



Jurisprudence and Actions to Crimes Against Humanity in The International Criminal Court:

A Case Study on the Applicability of the Rome Statute

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Chapter 1: Functions of the International Criminal Court and The Jurisprudence of the Rome Statue

PART 1. ESTABLISHMENT OF THE COURT

The Court

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

Relationship of the Court with the United Nations

The Court shall be brought into relationship with the United Nations through an agreement to be approved by the Assembly of States Parties to this Statute and thereafter concluded by the President of the Court on its behalf.

Seat of the Court

1. The seat of the Court shall be established at The Hague in the Netherlands ("the host State").
2. The Court shall enter into a headquarters agreement with the host State, to be approved by the Assembly of States Parties and thereafter concluded by the President of the Court on its behalf.
3. The Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute.

Legal status and powers of the Court

1. The Court shall have international legal personality. It shall also have such legal capacity as may be necessary for the exercise of its functions and the fulfilment of its purposes.
2. The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State.

PART 2. JURISDICTION, ADMISSIBILITY AND APPLICABLE LAW

Crimes within the jurisdiction of the Court

The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.

Genocide

For the purpose of this Statute, "genocide" means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;
 - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) Torture;
 - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.
2. For the purpose of paragraph 1:
 - (a) "Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack;
 - (b) "Extermination" includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population;

- (c) "Enslavement" means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children;
 - (d) "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law;
 - (e) "Torture" means the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions;
 - (f) "Forced pregnancy" means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy;
 - (g) "Persecution" means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity;
 - (h) "The crime of apartheid" means inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime;
 - (i) "Enforced disappearance of persons" means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.
3. For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.

War crimes

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:
 - (i) Wilful killing;
 - (ii) Torture or inhuman treatment, including biological experiments;
 - (iii) Wilfully causing great suffering, or serious injury to body or health;

- (iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
- (v) Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;
- (vi) Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
- (vii) Unlawful deportation or transfer or unlawful confinement; (viii) Taking of hostages.

Crime of aggression

1. For the purpose of this Statute, “crime of aggression” means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.
2. For the purpose of paragraph 1, “act of aggression” means the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations. Any of the following acts, regardless of a declaration of war, shall, in accordance with United Nations General Assembly resolution 3314 (XXIX) of 14 December 1974, qualify as an act of aggression:
 - (a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof;
 - (b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;
 - (c) The blockade of the ports or coasts of a State by the armed forces of another State;
 - (d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;
 - (e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;
 - (f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;
 - (g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

Elements of Crimes

1. Elements of Crimes shall assist the Court in the interpretation and application of articles 6, 7, 8 and 8 *bis*. They shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

2. Amendments to the Elements of Crimes may be proposed by:

- (a) Any State Party;
- (b) The judges acting by an absolute majority; (c) The Prosecutor.

Such amendments shall be adopted by a two-thirds majority of the members of the Assembly of States Parties.

3. The Elements of Crimes and amendments thereto shall be consistent with this Statute.

Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

Jurisdiction *ratione temporis*

- 1. The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute.
- 2. If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under paragraph 3.

Preconditions to the exercise of jurisdiction

- 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
- 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
- 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

Exercise of jurisdiction

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

Referral of a situation by a State Party

1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Prosecutor

1. The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.
2. The Prosecutor shall analyse the seriousness of the information received. For this purpose, he or she may seek additional information from States, organs of the United Nations, intergovernmental or non-governmental organizations, or other reliable sources that he or she deems appropriate, and may receive written or oral testimony at the seat of the Court.
3. If the Prosecutor concludes that there is a reasonable basis to proceed with an investigation, he or she shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected. Victims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence.
4. If the Pre-Trial Chamber, upon examination of the request and the supporting material, considers that there is a reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court, it shall authorize the commencement of the investigation, without prejudice to subsequent determinations by the Court with regard to the jurisdiction and admissibility of a case.
5. The refusal of the Pre-Trial Chamber to authorize the investigation shall not preclude the presentation of a subsequent request by the Prosecutor based on new facts or evidence regarding the same situation.
6. If, after the preliminary examination referred to in paragraphs 1 and 2, the Prosecutor concludes that the information provided does not constitute a reasonable basis for an investigation, he or she shall inform those who provided the information. This shall not preclude the Prosecutor from considering further information submitted to him or her regarding the same situation in the light of new facts or evidence.

Exercise of jurisdiction over the crime of aggression (State referral, *proprio motu*)

1. The Court may exercise jurisdiction over the crime of aggression in accordance with article 13, paragraphs (a) and (c), subject to the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.

3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. The Court may, in accordance with article 12, exercise jurisdiction over a crime of aggression, arising from an act of aggression committed by a State Party, unless that State Party has previously declared that it does not accept such jurisdiction by lodging a declaration with the Registrar. The withdrawal of such a declaration may be effected at any time and shall be considered by the State Party within three years.

**Exercise of jurisdiction over the crime of aggression
(Security Council referral)**

1. The Court may exercise jurisdiction over the crime of aggression in accordance the provisions of this article.
2. The Court may exercise jurisdiction only with respect to crimes of aggression committed one year after the ratification or acceptance of the amendments by thirty States Parties.
3. The Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after 1 January 2017 by the same majority of States Parties as is required for the adoption of an amendment to the Statute.
4. A determination of an act of aggression by an organ outside the Court shall be without prejudice to the Court's own findings under this Statute.
5. This article is without prejudice to the provisions relating to the exercise of jurisdiction with respect to other crimes referred to in article 5.

Deferral of investigation or prosecution

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

Article 19 Challenges to the jurisdiction of the Court or the admissibility of a case

1. The Court shall satisfy itself that it has jurisdiction in any case brought before it. The Court may, on its own motion, determine the admissibility of a case in accordance with article 17.
2. Challenges to the admissibility of a case on the grounds referred to in article 17 or challenges to the jurisdiction of the Court may be made by:
 - (a) An accused or a person for whom a warrant of arrest or a summons to appear has been issued under article 58;
 - (b) A State which has jurisdiction over a case, on the ground that it is investigating or prosecuting the case or has investigated or prosecuted; or
 - (c) A State from which acceptance of jurisdiction is required under article 12.
3. The Prosecutor may seek a ruling from the Court regarding a question of jurisdiction or admissibility. In proceedings with respect to jurisdiction or admissibility, those who have

referred the situation under article 13, as well as victims, may also submit observations to the Court.

4. The admissibility of a case or the jurisdiction of the Court may be challenged only once by any person or State referred to in paragraph 2. The challenge shall take place prior to or at the commencement of the trial. In exceptional circumstances, the Court may grant leave for a challenge to be brought more than once or at a time later than the commencement of the trial. Challenges to the admissibility of a case, at the commencement of a trial, or subsequently with the leave of the Court, may be based only on article 17, paragraph 1 (c).
5. A State referred to in paragraph 2 (b) and (c) shall make a challenge at the earliest opportunity.
6. Prior to the confirmation of the charges, challenges to the admissibility of a case or challenges to the jurisdiction of the Court shall be referred to the Pre-Trial Chamber. After confirmation of the charges, they shall be referred to the Trial Chamber. Decisions with respect to jurisdiction or admissibility may be appealed to the Appeals Chamber in accordance with article 82.
7. If a challenge is made by a State referred to in paragraph 2 (b) or (c), the Prosecutor shall suspend the investigation until such time as the Court makes a determination in accordance with article 17.
8. Pending a ruling by the Court, the Prosecutor may seek authority from the Court:
 - (a) To pursue necessary investigative steps of the kind referred to in article 18, paragraph 6;
 - (b) To take a statement or testimony from a witness or complete the collection and examination of evidence which had begun prior to the making of the challenge; and
 - (c) In cooperation with the relevant States, to prevent the absconding of persons in respect of whom the Prosecutor has already requested a warrant of arrest under article 58.
9. The making of a challenge shall not affect the validity of any act performed by the Prosecutor or any order or warrant issued by the Court prior to the making of the challenge.
10. If the Court has decided that a case is inadmissible under article 17, the Prosecutor may submit a request for a review of the decision when he or she is fully satisfied that new facts have arisen which negate the basis on which the case had previously been found inadmissible under article 17.
11. If the Prosecutor, having regard to the matters referred to in article 17, defers an investigation, the Prosecutor may request that the relevant State make available to the Prosecutor information on the proceedings. That information shall, at the request of the State concerned, be confidential. If the Prosecutor thereafter decides to proceed with an investigation, he or she shall notify the State to which deferral of the proceedings has taken place.

Applicable law

1. The Court shall apply:
 - (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
- (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.

2. The Court may apply principles and rules of law as interpreted in its previous decisions.

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

PART 3. GENERAL PRINCIPLES OF CRIMINAL LAW

Nullum crimen sine lege

1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.
2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted.
3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute.

Nulla poena sine lege

A person convicted by the Court may be punished only in accordance with this Statute.

Non-retroactivity *ratione personae*

1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute.
2. In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Individual criminal responsibility

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;

- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

Exclusion of jurisdiction over persons under eighteen

The Court shall have no jurisdiction over any person who was under the age of 18 at the time of the alleged commission of a crime.

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

Responsibility of commanders and other superiors

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.
- (b) With respect to superior and subordinate relationships not described in paragraph (a), 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:
 - (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

- (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
- (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

Non-applicability of statute of limitations

The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.

Mental element

1. Unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.
2. For the purposes of this article, a person has intent where:
 - (a) In relation to conduct, that person means to engage in the conduct;
 - (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.
3. For the purposes of this article, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. "Know" and "knowingly" shall be construed accordingly.

Grounds for excluding criminal responsibility

1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
 - (a) The person suffers from a mental disease or defect that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;
 - (b) The person is in a state of intoxication that destroys that person's capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court;
 - (c) The person acts reasonably to defend himself or herself or another person or, in the case of war crimes, property which is essential for the survival of the person or another person or property which is essential for accomplishing a military mission, against an imminent and unlawful use of force in a manner proportionate to the degree of danger to the person or the other person or property protected. The fact that the person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility under this subparagraph;

- (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:
 - (i) Made by other persons; or
 - (ii) Constituted by other circumstances beyond that person's control.
- 2. The Court shall determine the applicability of the grounds for excluding criminal responsibility provided for in this Statute to the case before it.
- 3. At trial, the Court may consider a ground for excluding criminal responsibility other than those referred to in paragraph 1 where such a ground is derived from applicable law as set forth in article 21. The procedures relating to the consideration of such a ground shall be provided for in the Rules of Procedure and Evidence.

Superior orders and prescription of law

- 1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.

For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

PART 4. PENALTIES

Applicable penalties

- 1. Subject to article 110, the Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:
 - (a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years; or
 - (b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.
- 2. In addition to imprisonment, the Court may order:
 - (a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
 - (b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime, without prejudice to the rights of bona fide third parties.

Determination of the sentence

1. In determining the sentence, the Court shall, in accordance with the Rules of Procedure and Evidence, take into account such factors as the gravity of the crime and the individual circumstances of the convicted person.
2. In imposing a sentence of imprisonment, the Court shall deduct the time, if any, previously spent in detention in accordance with an order of the Court. The Court may deduct any time otherwise spent in detention in connection with conduct underlying the crime.
3. When a person has been convicted of more than one crime, the Court shall pronounce a sentence for each crime and a joint sentence specifying the total period of imprisonment. This period shall be no less than the highest individual sentence pronounced and shall not exceed 30 years imprisonment or a sentence of life imprisonment in conformity with article 77, paragraph 1 (b).

Trust Fund

1. A Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.
2. The Court may order money and other property collected through fines or forfeiture to be transferred, by order of the Court, to the Trust Fund.
3. The Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties.

Non-prejudice to national application of penalties and national laws

Nothing in this Part affects the application by States of penalties prescribed by their national law, nor the law of States which do not provide for penalties prescribed in this Part.

Chapter 2: Rome Statue and Agenda Crimes Detected Under the Jurisdiction of the ICC and Exceptions

China

The International Criminal Court has decided not to pursue an investigation into China's mass detention of Muslims, a setback for activists eager to hold Beijing accountable for persecution of ethnic and religious minorities.

Prosecutors in The Hague said on Monday that they would not, for the moment, investigate allegations that China had committed genocide and crimes against humanity regarding the Uighurs, a predominantly Muslim ethnic group, because the alleged crimes took place in China, which is not a party to the court.

The abuses described "have been committed solely by nationals of China within the territory of China," said a report by the court's chief prosecutor, Fatou Bensouda of Gambia.

For months, Uighurs in exile had urged the court to investigate China's repressive policies against Muslim minorities, the first attempt by activists to use the force of international law to hold Chinese officials accountable for the crackdown. They accused the Chinese government of carrying out a campaign of torture, forced sterilization and mass surveillance against Muslims, among other abuses.

China has faced growing international condemnation for its harsh treatment of Muslims, including the construction of vast indoctrination camps in the western region of Xinjiang. President-elect Joseph R. Biden Jr.'s campaign described China's actions in Xinjiang as genocide, a position also taken by other Western leaders.

China has denied that the camps are abusive, describing them instead as job training centers aimed at countering religious extremism and terrorism, despite a preponderance of contradictory evidence.

V.i The Stages of the Uyghur Genocide

In order to analyse the events of the Uyghur genocide, this section will be comprised of several smaller sub-sections, each according to their respective stage of genocide.

The ten stages describes are: (1) Classification, (2) Symbolization, (3) Discrimination, (4) Dehumanization, (5) Organization, (6) Polarization, (7) Preparation, (8) Persecution, (9) Extermination, and (10) Denial.

(1) Classification

The first stage of genocide is the classification of ethnic groups, which serves to increase an 'us versus them' mindset. While the simple naming of a group does not constitute a genocidal action, especially when such group classifies itself, it is important for the state and society to stress the similarities between such groups instead of the differences. Such similarities include a common language, religion, values, etc. When the differences between groups are constantly highlighted it will increase the 'us versus them' mentality (or 'othering') which is the first step to genocide and quickly evolves into the second stage.

In the case of the Uyghurs, the classification started as early as the integration of Xinjiang into the Chinese Republic. According to Jakimów and Barabantseva (2016), the formation of the concept of citizenship in China

has always closely been linked to the social and ethnic status of the people. While Han Chinese were (and are) viewed as the epitome of the Chinese nation, Tibetans and Uyghurs (among other minorities) were seen as 'weak', 'backward' peasant nations (Barabantseva 2011: 86). This classification therefore was not targeted directly against Uyghurs, but rather targeted against any ethnic minority in China. However, it certainly had an impact on how the classification of several minorities in China developed.

The Uyghurs have been officially recognized as an ethnic minority nation in China, native to Xinjiang and mainly speaking the Turkic language Uyghur. The majority of Uyghurs identifies as Muslim, and many Uyghurs live in countries bordering the region of Xinjiang, such as Kazakhstan and Kyrgyzstan. Due to the history of the region of Xinjiang, specifically the two short-lived East Turkestan republics (1933–34, 1944–49) and several further attempts to gain independence from China, its ethnic inhabitants (Uyghurs) became known as separatists and religious extremists. After 9/11 and the start of the global 'war on terror', the association with religious extremism largely turned into terrorism, which increased after the unrest in Xinjiang's capital Ürümqi in 2009. A report on the 2010 national defense plan in China references the East Turkestan Independence (ETI)¹ movement several times as a separatist group whose supporters require a 'crackdown', while simultaneously equating separatism, extremism and terrorism (State Council, 2011). Although the report does not state further how exactly such crackdown is to be conducted and how to identify supporters of the ETI movement, it is reasonable to believe that any Uyghur or Muslim may be associated with the ETI movement. In an official report on the terror attack of 2014 in Xinjiang, the East Turkestan Islamic Movement (ETIM)² is credited with the attack, whereas participants of the violence are interchangeably referred to as terrorists and gangsters (State Council, 2014). Another report from the same year describes the punishment of fifteen officials from Xinjiang for their religious beliefs (Jia, 2014). The report states that due to the beliefs or participation in religious activities, which is forbidden for government officials, several officials were either removed from their position or investigated by police, insisting that the region threatens 'ethnic unity' and officials need to be 'tough enough' in the fight against terrorism (Jia, 2014). Solely the possession of religious texts or religious gatherings are described as illegal and 'compromising social stability'.

The language used in these reports paints a clear picture. Uyghur Muslims are equated with separatists and terrorists, even gangsters, which classifies Uyghurs not only as 'weak peasants' but as threats to the stability and unity of the entire state. The single classification of Uyghurs thus started around the time of violent conflicts in Xinjiang and the 'war on terror', when they were unofficially declared as part of the common enemy – terrorism. An attempt to emphasize similarities between Hans and Uyghurs would not have been successful, as the image of the Uyghur as a terrorist or separatist with no common grounds has already been painted.

1 The East Turkestan Independence movement calls for the independence of the autonomous region of Xinjiang as an Uyghur or Muslim republic. Supported by groups globally recognized as terrorist organizations, support for the East Turkestan Independence movement is currently recognized as a terrorist ideology only by the People's Republic of China.

2 The East Turkestan Islamic Movement, founded in 1988, is an organization today known as the Turkistan Islamic Party (TIP). It is globally recognized as a terrorist group and distinct from the East

Turkestan Independence movement based on its organization. However, support for each other exists.

(2) Symbolization

The second stage describes the symbolization of the group. This means that the 'other' group will be associated with certain names and symbols, as was the case with the yellow stars which Jews were forced to wear during the Holocaust. At this stage, the othering of the victim group first becomes obvious (especially to outsiders) and increasingly dangerous. Furthermore, the symbols do not have to be forced upon the group, instead, existing symbols may be criminalized or at least become socially unacceptable and thus forcing the group to refrain from showcasing their symbols. This can include any type of clothing, styling, body modification or similar. If the government is involved in the legal status of symbols (either the forced symbolization or criminalization of existing symbols), it is the responsibility of the majority population to disregard the symbols and as such deprive them of their meaning.

As a majority Muslim group, it may be obvious that in this stage any type of Muslim symbols will be subject to symbolization. And indeed, already in 2015 China banned "abnormally" long beards, wearing headscarves in public and fasting during Ramadan in Xinjiang (Kuo, 2015). Especially long beards and headscarves (such as the burqa, hijab, niqab) are commonly associated with Islam, and thus the banning of displaying these symbols is supposed to serve as a measure against Islamic extremism. However, proper measurements to enforce these new bans were not in place yet, except the barring from taking public buses. In 2017, it was reported that these bans will be sanctioned from then on forward, and new restrictions on religious weddings were implemented as well (BBC, 2017). In regards to preventive measures, Kuo writes: "as long as Chinese officials tell residents they will be safer if religious expressions are kept to a minimum, these measures are likely to continue."

(3) Discrimination

As soon as the victim group is associated with symbols, it becomes easier for law enforcement and society to openly discriminate against the group. In the third stage, discrimination becomes institutionalized through laws that deprive the group of certain rights. Civil rights, voting rights, right to citizenship, freedom of expression of religion, marital and family rights, among others can be affected, either at once or throughout time. When laws prevent a certain group from engaging in politics, society, or infrastructure, they have no legal protection against discrimination and easily become victims to more severe crimes. Especially in the case of denied citizenship, the government attempts to rid itself of any responsibility toward the victim group and instead pushes the issue onto the international stage.

The Uyghurs have been subject to several types of institutionalized discrimination. Of course, freedom of religion has been severely repressed by policies regarding the wearing of Muslim symbols and participation in Muslim traditions in Xinjiang, as has already been discussed in the previous section. Furthermore, the Chinese government ordered the return of all passports of Xinjiang citizens in 2016 (Solomon, 2016). As with previous restrictions on Uyghurs, the government cited the unrest and extremism in the region as reason to limit travelling. It was further stated that the travel plans of 'ordinary people' will not be affected, as only 'criminals' will be prevented from leaving the country (Solomon, 2016). Based on the language used previously by Chinese officials, one can argue that 'ordinary people' most likely refers to Han Chinese, whereas any Uyghur Muslim displaying religious affiliation can be classified as a 'criminal'. This measure greatly impedes on the freedom of movement, hindering Uyghurs to safely emigrate or to ever return to China.

Although China's heavily criticized one-child policy has been lifted in 2015, family policies are still targeting Uyghurs. Previously, ethnic minorities in China enjoyed the privilege of having less restrictions on reproduction than Han Chinese. In 2017, a new policy was implemented which called for ethnic equality by allowing Han Chinese to reproduce at the same rate as ethnic minorities (Hincks, 2017). While the policy itself is not a discrimination of Uyghurs, it has been argued that this policy is intended to increase the Han population, especially in Xinjiang (Hincks, 2017). This policy may be coupled with the policy of 2014, when the government of Xinjiang started offering financial support to inter-ethnic couples, in an attempt to assimilate Uyghur culture (Kaiman, 2014). The incentive is to promote marriages between Uyghurs and Hans, with the goal of limiting Uyghur cultural influence on children. Interestingly, in other instances of genocide family-planning policies targeted inter-ethnic couples in the opposite way: in Myanmar, Rohingya couples reportedly have to pay high fees and often are denied permission to get married (Amnesty, 2004: 30) whereas inter-ethnic marriage is commonly discouraged and opposed (Wardle, 2015).

Ultimately, the Uyghurs became subject to legal and social discrimination in the form of restrictions on travel and expression of religion, as well as the promotion of Han culture for the assimilation of Uyghur culture. Due to China's justification of the passport policy (preventing criminals from traveling) and the family policies not being restrictive, it is difficult for the international community to intervene or offer support to the Uyghurs. It is thus unclear what kind of preventive measures could have been useful in these instances of discrimination.

(4) Dehumanization

After discrimination becomes institutionalized, the dehumanization of the discriminated group begins. While the discrimination takes place on the legal level, the dehumanization is primarily in the social sphere. Hate propaganda deprives the victim group of their humanity through name-calling and depiction as anything less than a human being, which serves the purpose of reducing the population's aversion against violence, torture and even murder of the victim group. At this stage, Stanton suggest the first involvement of the international community by directly targeting perpetrators with sanctions. Local leaders and public figures need to get involved as well, condemning the dehumanization of the group.

Under Chinese law, ethnic minorities (including Uyghurs) are protected from discrimination. However, the framing of Muslims in state media largely contributes to the general population's perception of Muslims. Luqiu and Fang (2018) conducted a study over a 10-year period examining Chinese state media's reporting on Muslims and Islam, and how this reporting affects how Muslims are perceived by non-Muslims and themselves in China. Due to the strict laws concerning media and information, all news outlets are controlled by the government, some more and some less, and international reports are almost exclusively derived from Western news agencies (Luqiu & Fang, 2018: 602-603). Any type of agenda, whether Chinese or Western, is thus exclusively aired to the population which perpetrates perceptions and stereotypes. The authors found that Western media tends to report on Muslims and Islam negatively, usually perpetrating the terrorist stereotype, which means that Chinese news on international issues will portray Muslims and Islam negatively as well (Luqiu & Fang, 2018: 603). This issue is related to Morgan and Poynting's (2001) assertion of Muslims being the global 'folk devil', as has been previously discussed in the literature review section on the origins of genocide. Such international, structural stereotyping of Muslims clearly influences the development of genocide in China.

Furthermore, education about Islam (or any religion for that matter) is strictly prohibited in China in order to preserve the national Chinese ideology, leading to misunderstandings about Muslim traditions. Such misunderstanding contributes to the negative portrayal of Muslims in China, and policies that are intended to benefit ethnic minorities anger the Han majority, as they often do not understand (due to lack of education on the issue) why such policies are necessary in the first place (Luqiu & Fang, 2018: 609). Luqiu and Fang's study (2018) further attests to the stereotypical portrayal of Muslims, as it shows that non-Muslim participants largely attribute negative words with Islam. While the dehumanization in this case may not be overt, the association of Muslims with terrorism and solely negative connotations dehumanizes them to terrorists and criminals. In a country like China, where cases of capital punishment are the highest globally and 'lesser' crimes than terrorism are punishable by death, the perception of Muslims solely as terrorist is equally dehumanizing, as it reduces the population's aversion to their persecution, torture, and death.

This can be further witnessed by looking at the murals that were painted near a mosque in Xinjiang in 2015. The BBC (2015) has published several images of these murals depicting the killing of terrorists by the PRC and many other depictions of the 'unacceptable' behaviour of Muslims. While it is not clear who painted these murals, they are a visual representation of the public's perception of (Uyghur) Muslims and Islam in China. Whether international campaigns to reduce the dehumanization of Uyghurs would be successful is unlikely. Due to the restrictions on the internet and social media as well as education, the local population would most likely not receive much information from outside of China. A more structural preventive measure would be a change in international and specifically Western media and news that would refrain from stereotyping Islam and instead focuses on the struggles faced by Muslims globally, as well as a more informed reporting to raise awareness. Furthermore, Western media and news outlets have the responsibility to clearly distinguish between terrorism and Islam, and report more often on other forms of terrorism such as nationalist, white supremacist and populist terrorism.

(5) Organization

The fifth stage of genocide is the organization. At this point, the process of genocide turns from social and institutionalized discrimination and hate into an organized persecution of the victim group. Whether it is the state's official military or a type of militia or otherwise supported group (in order to divert responsibility for the crimes away from the government), the government is employing and training troops or groups for the espionage, persecution and even murder of the victim group. This stage becomes visible through the purchase and distribution of arms to those militias and groups. Here, the international community must stop the distribution of arms and military gear to the perpetrator state, and impose targeted sanctions and embargoes.

As China is a heavily armed and militarized state already as one of the top five arms exporters (China Power, 2020), this stage may be less obvious to recognize as an outsider, and prevention efforts may be relatively useless. Nevertheless, reports exist about special training and deployment of paramilitary forces in Xinjiang specifically, always justified as a counterterrorism effort. In 2015, for example, a year-long 'security campaign' was launched in Xinjiang in response to several violent attacks in Kashgar, one of the most important cities economically in the country's west (Gracie, 2015). Military presence was and is more concentrated in Xinjiang (and other regions with great numbers of Muslims) than in Hanmajority regions. A similar picture can be seen in 2017 when within one week several thousand troops have been deployed to Ürümqi in another anti-terror strike (Phillips, 2017). Later, at the end of 2019, Reuters reports on another

paramilitary drill in the Pamir mountains located in Xinjiang, training for the targeting of 'thugs' in an anti-terror campaign (Wu, 2019).

Here, again, the framing of these drills and deployments as anti-terror campaigns makes international involvement difficult. However, as has been already established in earlier sections, Uyghurs and Muslims are universally understood as separatists and terrorists, and using language such as 'gangsters' and 'thugs' puts a greater target on Uyghurs in the region. These drills and parades can be understood as a symbolic threat to the native population, as a way of showing off the military capabilities and incentive to put a stop to the unrest in any way necessary. The behaviour of the Chinese state and military is clearly threatening towards the Uyghur nation even though the power dynamics are already incredibly unequal. In terms of prevention measures, as stated in the earlier paragraph, arms embargoes would have most likely been unsuccessful as a measure against the armament of troops in Xinjiang. Nevertheless, targeted sanctions against military officials, as proposed by Stanton, have been imposed. Unfortunately, these sanctions were imposed way too late by the U.S. government in July of this year (Palmer & Gramer, 2020), when preventive measures such as economic sanctions have barely any impact on the situation anymore. I will come back to this later in the analysis.

(6) Polarization

In the sixth stage, the discrimination is taken further by polarizing the population. The 'moderate', less biased center is the main group that may oppose the persecution and genocide of the victim group and thus poses a threat to the perpetrator. Polarization, the exaggeration of the 'us versus them' mentality, is the perpetrator's weapon against a moderate center in order to garner support from the majority of the population. Hateful propaganda spread by mass media, laws that prevent marriage or reproduction between opposing groups, and the disarmament of the victim group are all measures that further the gap and conflict between the groups. Depending on the situation of the group at this stage, the international community has the responsibility to provide the victims with resources that help their defense, either through humanitarian assistance or, in an extreme situation, the distribution of arms.

It may be not obvious at first if propaganda is still at the symbolization stage, dehumanization stage or already at the polarization stage. In the case of the Uyghurs, this stage may be even more blurred. Hateful propaganda has already been identified in an earlier stage, and in another earlier stage we found that marriage and reproduction between opposing groups are actually encouraged in Xinjiang. So, what event may constitute the sixth stage of polarization in the Uyghur genocide? Even though the government and media have already succeeded in the classification and dehumanization of Uyghurs as terrorists and separatists, the government further tried to erase Uyghur history in an attempt to invalidate any Uyghur national sentiments. A white paper published by the State Council's information office in 2019 claims that the East Turkistan state has never existed (Jia, 2019). The white paper claims that terrorists and separatists were "distorting history and facts", and that the absorption of Xinjiang in 1949 into the newly founded People's Republic of China was a 'peaceful liberation' (Jia, 2019). The report concludes that under the leadership of the ruling communist party, "people of all ethnic groups in Xinjiang strive together with people from all over the country, and the region is now in the best development stage in its history with the economy in the region developing sustainably, the social environment harmonious and stable, people's lives continuously improving, religions developing soundly and people unifying" (Jia, 2019).

Although the phrasing, especially of the conclusion, may not seem polarizing at first, this white paper should be understood as an attempt to erase certain Uyghur history and with it any claims to an Uyghur national identity. By invalidating the identity and history of the Uyghurs, the government is signalling to the general population that any wish to be sovereign is a threat to China's stability and security. Any foreign mention of the East Turkistan republic would be seen as extremist propaganda and a direct threat to China's sovereignty. The goal is to convince the moderate population that Uyghur national identity is a foreign terrorist plot that intends to break apart the Chinese state and thus the moderate population would side with the government in the fight against the 'international' threat. Preventive measures as suggested by Stanton are almost impossible to be implemented in this situation. The paper does not mention any organized groups specifically, only 'separatists' and Uyghurs, but one can assume that the ETI movement and Turkistan Islamic Party (TIP) are referenced. Whereas the ETI movement is not an organized group but rather a collective of national sentiments, the TIP is organized and universally recognized as a terrorist group. Thus, any international support for TIP would constitute an explicit threat against China and the military may be incentivized to counterattack. A possible preventive measure in this case would be education campaigns about Uyghur history and national identity but as stated earlier, internet and media restrictions most likely prevent international awareness campaigns for the general, moderate population.

(7) Preparation

After the indoctrination of the general population, the perpetrator begins the planning and preparation for the mass murder. Of course, the perpetrator (state) does not admit to planning a genocide. Rather, covert language will be used that would legitimize or justify a militarized attack against a group, such as 'counter-terrorism' or 'counter-insurgency' in the case of an ongoing war/conflict. Once such language becomes obvious, which it should in the context of the previous stages, Stanton argues that prosecution of the perpetrator on the count of incitement and conspiracy to commit genocide needs to be launched, referring to article 3 of the Genocide Convention. This seventh stage is the last stage to prevent a severe mass killing.

Throughout the process of the Uyghur genocide, Uyghurs have always been associated with terrorists, thus the planning of any 'counter-terrorist' attack in Xinjiang must be understood as the preparation for genocide. Of course, as we already saw in previous stages, the anti-terror campaigns were omnipresent and it may be difficult to distinguish which campaign or attack should be understood as the starting point of the preparation, if not all of them are part of it. Instead, the preparation in this case may be better understood as the increasing deportation of Uyghur Muslims to the so-called re-education camps. From there, a labour transfer programme has been established that sends tens to hundreds of thousand Uyghurs to factories of forced labour that supply international corporations (BBC, 2020). From what we know, at this point, the detention camps are not 'death camps' (yet) and thus I understand these camps as preparation facilities for the following persecution.

These re-education camps are believed to be operational since 2017, when footage and witness accounts gained world-wide attention. At first, the Chinese government denied the existence of the camps completely. In response to criticism from the United Nations, senior official of the Chinese Communist Party (CCP) Hu Lianhe assured that there are no internment camps in China and Xinjiang and that all minorities lived in harmony (Cumming-Bruce, 2018). Furthermore, the Chinese ambassador to the UN in Geneva claimed that the reports on the internment camps were solely separatist propaganda aiming to break China apart (CummingBruce, 2018). However, once the evidence of the existence of these camps increased, China

changed its course and no longer denied their existence. Instead, the government started to advertise the camps as vocational education and training centers that provided the citizens of Xinjiang with education and skills on a voluntary basis (Kuo, 2018). As usual, China cites the unrest and terrorist activities in Xinjiang as reason to establish these camps, further claiming that “[they] may not operate flawlessly, but aim to stop impetuous killings and comfort people frightened by violent terrorist activities” (Kuo, 2018).

Of course, countless reports from eye-witnesses, journalists and refugees claim that these camps are not, in fact, voluntary. Any Uyghur in Xinjiang who openly practices Islam (e.g. wearing religious symbols as per the second stage) or has otherwise been identified as a ‘threat’ to the Chinese state may be deported to one of these camps without any official charges against them (HRW, 2018). The BBC reported about a leak of official Chinese documents to the International Consortium of Investigative Journalists (ICIJ), which detail how these detention camps are to be run (BBC, 2019). According to these documents, the goal of the camps is not de-radicalization and the teaching of skills, but rather to use torture, punishments and brainwashing for cultural assimilation. Inmates must speak Mandarin Chinese and are not allowed to speak Uyghur, must adhere to Chinese national identity, and must not practice any religious customs. The goal is clearly to eliminate Uyghur national identity and culture, which initially prompted the classification of the situation as a ‘cultural genocide’. Much like ethnic cleansing, which is often defined as the attempt to physically rid a territory of a certain ethnic group, ‘cultural genocide’ is not necessarily aimed at the physical destruction of a group but quickly leads to it. Thus, once this situation was acknowledged in 2019, the United Nations and the world had the responsibility to intervene. Unfortunately, the UN has yet to acknowledge the situation as ‘cultural genocide’, let alone genocide. Only 22 member states of the UN Human Rights Council issued a statement criticizing China for their mistreatment of Uyghurs and called for the end of the mass detentions, yet again avoiding the term genocide (HRW, 2019). This lack of international responsibility and proper acknowledgement enabled the Chinese state to go forth with their persecution of the Uyghurs.

(8) Persecution

The eighth stage describes the logical stage after preparation: persecution. Members of the victim group are identified and actively persecuted, which includes the expropriation of property, deportation to ghettos or concentration camps, and forced sterilization or abortion. At this stage, torture and extrajudicial killings increase to extreme numbers, indicating genocidal intent. Stanton describes this stage as the last test to evaluate the intention of the international community to intervene, or if other states become bystanders to the atrocities. If prevention measures have failed or not been implemented to this point, the international community must intervene militarily, as (economic) sanctions will no longer prevent the genocide.

I argue that this is the stage where the Uyghur genocide is at now. As has already been described in the introduction, Uyghur women are being forcibly sterilized or performed abortions on (Zenz, 2020), which is an act of genocide specifically mentioned by Stanton and the Genocide Convention. It is plausible to assume that after the international community acknowledged the situation but showed no intent to intervene in any way, the Chinese government concluded that more extreme measures to erase Uyghur identity can be employed. Although the government is not resorting to the actual killing of the Uyghur population (at the moment), the prevention of birth of Uyghur children coupled with the policies to promote interethnic reproduction discussed earlier is a long-term attempt at physically destroying the Uyghur nation and identity. As in most of the stages, it is not quite clear when exactly this persecution began, as Zenz’ (2020) report indicates that as early as 2015 the population growth in Xinjiang decreased significantly, but the rates were incredibly low

in 2019 and 2020. The earlier decrease in population growth can be attributed to a general attempt by the Chinese government to control national population growth, whereas official documents from 2019 detail plans for mass female sterilization in Xinjiang for the past year. Zenz also noted a significant increase in the number of (young) female Uyghur widows starting in 2017 when detention camps were fully operating, meaning that it is likely that many men (who constitute the majority of inmates) died due to the treatment they received in those camps (Zenz, 2020: 19). Whether these deaths are results of physical violence or abuse such as malnourishment, drugging, lack of medical attention, over-exhaustion and the like is not clear, although both might be possible.

A clear attempt at genocide is becoming visible at this stage, and many organizations and countries are using the term to describe the current situation. Soft prevention measures are not suitable anymore and physical intervention is needed to prevent the situation from escalating. As already mentioned, the United States recently implemented targeted economic sanctions against Chinese and Xinjiang officials, but they are unlikely to de-escalate the situation. The U.S. and China have been involved in a trade war since 2018, therefore any more economic conflicts between the two states are unlikely to influence the development of the current genocide.

V.ii Predicting the Course of the Uyghur Genocide

While analysing the events of the Uyghur genocide in correspondence to their stages, it became quite obvious how intertwined and overlapping the stages are. Especially the chronology of the events of the last few stages became increasingly blurred with omnipresent anti-terror campaigns and deportations to re-education centers. The hostility of not only the government but the majority population against Uyghurs specifically and Xinjiang Muslims in general started quite early but the terrorist attack in 2009 can be argued to be the trigger that set in motion the increased classification of Uyghurs. The stages of symbolization, discrimination, dehumanization, and organization followed comparably slowly and chronologically, whereas the other stages appear to have occurred in a relatively short time-span starting in circa 2017 until now and are tightly intertwined. Based on the events that we know of, I conclude that the genocide is currently at the eighth of ten stages, only one stage away from irreversible physical damage to the population of the Uyghurs. And since the last stages occurred so fast, it is important to act as quickly as possible. If the development of suitable intervention methods is the ultimate goal of genocide research, it is important to understand the current domestic and international context of the situation that helps predict how the process of genocide is likely to develop. Therefore, this section will be divided into two parts. The first part will examine China in the context of the international structure in relation to the genocide and whether this context makes intervention likely, and in the second part I will formulate my predictions regarding the development of the situation in accordance to the remaining stages.

V.ii.a International structure and intervention

First, we need to understand the importance of the region of Xinjiang to China. According to Wong (2014), Xinjiang is a hub for energy production, as approximately 40% of national coal reserves and the largest national gas reserves can be found in the province. Oil production and refining, as well as oil, gas and coal transport are all soaring, rendering Xinjiang as one of the most important Chinese regions in terms of national energy production and exports. With a booming economy and industry, as well as the world's largest

population, China is heavily dependent on Xinjiang's energy sector. Thus, the threat of losing that territory explains China's hostility towards the group inhabiting it – the Uyghurs. As already discussed in the literature review, Midlarsky (2005: 83, 86) argues that state vulnerability and the fear of (territorial) loss are the main progenitors of genocide. Such loss of territory does not have to be strictly geopolitical – decreasing autonomy over socio-economic spaces and sectors threatens the state and its assets. Therefore, it is likely that the threat of separatism and even increased Uyghur autonomy triggered China's resort to hostility. Ever since, the international 'war on terror' has been used as a justification for China's persecution of Uyghurs and Muslims, since international objections to the persecution of the 'folk devil' (Morgan & Poynting, 2012: 1) or 'international enemy' (Shaw, 2011: 647) were less likely.

In terms of energy production, Xinjiang is an important region for China and Central Asia, as it is the main distribution hub. However, Xinjiang is also prevalent in the global supply chains of clothing and medical equipment through forced labour. The Uyghur Human Rights Project (UHRP) recently published findings of multiple international clothing corporations being complicit in forced labour in Xinjiang. The press release included a list of the many corporations that have been linked to forced labour through the usage of cotton produced by Uyghur detainees (UHRP, 2020). In fact, China is the world's biggest cotton supplier with approximately 84% of its cotton production sourced in Xinjiang (Workman, 2020; Kelly, 2020). Thus, the international structure of global supply chains forces the international community to economically support the forced labour of Uyghurs, making them complicit in the related genocide. And not only clothing is produced in labour camps. The current COVID-19 pandemic increased the national and global demand of medical equipment mainly produced in China, including P.P.E. face masks. Xiao et al. (2020) of the NY Times found that not only have several new medical equipment factories opened in Xinjiang, face masks produced by Uyghur workers are also being supplied within the USA. This situation is difficult to resolve as medical grade face masks are currently highly in demand and medical suppliers may be reluctant to end their trade with the Chinese factories.

Besides the economy, the current political and diplomatic context of China is important to consider as well. In the literature review, we found that states usually only intervene in conflict when they expect the mission to be successful (Saideman & Jenne, 2009: 274, 276), if diplomatic missions and relations are not endangered (Southwick, 2018: 131), and if the intervention does not pose a security risk to the interventionist (Gregory et al., 2018: 111, 125). In the case of China, most likely none of these criteria will be met. China has one of the largest and strongest militaries in the world, is a P5 member of the United Nations with veto power in the Security Council, and is an NPT member which legally permits China to possess nuclear weapons. Furthermore, China is known to be adamant on state sovereignty within the UN, thus any intervention in China's sovereignty will be viewed as an attack that may require defense. Therefore, policy-makers likely will not believe a military intervention in China to be successful, will find it to endanger diplomatic relations, and may even prompt a threat to the national security of the third-party state. Another current event to consider here is the recent conflict in the Himalayas on the de-facto border to India, where 20 Indian soldiers died at the hands of Chinese troops (Griffiths et al., 2020). After all, a state that is involved in domestic and international conflict may be more hostile in case of an intervention or attack.

V.ii.b The remaining stages

Understanding China's role in the international economic and political structure, I will now make predictions regarding the next stages of genocide. But first, we have to look at stages 9 (extermination) and 10 (denial).

The ninth stage is characterized by brutal mass killings, dismemberment of bodies, torture, mass rapes, destruction of cultural or religious properties and sites. It is the final stage that aims to physically destroy the victim group and can only be prevented by immediate military intervention. This stage is what most countries, organizations and legal institutions first refer to as 'genocide', prompting the international responsibility to protect and intervene. Although scholars have already termed the Uyghur situation a genocide, it is likely that the international community will refrain from doing so unless the atrocities of the ninth stage are committed and witnessed. Even then, it is uncertain whether the international community has any intention of militarily intervening in China, seeing as there are no plans to intervene in a much smaller (economically, militarily, geographically) country like Myanmar, where we are currently witnessing brutal murder and mass rape of the Rohingya people (Southwick, 2018). But what could the ninth stage look like in China?

As discussed earlier, through modern communication technologies it has become much easier to raise awareness of humanitarian crises in other countries, but it has also made it easier for the perpetrator to adapt to the challenges of covering up their actions. The perpetrator is also able to adapt to current events and the international structure, which we have already seen as the Chinese government uses the 'war on terror' as a cover for their actions. China likely would refrain from openly and publicly exterminating their Uyghur population, whereas the detention camps are likely extermination sites. In these camps, Uyghur women have already been subject to forced sterilization, and more Uyghur men in Xinjiang died (under partially unknown circumstances) since the camps started operating (Zenz, 2020). The current pandemic has the potential to be used as an indirect murder weapon in those camps. The Chinese government keeps quiet about the situation in the camps, but one can assume that the virus has likely entered the camps and factories, and due to the conditions including crowding, malnourishment and lack of medical attention the virus is able to spread easily and seriously harm, if not kill the detainees. Recently, on July 29, cases started to spike again with 96 of 105 new cases in China being recorded in Xinjiang (Wu & Hua, 2020). Therefore, the uncontrolled spread of the novel corona virus in the camps and factories may be used as a less brutal, yet efficient, method of mass extermination. Another possibility, of course, could be another 'anti-terror' strike in Xinjiang of much bigger dimensions. The Chinese government is able to orchestrate a (possibly fake) terrorist attack in the region and then strike back with stronger military power. Under the guise of counter-terrorism, the Chinese military has the possibility to kill a large number of civilians and claim that those were separatists/terrorists. There is no physical evidence to support this theory, but it does fit within the on-going theme of the genocide. International wars have been started based on made-up claims without consequences (e.g. the 2003 US invasion of Iraq), so it is possible that the Chinese government may at least consider it.

X. Denial

The tenth and last stage is the denial throughout and after the atrocities. Not only does the perpetrator deny the actions that they are accused of, they will actively try to destroy any evidence that could prove and remind of the genocide. Investigations of the crimes will be blocked and the victims will be made responsible for what happened. Of course, this is already happening by accusing the victims of being separatists/terrorists and insisting that the concentration camps are actually voluntary vocational training centers. While international awareness of the situation is high, the Chinese government is able to keep their population largely unaware of the actual situation, in the present and future. Due to censorship and state control of the internet, social media and news outlets, the Chinese state can control what their population is exposed to and label any international claims as foreign or terrorist propaganda. A fitting example of the

power of the Chinese state is the censorship regarding the massacre at Tiananmen square in 1989. What is internationally known as a symbol of suppression of democracy and human rights is remembered in China as an event that put a necessary end to 'political turmoil' which helped China's economy to prosperity (Griffiths, 2019). It is continually erased from history books in China, and many younger citizens have never even heard about the massacre (Lau & Zhang, 2019). A personal encounter with a young man from mainland China living in the United Kingdom (who will not be named) revealed to me that he had only heard about the event from relatives and that he believes the violence and killing of protestors was justified and necessary. Such understanding of the event is quite common in China and reveals the ability of the government to influence their population's opinions and knowledge of national history. Having already discussed the wide-spread propaganda against Muslims and Islam, which negatively influences the majority population according to Luqiu and Fang (2018), China is well prepared for the further denial of the atrocities committed against the Uyghurs. According to Stanton, it is the responsibility of the international community to punish the perpetrator in an international tribunal in order to fight denial of the genocide. But if we learned anything from past examples of genocide, it is that prevention and intervention efforts by the international community always come too late, if ever.

Myanmar / Bangladesh

Bangladesh ratified the Rome Statute in 2010. On 9 April 2018, the Prosecutor requested the ICC Judges to determine whether it could exercise its jurisdiction over the alleged deportation of the Rohingya people from Myanmar (Non-State Party) to Bangladesh (State Party). On 6 September 2018, the PTC I declared the Court's jurisdiction over the alleged deportation. On 18 September 2018, the Prosecutor announced the opening of a preliminary examination and on 4 July 2019, the Prosecutor requested the PTC III to authorize an investigation on alleged crimes against humanity, such as deportation, other inhumane acts and persecution, committed against the civilian Rohingya population in Myanmar in the period since 9 October 2016. On 14 November 2019, ICC Judges authorized the Prosecutor to proceed with an investigation for the alleged crimes within the ICC's jurisdiction in the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar.

On 14 November 2019, Pre-Trial Chamber (PTC) III of the International Criminal Court (ICC) delivered its decision authorizing the Prosecutor to open an investigation for alleged crimes against humanity, such as deportation, acts of persecution and other inhumane acts, committed against Myanmar's Rohingya population on or after 1 June 2010.

The Judges agreed with the ICC Prosecutor that there were no substantial reasons to believe that an investigation into the situation would not be in the interest of justice and highlighted the unanimous calls expressed by victims' for an investigation into the situation. The Judges also stated that even though Myanmar is not a State Party to the Rome Statute, the ICC had jurisdiction over crimes that were partially committed on the territory of a State Party, such as, in this situation, Bangladesh. This decision comes after the ICC Prosecutor, Fatou Bensouda, requested on 4 July 2019 that the PTC III authorize an investigation into the deportation, acts of persecution and other inhumane acts committed against Myanmar's Rohingya population.

As a non-State Party, Myanmar will likely not cooperate with the Court in matters such as the gathering of evidence, the protection of victims and witnesses or the execution of arrest warrants. Also, given the current situation, any effort by the ICC to provide justice to victims in Myanmar would not encompass all crimes allegedly committed against the Rohingya, but only those cross-border crimes allegedly committed, at least partially, in Bangladesh.

Coalition members such as Women's Initiative for Gender Justice (WIGJ), the European Centre for Constitutional and Human Rights (ECCHR), the Canadian Partnership for International Justice (CPIJ), and the International Commission of Jurists (ICJ), as well as other civil society organization, submitted a number of *amici curiae* briefs, to help the Court in considering whether the ICC had jurisdiction over crimes committed against the Rohingya.

These submissions were repeatedly cited by the PTC throughout its reasoning in the jurisdiction decision, suggesting that civil society's unique perspective assisted the Chamber in making an informed decision.

PALESTINE

Since 1948, the Israel-Palestine conflict has been characterized by well-documented widespread violations of international humanitarian law and grave breaches of the Geneva Conventions. Civil society long called for both Israel and Palestine to join the ICC to ensure accountability for those responsible.

While the Palestinian Authority expressed its desire to accept ICC jurisdiction, it was only following its upgrade to “non-member state” observer status at the United Nations that Palestine could finally accede to the Rome Statute on 2 January 2015, giving the ICC jurisdiction from that date forward. Several days later Palestine submitted a declaration under article 12(3) of the Rome Statute giving the ICC prosecutor jurisdiction over alleged grave crimes committed in the context of the Israel-Palestine conflict in Gaza and East-Jerusalem beginning June 2014. The prosecutor subsequently opened a preliminary examination to determine whether a full investigation is warranted. In June 2016, Palestine ratified both the Kampala amendments, becoming the 30th state to ratify the amendment on the crime of aggression.

CC preliminary examination into the 2014 Gaza conflict

The ICC prosecutor opened a preliminary examination into the situation in Palestine on 16 January 2015, following an article 12(3) declaration lodged by the Palestinian government on 1 January of that same year. The ICC has jurisdiction over crimes committed on Palestinian territory or by Palestinian nationals as of 13 June 2015. The preliminary investigation is focused on alleged crimes committed by both Palestinian armed groups and Israeli defense forces during the 51-day Gaza conflict in 2014, as well as alleged crimes related to settlement activities in Gaza and the West Bank.

UN Commission of Inquiry calls for investigations into grave crimes during 2014 Gaza conflict

In June 2015, a commission of inquiry into the 2014 Gaza war—mandated by the UN Human Rights Council—presented a report detailing war crimes allegedly committed by both sides during the summer of 2014. Citing indiscriminate and disproportionate rocket fire into civilian populations by both Israel and Palestinian armed groups, the report encouraged local authorities to conduct criminal investigations to uphold accountability and deter future escalations of violence.

The government of Palestine has provided information to the ICC Office of the Prosecutor (OTP) on alleged crimes in relation to the 2014 Gaza conflict.

In July 2015, Israel opened a dialogue with the OTP in relation to the preliminary examination, publishing a report on factual and legal aspects of the 2014 conflict.

However, the Palestine preliminary examination has caused a worrying political backlash. Israel and the US have issued strong statements against the recognition of Palestine as a state as well as against the ICC, and both withheld aid to put pressure on Palestine.

Palestine’s responsibilities as an ICC member state include cooperating with the Court and its decisions, incorporating the Rome Statute into national legislation, and assisting the OTP with its preliminary examination. Israel should also engage positively with the Court. The international community—ICC member states in particular—must support the accountability process, whether through national courts or the ICC.

Afghanistan

After the 11 September 2001 attacks by Taliban members in the United States, the US-led invasion of Afghanistan resulted in over ten years of war in the country. The US-led coalition of allies, joined by the North Atlantic Treaty Organization in 2003, launched air strikes and ground operations in Afghanistan to oust the Taliban from power and dismantle the al-Qaeda terrorist group responsible for the attacks on the World Trade Center in New York. A transitional Afghan government was installed in 2002, and the UN Security Council subsequently established the International Security Assistance Force (ISAF) by Resolution 1386. Intended to assist the Afghan government in combating the Taliban and other armed groups, ISAF later came under NATO command. International forces withdrew major combat missions from Afghanistan in December 2014, although a new, smaller group of forces remains present to offer training and assistance to Afghan security forces. From the start of the war to the withdrawal of international forces, 26,000 are reported to have died and over 29,900 civilians have been injured.

In 2007, the Prosecutor of the ICC started a preliminary examination into Afghanistan. 10 years later, on 20 November 2017, she filed her request to open an investigation before the judges of the Pre-Trial Chamber, which was rejected on 12 April 2019. Even though the legal criteria of jurisdiction and admissibility were met, the judges argued that an investigation *"would not serve the interests of justice"*. They argued that a possible investigation was unlikely to lead to effective prosecutions in a reasonable timeframe due to limited cooperation, the difficulties to secure evidence and the time elapsed between the crimes and the Prosecutor's request. They also pointed out that the Court needs to use its scarce resources prioritizing activities that would have better chances to succeed. The Prosecutor of the ICC noted that it was the first time an investigation was not authorized on the grounds of the interests of justice, provoking many open questions. On 7 June 2019, the OTP filed their request for leave to appeal, to challenge the decision that was perceived as a big blow for the victims.

The preliminary examination:

During the preliminary examination, the Prosecutor looked into alleged crimes against humanity and war crimes committed on Afghan territory and territories of other States Parties, since 1 May 2003 and since 1 July 2002 respectively. In her assessment, the OTP has found a reasonable basis to believe that war crimes and crimes against humanity were and continue to be committed by members of Afghan and foreign government forces, including the CIA and American forces, and by anti-government forces such as the Taliban. The OTP also found that no relevant national investigations or prosecutions have been conducted or are ongoing against those who appear most responsible for the crimes allegedly committed by all three conflict-parties.

After the Prosecutor requested the opening of an investigation, US threats towards the Court intensified. One week before the judgement, the visa of the Prosecutor of the ICC was revoked. In response to the direct threats, the Prosecutor stated that she will continue to pursue her duties for the Court, in The Hague, "without fear or favor" and would continue to travel to the US.

Afghanistan acceded to the Rome Statute in 2003 and has largely cooperated with the OTP preliminary examination on its territory. Civil society, however, remains concerned about the possible role of the US and other occupying forces to influence the scope of Afghanistan's cooperation with the ICC.

Afghanistan's obligation as an ICC member state to cooperate includes cooperation with the OTP examination of conduct – including alleged detainee abuse – by Afghanistan's international partners in the US-led invasion and occupation of Afghanistan after 1 May 2003.

In a positive show of cooperation, the second vice president of Afghanistan made a statement in 2016 welcoming an ICC visit to Afghanistan. The government also announced the creation of a technical committee of government officials and the Afghanistan Independent Human Rights Commission (AIHRC) to broker cooperation with the ICC.

Until 2017, despite its obligations as an ICC member state, Afghanistan had not updated its 1976 Criminal Code to cover international crimes, which frustrated domestic efforts to deliver justice to victims of gross human rights violations.

In 2017, Afghanistan enacted a new criminal code incorporating provisions on war crimes, crimes against humanity, genocide, and the crime of aggression – the four core international crimes within the subject matter jurisdiction of the ICC. Such implementing legislation, which includes provisions on command responsibility as well as recruitment of soldiers under 18 years of age, will prove crucial to Afghanistan's ability to address Rome Statute crimes within the domestic jurisdiction.

The Criminal Code will enter into force in 2018.

At the request of the Afghan government, AIHRC charted an “Action Plan for Peace, Reconciliation and Justice in Afghanistan”, launched by President Hamid Karzai in 2006, to instruct that the commission of war crimes, crimes against humanity, or obvious human rights violations “*does not fall into the scope of amnesty on the basis of the principles of the sacred religion of Islam and internationally accepted standards.*”

Contrary to the Action Plan, the 2007 “Law on Public Amnesty and National Stability” granted legal immunity to “*all political parties and belligerent groups who fought each other during the past two and a half decades*”, without any temporal limit to the law's application or any exception in the case of international crimes.

The move, viewed as a violation of the fundamental right to redress for victims of gross human rights violations, spurred a vehement reaction from national and international NGOs, including concerns about Afghanistan's willingness and the ability of the Afghan legal order to put an end to impunity.

Only one high-ranking member of an armed group has been put on trial in Afghanistan, for crimes committed in 1992-93 – prior to the passing of the amnesty law, but also prior to ICC jurisdiction. The government has launched only a limited number of proceedings against its own alleged perpetrators, such as two officials from the National Directorate of Security.

Allegations of detainee abuse by US forces have resulted in one conviction – of a former Central Intelligence Agency independent contractor – and the court-martialing of a few dozen members of the military. Considering that these individuals were deemed responsible for isolated incidences of cruelty towards Afghan prisoners, civil society has alleged that the United States has not genuinely carried out an investigation.

Regarding the October 2015 aerial bombardment of a Médecins Sans Frontières hospital in Kunduz by US armed forces, a NATO investigation concluded that the bombardment resulted from human error. The only outcome was the suspension of the individuals most closely associated with the incident.

Local civil society groups in Afghanistan have played a pivotal role in advocating for victims' concerns and issues of justice and accountability to be included in Afghanistan's transitional justice process.

In March 2005, the Afghan government appointed an inter-ministerial Commission with senior representatives from the ministries of foreign affairs, justice, and the interior; from the Supreme Court; from the University of Kabul; and from the civil society organization Afghan Professional Alliance for Minority Rights. The goal of the Commission was to evaluate and determine steps toward implementation of the Rome Statute into national laws.

During a March 2006 roundtable, the Commission expanded its membership to other actors, including civil society organizations. The Afghanistan Independent Human Rights Commission prepared a preliminary draft on ICC implementing legislation, which received feedback from various actors and was then presented to the Ministry of Justice.

Civil society in Afghanistan and the Middle East have worked with the Coalition for the ICC facilitating discussions with the government and raising awareness of the significance of ICC activities in the country. These efforts have been key in laying the groundwork for Afghan leaders and the general public to engage in serious debates on the role of justice and the importance of an inclusive peace process.

Côte d'Ivoire

Côte d'Ivoire ratified the Rome Statute in 2013 following a decade long civil society campaign coordinated by the Côte d'Ivoire Coalition for the ICC. Partial implementation of ICC crimes into national law followed in 2014.

On 3 October 2011, Pre-Trial Chamber III granted the Prosecutor's request to open an investigation proprio motu in the situation in Côte d'Ivoire.

The investigation has focused on alleged crimes against humanity committed during the 2010/2011 post-electoral violence in Côte d'Ivoire. According to reports, the post-election violence erupted after Presidential election results between opponents Mr Laurent Gbagbo and Mr Alassane Ouattara were disputed. Gbagbo refused to hand over power to Alassane Ouattara, the current president of Côte d'Ivoire and about 3000 people died in the post-election violence. The Prosecutor brought charges against Laurent Gbagbo and Charles Blé Goudé for alleged crimes against humanity (murder, rape, other inhumane acts or and persecution) allegedly committed in the context of post-electoral violence in Côte d'Ivoire between 16 December 2010 and 12 April 2011.

The cases of Laurent Gbagbo and Charles Blé Goudé were joined in 2015 and the trial opened on 28 January 2016. After the Defence of Charles Blé Goudé filed a No Case to Answer Motion Trial Chamber III acquitted Mr Laurent Gbagbo and Mr Charles Blé Goudé from all charges of crimes against humanity in a controversial judgment. The written decision was published recently by the Court.

First state to accept ICC jurisdiction as a non-member

Côte d'Ivoire signed the Rome Statute in 1998 but did not formally ratify the Court's founding treaty until 2013. In 2003, Côte d'Ivoire became the first state to accept the Court's jurisdiction through a special mechanism for non-ICC member states under Article 12 (3) of the Rome Statute. Côte d'Ivoire reaffirmed its acceptance of the Court's jurisdiction through two separate communications to the ICC in 2010 and 2011. Full ratification, and implementation, of the Rome Statute came in 2013 after years of civil society advocacy.

ICC prosecutor investigates Côte d'Ivoire 2010-11 post-election violence

After conducting a preliminary examination of the situation in Côte d'Ivoire from 2003 onward, the ICC prosecutor independently requested a formal investigation (proprio motu request). In 2004, ICC pre-trial judges authorized the prosecutor to investigate war crimes and crimes against humanity allegedly committed following the country's disputed presidential election of 28 November 2010. It was the second time that the prosecutor had opened an investigation on a proprio motu basis.

ICC arrest warrants for Gbagbo camp

In the first cases opened by the ICC, the prosecutor alleges that Laurent Gbagbo and his inner circle, including former first lady Simone Gbagbo and youth leader Charles Blé Goudé, created and executed a common plan to hold on to power after losing the 2010 presidential election by encouraging attacks on the supporters of president-elect Alassane Ouattara. The Gbagbo-Blé Goudé ICC trial began in 2016. Simone Gbagbo was convicted by an Ivorian court but remains wanted by the ICC. In 2019, Gbagbo and Blé Goudé were released after an acquittal by Trial Chamber I. According to the judges, the Prosecutor failed to satisfy

the burden of proof. Simone Gbagbo, the former first lady of Côte d'Ivoire was convicted by an Ivorian court but remains wanted by the ICC.

Investigative timeframe extended back to 2002

In February 2012, at the request of ICC judges, the ICC prosecutor provided additional information on potential crimes committed in the context of Côte d'Ivoire's civil war during the years 2002–2010. Based on their assessment of this information, the judges expanded authorization for the investigation to cover the period from 19 September 2002 to 28 November 2010. They considered that the violent events in Côte d'Ivoire during this period (including relevant events since 28 November 2010) formed a single situation, in which an ongoing political crisis and power-struggle culminated in the events that the Pre-Trial Chamber had earlier authorized the prosecutor to investigate.

A complicated path to national justice

In 2003, the Ivorian Constitutional Court ruled that the Rome Statute was incompatible with the constitution. In 2012, parliament finally passed legislation amending the constitution, leading to ratification of the Rome Statute the following year.

In 2014, the Ivorian Parliament adopted amendments to bring the country's criminal and criminal procedure codes into line with the Rome Statute. While the amendments allow prosecution of ICC crimes and in fact define war crimes more broadly than the Rome Statute does, they do not include any provisions to strengthen cooperation with the ICC. The legislation enables impunity through escape clauses that provide immunity based on official capacity and the possibility of presidential pardon.

In March 2015, former first lady Simone Gbagbo was convicted of charges related to undermining state security by an Ivorian court and sentenced to serve 20 years in prison.. ICC judges, however, believe the national proceedings still do not reflect the gravity of the charges at the ICC and have ruled that Simone Gbagbo should be transferred to The Hague to face trial.

Civil society groups have also supported cases in national courts for victims and communities that the ICC has not been able to accommodate.

Civil society in Côte d'Ivoire

The Côte d'Ivoire Coalition for the ICC is one of the most active national civil society networks working to advance justice for grave international crimes. Through a range of awareness-raising activities along with advocacy with national and international actors, the Côte d'Ivoire Coalition successfully campaigned for ratification and partial implementation of the Rome Statute. The Coalition continues to work with the government to reform the national judicial system's capacity to prosecute grave international crimes and cooperate with the ICC.

One sided justice?

Civil society, including global and local Ivorian organizations, urge the ICC and Ivorian government to ensure all sides to the conflict are prosecuted for grave crimes. The prosecutor has repeatedly emphasized that investigations are ongoing, and therefore, all of those responsible for the crimes will be held accountable.

KENYA

Kenya ratified the Rome Statute in 2005, and incorporated ICC crimes into national legislation through the 2008 International Crimes Act. In 2010, the ICC Office of the Prosecutor used its *proprio motu* powers for the first time in opening an investigation into alleged crimes against humanity during Kenya's 2007–08 post-election violence.

Kenyan authorities had on three occasions failed to establish a national mechanism to investigate and prosecute those responsible. In March 2011, the ICC issued summonses to six high profile suspects from both sides of Kenya's political conflict. Cases against four suspects – two of whom would go on to assume the Kenyan presidency – were eventually withdrawn due to a lack of evidence and to what the prosecutor alleged was widespread witness interference. Kenya's 2007–8 PEV cases prompted an anti-ICC campaign, including intimidation and threats against civil society, threats to withdraw from the Rome Statute and attempts to interfere with ICC judicial decisions, at the highest levels of the Kenyan government.

ICC prosecutor opens first *proprio motu* investigation

In November 2009, the ICC prosecutor for the first time used *proprio motu* powers to seek authorization to open an investigation absent a referral from an ICC member state or the UN Security Council. In a March 2010 majority decision, Pre-Trial Chamber (PTC) II found a reasonable basis to proceed with an investigation into Kenya's 2007–8 post-election violence (PEV), agreeing that the prosecutor's preliminary examination suggested Kenya's failure to establish a competent domestic tribunal to prosecute perpetrators of the widespread violence.

In March 2011, PTCII issued summonses for six high-profile Kenyans from both sides of Kenya's 2007 elections, all suspected of orchestrating attacks on rival political supporters. All six made their initial appearances before the Court in April 2011. One ICC case involved ODM politicians Henry Kosgey and William Ruto, who would become deputy president, and radio broadcaster Joshua Sang. Another case involved PNU politicians Uhuru Kenyatta—later president—and Francis Muthaura as well as a former police commissioner, Mohammed Hussein Ali.

Judges send Kenyatta/Muthaura and Ruto/Sang to trial

In January 2012, PTCII approved the cases against Ruto and Sang and against Muthaura and Kenyatta for trial following confirmation of charges hearings in September and October 2011 respectively. In May 2012, the Appeals Chamber unanimously rejected defence challenges to the ICC's jurisdiction over the Kenya situation. PTCII judges declined to confirm charges against Kosgey and Ali.

All charges withdrawn as witnesses recant evidence

In March 2013, the ICC prosecutor withdrew all charges against Muthaura, citing issues with recanting witnesses and Kenya's limited cooperation and failure to assist in uncovering crucial evidence. In December 2014, the prosecutor withdrew charges against Kenyatta prior to trial, citing similar challenges. In April 2016, a majority of judges in Trial Chamber V(a) concluded there was insufficient evidence to continue the Ruto/Sang trial, which had been running for a year and which the prosecution alleged was plagued by witness-tampering. The OTP stressed the possibility of re-opening the cases should new evidence appear.

Arrest warrants for witness-tampering in Kenya cases

Witness-tampering allegations featured heavily in the ICC cases related to Kenya's 2007-8 PEV. Many prosecution witnesses recanted their statements while others disappeared. The prosecution alleged bribery in exchange for recantations or withdrawals and received authorization to issue arrest warrants charging three Kenyans with offenses against the administration of justice.

Kenya's anti-ICC campaign

While the ICC proceedings against them were ongoing, Kenyatta and Ruto decided to run jointly in Kenya's March 2013 presidential election, with Kenyatta elected president and Ruto his deputy. Both were accused of using the cases against them as platforms to frame the ICC's interests in Kenya as western and of exploiting their official status to influence judicial proceedings at the ICC.

At the international level, Kenya attempted, but ultimately failed, to rally UN Security Council support in favor of deferring the ICC's 2007-8 PEV cases. Kenya also appealed to fellow African Union (AU) members to collectively pressure the ICC, denouncing the ICC as a discriminatory institution and calling for withdrawal en masse if, for instance, official immunity was not recognized or the charges against Kenyatta and Ruto not withdrawn.

Threats to withdraw from the Rome Statute

At the national level, members of the Kenyan government repeatedly threatened to withdraw from the Rome Statute as part of Kenya's plan to forestall the 2007-8 PEV cases. In September 2013, anti-ICC lawmakers introduced an unsuccessful vote on Kenya withdrawing from the ICC, repealing domestic international crimes legislation, and ceasing to cooperate with the Court. The plan was strongly opposed by the Coalition's Kenyan, African, and international civil society members.

ASP sessions under intense pressure from Kenya

At the 12th ASP session in November 2013 and under intense pressure from Kenya, States Parties adopted changes to the Court's Rules of Procedure and Evidence (RPE) regarding summonses to appear, allowing presence at trial to be excused for those fulfilling "extraordinary public duties at the highest national level." It remained with the ICC trial judges to decide on any request, taking into account factors such as the interests of justice and the nature of the hearing in question. The Coalition questioned the process that led to the changes.

The appearance of the accused in the courtroom via video-link, the use of prior recorded testimony during proceedings, and the discretion of trial judges to hold hearing outside The Hague were also made possible by the 2013 RPE amendments.

In the run-up to 13th ASP session in December 2014, civil society strongly opposed a proposal by Kenya to amend the Rome Statute to allow immunity for heads-of-state and high government officials.

At the 14th ASP session in November 2015, governments agreed to accommodate Kenya's proposed agenda item on the application of RPE rule 68 on the use of prior-recorded witness testimony, an issue that was under appeal in the Ruto/Sang trial. While the session ended without any decisive action by states parties, governments agreed to include in the Assembly's final report an interpretation of rule 68. The Coalition denounced the dangerous precedent set by attempting to politically influence issues under judicial review.

Kenya fails to establish national mechanism to try 2007-8 PEV

Domestic attempts at addressing the PEV included the establishment of the Truth, Justice and Reconciliation Commission and government discussions on the use of existing criminal courts in place of a separately convened tribunal. Constitutional amendments that would have established such a tribunal, as recommended by the Waki Commission, thrice failed to achieve the requisite consensus in parliament, resulting in Kenya missing the negotiated September 2009 deadline—agreed upon by Kenya and the ICC prosecutor in July 2009—to initiate national prosecutions.

Waki Commission shares evidence of 2007-8 PEV with ICC prosecutor

In July 2009, following the failure to establish national accountability mechanisms for the PEV violence, the ICC prosecutor received six boxes containing documents and supporting material compiled by the Waki Commission, an international commission of inquiry established by Kenya to investigate the 2007-8 PEV.

The Waki evidence also contained a list of suspects the Commission deemed most responsible for the PEV. In addition to the materials supplied by the Commission, the ICC prosecutor received information from Kenyan authorities on witness protection measures and the status of national legal proceedings.

Many civil society organizations welcomed the ICC's move to bring the highest possible ranking officials in Kenya to account, demonstrating that no one is above the scrutiny of the law. Kenyan civil society has been at the forefront of calling for justice for victims of Kenya's 2007-8 PEV, supporting the ICC process, and actively opposing political attempts to interfere with the cases or undermine the ICC at the national and international levels. This support has come at the price of intimidation and a diminishing space in which to operate.

However, with the withdrawal of the ICC's 2007-8 PEV cases, some civil society groups have expressed doubt about the ICC's ability to overcome political challenges and disappointment at the Trust Fund for Victims' inability to deliver general assistance to victims over the almost eight years that the ICC dealt with the PEV cases, Kenyan authorities' lack of cooperation and witness protection, and the lack of initiatives at the national level to secure comprehensive justice for victims of the 2007-8 PEV.

Conclusion

This Case Study, highlighting the precedent set by the Rome Statue in consideration with its statute of limitations, countries which fall under ambit of the aforementioned jurisprudence, scenarios and general principals of its judicial law while including exceptions of ratification and withdrawal, paints a clear picture that under the actions and atrocities committed by state actors responsible for expediting the process and committing such acts (falling under all cases in Part 2) on the basis of xenophobia, ethnic cleansing, genocide etc., it is advisable to initiate and strategize the appropriate mandates under the UN Charter and its relevant bodies to make such actors appear in trial for their actions in the “International Criminal Court”, under the unanimous decision under an advisory body and/or Security Council