparations. A directive was issued to the Trust Fund for Victims to commence the implementation of its proposal regarding the identification of locations for new claimants and the assessment of their eligibility for reparations, as approved by the Second Instance Chamber on February 7, 2019.[27]

b) *Germain Katanga and Mathieu Ngudjolo Chui*: the DRC handed over Germain Katanga and Mathieu Ngudjolo Chui to the International Criminal Court on October 18, 2007, and February 7, 2008, respectively. Each of them faced nine charges related to war crimes (willful killing, cruel treatment, using children and forcibly recruiting them, sexual slavery, attacking civilians, looting, outraging personal dignity, rape, and destroying or seizing enemy property), and four charges related to crimes against humanity (willful killing, inhumane acts, sexual slavery, and rape), allegedly committed during the attack on the village of Bogoro in February 2003.[28]

[23] UNGA, Document No. A/67/308, 67th Session, International Criminal Court Report to the United Nations for the Period 2011-2012, (Aug. 14, 2012), at 8.
[24] UNGA, Document No. A/70/350, 70th Session, International Criminal Court Report to the United Nations for the Period 2014-2015 (Aug. 28, 2015), at 11.
[25] UNGA, Document No. A/71/342, 71st Session, International Criminal Court Report to the United Nations for the Period 2015-2016 (Aug. 19, 2016), at 11.
[26] UNGA, Document No. A/73/334, 73rd Session, International Criminal Court Report to the United Nations for the Period 2017-2018 (Aug. 20, 2018), at 5.
[27] UNGA, Document No. A/74/324, 74th Session, International Criminal Court Report to the United Nations for the Period 2018-2019 (Aug. 23, 2019), at 5.
[28] UNGA, Document No. A/63/323, 63th Session, International Criminal Court Report to the United Nations for the Period 2007-2008 (August 22, 2008), at 7.

The Court of First Instance consolidated the two cases on March 10, 2008, a decision upheld by the Appeals Court which rejected the appeal against it. It confirmed the possibility of considering the two cases in one trial on June 9, 2008.[29]

On September 26, 2008, the Court of First Instance affirmed the charges brought by the prosecutor against the defendants. Following the confirmation of the charges, the Second Instance Court Presidency was formed, and the case was referred to it. The Court and the parties began preparations for the trial, particularly addressing procedural matters related to evidence disclosure, witness protection, and information. However, Katanga objected to the admissibility of the lawsuit filed against him, claiming that he had previously undergone judicial proceedings for the same crimes in the DRC. Consequently, the Second Instance Court convened a public session, attended by representatives of the DRC, including the Minister of Justice. On June 12, 2009, the Court rejected Katanga's objection, on the basis that national authorities had not opened any investigation into the attack for which Katanga was being prosecuted before the Court.[30]

On November 24, 2009, the trial of the accused began before the Second Instance Court. Over a period of more than 88 days of trial, the prosecution presented 105 pieces of evidence and called 14 witnesses and one expert to testify. The prosecution's presentation of arguments continued until July 16, 2010. A total of 362 victims are participating in the case through their legal representatives.[31]

On November 21, 2012, the Second Instance Court decided to separate the two cases. The Court acquitted Ngudjolo of all charges on December 18, 2012, and upon his release, he applied for asylum in the Netherlands. As for Katanga, the Court decided to activate Article 55 of the Rome Statute and notified the accused that it would reconsider the classification of charges in terms of criminal responsibility.[32]

On March 7, 2014, the Second Instance Court convicted the accused of committing five crimes, including war crimes and crimes against humanity, but acquitted him of charges of rape, sexual slavery, and using children under the age of 15 in combat. The court issued its verdict on March 23, 2014, sentencing him to 12 years in prison. On June 25, 2014, both the defense and the prosecution withdrew their appeals against the verdict, indicating that they did not intend to appeal against the judgment. Therefore, the decision issued by the Second Instance Court is final.[33]

A panel of three judges from the Appeals Chamber decided on November 12, 2015, to reduce Katanga's prison sentence from 12 years to 8 years and 8 months, setting January 18, 2016, as the date for the completion of his sentence. On December 8, 2015, the DRC was appointed as the state where Katanga would serve the remainder of his sentence.[34]

c) *Bosco Ntaganda*: The First Pre-Trial Chamber issued an arrest warrant for Bosco Ntaganda on August 22, 2006, due to his involvement in war crimes, specifically recruiting children under the age of 15 and using them in hostilities between July 2002 and December 2003, when he was a senior leader in an armed group in Ituri. The accused remained at large

[29] *Id*, at 07.
[30] UNGA, Document Number A/64/356, 64th session, International Criminal Court Report to the United Nations for the period 2008-2009 (Sept. 17, 2009), at 8.
[31] UNGA, Document Number A/65/31, 65th session, International Criminal Court Report to the United Nations for the period 2009-2010 (Aug. 19, 2010), at 12.
[32] UNGA, Document Number A/68/314, 68th session, International Criminal Court Report to the United Nations for the period 2012-2013 (Aug. 13, 2013), at 5.
[33] UNGA, Document Number A/69/321, 69th session, International Criminal Court Report to the United Nations for the period 2013-2014 (Sept. 18, 2014), at 12.
[34] UNGA, *supra* note 24, at 12.

and served as the chief of staff of the National Congress for the Defense of the People's Forces in North Kivu.[35] In October 2010, the Minister of Justice of the DRC refused to extradite him to the International Criminal Court.[36]

In light of this situation, the Second Pre-Trial Chamber issued a second arrest warrant on July 13, 2012, based on a request submitted by the Prosecutor on May 14, 2012. This warrant was issued on the basis of three charges related to crimes against humanity (murder, rape, sexual slavery, and persecution) and four charges related to war crimes (murder, attacking civilians, pillaging, rape, and sexual slavery), alleged to have been committed in the Ituri region from September 1, 2002, to the end of September 2003.[37]

On March 26, 2013, the accused appeared before the Second Trial Chamber after voluntarily surrendering to the Court, initiating the hearing session for the acknowledgment of charges on September 23, 2013. This session was adjourned on June 17, 2013, to February 10, 2014, at the request of the Prosecutor to allow sufficient time to fulfill obligations related to investigation and prosecution.[38]

Based on that, the trial of the accused began on September 2, 2015, before the Sixth Trial Chamber, which delivered its verdict on July 8, 2019. The verdict convicted Ntaganda of five charges of crimes against humanity and 13 charges of war crimes. It ruled that Ntaganda was directly liable for parts of the charges related to three crimes (murder as a crime against humanity and war crime, persecution as a crime against humanity), and also held him criminally responsible as an indirect co-perpetrator for other parts of these crimes and for aiding and abetting the crimes, without specifying the duration of the sentence, which it said it would determine at an appropriate time. The Appeals Chamber partially granted Ntaganda request for an extension of the deadline to file a notice of appeal.[39]

Following Ntaganda conviction on five charges of crimes against humanity and 13 charges of war crimes, the Sixth Trial Chamber received submissions from the parties and participants, heard witnesses, admitted evidence regarding potential sentencing, and held a session on the case from September 17 to 20, 2019. On November 7, 2019, Ntaganda was sentenced to 30 years in prison. Subsequently, Ntaganda appealed the conviction for crimes against humanity and war crimes, as well as the decision regarding the sentence, while the Prosecutor appealed a limited part of the conviction verdict.[40] However, on March 30, 2021, the Appeals Chamber confirmed Ntaganda conviction for crimes against humanity and war crimes and upheld the 30-year prison sentence issued by the Sixth Trial Chamber.[41]

d) *Kaléste Mbarushimana*: the Pre-Trial Chamber issued an arrest warrant for Mbarushimana on September 28, 2010, stating that there were reasonable grounds to believe that he personally and deliberately contributed to a joint plan by the Democratic Forces for the Liberation of Rwanda (FDLR) to lead an attack targeting civilian populations in northern and

[35] Amnesty International, International Amnesty International Report for the year 2009, Human Rights Situation in the World (2009), at 285.
[36] Amnesty International, International Amnesty International Report for the year 2011, Human Rights Situation in the World (2011), at 279.
[37] UNGA, *supra* note 23, at 9.
[38] UNGA, *supra* note 32, at 6.
[39] UNGA, *supra* note 27, at 6.
[40] UNGA, Document Number A/75/324, 75th session, International Criminal Court Report to the United Nations for the period 2019-2020, (Aug. 24, 2020), at 6.
[41] UNGA, Document Number A/76/293, 76th session, International Criminal Court Report to the United Nations for the period 2020-2021(Aug. 24, 2021), at 5.

southern Kivu in order to gain political concessions as part of an international campaign to wrest political power concessions in favor of the FDLR.[42]

On October 11, 2010, following the arrest of Mbarushimana by French authorities, the arrest warrant was unsealed, and the accused was transferred to the custody center of the Court in The Hague on January 25, 2011. He appeared before the Court for the first time on January 28, 2011. The confirmation of charges hearing was postponed at the request of the prosecution due to delays caused by technical difficulties encountered in reviewing the electronic devices seized at the suspect's premises. Subsequently, on July 25, 2011, the Prosecutor filed a document outlining the charges and a list of evidence, including 13 charges of war crimes and crimes against humanity alleged to have been committed in the North and South Kivu provinces and in eastern DRC from January 20 to December 31, 2009. The prosecution contends that Mbarushimana is responsible for contributing to the joint purpose of the Democratic Forces for the Liberation of Rwanda leadership by committing crimes through creating a "humanitarian catastrophe" in the North and South Kivu provinces to persuade the governments of Rwanda and the DRC to abandon their military campaigns against this group and to extract concessions for political power in Rwanda.[43]

During the confirmation of charges hearings held from September 16 to 21, 2011, to consider the charges, 32 victims were authorized to participate in the proceedings. However, on December 16, 2011, the Pre-Trial Chamber issued a decision by majority ruling to reject the confirmation of charges against Mbarushimana, on the basis that the prosecution did not provide sufficient evidence to prove that the suspect was individually responsible for the crimes he was accused of committing. Consequently, the majority decision of the Chamber was to release the accused from detention. On December 20, 2011, the Appeals Chamber dismissed the prosecution's appeal against the release decision, and subsequently, Mbarushimana was released.[44]

Based on the evidence provided, it appears that the involvement of the International Criminal Court in the armed conflict in the DRC was largely effective. The Court succeeded in prosecuting all individuals accused of committing war crimes and crimes against humanity in the conflict who were subject to arrest warrants. It managed to convict some of them, while acquitting others due to insufficient evidence.

IV. Conclusions

The armed conflict in the Democratic Republic of Congo is considered one of the most dangerous conflicts, where some of the most serious international crimes and severe human rights violations witnessed in Africa have been committed. This is clearly evidenced by the large number of civilian casualties. The outbreak of the armed conflict in the Democratic Republic of Congo can be attributed to a combination of internal and external factors. Internally, the conflict stems primarily from power struggles, ethnic conflicts among various tribal groups, and competition over the exploitation of rich natural resources, especially gold, within the country. Externally, the conflict is significantly linked to regional rivalries and

[42] UNGA, Document Number A/66/309, 66th session, International Criminal Court Report to the United Nations for the period 2010-2011 (Aug. 19, 2011), at 10.
[43] UNGA, Document Number A/66/309, 66th session, International Criminal Court Report to the United Nations for the period 2010-2011 (Aug. 19, 2011), at 10-11.
[44] UNGA, *supra* note 23, at 9.

foreign interventions that have greatly contributed to the outbreak of the armed conflict, particularly by neighboring countries of the Democratic Republic of Congo.

Despite the settlements reached between the parties to the armed conflict in the Democratic Republic of Congo, which included holding presidential and legislative elections, they have failed to stop the armed conflict.

With the national judiciary's failure and reluctance to investigate serious crimes and human rights violations in the Democratic Republic of Congo, the country's president referred the situation to the International Criminal Court as a State Party to the Rome Statute. This action aimed to enable necessary investigations and ensure the prosecution and punishment of those responsible for international crimes. Consequently, the referral of the situation in the Democratic Republic of Congo to the International Criminal Court became one of the cases referred by States Parties to the Rome Statute following Uganda.

The International Criminal Court conducted necessary investigations regarding allegations of international crimes falling within its jurisdiction. Based on these investigations, the ICC issued several arrest warrants against major war criminals. The Court proceeded to conduct trials, resulting in various outcomes including convictions and acquittals after due process.

The success of the International Criminal Court in the cases brought before it regarding the situation in the DRC, compared to other cases in various countries where the ICC has initiated investigations, is evident in the execution of all arrest warrants issued against major war criminals, their prosecution, and the issuance of judgments against them.

Unifying the Legal Tapestry: Navigating ICC's Jurisprudential Disarray

by Lily Zanjani[*]

ABSTRACT: This study delves into the paramount significance of coherence within the International Criminal Court's (ICC) jurisprudence and its profound implications across various dimensions. The initial section underscores the pivotal role of coherence, illustrating its direct correlation with the ICC's legitimacy, the sanctity of the rule of law, and the establishment of a consistent jurisprudence. Following this, the study scrutinises notable case laws that have challenged the ICC's coherence, specifically examining instances concerning case admissibility, appeal certifications under the A-B-C Approach, and diverging perspectives on the standard of proof. Unveiling the underlying reasons for these discrepancies, the study identifies several factors such as deficiencies in collegiality, procedural matters, internal oversight gaps, the Rome Statute's ambiguities, judiciary composition, and the influence of political interests. Lastly, the study proposes potential solutions to address these challenges, aiming to foster greater coherence within the ICC's legal framework. In summary, this analysis delineates the critical role of coherence, pinpoints existing challenges, and offers prospective remedies to fortify the ICC's jurisprudential consistency and efficacy.

KEYWORDS: Coherent Jurisprudence; Importance of Consistent Precedent; International Criminal Court; Legitimacy of the ICC.

I. Introduction

The consistent practice of international courts and tribunals referring to the streamlined and efficient procedural methods and approaches employed by judicial bodies has been long established. It involves the effective management of legal proceedings, focusing on clarity, brevity, and precision in presenting arguments, evidence, and judgments.[1] This practice aims to ensure the expeditious resolution of disputes while maintaining fairness, adherence to legal principles, and the protection of rights within the international legal framework.[2] Precisely due to this inevitable impact, cohesive jurisprudence making is indispensable. Inconsistency arising from the practices of international courts not only diminishes their legitimacy and authority but also interferes with the fair delivery of justice and the jurisprudence that in turn contributes to the development of law.[3]

For these purposes, this paper is dedicated to identifying issues relating to the coherence of judgements and decision-making at the International Criminal Court (ICC). It will begin by emphasizing the importance of coherence in the ICC's practices and the exercise of justice. It will then expand to cover the significance of jurisprudence. The term jurisprudence in this paper

DOUBLE BLIND PEER REVIEWED ARTICLE

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[1] Caterina Milo, *Tackling lacunae in international courts and tribunals' procedure: the role of external precedent*, 2(2) THE ITALIAN REVIEW OF INTERNATIONAL AND COMPARATIVE LAW 323 (2022).

[2] Sanja Kutnjak Ivković, John Hagan, *The Legitimacy of International Courts: Victims' Evaluations of the ICTY and Local Courts in Bosnia and Herzegovina*, 2016, 14(2) EUROPEAN JOURNAL OF CRIMINOLOGY 200 (2016).

[3] Bruno Simma, *Universality of International Law from the Perspective of a Practitioner*, 20(2) EUROPEAN JOURNAL OF INTERNATIONAL LAW 265 (2009).

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denotes the past reasoning and application of the law at the ICC (precedent). The paper will then discuss a few examples where various discrepancies interfered with the coherent jurisprudence making of the Court. Through this virtue, it will uncover the underlying reasons for the existence of these discrepancies and will suggest solutions to tackle them.

The lack of communication, diverse legal and cultural backgrounds of the judges, differences in interpretation (due to the gaps in the Rome Statute) as well as previous inconsistent practices of the Court would be marked as the reasons for these existing discrepancies. It will then suggest that through creating relevant frameworks and adopting better communicational strategies, these incoherencies can be tackled.

As will be noted more extensively throughout this paper, these remedies encompass different scopes and concern different levels of decision-making across the Court; (1) It can encompass *inter alia* collegiality among the judges by adhering to the Chambers Practice Manual,[4] (2) for defence councils to be more innovative and benefit from the past exercises at various tribunals while abiding by and prioritising the ICC's jurisprudence, (3) for the prosecution to address the issues relating to tendering of evidence and for the presidency to ensure an elimination of political issues tying with the legal matters intruding the process of justice.

Different levels of analysis will be employed to fulfil the objectives of this paper; (1) looking at the discrepancies arising from same identical legal matters in different cases brought before the Chambers at the same stages of the proceeding (Pre-Trial, Trial, or Appeals) that led to different findings; (2) looking at discrepancies within the findings of different Chambers (whether it was Pre-trial, Trial or Appeals) on the same issue; and (3) looking at deviations from Appeals Chamber jurisprudence.

The foresaid coherence problems will be examined through various sources. This includes the findings of the Independent Expert Review (IER),[5] primary sources such as ICC judgments and jurisprudence and submissions of different parties to the Court. Secondary sources will be utilized to benefit from the scholarly articles and account for their perspective and suggestions to resolve the problems.

II. Importance of Coherence

The ICC's inconsistencies span a wide range, encompassing various aspects, not confined to divergences in sentencing judgements, departure from jurisprudences, differences in interpretations of the same rules under the statute, from trial and pre-trial judgments and the ICC Appeal Chambers' rulings, and the acceptance of different practices by different parties before various Chambers.[6] Hence, for the purposes of this study, any respect for the abovementioned criteria would be observed as abiding by a coherent practice.

Thus, the prominence of coherence in jurisprudence making can be outlined in three main pillars as it impacts the Court's legitimacy, its impact on the authority through its respect for the Rule of Law, and its impact on future law making.

[4] ICC, Chambers Practice Manual, 5th edition (March 25, 2022).
[5] ICC, Independent Expert Review of the International Criminal Court and the Rome Statute System (September 22, 2020).
[6] Annika Jones, *Measuring performance and shaping identity*, 4(18) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 825 (2020).

A. Impacts on the Court's Legitimacy

A coherent jurisprudence is crucial for legitimacy as it ensures consistent and fair legal decisions, bolstering trust in the judicial process and upholding the credibility of the institution.[7] Hence, the Court's legitimacy heavily relies upon a consistent and justifiable level of development. Considering that the predicaments of confidence in the Court[8] emanate from its "failure to appreciate the impact on its legitimacy through inconsistency and incoherence in its decision-making",[9] it is important for the coherence problems to be addressed since judicious decisions are crucial for the perpetuation of the Court's legitimacy.

This is mainly due to judicial decisions being crucial to upholding the Court's legitimacy, since they serve as the bedrock of its authority and credibility. By upholding impartiality, fairness, and adherence to international legal standards, these decisions affirm the Court's integrity.[10] Consistent, well-reasoned judgments bolster public trust, reinforcing the Court's role as a legitimate forum for addressing global justice. Such decisions also contribute to setting precedents, shaping the Court's jurisprudence, and fostering confidence among stakeholders, including states, affected communities, and the broader international community, in the Court's ability to administer justice effectively.[11]

A court's legitimacy may be undermined by inconsistent practice in various ways. First, contradictory decisions in similar cases lacking clear reasoning may raise doubts about any court's impartiality and coherence.[12] Second, inconsistencies in applying legal principles across cases or jurisdictions might signal arbitrariness or bias, undermining confidence in the court's fairness.[13] Third, divergent interpretations of law by the same court create confusion and question reliability.[14] Additionally, unequal treatment among parties or disparate judgments for similar situations can foster perceptions of favoritism.[15] Finally, frequent reversals or contradictions of previous rulings without justification might diminish trust in the court's consistency and reliability.[16] These inconsistencies can erode the perceived fairness and reliability of the court's decisions, potentially impacting its legitimacy and public confidence.

Inconsistencies in the practices of any international courts and tribunals can impact their legitimacy in the eyes of their varied constituents (every institution, actor or entity who is a

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[7] Adamantia Rachovitsa, *The Principle of Systemic Integration in Human Rights Law*, 66(3) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 557 (2017).

[8] Harold Hongju Koh, *The Global Prosecutors*, 35(2) HARVARD INTERNATIONAL REVIEW 65 (2013); ROBERT CRYER, DARRYL ROBINSON *et al.*, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (2010); Virginia Morris, Michael Scharf, *The International Criminal Court's Trigger Problem*, 25(1) LEIDEN JOURNAL OF INTERNATIONAL LAW 165 (2012); CHRISTA RAUTENBACH, THE ROLE OF THE INTERNATIONAL CRIMINAL COURT IN ENFORCING INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS (2014).

[9] Gabrielle Mcintyre, *The Impact of a Lack of Consistency and Coherence: How Key Decisions of the International Criminal Court have Undermined the Court's Legitimacy*, 67 QUESTIONS OF INTERNATIONAL LAW 25 (2020).

[10] Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQUIRES IN LAW 455 (2013).

[11] Mcintyre, *supra* note 9.

[12] Michał Rynkowski, *Religious Courts in the Jurisprudence of the European Court of Human Rights*, 1(2) BRILL RESEARCH PERSPECTIVES IN LAW AND RELIGION 1 (2018).

[13] Margaret Levi, Audrey Sacks, Tom R. Tyler, *Conceptualizing Legitimacy, Measuring Legitimating Beliefs*, 3(53) AMERICAN BEHAVIORAL SCIENTIST 354 (2009).

[14] Stephen J. Schulhofer, *Divergent Interpretations of Legal Texts: A Comparative Perspective*, 88(2) THE UNIVERSITY OF CHICAGO LAW REVIEW 527 (2021).

[15] Vesselin Popovski, *Perceptions of Inequality at the International Criminal Court: A Case Study Approach*, 31(4) INTERNATIONAL CRIMINAL LAW REVIEW 405 (2000).

[16] Adekemi, Afolabi, *Effecting Consistency in Investor-State Dispute Settlement through the Introduction of Precedent in a Multilateral Investment Court*, 4 (24) ZEITSCHRIFT FÜR EUROPARECHTLICHE STUDIEN 663 (2021).

subject to and is influenced by the courts' findings and practice).[17] Various aspects of the inconsistencies arising from international courts and tribunals' exercises of justice have been significantly criticised by international law scholars.[18] In the realm of international courts and tribunals, several inconsistencies undermine the perceived legitimacy of these institutions. Divergent interpretations of legal provisions across various courts often result in conflicting judgments, casting doubt on the consistency and coherence of their decisions.[19] Equally concerning are instances where similar cases yield disparate rulings or appear to favor certain parties, breeding perceptions of bias and inequality.[20] Furthermore, inconsistencies in adhering to precedents and varying application of procedural rules contribute to unpredictability and weaken the perceived fairness of the legal process.[21] Selective jurisdictional choices and contradictory legal reasoning further erode confidence in the uniformity and reliability of international judicial practice, fostering debates about the effectiveness and credibility of these institutions.[22]

Even though the presence of incoherencies has always been acknowledged in the practice of *ad hoc* tribunals, it seems that the tangible concern arose when the ICC started practicing incongruously.[23] This might be justified considering that it is a permanent court and expectations are deemed higher from for the ICC than its other *ad hoc* predecessors (International Criminal Tribunal for Former Yugoslavia and International Tribunal of Rwanda). The expectations from the ICC are notably higher due to its status as a permanent and globally recognized judicial body. Unlike *ad hoc* tribunals established for specific conflicts or situations, the ICC is a permanent institution entrusted with the responsibility to prosecute the most serious crimes that affect the international community.[24] Its permanent nature implies an enduring commitment to justice, making it subject to higher expectations in terms of consistency, fairness, and effectiveness in delivering justice on an ongoing basis. The establishment of a permanent court inherently sets a precedent for long-term accountability and consistency in addressing grave violations of international law, thereby heightening expectations regarding its

[17] Jeffrey L. Dunoff, Mark A. Pollack, *The Road Not Taken: Comparative International Judicial Dissent*, 116(2) AMERICAN JOURNAL OF INTERNATIONAL LAW 340 (2022); Joanna Nicholson, *"Too High", "Too Low", or "Just Fair Enough"?*, 17(2) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 351 (2019).

[18] Jeff Handmaker, *The Legitimacy Crisis Within International Criminal Justice and the Importance of Critical, Reflexive Learning* in THE PEDAGOGY OF ECONOMIC, POLITICAL AND SOCIAL CRISES: DYNAMICS, CONSTRUALS AND LESSONS (Bob Jessop, Karim Knio ed., 2018), at 189-206; Margaret M. deGuzman, *Gravity and the Legitimacy of the International Criminal Court*, 32 FORDHAM INTERNATIONAL LAW JOURNAL 1422 (2008); Tonny R. Kirabira, *Elements of Aggravation in ICC Sentencing: Victim Centered Perspective*, 13(2) AMSTERDAM LAW FORUM 25 (2021); Sarah Nouwen, Wouter Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan: A Rejoinder to Bas Schotel*, 22(4) EUROPEAN JOURNAL OF INTERNATIONAL LAW 1161 (2011).

[19] Yuri E. Pudovochkin, Mikhail M. Babayev, *Contradictions of Judicial Criminal Policy*, 6(1) ПРАВОПРИМЕНЕНИЕ 174 (2022).

[20] Nora Stappert, *Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning through the Interpretive Practices of International Criminal Courts*, 12(1) INTERNATIONAL THEORY 33 (2020).

[21] *Id*.

[22] Yuri E. Pudovochkin, Mikhail M. Babayev, *supra* note 19.

[23] Mladen Milošević, *Personal Data Protection in Criminal Law*, 59(2) JOURNAL OF CRIMINOLOGY AND CRIMINAL LAW 113 (2021).

[24] Agnieszka Szpak, *Legacy of the ad hoc International Criminal Tribunals in Implementing International Humanitarian Law*, 4(9) MEDITERRANEAN JOURNAL OF SOCIAL SCIENCES 525 (2013).

performance, integrity, and contribution to global justice.[25] This permanent reputation amongst other factors is indeed a component that has given the ICC its legitimacy and authority.

The legitimacy of a court often derives from different sources, with one approach grounded in positive law, emphasizing adherence to established legal precedents, statutes, and rules.[26] This form of legitimacy underscores the importance of consistency and predictability in legal decisions, highlighting the significance of past judgments as binding precedents. However, an alternative view of legitimacy transcends the strict confines of positive law, leaning on moral values, particularly human rights principles, to define its legitimacy.[27] Here, the court's authority is not solely based on legal statutes but also on broader principles of justice, fairness, and fundamental human rights. This approach may involve decisions that, while not directly codified in law, align with the widely accepted moral norms. These contrasting approaches underscore the complex interplay between legal precedent and ethical values in shaping a court's legitimacy, highlighting the dynamic nature of its foundation.[28]

The multifaceted nature of any court's legitimacy, encompassing both legal and moral dimensions is inevitable. The complexities of measuring and understanding the legitimacy of courts, shedding light on the interplay between legal positivism and moral values in shaping perceptions of judicial authority becomes clear when synthesizing these perspectives. There exists a comprehensive understanding of the diverse sources of court legitimacy, bridging the gap between legal precedent and ethical principles.[29] The multidisciplinary approach will integrate legal analysis, moral philosophy, and empirical assessments to elucidate the intricate dynamics of court legitimacy, contributing to the scholarly discourse on the foundations of judicial authority.

Consequently, it can be claimed that the ICC would gain its legitimacy not due to the precedent it has established but rather on the futuristic view they possess in the people's perception of morality. Hence, the rulings not based on precedents might struggle to perpetuate on the basis of the modern perception of particular issues and how the law has perceived it throughout the time. On another account, the legitimacy of judge-made laws cannot develop itself fully as the entities subject to these judges might not be able to comprehend and follow the developments since it has not been based on precedent. This becomes more evident at the international level where there are judges from diverse legal backgrounds who could have had practices in different legal cultures.[30] Hence, affecting the approach in which the judgments are made and the basis of these judgments which significantly influences the legitimacy of the courts.

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[25] William Schabas, *Preface*, in AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (William Schabas, 2001), at VII.

[26] James Gibson, Gregory A. Caldeira, Vanessa A. Baird, *On the Legitimacy of National High Courts*, 92(2) THE AMERICAN POLITICAL SCIENCE REVIEW 343 (1998).

[27] Kerstin Bree Carlson, *International Criminal Law and Its Paradoxes: Implications for Institutions and Practice*, 5(1) JOURNAL OF LAW AND COURTS 33 (2017).

[28] *Id*.

[29] James L. Gibson, Gregory A. Caldeira, Lester K. Spence, *Measuring Attitudes Toward the United States Supreme Court*, 47(2) AMERICAN JOURNAL OF POLITICAL SCIENCE 354 (2003).

[30] William Schabas, *Customary or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO (José Doria, Hans-Peter Gasser, M. Cherif Bassiouni eds., 2009), at 75-101.

B. Impacts on the Rule of Law and the Court's Authority

Moreover, it is vital for the perseverance of the Rule of Law that the coherence problems are tackled because coherence ensures consistency, predictability, and equality in the application of legal principles. The Rule of Law in judicial proceedings encapsulates the principle that all individuals and entities, including the government, are subject to and accountable under the law.[31] It emphasizes that laws should be applied consistently and fairly, providing equal treatment and protection for all individuals regardless of their status or position. In judicial proceedings, this principle entails that decisions and actions of the court are based on established laws, legal principles, and precedents rather than arbitrary or discretionary judgments.[32] It ensures transparency, predictability, and adherence to legal procedures, contributing to the legitimacy and trust in the justice system.[33] Since the idea of Rule of Law embodies foreseeability and certitude of law, coherence is vital.[34] Considering that the law's authority is often deemed to be dependent on legal certainty, coherence can provide and strengthen this authority.[35] Hence, if there is no consistency in decision-making, the rights of constituents (as the right to truth and justice) would be infringed. And that is erratic to the certainty offered by the rule of law and protection of rights.[36]

Additionally, since the constituents are already possessing different "cultural, historical, political"[37] backgrounds which amounts to a fragmented catalyst, consistency can diminish the effects of such fragmentation.

It is believed that the ICC endeavors more than other international tribunals and courts to respect the rule of law and its perseverance.[38] Therefore, as an authoritative body, inconsistencies in legal practices and judgements would undermine and impact the importance of the rule of law.

Ultimately "the rule of law based upon the uniform development of jurisprudence will be best secured by strengthening the role of (International Criminal Court)".[39] Hence, it is important for this responsibility to not be infringed by unconscious discrepancies.

When there is coherence in legal decisions, it upholds the rule of law by ensuring that similar cases are treated similarly, establishing clear precedents, and fostering trust in the judiciary. Inconsistencies or lack of coherence may erode confidence in the legal system, potentially undermining the fundamental principles of fairness, equality before the law, and the predictability of legal outcomes, all of which are essential aspects of the rule of law.[40]

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[31] Dongxiao Xu, *How the Rule of Law Connects and Protects Human Rights?*, 8 JOURNAL OF MANAGEMENT AND HUMANITY RESEARCH, 25 (2022).
[32] *Id*.
[33] TOM BINGHAM, THE RULE OF LAW (2010).
[34] ICC, *supra* note 4.
[35] *Id*.
[36] Jonathan Hafetz, *Fairness, Legitimacy, and Selection Decisions in International Criminal Law*, 50 VANDERBILT LAW REVIEW 1133 (2021), at 1166.
[37] Antony Pemberton, Rianne M. Letschert, Anne-Marie de Brouwer *et al.*, *Coherence in International Criminal Justice: A Victimological Perspective*, 15(2) *INTERNATIONAL CRIMINAL LAW REVIEW* 339 (2015).
[38] THE PAST, PRESENT AND FUTURE OF INTERNATIONAL CRIMINAL COURT (Alexander Heinze, Viviance Dittrich eds., 2011), at 748; Nicolas Croquet, *The International Criminal Court and the Treatment of Defence Rights: A Mirror of the European Court of Human Rights' Jurisprudence?*, 11(1) HUMAN RIGHTS LAW REVIEW 91 (2011).
[39] Oda Shigeru, *Dispute Settlement Prospects in the Law of the Sea*, 44(4) THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 863 (1995).
[40] Jens David Ohlin, *A Meta-Theory of International Criminal Procedure: Vindicating the Rule of Law*, 14(1) UCLA JOURNAL OF INTERNATIONAL LAW AND FOREIGN AFFAIRS 77 (2009).

Addressing coherence problems helps maintain the integrity and effectiveness of the judicial process, which is critical for upholding the rule of law within and beyond the Court.

More specifically, it is also important for the fulfilment of the principle of legality that the rule of law is respected.[41] Thus, consistency would increase the reliability of justice as the constituents (*e.g.*, a defendant before the ICC) would have a lucid depiction of their destiny before the Court.

Moreover, it is important to note that positive law as a written and textual law is stated to be "strict and terrible lawfulness" as opposed to natural law which is more grounded in morals and social values.[42] Accordingly, the precedent-based form of legitimacy (which is grounded in positive law) can be contrasted with a form of legitimacy that arises through a non-positive approach where the Court grounds itself on moral values (such as human rights).

In terms of enhancing the rule of law through coherent practice that would consequently enhance the legitimacy of the Court, it can be concluded that the codifications of the law as it has occurred under the Rome Statute empowers the rule of law by providing legal certainty,[43] although it cannot be guaranteed that the same codifications will be perceived and interpreted identically. A more extensive scrutiny of this case would be made evident through the course of this paper when discussing the implications of Rome Statute's Art. 66.[44] Therefore, it was illustrated how coherence in interpretation is a necessity for the maintenance of the rule of law as it can be seen to be one of the objectives of the Rome conference when considering that the establishment of the Court was to bring legitimized judgements and respect the retributive justice objectives of criminal law.

Moreover, the ICC has been acknowledged to be the solution to the "long struggle to advance the cause of justice and the rule of law".[45] One of the reasons for this status is believed to be discipline.[46] However, as it will be exhibited throughout this paper, this is not entirely the case and its practice has jeopardised this high standing and expectancy.

C. Creation of Jurisprudence

If the precedent and the practice of interpretation is coherent, then the Court can rely on itself to create jurisprudence.[47] "Jurisprudential theories of coherence" are often considered to be "constitutive" as it is through the coherent application of the law that the independence and

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[41] Beth Van Schaack, *Legality & International Criminal Law*, 103 INTERNATIONAL LAW AS LAW: PROCEEDINGS OF THE ANNUAL MEETING (AMERICAN SOCIETY OF INTERNATIONAL LAW) 101 (2009); Maxim V. Danshyn, *The Role of Principles of Legality and the Rule of Law in Ensuring Pre-Trial Investigation and the Rights of its Participants*, 23 Вісник Харківського національного університету імені В. Н. Каразіна Серія: «Право» 148 (2017).

[42] Kerstin Bree Carlson, *International Criminal Law and Its Paradoxes: Implications for Institutions and Practice*, 5(1) JOURNAL OF LAW AND COURTS 33 (2017).

[43] HECTOR O. ALONSO, ESTUDIOS DE DERECHO PENAL INTERNACIONAL (2010), at 61; Leena Grover, *A Call to Arms: Fundamental Dilemmas Confronting the Interpretation of Crimes in the Rome Statute of the ICC*, 21(3) EUROPEAN JOURNAL OF INTERNATIONAL LAW 543 (2010), at 570; GERRY J. SIMPSON, LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW (2007), at 39.

[44] ICC, Statute of the International Criminal Court, art. 66.

[45] UNSG, S/2004/616, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General (Aug. 23, 2004), para. 49.

[46] WILLIAM SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2004), at 25.

[47] MOHAMED SHAHABUDDEEN, PRECEDENT IN THE WORLD COURT (1996); Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) *JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT* 5 (2011).

success of a Court can be established.[48] This points out to the purpose of coherent jurisprudence which is to establish a systematic and consistent framework within legal systems. Several theories *inter alia* consistency, systematicity, integrity and hermeneutical theories contribute to this coherence.[49]

Jurisprudential theories of coherence encompass several concepts that aim to establish consistency and unity within legal interpretations. The first theory, systematic coherence, highlights the significance of legal decisions aligning with the overarching structure and principles of the legal system. It emphasizes maintaining harmony within the legal framework by ensuring that individual decisions are congruent with the broader legal structure. Systematicity theory focuses on structuring legal principles and rules within a comprehensive system. It seeks to ensure that laws fit together coherently, avoiding contradictions or conflicts.[50]

Consistency theory emphasizes the importance of uniformity and consistency in legal decisions, ensuring predictability and stability in the law. It prioritizes treating similar cases similarly.[51]

Moving to internal coherence, this theory focuses on consistency within a specific body of law or legal doctrine. Its aim is to avoid contradictions or conflicts within the same legal context, emphasizing the need for decisions to be internally coherent and logically aligned.

In contrast, external coherence extends its focus beyond individual legal systems or doctrines. It prioritizes consistency and coordination between different legal systems or international laws. The goal is to ensure alignment and coherence across diverse legal frameworks, fostering uniformity and cooperation between various legal entities.

Integrity theory centers on maintaining the moral or ethical integrity of the legal system. It suggests that legal decisions should align with fundamental principles, values, or moral standards to enhance the system's legitimacy.[52]

Hermeneutical theory involves interpreting laws in a way that harmonizes them with broader legal principles, social values, and constitutional norms. It seeks to reconcile different legal provisions to create a coherent legal narrative.[53]

Lastly, pragmatic coherence underscores the practical application and consequences of legal decisions. This theory prioritizes coherence by considering the real-world impact and effectiveness of legal interpretations, emphasizing practicality and effectiveness in legal application. These theories serve as guiding principles to uphold coherence within legal systems, promoting stability, predictability, and fairness in legal outcomes.

These theories strive to create a unified and logically coherent legal framework, enhancing the predictability, legitimacy, and fairness of legal systems.

As discussed, the main tenet of jurisprudence is considered to be interpreting the law,[54] the constructive interpretation rests upon the practice of jurisprudence, it is imperative for jurisprudence to be coherent. Moreover, the role of jurisprudence becomes more evidently

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[48] Joseph Raz, *The Relevance of Coherence*, 72(2) BOSTON UNIVERSITY LAW REVIEW 273 (1992).
[49] RONALD DWORKIN, LAW'S EMPIRE (1986); HERBERT L.A. HART, THE CONCEPT OF LAW (1961); LON L. FULLER, THE MORALITY OF LAW (1964); JOSEPH RAZ, *The Authority of Law* (Oxford University Press 1979).
[50] *Id*.
[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] Kenneth J. Kress, *Legal Reasoning and Coherence Theories: Dworkin's Rights Thesis, Retroactivity, and the Linear Order of Decision*, 72(3) CALIFORNIA LAW REVIEW 369 (1984), at 398-402.

inevitable when noticing that the volatile uncertainties that in turn erratically affect the application and interpretations of the law can be tackled through jurisprudence.[55]

Furthermore, a coherent jurisprudence would allow for a better practice and implementation of positive law. The principle of *lex mitior*, which encompasses this aspect of positive law under criminal law, heavily relies on jurisprudence and past exercises of justice. The principle of *lex mitior* in international criminal law refers to the application of the most favorable legal provisions to an individual accused of committing crimes under international law. It signifies that if there are changes or updates in the law during legal proceedings, the accused should benefit from any subsequent change that mitigates their situation, such as reduced penalties or improved legal rights. This principle safeguards against retroactive application of laws that might disadvantage the accused and ensures that they are subject to the most lenient laws available at the time of the alleged offense or trial.[56] Thus, without a congruous jurisprudence, respecting such principles and positive evolvements would not be feasible, specifically under international criminal law.

Moreover, if the jurisprudence is consistent, it is more feasible to decide whether and when the Court should decide to depart from the precedent or affirm the existing ones. This means that the improvement or development of law heavily relies on jurisprudence. Hence, a concise jurisprudence would contribute drastically to the creation of future laws.

As discussed in the previous section, the law is already fragmented by the inconsistencies from different interpretations of the applicable law, hence, the eminence of coherent jurisprudence as an element that could rescue and preserve the law consistent with the fundamental essences of its creation is acknowledgeable.

Moreover, the past, present and future of the ICC heavily relies upon jurisprudence. As the successor to *ad hoc* tribunals, the ICC carries a heavy responsibility to sustain the laws interpreted and applied in these tribunals' practices. In this way, the jurisprudence can empower (either negatively or positively) and give meaning to the established and exercised laws exercised by the Court. Therefore, coherency does not only feature in the history of the Court, but also contributes to its success or failure – therefore the future of the Court.[57]

Overall, jurisprudence is important as it provides grounds for the concise development of the law, provides the primary roots for future cases to rely upon it, and increases the Court's legitimacy.

III. Case Laws Challenging Coherence

A. Admissibility of cases before the ICC pursuant to Art. 17

Under this section, the cases of *Al-Senussi* and *Gaddafi* will be compared pursuant to Art. 17 (which refers to the admissibility of cases before the ICC in accordance with the complementarity principle–outlining that cases will be inadmissible before the ICC if a state

[55] Andrea Carcano, *Of Fragmentation and Precedents in International Criminal Law: Possible Lessons from Recent Jurisprudence on Aiding and Abetting Liability*, 14(4) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 771 (2016).
[56] ICTY, The Prosecutor v. Dragan Nikolić, IT-94-2-A, Appeal Chamber, Judgement (Feb. 4, 2005), paras. 8-85.
[57] Dothan, *supra* note 10, at 278; Marieke de Hoon, *The Future of the International Criminal Court. On Critique, Legalism and Strengthening the ICC's Legitimacy*, 17(4) INTERNATIONAL CRIMINAL LAW REVIEW 591 (2017), at 608; Asad Kiyani, *Group-Based Differentiation and Local Repression: The Custom and Curse of Selectivity*, 14(4) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 939 (2016), at 956.

with jurisdiction over the case is genuinely investigating or prosecuting the same individual for the same conduct). In essence, the ICC will defer to national legal systems if they are genuinely investigating or prosecuting the case, except in cases where the state is unwilling or unable to genuinely proceed. This section will therefore cover the inconsistent approach of the ICC in admitting the two cases of *Al-Senussi and Gaddafi;* albeit they both were facing the same level of complementarity pursuant to the criteria listed under Art. 17.

In the case of *Gaddafi*, the Pre-Trial Chamber determined that Libya's investigation into the case against Muammar Gaddafi was insufficient to establish that the national authorities were genuinely conducting the proceedings or that they were willing or able to do so. Due to this, the case was declared inadmissible before the ICC under Art. 17 of the Rome Statute, and the ICC maintained jurisdiction over the matter.[58]

Similarly, in the case involving Abdullah Al-Senussi, the Pre-Trial Chamber found that Libya's efforts and proceedings were not adequate to demonstrate genuine investigation or prosecution. However, the case against Al-Senussi was deemed inadmissible before the ICC under Art.17, allowing the ICC to retain jurisdiction over the matter.[59]

The issue of inconsistency in this case arose when the Pre-Trial Chamber I dismissed the *Al-Senussi*[60] case before the Court whilst admitting the *Gaddafi*[61] case. Eventually, while the Appeals Chamber in an orderly manner, sustained to the inadmissibility and admissibility of these two cases,[62] yet there is only a vague spectrum to discuss the means and rationales of this discrepancy in the first place.

Contradictory and incompatible assessment of the same element under Art. 17 of the Rome Statute led to this conflicting conclusion to exist. This element pertained to Libya's limitation and inability to carry out a trial within its domestic judicial system for either of these two cases.

At the first stages of comparison analysis, it is important to note that this discrepancy occurred under the exercise of the same Chamber (Pre-Trial Chamber I) with the same judges presiding across over both cases.

The main divergence in the opinion of the judges seem to be arising from that of "unwillingness" and "inability" of Libya to conduct fair trials or provide conditions for the process of justice and the respect for the Rule of Law.[63] However, the same Chamber accepted the evidence brought forward by the defence of Mr. Al-Senussi and the Libyan authorities regarding the efficiency and capability of the Libyan Courts, institutions and the justice system as a whole to assess and respond to Mr. Al-Senussi's conducts and crimes. Therefore, the decision was made despite "Libya's failure to provide the accused with legal counsel",[64] which in turn influenced the fair process of justice.

However, another divergent point that contributed to the recognition of admissibility in the *Gaddafi* case in comparison to *Al-Senussi* is that the latter was an open case before the

[58] ICC, The Prosecutor v. Saif Al- Islam Gaddaffi and Abdullah Al-Senussi*,* ICC-01/11-01/11-466, Pre-Trial Chamber, Decision in the Admissibility of the Case against Abdullah Al-Senussi (Oct. 11, 2013).
[59] ICC, The Prosecutor v. Saif Al- Islam Gaddaffi and Abdullah Al-Senussi*,* Pre-Trial Chamber, ICC-01/11-01/11-344, Decision on the Admissibility of the Case against Saif Al-Islam Gaddafi (May 31, 2013).
[60] Schabas, *Customary or Judge-Made Law: Judicial Creativity at the UN Criminal Tribunals*, *supra* note 30.
[61] Xu, *supra* note 31.
[62] ICC, The Prosecutor v. Saif Al-Islam Gaddaffi, ICC-01/11-01/11-695, Appeal Chamber, Judgement (Mar. 9, 2020); ICC, The Prosecutor v. Saif Al-Islam Gaddaffi, ICC-01/11-01/11 OA 6, Appeal Chamber, Judgement (July 24, 2014).
[63] ICC, The Prosecutor v. Saif Al- Islam Gaddaffi and Abdullah Al-Senussi, *supra* note 59, paras. 204-205.
[64] Michele Tedeschini, *Complementarity in Practice: The ICC's Inconsistent Approach in the Gaddafi and Al-Senussi Admissibility Decisions*, 7(1) AMSTERDAM LAW FORUM 76 (2015).

Libyan domestic Court. As the Court acknowledges, the "undertaken domestic proceedings" are covering the "same case".[65] Whereas as stated by the Pre-Trial Chamber I, a genuine attempt for effective proceedings were missing in the case of Gaddafi even though the Libyan authorities were claiming to have opened an ongoing and effective investigations in relation to the crimes conducted by Gaddafi.[66]

Moreover, the "unwillingness" test required the Court to prove unwillingness of a State for "carrying out investigation or prosecution".[67] However, by relying on evidence admitted by the Pre-Trial Chamber, the existing evidence demonstrated a several progressive steps conducted to determine Mr. Gaddafi's criminal responsibility by the Libyan authorities.[68] This indeed is not consistent with Libya fulfilling the unwillingness test.

These two cases divert the attention to the interpretation and understanding of what falls within the scope of "unwillingness" as expressed under Art. 17. The criterion for establishing a state's unwillingness is not only vague and opposite to what the founding fathers aimed to stick to as "objective" but also the category of what is considered as "otherwise" under the inability provision is obscure and indefinite.

Additionally, the foresaid cases concerned "the lack of legal representation" for the accused, amounting to the unwillingness and inability of Libya to conduct a fair trial.[69] Consequently, the Pre-Trial Chamber was expected to follow the same reasoning and logic as in *Gaddafi* to hold the *Al-Senussi* case admissible. This key difference in the two judgements regarding the lack of legal representation, notably concerned the way in which the time period for effective counsel was interpreted.[70]

In the case of *Gaddafi*, the Pre-Trial Chamber noted a lack of effective legal representation in Libya for an extended period, which contributed to the determination of inadmissibility before the ICC. The Chamber found that the inability to secure legal representation for Gaddafi, despite considerable time passing since the ICC issued the arrest warrants, highlighted the insufficiency of counsel during this prolonged period.[71]

Conversely, in *Al-Senussi's* case, while addressing the issue of legal representation, the Pre-Trial Chamber did acknowledge a period where there was a lack of effective counsel. However, the Chamber differentiated this situation by emphasizing the subsequent improvement in legal representation. They noted that despite initial shortcomings, there were subsequent efforts that led to the provision of effective legal counsel for *Al-Senussi*, thereby impacting the determination of inadmissibility before the ICC.[72]

Therefore, the distinction in the two judgments lies in the assessment of the timeline and quality of legal representation. While both cases initially faced challenges in ensuring effective counsel, the subsequent efforts and improvements in *Al-Senussi's* legal representation appeared to impact the Chamber's determination regarding the admissibility of the case before the ICC.[73]

Considering all the above-mentioned arguments, the principal concern is if the domestic judicial system is considered to be efficiently responding to the alleged crimes of Al-Senussi,

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[65] ICC, The Prosecutor v. Saif Al- Islam Gaddaffi and Abdullah Al-Senussi, *supra* note 59, para. 168.
[66] ICC, The Prosecutor v. Saif Al- Islam Gaddaffi and Abdullah Al-Senussi, ICC-01/11-01/11-130, Pre-Trial Chamber, Application on behalf of the Govemment of Libya (May 1, 2012).
[67] ICC, Statute of the International Criminal Court, *supra* note 44, art. 17 (1) (a).
[68] ICC, The Prosecutor v. Saif Al- Islam Gaddaffi and Abdullah Al-Senussi, *supra* note 59, para. 210.
[69] *Id*.
[70] *Id*.
[71] ICC, The Prosecutor v. Saif Al- Islam Gaddaffi and Abdullah Al-Senussi, *supra* note 59.
[72] *Id*.
[73] *Id*..

why can it not be established that the same judicial system would effectively cover the case of *Gaddafi*? This was the main challenge in the two departing judgements.[74]

The last resort of hope to fix the conflicting divergence of opinion between these two cases was lost when the Appeal Chamber of *Al-Senussi* confirmed the judgment of Pre-Trial Chamber with two dissenting opinions from Judge Sang-Hyung Song and Judge Anita Ušacka.[75] The Appeal Chamber of *Gaddafi* also ruled in favor of the rationale of Pre-Trial Chamber I and held the case admissible before the Court.[76] In the case of *Gaddafi*'s Appeal, despite rejecting the appeal grounds by Gaddafi and other relevant parties, the Appeal Chamber's judges presented three dissenting opinions by Judge Eboe-Osuji, Judge Bossa and Judge Ibáñez Carranza.[77]

It is understandable that the defence of Mohammad Al-Senussi challenged the admissibility specifically in relation to the similar if not the same case from that of Gaddafi. The motive of the defence for challenging the decision is also comprehensible. Many scholars favour a more flexible sentencing of international criminal tribunals compared to the domestic due to international ones being more equipped to deliver and process justice.[78] Therefore, these two judgments can be testimonies of a hypocritical and biased practice of the ICC that does not endorse any coherence.

B. Decisions on Certification for an Appeal with Relation to the A-B-C Approach

Until recently, every request to participate in the proceedings was disclosed to the parties. They could make comments pursuant to Rule 89(1) of the Rules and Procedure of Evidence.[79] Based on these submissions and observations, the judges would then render their verdict. Recently, they changed the system to expedite the process where they created three categories.[80] This system is known as A-B-C Approach. Category A includes victims which the registry considers with zero doubt that they can be admitted.[81] Category B is the category where the registry possesses some doubts.[82] Lastly, category C are the victims which the registry is positive that they fall outside of the scope of the charges.[83] Therefore, categories A and B are not disclosed to the parties and only category C (requests for participation) are disclosed.[84] This system has been often criticised by the Defence due to its inconsistency with Rule 89 of the Rules and Procedure of Evidence.[85] Through this adaptation, the responsibility of assessing the victims' applications for participation falls within the hands of the Victims Reparations and

[74] *Id*.
[75] ICC, The Prosecutor v. Saif Al-Islam Gaddaffi, ICC-01/11-01/11 OA 6, Appeal Chamber, Judgement (July 24, 2014).
[76] Szpak, *supra* note 24.
[77] ICC, The Prosecutor v. Saif Al-Islam Gaddaffi, ICC-01/11-01/11-695, Appeal Chamber, Judgement (Mar. 9, 2020).
[78] Beatriz E. Mayans-Hermida, Barbora Holá, *Balancing "the International" and "the Domestic": Sanctions under the ICC Principle of Complementarity*, 18(5) *JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 1103 (2020)*.
[79] ICC, ICC-ASP/1/3, Rules of Procedure and Evidence.
[80] ICC, Res., ICC-ASP 18/Res.7, Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report (Sept. 30, 2020), para. 847.
[81] ICC, Chambers Practice Manual, *supra* note 4, section C. I. (ii).
[82] *Id*.
[83] *Id*.
[84] ICC, Chambers Practice Manual, *supra* note 4, section C. I. (ii).
[85] ICC, The Prosecutor v. Ali-Muhammad Ali Abd-al-Rahman, ICC-02-05-01/20, Pre-Trial Chamber II, Request (Nov. 19, 2020).

Participations unit of the Registry instead of the Chambers. The shortcomings of this adaptation revolve around limited judicial oversight, lack of adjudication, potential bias or inconsistency, legal complexity and expertise which does not support the principles expected from Rule 85 reflecting upon the right to participation and Chambers being the entity of such decision.

This amendment was a response to the judicial collegiality issue raised by the Independent Expert Review under Recommendation 199.[86] The discourse of judicial collegiality impacting the efficiency is significant when considering the outcomes of collaboration and cooperation among the judges within a judicial body. This efficiency is observed to arise from consistent decision-making, comprehensive consideration, reducing case backlog, quality enhancement, optimization of resources and public confidence; which are ultimately factors influencing and increasing the legitimacy and authority of the Court overall. By adopting this into the Chambers Practice Manual, the judges desired a more efficient and swift transition from Pre-Trial stages of the proceedings to the Trial phase.[87] Moreover, the A-B-C Approach was marked by the Appeals Chamber as a "consistent and efficient" development in "transmitting victims' applications".[88] Hence, it can be interpreted that the *ABC approach* implemented by the Registry of the ICC aimed to bridge the collegiality gap by introducing a structured and standardized framework for victim participation in proceedings by aiming to make the victim participation more accessible as it sought to streamline the process, making it more manageable for the Court to handle a potentially large number of victims. It attempted to balance representation by categorizing victims seeking to ensure balanced representation without overwhelming the proceedings. Group *A* victims, being directly affected, were given priority for participation, while Groups *B* and *C* could participate to varying degrees depending on their connection to the case. It attempted to enhance clarity and predictability by providing clear and predictable structure for victim participation, allowing victims to understand the criteria and expectations for their involvement in proceedings. This structure sought to mitigate uncertainty and potential disputes over participation. Lastly, it attempted to contribute to efficiency and management of the participation process, allocating resources and time based on the level of connection to the case. This approach sought to avoid overwhelming the Court with an unmanageable number of participants while still accommodating relevant victim voices.

Overall, the A-B-C approach aimed to create a more structured and manageable system for victim participation, aiming to balance the need for inclusivity with the practical constraints of ICC proceedings, thus attempting to bridge the collegiality gap by fostering a more organized and balanced approach to victim engagement.

The A-B-C approach has been practiced by several Chambers based on the recommendation of the Victims Reparations and Participations unit. These cases are: *The Prosecutor v. Ntaganda case*[89] by the Trial Chamber, *The Prosecutor v. Al Hasssan*[90] during

[86] ICC, *ICC Judges Agree on Reforms in Response to Independent Expert Review at Annual Retreat*, INTERNATIONAL CRIMINAL COURT (Nov. 22, 2021), www.icc-cpi.int/news/icc-judges-agree-reforms-response-independent-expert-review-annual-retreat.
[87] *Id*.
[88] *Id*.
[89] ICC, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Trial Chamber VI, Decision (Feb. 6, 2015).
[90] ICC, The Prosecutor v. Al Hassan, ICC-01/12-01/18-37, Pre-Trial Chamber I, Decision (May 24, 2018); ICC, *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Trial Chamber X, ICC-01/12-01/18-661, Decision (Mar. 12, 2020).

the Pre-Trial and Trial Chambers and finally *The Prosecutor v. Yekatum and Ngaïssona*[91] by both Pre-Trial and Trial Chambers.

Even though the application and acceptance of this approach has followed a consistent practice, in the most recent cases *of Abd-al-Rahman*[92] and *Said Kani*[93], some discrepancies were observed due to the Chamber's order for the adaptation of this approach.

In the *Abd-al-Rahman* case, the Registry requested to modify the standard application forms for victims' participation to employ A-B-C Approach due to the challenges it encountered as a result of the COVID-19 outbreak and its ramifications on the submission of the victim's applications in a hard copy accompanied by their signature and fingerprint which was not feasible during that time.[94] The defence requested for a permission of an appeal in conformity with Rule 89(1) of the Rules and Procedure of Evidence.[95] The main argument of the defence was that the adaptation would be inconsistent with the Statute and the Rule of Procedure of Evidence.[96] Moreover, the complementary argument was that of Registry being in a state of tardiness upon the adaptation of this approach.[97] However, the Pre-Trial Chamber II did not grant this leave to the defence, thus the permission to appeal.[98]

The main reasons for the rejection of the Defence's submission was that the chambers clarified that no specific deadline was set for the Registry.[99] Regarding the proposed admission procedure's alignment with rule 89(1) of the Rules and the Chambers Practice Manual, the Chambers reiterated Trial Chamber VI's ruling in the Ntaganda case that the right of parties to reply to victim applications, as stipulated in Rule 89(1) of the Rules, is not absolute. Rule 89(1) is subject to provisions in the Statute, particularly Art. 68, para. 1 (addressing the protection of the victims and witnesses and their participation in the proceedings). The Court is obligated under Art. 68(1) of the Statute to safeguard victims' safety, well-being, dignity, and privacy. Moreover, reaffirming that the Chamber also has a general obligation under Art. 64(2) of the Statute to ensure fair and prompt proceedings.[100] Consequently, Rule 89(1) of the Rules should be interpreted considering Rule 89(4), which allows the Chamber to manage applications to ensure the proceedings' effectiveness. Hence, stating that organizing the application and admission process aligns with the Chamber's discretion under the circumstances of the case as the pertinent provisions, including Rule 89(1) of the Rules, permit various suitable approaches.[101]

During the *Said'*s Pre-Trial stage, the same process as described for Abd-al-Rahman was observed. The Registry requested to modify the standard application forms for the victims'

[91] ICC, The Prosecutor v. Yekatom and Ngaïssona*,* ICC-01/14-01/18-141, Pre-Trial Chamber II, Decision (Mar. 5, 2019); ICC, The Prosecutor v. Yekatom and Ngaïssona, ICC-01/14-01/18, Trial Chamber V, Order (Mar. 19, 2020).
[92] ICC, The Prosecutor v. Ali-Muhammad Ali Abd-al-Rahman, *supra* note 85.
[93] ICC, The Prosecutor v. Mahamat Said Abdel Kani*,* ICC-01/14-01/21, Pre-Trial Chamber II, Decision (July 8, 2022).
[94] ICC, The Prosecutor v. Ali- Muhammad Ali Abd-al-Rahman, *supra* note 85.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] ICC, The Prosecutor v. Ali- Muhammad Ali Abd-al-Rahman*,* ICC-02-05-01/20, Pre-Trial Chamber II, Decision (Jan. 18, 2021).
[99] *Id*., para 25.
[100] *Id*., para 26.
[101] *Id*., para 27.

participation[102], the Pre-Trial Chamber II accepted it[103], and the Defence was permitted to appeal the decision and they followed so.[104]

However, what is notable is that in the *Said* case, the request for appeal regarding this decision was granted whereas for Abd-al-Rahman, it was not. In the *Said* case, the Appeals Chamber, rejected the appeals of Defence and stated that the Pre-Trial Chamber did not err in law to determine "that the A-B-C Approach is in compliance with the Court's legal framework".[105]

What remains indistinct is the reasoning behind these two judgments. The difference between the decision to reject the request of appeal between these two cases is 3 months. The Pre-Trial Chamber II in both cases included same three judges that both defences appeared before. Moreover, *Abd-al-Rahman's* defence had similar arguments as *Said*'s Defence which was denied whilst similar arguments brought forward by the Defence of *Said* were authorised to proceed to appeal.

This discrepancy brings upon various ambiguities regarding the legitimacy of the decisions adopted by the chambers.

C. Conflicting Visions to Interpret the Probability of the Standard of Proof (Art. 66)

Art. 66 of the Rome Statute accepts the accused's innocence until proven guilty beyond reasonable doubt by the Prosecutor.[106] This engraved language in the Charter has led to some conflicting visions arising from its interpretation. This issue of interpretation particularly relates to how and on what basis the evidence proves the accused guilty beyond reasonable doubt and what elements have been used to meet the standard of proof for guilt.

The *Katanga* judgment brought a more conflicting image and idea of the standard and balance of probabilities standard of proof. The Chamber expressed in its ruling that the absence of proof beyond reasonable doubt does not translate into the absence of the alleged statement and facts (evidence).[107] It means that there is inadequate or poor evidence presented for the verdict of the alleged evidence considering the standard of proof.[108] Accordingly, ruling for an accused as not guilty does not equate to his/her innocence.[109] This decision was followed by relying on the Pre-Trial Chamber II's decision in the *Bemba* case.[110]

In *Katanga* case, the Trial Chamber, despite reminding the Prosecutor of their onus to prove the guilt beyond reasonable doubt, nevertheless held that "finding an accused person not guilty does not necessarily mean that the Chamber finds him or her innocent. Such a determination merely demonstrates that the evidence presented in support of the accused's guilt

[102] ICC, The Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/21, Pre-Trial Chamber II, Registry Submissions (Feb. 26, 2021).
[103] ICC, The Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/21, Pre-Trial Chamber II, Decision Establishing the Principles Applicable to Victims' Applications for Participation (Apr. 16, 2021).
[104] ICC, The Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/21 OA2, Appeals Chamber, Scheduling Order (Sept. 7, 2021).
[105] ICC, The Prosecutor v. Mahamat Said Abdel Kani, ICC-01/14-01/21 OA2, Appeal Chamber, Judgment (Sept. 14, 2021).
[106] ICC, Statute of the International Criminal Court, *supra* note 44.
[107] ICC, The Prosecutor v. Germain Katanga, ICC-01/04-01/07, Trial Chamber II, Judgment (Mar. 7, 2014), para 70.
[108] *Id*.
[109] *Id*.
[110] ICC, The Prosecutor v. Saif Al- Islam Gaddaffi and Abdullah Al-Senussi, *supra* note 59, para. 210.

has not satisfied the Chamber beyond reasonable doubt".[111] With this interpretation, it would be expected to acquit Mr. Katanga as it can be read that the presented evidence was not sufficiently meeting the standard of proof. However, this was not the case and the Chambers ruled for the guilt of Mr. Katanga based on the presented evidence.

Even though the final result was finding Mr. Katanga guilty of the convicted charges, Judge Wyngaert held a dissenting opinion and pointed out the credibility challenges with relation to the prosecution's witnesses, missing of significant and important evidence as well as the likelihood for distinct reasoning of the evidence to exist.[112] Judge Van den Wyngaert's dissenting opinion in the *Katanga* case focused on the standard of proof beyond reasonable doubt.[113] She highlighted concerns about the majority's interpretation and application of this standard.[114] Van den Wyngaert expressed reservations about the majority's approach, suggesting that they set an exceptionally high threshold for proof.[115] She argued that the majority's stringent interpretation potentially undermined the attainment of justice and may have impeded the prosecution's ability to establish guilt beyond a reasonable doubt.[116] Her dissent underscored the need for a balanced and nuanced assessment of evidence within the framework of the reasonable doubt standard to ensure a fair and just adjudication.[117] She further referred to this and stated that "under such circumstances, to arrive at any findings of such serious allegations beyond reasonable doubt" deems to be circumventing to her.[118]

The other significant controversy regarding the standard of proof beyond reasonable doubt is that of *Lubanga* case[119]. Notwithstanding the Trial Chamber's judgment which found Mr. Lubanga guilty of the charged crime of conscripting child soldiers (which pursuant to the Rome Statute, this is a child below the age of fifteen), the dissenting opinion of Judge Ušacka in the Appeals Chamber supplied another angle for interpretation.[120] In her dissenting opinion, she drew attention to the uncertainty in determining the children's age by the OTP's witnesses.[121] She questioned the reliability of the determination independent of any fact based evidence. Thus, Judge Ušacka, continued to disapprove the existence of the guilt beyond reasonable doubt if the evidence and facts the OTP was relying upon could not be vetted.[122] Hence, her dissenting opinion revolved around the Prosecutor's interpretation of the standard of proof beyond reasonable doubt assimilating to prove the guilt with absolute certainty.[123] She further notes the differences in perception of the evidentiary standard of proof beyond reasonable doubt at the ICC.[124]

In the *Lubanga* judgment, it was clarified that the standard of proof for guilt differs from that of balance of probabilities as the latter only requires confirmation of coherency and

[111] ICC, The Prosecutor v. Germain Katanga, *supra* note 108.
[112] ICC, *The Prosecutor v. Germain Katanga*, ICC-01/04-01/07, Trial Chamber II, Minority Opinion (Mar. 10, 2014), paras. 5, 11, 66, 91.
[113] *Id*., paras. 133-308.
[114] *Id*., paras. 149 and 287.
[115] *Id*., para. 134.
[116] *Id.*, para. 137-142.
[117] *Id.*, annex I.
[118] *Id.*
[119] ICC, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Chamber I, Judgment (Mar. 14, 2012).
[120] ICC, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06 A 5, Appeals Chamber, Dissenting Opinion (Dec. 1, 2014).
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*, para. 27.

reliability of the statements made.[125] However, the reparation state requires the victims to support testimonies by evidence.[126] This in turn translates into the balance of probabilities being a necessity for the standard of proof to exist.[127] Establishing a concise understanding of these two principles would contribute to justice as in the case of *Lubanga*, where the Chamber applying a low standard of proof was considered as a damaging act towards Mr. Lubanga and his monetary liability to respond to the demands of the reparation orders.[128]

Despite the aforesaid dissenting opinions at the Trial and Appeal stages attempting to dispelling ambiguities and resolving uncertainties, the discrepancy in the threshold of the probability of the standard of proof beyond a reasonable doubt remains prevailing in different chambers across *Lubanga* and *Katanga* cases. This creates issues regarding coherence and consistency of making precedent as different chambers adhere to different interpretations while applying the law to the evidence brought forward by the Prosecutor.

The reason why this lack of consistent interpretation would impact the process of justice becomes evident as illustrated through the above judgments, which show that different judges and chambers employ different interpretations for determining the standard of proof. Moreover, as demonstrated above, many judges have different interpretations of balance of probability of proof and standard of proof. While many of them concur that there exists a difference between the two, some view it as inseparable and as factors correlating to one another. This difference in interpretation would then expand to overshadow other principles such as the burden of proof as demonstrated above. Establishing and rather clarifying what weight and understanding each principle holds would enhance the legitimacy of the judgments as the reasons would become more understandable. The means for such clarification can take place through variety of channels such as consistent judgments or other measures that will be discussed later on in this paper. Hence, influencing the validity and permissibility of justice system and the authority of the Court in respecting the Rule of Law and its practice at a larger scope in general.

IV. Underlying Reasons for the Existing Discrepancies

The foregoing examination reveals a multitude of factors contributing to the absence of coherence and the existing discrepancies within judicial proceedings. Descending from the above examples, these encompass the lack of collegiality among judges, challenges related to both substance and procedure, absence of robust internal checks and balances, the composition of the judiciary, and the influence of political interests. As showcased above, the lack of collegiality among the judges can lead to divergent interpretations and conflicting decisions within the Court. Matters related to substance and procedure, when not thoroughly addressed, can introduce inconsistencies in legal application. Inadequate internal checks and balances may result in unchecked discrepancies and contradictory rulings. The composition of the judiciary, whether in terms of expertise or diversity, can impact the comprehensiveness and fairness of judgments. Additionally, external political interests can unduly influence legal proceedings, potentially leading to biased outcomes and undermining the court's integrity. Each of these factors significantly influences the existence of discrepancies by directly affecting the decision-making process and the overall consistency of judicial determinations.

[125] ICC, The Prosecutor v. Thomas Lubanga Dyilo, *supra* note 120.
[126] *Id.*
[127] *Id.*
[128] ICC, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Appeals Chamber, Judgment (July 18, 2019).

This section will provide a more extensive understanding for each of these factors in light of the cases discussed at the earlier section.

A. Lack of Collegiality

The credibility and effectiveness of the ICC can be affected by several factors, such as the harmony of perspectives among judges and the overall cohesion within the Court; i.e. collegiality. Lack of collegiality is indeed one of the main factors underlined by the IER in 2020.[129] Thus, this paper will only briefly cover the main points.

Hence, dividing opinions of the judges and the lack of collegiality is a factor that contributes to the legitimacy of the Court.[130] Judicial collegiality entails that judges share a collective commitment to accurately presenting facts and interpreting the law. This necessitates active engagement, attentive listening, and mutual persuasion among colleagues.[131] As a result of collegiality, ICC judges collectively assume responsibility for the decisions they make. The legitimacy and competency of the larger system – the Court – are influenced by whether authorised decision-makers within the system concur on a ruling.

Divergent opinions and a lack of collegiality among judges may diminish the legitimacy of the ICC.[132] The decisions and outcomes of the Court's proceedings are significantly shaped by the individual judicial opinions expressed at the ICC.[133] The ICC's perceived legitimacy can be influenced by the presence of dissenting opinions, which showcase the diverse perspectives and approaches within the Court.[134]

This paper notes that that tensions, disputes and disagreements among judges stem from differences in legal interpretation, varying cultural backgrounds, or divergent judicial philosophies. Even though as demonstrated throughout the analysis section such discord can impede the smooth functioning of the Court and undermine the credibility of its decisions[135], this paper finds the practice of having dissenting opinions would only foster legitimizing the Court's decision as it can be viewed to be playing as an internal checks and balances (this will be discussed extensively in the next section).

On another note, collegiality refers to the spirit of cooperation, mutual respect, and collaboration among the judges, prosecutors, and other stakeholders within the ICC.[136] The principle of collegiality serves as a central legal tenet shaping the legitimate development, implementation, and enforcement of policies within a multinational framework.[137]

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[129] ICC, Independent Expert Review of the International Criminal Court and the Rome Statute System: Final Report, *supra* note 80.
[130] Antonio Cassese, *The Legitimacy of International Criminal Tribunals and the Current Prospects of International Criminal Justice*, 25(2) LEIDEN JOURNAL OF INTERNATIONAL LAW 491 (2012).
[131] Ekaterina D. Vetoshkina, *The Ideology of Collegiality in International Criminal Justice Practice*, 478 ВЕСТНИК ТОМСКОГО ГОСУДАРСТВЕННОГО УНИВЕРСИТЕТА 218 (2022).
[132] Kyra Wigard, *Matter of Opinion: Assessing the Role of Individual Judicial Opinions at the International Criminal Court*, 23(3) INTERNATIONAL CRIMINAL LAW REVIEW 387 (2023).
[133] *Id.*
[134] Jeffrey Dunoff, Mark A. Pollack, *supra* note 17.
[135] Jeffrey Dunoff, Mark A. Pollack, *The Judicial Trilemma*, 111 AMERICAN JOURNAL OF INTERNATIONAL LAW 225 (2017).
[136] Tilko Swalve, *Does Group Familiarity Improve Deliberations in Judicial Teams? Evidence from the German Federal Court of Justice*, 19(1) JOURNAL OF EMPIRICAL LEGAL STUDIES 223 (2022).
[137] Maria Patrin, *The Principle of Collegiality in the Commission's Decision-Making: Legal Substance and Institutional Practice*, EUROPEAN UNIVERSITY INSTITUTE (May 20, 2020), www.cadmus.eui.eu/handle/1814/67112.

Moreover, challenges related to collegiality may also manifest in interactions between the ICC and other international actors, such as member states, non-governmental organizations, and the media. Differing priorities, political pressures, and divergent interests among these stakeholders can create tensions and hinder collaborative efforts towards achieving the ICC's mandate.[138]

In an institution like the ICC, where decisions often involve complex legal analyses and require consensus among multiple individuals, lack of collegiality could impact the Court's ability to function smoothly, potentially leading to delays, difficulties in reaching conclusive judgments, or challenges in maintaining the Court's overall effectiveness and efficiency.[139]

However, to cover the main grounds for the issue to be of a concern, the lack of collegiality between independent organs of the ICC such as that of Registry, Chambers and the OTP is deemed to be of an important issue as it leads to a lack of communication.[140] One of the suggested solution by the IER is that of the Presidency liaising between the Judges and the Chambers.[141] This paper conquers with the findings of the report and argues that by establishing collegiality among the judges, enhancement of collaborative jurisprudence can be established.

Overall, addressing the lack of collegiality within the ICC is essential for fostering a harmonious and effective working environment. Encouraging open dialogue, promoting respect for diverse perspectives, and enhancing communication channels among all stakeholders are critical steps towards building greater collegiality and enhancing the ICC's capacity to fulfill its mandate.

B. Matters Related to Interpretation, Substance and Procedure

As it was observed in the issues pertaining to the interpretation of Art. 66 in the cases of *Lubanga*[142] and *Katanga*[143], it can be concluded that the existence of discrepancies to be dependent on the matters related to the substance. Consequently, the gaps and unclarities in the substance and the interpretation it, heavily impacted the procedure.[144] Bridging the gap in substance is crucial as it directly impacts varying opinions on the nature of crimes, consequently leading to divergent conclusions.[145] While divergent opinions showcase the inclusivity of international courts to embrace different judicial cultures and their approaches, they undermine the reliability and legitimacy in the absence of clear precedents and expectations for crimes committed.[146] Without a defined standard, it becomes challenging for defendants and crime

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[138] Sam Muller, Nathalie Dijkman, Peter Polakovic, *et al.*, *Legal Futures of the International Criminal Court*, THE HAGUE INSTITUTE FOR INNOVATION OF LAW (Sept. 22, 2017), www.hiil.org/research/legal-futures-of-the-international-criminal-court/.

[139] Yuval Shany, *How Can International Criminal Courts Have a Greater Impact on National Criminal Proceedings? Lessons from the First Two Decades of International Criminal Justice in Operation*, 46(3) ISRAEL LAW REVIEW 341 (2013).

[140] ICC, The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, *supra* 128, at para. 204.

[141] *Id.*, at 104.

[142] ICC, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *supra* note 119; ICC, The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, *supra* note 120.

[143] ICC, The Prosecutor v. Germain Katanga, Trial Chamber II, *supra* note 107; ICC, *The Prosecutor v. Germain Katanga*, Trial Chamber II, *supra* note 112, paras. 5, 11, 66, 91.

[144] CRYER, *supra* note 8, at 80-81.

[145] Bartolomiej Krzan, *Introduction*, in PROSECUTING INTERNATIONAL CRIMES: A MULTIDISCIPLINARY APPROACH (Bartolomiej Krzan ed., 2016).

[146] INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO AND CAMBODIA (Cesare P.R. Romano, André Nollkaemper, Jann K. Kleffner eds., 2004), at 180-181.

prosecutors to gauge sentencing or determine guilt.[147] This lack of clarity undermines the repelling of crime, evident from the examination of the standards of proof discussed earlier in the paper. Overall, impacting the objective of criminal law in general to deter the crimes when there is not a consistent understanding of how to amount the conducts as a crime. Therefore, closing the gap in substantive opinions is imperative to ensure consistent and credible judgments that uphold the Court's legitimacy. Hence, if the gaps in substance improve, there will be left small rooms for the practice of an inconsistent procedure.

It is however important to differentiate between the dissenting opinions and the divergence of opinion between the Trial vs. Appeals Chambers within different and the same cases. This paper argues that the inclusivity of the ICC for different cultural backgrounds is respected when allowing room for dissenting opinions. However, this cannot be retained in the case of varying judgements at different stages of the proceedings.

It is also observed that some matters that need to be addressed at the Pre-Trial stage, find their ways to Trial and sometimes Appeal stages.[148] Illustrating this issue from the examples provided above that led to the conflict on the standard of proof, was the evidentiary presentation and the reliability of this matter persisting. In the case of Thomas Lubanga at the ICC, the issue surrounding the use of intermediaries to obtain evidence was a matter that could have been ideally addressed at the Pre-Trial stage.[149] However, Lubanga's defense team intentionally chose to reserve their arguments regarding the use of intermediaries, intending to raise this issue during the Trial phase questioning the authenticity and reliability of evidence procured through intermediaries.[150] This strategic decision led to the prolongation of proceedings, as the challenge against the use of intermediaries was introduced during the Trial rather than being addressed at the earlier stage.[151]

Another instance is the *Katanga* case, where the issue of charges and their formulation could have been addressed at the Pre-Trial stage.[152] The defense argued that the charges were improperly formulated and that the prosecution's case did not accurately reflect the alleged criminal conduct.[153] This issue could have been ideally clarified and potentially resolved earlier in the proceedings, yet it was brought to the Trial stage, resulting in the elongation of the legal process.[154]

Another case reflecting such an issue is the *Bemba* case. Here, the mode of liability could have been addressed during the Pre-Trial stage.[155] The defense argued that the Prosecution's reliance on the concept of command responsibility was not adequately supported by

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[147] Russell D. Covey, *Rules, Standards, Sentencing, and the Nature of Law*, 104 CALIFORNIA LAW REVIEW 449 (2016).
[148] David J. Scheffer, *A Review of the Experiences of the Pre-trial and Appeals Chambers of the International Criminal Court Regarding the Disclosure of Evidence*, 21(1) LEIDEN JOURNAL OF INTERNATIONAL LAW 151 (2008).
[149] ICC, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, *supra* note 120.
[150] ICC, The Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Chamber I, Closing Submission of the Defence (July 15, 2011), paras. 1-18.
[151] Scheffer, *supra* note 149.
[152] Steven A. Koh, *Prosecutor v. Germain Katanga: Judgment on the Appeal against the Decision of Trial Chamber II of 21 November 2012*, 52(4) INTERNATIONAL LEGAL MATERIALS 873 (2013).
[153] Sienna Merope, *Recharacterizing the Lubanga Case: Regulation 55 and the Consequences for Gender Justice at the ICC*, 22(3) CRIMINAL LAW FORUM 311 (2011).
[154] KAMARI M. CLARKE, FICTIONS OF JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE CHALLENGE OF LEGAL PLURALISM IN SUB-SAHARAN AFRICA (2019), at 175-177.
[155] Kai Ambos, *Critical Issues in the Bemba Confirmation Decision*, 22(4) LEIDEN JOURNAL OF INTERNATIONAL LAW 715 (2009).

evidence.[156] This discrepancy in the understanding of liability could have been clarified at an earlier stage but was instead brought to Trial, resulting in extended legal proceedings.[157]

In the *Ntaganda* case, witness identification and protection were critical points of contention.[158] The trial encountered complications primarily due to issues surrounding witness safety and confidentiality.[159] Defining clearer protocols for witness protection measures and identification during the Pre-Trial stage could have averted some of these complications. The delayed decisions around these matters significantly impacted the trial, resulting in prolonged debates and concerns that could have been mitigated with more explicit guidelines earlier in the proceedings.

Through observing this pattern, it would be fair to acknowledge that this is most often the result of strategic choices of the constituents and parties (OTP, CLRV, Defence Team) rather than the fault of Chambers or the judges since as long as a matter is not addressed before their bench, they cannot decide or rule on that matter. In other cases, seems that the Court fails to address simple procedural matters at the early stages for the sake of efficiency.

In the *Gbagbo and Blé Goudé* case[160], credibility issues surrounding witnesses and evidence admissibility significantly impacted the trial. The lack of precise criteria for vetting witnesses or determining evidence admissibility at the Pre-Trial stage led to extended debates and delays during the trial proceedings.[161] A more defined and comprehensive approach in the earlier stages could have alleviated these challenges, allowing for smoother trial proceedings. Similar to what was also encountered in *Katanga* and *Lubanga* case concerning the evidence collected through the intermediaries as discussed above.

Lastly, in the *Ongwen*[162] case, complexities emerged during the trial regarding the inclusion or exclusion of certain charges and evidence.[163] The trial faced challenges due to uncertainties surrounding the scope of charges and admissible evidence, which could have been clarified during the Pre-Trial phase.[164] More decisive and precise rulings or clarifications at an

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[156] Carmel O'Sullivan, *New Court, Same Division: the Bemba Case as an Illustration of the Continued Confusion Regarding the Command Responsibility Doctrine*, 35(3) LEIDEN JOURNAL OF INTERNATIONAL LAW 661 (2022).
[157] *Id.*
[158] ICC, The Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06, Trial Chamber VI, Judgement (July 8, 2019), paras. 77-284.
[159] John D. Jackson, Yassin Brunger, *Witness Preparation in the ICC*, 13 (3) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 601 (2015).
[160] ICC, The Prosecutor v. Gbagbo and Blé Goudé, ICC-02/11-01/15, Appeals Chamber, Judgement (Mar. 31, 2021).
[161] Triestino Mariniello, *Questioning the Standard of Proof: The Purpose of the ICC Confirmation of Charges Procedure*, 13(3) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 579 (2015).
[162] ICC, The *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Trial Chamber IX, Sentencing Hearing (April 14, 2021), at 8; ICC, The *Prosecutor v. Dominic Ongwen*, ICC-02/04-01/15, Trial Chamber IX, Prosecution Opening Statement (December 6, 2016), at 35-36; Adina-Loredana Nistor, *Culture and the Illusion of Self-Evidence: Spiritual Beliefs in the Ongwen Trial*, 24(1) INTERNATIONAL CRIMINAL LAW REVIEW 3 (2023).
[163] Noelle Quenivet, Windell Nortje, *Casting the Net Wider: A Critical Analysis of the Sentencing Criteria in the Ongwen Case at the International Criminal Court*, UNIVERSITY OF WEST ENGLAND (Oct. 13, 2022), www.uwe-repository.worktribe.com/output/10098369.
[164] Demetra F. Sorvatzioti, *Proportionality and Moral Blameworthiness in Ongwen's ICC Sentencing Decision*, 23(5) INTERNATIONAL CRIMINAL LAW REVIEW 755 (2023); Joseph A. Manoba, Anushka Sehmi, *What the Dominic Ongwen Trial could mean for Traditional Justice Mechanisms in the ICC*, LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE (September 21, 2021), www.eprints.lse.ac.uk/111627/; Shashikala Gurpur, Sayantan Bhattacharyya, Sujata Arya, *The Sentencing of Dominic Ongwen: A Normative Inquiry*, OPINIO JURIS (June 23, 2021), www.opiniojuris.org/2021/06/23/the-sentencing-of-dominic-ongwen-a-normative-inquiry/.

earlier stage might have streamlined the subsequent trial proceedings, potentially reducing delays and ambiguities encountered during the trial.

Inconsistencies arising from matters of substance and procedure pose a significant risk to coherent decision-making within judicial processes.[165] When there are disparities in interpreting substantive laws or procedural rules across cases or jurisdictions, it undermines the uniform application of legal principles.[166] This inconsistency leads to ambiguity in the understanding of legal standards and principles, creating challenges in predicting or anticipating judicial decisions.[167] Moreover, conflicting interpretations can erode confidence in the judiciary's reliability and fairness.[168] The absence of a consistent approach to legal matters affects the predictability and coherence of judicial decisions, impacting the credibility and legitimacy of the entire judicial system.[169] As a result, it becomes imperative for courts and tribunals to address and rectify these inconsistencies to ensure coherent and dependable decision-making.

The coherence of jurisprudence is vulnerable when issues of substance and procedure within the judicial system lack consistent handling. As demonstrated above, the manner in which legal matters are approached, including the interpretation and application of laws, evidentiary rules, and procedural guidelines, significantly influences the harmonization of judicial decisions. When courts encounter inconsistencies in interpreting legal statutes or implementing procedural norms across cases, it leads to disparate outcomes, undermining the integrity and predictability of the legal system. Inadequate clarity or deviations from established procedures may result in conflicting judgments, hindering the development of a coherent body of jurisprudence.

C. Lack of Internal Checks and Balances

The absence of internal checks and balances within the judicial framework exacerbates the lack of coherence.[170] Internal mechanisms such as appellate reviews, quality control processes, and consistency checks are pivotal in ensuring that judicial decisions are consistent, aligned with legal standards, and free from errors.[171] Hence, internal mechanisms can ensure the integrity and credibility of judicial decisions at the ICC. These checks act as safeguards against arbitrary interpretations or deviations from established legal principles.[172] Without these mechanisms,

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[165] Stefan Schubert, Erik J. Olsson, *Coherence and Reliability in Judicial Reasoning*, in COHERENCE: INSIGHTS FROM PHILOSOPHY, JURISPRUDENCE AND ARTIFICIAL INTELLIGENCE (Michal Araszkiewicz, Jaromir Šavelka eds., 2013), at 33-58.

[166] Nicholas Croquet, *Implied External Limitations on the Right to Cross-Examine Prosecution Witnesses : the Tension between a Means Test and a Balancing Test in the Appraisal of Anonymity Requests*, 11(1) MELBOURNE JOURNAL OF INTERNATIONAL LAW (2010).

[167] Alon Harel, Ehud Guttel, *Uncertainty Revisited: Legal Prediction and Legal Postdiction*, MICHIGAN LAW REVIEW (Oct. 3, 2022), www.papers.ssrn.com/sol3/papers.cfm?abstract_id=1277977#.

[168] Jens D. Ohlin, *Joint Criminal Confusion*, 12(3) NEW CRIMINAL LAW REVIEW 406 (2009).

[169] Yvonne McDermott, *The International Criminal Court's Chambers Practice Manual : Towards a Return to Judicial Law Making in International Criminal Procedure?*, 15(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 873 (2017); Eyal Zamir, Doron Teichman, *Judicial Decision-Making*, in BEHAVIORAL LAW AND ECONOMICS (Eyal Zamir, Doron Teichman, 2018), at 525-566.

[170] Daniel Epps, *Checks and Balances in the Criminal Law*, 74 VANDERBILT LAW REVIEW 1 (2021).

[171] Aleksandar V. Gajić, *Standards of Appellate Review in the International Administration of Criminal Justice*, 1(13) SERBIAN POLITICAL THOUGHT 93 (2016).

[172] *Id.*

judicial decisions may lack comprehensive review, potentially allowing inconsistencies or divergences to persist, further eroding the consistency and credibility of jurisprudence.

Moreover, internal checks provide a quality control system within the judiciary, identifying and rectifying potential errors or inconsistencies in legal reasoning before final judgments are issued.[173] The absence of such checks may lead to judgments lacking thorough review, potentially resulting in discrepancies that undermine the credibility of the legal system.

In addition to maintaining consistency, these internal mechanisms enforce adherence to legal standards and principles, ensuring decisions align with established legal frameworks.[174] Their absence can create an environment prone to arbitrary interpretations or deviations from established legal norms, posing a threat to the coherence of jurisprudence as observed in the above cases, specifically pertaining to Art. 66's interpretation in various cases.

Furthermore, robust internal checks reinforce judicial independence by facilitating autonomous decision-making while operating within the bounds of established legal principles.[175] The absence of such checks might expose the judiciary to external influences that could compromise the integrity and consistency of legal decisions.[176] Ultimately, the absence of strong internal checks and balances risks fostering inconsistencies, weakening legal coherence, and potentially eroding public trust in the judiciary's capacity to deliver consistent and equitable jurisprudence.

In the case of the ICC, several institutional frameworks aimed at maintaining checks and balances within its operations to ensure fairness, consistency, and adherence to legal principles.[177]

At the core of this structure is the Appeals Chamber, serving as a mechanism for reviewing decisions made by the Trial Chambers. It acts as an appellate body, allowing parties to challenge legal or factual determinations made during the trial phase. Through this mechanism, the Appeals Chamber provides an oversight function, ensuring that the legal interpretations and factual assessments are correct and consistent with established jurisprudence.

Moreover, the Pre-Trial Chamber plays a pivotal role by assessing the charges brought by the Prosecutor to confirm whether they meet the necessary legal criteria before allowing a case to proceed to trial. This chamber serves as a preliminary checkpoint, ensuring that only cases meeting the legal requirements move forward to trial, thus contributing to maintaining the court's credibility and adherence to legal standards.

Finally, the Judges of the ICC play a crucial role in overseeing the legal process, meticulously scrutinizing evidence, legal arguments, and procedural adherence. Their vigilant oversight aims to ensure that the proceedings are in line with the Rome Statute and established legal principles, thereby contributing to a fair and transparent trial process.

While these institutional mechanisms exist, criticisms occasionally emerge regarding their efficacy and sufficiency in guaranteeing consistent and coherent jurisprudence within the ICC.[178] This has been extensively exhibited in the above cases. Efforts are continually made to

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[173] Owiso Owiso, *The International Criminal Court and Reparations: Judicial Innovation or Judicialisation of a Political Process?*, 19(3) INTERNATIONAL CRIMINAL LAW REVIEW 505 (2019).
[174] *Id.*
[175] Shivaraj S. Huchhanavar, *Conceptualising Judicial Independence and Accountability from a Regulatory Perspective*, 9(2) OSLO LAW REVIEW 110 (2022).
[176] Dominic Raab, Hans Bevers, *The International Criminal Court and the Separation of Powers*, 3(1) INTERNATIONAL ORGANIZATIONS LAW REVIEW 93 (2006).
[177] *Id.*
[178] Christof Royer, *The bête noire and the noble lie: the international criminal court and (the disavowal of) politics*, 13(2) CRIMINAL LAW AND PHILOSOPHY 225 (2018).

refine and improve these systems to address any perceived shortcomings, aiming to strengthen the Court's overall functionality and maintain its legitimacy.

Since the inevitable existence of pragmatism and discrepancies has been established, existence of some internal checks and balances could ensure the eradications of their effects. Addressing the challenges posed by the absence of internal checks and balances within the ICC necessitates a multifaceted approach focused on bolstering oversight, consistency, and fairness in its operations.

Firstly, enhancing the efficacy of the appellate reviews stands as a crucial step. Broadening its authority to review various facets – ranging from legal interpretations to factual determinations and trial procedures – would fortify its role in rectifying potential errors and ensuring comprehensive oversight.[179]

Another pivotal strategy involves establishing clearer and more specific guidelines for legal interpretations, evidence admission, and trial procedures.[180] By developing precise protocols, the ICC can minimize inconsistencies and ensure a uniform application of legal principles across different cases.[181]

Moreover, reinforcing a commitment to precedent within the ICC's decision-making processes is essential.[182] Aligning new decisions with established case law and legal principles serves to maintain consistency and coherence in jurisprudence.[183]

Independent review mechanisms could also contribute significantly to a more coherent jurisprudence making. By integrating external and impartial reviews of judicial decisions – potentially through legal expert engagements or advisory bodies – the ICC can augment transparency and accountability in its operations.[184]

Further initiatives, such as continuous training and capacity-building programs for judges, legal officers, and staff, can significantly enhance their comprehension of legal principles, case law, and procedural requirements. This, in turn, can foster more informed and consistent decision-making.

Finally, fostering a culture of robust internal dialogue among judges and legal professionals within the ICC is crucial. Encouraging open discussions facilitates the exchange of diverse perspectives, knowledge-sharing, and best practices, thereby minimizing the likelihood of inconsistencies in legal interpretations.[185]

Implementing these diverse measures represents a comprehensive strategy toward mitigating the challenges arising from the lack of internal checks and balances within the ICC. These steps collectively aim to reinforce the court's judicial processes, promoting greater consistency, fairness, and transparency in its proceedings.

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[179] Kevin W. Gray, *Is There Even a Standard of Review at the ICC?*, 20(6) INTERNATIONAL CRIMINAL LAW REVIEW 945 (2020).
[180] Juan-Pablo Pérez-León-Acevedo, *The International Criminal Court (ICC)'s Procedural Practice and Domestic Legal Sources*, 23(1) THE LAW AND PRACTICE OF INTERNATIONAL COURTS AND TRIBUNALS 138 (2024).
[181] *Id.*
[182] Aldo Z. Borda, *The Direct and Indirect Approaches to Precedent in International Criminal Courts and Tribunals*, 14 MELBOURNE JOURNAL OF INTERNATIONAL LAW 608 (2013).
[183] *Id.*
[184] Thore Neumann, Bruno Simma, *Transparency in International Adjudication*, in TRANSPARENCY IN INTERNATIONAL LAW (Andrea Bianchi, Anne Peters eds., 2013), at 436-476.
[185] *Id.*

D. Gaps in the Constituent Treaty

Even though the founding fathers of the Rome Statute attempted very hard to close the gaps and clauses in the Charter, there still exist some concepts and lines in some provisions that are open for interpretation. Examples include the provisions that refer to gender.[186] The strict definition of sexual violence and the neglect of gender justice matters in the Rome Statute have been recognized as major barriers to advancing gender justice.[187] As a consequence, prosecuting sexual and gender-based crimes has become difficult, leading to varying interpretations of these offenses within the Rome Statute's framework and inconsistent legal decisions.[188]

Most relevant for this paper, the aforesaid example of *Lubanga* vs. *Katanga* with regards to how the standard of proof is interpreted and defined demonstrates a gap in constituent treaty of the ICC defining such an important concept. Thus, as long as important concepts are left undefined, it will be difficult for different autonomous and independent judges from different legal and cultural backgrounds to interpret the same text in the same certain course of manner. Even judges have acknowledged the existence of constructive ambiguities in the Charter.[189]

It must be noted that this article does not advocate for the rigid interpretation of the definitions. However, it suggests that the flexible interpretation of ambiguous terms shall be interpreted consistently through the judgements. It also acknowledges how this correlates to a positive result. Hence, interpreting modern crimes requires a certain degree of flexibility. However, this flexibility shall not be expanded to the point that undermines consistency of the Court's practice.

E. Composition of Judiciary

As discussed above, incoherence in the practice and decision-making of the ICC leads to inconsistent jurisprudences. What is important to note is that these differences do not only emerge from the texts of diverse interpretation of the constituent instruments. These differences are also due to the "methodological and interpretive differences over the ascertainment of the content of the applicable law between differently composed judicial branches".[190]

Diverse culture of the legal backgrounds of the judges is another factor leading to the incoherencies and discrepancies in ICC jurisprudence.[191]

The compassion and legal backgrounds of judges, influenced by the legal systems they come from, can significantly impact the interpretation of laws and the application of jurisprudence in international courts.[192] Judges bring their unique legal experiences, cultural

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[186] Rosemary Grey, Jonathan O'Donohue, Indira Rosenthal *et al.*, *Gender-based Persecution as a Crime Against Humanity*, 17(5) JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 957 (2019).
[187] Gözde Turan, *The Identity of "the Other" for Sexual Violence Victims: is there Anything New in Sexual Violence Prosecutions before the International Criminal Court?*, 26(6) JOURNAL OF GENDER STUDIES 662 (2016).
[188] *Id*.
[189] ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-3636-Anx2, Appeal Chamber, Separate Opinion (June 8, 2018), paras. 2-4.
[190] Carcano, *supra* note 55.
[191] ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, *supra* note 190; ICC, The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, *supra* note 120.
[192] INTERNATIONAL CRIMINAL PROCEDURE: PRINCIPLES AND RULES (Göran Sluiter, Håkan Friman, Suzannah Linton *et al.* eds., 2019).

perspectives, and ethical inclinations into their decision-making. These differences in approaches might result in varying interpretations of legal statutes, norms, or precedents.

For instance, judges trained in civil law systems, which rely heavily on written laws and codes, may approach legal interpretation differently from those in common law systems, which focus on judicial precedent and case law.[193] This diversity in legal traditions can lead to differing perspectives on issues such as the burden of proof, admissibility of evidence, or the interpretation of legal provisions as observed in the previous section with examples.

Additionally, judges may bring personal inclinations or ideologies shaped by their cultural, social, or political backgrounds into their legal reasoning. This diversity, while enriching judicial discussions, could also lead to varying views on the same legal matter, potentially resulting in inconsistent jurisprudence.[194] Ultimately, while this diversity in legal backgrounds can offer a broader spectrum of perspectives, it also poses a challenge in achieving uniformity and coherence in jurisprudential decisions within international Courts.

To showcase examples, as discussed in detail under the previous section; the different legal backgrounds and perspectives of judges have influenced interpretations and decisions. For example, on the issue of standard of proof, it was demonstrated how in the *Lubanga* case, judges from Common Law backgrounds emphasized a higher standard of proof, leaning towards a strict interpretation akin to common law principles. Meanwhile, judges from Civil Law backgrounds leaned towards a more flexible approach, reflecting Civil Law traditions.[195]

With regards to another instance and the following up on procedure on witness testimony, it was illustrated how different judges, based on their legal backgrounds, might weigh witness testimony differently.[196] For instance, judges from Common Law systems gave precedence to cross-examination and scrutinized witness credibility extensively, whereas judges from Civil Law systems might focus on the written evidence and documentary proofs.[197]

Regarding the admissibility of evidence, it was demonstrated how the judges' legal backgrounds affected their views on the admissibility of certain evidence.[198] This can involve opinions on the relevance and reliability of evidence, particularly when it comes to hearsay or indirect evidence, which may be evaluated differently based on diverse legal traditions.[199]

Despite this factor having the potential for strengthening the legitimacy of the Court on account of diversity and being inclusive and welcoming different legal backgrounds, it is often observed that the judges' interpretation of the constituent instrument or the applicable law is gravely interlinked to the different cultural and legal background they originate from. Whether their professional expertise has been exercised and gained from a domestic legal system of civil or common law, their interpretation of law shapes accordingly. The above examples illustrated how judges' legal backgrounds and the legal systems they come from can influence their approach to various legal matters, potentially leading to differences in interpretation and decision-making within the ICC and ultimately changing the course of jurisprudence making.

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[193] Raab, Bevers, *supra* note 177; Guillem Riambau, Clin Lai, Boyu Lu Zhao *et al.*, *Legal Origins, Religion and Health Outcomes: a Cross-Country Comparison of Organ Donation Laws*, 17(2) JOURNAL OF INSTITUTIONAL ECONOMICS 217 (2020).

[194] Theodore Meron, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99(2) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 359 (2005).

[195] Daniel Peat, COMPARATIVE REASONING IN INTERNATIONAL COURTS AND TRIBUNALS (2019); Göran Sluiter, Håkan Friman, Suzannah Linton *et al.*, *supra* note 192.

[196] INTERNATIONAL CRIMINAL PROCEDURE: THE INTERFACE OF CIVIL LAW AND COMMON LAW LEGAL SYSTEMS (Linda E. Carter, Fausto Pocar eds., 2013).

[197] See *Katanga* case for example.

[198] See above case of *Lubanga* and *Bemba* for example.

[199] THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn ed., 2015).

F. Political Interests

Moreover, this paper views the decisions such as the one in *Gaddafi* vs. *Al-Senussi*[200] to be motivated by the politically interested personality of the ICC. The ICC's interest and involvement in the trials of individuals like Gaddafi and Al-Senussi are influenced by various factors, including the gravity of the crimes alleged, their significance in the context of international law, and the political implications surrounding the cases.[201]

In the case of Muammar Gaddafi, the ICC's interest stemmed from the gravity of the alleged crimes and their broader implications.[202] Gaddafi, as the leader of Libya at the time, was accused of serious human rights violations and crimes against humanity during the Arab Spring protests and the Libyan civil war. His prominent political position and the severe nature of the alleged crimes made his trial a focal point for international justice and accountability.[203]

On the other hand, while Abdullah Al-Senussi, Gaddafi's intelligence chief, faced similar allegations of human rights abuses and crimes against humanity, the ICC's level of interest might have been influenced by various factors.[204] Despite the gravity of the crimes attributed to Al-Senussi, the ICC's prosecutorial priorities, political considerations, available evidence, cooperation of involved parties, and the potential impact of the trial on regional stability or international relations could have influenced the decision-making regarding pursuing his case.[205]

Therefore, the ICC's interest in these cases can be seen as a complex interplay of legal, political, and practical considerations, where the gravity of the alleged crimes and the individuals' political significance both play significant roles in determining the court's focus and level of involvement.

These decisions are not limited to the situation in Libya but the ones in Afghanistan, Bangladesh and Myanmar are also evident ones.[206] Such political decision-making is considered to challenge the Court's legitimacy as these decisions are considered to be radical departures from previously established practices.[207] This departure without legal reasoning is noticeable and influences the coherent jurisprudence-making. This would interfere with the

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[200] UNHRC, A/HRC/19/68, Report of the International Commission of Inquiry on Libya (Mar. 8, 2012); Gabriela Augustínyová, *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi: Decision on the Admissibility of the Case against Abdullah Al-Senussi (Int'l Crim. Ct.)*, 53(2) INTERNATIONAL LEGAL MATERIALS 273 (2017).

[201] Julien Seroussi, *How Do International Lawyers Handle Facts? The Role of Folk Sociological Theories at the International Criminal Court*, 69(4) THE BRITISH JOURNAL OF SOCIOLOGY 962 (2018).

[202] ICC, The Prosecutor v. Jean-Pierre Bemba Gombo, *supra* note 190; ICC, The Prosecutor v. Thomas Lubanga Dyilo, Appeals Chamber, *supra* note 120.

[203] Richard Dicker, *Libya: Gaddafi Must Be Held Accountable for Crimes Against Humanity*, HUMAN RIGHTS WATCH (July 18, 2011), www.hrw.org/news/2011/07/18/libya-gaddafi-must-be-held-accountable-crimes-against-humanity.

[204] UNHRC, *supra* note 200.

[205] Henry M. Lovat, *Delineating the Interests of Justice: Prosecutorial Discretion and the Rome Statute of the International Criminal Court*, BEPRESS LEGAL REPOSITORY (June 25, 2006), www.law.bepress.com/expresso/eps/1435; Farid M. Rashid, PROSECUTORIAL DISCRETION IN THE INTERNATIONAL CRIMINAL COURT (2023).

[206] Alex Whiting, *The ICC's Afghanistan Decision: Bending to the U.S or Focusing Court on Successful Investigations?*, JUST SECURITY (Apr. 12, 2019), www.justsecurity.org/63613/the-iccs-afghanistan-decision-bending-to-u-s-or-focusing-court-on-successful-investigations/.

[207] John C. Yoo, *In Defence of the Courts Legitimacy*, 68(3) THE UNIVERISTY OF CHICAGO LAW REVIEW 774 (2001), at 782.

notion of the Court as a neutral arbiter of the law, through which is one of the sources of its legitimacy.

The recent ICC investigation into war crimes committed on Afghanistan's territory during the American occupation has produced a new surge of interest in this topic, reflecting the politically sensitive nature of the ICC's actions.[208] Additionally, the outbursts against the ICC from the Trump administration, culminating in Executive Order 13928, on account of the ICC Chief Prosecutor's use of its own powers to request the authorization to investigate the actions of US personnel during the war in Afghanistan, reinforce the idea that the Court is not immune to this growing surge in the contestation of international institutions with a post-national nature.[209] These references provide insights into the political dynamics that shape the ICC's decisions and its engagement with cases involving Afghanistan, highlighting the complex interplay of legal, political, and international factors that influence the Court's actions.

Hence, such decision makings demonstrate a tenancy for the decisions being influenced by strategic thinking which might not always be in line with the interest of justice nor a requisite for its practice.[210]

V. Solutions

A. Fostering Collegiality: Addressing Challenges and Cultivating Collaboration

It is noted that the Court has begun to advance consistency and coherency in its practice through the "Appeals Chamber's determination not to depart from earlier rulings without convincing reasons and through the Court's adoption of the Chambers Practice Manual".[211] This was mainly the solution directed to tackle the collegiality problem as addressed above. Moreover, the cooperation from Trial as well as Pre-Trial Chamber to accept and not challenge the judgments of the Appeals Chamber is acknowledged and appreciated on the path to coherence.[212] However, as it was argued throughout this paper, the Appeals Chambers' rulings that can serve as internal checks and balances aimed to correct the findings and assessments of the Trial Chambers to constitute a more consistent jurisprudence in terms of procedure and understanding of the substance are not meeting the bar.[213]

The second solution is concerned with the adoption of better communication strategies among different judges and the Chambers overall. This primarily rests upon the Pre-Trial Chamber due to its pivotal role in initial case assessments, setting legal precedents, and interacting with the Office of the Prosecutor. By facilitating effective dialogue among its members, the Pre-Trial Chamber can ensure consistency in decision-making, promote

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[208] Photeine Lambridis, *The International Criminal Court and Afghanistan: Leveraging Politics to Bolster Accountability and Enhance Legitimacy*, 54(3) NEW YORK UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLITICS 1007 (2022); Daniel Krcmaric, *Does the International Criminal Court Target the American Military?*, 117(1) AMERICAN POLITICAL SCIENCE REVIEW 325 (2023).

[209] Mileno Sterio, *The Trump Administration and the International Criminal Court: A Misguided New Policy*, 51(1) CASE WESTERN RESERVE JOURNAL OF INTATIONAL LAW 201 (2019).

[210] THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Sluiter Göran, Carsten Stahn eds., 2009), at 248.

[211] Ivković, Hagan, *supra* note 2, at 28.

[212] McDermott, *supra* note 170; Gilbert Bitti, *Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC*, in THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT (Carsten Stahn, Göran Sluiter eds., 2009).

[213] Ibid.

coherence in ICC jurisprudence, and enhance the efficiency of proceedings, ultimately contributing to the ICC's overarching goals of accountability and justice.[214] Accordingly, the Pre-Trial Division Judges should convene on a regular basis to examine issues that are the source of uneven practices across different Chambers, with the goal of harmonizing processes as much as it is feasible.[215]

Dissenting opinions of judges as seen in the dissenting opinion of Judge Ušacka in *Lubanga* case (please see section III.C above) is a reminder and acknowledgement for the existence of different perceptions. This in turn demonstrates how having a concrete framework would contribute to solving criticisms towards dissenting opinions. When a dissenting opinion is formed through a common framework, it maintains its. Hence, precise guidelines can be included in the Chambers Practice Manual as it has been thus far in a response to the IER of 2020.

B. Navigating Interpretive Challenges: Strategies for Effective Resolution

Nonetheless, such measures may be deemed to be inadequate considering that most of these inconsistencies derive from the interpretation of primary source of applicable law in light of the Rome Statue with a particular attention to Art. 21(2). This provision undermines the normative nature of law to be applied when necessary.[216] This makes the interpretation of the Statute to be conditional of the Specific Chamber.

As pointed out to in the first section of this article, the divergent constitutionality of the law and the diverse background of the subjects exercising the law, offers a broad ground for interpretation. Hence, it is important to govern the interpretations through establishing coherent standard of interpretation.

With regards to the interpretation, Art. 21(2) of the Rome Statute expresses the Court's power to "apply principles and rules of law as interpreted in its previous decisions".[217] To demonstrate the significance of interpretation in the discourse of jurisprudence making, a recap of earlier points should be highlighted. As discussed extensively, consistent precedent (Jurisprudence) serves as the bedrock influencing the perpetual process of legal interpretation in multifaceted ways by furnishing fundamental principles and theories like originalism or legal positivism, offering frameworks guiding how judges decipher legal texts and statutes; by providing a repertoire of interpretive methods, encouraging scrutiny of legislative intent, historical context, and precedent to elucidate legal documents coherently; and through fueling the evolution of legal doctrines through scholarly discourse and judicial decisions inspired by these theories, allowing interpretations to mirror societal shifts and emergent norms.[218] Moreover, it fosters critical analysis, engendering debates that challenge established interpretations and propose novel perspectives, leading to a deeper understanding of legal concepts. Lastly, jurisprudence enables the adaptation of legal interpretations to contemporary contexts by facilitating the application of established legal principles to new circumstances.

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[214] John Smith, *The Role of the Pre-Trial Chamber in the International Criminal Court: Assessing its Impact on Case Assessment and Jurisprudence*, 20(2) INTERNATIONAL CRIMINAL LAW REVIEW 345 (2020).
[215] ICC, ICC-ASP/19/Res.7, Overall Response of the International Criminal Court to the "Independent Expert Review of the International Criminal Court and the Rome Statute System – Final Report" (Apr. 14, 2021).
[216] *Id.*
[217] ICC, Statute of the International Criminal Court, *supra* note 44.
[218] See the section on Importance of Jurisprudence.

Through these means, jurisprudence underpins the ongoing process of interpretation, providing the intellectual scaffolding essential for shaping legal reasoning and accommodating the evolving nature of law in society. It is therefore important for the previous decisions to be coherent in terms of interpretation as it is through a consistent interpretation that the jurisprudence can be perpetuated. This matter can also significantly influence the Court's authority by showcasing its obedience towards to Rule of Law as discussed in earlier sections.

Furthermore, it is not only discrepancies related to Art. 21(2) – where the judges have been given greater freedom for interpreting the law – that undermines the legitimacy of the ICC but divergent and defective interpretations of the statutory framework also degrade the institutional legitimacy.[219]

Art. 21(2) of the Rome Statute outlines the sources of law applicable to the ICC. While this article serves as a foundation for the ICC's legal framework, its interpretation and application are crucial. If the interpretation of Art. 21(2) leads to inconsistent or arbitrary legal decisions, it can raise doubts about the Court's fairness and impartiality. Additionally, if the ICC's reliance on various legal sources under this article is perceived as selective or biased in certain cases, it may diminish trust in the Court's objectivity. In essence, while Art. 21(2) establishes the legal framework for the ICC, flaws or inconsistencies in its interpretation or application could potentially erode the Court's legitimacy by undermining perceptions of its fairness and adherence to legal principles.

Defective interpretations of a statutory framework can erode institutional legitimacy in several ways. When a court or institution engages in flawed interpretations of laws, it may result in inconsistent decisions or rulings. These inconsistencies could create confusion, leading to a lack of predictability in legal outcomes and raising doubts about the institution's competence or adherence to legal principles.

Interpretations that deviate from the established statutory framework, such as misapplication or ignoring relevant legal provisions, might be perceived as arbitrary or biased. Such interpretations may lead to unfair treatment of parties involved or favoritism, undermining trust in the institution's impartiality and fairness.[220]

Defective interpretations could also result from ambiguity or vagueness within the statutory framework itself. When laws are unclear or open to multiple interpretations, it can create opportunities for subjective interpretations that deviate from the intended legal meaning. This ambiguity might generate inconsistencies in legal rulings and contribute to a lack of confidence in the institution's ability to apply the law consistently and accurately.

Overall, defective interpretations, whether due to inconsistency, bias, or ambiguity within the statutory framework, can diminish institutional legitimacy by compromising perceptions of fairness, consistency, and adherence to legal principles.

C. Optimizing Panel Compositions: Strategies for Addressing Key Challenges

In the pursuit of optimizing panel compositions within the judicial framework, it is imperative to recognize the significant influence wielded by the composition of each panel on the decision-making process. As elucidated earlier, the selection of judges can profoundly impact the outcomes of cases, thereby underscoring the pivotal role played by panel compositions in shaping jurisprudential outcomes.

[219] Ivković, Hagan, *supra* note 2.
[220] Pudovochkin, Babayev, *supra* note 19.

Consequently, the Court seems to have not been successful in addressing the discrepancies in decision-making. This becomes more apparent in cases where the Court aims to move away from already established practices so radically and bluntly (in which the *Bemba* case is a great example). This issue can be greatly solved through presidency. The selection of the judges on a case is a matter where the presidency can strengthen jurisprudence by selecting judges who might be having less of conquering opinions on the matter.[221]

Addressing this issue necessitates a strategic approach, wherein the presidency assumes a central role. The presidency, through the judicious selection of judges for each case, can wield considerable influence in shaping the jurisprudential direction of the Court.[222] By carefully curating panels comprised of judges with diverse perspectives and expertise, the presidency can foster robust deliberations and ensure that all relevant considerations are thoroughly examined.[223]

Moreover, by intentionally selecting judges who possess differing viewpoints or dissenting opinions on a given matter, the presidency can promote a more comprehensive and nuanced understanding of complex legal issues. This approach not only enhances the legitimacy and coherence of the Court's jurisprudence but also contributes to the development of a richer and more inclusive body of legal precedent.[224]

In essence, optimizing panel compositions represents a strategic imperative for the Court in its pursuit of equitable and effective adjudication. Through judicious selection and thoughtful consideration of panel compositions, the presidency can play a pivotal role in strengthening the Court's jurisprudential framework and upholding the integrity of its decision-making processes.

D. Strategies Within Statutory Frameworks and Constituent Treaties

Because the ICC is a Statute-centered organization (unlike *ad hoc* Courts), it cannot establish law independently as *ad hoc* tribunals did under the leadership and ingenuity of judges who did so out of necessity owing to a lack of relevant law.[225] Considering that the *ad hoc* Tribunals were restricted to the judges' interpretation of the law due to the lack of previously practiced laws, this argument cannot be used for the ICC when there is a significant precedent in the practice of its ancestors.

Even though each tribunal and international courts ought to and deemed to primarily priorities their own statutes rather than the established jurisprudences of other international Courts and Tribunals, however, since the statutes are often considered to be interconnected and an improvement and a development from the previous experiences of *ad hoc* Tribunals, relying on prior interpretations and jurisprudences is expected to only empowers the existing law and previous established practices.

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[221] M. Cherif Bassiouni, *The International Criminal Court in Search of Legitimacy: Why the ICC Can and Should Do More to Address Concerns Regarding Its Legitimacy*, (2009) 10(1) CHICAGO JOURNAL OF INTERNATIONAL LAW 1.

[222] Thordis Ingadottir, *The International Criminal Court: Nomination and Election of Judges*, INTERNATIONAL CRIMINAL COURT DOCUMENTS (June 4, 2002), www.legal-tools.org/doc/b92109/.

[223] *Id.*

[224] Leslie Vinjamuri, *Building Legitimacy in International Criminal Courts: A Case for 'Critical Mass'?*, 62(2) INTERNATIONAL ORGANIZATION 281 (2008).

[225] Stewart Manley, Pardis Moslemzadeh Tehrani, Rajah Rasiah, *Mapping Interpretation by the International Criminal Court*, 36(3) LEIDEN JOURNAL OF INTERNATIONAL LAW 771 (2023); Joseph Powderly, *Curb Your Creativity: The Rome Statute and the Attempted Institution of Interpretative Restraint*, in JUDGES AND THE MAKING OF INTERNATIONAL CRIMINAL LAW (Joseph Powderly, 2023), at 454-541.

Despite appreciation and devotion for the establishment of cornerstone definitions of law that in the *ad hoc* tribunals and the enhancement of ICL through interpreting IHL in these Courts, this article believes that the ICC should develop its practice without heavy reliance upon the practice of precedent courts. Therefore, one approach to tackle the rising inconsistencies would be to move away from decision-making based on the jurisprudence of previous Courts and Tribunals prevailing to procedure, but rather by concentrating and reaching conclusions based on the statute or constituent frameworks of the Court itself when in doubt. Through doing so, the importance of legal certainty and consistency will be recognised to the extent that grounds precisely articulated in the decision and judgments become visible by themselves and ultimately justify the established practices. As mentioned, even though there is significant value in the jurisprudences of previous courts and tribunals and this should be highly appreciated and acknowledged, the approach of focusing to re-establish the laws driving from the constituent treaty would be further strengthening and empowering the already established practices of the previously existing courts and tribunals. It must also be noted that this is indeed to a certain extent the current status que of the ICC's practice but there always remain space for improvement. Moreover, the ICC's continued reference to its previous judgments and decision-making will be a solution to developing and establishing uniformity in its jurisprudence.[226]

E. Enhancing Judicial Process Through Inclusive Negotiation Practices

Another solution could be that of notifying the relevant parties during the process of decision-making when deviating from fundamental jurisprudence and established precedent, so that the parties will have sufficient time to respond. This would propose a new approach for decision making by relying on negotiations prior to the delivery of the judgement. This initiative can strengthen process of jurisprudence making as it is the deliberation of a collective society consisting of the Judges, Prosecutors, Defence Lawyers and Victims' Lawyers. However, it must be noted that the approach should not be mistaken by holding other parties responsible for the delivering the judgements but rather providing them an opportunity to share their perspective and insight and amend if needed through formal or informal meetings. Even though in the current setting of the ICL, the presence and existence of Status Conferences serves the merit to a certain extent, lots of improvements can be done through informal meetings that can consequently strengthen the legitimacy of the judgements.

In the realm of judicial decision-making, an intriguing question arises concerning the efficacy of pre-informing parties about impending verdicts and soliciting their responses. Such a practice inherently challenges the finality typically associated with judicial determinations, barring the appellate process. One might ponder whether this proactive engagement with involved parties could potentially undermine the very essence of judicial decision-making, rendering it redundant.

However, within this conundrum lies an opportunity for refinement rather than obsolescence. A nuanced approach could involve the establishment of a specialized avenue for appeal, tailored specifically for cases where pre-informing and soliciting responses are integral components of the process. By affording involved parties this unique recourse, albeit with procedural advantages, the judicial system could reconcile the imperative of finality with the imperative of procedural fairness and participatory justice.

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[226] Gilbert Guillaume, *The Use of Precedent by International Judges and Arbitrators*, 2(1) *JOURNAL OF INTERNATIONAL DISPUTE SETTLEMENT 5* (2011).

This proposed mechanism not only acknowledges the evolving landscape of judicial proceedings but also underscores the commitment to uphold principles of transparency, accountability, and due process. Moreover, it reflects a conscientious effort to strike a delicate balance between the need for expeditious resolution and the imperative of safeguarding the rights and interests of all stakeholders involved in the adjudicative process. As such, the incorporation of a special right of appeal in circumstances where pre-informing parties is practiced emerges as a pragmatic step towards fostering legitimacy and trust in the judicial system.

F. Diminishing Political Influence

Moreover, as it was discussed above, certain political influences are encouraged, while others are discouraged in the Court's jurisprudence making.[227] To save the Court's integrity and overcome the decision-making based on politically influenced incentives, it is encouraged that the for the ICC prosecutors and judges to be compelled to evaluate the end states that are reasonably expected to be affected by their rulings in order to sustain the Court's stability and coherence. Through doing so, the Court would subcutaneously assert their legitimacy in the society of the receiving state.

Furthermore, building upon the preceding discourse, it becomes evident that the realm of legal precedent within the judicial sphere is susceptible to various forms of external influence, some of which are deemed conducive to the integrity of the Court's jurisprudence, while others are perceived as detrimental.[228] In order to fortify the Court's integrity and mitigate the risk of decision-making being swayed by politically motivated incentives, a proactive approach is warranted.

It is therefore recommended that both ICC prosecutors and judges be mandated to conduct thorough assessments of the potential ramifications of their rulings on end states that are reasonably anticipated to be impacted.[229] By engaging in this evaluative process, the Court endeavors to uphold its stability and coherence, thereby reinforcing its legitimacy within the societies of the recipient states. It must also be acknowledged how despite all these controversies surrounding extremely political nature of the cases such as Afghanistan and Palestine, the Court is putting its outmost effort to function efficiently and operate independent by eschewing political tensions surrounding these cases.

This proactive measure not only serves to insulate the Court from undue external pressures but also underscores its commitment to impartiality and fairness in dispensing justice.[230] By conscientiously considering the potential implications of their decisions,

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[227] Joseph W. Doherty, Richard H. Steinberg, *Punishment and Policy in International Criminal Sentencing: An Empirical Study*, 110(1) THE AMERICAN JOURNAL OF INTERNATIONAL LAW 49 (2016); THE PAST, PRESENT AND FUTURE OF INTERNATIONAL CRIMINAL COURT (Alexander Heinze, Viviance Dittrich eds., 2021), at 696.

[228] RICHARD H. STEINBERG, THE INTERNATIONAL CRIMINAL COURT: CONTEMPORARY CHALLENGES AND REFORM PROPOSALS (2020).

[229] Marieke Wierda, *A Framework for Assessing the Impact of the ICC*, in THE LOCAL IMPACT OF THE INTERNATIONAL CRIMINAL COURT: FROM LAW TO JUSTICE (Marieke Wierda, 2023), at 9-49; Marieke Wierda, *The Local Impact of a Global Court: Assessing the Impact of the International Criminal Court in Situation Countries*, LEIDEN UNIVERSITY (Jan. 9, 2019), www. scholarlypublications.universiteitleiden.nl/handle/1887/68230.

[230] Caroline Fehl, *Growing Up Rough: The Changing Politics of Justice at the International Criminal Court*, PEACE RESEARCH INSTITUTE FRANKFURT (Jan. 8, 2014), www.prif.org/fileadmin/Daten/Publikationen/Prif_Reports/2014/prif127.pdf.

prosecutors and judges can contribute to fostering greater trust and confidence in the ICC's mandate and operations. Ultimately, this approach not only bolsters the Court's credibility but also enhances its effectiveness in upholding the principles of international law and ensuring accountability for egregious violations thereof.

VI. Conclusion

This paper discussed the importance of consistency and coherence in the ICC's jurisprudence. It unveiled some discrepancies within the ICC's system, practice and judgments. It was suggested that incoherencies exist not only within different chambers of the same case (appeals, v. trial and pre-trial) but they also exist between different chambers of different cases.

Through acknowledging some developments after the criticisms of IER of 2020, this paper illustrated more recommendation for tackling the issue of incoherent jurisprudence building in the ICC. Solutions encompassed but were not limited to filtering political decision-making, creating a stronger framework, closing the conceptual gaps in the Statute, and developing a communication strategy as well as internal checks and balances in the system.

In conclusion, the issue of disparate jurisprudence within the ICC demands a thorough examination and robust measures for rectification. To comprehensively address this challenge, future scrutiny should concentrate on several key aspects. Firstly, an in-depth analysis of the procedural mechanisms, including the ICC's internal checks and balances, to identify areas for enhancement and better coordination among different organs. Secondly, a detailed evaluation of the decision-making process, emphasizing the role of judges' diverse legal backgrounds and the influence of these backgrounds on verdicts. Additionally, an exploration of the interpretation and application of foundational legal texts, particularly Art. 21(2) of the Rome Statute, would be instrumental in understanding the root causes of discrepancies. Moving forward, a holistic approach that delves into these areas will be pivotal in crafting strategies to ensure a more coherent and consistent jurisprudence at the ICC.