To the memory of my father, Khalidou Saidou Ba
To my mother Aissata Nazirou Ly
To Mamadou Khalidou, gone too soon
ACKNOWLEDGMENTS

I extend my sincere thanks to the members of my dissertation committee: Drs. Aida Hozic, Leonard Villalón, Ido Oren, Dan O’Neill, and Sharon Abramowitz. Dr. Hozic has provided me with the guidance and mentorship that constantly pushed me to reflect on myself as much as I reflect on my subject. But for the funding opportunity that Dr. Villalón offered me, I would not have could not have started my doctoral studies at UF. Drs. Oren, O’Neill, and Abramowitz probing questions pushed this work in directions that I had not anticipated, and expanded my intellectual horizon. This dissertation project was funded in part by generous grants from the UF Center for African Studies, the Department of Political Science, the College of Liberal Arts and Sciences, and the UF Graduate School. I owe these institutions, their faculty and staff a debt of gratitude.

In Uganda, Amanda Edgell and Dr. Charlotte Mafumbo offered me tremendous help by facilitating my fieldwork research and connecting me to key resources. In Kenya, Tom Wolf taught me a lot about Kenyan politics and pointed me to new directions. Sammy Gachigua made me feel home in Nairobi, shared many cups of tea – Kenyan style, with copious amounts of sugar and milk – and connected me with his colleagues around the country. I also express my deep gratitude to all those who agreed to be interviewed for this work, and shared their insights, experiences, and personal stories with me.

Over the past six years, Leo Villalón and Fiona McLaughlin made Gainesville a welcoming and nurturing place, which provided much social, moral, and intellectual support. Their generosity is without parallel; indeed, amuleen morom. Abdoulaye Kane and Aissé (Ba) Diallo fed this perpetually hungry grad student on countless occasions,
and opened their home, recreating a Fouta atmosphere in the heart of Florida. For this, I simply say *on njaaraama*.

I have benefit from a tremendous support from my friends and colleagues in the department of political science. I cherish the shared memories, the moments of joy, doubts, and pain throughout these years of camaraderie. I would like to particularly thank Lina Benabdallah for having been present and supportive every step of the way, from the first semester to the finish line. Lina’s wit has always made the very long study and writing sessions at various coffee shops and library rooms more enjoyable.

Finally, my decades of schooling and pursuit of intellect curiosity was sustained by my family support and understanding. I would not have made it this far without the help of my uncles Amadou Ly and Saikhou Oumar Ly, my aunt Néné Couro and grandmother Maam Poulo. If there is any merit in this work, it is theirs.
TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACKNOWLEDGMENTS</td>
<td>4</td>
</tr>
<tr>
<td>LIST OF TABLES</td>
<td>9</td>
</tr>
<tr>
<td>ABSTRACT</td>
<td>10</td>
</tr>
<tr>
<td>CHAPTER</td>
<td></td>
</tr>
<tr>
<td>1 REGIMES OF INTERNATIONAL JUSTICE</td>
<td>12</td>
</tr>
<tr>
<td>The ICC and Regimes of Transnational Criminal Justice</td>
<td>17</td>
</tr>
<tr>
<td>The ICC and African States</td>
<td>20</td>
</tr>
<tr>
<td>The ICC as a Biased Court</td>
<td>21</td>
</tr>
<tr>
<td>Africa’s Weak Judicial Systems</td>
<td>23</td>
</tr>
<tr>
<td>From State Party Referral to Self-Referral: Unintended Use (and Abuse)</td>
<td>25</td>
</tr>
<tr>
<td>Failure of the Complementarity Principle</td>
<td>29</td>
</tr>
<tr>
<td>The Limits of State Compliance</td>
<td>33</td>
</tr>
<tr>
<td>The Court is the Political Arena</td>
<td>35</td>
</tr>
<tr>
<td>A Word on Justice</td>
<td>37</td>
</tr>
<tr>
<td>Sources for Evidence</td>
<td>39</td>
</tr>
<tr>
<td>Conclusion</td>
<td>41</td>
</tr>
<tr>
<td>2 STATES, INTERNATIONAL INSTITUTIONS, AND HUMAN RIGHTS BASED REGIMES</td>
<td>43</td>
</tr>
<tr>
<td>Introduction</td>
<td>43</td>
</tr>
<tr>
<td>The Rise of International Legalism</td>
<td>43</td>
</tr>
<tr>
<td>International Legal Regimes and State Sovereignty</td>
<td>44</td>
</tr>
<tr>
<td>Balancing Norms of International Justice with States’ Interests</td>
<td>48</td>
</tr>
<tr>
<td>Taking Norms Seriously</td>
<td>50</td>
</tr>
<tr>
<td>International Socialization</td>
<td>51</td>
</tr>
<tr>
<td>Problematizing States’ Interests</td>
<td>52</td>
</tr>
<tr>
<td>The “Justice Cascade”</td>
<td>53</td>
</tr>
<tr>
<td>Unraveling the Justice Cascade: A Critique</td>
<td>55</td>
</tr>
<tr>
<td>When Norms Subversion Becomes Strategic</td>
<td>59</td>
</tr>
<tr>
<td>3 OUTSOURCING JUSTICE AND PERVERTING INTERNATIONAL LEGAL NORMS</td>
<td>63</td>
</tr>
<tr>
<td>Introduction</td>
<td>63</td>
</tr>
<tr>
<td>From State Referrals to Self-referral: The Perversion of an Idea</td>
<td>67</td>
</tr>
<tr>
<td>State Referrals or Self-referrals: What’s in a Word?</td>
<td>69</td>
</tr>
<tr>
<td>Uganda’s History of Political Violence</td>
<td>71</td>
</tr>
<tr>
<td>Northern Uganda in the 1990s: Abductions, Internment and Repression</td>
<td>74</td>
</tr>
</tbody>
</table>
Northern Uganda in the 2000s: Amnesty, Peace Talks, and ICC Prosecution ............................................. 77
Uganda’s Self-referral to the ICC .................................................................................................................. 79
The ICC in Uganda: A Joint Venture ........................................................................................................ 80
Self-referrals as a (Temporary) Marriage of Convenience ....................................................................... 82
In Uganda’s Interests .................................................................................................................................. 83
Self-Referrals as ICC’s Safe Bets ................................................................................................................. 86
The Politics of Self-Referrals ...................................................................................................................... 88
Making Friends and Enemies of Mankind ..................................................................................................... 89
Is the Self-Referral in the Interest of the Local Populations? ..................................................................... 90
The ICC Warrants: Uganda’s Winning Strategy and the Road to Juba .................................................. 92
Conclusion .................................................................................................................................................... 96


Introduction .................................................................................................................................................. 98
The UN Security Council and The ICC ...................................................................................................... 99
The Article 16 Trap ...................................................................................................................................... 102
The Politics of UNSC Referrals: Do International Treaties Apply to Non-Signatories? ......................... 106
Can the UNSC Remove President Bashir’s Immunity? .............................................................................. 107
The Politics of UNSC ICC Non-Referrals: The Case of Syria ................................................................ 111
The Libya Referral ....................................................................................................................................... 116
  The UNSC Resolution 1970 .................................................................................................................... 118
  Libya’s Political Maneuvering ................................................................................................................... 119
The Case against Saif Al Islam: Admissibility Challenge Denied .............................................................. 121
The Al-Senussi Case: The Successful Admissibility Challenge .................................................................. 124
Two Admissibility Challenges, Two Different Outcomes ......................................................................... 125
Complementarity’s Blind Spot: The ICC Is Not a Human Rights Court ................................................. 129
Conclusion .................................................................................................................................................... 130

5 THE LIMITS OF STATE COMPLIANCE ........................................................................................................ 133

Introduction .................................................................................................................................................. 133
Why Do States Delegate Authority to International Institutions? ............................................................... 134
International Institutions as Social Environments ...................................................................................... 137
States’ Support of International Courts and The Erosion of Sovereignty .................................................. 137
The Limits of State Cooperation ................................................................................................................ 139
The Situation in the Republic of Kenya ....................................................................................................... 141
Going after the Ocampo-Six ......................................................................................................................... 142
Why Did Kenya Ratify the Rome Statute and Later Refuse to Comply? .................................................. 143
Reckoning with The Post-Electoral Violence at Home: The Waki Commission of Inquiry .................... 146
Undermining the Waki Commission ........................................................................................................ 148
Kenya’s Delaying Tactics and Outreach against the ICC ......................................................................... 149
The Limits of ICC Prosecution in Addressing Political Violence ............................................................. 156
The Kenya Cases: Prosecution Failed ........................................................................................................ 160
The Kenyatta Case: Witness’ Conundrum and Case Collapse ........................................ 162
The Pitfalls of the Ruto-Sang Trial: Witnessing the Problem ................................... 164
The Limits of a Professed Apolitical Court ................................................................. 167
Conclusion ...................................................................................................................... 168

6  THE COURT IS THE POLITICAL ARENA .................................................................. 171

Introduction ..................................................................................................................... 171
Côte d’Ivoire: Anatomy of a crisis .................................................................................. 172
The 2010 Elections: Political Violence Unleashed ...................................................... 178
All international justice politics are local ......................................................................... 179
  The Unfulfilled Promise of Transitional Justice ......................................................... 180
  Côte d’Ivoire and the ICC .......................................................................................... 182
  Ad Hoc Declarations to The ICC Jurisdiction by Non-States Parties ....................... 184
  Côte d’Ivoire’s Ad Hoc Declarations under Article 12(3) ........................................ 185
ICC’s Judicial Intervention in Côte d’Ivoire and Its Aftermath ...................................... 188
Gbagbo Goes to The Hague: A Narrative of the Politics of Crisis .............................. 189
The ICC as A Political Actor ............................................................................................ 194
  The ICC’s One-sided Prosecution and Sequential Approach in Côte d’Ivoire ...... 195
  The ICC Failure to Act at Gbagbo’s Request in 2003 .............................................. 198
  The Curious Case of Simone Gbagbo, or Ouattara’s Double-jeu ............................... 199
Conclusion: Outsourcing Justice to The ICC ................................................................. 201

7  INTERNATIONAL JUSTICE IN A WORLD OF STATES ............................................ 203

Introduction ..................................................................................................................... 203
Outsourcing Justice and Norms Perversion ................................................................. 205
State-centered System, Individual-oriented Criminality .............................................. 207
International Justice and Power Politics ....................................................................... 209
The ICC and African States ........................................................................................... 211
International Courts Are Not Epiphenomenal ............................................................. 213
Conclusion ...................................................................................................................... 214

BIBLIOGRAPHY .............................................................................................................. 216

BIOGRAPHICAL SKETCH ............................................................................................ 240
## LIST OF TABLES

<table>
<thead>
<tr>
<th>Table</th>
<th>page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-1</td>
<td>19</td>
</tr>
<tr>
<td>Investigations and prosecutions by the ICC as of August 2016</td>
<td>19</td>
</tr>
</tbody>
</table>

OUTSOURCING JUSTICE: AFRICA AND THE POLITICS OF THE INTERNATIONAL CRIMINAL COURT

By

Oumar Ba

May 2017

Chair: Aida A. Hozic
Major: Political Science

How do states respond to the increasingly transnational character of criminal justice and the diffusion of human rights norms and regimes? Whereas it is often argued that such transnational regimes may erode state sovereignty, I explore the ways in which states — especially those presumed to be weaker in the international system — use the International Criminal Court (ICC) as leverage in their domestic conflicts and to empower themselves in the pursuit of their political interests. Doing so, I postulate a dynamic process by which states and international courts are in a constant struggle over power and influence, within those international legal regimes. As such, states manage to instrumentally use the international justice system by outsourcing justice and perverting international legal norms, which refutes the “justice cascade” argument.

The empirical work of this study focuses on four major themes around the intersection of power, states’ interests, and the global governance of atrocity crimes: (1) the strategic use of self-referrals to the ICC, (2) complementarity between national and international justice systems, (3) the limits of state compliance with international courts, and (4) the use of international courts in domestic political conflicts. The findings of this study contribute to the literature on international criminal justice and the adoption or
perversion of human rights norms. Moreover, this study offers a critical reading of transnational legal processes that challenges the conception of an international criminal justice regime as an unmitigated good, while also furthering our understanding of the ways in which weaker states in the international system also use the regime for their own (political) interests. To do so, I conduct an in-depth analysis of four ICC situations in Africa, each one of them particularly highlighting one issue area: Uganda (self-referrals), Kenya (compliance), Libya (complementarity), and Côte d’Ivoire (domestic politics).
CHAPTER 1
REGIMES OF INTERNATIONAL JUSTICE

On 16 May 2014, the Prosecutor of the International Criminal Court (ICC) requested an adjournment until the end of June in the trial of William Ruto and Joshua Sang. Ruto is the Deputy President of the Republic of Kenya. Alongside former journalist Sang, he was standing trial before the ICC for charges of crimes against humanity in the aftermath of the Kenyan post-electoral violence of 2007-2008. In a separate case, but stemming from the same context of political violence, the sitting President of Kenya, Uhuru Kenyatta, was also charged with the same crimes and his case was still on the pre-trial phase at the ICC at the time. The Office of the Prosecutor (OTP) had informed the judges of their intention to withdraw their witness, code named P-025. Anton Steynberg, the lead trial lawyer for the OTP, wrote that Witness P-025 “was unable to accurately recall or give a coherent and consistent account of critical parts of the evidence the prosecution had intended to lead.” In granting the adjournment, Presiding Judge Chile Eboe-Osuji issued a strong warning to the Office of the Prosecutor: “The chamber expresses very serious concern and dissatisfaction that we only had two days of testimony this session, a session that was scheduled to last four weeks, hearing witnesses,” the judge said. “All available means must be employed by the prosecution to ensure this is not repeated.” Judge Eboe-Osuji, visibly disappointed and angry, told the Prosecutor that the Chamber expected “to have witnesses lined up for testimonies” and the Prosecutor to have “their ducks in a row” when the trial reconvenes.¹

¹ The author was present at this audience, while doing fieldwork at the ICC in The Hague, in May and June 2014.
This episode encapsulates many of the issues and debates that animate the current state of international criminal justice, as embodied by the practice of the ICC. The first permanent international criminal court was prosecuting both a sitting president and his deputy for crimes against humanity. Its goal to end impunity for atrocity crimes faces challenges of pursuing justice for individual criminal accountability in a world where states remain the main actors. The daunting task of the Prosecutor to bring witnesses to The Hague to testify against their own government officials is but one of the issues that the Court faces with the lack of compliance that borders on obstruction from States Parties to the ICC – when their agents are target for investigation or prosecution. Then again, the ICC is a treaty-based court to which states become willing members by ratifying the Rome Statute, its founding document. Such action brings states under the jurisdiction of the Court.

How do states respond to the increasing transnational character of criminal justice and the diffusion of human rights norms and regimes that uphold individual criminal accountability following the perpetration of mass atrocities? Whereas it is often argued that such transnational regimes may erode state sovereignty, I explore the ways in which states — especially those presumed to be weaker in the international system — use the International Criminal Court (ICC) as leverage in their domestic conflicts and to empower themselves in the pursuit of their political interests. Doing so, I postulate a dynamic process by which states and international courts are in a constant struggle over power and influence, within those international legal regimes. As such, this study

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2 For sure, former heads of states have been prosecuted by international courts in the past, but none of them was prosecuted while in office. Moreover, those courts were ad hoc tribunals
seeks also to answer the question whether states’ strategic use of international criminal justice norms embolden or pervert the latter.

The empirical work of my dissertation focuses on four major themes around the intersection of state power and international criminal justice: the strategic use of self-referrals to the ICC, complementarity between national and international justice systems, the limits of state compliance with international courts, and the use of international courts in domestic political conflicts. Each of these major themes revolves around the ICC and its relationship with African states, because to date, all ICC investigations and prosecutions have targeted only African states and individuals. These four cases that are the main empirical focus of this work cover all available trigger mechanisms of ICC jurisdiction over cases of genocide, war crimes, crimes against humanity, and crimes of aggression. Under the Rome Statute, ICC jurisdiction can be triggered by three mechanisms: a state referral, a UN Security Council resolution, or the ICC Prosecutor acting on his/her own initiative, using his/her proprio motu powers for cases concerning States Parties to the Rome Statute (See Table I below).

I argue that the use of the self-referral mechanism to invite the ICC to investigate breaches of international law is based on states’ political calculations of the costs and benefits associated with engaging with the Court. It appears that political elites in the countries that have used the self-referral mechanism have deferred to the ICC jurisdiction to advance their own agendas by inviting the court to remove or incapacitate their local adversaries—whether political opponents or rebel leaders. These states abandoned their responsibility to investigate and prosecute the alleged crimes
committed in their territory, and preferred handing the task to the ICC. At the superficial level, it may look like the states are deferring to an international court because the latter is better equipped to investigate and prosecute atrocity crimes, which is the reason why the ICC was created. However, when one looks closely, the use of self-referrals stems actually from strategic calculations that aim at giving the state a political and military leverage against its opponents, whom the state is having the ICC prosecute, as the Uganda case illustrates.

Whereas the complementarity principle sought to make the ICC the court of last resort, in these instances, the ICC has become the court of first resort, or even the court of only resort. Thus, self-referrals offer states the means to use the ICC as a “bad bank” (Jessberger and Geneuss 2012, 1089) by “exposing dangerous rebels internationally so as to dispose of them through the judicial process of the ICC” (Cassese 2006, 436). Moreover, states that self-refer to the ICC “outsource” their obligation to investigate international crimes (Jessberger and Geneuss 2012, 1089). The Libyan situation also illustrates the challenges of the use of Article 17 of the Rome Statute, related to complementarity and primacy given to national courts, in lieu of the ICC. But the case of Libya illustrates also the strategic interpretation and use of the complementarity clause, in ways that advance both the interests of the Libyan state and the ICC as an institution. If, concerning non-state parties, the ICC jurisdiction is triggered by a UNSC referral, as in the Libyan case, the state develops mechanisms that challenge the ICC jurisdiction by arguing that the complementarity principle gives primacy to the national jurisdiction.
How do states react when their agents become targets of international legal prosecutions? In the Kenyan situation where both the sitting President and Deputy President have been indicted with crimes against humanity by the ICC, it is apparent that the state has developed mechanisms that make such prosecution difficult. Because international courts lack enforcement capacity and hence must rely on the compliance of the states that have agreed to the Court’s jurisdiction and the cooperation of states in general, this study shows that compliance and cooperation are dynamic tools that states wield depending on where their relationship with the court stands at any given moment. Finally, the ICC involvement with domestic political conflicts opens new areas of inquiry for IR scholars at the intersection of international criminal law and domestic politics. In the case of Côte d’Ivoire where a new government has surrendered a former president to the ICC, and where the ICC faces criticism of one-sided investigation, one sees how the international court is also the stage for domestic political struggles.

To that end, my study sheds light on the intersection of state power and interests vis-à-vis international human rights norms and regimes of transnational criminal justice. The findings of this study contribute to the literature on international criminal justice and human rights norms adoption and/or perversion. Moreover, this study offers a critical reading of transnational legal processes that challenges the conception of an international criminal justice regime as an unmitigated good. When reading the international criminal justice regime through a critical lens, it is noticeable that the literature has addressed the ways in which powerful states use the system to their advantage. However, there is still a lack of understanding or acknowledgement of the
ways in which weaker states use the regime for their own (political) interests. The focus on African states here fills that gap in the literature. The next section of this introductory chapter presents briefly the ICC within the context of regimes of transnational criminal justice. I then describe the relationship between the ICC and African states and the main debates surrounding that relationship. Following that section, I introduce the main themes of this study: the use and abuse of self-referrals, the failure of the complementarity principle, the limits of state compliance, and the court as the (domestic) arena. Finally, I present my research methods. The following chapter discusses my theoretical argument in depth.

The ICC and Regimes of Transnational Criminal Justice

The international community faced many dilemmas at the Rome Conference in 1998, while drafting the Statute that created the ICC. How does one balance state sovereignty with the powers vested in an international prosecutor to instigate investigations and prosecution of crimes that fall under the ICC jurisdiction? The Rome Statute was ultimately a work of compromise, widely adopted by the states, albeit with the opposition of some of the most powerful ones. The ICC has jurisdiction over four types of crimes: genocide, war crimes, crimes against humanity, and crimes of aggression.

My dissertation project explores the following question: How do states respond to the widening adoption of human rights norms and transnational regimes of criminal

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3 See the Rome Statute of the International Criminal Court, https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

4 For example, many states, including the United States, Russia, China, India, Turkey, are not members of the ICC.
justice? In other words, what mechanisms and strategies do states develop in reaction to international human rights norms of individual criminal accountability in face of mass atrocities and the regimes of transnational criminal justice? Adopting a critical reading of international human rights regimes, I question whether and to what extent states pervert or subvert the norms, which leads to unattended consequences. Consequently, one may ask what lessons can be drawn from such mechanisms in terms of the primacy of states interests. Moreover, do weaker states in the international system have as much leverage as the powerful states? This study attempts to answer these questions by focusing on four main issues that stem from the functioning of the ICC and its relationship with states: self-referrals, complementarity, compliance, and domestic politics. To do so, I conduct an in-depth analysis of four ICC situations in Africa, each one of them particularly highlighting one issue area: Uganda (self-referrals), Kenya (compliance), Libya (complementarity), and Côte d’Ivoire (domestic politics).

More than any other principle guiding the functioning of the ICC, the complementarity principle has been the most agreed upon, but also the most controversial in light of the ways in which the court has operated since its inception. The complementarity principle is independent of the three trigger mechanisms; it governs the general rule of ICC’s involvement in criminal acts that fall under its jurisdiction. The complementarity principle gives primacy to the state in which the crimes have been committed to investigate and prosecute them. In theory, this means that the ICC intervenes only when the state is unwilling or unable to fulfil its duty to investigate and prosecute. However, the reality of the ICC investigations and prosecutions suggest that both the ICC Prosecutor and the states have manipulated the
basic reading of the complementarity principle. As the discussion of the ICC cases in Africa below will show, the unwillingness or inability of the state to investigate and prosecute has not always been taken into consideration either by states or by the ICC prosecutor’s office.\(^5\)

### Table 1-1. Investigations and prosecutions by the ICC as of August 2016

<table>
<thead>
<tr>
<th>ICC situations</th>
<th>Trigger mechanism</th>
<th>Situation referred to the ICC</th>
<th>Opening date of ICC investigations</th>
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<tbody>
<tr>
<td>Uganda</td>
<td>Self-referral</td>
<td>January 2004</td>
<td>July 2004</td>
</tr>
<tr>
<td>DRC</td>
<td>Self-referral</td>
<td>April 2004</td>
<td>June 2004</td>
</tr>
<tr>
<td>CAR I</td>
<td>Self-referral</td>
<td>December 2004</td>
<td>May 2007</td>
</tr>
<tr>
<td>Mali</td>
<td>Self-referral</td>
<td>July 2012</td>
<td>January 2013</td>
</tr>
<tr>
<td>Darfur</td>
<td>UNSC referral</td>
<td>March 2005</td>
<td>June 2005</td>
</tr>
<tr>
<td>Libya</td>
<td>UNSC referral</td>
<td>February 2011</td>
<td>March 2011</td>
</tr>
<tr>
<td>Kenya</td>
<td>Proprio motu</td>
<td>March 2010</td>
<td>September 2014</td>
</tr>
<tr>
<td>Côte d’Ivoire</td>
<td>Self-referral/ Proprio motu</td>
<td>April 2003</td>
<td>October 2011</td>
</tr>
<tr>
<td>CAR II</td>
<td>Self-referral</td>
<td>May 2014</td>
<td>September 2014</td>
</tr>
<tr>
<td>Georgia</td>
<td>Proprio motu</td>
<td></td>
<td>January 2016</td>
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Since the entry into force of the Rome Statute on July 1 2002, many scholars and practitioners have made different arguments on the politics and the mechanics of the ICC. Particularly, all the situations currently under prosecution or investigation at the ICC are located on the African continent and concern African individuals, except for the situation in Georgia which investigation opened in January 2016. Therefore, in the cases of self-referrals, I ask whether the African states that have referred situations in their territory to the ICC are outsourcing justice, which means the process by which

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\(^5\) For example, Akhavan (2010, 110) writes that Uganda, whose “judiciary is among the best in Africa” had a justice system and courts that were fully functional when its government referred the case to the ICC.
states forego their right and duty to investigate and prosecute crimes committed in their territory for the convenience of handing the task to an international court. Obviously, there may be many reasons guiding such actions, and certainly such reasons may differ from one case to another. In addition, I seek to unveil the reasons guiding such actions by closely investigating the process that led to the first case of self-referral of Uganda, and that of Côte d'Ivoire. This study also investigates the ways in which Kenya and Libya have addressed the ICC's involvement in the judicial process of crimes that may have been committed in their territory.

The ICC and African States

Whereas Henry Kissinger (2001) portrays the ICC and universal jurisdiction as “pitfalls,” it is also clear that the ICC does nothing more than what any state could do under current international law (Bassiouni 2001). The ICC depends on its States Parties for funding, prosecution, and enforcement; therefore, power politics are a fundamental component of the international criminal justice regime (Ba 2011). African states were especially eager for the establishment of a permanent international court. In fact, 47 out of the 54 African states took part in the 1998 Rome Conference during which the ICC was created (Manirakiza 2009). As Moghalu (2006) explains, Africa’s early support for the ICC is related to the fact that some of the weakest states in the international system are located on the continent. However, soon after the ICC started its first prosecutions in Africa, the strong support between the Court and Africa became troubled. The main criticism regarding the ICC is that the Court is biased and unfairly targeting Africans, because all of its prosecutions to date are located on the African continent. However, a counterargument to that charge may be that Africa’s judicial systems are weak, hence the need for ICC's involvement to fight against impunity for atrocity crimes in Africa. In
any case, Africa and the ICC are involved in a deeply complicated, contentious and entangled relationship around international justice (Clarke 2014). This section outlines the main criticisms and counterarguments regarding the ICC’s involvement in African situations.

**The ICC as a Biased Court**

Many critics argue that the ICC is biased, questioning its impartiality. For example, Mamdani (2009) has addressed the consequences of the implication of the ICC in the conflict in Darfur, pointing out the role that the Great Powers politics play in the fake delivery of international justice. Schabas (2013, 545) argues that the ICC “has failed to live up to its expectations” due in part to its deference to the Security Council and “its inability or reluctance to take on hard cases that threaten powerful states.” Similarly, Goldsmith (2003) contends that the ICC, as designed, is a self-defeating institution that will be incapable of punishing serious human rights violators, whereas Clarke (2009) argues that the current spectacle that the ICC enacts is part of a long history of “fictions of justice” embedded in the fusion of political and moral economies of neo-liberal regimes.

Moreover, Struett (2008, 165) explains, “for the ICC to be legitimate, it must create the impression that war crimes, crimes against humanity and genocide can be prosecuted regardless of whom commits them, be they citizens of impoverished failed states or great powers.” Furthermore, Nouwen and Werner (2011) make the case that the ICC is inherently a political institution. By making the distinction between friends and enemies of the international community, the ICC becomes a weapon used in political struggles, as in Uganda and Sudan where the warring parties brand each other (Nouwen and Werner 2011). Mamdani (2009) has also argued that ICC’s involvement
in African conflicts has made their peaceful resolution more elusive.\textsuperscript{6} Referring to the situation in Darfur and the warrant for the arrest of President Bashir of Sudan, Mamdani (2009, 273) writes, “More than the innocence or guilt of the president of Sudan, it is the relationship between law and politics, including the politicization of the ICC, that poses a wider issue.” Mamdani (2009, 284) concludes, “The ICC is rapidly turning into a western court to try African crimes against humanity. Even then, its approach is selective: it targets governments that are adversaries of the United States and ignores U.S. allies…”

As expected, critics of the ICC also abound among African political elites. For example, Rwandan president Paul Kagame, calling the ICC a “fraudulent institution” (Lamony 2014), explained that

> Rwanda cannot be party to ICC for one simple reason… with ICC all the injustices of the past including colonialism, imperialism, keep coming back in different forms. They control you. As long as you are poor, weak, there is always some rope to hang you.

Jean Ping, then President of the AU Commission, has said that “the international justice system seems to fight impunity only in Africa, as if there was nothing happening also in Iraq, Gaza, Colombia, or the Caucasus” (Manirakiza 2009, 32). Moreover, the African Union (AU) has adopted a stance of defiance towards the ICC, and has consistently appealed to its members not to enforce ICC rulings. For example, after the ICC had issued a warrant for the arrest of President Bashir of Sudan in 2009, the AU justified its decision not to cooperate with the ICC by what it called the "publicity-seeking approach

\textsuperscript{6} Specifically, Mamdani (2009) contends that, had the ICC had existed then, there would be no peace and reconciliation in South Africa in 1990. The ICC would have also prevented the peace process in Mozambique that have allowed the RENAMO, the armed opposition backed at the time by the apartheid regime of South Africa, to sign a peace agreement and benefit from amnesty.
of the ICC Prosecutor” and has asked for deferment of Bashir’s indictment (African Union, 2009). Furthermore, amidst the indictment of both the President and Deputy President of Kenya, the AU convened an extraordinary session in October 2013 to discuss “Africa’s Relationship with the International Criminal Court (ICC).” Although the AU Assembly stopped short of calling for its members to withdraw en masse from the ICC, it has nonetheless reiterated its “concern on the politicization and misuse of indictments against African leaders by ICC” and has called on the UN Security Council (UNSC) for a deferral of the cases of Kenya and Sudan. The UNSC has not granted the deferral. The AU also decided that any of its members that wish to refer a case to the ICC may inform and seek advice from the Union (African Union 2013). Therefore, it is clear that African leaders and Pan-African organizations are unhappy about the ICC. Paradoxically, it is also noticeable that some African states chose to engage with the ICC by using the state referral trigger mechanism.

**Africa’s Weak Judicial Systems**

Others cite the atrocities committed in many African states and the weakness of local judicial systems as explanatory factors of the focus of the ICC on the continent. James Goldston (2010, 387), the former ICC’s Coordinator of Prosecutions, explains prosecutor’s discretionary power as “grounded in law and evidence, but, of necessity, taking into account broader considerations of strategy and policy, even while refraining from ‘politics.’” Amidst African leaders’ criticism of the ICC, Desmond Tutu has argued that

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7 This refers to the ICC’s first Chief Prosecutor, the Argentinian Luis Moreno-Ocampo.

Those leaders seeking to skirt the court are effectively looking for a license to kill, maim and oppress their own people without consequence. They believe the interests of the people should not stand in the way of their ambitions of wealth and power; that being held to account by the I.C.C. interferes with their ability to achieve these ambitions; and that those who get in their way — the victims: their own people — should remain faceless and voiceless.⁹

The criticisms and counterarguments matter greatly in the current debate about the relationships between the ICC and Africa, which revolves around issues of sovereignty versus international institutions and regimes and what some Africans view as a Western tool for their subjugation. However, I argue that these critiques do not take into consideration the fact that most of the ICC cases in African states were initiated by the states themselves, when their respective governments approached the court to self-refer cases to the ICC prosecutor. And in any case, the ICC was also bound to become a political tool at the hand of states in their attempt to settle scores. The paradox then is that the ICC was created to deliver justice by pursuing individual criminal accountability in a world made of states, thus making the Office of the Prosecutor a political tool at the hands of both powerful and less powerful states in the international system. The focus on the latter group is one of the main contributions that my dissertation makes to the study of international criminal justice and international relations. In the next section, I discuss each of the four main issues that this study addresses: self-referrals, complementarity, compliance, and the intersection between international justice and domestic politics.

From State Party Referral to Self-Referral: Unintended Use (and Abuse)

Self-referrals ushered in a “revolution” in global justice (Akhavan 2012). The debate about the legal understanding and political implications of self-referrals started shortly after Uganda referred a situation in its northern territory to the ICC in 2003. While some scholars questioned the admissibility of self-referrals and whether that conformed to the legal procedures of the court, the ICC Appeals Chamber in the Katanga case ruled that self-referrals are legally acceptable (Akhavan 2012, 103). But this legal ruling does not foreclose the political questions about self-referrals. As Akhavan (2010, 104) notes, “An important aspect of ‘self-referrals’ relates to the mutuality of interests between the Court and States Parties because of the unprecedented capacity of non-State actors to commit large-scale atrocities…” Therefore, self-referral offered the states a convenient way to dispose of non-state actors operating in their territory.

Interestingly, during the negotiations that led to the adoption of the Rome Statute, no one seriously thought that states would self-refer to the ICC. Arsanjani and Reisman (2005, 386) write that “no one – neither states that were initially skeptical about the viability of an ICC nor states that supported it – assumed that governments would want to invite the future court to investigate and prosecute crimes that had occurred on their territory.” Instead, Article 14 of the Rome Statute about state referrals was thought as a referral mechanism initiated by an interested state about another state (Akhavan 2010). However, states hardly serve as watchdogs for other states regarding human rights

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10 Former militia leader Katanga’s defense team had argued that the Democratic Republic of Congo is able to prosecute him, and therefore, his case before the ICC should be inadmissible.
abuses. In fact, as Akhavan (1995, 236-237) notes, “inter-state human rights mechanisms are generally effective only to the extent that geopolitical or other interests are at stake. Otherwise, states cannot be counted on to act as guardians of human rights, let alone on an impartial basis.” During the drafting of the Rome Statute, state referral was therefore thought to be the least likely trigger mechanism to lead to prosecution. As Schabas (2011, 159) notes “It was frequently pointed out that States were notoriously reluctant to complain against other States on a bilateral basis, unless they had bilateral interests at stake. They would not, however, be likely to act as international altruists.” Therefore, it is not surprising that so far, no state has used Article 14 to refer another state to the ICC, but it is certainly an unanticipated occurrence that states used that trigger mechanism to refer themselves to the ICC.

The state referral became the trigger mechanism for the first three cases before the Court: Uganda, DRC, and CAR. The Côte d’Ivoire’s self-referral was a bit different. Because it did not ratify the Rome Statute but accepted ICC jurisdiction in 2003 through an ad-hoc declaration under Article 12(3) of the Rome Statute, “which in substance amounted to a self-referral” (Akhavan 2010, 106). Finally, Mali also self-referred to the ICC in 2013, and so did Gabon in 2016. The state referral mechanism did not operate as expected, because these were not inter-state referrals. Rather, the states in question referred situations that occurred within their own borders. However, the use of the word “self-referral” is also misleading. In fact, while referring their “situations” to the ICC, these states did not intend that the ICC prosecution be directed against them. In fact, “they sought to induce the Court to prosecute rebel groups operating within their own borders” (Schabas 2011, 160). For example, in its referral letter, the government of
Uganda mentioned specifically “the situation concerning the ‘Lord’s Resistance Army’ in northern and western Uganda” (Schabas 2011, 160). This letter clearly shows that the intention of the government of Uganda was to make the ICC direct its investigation and prosecution against the LRA.

The self-referrals come with their own pitfalls, given that states may be willing to cooperate with the ICC as long as the investigations are targeting their enemies and the compliance is withdrawn as soon as the states’ agent become the focus of the Court (Gaeta 2004, 952). Indeed, when the ICC Prosecutor issued warrants for the arrest of five LRA leaders, both Amnesty International and Human Rights Watch questioned the one-sided approach and called for the prosecution of the Ugandan military forces as well (Schabas 2011). However, there was a tacit, if not explicit understanding with the Ugandan government that the ICC would only prosecute the rebel leaders. Schabas (2001, 166) writes,

> To the extent that the Prosecutor believed his strategy of encouraging self-referral was a productive one, he surely had to reassure States that those who referred the case were not threatened. Indeed, if he intended for the strategy to continue, and to solicit more self-referrals, he will need to show a track record of one-sided investigations, directed against anti-government forces and entities.

When states defer to the ICC, one may ask whether they did not abdicate their own responsibility to address the crimes committed in their territory before their national jurisdictions. Moreover, self-referral provides states an avenue to gain immunity for their government officials while at the same time having the ICC prosecute their political adversaries or the rebel leaders operating in their territory. As Schabas (2011, 38) argues, by using the self-referral mechanism, Uganda and DRC “had their own strategic objectives. Put simply, they appear to have been to use the Court in order to prosecute...
rebel bands within their own territory.” It is thus important to explore the reasons why state leaders in Uganda have used the self-referral trigger mechanism.

**Uganda:** In late 2003, the ICC Prosecutor announced that Uganda, as an ICC member state, had referred a “situation” to him. After a preliminary examination, the Prosecutor announced on June 28 2004 that there was “a reasonable basis to proceed with an investigation.” The warrants for the arrest of five LRA leaders were unsealed in October 2005, which led them to seek a peace settlement with the government of Uganda during negotiations that were held in Juba from 2006 to 2008 (Schabas 2011). The discussion regarding the ICC involvement in Uganda has focused mostly on the motives of the Court and the Ugandan government, and its consequences on the stalemate of the peace negotiations and the protraction of the victimization of the local populations. Interestingly, although the warrant for the arrest of the LRA leaders triggered the cessation of hostilities and the initiation of peace negotiations, it also prevented the completion of the peace accords because the LRA commanders insisted that the warrants for their arrest be annulled before they sign the peace accords.

Hence, President Museveni of Uganda, who had triggered the prosecution, asked the ICC prosecutor to withdraw the warrants and promised immunity to the LRA commanders (Schabas 2011, 42). This move by the Ugandan president clearly shows that the self-referral to the ICC was destined to further his own interests, mainly to guarantee his political survival. As stated earlier, the focus of this argument is on state leaders, and how they use the international criminal justice regime to further their own interests, and how they switch their strategy when the demands for their political interests warrants such action. Clearly, when assuring the LRA leaders that they will
get immunity from the Ugandan government if they agreed to a peace treaty, President Museveni was not following through with his self-referral to the ICC.

In regard of President Museveni’s willingness to grant immunity to the LRA leaders, Richard Goldstone, the first Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), wrote that "it would be fatally damaging to the credibility of the international court if Museveni was allowed to get away with granting amnesty. I just don’t accept that Museveni has the right to use the International Criminal Court like this" (quoted in Schabas 2011, 42). In June 2010, the president of the Ugandan War Crimes Division said that their national courts were perfectly capable of prosecuting the LRA leaders (Schabas 2011). This means that the Ugandan government was asking the ICC to back away from the case, and let Uganda handle it as it wishes, for political expediency. Moreover, the case in Uganda is a potent illustration of the hypocrisy with which the international justice regime operates. In fact, there have been allegations of atrocities committed by the Ugandan armed forces as well, but the ICC has decided not to investigate those allegations. However, even if the ICC had decided to investigate and prosecute crimes committed by the Ugandan military forces, the Ugandan government could argue that the complementarity principle does not permit the ICC to get involved because the Ugandan justice system has not collapsed (Arsanjani and Reisman, 2005).

**Failure of the Complementarity Principle**

Article 17 of the Rome Statute stipulates that, under the principle of complementarity, the Court may get involved in a case only when the state responsible for prosecution can be shown to be unwilling or unable to do so. The former ICC
prosecutor Luis Moreno-Ocampo stated that “As a general rule, the policy of the Office of the Prosecutor will be to undertake investigations only when there is a clear case of failure to act by the State or States concerned” (cited in Schabas 2011, 35). The complementarity principle was thus intended to recognize the primary responsibility of states to exercise criminal jurisdiction but it is also because “the recognition that the exercise of national criminal jurisdiction is not only a right, but also a duty of States” (Schabas 2011). States thus have the primary duty to investigate and prosecute breaches of international law and the ICC would intervene only if they fail to do so. This also means that any state can introduce an admissibility challenge to the ICC to prove its ability and willingness to fulfil that duty.

The ICC reacted to the UNSC resolution that granted it jurisdiction over the Libyan crisis with lightning speed, the OTP opening the investigation only a couple days after the referral, on 2 March 2011, which made the preliminary examination the fastest one in the history of the ICC (Stahn 2012, 329).11 Soon after the referral, on 16 May 2011, Ocampo requested warrants for arrest be issued against the “Tripoli Three:” Muammar Gaddafi, Saif Al Islam Gaddafi and Abdallah Al-Senussi.12 After the fall of the Gaddafi regime, the new government of Libya – the Transitional National Council (TNC) – introduced an admissibility challenge before the ICC, based on Article 17 of the Rome Statute on complementarity. Libya essentially argued that it was willing and able to prosecute Saif Al Islam Gaddafi and Abdallah Al-Senussi.13 After a long and drawn

11 By comparison, the preliminary examination in Darfur lasted roughly two months.
12 Al Senussi was head of Libyan intelligence services under the Gaddafi administration.
13 The case against Muammar Gaddafi had become moot, following his death.
out proceedings between Libya and the ICC, the ICC had decided that Gaddafi must be tried in The Hague but Al-Senussi may be tried in Libya. How does one explain the seemingly contradictory decisions of the Gaddafi and Al-Senussi cases? In the Al-Senussi case, the Prosecutor supported Libya’s argument in favor of national prosecution, whereas she opposed Libya’s challenge in the Gaddafi case.

The Libyan cases illustrate the ICC inconsistency in matters of complementarity. For the self-referral situations – such as Uganda, DRC, CAR, complementarity challenges were not introduced by the referring states. However, with the first UNSC referral of Darfur, the ICC has stressed its jurisdiction in face of the absence of domestic investigations and prosecutions. The Court stressed also on the duty of States Parties to help enforce the warrants for arrest. In Kenya, the Court agreed to prioritize domestic proceedings, subject to conditions which set out clear benchmarks and timelines for investigation and prosecutions (Stahn 2012, 332). Finally, one may also ask why Libya chose to challenge the admissibility of the cases before the ICC, thus recognizing the legitimacy and rule of law governance of the ICC? What could explain Libya’s course of action compared to Sudan’s for instance, keeping in mind that in both situations, the ICC gained jurisdiction after a UNSC referral?

Moreover, ICC investigations that are triggered by a UNSC resolution – such as in Darfur and Libya – show a collusion between the political and the legal in international relations. The UN Security Council has the ability to refer a situation to the ICC prosecutor. The case in Sudan was the first instance where the Security Council

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mandated the ICC prosecutor to open an investigation. There are many debates surrounding the collusion between international criminal justice and international politics, especially whether the relationship between the ICC and the Security Council allows for a separation between the legal and the political. As noted by Stahn (2012, 327), the former prosecutor of the ICTY Louise Arbour, has called for a greater separation between the ICC and the UNSC, noting that “international criminal justice cannot be sheltered from political considerations when [it is] administered by the quintessential political body.” The Libyan case is the second instance where the UN Security Council has referred a situation to the ICC. But the particularity of the Libyan case is also that it was the first time where the ICC involvement was coupled with the invocation of the Responsibility to Protect (Stahn 2012).

**Libya:** Having not ratified the Rome Statute, Libya and Sudan are not members of the ICC. The situations in Sudan and Libya are the only two ICC cases so far that were triggered by a UN Security Council resolution. Although both the situations in Sudan and Libya stem from the same trigger mechanism, they evolve in different directions and have resulted in two different outcomes so far. The two states have developed different mechanisms in response to the ICC investigation and prosecution. Whereas in the case of Sudan the main suspects are President al-Bashir and other high ranking officials, in Libya, the ICC prosecutor targeted three individuals who are no longer in power: Muammar Gaddafi (now deceased), his son Saif al Islam Gaddafi, and Abdullah al Senussi, the former head of intelligence under the Gaddafi regime. The Libyan government of the post-Gaddafi era has challenged the ICC jurisdiction under the complementarity principle, arguing that it has been conducting an active
investigation, and that it is willing and able to carry out a full investigation and prosecution of the accused.

Keeping in mind that the complementarity principle of the Rome Statute stipulates that the ICC may have jurisdiction over a case only if and when the state is unable or unwilling to investigate and prosecute, Libya may have a compelling argument for its refusal to surrender Saif al Islam to the ICC. A closer study of the Libya case will unveil the reasons why Libya decided to challenge the admissibility of the case before the ICC and why the Libyan authorities expressed their preference to try Saif al Islam before their national courts.

The Limits of State Compliance

The ICC declares in the Preamble of the Rome Statute that its goal is to end impunity for atrocity crimes. To accomplish that mission, the ICC must rely on the compliance and cooperation of state parties to the Rome Statute at every step, from the initial investigation, to arresting the perpetrators, to the trials, and to housing the prisoners. However, compliance and cooperation of states with the ICC are not a given. Moreover, by ratifying the Rome Statute, states delegate their power and privileges to an international institution, whose main purpose is to limit the sovereignty of said states. This delegation of power and privileges to an international court poses challenges to a state when its officials are sought after by the court. Going beyond the literature on delegation of powers, my concern is focused on the processes that follow such delegation of power. I don’t view delegation of power as static; rather, I contend that delegation is a dynamic process that does not stop at the door of treaty ratification. What happens in the dynamic relationship between the agent and the delegate? How do the ICC and the state manage such expectations and rules, amidst changing
conditions in international politics? How does a state that vested powers in the international court and later becomes target of investigations manage such relationship? How does this affect cooperation and compliance?

Using the example of the Kenya cases before the ICC, I explore the instances that lead a state to renege its commitment to cooperate with an international court and comply with its requests. For the ICC to be operational, it must rely on the willingness of states to comply with the Rome Statute and to assist the Court in its investigation and prosecution. Ultimately, I contend that the need for and limits to state cooperation may be one the most enduring challenges to the delivery of international criminal justice.

**Kenya:** The Kenyan case is a situation in which the ICC prosecutor used his *proprio motu* powers granted to him by the Rome Statute. It means that the ICC prosecutor took his own initiative to start preliminary investigation related to the 2007 post-electoral violence in Kenya. Upon presenting the preliminary findings to the Pre-Trial Chamber, the latter gave the prosecutor a “motion to proceed” which allows the prosecutor to open a full investigation and issue indictments. The Kenyan case is very interesting to this study for many reasons. First, Kenya is a member of the ICC, which obliges it obligated to cooperate with the Court. Second, Uhuru Kenyatta and Williams Ruto, respectively President and Deputy President of Kenya, are the main suspects, accused of crimes against humanity. Moreover, because their prosecution started before they were elected to office, Kenyatta and Ruto had used their indictment as a political platform and made an alliance for the following presidential elections by running on the same ticket. Kenyatta’s trial was set to begin in October 2014, but the case against him was later dismissed, following the Prosecutor’s inability to gather enough
evidence. Ruto’s trial started in September 2013 and lasted until April 2016, when the case was terminated.

The Kenyan government has developed mechanisms to challenge the indictment of its president and deputy president by seeking support from the African Union that appealed to the UNSC to hold off the proceedings, and by proposing an amendment to the Rome Statute that would grant immunity for sitting heads of states. At the same time, Kenyatta and Ruto had vowed to cooperate with the court and show up for their trials, although they had filed motions that would allow them not to be physically present at the Court during their trials. Moreover, while pretending to cooperate and comply with the ICC as a state party to the Rome Statute, Kenya has nonetheless used extensive measures to obstruct the work of the ICC prosecutor, and to basically make the cases collapse.

**The Court is the Political Arena**

While exploring the politics of international criminal justice, I argue that the ICC is a lieu of staged performance where actors deploy their political narratives. Using the *Situation in the Republic of Côte d’Ivoire* before the ICC and focusing on the pre-trial phase, I contend that the defendants former Ivorian president Laurent Gbagbo and Charles Blé Goudé project a performance and deploy political narratives that are the extension of the politics of the Ivorian crisis, which make the Court the quintessential arena where domestic and international politics cohabit with law and rules of procedure. The ICC hence becomes a stage of performative discourse where actors create, change, frame, make and unmake their political narratives. Focusing on the pre-trial phase before the Court that places the defendant at the center of the stage and analyzing their own statement in their original language – French – I show the extent to
which Laurent Gbagbo and Charles Blé Goudé have used their appearance before the Court to not only address the Chamber, but also speak to their compatriots and to a global audience to tell their (his)stories, which fit in the larger frame of the (dis)placement of the Ivoirian crisis into an international criminal justice apparatus. The Court is therefore the domestic political arena for Ivoirian politics.

Côte d'Ivoire: The current situation in Côte d'Ivoire involves the prosecution of three individuals: former president Laurent Gbagbo, his wife, Simone Gbagbo, and Charles Blé Goudé, a former official in Gbagbo’s administration. Côte d'Ivoire held a presidential election in November 2010, the aftermath of which triggered six months of unrest and human rights abuses. Gbagbo had refused to leave power despite being defeated by his opponent Alassane Ouattara. In the violence that followed the struggle for power, at least 3,000 people were killed by forces on both sides along political, ethnic, and religious lines (Human Rights Watch 2013).

Although the situation in Côte d'Ivoire is officially a proprio motu case, similar to the one in Kenya, the Ivoirian case is peculiar because it is also a self-referral situation. Unlike Kenya that is a member of the ICC, Côte d'Ivoire did not join the ICC at the time when its situation fell under ICC jurisdiction. One may then ask why a government that did not join the ICC would nonetheless extend an invitation to the ICC to investigate and open prosecution cases in relations to its political crisis. The government of Côte d'Ivoire first recognized the jurisdiction of the ICC in a letter signed by then-Minister of Foreign Affairs Bamba Mamadou on 18 April 2003, following the Ivoirian first civil war. After the 2010 elections that saw the defeat of Gbagbo and his refusal to relinquish power and the post-electoral violence that ensued, the President-elect Ouattara sent a
new letter to the ICC on 14 December 2010 in which he “confirms the declaration of 18 Avril 2003” and he engages Côte d’Ivoire “to fully cooperate and without delay with the ICC, especially regarding all the crimes and abuses perpetrated since Mars 2004.”15

Despite this invitation letter that Ouattara sent to the ICC, Côte d’Ivoire did not ratify the Rome Statute until 15 December 2013, even though the Ouattara government had arrested Gbagbo and handed him over to ICC custody since November 2011. For the purpose of this study, the situation in Côte d’Ivoire raises many interesting questions. For example, why did the Ivoirian government accept ICC jurisdiction in 2003 while it did not ratify the Rome Statute? Why did President Ouattara renew that invitation to the ICC in 2010 while his government was still not member of the ICC? Why did Ouattara’s government hand over Gbagbo and Blé Goudé to ICC custody while at the same time deciding that Simone Gbagbo will be tried in Côte d’Ivoire? Why did the ICC prosecution in Côte d’Ivoire target only Gbagbo loyalists despite the fact that, as Human Rights Watch (2013) reports, both pro-Gbagbo and pro-Ouattara forces are implicated in “war crimes and likely crimes against humanity”? What does the situation in Côte d’Ivoire mean for human rights norms and the international criminal justice regime?

**A Word on Justice**

Central to this research project are the contestations around the meaning, means, and delivery of justice at the international level. Although it is not in the scope of this dissertation to engage in the depth of theoretical discussions of what justice

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means, it is nonetheless important to briefly discuss the concept of justice, which has always been central to political thought (Porter, 2015). For instance, in Plato’s *Republic*, Socrates asks, “Is not justice the standard of all human excellence?” (1971, Part 1, Book 1, 334). Aristotle’s *Ethics* defines justice as that which is “lawful and fair” (1977, Book 5, 1129a21-b6). Therefore, for both Plato and Aristotle justice is important to moral character because it “implies a relation to somebody else – justice is the only virtue that is regarded as someone else’s good” (*Ethics* 1977:1129b30-1130a18). And John Rawls (1971, 3) takes justice to be the “first virtue of social institutions” (cited in Porter 2015, 9).\(^{16}\) But how do these conceptions of justice translate to the world of international courts and politics? Or in other words, what is to be expected from international courts in their ability to deliver justice that is meaningful to its recipients?

As Richard Goldstone, the former chief prosecutor for ICTY and ICTR wrote, “One must not expect too much from justice, for justice is merely one aspect of many-faceted approach needed to secure enduring peace in transitional society” (Goldstone 1996, p.486, cited in Porter 2015, 10). But also, it is clear that justice, whether at the domestic or international level, “extends beyond the ability of courts to specify the legal, material and moral dimensions of an offence” (Grovogui 2015, 99). Therefore, as Grovogui (2015) contends, justice exceeds the mechanics of its delivery and has social ends. For example, the Luo/Acholi people, who were the main victims of the war in Northern Uganda, view justice predominantly through a restorative lens, rather than a punitive one. As Lokwiya Francis, the Executive Coordinator of the Acholi Religious Leaders Peace Initiative (ARLPI) said,

\(^{16}\) Porter, Elizabeth. 2015. Connecting Peace, Justice, and Reconciliation. Lynne Rienner Publishers
“I think for the Luo/Acholi people, justice is more of a kind of restorative [process]. For us, we don’t have penalty [only]. In our history, as Luo people, as Acholi people, there is no just penalty. And there is no crime that is too much to be forgiven… So if you look at where we are, how we move, then we feel the question that remains is the justice that the ICC is demanding for, that the U.S. is demanding for, we ask, whose justice is that?”

Such view of the ICC process in northern Uganda is heightened by the arrest and transfer of LRA Commander Dominic Ongwen to The Hague to face 70 counts of war crimes and crimes against humanity. Ongwen was abducted by the LRA when he was 9 years old, became a child soldier, and later moved up the ranks of the LRA command structure. My interviews with human rights activists and local officials in northern Uganda reveal that Ongwen should have been granted the opportunity of “coming home,” going through cleansing ceremonies, and the community having a voice on whether a criminal trial is warranted or not. As Grovogui (2015, 119-120) contends, “Justice thus is the cumulative and combined effects of cognitive, sensorial, affective and emotional events that extend from the moment of the commission of crimes to prosecution; the setting into motion of post-indictment events; the operations of judicial and non-judicial processes; the collection of evidence; the trial and verdict; and the more intangible expectations for a better future.”

Sources for Evidence

I have devoted an important part of this work to bibliographic research in order to build the theoretical framework of my argument. To that end, I use an interpretive

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17 Interview with Lokwiya Francis, Executive Coordinator of ARLPI, Gulu, Northern Uganda, March 2016.
method of inquiry of the relevant literature. The first part of my research relied mostly on secondary literature related to international relations and international criminal justice to help situate my arguments within the literature. Both academic and legal sources are used to that extent. Moreover, I have relied on various primary sources, including legal ICC documents, that I accessed both through the ICC website and at the ICC offices in The Hague during my fieldwork research. Other primary sources include local newspaper articles from Kenya, Uganda, and Côte d'Ivoire. Because I am concerned in revealing the narratives behind the discourse used by the international criminal justice apparatus, I use qualitative methods to study the speeches made by the officials of the ICC, human rights activists, administration officials, as well as the people that are directly impacted by the actions of the Court in the empirical cases that encompass this study.

Additionally, I conducted in-depth semi-structured interviews in The Hague, Kenya, and Uganda. In Kenya, conducted fieldwork research in Nairobi, but also in the Rift Valley towns of Nakuru, Eldoret, and in Kisumu. These sites were at the epicenter of the 2007-08 political violence. I also conducted interviews in Kampala and Gulu, which is the main city in Acholiland, where the LRA fought against the Ugandan government forces for over two decades. In the Netherlands, Kenya, and Uganda, these interviews were conducted with ICC officials, lawyers, human rights activists, government officials, law professors, journalists, Kenyan and Ugandan citizens, researchers, and victims of political violence. These interviews were complemented by participant observation. At The Hague, I observed the ICC in operation, watching various proceedings at different stages of the trials of Thomas Lubanga, Germaine
Katanga, and Ruto/Sang. I also observed proceedings of the Libyan admissibility challenge.

**Conclusion**

In the fourteen years since the entry in force of the Rome Statute, the ICC has without doubt spearheaded a new era in the global governance of criminal justice and atrocity crimes. As a relatively new institution, the ICC departed from former UN ad hoc tribunals given that those were created in the aftermath of conflicts, therefore their jurisdiction was both limited in time and space, and they were often criticized as “victor’s justice” (De Vos, Kendall, and Stahn 2015). To that extent, the current global phase of justice is characterized by ‘judicialization’ that is becoming normalized, judgement is now more centralized by an international body in the area of mass atrocities, and the ICC personifies the new permanent international actor. Around the world, in places as varied as Afghanistan, Colombia or Ukraine, the work of the ICC has been “vernacularized” to varying degrees, circulating among alternate and often competing conceptions of what qualifies as an appropriate response to mass atrocity (Mégret 2015). But as Mégret (2015) also concludes, the plurality of competing constituencies invoked by the Court suggests that its main constituency may in fact be “nothing but itself.”

Furthermore, scholars such as Kamari Clarke (2009, 45) have noted the growing “tribunalization of violence.” And while trying to include “the local” in its approaches, the ICC becomes also “vulnerable to some of the dilemmas that other liberal and emancipatory projects face in their engagement with ‘the local’, such as paternalistic and missionary features, perpetuation of structural inequalities or distorting effects of de-localisation” (Stahn 2015, 50). Nevertheless, as Stahn argues, the ICC is different
from former hegemonic projects of the 19th and 20th century in the sense that it is not dependent on a few powerful Western states but results rather from the success of the power of small states in international law and the push form civil society organizations. In this sense then, “the project of the ICC reflects a certain democratization in international relations” (Stahn 2015, 56).

    The ICC’s raison d’être is to seek justice, while working with local mechanisms. Justice is, however, a diffuse concept, often meaning different things to different people, depending on their relationship to the crimes committed and the relevant cultural norms within the affected community (Newton, 2015, 122). A delicate balance between appropriate punitive measures and some dimension of local mechanisms of restorative justice may be necessary (Newton 123). The following chapter lays out the theoretical groundwork for the arguments that will be developed in this work.
CHAPTER 2
STATES, INTERNATIONAL INSTITUTIONS, AND HUMAN RIGHTS BASED REGIMES

Introduction

International Relations, as a discipline – especially from the Realist perspectives – has long viewed international law as epiphenomenal. As a practice, law is often presumed to be meaningful only when backed by enforcement, which is carried out by a legitimate authority. This is even more so with international law, where a central enforcer is absent, unlike in the case of domestic laws. Hence, following this logic, international law cannot meaningfully exist in a world where there is no world-state. However, as Alter (2014, 68) asserts, at the end of the Cold War, there were only 6 permanent international courts, which had collectively issued 373 binding judgments between 1945 and 1989. It is then puzzling to note that, by the year 2014, there were at least 24 permanent international courts, which had issued some 37,000 binding legal documents (Alter 2014, 68). What explain the dramatic rise of international courts not only in terms of their numbers, but also in terms of their relevance and the widening of their jurisdiction and competency?

The Rise of International Legalism

Unlike the previous generation of international courts that functioned mostly as dispute settlements mechanisms, the new wave of post-Cold War international courts has jurisdiction over economic, human rights, and crimes associated with mass violence. The rapid growth of international courts signifies an increased relevance of international law and legalism, in a context where courts and judges challenge powerful individuals and shape major political events. Long gone are the days when scholars’ interests in international courts focused mostly on the International Court of Justice.
(ICJ), which functions mostly as an arbitration process between two willing parties.

International relations scholarship and international law are now confronted with an ever increasing complexity and entrenchment between law and international politics within the post-Cold War supranational judicial institutions.

These international courts have altered domestic and international politics in profound ways. For instance, as Alter (2014, 3) writes,

since the end of the Cold War, the ruling of international judges have led Latin American governments to secure indigenous peoples’ land rights; the United States Congress to eliminate a tax benefit for American corporations; Germany to grant women a wider role in the military; Niger to compensate a former slave for her entrapment in Niger’s family law justice system; and a Congolese warlord Thomas Lubanga Dyilo, Liberian president Charles Taylor, Jean Paul Akayesu, and others to be convicted of conscripting child soldiers, abetting insurgents in neighboring countries, and tolerating rape.

Knowing that the adjudicating of such matters were exclusively within the domestic affairs of states, one may ask how were international courts, in the absence of an enforcing authority, able to get states to abide by their rulings? Indeed, today’s international courts are politically more prominent than international courts of the past. Moreover, as Alter (2014, xvi) contends, “The reality that legitimate governance is increasingly equated with rule of law governance is why governments bend over backward not to be seen as violating the law. One must only look at the tortured ‘torture memos’ to recognize the length governments will go to be seen as rule of law actors.” So, why does it matter to states to be viewed as abiding by the rule of law and supporters of international legal regimes?

**International Legal Regimes and State Sovereignty**

Krasner (1983, 186) defines regimes as "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations
converge in a given area of international relations.” There is a “demand for international regimes,” according to Keohane (1982), who defines them as “institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations” Keohane (1989, 4). Adopting a constructivist perspective, Kratochwil and Ruggie (1986, 759) view regimes as “governing arrangements constructed by states to coordinate their expectations and organize aspects of international behavior in various issue-areas.” In any case, the international criminal justice regime is a set of norms, rules and regulations, spearheaded by states, but also a wide range of transnational non-state actors.

International institutions and human rights based regimes of international justice are designed to hold states and individuals accountable for both international and internal activities. These regimes also empower citizens to challenge their governments before international courts or fora. As such, they pose a challenge to Westphalian sovereignty in IR theory. The puzzling question is why states, whether democratic or not, would favor establishing or joining international regimes whose main purpose is to constrain their domestic sovereignty? Or as Simmons (2009, 4) asks, “Why would an individual government choose to commit itself internationally to limit freedom of action domestically?” This question is even more puzzling when taking into consideration the fact that 84% of the international courts that exist as of 2014 allow non-state actors to initiate litigation against them (Alter 2014). Whereas old-style courts lacked compulsory jurisdiction (requiring consent of the defendant-state), and functioned as voluntary interstate dispute settlement, new-style internationalized courts have compulsory
jurisdiction and allow non-state actors such as international commissions, prosecutors, international actors, and private litigants, to initiate litigation (Alter 2014).

In response to Simmons’ question about why a state would choose to commit itself internationally to limit freedom of action domestically (2009, 4), realist scholars have argued that states join international human rights regimes in a response to coercion. Idealists, on the other hand, argue that governments are convinced to adopt human rights norms. Therefore, the extant theories of international human rights cooperation focus on two elements: coercion, and normative persuasion (Moravcsik 2000). On the one hand, realist theories argue that governments join international human rights regimes because they are compelled to do so by great powers. On the other hand, normative persuasion stresses the idealistic and altruistic foundations for the creation and sustaining of international human rights regimes (Moravcsik 2000, 223). Thus, both realist and idealist theories argue that governments, interest groups, and public opinion in established democracies lead the effort to form and enforce human rights regimes.

However, Moravcsik (2008) argues that this is not the case because established democracies – in post-war Europe for instance – opposed binding human rights regimes, and never coerced or induced anyone else to accept them. Between these two positions, Moravcsik (2000) calls for a new theoretical starting point, that is the domestic political self-interest of national governments. Governments will resort to creating international human rights regimes when “reducing future political uncertainty [outweighs] the sovereignty costs of membership” (Moravcsik 2000, 220).¹ This

¹ Moravcsik (2000) posits a “republican liberal” explanation that argues that human rights regimes are a result of instrumental calculation about domestic politics. Governments delegate power to human rights
certainly poses a challenge to any rigid conception of Westphalian sovereignty. However, as Grovogui (2009) argues, it is problematic to imagine sovereignty on fixed and determined grounds. For Grovogui (2009, 263 emphasis added), “Sovereignty is first and foremost an historical abstraction intended to convoy an organizing principle of the international system. It thus serves to order a set of changing internal and external relationships between and amongst unequal political agents.”

Grovogui (2009) contends that contestations about the nature of the moral order underlying sovereignty resulted in political settlements that generated a succession of regimes of sovereignty that at times, have competed and coexisted. These regimes of sovereignty are visible in the “post-conflict” discourse and framework within which the ICC intervenes. For instance, at the end of the Cold War, in face of the perceived threats that weak and failed states represented for others, the notions of “shared”, “pooled” and “conditional sovereignty” emerged as possible solutions to failures of statehood. Thus, “malleable notions of sovereignty matched the malleable definition of conflict and the malleable concept of intervention” (Hozic 2014).

However, although human rights are prominent in the liberal global agenda, states do put in place mechanisms that try to limit their reach and their effectiveness, regimes in order to limit political uncertainty, for example to constrain the behavior of future national governments, which is the reason why, according to Moravcsik, the strongest support for binding human rights regimes came from new and potentially unstable democracies, not the established ones (229).

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2 See also Gerry Simpson (2004) for a discussion of the power hierarchy in the sovereignty of the states.

3 Grovogui (2009, 263) defines a regime of sovereignty as “a manner, a method, and a system of organization of sovereignty in time and space.”

given that the global codification of rights limits the sovereignty of states in principle, by setting uniform and universal global standards (Grugel and Piper 2007). The rising international legalization impacts state behavior and human rights based international regimes. As Simmons (2009, 3) explain, from the end of WWII to the turn of the century, “governments have committed themselves to a set of explicit legal obligations that run counter to the old claim of state sovereignty” (3). How did the supremacy of sovereignty give way progressively to its contestation? International institutions and regimes affect domestic politics, and treaties to which states adhere alter the political agenda of domestic elites and galvanize social movements (Simmons 2009).

**Balancing Norms of International Justice with States’ Interests**

Realism assumes that states are the most important actors in the international system, and they are unitary and rational, in pursuit of their self-interests. But, one may ask where do states’ interests and preferences come from? How do states know what they want? (Finnemore 1996). Social Constructivism sheds light on possible answers to these questions (Finnemore 1996). The ways in which states work within the international criminal justice regime suggest that their interests are the reflection of the interests of their elites. This position, derived from what Moravcsik (2008) called the “New Liberalism” is fundamentally different from Realism but also from Liberal institutionalism. For Moravcsik (2008), states preferences and interests reflect the preferences and interests of a subset of the state. Thus, the state is not an actor *per se*, but an institution susceptible to be captured by coalitions of social actors. Thus, some

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5 Grugel and Piper (2007) argue that the global codification of rights creates a kind of constitution that can be used as a vehicle for making claims and legitimizes non-state action on behalf of vulnerable groups.
norms developed to reflect the preferences of such domestic coalitions spill over in the international arena. Following the same reasoning, Bass (2002, 18) argues that liberal ideals make liberal states take up the cause of international justice. Therefore, war crimes legalism for example, encompasses the process by which domestic norms are transferred to international politics. To that extent, the ICC fits in the long and arduous road to build an international justice regime that holds individuals responsible for crimes in a world made of states.

**From Nuremberg to The Hague:** Following World War II, the Nuremberg trials consecrated the idea of individual responsibility for war crimes, which opened a new era in the international justice regime. The Nuremberg trials set a precedent for the possibility of prosecuting state officials for crimes committed against humanity regardless of where they were committed. The massive human rights violations that occurred during the spike in ethnic conflicts and civil wars at the end of the Cold War led to the creation of ad-hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone. Other international or hybrid ad hoc tribunals have also been implemented for Cambodia, Timor-Leste, and Lebanon. The necessity to address the “tribunal fatigue” led to the establishment of the ICC, the first permanent international criminal court (Cassese 2012, 18). But the establishment of the ICC is also a reflection of the rise and wide adoption of norms of international justice.

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6 Bass (2002, 19) notes that every international war crimes tribunal was established by liberal states, according to Bass (Leipzig, Constantinople, Nuremberg, Tokyo, Hague, Arusha. But this argument doesn’t account for why some liberal states opposed the creation of the ICC
Taking Norms Seriously

Human rights norms and international criminal justice legalism pose a challenge to state sovereignty and rationalist understandings of international relations and states interests (Krasner 1999). Finnemore (1996, 22) defines norms as “shared expectations about appropriate behavior held by a community of actors.” International norms are not epiphenomenal (Finnemore and Sikkink 1998). Rather, norms are intersubjective and they shape and construct states identities and interests by activating transnational advocacy networks that in turn help advance the norms (Sikkink 1996; Finnemore and Sikkink 1998). Norm entrepreneurs take upon themselves the task of starting off the process that sets off the “norms cascade” which is a three-step process: emergence, diffusion, and internalization (Finnemore and Sikkink 1998).

Katzenstein (1996, 19) conceptualizes norms as “social facts, which define standards of appropriate behaviour and express actors’ identities.” As Meyer (2005, 529) argues, “Norms, ideas and practices are not isolated variables, but should rather be seen as interrelated elements of and derived from an overarching identity narrative of a given community in its relation to the outside world.” Actors do not start with a “blank sheet”, as actions are ingrained in pre-existing beliefs, ideas, and norms that point towards appropriate behavior (Meyer 2005; Checkel, 2000; Olsen, 2000). Regardless of how actors want to pursue utilitarian interests, their actions are not divorced from the social and cultural context in which they exist. It is against this frame that one must study state’s behavior in shaping, re-shaping and sometimes subverting norms of international justice which they use strategically in pursuit of their interests. My argument that states strategically use international legal norms in ways that amount to their perversion fits in the framework of both adopting but also curtailing those norms.
International Socialization

Although African states have been socialized in engaging with international courts and integrating human rights normative discourse and practices, a careful analysis of the engagement with the ICC shows that such socialization is embedded in strategic calculations on the part of the states. These strategic calculations take into consideration costs and benefits of such engagements in deciding the extent and the limits to such compliance and cooperation with the ICC and the adoption of norms of international criminal justice. In fact, the adoption of norms of international criminal justice and compliance and cooperation with international court is characterized in self-interested political preferences and strategic instrumental action. As Schimmelfenig (2005, 832) argues,

[States] conform with international norms if it increases their political utility, and on the condition that the costs of adaptation are smaller than the benefits of external rewards or the costs of external punishment. In addition, actors manipulate the norms strategically to avoid or reduce the costs of socialization. They use and interpret international norms to justify their self-interested claims, and frame their preferences and actions as norm consistent. In other words, they act rhetorically…

For instance, while explaining the international socialization of Central and Eastern European countries to liberal human rights and democracy norms through a rationalist approach, Schimmelfenig (2005, 829) argues, “The higher the domestic political costs of adaptation to international human rights and democratic norms, the less likely target governments will conform with them…” This study shows that while working within the international criminal justice regimes, states adopt the norms, contest them, or reshape them in ways consistent with their political interests and cost/benefit analysis.

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7 Schimmelfenig (2005, 848) proposes “rhetorical action” as “the strategic use of norm-based arguments – as the intervening mechanism.”
Problematicizing States’ Interests

But, how do states know what they want? How do they develop their interests and what are the ways in which those interests change? A constructivist approach to international relations, Finnemore (1996) argues, helps us understand the social structure in which states are embedded, wherein networks of transnational social relations shape states preferences. “States do not always know what they want,” Finnemore (2016, 128) says. Finnemore (1996) argues that “States are socialized to want certain things by the international society in which they and the people in them live” (2). As Finnemore (1996, 1) shows, neorealist and neoliberal scholars dominated the field in their assumptions that states are known to want some combination of power, security, and wealth. Finnemore (1996, 2) develops “a systemic approach to understanding states interests and state behavior by investigating an international structure, not of power, but of meaning and social value.” As Finnemore (1996, 2) argues, “interests are not just ‘out there’ waiting to be discovered.” Indeed, “State interests are defined in the context of internationally held norms and understandings about what is good and appropriate” (Finnemore 1996, 2). Given that international norms and values change, the normative context in which states create and operate is also subject to change. A sociological approach to the study of norms emphasized the ways in which norms define identities, interests and social realities (Finnemore 1996). Indeed, states makes international organizations just as much as those organizations too constitute and reshape states, as “the international system can change what states want” (Finnemore 1996, 5). For Finnemore (1996), the main point is that International

8 For instance, Finnemore (1996) shows how UNESCO taught states that a science bureaucracy was a necessary component of the modern state; war is a highly regulated social institutions whose rules have
Organizations may affect states preferences in profound ways, and that they, not states – are the agents of change. This, brings us to the “justice cascade” argument (Sikkink 2012).

The “Justice Cascade”

In a number of earlier publications (Sikkink and Booth Walling, 2007; Lutz and Sikkink, 2001; Finnemore and Sikkink, 1998; Keck and Sikkink, 1998) and especially in her book *The Justice Cascade*, Sikkink (2012) contends that transnational emulation and normative socialization of states echoed the works of domestic activists and norms entrepreneurs, from the 1970s onwards. The resulting effect, which Sikkink (2012, 5) calls the “justice cascade” is defined as the emergence of “an interrelated, new trend in world politics towards holding individual state officials, including heads of state, criminally accountable for human rights violations.” Whereas sovereign immunity for heads of states and other officials had been the prevailing norm, that model eroded in the post-World War II era as state accountability started to take root in human rights regimes. Later, through prosecution for massive violations of human rights, the individual criminal accountability norm emerged, and all three coexist today (Sikkink 2012). International tribunals, which had been dormant after WWII, partly due to the Cold War, were resurrected by the UN Security Council in the wake of the wars in the former Yugoslavia and the genocide in Rwanda in the early 1990s. This, in turn, had the effect of leading to the establishment of domestic and hybrid tribunals elsewhere.

Sikkink (2012) situates the emergence of the latest norm of individual criminal accountability changed over time. ICRC taught states that the first Geneva convention was in their interests; in the 1960s and 1970s, alleviation of poverty and meeting of basic human needs became part of development policy because the World Bank taught that to states.
responsibility for atrocity crimes to the role that individuals, NGO activists and states have played in creating and diffusing the norm of individual criminal accountability in the wake of human rights abuses, which, in essence, is the “justice cascade” argument.

More specifically, the sources of the justice cascade can be traced back to transition periods from military dictatorships to democracy both in Southern Europe and Latin America during the 1970s. Constructivist scholarship points to a normative shift from blanket amnesties for human rights abuses to demands for individual criminal responsibility. A progressive de-legitimization of amnesties had the effect of holding former states officials individually accountable for past human rights abuses, notably in Latin America (Sikkink 2012). According to Sikkink, a transnational justice network was responsible for these changes, by socializing states into adopting to norm of the duty to prosecute past human rights abuses and international crimes. These transnational advocacy networks persuaded the countries emerging from dictatorships that amnesties were not only in violations of the rights of the victims, but also they would set the stage for further violations of human rights (Sikkink 2012). Therefore, prosecutions were necessary, they argued, not only as a matter of moral and legal duty, but also as an instrument to consolidate peace and democracy and prevent future atrocities. In definitive, Sikkink (2012) contends that trials for human rights abuses lead to lower levels of repression in those countries, that prosecutions work when balanced with truth commissions, and prosecutions deter human rights violations and create greater political stability. Therefore, for Sikkink (2012, 169), trials have both deterrent effects and socializing functions. However, my study aims to show that Sikkink’s argument on the justice cascade is simplistic and comports many flaws that can be traced to her
biases which lead her to exaggerate the normative and positive effects of prosecutions for human rights abuses.

Unraveling the Justice Cascade: A Critique

First, we may ask whether there is really a justice cascade, and if so, is it truly global, as Sikkink (2012) suggests? As the data that Sikkink (2012) provided show, there is a wide adoption of the norm of individual criminal accountability in Latin America that materialized in the use of trials to prosecute perpetrators of human rights abuses. However, Latin America seems to be a cluster of cases that are not representative of other regions around the world that have also experienced widespread human rights abuses. In Asia for instance, outside of Cambodia which has established the Extraordinary Chambers to reckon with the Khmer Rouge regime⁹, the claim of a widespread adoption of this norm is flimsy. The Middle East also seems to be outside of this cascading of justice. One could argue that African states, constituting the largest regional bloc in the ICC membership, show a widespread adoption of the norm of individual criminal accountability in the face of international crimes. But as I argue in this study, such claims rest on shaky grounds if we take into consideration the ways in which these states, although appearing to have adopted the norm, nonetheless devise strategies to circumvent it and bend the rules to fit their calculations. Joining the ICC and working with international tribunals can be a mere cost and benefit analysis for states that are eager to find avenues to prosecute their enemies while at the same time shielding their agents.

⁹ The Extraordinary Chambers in the Court of Cambodia (ECCC) is an internationalized hybrid tribunal established to prosecute crimes committed by the Khmer Rouge regime between 1975 and 1979. See https://eccc.gov.kh/en/about-eccc/introduction
Moreover, whereas Sikkink (2012) argues that “foreign prosecutions and international tribunals can be cost-effective alternatives to military intervention,” Rodman (2014) shows that the Special Court for Sierra Leone (SCSL) was able to prosecute former Liberian president Charles Taylor and hold other rebel leaders accountable only because of interventionist commitment from Western powers and West African regional organizations to a military victory over rebels in Sierra Leone and a regime change in Liberia. Hence, as Rodman (2014, 39) argues, “Taking criminal accountability seriously requires an interventionist rather than a consent-based approach to conflict resolution.” Therefore, the experience of the SCSL shows the limits of the norm diffusion argument when addressing accountability in ongoing conflicts (Rodman 2014).

As McAuliffe (2013, 109) contends, the justice cascade argument “has been accepted uncritically by a number of scholars” (see for instance Barahona de Brito, 2010; Sriram, 2003; Huneeus, 2007; Levy, 2010; Roht-Arriaza and Marrizcuena, 2006). However, one can also argue that the demand for justice has not translated into an increased willingness of states to engage in risky accountability processes (McAuliffe 2013; Payne, Olsen and Reiter 2010). In fact, Payne, Olsen and Reiter (2010, 101-103) contend that “the relative frequency of prosecutions and amnesties has remained stable” and that the increased number of prosecutions is simply due to a greater number of transitions since the late 1970s. As such, they argue that any increases in the adoption of trials merely reflect global democratization trends, not any adoption of the norm or individual criminal accountability and socialization of states, as the justice cascade argument would posit (Payne, Olsen, and Reiter 2010, 101).
It is therefore possible that what has been uncritically accepted as the justice cascade may merely be an “advocacy cascade” (McAuliffe 2013, 106). Such conflation may be due to the fact that transitional justice and its virtuous effects are often times presented in idealistic terms by scholars, which make its positive effects presumed but not proven (Van de Merwe, 2009, 121). As McAuliffe (2013, 106) writes,

Amongst advocates and activists in particular, one sees in the literature an emotional commitment to transitional justice that generally foregoes doubts about its overall efficacy even where isolated shortcomings are accepted. Policy has hitherto proceeded less from analysis to conclusions than from commitments to action.

And indeed, as Vinjamuri and Snyder (2004, 345) have pointed out, “the commitment to advocacy has come at the expense of progress in empirical research.” Sikkink (2012, 7) herself admits that her scholarship in The Justice Cascade is based on a mix of qualitative analysis of a database that she developed with a treatment of what she called her own “personal and scholarly journey.” In that regard, as McAuliffe (2013, 107) writes,

Although this approach should not necessarily condemn the undertaking, in a work that primarily seeks to examine the role of human rights activism on prosecutions for human rights abuses, the dangers of the old anecdotal reasoning are more pronounced than is ordinarily the case. Transitional justice advocacy is often presented in heroic terms, speaking truth to power on behalf of disenfranchised masses, selflessly enduring rocky relationships with the state and reacting against the cynicism and betrayal of values inherent in the sovereign control of international affairs.

Sikkink and other human rights scholars, as Coomans et al. (2010, 18, cited in McAuliffe 2013) write,

tend to passionately believe that human rights are positive. Many of the scholars are activists or former activists in the field of human rights. Although seldom stated, the explicit aim of their research is to contribute to improved respect for human rights standards… In accordance with these terms, there is little room for research challenging the conventional wisdom that such systems be applauded.
Sikkink herself admits that scholars of human rights have not found satisfactory ways to combine ethical commitments with empirical research (Sikkink 2013, 229) and her works show that she has not succeeded in that endeavor either.

It is in consideration of these shortcomings on the ethical commitments of human rights scholars that one must assess the claim that criminal prosecutions have had a deterrent effect on the perpetration of atrocity crimes. Even in the case of the ICC, its record of prosecuting individuals for war crimes and crimes against humanity since it opened in 2002 have not had the deterrent effect that many expected even on the African continent where all its cases are located so far. The fact that the ICC had to open two situations under investigation in the Central African Republic (CAR I opened in 2007 and CAR II in 2014) shows that the threat of being prosecuted in The Hague does not necessarily deter would-be perpetrators in a situation of conflict. Whereas transnational advocacy groups pushed for the prosecutions of atrocities in line of universal standards, Snyder and Vinjamuri (2004, 5) argue that such measures may be counterproductive because this strategy “risks causing more atrocities than it would prevent, because it pays insufficient attention to political realities.” Recent international criminal tribunals having often failed to gain cooperation from either great powers or countries where crimes were committed, the criminal prosecution agenda must be rethought in light of these shortcomings and a more pragmatic approach ought to be adopted (Snyder and Vinjamuri 2004). From this perspective, striking political bargains may be the best way to prevent future atrocities through building political coalitions that can put in place institutions that would contain the power of potential perpetrators and
uphold the rule of law. These political and institutional preconditions must be in place first, before norms of justice can be invoked and build up (Snyder and Vinjamuri 2004).

Therefore, a deep skepticism about the “Human Rights Imperium” is warranted (Hopgood 2013). In this ritualization of international justice where its unmitigated good is taken for granted, Hopgood (2013, Loc 3488) contends, “The ICC […] will be used by states to solve political problems, not to change the world.” However, whereas the organized hypocrisy of the international justice system is often leveled as a critique of Western powers, I show the ways in which African states as well are trying to maximize their benefits by collaborating with the ICC when it suits their goals, or stonewalling the Court despite the compliance that their ICC membership requires, when their agents are targeted for prosecution.

**When Norms Subversion Becomes Strategic**

My study points to the ways in which states use norms instrumentally. Empirically, Finnemore (1996) shows the ways in which IOs socialize states to accept new political goals and values. But, in asserting that norms shape interests, Finnemore (1996) overlooks the fact that interests, derived from outside of the norms, reshape those norms in the sense that they violate them, or subvert them, or in any case, engage with them in novel ways. I argue that states also, while interacting with international organizations, re-arrange those values to retrofit them with their interests derived from political calculations and cost-benefit analysis. Focusing on norms of international criminal justice, I show the ways in which states who have come to establish some working relationship with the ICC, adopt discursive strategies and courses of actions that allow them to pursue their interests, even when such strategies mean that they will subvert the norms while doing so. In that regard, my analysis takes
Finnemore’s argument a step further by looking at not only the ways in which states construct their interests through their social relations with each other and with international institutions, but also how those interactions unearth new interests that too are pursued, even if they do not match with the earlier goals that states may have had. Finnemore (1996, 3) argues that the redefinitions of states interests “are shaped by internationally shared norms and values that structure and give meaning to international political life.” I contend that these redefinitions of interests, are created by states and shape the normative framework that they take into new directions.

While the arguments that trials and prosecutions of state leaders for human rights abuses has gained ground (Sikkink 2011; Sikkink and Walling 2007), other works in transitional justice have shown that criminal prosecutions and states’ collaboration with international courts do not necessarily advance the rule of law or norms of human rights. In the case of the ICTY for example, Subotic (2009) shows that political elites “hijack” the transitional justice process for the advancement of their own goals. Thus, this is one area where transitional justice helps us better understand the ways in which, at the domestic level, norms can be hijacked and geared towards directions for which they were not intended. Subotic (2009) argues that compliance with international norms becomes a strategic, even subversive choice for states that do not have much interest in following them. Such subversion of norms is central to the theoretical framework of my argument.

Subotic (2009, 7) uses “the concept of normative and institutional compliance to explore not only whether states comply with international norms and institutions, but also how and why they comply.” Focusing on Bosnia, Serbia and Croatia, Subotic
(2009, 167) finds that “under specific domestic conditions, compliance with international norms becomes a political strategy that allows states to go through the motions of fulfilling international demands while in fact rejecting the profound social transformation these norms require.” The paradox that Subotic (2009) identifies is that as transitional justice institutions have become a very popular way of addressing past abuses, the international rules become less potent because domestic actors are able to manipulate them for their own ends. As this study shows, these strategies that Subotic (2009) has identified in the case of the Balkans are also present in the relationships between African states and the ICC. This means that we need to pay more attention to domestic political conditions and how they relate to international norms and standards and the rule of law and justice in regards to massive human rights abuses.

Doing so, Subotic (2009, 6) contends, “will help us understand why some clearly noble international goals, such as those of bringing justice to victims of horrific mass crimes, remain unfulfilled and deeply entangled in domestic political fights.” The concepts of norms hijacking and hijacked justice that Subotic (2009, 184) has developed regarding the Balkans are also applicable to the relationships between the ICC and African states. I contend that the African states under study here did not refer to or cooperate with the ICC because they firmly believed in advancing the norms of individual criminal responsibility in face of mass atrocities. Rather, they have used the international justice system as a mere political strategy that they played to their advantage. Furthermore, in the cases of UN Security referral and the prosecutor’s initiative, my study provides opportunities to better explain and understand the ways in
which states deploy resistance to or accommodation towards the international criminal justice regime.
CHAPTER 3
OUTSOURCING JUSTICE AND PERVERTING INTERNATIONAL LEGAL NORMS

Introduction

This chapter explores the ways in which states subvert international legal norms in the pursuit of their own political interests. Specifically, I argue that the use of self-referrals to the ICC stems from political calculations that allowed political leaders to advance their own domestic and international agendas, at the expense of furthering the goals of the international justice regime which, with the creation of the ICC, had vowed to work to “end impunity.” However, stating that actors, whether they are politicians, ICC officials, community leaders or NGOs use self-referrals, cooperation—or lack thereof—or the complementarity principle selectively with the ICC for the advancement of their political goals is self-evident. As Nouwen (2014, xvi) notes, it is obvious that “African states have engaged in political calculations to avoid the costs and maximize the benefits of cooperation with the ICC. These governments have sought—and often succeeded—in deflecting or coopting the ICC as an instrument for dealing with local adversaries…” But what we know less—and which will be the contribution of this chapter—is how states do so, and what are the effects of such calculations on the norms of international criminal justice? Hence, this chapter is a story of political calculations, political power and security interests, the agency of African states, and convergence and clashes of interests between African states and international legal institutions.

1 See the Preamble of the Rome Statute. Available at https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
As this chapter will argue, it is clear that Uganda and the Democratic Republic of Congo have been able to use the ICC for their own political and legal gains, which calls for the need to explore further the agency of states in creating and shaping the delivery of international justice (Clark 2011, 1182). Such agency is even more crucial to understand when coming from African states, which are often viewed as a weak link in shaping or perverting global norms. The focus here is on the use of self-referral, and the examples are driven mostly from Uganda's use of self-referral to the ICC. The selection of the Uganda case is dictated by the fact that Uganda was the first case before the ICC, but also the first instance of self-referral.

In late 2003, the ICC Prosecutor Luis Moreno-Ocampo announced that Uganda, a state party to the ICC, had referred a “situation concerning the Lord’s Resistance Army (LRA)” to him. On June 28 2004, Moreno-Ocampo announced that there was “a reasonable basis to proceed with an investigation.” Moreno-Ocampo said, “There was credible evidence that widespread and systematic attacks had been committed against the civilian population since July 2002, including the abduction of thousands of girls and boys” (Schabas 2011, 39). The report indicated that rape, torture, child conscription and forced displacement continued to take place. The prosecutor submitted applications for five arrest warrants on 6 May 2005. In the application, the prosecutor indicated that the LRA was conducting attacks against the Ugandan army and local militias, as well as civilian populations. The warrants were unsealed and became public in October 2005,

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which led the rebel leaders to seek peace. Hostilities halted in August 2006, and peace negotiations were held in Juba from 2006 to 2008.

The use of self-referrals as a point of entry for the study of perversion of international legal norms is compelling because of its place in the early years of the implementation of the ICC. In fact, the ICC Prosecutor took up three self-referral cases during his first eighteen months in office: Uganda, the Democratic Republic of Congo, and the Central African Republic. Schabas (2011, 163) argues that “the idea [of self-referrals] came from The Hague, not the foreign ministries of the three countries in Central Africa that availed of such an innovative interpretation of Article 14 of the Statute” [emphasis added]. As the next section will show, this innovative interpretation of Article 14 of the Rome Statute that stipulates that States Parties to the ICC may refer a situation to the Court is central to the argument of perversion of international legal norms. More interestingly, even if the ICC Prosecutor was able to convince Uganda, DRC and CAR to use self-referrals, that does not preclude that those countries engaged in political calculations to weigh the costs of and benefits from such actions before submitting the letters of referral to the Court. The focus of this argument is on state leaders, and how they use the international criminal justice regime to further their own interests, and how they switch their strategy when the demands for their political interests warrants such action. Such political calculations and instrumentalization of the referral trigger mechanism and the ICC came with a cost on the legitimacy of the Court, especially given that “[The ICC] has failed to mitigate the ability of domestic governments to use international justice to their advantage, especially in insulating
themselves from prosecution for serious crimes committed against their own civilians” (Clark 2011, 1181).³

The discussion about the ICC involvement in Uganda has focused mostly on the Court, and its motives and the consequences of its implication in the conflict for the local populations. Whereas it is often argued that the ICC prosecutor jumped into the opportunity to show the Court’s usefulness and building its legitimacy, another side of the argument has showed that the implication of the ICC has made the conflict more difficult to settle and has prolonged the suffering of the local populations and victims of this long conflict.⁴

Interestingly, if the warrant for the arrest of the LRA leaders triggered the cessation for hostilities and the initiation of peace negotiations, they also prevented the completion of the peace accords because the LRA commanders insisted that the arrest warrants be annulled before they sign the peace settlements. Facing the impasse, President Museveni, who had triggered the ICC prosecution when he used the self-referral, asked the Prosecutor to withdraw the arrest warrants and promised immunity to the LRA commanders (Schabas 2011, 42). This move by the Ugandan president clearly shows that the self-referral to the ICC was destined to further his own interests, mainly political to guarantee his political survival, and when the situation had changed, he did not hesitate to withdraw his support for a legalist solution to end the conflict in Northern Uganda.

³ And as Peskin (2008) showed, governments in the Former Yugoslavia and Rwanda also have been able to manipulate international justice for their own benefit.

This process of criticizing the ICC role in Uganda and highlighting the ways in which it may be an impediment to achieving peace coincided with a process of de-legitimization of the Court, which found many favorable echoes in Africa. This effort at de-legitimization occurred merely a decade after the Rome Statute was adopted with big fanfare. The de-legitimization of international norms is also often a project of legitimization of new norms (Hurd 2007, 196). At the same time where the process of de-legitimization of the ICC is prevalent among many circles in the African continent, I argue that some African states have not broken the international legal norms in this case. Rather, they have used the norms in ways that they were not intended to, thus essentially perverting them.

The first section of this chapter shows the processes through which the trigger of state referral was perverted into a self-referral mechanism used by states to further their own political gains. But to contextualize Uganda’s self-referral to the ICC and its consequences, I first present a brief history of Uganda’s history of political violence, before addressing the conflict with the LRA which precipitated the ICC’s involvement. I then show the agency of the government of Uganda in using the self-referral, which was also in the interests of the ICC’s Office of the Prosecutor. Finally, I discuss the politics of self-referrals and how they pervert international legal norms.

**From State Referrals to Self-referral: The Perversion of an Idea**

Self-referrals ushered in a “revolution” in global justice (Akhavan 2010). Shortly after Uganda referred the situation concerning the Lord’s Resistance Army in its

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5 For example, the African Union has amended the Protocol of the African Court of Human and People’s Rights to give it jurisdiction over international crimes such as genocide, war crimes, and crimes against humanity. For the implications of such action, see Du Plessis (2012).
northern territory in December 2003, a debate about the legal understanding of state referrals ensued. While some scholars questioned the admissibility of self-referrals and whether that conformed to the legal procedures of the Court, the ICC Appeals Chamber in the Katanga case ruled that self-referrals are legally admissible before the Court (Akhavan 2010, 103). But this legal ruling does not foreclose the political questions about self-referrals. As Akhavan (2010, 104) notes, “An important aspect of “self-referrals” relates to the mutuality of interests between the Court and States Parties because of the unprecedented capacity of non-State actors to commit large-scale atrocities, combined with the manifest historical failure of inter-State human rights mechanisms.” To the extent that states may be weak and become victims of atrocities at the hands of non-state armed groups, self-referrals offered states a mechanism by which they could air their grievances before international courts. However, the flip side of the coin is that self-referrals also offered the state means to dispose of armed non-state actors, or even political adversaries.

Interestingly, during the negotiations that led to the adoption of the Rome Statute, no one seriously thought that states would self-refer to the ICC. As Arsanjani and Reisman (2005, 386) have noted, “no one… assumed that governments would want to

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6 Former militia leader Katanga’s defense team had argued that the Democratic Republic of Congo is able to prosecute him, and therefore, his case before the ICC should be inadmissible.

7 Akhavan (2011) argues than in face of the growing “privatization of violence”, states have become “both villains and victims” due to the increased “statelessness of violence”. For Akhavan (2011, 183), fragile and weak states are often “besieged by powerful insurgencies and criminal organizations. Where states were once assumed to be the villains in the human rights narrative, they are now often all that stands between a civilian population and a non-state group determined to commit massive human rights atrocities.” This new state of affairs, according to Akhavan (2011), make state-referral vital in cases where a nation is divided and in need of an intervention from a third-party, in volatile security situations, and when the state is unable to conduct complex and expensive trials.
invite the future court to investigate and prosecute crimes that had occurred on their territory.” Moreover, state referral was thought to be the least likely trigger mechanism to lead to prosecution (Schabas 2011). As Schabas (2011, 159) writes, “It was frequently pointed out that States were notoriously reluctant to complain against other States on a bilateral basis, unless they had bilateral interests at stake.” Instead, Article 14 of the Rome Statute about state referrals was thought as a referral mechanism initiated by an interested state about another state (Akhavan 2010). However, states hardly serve as watchdogs for other states regarding human rights abuses. In fact, as Akhavan (1995, 236-237) notes, “inter-state human rights mechanisms are generally effective only to the extent that geopolitical or other interests are at stake.” It is hardly surprising that no state has referred another state to the ICC since the entry in force of the Rome Statute in 2002. But what is intriguing is the ways in which the three first situations before the ICC are all the result of states referring themselves to the ICC. The state referral became the trigger mechanism for the first three cases before the Court: Uganda, DRC, and Central African Republic (CAR). The Côte d’Ivoire’s self-referral was a bit different, because although a non-party to the Rome Stature at the time, it had accepted ICC jurisdiction in 2003 by submitting an ad-hoc declaration under Article 12(3) which in substance amounted to a self-referral (Akhavan 2010, 106). Finally, Mali also self-referred to the ICC in 2013 in relation to crimes that may have been committed in its northern regions during the 2012 jihadist takeover.

**State Referrals or Self-referrals: What’s in a Word?**

Although the situations in Uganda, DRC and CAR are called self-referral cases – because the government themselves “invited” the ICC – the use of the word “self-referral” is misleading. In fact, while referring situations in their territory to the ICC,
these states did not intend or anticipate to have the ICC Office of the Prosecutor (hereafter OTP) investigate them, or even all parties involved in the conflict. Instead, these states sought to have the ICC investigate and prosecute the rebel groups who were operating within their borders (Schabas 2011, 160). For example, in its referral letter, the government of Uganda mentioned specifically “the situation concerning the ‘Lord’s Resistance Army’ in northern and western Uganda.” This specification clearly shows that the intention of the government of Uganda was to make the ICC direct its investigation and prosecution against the Lord’s Resistance Army (LRA) rebel group.

In regard of the pitfalls of self-referral, the government authorities that use the self-referral mechanism may well be prepared to cooperate with the ICC for investigations targeting the opposing parties, but they will be reluctant to be cooperative if the ICC focuses on states agents, as well (Gaeta, 2004, 952). Indeed, when the ICC Prosecutor issued warrants for the arrest of five LRA leaders, both Amnesty International and Human Rights Watch questioned the one-sided approach and called for the prosecution of the Ugandan military forces as well (Schabas 2011). Furthermore, the concept of self-referral has “the practical consequence of establishing a degree of complicity between the Office of the Prosecutor and the referring state” (Schabas 2008, 751). Or at the very least, a tacit if not explicit understanding between the self-referring state and the OTP. In the case of Uganda, for example, Schabas (2011, 166) writes,

To the extent that the Prosecutor believed his strategy of encouraging self-referral was a productive one, he surely had to reassure States that those who referred the case were not threatened. Indeed, if he intended for the strategy to continue, and to solicit more self-referrals, he will need to show a track record of one-sided investigations, directed against anti-government forces and entities.
Therefore, self-referrals provide states an avenue to gain immunity for their government officials and military forces while at the same time having the ICC prosecute their political adversaries or the rebel leaders operating in their territory. In the next sections, I will focus on the Uganda’s case of self-referral to argue a few points:

- Uganda used the self-referral mechanism because it aligned with its political calculations
- The use of self-referral served to isolate the LRA and make it an enemy of the international community
- The self-referral was also in the interests of the ICC’s Office of the Prosecutor
- The self-referral is an example of perversion of international legal norms.

First, I briefly retrace the history of political violence in Uganda that led to the rise of the LRA and the conflict in northern Uganda.

**Uganda’s History of Political Violence**

Apollo Milton Obote, a Lwo-speaking from the North became the first president of Uganda at independence, in 1962. By 1966, Obote had become increasingly dictatorial, relying heavily on the armed forces, until he was ousted in 1971 by Idi Amin. Amin, who hailed from the West Nile province, removed Lwo-speaking soldiers – from the Langi and Acholi ethnic groups, many of whom fled and engaged in resistance against his troops. Some of those soldiers formed the Uganda National Liberation Army (UNLA), and in 1979, with the support of the Tanzanian army – Amin having previously invaded Tanzania – and other forces led by Yoweri Museveni invaded Uganda to overthrow Amin (Allen 2006, 29). Elections were subsequently organized, and Obote’s Uganda People’s Congress (UPC) won, which inaugurated the second Obote administration. Obote II relied on the UNLA, which became de facto the national army, but composed mostly of northerners. However, in 1981, Museveni “went to the bush” with a small
group of soldiers and founded the National Resistance Army (NRA). Museveni seized power in January 1986 at a time when, as Allen (2006, 31) aptly put it, "something really strange and unanticipated happened – spirit mediums emerged as military commanders."^8

Although diviners and healers were common by the early 1980s, they became drawn in political processes by the mid-1980s. In 1985, in the northern Ugandan town of Gulu, Alice Auma established a remarkable healing cult (Allen 2006, 33). Alice claimed that she became involved in war on 20 August 1986 when NRA soldiers – the Museveni forces – kidnapped many young people of her age in Gulu. She then recruited 150 former UNLA soldiers and liberated them (Allen 2006, 34). This started a violent campaign against Museveni forces. Her movement came to be known as the Holy Spirit Movement or the Holy Spirit Mobile Forces (HSMF).^9

Alice’s movement was very effective, with up to 18,000 “disciple-soldiers” by the end of 1986. The government soldiers were confronted by “scores of partly naked, glistening men and women marching towards them, some holding bibles, others throwing magical objects, and a few wielding guns. In several encounters, they seem to have been terrified or just did not know what to do. Initially, most ran away” (Allen 2006, 35). Alice left Acholiland in October 1987 with about 10,000 followers and marched south. She was defeated 80 miles from Kampala, and escaped to Kenya where she has been living since (Allen 2006, 36). Although dozens of groups had resisted Museveni’s

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^8 These new leaders were called ajwaki (sing. ajwaka), which in Lwo means diviner, spirit medium, or witch doctor (Allen 2006, 32).

^9 But it is unclear that Alice Auma herself came up with that name; Allen (2006, 35) suggests that foreign media may have had given her movement that name at first.
rule over time, most of them had been defeated or gave up at some point or the other. However, Joseph Kony’s Lord’s Resistance Army, which combined remnants of previous national armed forces with the spiritual drive of Alice Auma’s defeated movement, was still active, twenty years later (Nouwen 2014, 125).

Kony was born in the early 1960s. He has asserted kinship with Alice, claiming to be her cousin. They both seem to have spent their early life near the town of Gulu. When Museveni signed a peace agreement with the Uganda People’s Democratic Army – a rebel group that was operating in Northern Uganda – in May 1988, one of its commanders, Odong Latek, refused to surrender and joined Kony, becoming the commander of the forces while Kony was most concerned with healing and divining. The group called itself Uganda People’s Democratic Liberation Army (UPDLA). After Latek was killed in 1990, Kony changed the name of the group to Lord’s Resistance Army (LRA) and assumed its military leadership.¹⁰

The LRA was estimated to comprise between 3,000 and 4,000 fighters in 1997. But, in any case, large numbers have never been necessary for the LRA because, as Allen (2006, 40) argues, “[They] have rarely engaged in pitched battles with government forces, but have used terror tactics to maximum effect.” But, the often-overlooked fact is that the LRA has also made political demands such as an all-party national conference followed by elections, national unity, education for all, policies encouraging foreign investments, etc. (Allen 2006, 43).¹¹ Clearly the LRA has often tried to communicate to

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¹⁰ As Allen (2006, 43) writes, “Although there have been claims that Kony is no longer possessed, the spiritual dimension of the movement has remained important, continuing to instill both fear and respect for his powers.”

¹¹ The LRA is commonly characterized in Uganda and by the international media as a “barbaric cult”, with no political agenda (Allen 2006, 25). Akhavan – who advised the Ugandan government on the self-
the civilian populations and outside world and make its political demands known, when they have had the opportunity. Such examples include the use of Radio Mega FM, a community radio based in Gulu. Kony and his lieutenant Vincent Otti called in during a live broadcast in December 2002, and the radio was subsequently prohibited by the Ugandan government from airing LRA communications (Dolan 2011, 85). In any case, the LRA political demands have been ignored by both the Ugandan government and outside actors, who preferred to paint the movement as an evil organization which only commit unspeakable atrocities and against which only a military response is warranted.

**Northern Uganda in the 1990s: Abductions, Internment and Repression**

Amidst the conflict in northern Uganda in the 1990s, President Museveni appointed Betty Bigombe, a young Acholi woman, as Minister of State Pacification of Northern Uganda, based in Gulu, and she managed to engage with the LRA in peace talks. But she was cut off by Museveni, who in many ways, saw the continued fight against LRA as beneficial to his presidency. In fact, the strange spirituality and the horrendous acts that the LRA engaged in allowed Museveni to present northern Uganda as a kind of “barbaric periphery” (Allen 2006, 49). Moreover, the war in the north kept the Ugandan army busy, allowing senior officers to become wealthy and soldiers to engage in cattle raiding. As Lokwiya Francis, the ARLPI Executive Coordinator said, during the LRA war, there were no political will to stop it. We lost our cattle, and these cattle were later on discovered in Central Uganda, in Western Uganda… so you cannot say the war was just something not being used by the government [for other purposes.] And the government also wanted to justify its long stay in power. They would say ‘I still have referral – writes that “From its inception until the present, the LRA has had no coherent ideology, rational political agenda, or popular support” and that up to 85% of LRA’s base was made of abducted or forcibly conscripted children (2005, 407).
work to do in northern Uganda. The war is still there; we need to finish this war.”

Indeed, in addition to the military assistance that Museveni garnered during the twenty-year conflict, the war in northern Uganda became also a “money-making venture” for senior military officers (Wierda and Otim 2011, 1159).

LRA raids and Ugandan government responses were catastrophic to populations in Acholiland, whom the Ugandan forces interned in camps. In addition to running the risk of being abducted by LRA fighters, northern Ugandans had also suffered under the encampment policy of the government of Uganda, which drove the Acholi off their land. As Nouwen (2014, 126) writes, at the conflict’s peak, 1.84 million people (about 90 to 95 per cent of the population in the three Acholi districts) lived in camps for internally displaced persons in appalling humanitarian circumstances. In some cases, people who refused to move to the camps were forcibly displaced. Moreover, the people who wandered outside the camps were at the risk of being abducted by LRA, or accused of being collaborators by the Ugandan forces. By the time of the ICC intervention in Uganda in 2004, the population in the camps was almost one million, encompassing nearly the entire rural population of Acholiland (Branch 2007, 181).

When asked about the dire humanitarian conditions in the IDP camps, President Museveni replied,

I am not able to understand why there should be a problem about the humanitarian situation. I have not been active in that area myself because we had sort of divided jobs. I was dealing with the army and fighting the

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12 Interview with Lokwiya Francis, Executive Coordinator of ARLPI, in Gulu, March 2016.

13 The Acholi were told that anyone found outside the camps would be considered a rebel and killed. And more people died due to the living conditions in the camps than from direct attacks (Nouwen 2014, 126).
terrorists, and I was leaving the government departments, aid [organisations] and UN agencies to deal with the humanitarian issues. I therefore do not know why the humanitarian situation should be a problem. (IRIN 2005)

The Ugandan government euphemistically calls the internment camps “protected villages” but they are effectively “internment or concentration camps,” given that the populations in them were forcefully displaced, and the government uses violence to prevent them from leaving (Branch 2007, 181). Mortality rates at camps exceeded 1,000 per week, producing a humanitarian catastrophe (Branch 2007, 181). But also, northern Ugandans, including Kony’s own Acholi community, have also suffered the consequences of this prolonged conflict, accused by the LRA of cooperating with Museveni forces, and being punished with “indiscriminate killings, torture, mutilation, looting, arson, enslavement and forced recruitment” (Nouwen 2014, 125).

Nonetheless, significant resentment arose from the Acholi populations towards the Ugandan military forces and the Ugandan government, due to the failure of the latter to end the conflict and their suffering, the internment, and stringent curfews that the Acholi perceived as an attack on their self-worth (Wierda and Otim 2011, 1159). Hence, “Resentment against the government and the UPDF sometimes translated into ambivalence among the Acholi towards the LRA. This ambivalence also stemmed from the fact that the LRA is composed largely of kidnapped relatives and children of the victims of the conflict” (Wierda and Otim, 2011, 1159). As northern Ugandan often point out, it seems that the wheels of international justice turn only towards the LRA, failing to take into consideration the extent to which the Ugandan government contributed to the atrocities in northern Uganda, both through its actions and its failure to fulfill its mission of protecting the citizens. For instance, Lokwiya Francis says,
So if the LRA comes and abducts 200 hundred people in this community, then it means the government failed in its role to provide security, to provide protection. And for the huts that were burned, and other that were looted, those are properties of the people, which falls within the mandate of the government to do that. And also when the war was going on, other than failing to provide that protection, the army also conducted a lot of kind of bandit work, inhuman treatment to people. There were women who were raped. There were men also who were raped. But these people [the ICC] want to put it all on the LRA and say it was done by the LRA.14

Moreover, although abduction has become synonymous with the LRA modus operandi, but it is important to be cautious about the use of the word in this case. In effect, the word ‘abduction’ may suggest innocence and lack of agency. Although that may well be the case in many instances, it is also true that the numbers of abductees, especially children, is well over-blown by media reports. Allen (2006, 53) points out that he “[has] not been able to find evidence that over 85 per cent of recruitment to the LRA is made up of abducted children – a figure that appeared in many reports and articles and is even repeated in the ICC press release of January 2004 on the situation in Uganda.”15

Northern Uganda in the 2000s: Amnesty, Peace Talks, and ICC Prosecution

By the end of 2004, after 18 years of fighting, changes in the international political context seemed to usher in a new era in northern Uganda. Those changes in the international political context included the fact after the September 11 2001 attacks, the United States included the LRA in the list of terrorist organizations.16 This also

14 Interview with Lokwiya Francis, Gulu, March 2016.

15 Allen (2006) interviewed many former LRA abductees and LRA fighters who recounted their personal experiences (see pp. 66-71).

meant US assistance to the Operation Iron Fist that Museveni launched against the LRA in 2002. The LRA responded with renewed attacks, which accentuated the pressure on Museveni—whose prestige suffered—to engage in peace talks. By 2003, the European Union had expressed “reservations about the military option” (Allen 2006, 73). In January 2004, the pressure accentuated when the US Congress passed the “Northern Uganda Crisis Response Act”17 (Allen 2006, 73).

Domestically, the changes in the context of the conflict stemmed from activism of civil society groups and NGOs, an offer of amnesty to the rebels18—all of them, not only LRA fighters, efforts for a renewed peace talks and a ceasefire. First enacted on 21 January 2000, the Amnesty Act stipulates that “An amnesty is declared in respect of any Ugandan who has at any time since the 26th day of January, 1986, engaged in or is engaging in war or armed rebellion against the government of the Republic of Uganda”. An amnesty shall be granted to such person if he/she

reports to the nearest army or police unit, a chief, a member of the executive committee of a local government unit, a magistrate or a religious leader within the locality; renounces and abandons involvement in the war or armed rebellion; surrenders at any such place or to any such authority or person any weapons in his or her possession; and is issued with a certificate of amnesty as shall be prescribed in regulations to be made by the Minister. (Amnesty Act, 2000)

The Act shall expire within six months, and the Minister of Internal Affairs has the authority to extend it (Amnesty Act, 2000). The Amnesty Act has lapsed and been


restored a few times. ¹⁹ About 26,000 members of armed groups have been granted amnesty since 2000 (IRIN 2013), including over 5,000 adult former LRA fighters (Allen 2006, 75).

However, Museveni’s referral to the ICC seemed to hinder the peace talks and ceasefire negotiations. In fact, over the years, Museveni had favored the military option as a means to end the conflict against the LRA. But proponents of peace talks won a battle in December 1999 when the Parliament adopted the Amnesty Act that offered pardon to all former and current combatants who engaged in acts of rebellion against the government of Uganda since 1986, although Kony rejected the amnesty since it did not meet LRA’s demands and implied defeat (Nouwen 2014, 128). In this context of failed peace talks and inability of the government forces to defeat the LRA militarily, the government of Uganda referred the situation in northern Uganda to the ICC in 2004 (Clark 2011).

**Uganda’s Self-referral to the ICC**

A Ugandan official flew to the Netherlands in December 2003, with a briefcase containing a twenty-seven-page letter: the first ever referral to the ICC (Nouwen 2014, 111). Three months earlier, the focus of the ICC Prosecutor had instead been on the DRC, where he had indicated that he was monitoring the events closely and called on states to refer the situation to the ICC.²⁰ At the same time, the International Court of Justice (ICJ) was adjudicating a case from the DRC against Uganda, for the latter’s

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¹⁹ For example, in the 2013 version of the Amnesty Act, senior commanders of the LRA were not eligible (IRIN 2013).

²⁰ The ICC as well as the international community believed at that the ICC cases would come from states referring situations to other states, not self-referrals.
involvement in the war in DRC.\textsuperscript{21} Whereas Phil Clark (2011, 1198-9) writes that the ICC Prosecutor Ocampo approached Museveni in 2003 and persuaded him to use the self-referral trigger mechanism, Nouwen (2014) argues that her Ugandan interviewees and ICC officials denied that there were talks between the ICC and Uganda prior to the referral. According to Nouwen (2014, 113), the informal communications between the ICC and Uganda prior to the referral were at the initiative of the government of Uganda's foreign lawyers – not the ICC. Moreover, it is worthwhile to note that Office of the Prosecutor has not made the Uganda referral letter public, unlike all other referral letters, possibly because the ICC was involved in the drafting of the DRC referral letter (Nouwen 2014, 113). In any case, the fact is that the ICC’s involvement in Uganda through the self-referral was a joint enterprise between the government of Uganda and the OTP.

\textbf{The ICC in Uganda: A Joint Venture}

The ICC intervention in Uganda can be described as a joint venture between the government of Uganda and the ICC’s Office of the Prosecutor (OTP). The government of Uganda made to the OTP the referral of the “situation concerning the Lord’s Resistance Army” in December 2003, but it was not announced until a month later, on 29 January 2004, at a joint press conference in London of ICC Prosecutor Moreno-Ocampo and President Museveni (ICC 2004). The press statement that followed noted that “President Museveni has indicated to the Prosecutor his intention to amend [the amnesty law] so as to exclude the leadership of the LRA” (Allen 2006, 82). This clearly

shows that the government of Uganda offered guaranties to the OTP that it will not impede on any ICC’s attempt to prosecute the LRA leaders by making them eligible to amnesty within Ugandan domestic law.

Although the referral letter hasn’t been released publicly, the government of Uganda accuses in it the LRA of crimes against humanity. The referral letter did not mention war crimes, probably because the government of Uganda was trying to avoid implying that LRA could be seen as a legitimate belligerent entity entitled to the lawful conduct of armed hostility (Nouwen 2014, 114). And unsurprisingly, the referral letter was silent on the possible commission of crimes by the Ugandan People’s Defense Forces (UPDF), an omission that the NGOs called for its correction, by ensuring that the OTP investigation covers acts committed by the UPDF as well (Nouwen, 2014, 115).

Noting that it appears that the Ugandan government sought to limit the referral to crimes committed by one party to the conflict, Amnesty International (2004) wrote that the ICC investigation must be part of “a comprehensive plan to end impunity for all such crimes, regardless of which side committed them and of the level of the perpetrator.” Similarly, Human Rights Watch (2004) also noted its reports on “violations committed by the UPDF [that] include extrajudicial killings, rape and sexual assault, forcible displacement of over one million civilians, and the recruitment of children under the age of 15 into government militias”, and called on the ICC to investigate all parties in the conflict.

The ICC Prosecutor seemed to have been responsive to the calls to investigate both sides – or at least he expressed that intent at the time. Six months after the referral was made, the ICC Prosecutor addressed a letter to the President of the Court in which he said that his Office “has informed the Ugandan authorities that we must
interpret the scope of the referral consistently with the principles of the Rome Statute, and hence we are analyzing crimes within the situation of northern Uganda by whomever committed” (ICC 2004, ICC-02/04). Therefore, it seems that the OTP had intended to investigate both the LRA and the Ugandan security forces. However, up to this date, the investigations have focused only on the LRA and the Prosecutor has issued warrant for the arrest of only LRA members. On 8 July 2005, the ICC unsealed the warrants for the arrest of Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo and Dominic Ongwen. Even though officially the ICC is saying that analysis of information concerning UPDF is ongoing, it is unlikely that the OTP will investigate the UPDF at all because it has reassigned its investigative staff in Uganda to other situations (Nouwen 2014, 116).

**Self-referrals as a (Temporary) Marriage of Convenience**

Self-referrals do not occur overnight. They are the product of a thoughtful process from the government that intends to make them, but also it is very likely that the ICC is involved – at least informally – in the process leading to a self-referral. Phil Clark (2011, 1198) argues that “for nearly a year before President Museveni referred the situation in Uganda to the ICC Prosecutor, there were substantial negotiations between The Hague and Kampala over the nature and ramifications of a state referral.” Clark’s interviews with Ugandan government officials reveal that “Prosecutor Moreno-Ocampo approached President Museveni in 2003 and, despite the President’s initial reluctance, persuaded him to refer the northern Uganda situation to the ICC” (Clark 2011, 1199).

Interestingly, Payam Akhavan – who also advised the Ugandan government on the matter of the referral – contends that by making the self-referral, “Uganda acted to ensure that justice would be achieved in a way that would avoid the politicization of any
trials involving the LRA” (2005, 404).22 But as this section will show, the self-referral itself is a political act that cannot be dissociated from its legal meaning. The Uganda’s referral to the ICC was a marriage of convenience between the government of Uganda and the OTP. As Branch (2007, 180) contends,

> The Ugandan government cynically referred the ongoing conflict to the ICC, expecting to restrict the ICC’s prosecution to the rebels in order to obtain international support for its militarization and to entrench, not resolve, the war… [And the ICC] chose to pursue a politically pragmatic case, despite that doing so contravened its own mandate and the interests of peace, justice, and the rule of law.

By seeking and accepting the Uganda referral, the ICC had made itself a political instrument at the hands of the Ugandan government.

**In Uganda’s Interests**

The self-referral of Uganda to the ICC was in the interest of both parties. It had the potential of negatively affecting the reputation of the LRA, while at the same time improving the reputation of the government of Uganda. It also served to improve international support for the militarized approach, as the *Kony2012* saga shows. At the time of the referral, the government of Uganda had already labeled LRA as irrational, religious fundamentalists, terrorists, all part of a list of unflattering terms to which now the label of international wanted criminals could be added, thanks to the ICC arrest warrants.

Prior to the referral however, Uganda had adopted a “non-legal tradition” concerning the LRA, having opted to deal with the rebel groups “through military defeat,

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22 Akhavan (2005, 404) also argues that the self-referral was guided by “security considerations in Acholiland and by the consequent need to isolate and arrest the LRA leadership, operating from bases in southern Sudan.”
[and] de facto or de jure amnesties…rather than through criminal justice” (Nouwen 2011, 1121). As Nouwen (2011, 1122) contends, the ICC referral also was part of this non-legal tradition, because it fits in the government’s military strategy to defeat the LRA essentially by hoping that the ICC involvement would end Sudan’s support for the LRA and help spur an international attempt to arrest Kony and his commanders. In fact, Payam Akhavan, who advised the government of Uganda on this matter, has said that the referral was conceived as “a strategy for engaging the international community by committing the ICC proponents to the arrest and prosecution of top LRA leaders” (2005, 403 cited in Kastner 2012, 45).

International criminalization is an effective strategy for governments who want to rally forces behind them to neutralize or delegitimize political adversaries or military enemies (Branch 2007, 183). By making the self-referral to the ICC, the government of Uganda adopted a strategy of international criminalization of the LRA. However, the ICC intervention and the involvement of the international community in the conflict in northern Uganda could not bring the conflict to an end especially given the wrong assumption that the government of Uganda was genuinely interested in ending the conflict (Branch 2007).

But, one may ask, why would the government of Uganda want a prolongation of a contained war in Acholiland? According to Branch (2007), a war against the “terrorists” allows the government of Uganda to silence political dissidents and opponents23, it maintains military presence in the north while maintaining political

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23 For example, Museveni’s main challenger Kizza Besigye was arrested and charged with treason, allegedly for his links with the LRA (Branch 2007, 185).
support of the south by emphasizing the potential danger coming from the north, and the displacement of populations in the north to make land available (Branch 2007, 185). Moreover, the prolonged conflict has allowed President Museveni to reinvent himself as a key U.S. ally after 9/11, receiving military aid.

Additionally, for the government of Uganda, the self-referral served the purpose of bringing another international institution to bear on an armed conflict over which it had failed to achieve a decisive military victory for more than a decade (Schabas 2011, 160). In June 2005, President Museveni said in a State of the Union address that the ICC was a good ally to the government of Uganda because it makes Kony isolated as long as he is indicted; “anybody who touches him will have problems with the International Criminal Court, therefore, that is the advantage,” he said (quoted in Nouwen 2014, 117).

In 2007, Museveni also said

If [the LRA leaders] go through the peace process then we can use alternative justice, traditional justice, which is a bit of a soft landing for them. But if they persist, and stay in exile, then they will end up in The Hague for their crimes.” (Reuters 2007)

He also said, “If the [peace] talks succeed then it will be a soft landing for the terrorists,” referring to the LRA leaders, adding that dropping the ICC warrants beforehand “would not be a good signal because that ICC indictment is actually a good pressure on Kony, it’s an incentive on him to behave sensibly. Removing it without getting peace in exchange would be a mistake” (Sudan Tribune 2006). Regarding the offer of amnesty, Museveni said that Kony would be granted amnesty if he surrendered (IRIN 2005).

Moreover, the issuance of the ICC arrest warrants against Kony and the top LRA commanders in 2005 seemed to reinforce the Ugandan government’s strategy to
pursue its military campaign against the LRA, claiming to do so in an attempt to enforce the warrants (Kastner 2012, 47). Referring to his preference for a military option in dealing with the ICC, Museveni said,

There are those who believe in the magic of the peace talks – which I do not believe in. However, I do not want to be obstructive to those who wish to pursue this avenue – if you believe that you can convince evil to stop being evil, go ahead. But in the meantime, I do not want to give up my option [the military option]. That is why we have a dual track. (IRIN 2005)

In addition to making the LRA commanders international criminals, the referral also makes the government of Uganda “an ally of the ICC, a champion for international justice, and a friend of mankind” (Nouwen 2014, 116). The Minister of state for defense said to the Ugandan parliament, “The ICC is an ally to Uganda. Uganda approached them when we had a problem” (quoted in Nouwen 2014, 118). When asked whether the ICC would also investigate misconduct of government soldiers, Museveni replied,

There are no atrocities committed by our soldiers. If there are atrocities committed, we punish them ourselves – the evidence of that is plenty. We have executed soldiers for killing people. But I would not mind if the ICC wanted to investigate [the Ugandan army]. They are more than welcome. (IRIN 2005)

But in the public and official discourse, atrocities committed by the Ugandan government have been downplayed, whereas the focus has been on the atrocities committed by the LRA, which is portrayed as a bizarre group whose brutality defies understanding. As Branch (2007, 182) aptly notes, “It is concluded that the LRA, embodied in Joseph Kony, is simply insane, the latest manifestation of incomprehensible African violence.”

Self-Referrals as ICC’s Safe Bets

Compared to other ICC jurisdiction trigger mechanisms – namely UNSC referral, Prosecutor’s own initiative or even (third-party) state referral, a self-referral has the
potential to ease the fears of the ICC trampling on state sovereignty, which was very important especially in the early years of the Court where it faced a lot of suspicion or outright opposition. For the Office of the Prosecutor, self-referral also eases the fear of the absence of state cooperation. In fact, the ICC needs state cooperation at all stages of the prosecution from the preliminary investigations to the incarceration of those convicted. For example, state cooperation is needed for issuance of visas to investigators, for executing arrest warrants, for transfer of suspects, etc. Moreover, cases of self-referral such as the one from Uganda are advantageous to the OTP because it does not require the approval of the Pre-Trial Chamber.24

Additionally, the Uganda situation was attractive to the ICC because unlike the Democratic Republic of Congo and Central African Republic cases, the conflict in Uganda involved fewer parties, the territory was smaller, and few would come out and support the LRA (Nouwen 2014, 119). Moreover, the LRA was already on the U.S. terrorist list, and the U.S. could support the ICC investigation in Uganda since the government of Uganda had already signed a Bilateral Immunity Agreement (BIA).25 This plays especially in the ICC’s favor because the Court needed a good case where state cooperation was assured, and one that would not antagonize the United States, given the opposition of that country to the Court in its early years. Uganda’s self-referral was also perfect for the ICC and the U.S. because it targeted Sudan’s ally – the LRA

24 Pursuant the Rome Statute, in the case of the Prosecutor using his/her own prerogative to open a preliminary examination, a Pre-Trial Chamber approval is needed before the opening of a full investigation.

25 In an effort to shield American officials, military personnel and citizens, the US government has signed BIAs with over 100 countries whereby those countries agree that they would never surrender a US citizen to the ICC.
(Nouwen 2014, 186). If the initial strategy of the OTP was to encourage self-referrals in order to make a caseload for the Court, the strategy appears to have succeeded, because soon after the Uganda self-referral, DRC and CAR would follow suit (Schabas 2011, 163).

The Politics of Self-Referrals

As Arsanjani and Reisman (2005, 395) have argued, in strict legal terms, a voluntary referral such as the one by Uganda appears to fail to satisfy the threshold for admissibility set out in Article 17 of the Rome Statute, especially given Ugandan judiciary system has not collapsed or even been affected by the insecurity in its northern territory. The Ugandan government instead made the claim in its referral letter that it was incapable of capturing Joseph Kony, which is essentially a matter of policing, and “An ineffective police force in the northern region does not meet the requirement set out in Article 17” (Arsanjani and Reisman 2005, 395). There are certainly other reasons that motivated the self-referral than the one outlined in the letter. This section discusses the politics of self-referral which in fact, can be asserted in all the self-referral cases of Uganda, DRC and CAR.

As Nouwen and Werner (2010) emphasize, the Ugandan government decided to refer the LRA to the ICC as part of a military strategy and in an attempt to stir an international campaign against the LRA, rather than out of a concern for the rule of law and justice. The fact that the referral was initiated by the Ugandan Ministry of Defence – not the Ministry of Justice, speaks to this strategy (Nouwen and Werner 2010). By referring the LRA to the ICC, the Ugandan government internationalized the conflict in order to be able to use the international criminal justice system to defeat its enemy. The government of Uganda had previously already labeled the LRA as irrational, religious
fundamentalists, and terrorists. Now with the help of the ICC, the LRA would become enemies of the international community (Nouwen and Werner 2010).

**Making Friends and Enemies of Mankind**

By internationalizing the conflict in northern Uganda and referring the LRA to the ICC, the government of Uganda branded the LRA as “humanity’s enemy” while portraying itself as a “defender and friend of mankind” (Nouwen and Werner 2010, 950). The ICC, and especially the OTP, have used the friend-enemy dichotomy. Not only did the OTP refrain from opening an investigation of Ugandan government officials and its military forces, but also “[it] has nourished a team spirit with them by joint conduct of investigations into the LRA and leisurely activities such as a boat trip for senior Ugandan officials and senior OTP staff along the Dutch canals” (Nouwen and Werner 2010, 952). Moreover, the OTP had already branded the LRA leaders as criminals, as soon as it received the referral, before having conducted an official investigation. In fact, at the press briefing announcing the referral, the Prosecutor had already mentioned that “locating and arresting the LRA leadership’ as a key issue” (cited in Nouwen and Werner 2010, 952). This leaves out potential crimes committed by the Ugandan security forces.

Indeed, the internment of over a million people without adequate protection and assistance constitutes a grave violation of the laws of war and therefore falls within the ICC’s jurisdiction (Branch 2007, 181). Additionally, Olara Otunnu, the former UN Undersecretary-General and Special Representative for Children and Armed Conflict,

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26 The Ugandan Defence Minister Mbabazi and his lawyers were pictured sitting with officials of the OTP’s Jurisdiction, Complementarity and Cooperation Division (JCCD) on a boat in the Dutch canals, with the Prosecutor himself, at the helm (Nouwen and Werner 2010, 952).
himself a Ugandan, has argued, “given that internment is an explicit government policy that targets the Acholi as a group and has led to tens, or even hundreds of thousands of deaths and to the slow destruction of an entire ethnic group, it in fact amounts to genocide” (quoted in Branch 2007, 181-2). This shows that there is clearly a legal basis for the OTP to investigate the government of Uganda and its military forces for actions that fall under the ICC’s jurisdiction, which the OTP has failed to do.

The ICC investigations in Uganda betrays the prosecutor’s own strategy because the ICC involvement is not based on the inability or unwillingness of the government of Uganda to prosecute the LRA leaders. It is rather based on the inability of the government of Uganda to arrest the LRA leaders; “The Ugandan judiciary – one of the most proficient and robust in Africa – is unquestionably able and willing to prosecute serious cases such as those involving the LRA” (Clark 2011, 1202). And ironically, as Clark (2011, 1202) notes, “even if it is considered justifiable for the ICC to open investigations on the basis that Uganda’s military and police (rather than judicial) capacity is insufficient to address serious crimes, the ICC itself has neither military nor police capacity.”

**Is the Self-Referral in the Interest of the Local Populations?**

In Uganda, the ICC referral was not warmly received. The ARLPI Vice President of the Acholi Religious Leaders Peace Initiative (ARLPI), Bishop Baker Ochola said, “This kind of approach is going to destroy all efforts for peace.” ARLPI activist Father Carlos Rodriguez said, “the issuing of … international arrest warrants would practically close once and for all the path to peaceful negotiation as a means to end this long war, crushing whatever little progress has been made during these years” (cited in Allen 2006, 85). James Otto, head of Gulu-based HRW said in March 2005,
We have our own traditional justice system. The international system despises it, but it works. There is a balance in the community that cannot be found in the briefcase of the white man…The real issue for the ICC is that the USA is out of its yoke. It should deal with that and leave us alone… The ICC see [sic] Uganda as a soft target. If we had the military might of the USA we would be talking to the ICC in equal terms. We are forced to kneel. (cited in Allen 2006, 87)

Moreover, at the time of the ICC referral, there was also in Uganda a deep misunderstanding and ignorance of how the ICC operates, even among Ugandan officials.27 It seems that even Museveni was not aware of the workings of the ICC. As Allen (2006, 94) argues, Museveni said at the time that if the efforts for peace talks succeeded, he would ask the ICC to stop the investigations, which may denote a lack of understanding of ICC proceedings. In fact, the best the government of Uganda could do in that scenario would be to persuade the OTP to make a case before the ICC’s Pre-Trial Chamber that proceeding with the investigations would not be “in the interests of justice.” However, one could also make the case that the Museveni knew well what he was getting into given that, as Nouwen (20114) has shown, the Uganda self-referral was prepared by international lawyers hired by the Ugandan government. Therefore, it may well be the case that Museveni knew in fact the procedures, but was merely pursuing a political strategy to have the upper hand in the ICC involvement in the case and for the negotiations with the LRA.

Other concerns among the Ugandans about the ICC’s intervention included the view that the Court is biased towards the Ugandan government, as the fact that the referral was announced by Ocampo and Museveni at a joint conference accentuated

27 For example, senior UPDF officers confused the International Criminal Court (ICC) with the International Court of Justice (ICJ), and thought the Court would deal with the border dispute between Uganda and Sudan (Allen 2006, 88).
that perception. Furthermore, ICC investigators were rumored to having used Ugandan
government vehicles while conducting their investigations. Other recriminations about
the ICC in Uganda concern the fact that the Court will exacerbate the violence and
make the peace process more volatile by undermining the amnesty offer, and ignoring
local justice initiatives. In fact, leaders of the communities in northern Uganda visited
the ICC in The Hague in April 2005 to voice their opinions (ICC – OTP 2005). Finally,
some northern Ugandans questioned the legitimacy of the ICC to be involved in the
conflict, given that they never had heard about the Court, not even when Uganda
ratified the Rome Statute in 2002 (Wierda and Otim 2011, 1161).

The ICC Warrants: Uganda’s Winning Strategy and the Road to Juba

Uganda’s self-referral, because it aligned with the interests of both the Ugandan
government and the ICC’s OTP, followed an initial trajectory that was beneficial for both
parties, and obviously detrimental to the LRA’s leadership. On 7 October 2005, after the
ICC had issued the warrants for the arrest of Kony and his top lieutenants, Uganda
defense minister Amama Mbabazi announced that “The [ICC] investigation is complete
and the court has taken a decision” (Allen 2006, 182). But of course the investigation
is not complete, or at least it should not be complete at that point, given that only one
side of the conflict had been investigated. The issuance of the warrants for the arrest

28 As Allen (2006, 182) point out, Minister Mbabazi jumped the gun, releasing information that was
technically still sealed by the ICC. The OTP applied for the arrest warrants in May 2005, but had
requested that the proceedings be under seal. Pre-Trial Chamber II accepted the request and issued the
warrants on 8 July 2005, which too was kept secret. However, some people who knew of the warrants
divulgated the information. The initial leak appears to come from the UN system at the end of September
2005. The UN undersecretary general for political affairs Ibrahim Gambari told a news conference in
Nairobi that the ICC had issued an arrest warrant for Kony (Allen 2006, 183). Although Gambari said later
that he ‘misspoke’, the damage was done. The OTP then applied for the unsealing of the warrants before
the PTC on September 9 2005 but the PTC had not approved it at the time. The PTC finally unsealed the
of the top LRA commanders was a milestone in the proceedings of the ICC and the first of a kind for the nascent institution. However, its aftermath proved to be much more complicated than both the ICC and the Ugandan government had anticipated, as the interests of the two partners started to diverge in 2006, when the OTP wanted to pursue the ICC proceedings while the Government of Uganda began exploring multiple routes including ones that would bypass the Court. As Nouwen (2014, 124) argues, “The Ugandan government incurred domestic political costs when the ICC proved unable to do what the [government of Uganda] had involved it for,” namely to arrest or neutralize the LRA leadership and northern Ugandans started viewing the Court’s involvement as an obstacle to peace.

Moreover, Allen (2006, 186) contends that “The arrest warrants exposed the ICC’s betrayal of the very principles of justice and law upon which the global court is supposed to be based.” The Ugandan government has in effect instrumentalized the Court by having it criminalize the LRA which allowed the government to boost its international legitimacy and aura and to pursue its military campaigns. Ugandan internal affairs minister Dr. Ruhakana Rugunda – who was also the leader of the government’s negotiating team in the Juba peace talks, said that for the government of Uganda, “the ICC indictments [of the Kony and his lieutenants] are not a hindrance to the peace process” (Sudan Tribune 2007). In other words, the Ugandan government views the ICC indictment as a sword of Damocles hanging over the head of the LRA, which would eventually lead them to follow through the peace process, at the end of which, amnesty could be eventually granted. This strategy is made clear in the words of Stephen Kagoda, a member of the government team for the Juba peace talks, who said,
The warrants would not be withdrawn unless the rebels fulfill some obligations. These include signing the final peace agreement with the government, abandoning rebellion, observing total cease-fire, disarming and integrating into the Acholi community…That is when Uganda will tell the United States, the ICC and the world that the LRA have met all the required conditions and should be removed from the terrorist list thus the cancellation of the ICC warrants. *(New Vision 2007)*

This means that during the Juba peace talks between the Ugandan government and the LRA, the warrants for the arrest of the LRA leaders was a bargaining chip in the hands of Kampala. Soon after his indictment by the ICC, the ever elusive Kony appeared on a video with the Sudan People’s Liberation Army (SPLA)’s vice president Riek Machar and appealed for peace. *(Reuters 2006)* In the video, Kony says, “Most people do not know me… I am not a terrorist… I am a human being. I want peace also… I want you to know that we, the LRA, want peace… That is why I was in the bush… I am fighting for peace” *(Reuters 2006)*. Under the auspices of the SPLA, the Juba peace talks went on from 2006 to 2008, between the Ugandan government and the LRA, with the ICC arrest warrants still hanging in the air. The Ugandan government played well with its bargaining chips, opening the possibility of withdrawing the warrants, while at the same time re-assuring the ICC that it would not impede on its jurisdiction.

When asked about the ICC indictment of Kony and his commanders, the Ugandan minister of information Ali Kirunda Kivejinj said,

Kony and his commanders have not been fighting in Uganda. He has never set foot in Uganda and right now he is not in Uganda… It is up to the DR Congo, where Kony is hiding and the United Nations to arrest and hand him over to the ICC. We have been the victims of his long war but we cannot do anything about the arrest. *(The New Vision, 2006)*

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29 The video also showed Machar handing to Kony an envelope stuffed with cash and telling him: “Twenty-thousand dollars, okay? Buy food with it, not ammunition” *(Reuters 2006)*.
Such a statement clearly makes the attempt to arrest Kony someone else’s business. The ICC stayed clear from the Juba talks, reiterating the fact that the warrants still stood, and complaining that the talks were allowing the LRA to rearm and regroup (Wierda and Otim 2011, 1167).

In the end, the government of Uganda and the LRA signed the Agreement on Accountability and Reconciliation (AAR) in Juba on 29 June 2007, following the Cessation of Hostility Agreement that was reached the previous year. The AAR and its Annexure stipulates that “Traditional justice mechanisms, such as Culo Kwor, Mato Oput, Kayo Cuk, Ailuc and Tonu ci Koka and others as practiced in the communities affected by the conflict, shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation.” Moreover, the parties affirmed that “Uganda has institutions and mechanisms, customs and usages as provided for and recognised under national laws, capable of addressing the crimes and human rights violations committed during the conflict.” Furthermore, the government of Uganda agreed to

Address conscientiously the question of the ICC arrest warrants relating to the leaders of the LRA/M…, [r]emove the LRA/M from the list of Terrorist Organisations under the Anti-Terrorism Act of Uganda upon the LRA/M abandoning rebellion, ceasing fire, and submitting its members to the process of Disarmament, Demobilisation, and Reintegration, [and] [m]ake representations to any state or institution which has proscribed the LRA/M to take steps to remove the LRA/M or its members from such list.

The Annexure to the AAR, on 19 February 2008, decided that a special division of the High Court of Uganda shall be established “to try individuals who are alleged to have committed serious crimes during the conflict,” which essentially meant that the ICC could – would? – be bypassed. A “Disarmament, Demobilisation and Reintegration” deal was signed on 29 February 2008, and it was believed that Kony himself would
come out to sign the peace treaty on 28 March 2008, which was delayed to April 2008. However, and quite ironically, if the ICC warrant for the arrest of the LRA leaders triggered the cessation for hostilities and the initiation of the Juba peace talks, they also prevented the completion of the peace accords because the LRA commanders insisted that the arrest warrants be annulled before they sign the peace settlements, and in the end, they never travelled to Juba to sign the treaty.

**Conclusion**

This chapter has argued that self-referrals can serve the advancement of political and military gains for governments that used them as a trigger for ICC jurisdiction. The three African cases of the use of self-referrals – Uganda, DRC, and CAR – tell a story of agency of these states in shaping and reformulating the process and delivery of international criminal justice norms. Because the use of norms in ways other than they were originally intended for is not necessarily in violation of them, I make the argument that the use of self-referrals is an example of perversion or subversion of the “Referral of a situation by a State Party” as outlined in Article 14 of the Rome Statute.

Even if the use of the self-referral shows the convergence of interests between the state and the ICC – namely the Office of the Prosecutor, that does not diminish the fact that the states that have used the self-referral trigger mechanism resorted to political calculations and weighted the domestic and international costs and benefits of such action. Using Uganda as the main empirical case – because Uganda was the first country that used the self-referral mechanism, this chapter outlined the ways in which Uganda used the self-referral mechanism because it aligned with its political calculations. Indeed, the use of self-referral served to isolate the LRA and make it an enemy of the international community. This chapter also shows the ways in which the
interests of the government of Uganda were aligned with those of the ICC – namely the OTP – at the start of the process, before they diverged later, and concludes that the Ugandan government perverted the legal system for its political gains. In fact, the self-referral in Uganda had the effects of hindering the peace talks, justifying the amendment of the Amnesty Act of 2000, while at the same time legitimizing further the military approach, and potentially prolonging the conflict in northern Uganda. And this may be in fact what the government of Uganda had in mind in late 2003 when it decided to draft the referral letter.
CHAPTER 4

The tragedy of the ICC is its incapacity to exercise political jurisdiction over great powers, thus, creating a permanent two-tier justice system in which strong states use global institutions to discipline the weak

—Stephen Hopgood

The Endtimes of Human Rights

Introduction

International justice is inherently political. Throughout history, it is political will that created international courts, special tribunals, and commissions of inquiry. The creation of the ICC and the establishment of its rules of procedures have been the result of political compromise between states. And nothing exemplifies that compromise more than the relationship between the ICC and the UN Security Council (UNSC). This working relationship between the two institutions is a “political-judicial paradox” in the sense that there is an assumption that “in order for international justice to be legitimate, independence from political will is a necessary requirement” (Aloisi 2013, 159).

However, as Clarke and Koulen (2014) have shown, efforts to demarcate law and politics are untenable and they render an analysis of the politics of law impossible. Even more so, the ICC is inherently and inextricably political (Nouwen and Wouter 2011).

In the realm of domestic political institutions and courts, a distinction is often made between legal and political institutions. Courts are perceived to be divorced from, and above politics, which is the domain of political institutions. This distinction offers law a foundation upon which to legitimate itself as a system of neutral rules that is above the

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partisan processes (Clarke and Koulen 2014, 301). The same distinction has been translated to international law and international politics, recreating the play between “the law” and “politics”, where in this case, the ICC would embody the legal, and the UN Security Council would exemplify the political. This chapter, however, argues that such distinction is problematic and do not reflect the reality of the workings of these institutions. In fact, the UNSC and the ICC do not occupy respectively the realms of the political and legal. The relationship between these institutions, as shown through the debates that animated the Rome Conference negotiations, the drafting of the Rome Statute, and the use of UNSC referrals all show that international justice is inherently political.

This chapter first explores the institutional relations between the ICC and the UNSC, as set by the Rome Statute, before arguing that the ways in which the UNSC has selectively referred Sudan and Libya to the ICC while failing to refer Syria for instance, exemplify the political dimension of the workings of international justice. Moreover, given that the UNSC is the institution that allows the ICC to gain jurisdiction over states that have not ratified the Rome Statute, this chapter also asks whether international treaties such as the Rome Statute apply to states who are not signatories. Finally, the example of Libya is studied in detail to highlight the ways in which a non-ICC member chose to engage the Court by introducing an admissibility challenge, and how the Court responded to the challenge to show the inconsistency of its ruling, which also brings back the political dimension of international justice.

**The UN Security Council and The ICC**

Unlike other international or hybrid ad hoc tribunals such as ICTY, ICTR, the Sierra Leone Court, and others, the ICC was not created by the UN, and is not a UN
organ. The ICC has therefore a distinct international legal personality, independent from the UN system. However, the Rome Statute provided that the Court “shall be brought into relationship with the United Nations through an agreement.” As Paragraph 4 of the Rome Statute reflects, the ICC was established with the consideration that prosecuting atrocity crimes that are of concern to the international community would enhance peace and security around the world. The UN Security Council, as the international body par excellence that is tasked with ensuring peace and security through its Chapter VII powers, would then work in tandem with the Court when necessary. To that end, the Rome Statute included a provision — namely, Article 13(b) and Article 16 — by which the UNSC could authorize the ICC to investigate and prosecute situations that arise in states that are not members of the ICC. This gives the ICC a virtual universal jurisdiction, regardless of the number of states that would opt to not join the Court. But also, Article 16 of the Rome Statute gave the UNSC the power to defer any prosecution or investigations for periods of 12 months.

Soon after the Rome Statute went into effect, the UN Security Council adopted Resolution 1422 on 12 July 2002, in which it requested that the ICC not start or proceed in any investigation arising from an operation established or authorized under Chapter VII of the UN Charter that involves officials or personals from states that are not party to the Rome Statute. The reasoning of the UNSC was that this resolution is in

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accordance with Article 16 of the Rome Statute that gives the UNSC the powers to defer any ICC investigations or prosecutions for periods of 12 months (Elias and Quast 2003).

During the Rome conference, permanent members of the court have sought to place ICC jurisdiction under the supervision and control of the UNSC, trying to make ICC jurisdiction subject to UNSC approval. In the end, the so-called Singaporean Compromise was reached, taking into consideration both the desires of those who sought to place the ICC under the supervision of the UNSC, and those who wanted a court independent from the UNSC: giving the UNSC the power to refer non-state members to the ICC – Article 13b – and the power to defer cases before the ICC, using Article 16 (Scheffer 2013; Clarke and Koulen 2014; Glasius 2016, 47-60). This gives the Security Council an effective control over the ICC, the irony being of course that three of the permanent members of the UNSC – the US, Russia, and China – are not ICC members. It also effectively merges a political agenda into one that prima facie claimed to be first and foremost a legalistic approach to ending impunity for atrocity crimes around the world. As Louise Arbour, the former Chief Prosecutor at the ICTY and ICTR argues,

[I]nternational criminal justice cannot be sheltered from political considerations when they are administered by the quintessential political body: the Security Council. I have long advocated a separation of the justice and the political agendas, and would prefer to see an ICC that had no connection to the Security Council. But this is neither the case nor the trend. (Arbour 2011)

However, this is certainly a conundrum for the ICC. In the absence of universal jurisdiction, the ICC can only receive cases from states that have willingly joined the Court or have accepted its ad hoc jurisdiction. The ICC Prosecutor can use his/her own
initiative but only for states who are parties to the Rome Statute. Hence, UNSC referrals are the only way by which the ICC may have jurisdiction over non-consenting non-state parties. But, Article 16 had the potential of trapping the vision of an independent and impartial court into the political calculations of the UNSC members.

**The Article 16 Trap**

Although the ICC is not exactly an organ of the UN, members of the UNSC have sought to control the court from its inception (Clarke and Koulen 2014, 298). Indeed, the possibility of extension of the reach of accountability that the UNSC referrals offer is to be welcomed in principle, but that comes with costs that may outweigh its benefits (Arbour 2014). During the Rome Conference, it became clear that most delegations supported the inclusion of a provision where the UNSC would be able to have a trigger mechanism for the court. For instance, the US delegation was primarily concerned with finding ways to protect its military personnel from prosecution by the Court. As David Scheffer, the head of the US delegation at the Rome Conference writes,

> I struggled to avoid the train wreck at Rome only to embrace certain defeat. I would have risked my own removal from the negotiations if I had pressed too openly or too hard on the Pentagon or on Senator Jesse Helms, so I had to maneuver in ways that steadily built broader circles of support for the policies that stood any chance of adoption at Rome...The stubbornness of various Washington agencies and officials in seeking full immunity from prosecution for American soldiers and other citizens, regardless of whether the United States joined the International Criminal Court, seemed at times to be forged in Alice's Wonderlands. (Scheffer 2012, 413)

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4 See for instance the current debates about referring the civil war in Syria to the ICC. Syria being a non-party state to the ICC, the only way the Court can gain jurisdiction is through a UNSC referral. Such attempts have been defeated at the UNSC because of the reluctance of some of the P5 members to support such resolution.
David Scheffer and the US delegation went to the Rome conference, obligated to defend the position of the Pentagon that required full immunity of US personnel – which, by the way, was not the position of the State and Justice departments. The US was also opposed to an independent prosecutor for the Court, and sought to give the Security Council exclusive power of referral. This position held by the US and a few other delegations was untenable, as the majority of the conference attendees sought to create a court that would allow prosecutorial independence from the Security Council. The compromise became thus the possibility for the UNSC to refer “situations” – which are wider in concept—than “cases” or “matters” (Arbour 2014, 197).

Article 16 of the Rome Statute, titled “Deferral of investigation or prosecution,” provides,

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.

Its provisions were more contentious among the delegations and the NGOs, because it opened the possibility of political interference once proceedings were under way. It is because the International Law Commission’s draft has previously suggested that the Court seeks permission form the UNSC for proceedings, and the Singaporean Compromise replaced that provision by making the Court defer proceedings rather than the Court asking for permission (Scheffer 2013). The Canadian delegation added a 12-month expiration for any deferral. Although the criticism against Article 16 has been

5 After what had become a fiasco for the American delegation at the negotiations in Rome, Scheffer (2002, 230) writes that upon his return, his bosses did not acknowledge his efforts, and that his relationship with Secretary of State Albright became distant. He notes that Albright omits any reference to the ICC in her memoirs.
more vocal than that of Article 13(b), in essence, both present the risk of politicization of ICC proceedings (Arbour 2014). It is important to note that following this article, the Security Council does not have the power to prevent the ICC from exercising its jurisdiction indefinitely, as it is required to issue deferral for periods of 12 months, renewable. Interestingly though, UNSC Resolution 1422 (2002) was adopted less than two weeks after the entry into force of the Rome Statute. This resolution is inspired by the staunch opposition of the US to the ICC at the time (Elias and Quast 2003, 170), and it would later inspire the UNSC referral resolutions of Darfur and Libya, in relation of not extending the ICC jurisdiction over service members from states who are not party to the Rome Statute.

Could the UNSC use the leverage conferred to it by the Rome Statute in a way that would be devoid of politics? The UNSC has in fact acted just as a quintessential political body. For instance, the Security Council using its power to refer Sudan and Libya to the ICC contrasts with its failure to act in Sri Lanka and Syria. The Security Council has also refused to grant Article 16 deferral for Sudan and Kenya, while recalling the provisions of Article 16 in the resolution that referred Libya. UNSC Resolution 1970 also excluded nationals from states non-party to the Rome Statute from ICC jurisdiction in the situations of Sudan and Libya. All these examples point to partisan politics within the UNSC that tainted its actions or failures to act, in relation to cases that may have been within the ICC mandate.

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6 Article 13(b) is related to the Court exercising its jurisdiction over situations referred to it by the UNSC under Chapter VII of the UN Charter. Article 16 relates to the ability of the UNSC to defer cases already in the hands of the ICC. See the Rome Statute https://www.icc-cpi.int/nr/rdonlyres/ea9aef7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf
But perhaps none of these actions exemplifies the politics that guide the UNSC in regards to its relationship with the ICC and in the domain of international criminal law that the UNSC Resolution 1970 that referred the situation in Libya to the ICC. As Stahn (2012) writes, “The language of [Security Council Resolution] 1970 stands as an unfortunate precedent for future practice.” Stahn (2012) shows that UNSC referrals come to the ICC with their own pitfalls and problems, and pose challenges to the idea of “shared responsibility” as outlined in the Right to Protect (R2P) doctrine and the Rome Statute. The complementarity is interpreted differently by different organs of the Court. Following the two UNSC Libya resolutions, the mandate of the ICC coexisted with an authorization of the use of force to protect Libyans citizens, which falls within the purview of R2P, and provided the legal rationale for the NATO intervention in Libya. The referral was initially applauded by the international community and human rights organizations as a victory of justice (Stahn 2012, 326). But as Stahn (2012-326-7) writes,

[with] emerging criticism regarding NATO’s wide interpretation of the enforcement mandate under Resolution 1973, the controversial circumstances of Muammar Mohammed Abu Minyar Gaddafi’s death, allegations of crimes relating to the conduct of all sides, including abuses by opposition forces and NATO, as well as struggles over cooperation and the proper forum of jurisdiction, the role of the ICC has become a bone of contention.

Stahn (2012, 328) contends that in the case of Sudan, the UNSC has done little to support arrest and cooperation, but in the Libya case, “the Security Council reacted fast to facts on the ground.” And this precipitation came at a price, given that the Libya referral copied the same flaws of the Sudan referral: namely excluding citizens of non-States Parties – except for Libyans – from the ICC jurisdiction, and making the ICC bear the cost of the investigations and prosecution (Stahn 2012, 328).
Indeed, the ICC reacted to UNSC Resolution 1970 with lightning speed, the Office of the Prosecutor opening the investigation only a couple of days after the referral, on 2 March 2011, which made the preliminary examination the fastest one in the history of the ICC.\(^7\) Soon after the referral, on 16 May 2011, ICC Prosecutor Ocampo requested warrants for arrest be issued for the “Tripoli Three” – Muammar Gaddafi, Saif Gaddafi, and Abdullah Al-Senussi. The Pre-Trial Chamber issued all three warrants on 27 June 2011. By moving swiftly, the ICC clearly wanted to have a say in mitigating the ongoing violence in Libya, but it also raised concerns over the prospects of a negotiated political solution. For instance, the African Union argued that “[the warrant] concerning Colonel Qadhafi seriously complicates the efforts aimed at finding a negotiated political solution to the crisis in Libya” (African Union 2011, para 6). The AU also urged its members not to cooperate with the ICC for the execution of the arrest warrant against Muammar Gaddafi, as it had made the same call regarding the warrant for the arrest of President Bashir.

**The Politics of UNSC Referrals: Do International Treaties Apply to Non-Signatories?**

Part 9 of the Rome Statute addresses state cooperation with the ICC and sets out the obligations of States Parties to assist the Court in its mission. Particularly, Article 86 says that “States Parties shall, in accordance with the provisions of the Statute, cooperate fully with the Court in its investigations and prosecutions of crimes within the jurisdiction of the Court” (Rome Statute, 1998). But, the ICC is a treaty-based court, and states willingly choose to join the institution, which also means that many

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\(^7\) By comparison, the preliminary examination in Darfur lasted roughly two months.
states have opted to not sign or ratify the Rome Statute. Therefore, UNSC referrals are made under article 13 (b) of the Rome Statute, which purpose is to extend jurisdiction of the Court to states that are not members (Akande 2010, 301). Then, states that fall under the UNSC referral are likely to be non-ICC members, which has been the case so far, given that the two states that have been subjected to UNSC referrals are Sudan and Libya. As non-parties to the ICC, those states do not have any pre-existing obligations set out in Part 9 of Rome Statute (Akande 2012, 301). Contrary to States Parties to the Rome Statute, they do not have any obligation to cooperate or assist the ICC in any way. The contending question then among legal scholars becomes whether the Rome Statute applies to a state that has become subject of a UNSC referral? In other words, does a UNSC resolution makes a state bound to a treaty that it has not joined. This raises a broader question on how do treaties apply to non-signatories. For example, does Article 98 of the Rome Statute that removes head of state immunity apply to non-signatory states, or are they exempt? More precisely, does the UNSC referral strips President Bashir of Sudan of his immunity?

Can the UNSC Remove President Bashir’s Immunity?

It is well established under customary international law that incumbent heads of states enjoy immunity from prosecution in foreign courts. The drafters of the Rome Statute had that in mind when they sought to make sure that such immunity does not

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8 As of June 2016, there are only 124 countries that are State Parties to the Rome Statute of the International Criminal Court.

9 See chapter “The Limits of State Cooperation.”

10 The case of Libyan president Gadaffi is moot since he died soon after the UNSC referral.
apply in the case of the ICC. Article 27 of the Rome Statute provides in its first paragraph that,

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.\textsuperscript{11}

As David Scheffer, the first US Ambassador at-Large for War Crimes during the Clinton administration writes, whereas

Joseph Stalin of the Soviet Union, Idi Amin of Uganda, Mengistu Haile Mariam of Ethiopia, Kim Il Sung of North Korea, Suharto of Indonesia, rebel leader Jonas Savimbi of Angola, Robert Mugabe of Zimbabwe, and even Richard Nixon and Henry Kissinger of the United States ... escaped the jaws of justice partly because the legal doctrine of ‘head-of-state immunity’ shielded them, [the UN special tribunals and the ICC] have represented a truly counterattack on impunity for the worst possible crimes, a mission that has gathered strength with each passing year. (Scheffer 2012,439-440)

However, the issue of head of state immunity is a bit more complicated regarding the ICC, given the fact that the Court is a treaty-based institution.

Obviously, any state that has ratified the Rome Statute has accepted the fact that its head of state immunity and other government officials would not be immune from an ICC investigation or prosecution. But, what of states that have not ratified the Rome Statute? In other words, does the UNSC, through an ICC referral, have the power to lift head of state immunity of non-signatories of the Rome Statute? The first warrant for a sitting head of state that the ICC issued was against President Bashir, on

\textsuperscript{11} Rome Statute, Article 27.
4 March 2009. Although this customary international law was confirmed by a decision of the International Court of Justice in the case of the Democratic Republic of Congo v Belgium, the ICC pre-trial chamber that issued the warrant against Bashir found that it has no bearing over Bashir’s immunity before the ICC, in accordance with article 27(2) of the Rome Statute, even though Sudan is not a signatory of the treaty.

Dapo Akande (2012, 323) argues that the UNSC may, in the context of a referral, “choose to impose on states obligations to cooperate with the ICC that are more extensive than those set out in the ICC Statute.” Such obligations imposed on Sudan and Libya are within the confines of the Rome Statute, which means that those states are entitled to benefit from the same provisions of the Rome Statute that permit a refusal to cooperate with the Court or permit the state to postpone the execution of a request by the Court for assistance. In particular, Libya would be entitled to rely on the provisions of the Statute dealing with suspension of the obligation of cooperation in the case of a challenge to the admissibility of the ICC cases arising out of the Libya situation. (Akande 2012, 323)

This argument posits that a non-signatory state is still obligated to cooperate with the Court in case of a UNSC referral. Such state may introduce an admissibility challenge to the ICC – which is what Libya did – and while the challenge is still pending, the state may postpone its requirement to assist the Court in its investigation and prosecution. For its part, the ICC has made the case that Security Council resolutions


under Chapter VII of the UN Charter are compulsory.\textsuperscript{14} In fact, UNSC ICC referrals under article 13 (b) are done under the Chapter VII of the UN Charter provisions, to restore peace and security, which then necessarily engage all states. Following this reasoning, Papillon (2010) contends that the UNSC implicitly removes head of state immunity when referring a case to the ICC, even when said state is not an ICC member, as was the case of Sudan and Libya. This question would have been resolved if Sudan had waived Bashir’s immunity for instance, by ratifying the Rome Statute. However, in the absence of such a waiver, some scholars may argue that Sudan has indeed waived its president’s personal immunity for circumstances involving the UNSC resolutions under Chapter VII of the UN Charter (Papillon 2010).

On the other hand, Jacobs (2015) is of the position that the UNSC does not have the power to lift head of state immunity of a non-signatory to the ICC. It means then that the UNSC referral of Sudan to the ICC cannot forego President Bashir’s immunity as a head of state. As Jacobs (2015) argues, the removal of head of state immunity originates first from the Rome Statute, specifically in its Article 27. It follows from this argument then that a UNSC ICC referral of the situation in Darfur, even when invoking Chapter VII powers from the UN Charter, is still limited by the fact that Sudan has not acceded to the Rome Statute, therefore, has not accepted the removal of the immunity of its head of state. Jacobs (2015) contends that the current state of the debate about immunity is influenced by the wishful thinking of NGOs, human rights activists, and global civil society networks but the fact remains that there is an absolute head of state

\textsuperscript{14} See ICC Pre-Trial Chamber II (2014): “Decision on the Cooperation of the Democratic Republic of Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, 9 May. Available at https://www.icc-cpi.int/CourtRecords/CR2014_03452.PDF
immunity consecrated by international law as it stands at this moment, even in face of international crimes. Gaeta (2009) argues along the same lines, albeit with nuance. Whereas she argues that the ICC can lawfully issue a warrant for the arrest of Bashir despite the fact that Sudan is not an ICC member, she also contends that the ICC’s request for states to execute that warrant is not permitted under international law. Gaeta (2009) argues thus that the ICC is within its legal prerogative to seek the arrest of Bashir, but that does not translate to a requirement of States Parties to execute that warrant.

**The Politics of UNSC ICC Non-Referrals: The Case of Syria**

The political calculations that underpin the relations between the UNSC and the ICC in relation to non-State Parties is exemplified in the cases in which the UNSC has in fact failed to issue a resolution that grants jurisdiction to the ICC over a situation. Syria provides for an interesting example of the ways in which political considerations and patronage at the UNSC play into the deployment of the UNSC’s power to refer or defer cases to the ICC. The war in Syria has escalated since it started in 2011 in the wake of the so-called Arab Spring. The government forces loyal to President Assad and its militias have deliberately targeted civilian areas, while also armed opposition groups have also attacked civilians, used child soldiers, kidnappings and torture (Human Rights Watch 2016). Extremists groups such as the Islamic State, and Al Qaeda affiliates in Syria are also responsible for targeting civilians, kidnappings, and summary executions.

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As of October 2015, the Syrian conflict’s death toll is over 250,000 people, more than 7 million Syrians have been internally displaced, and more than 4 million refugees have fled to neighboring countries and farther away (Human Rights Watch 2016). It is therefore clear that acts that fall within the *ratione materiae* (material jurisdiction) of the ICC – war crimes, crimes against humanity – may have been committed in Syria as preliminary evidence shows, which warrants further investigation by the ICC Prosecutor. The ICC would also have *ratione tempore* (temporal jurisdiction) over the situation in Syria, since these events occurred after the entry in force of the Rome Statute in 2002. However, given that Syria is not an ICC member, the way that the ICC could have territorial jurisdiction in Syria would be through a UNSC resolution.\(^\text{16}\)

And indeed, various resolutions that would have referred Syria to the ICC have been introduced before the Security Council, but they all have been vetoed. As Clarke and Koulen (2014, 298-299) note, “[that prompts] questions regarding the play of political interests in the dynamic between the UNSC and the ICC.” A UNSC referral would give the ICC prosecutor the green light to investigate and prosecute all crimes against humanity and war crimes committed in Syria by all parties to the conflict, including the government forces, the Syrian opposition militias, and the Islamists groups. By September 2013, when major human rights organizations were pushing for the UNSC to refer Syria to the ICC, members of the UNSC were divided in the support for such referral. Whereas six members – France, the United Kingdom, Luxembourg,

\(^\text{16}\) Another way the ICC prosecutor could gain jurisdiction to investigate and prosecute in Syria is if the Syrian government accepted the Court’s jurisdiction through an ad hoc declaration. But that is unlikely to happen, for obvious reasons. The only viable way for the ICC to gain jurisdiction then is through a UNSC referral.
Argentina, Australia, and South Korea – supported a referral, US, China and Russia were not in favor (HRW 2013). In January 2013, Switzerland sent a letter to the UNSC on behalf of 58 countries which called on the Security Council to issue a resolution referring Syria to the ICC (Gruber 2013).

But in May 2014, Russia and China vetoed a UNSC resolution introduced by France that would have referred Syria to the ICC (UNSC 2014). The resolution was backed by the other thirteen members of the Security Council. In his statement before the Council, the Russian representative recalled that when the Council referred Libya to the ICC in 2011, that referral had only resulted in “throwing oil on the fire,” and the Court has evaded “the matter of the bombardment by North Atlantic Treaty Organization (NATO) forces against civilians.” Russia also recalled that the United States was pushing for the referral, despite not being a member of the ICC, and the UK, while a party to the Rome Statute, “was reluctant to try its own nationals who were fighting as members of armed groups in Syria.” As in the case of previous resolutions for ICC referrals, this draft resolution also included a provision to exclude any citizen of a state that is not an ICC member from prosecution – except for Syrians, of course – at The Hague.

France had introduced the draft resolution, and in a move that surprised many, the Obama administration decided to support the ICC referral. But, “The United States

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17 Human Rights Watch (2013): Syria and the International Criminal Court
https://www.hrw.org/sites/default/files/related_material/Q%26A_Syria_ICC_Sept2013_en_0.pdf

18 See the letter address to the Security Council here

19 See the minutes of the UNSC meeting. Available at www.un.org/press/en/2014/sc11407.doc.htm
indicated that it could support the text after seeking assurances that the ICC prosecutor, based in The Hague, would have no authority to investigate any possible war crimes by Israel, which has occupied the Golan Heights since the Six-Day War in 1967,” according to US diplomats (Lynch 2014). This caveat is noteworthy because with the ICC gaining jurisdiction in Syria, Israel’s occupation of the Golan Heights could fall within the jurisdiction of the Court. The exclusion of citizens from states that are not members of the ICC from prosecution reassures Israel in the case of a Syria referral, but also it reassures US military personnel who may be involved in the Syrian conflict one way or the other.

The provision to shield non-Syrian nationals from ICC prosecution, which is copied from the Sudan and Libya referrals, has become a de facto part of UN proposals to refer states that are not signatories to the Rome Statute to the Court. Had the Syria ICC referral passed, except for Syrian nationals, any citizens of a non-ICC member states would be safe from investigation and prosecution by the ICC in relation to the conflict. Both the previous resolutions on Darfur and Libya were written with a similar language. The Darfur and Libya resolutions both said in their Paragraph 6 that except for nationals of Sudan or Libya, citizens of states nonmembers of the ICC shall be exempted from ICC investigation and prosecution. As Cryer (2006) noted regarding the Sudan referral (UNSC Resolution 1593), this not only limits the independence of the prosecutor, but it also defies the idea of equality before law. It raises concerns about exclusionary and selective justice, but also hierarchy of crimes based on the nationality of the individuals who perpetrated them (Aloisi 2013, 153). Argentina and Brazil voiced
their disapproval of this limitation of jurisdiction within Resolution 1593 (Sudan), and Brazil did the same for Resolution 1970 (Libya).

In any case, while the narrative on the failure of the UNSC to act in the case of Syria is construed around the images of Russia and China being responsible for the ongoing impunity, the story is indeed more complex. The US has shifted its position on the matter, moving towards the states that proclaim to be on the right side of history, to refer Syria to the ICC, which, according to this narrative, works towards accountability for atrocity crimes, and acts towards putting an end to the civil war. But the text of the draft resolution that would have referred Syria to the ICC contains caveats that can barely pass the “ending impunity” test. Moreover, with the precedents of the Libya resolution in 2011 and its aftermath, one can see why using the UNSC to refer a state to the ICC does not necessarily end an ongoing conflict, or provide an avenue for accountability for war crimes and crimes against humanity. In the end, politics and strategic interest amongst UNSC members and their allies and protégés are what guides both action and failure to act to grant the ICC jurisdiction over conflicts in states that are not members of the Court.

Beyond the Syria case, the UNSC has also failed to take action in situations that bore similar characteristics to Libya and Darfur, to some extent. For instance, a UN report had documented that tens of thousands of civilians had lost their lives in Sri Lanka between January and May 2009, as result of the fighting between the Sri Lankan forces and Tamil rebels, and that it was likely that both sides had committed war
crimes. China’s support to the Sri Lankan government and Russia’s opposition to consider the case have meant that the issue of referring Sri Lanka to the ICC has never been seriously contemplated. Moreover, in the wake of the so-called Arab Spring, the civil war in Yemen, human rights abuse and repression in Bahrain are also examples of instances where the UNSC has not seriously considered an ICC referral (Aloisi 2013, 165). Furthermore, the details of the Libya referral show the long shadow of power politics in the deliberations that lead to UNSC to grant jurisdiction to the ICC during the 2011 uprisings.

**The Libya Referral**

Libya is not a state party to the Rome Statute. Therefore, as a non-member of the ICC, the trigger mechanisms through which the ICC could gain jurisdiction over events that occurred in Libya were limited. The only way the ICC can have jurisdiction over non-States Parties without their consent is through a UN Security Council resolution. The UNSC Resolution 1970, passed on 26 February 2011, during the uprisings in Libya, included a battery of sanctions against the embattled Gaddafi regime. It also referred the situation in Libya to the ICC, without much dissent or concern from the Security Council members, unlike the first UNSC ICC referral related to Darfur. But it was clear from the beginning that the Libya ICC referral was

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21 Note that non-States Parties can still accept ICC jurisdiction by submitting an ad-hoc declaration to the Court, pursuant Article 12(3) of the Rome Statute.

22 UNSC Resolution 1970 was unanimously adopted under Article 41 Chapter VII of the UN Charter. Subsequently, Resolution 1973 imposing the no-fly zone was passed three weeks later. Even the US, despite having previously abstained for the Sudan referral, voted in favor of the Libya referral.
First, the referral excluded citizens from non-states members—except for Libyans—thus, granting them *de facto* amnesty. This, without any doubt, was a move to shield US soldiers and other NATO service members from the ICC jurisdiction in connection to the events in Libya. Brazil was the only UNSC member that openly criticized the exclusion of non-States Parties from the jurisdiction of the ICC referral in Libya.

Second, Article 16 of the Rome Statute about UNSC deferrals was recalled in the resolution, which was meant to assuage fears that the ICC could impede on the political process, thus giving the UNSC a way out if that was to happen. The resolution included language that recalled that if and when needed, the UNSC would use Article 16 to defer any ICC proceedings, giving therefore the Security Council some control over the judicial process as well. This, in fact, follows the thinking that resulted in the compromise of Article 16 during the Rome Conference, mainly to give the Security Council powers to both initiate and stop ICC investigations and prosecutions. Finally, the temporal limitation of the referral to events that occurred only on or after 15 February 2011 may have been meant to shield Western powers from investigation of potentially damaging dealings with the Gaddafi regime, in the context of the warming up between Libya and the West in the years immediately preceding the Libyan crisis of 2011.\(^\text{24}\)

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\(^{23}\) After all, the UNSC is the international law body making par excellence, but also quintessentially political.

\(^{24}\) It is important to note that the Libyan crisis occurred following a few years of Western powers engaging the Gaddafi regime, after decades of sanctions against Libya.
The UNSC Resolution 1970

The UNSC Resolution 1970 (2011) was adopted on 26 February 2011. The resolution, “Taking note of the letter to the President of the Security Council from the Permanent Representative of the Libyan Arab Jamahiriya dated 26 February 2011”, and also “Expressing concern at the plight of refugees forced to flee the violence in the Libyan Arab Jamahiriya, [recalled] the Libyan authorities’ responsibility to protect its population.” This was the first instance in which a UNSC resolution made reference to the concept of Responsibility to Protect (R2P) when authorizing an intervention. The Resolution also “[recalls] article 16 of the Rome Statute under which no investigation or prosecution may be commenced or proceeded with by the International Criminal Court for a period of 12 months after a Security Council request to that effect,” acted under Chapter VII of the UN Charter.

The Resolution “[decided] to refer the situation in the Libyan Arab Jamahiriya since 15 February 2011 to the Prosecutor of the International Criminal Court”, and that Libya shall cooperate with the Court. The Resolution also decides that non-Libyans who are citizens of a state that have not ratified the Rome Statute shall be subject to the exclusive jurisdiction of their state, which essentially is a way to remove citizens of non-States Parties from the reach of this ICC referral. This clause basically shields non-States Parties to the Rome Statute form prosecution by the ICC in relation to the situation in Libya. Brazil’s representative “expressed strong reservations to the

25 The wording of the resolution leaves no doubt about that. It “[decides] that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a state party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State” (UNSC Resolution 1970 (2011)).
provision in the resolution allowing for exemptions from jurisdiction of nationals from non-States Parties, saying those were not helpful to advance the cause of justice and accountability”, noting also that five members of the Security Council were not States Parties to the ICC (UN 2011).26

Moreover, the UNSC “[recognizes] that none of the expenses incurred in connection with the referral, including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations,” leaving it up to the ICC to finance the investigations and the prosecutions.27

**Libya’s Political Maneuvering**

The UNSC referral of Libya occurred at a time of political upheaval in the country, in the wave of the so-called Arab Spring. The political maneuvering of the UN Diplomatic Mission at the UN, which played a crucial role in the lead up to the referral, begs questions about its legitimacy. The Chargé d’Affaires of the Permanent Mission of Libya to the UN, Ibrahim Dabbashi had sent a letter to the UNSC requesting an urgent meeting of the Council “to discuss the grave situation in Libya and to take the appropriate actions” (UNSC 2011).28 This, in fact, means that the UNSC process that led to the referral was initiated by a party whose legitimacy may be questioned. At the

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26 These five members of the Security Council which were not members of the ICC at the time of the referral were: United States, Russia, China, India, and Lebanon.

27 Article 115 of the Rome Statute notes that Court expenses “shall be provided” not only by the States Parties but also “by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.” This explains why many were disappointed that the UNSC failed to authorize UN funding in the Sudan and Libya situations (Kaye 2013, 4).

time, Dabbashi was the Chargé d’Affaires to the UN for Libya, and he first announced that he had defected from the Libyan government on 21 February 2011, the same day he sent the letter to the UNSC. He was until then the Deputy Ambassador for Libya to the UN. But that defection did not lead to his resignation from that position. In fact, he held the press conference at the Libyan mission to the UN, and had requested an emergency meeting of the UNSC about the situation in Libya.29

The letter reads, “In accordance with rule 3 of the provisional rules of procedure of the Security Council, I have the honour to request an urgent meeting of the Council, to discuss the grave situation in Libya and to take the appropriate actions.”30 In fact, Rule 3 refers to the possibility of a member nation to the UN to request a meeting, which, normally, Dabbashi, as a defector, should not have been able to do. Normally, only a representative of the Libyan government should be able to call for such UNSC meeting.31 And as one would expect, the Libyan government had sent a letter to the UN Secretary General, revoking the credentials of Dabbashi and Shalgham, yet they continued to speak in the name of Libya at the UN meetings. 32 This process calls into

29 Shalgham too, the head of the Libyan mission at the UN, defected by 25 February 2011 and denounced the Libyan government at the Security Council meeting that same day.


31 Here are the Rules of Procedure for Termination of Service at Permanent/Observer Missions: Before relinquishing his/her post, a Permanent Representative/Observer should inform the Secretary-General in writing and, at the same time, communicate the name of the member of the mission who will act as Chargé d’Affaires a.i. pending the arrival of the new Permanent Representative/Observer. It is of special importance to note that a Chargé d’Affaires a.i. cannot appoint himself and can hold this function only after being appointed by the Permanent Representative/Observer or by the Ministry of Foreign Affairs of the State concerned.” (Section X)

question not only the political maneuverings that led to the Libya referral to the ICC, but also the extent to which the Council was willing to play along.

The Case against Saif Al Islam: Admissibility Challenge Denied

After the UN decided unanimously to refer the situation in Libya since 15 February 2011 to the ICC, the Prosecutor concluded on 3 March 2011 that there were reasonable grounds to believe that crimes under ICC jurisdiction were committed and decided to open an investigation. Then, on 16 March 2011, the Prosecutor requested issuance of warrants for the arrest of Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi “for their alleged criminal responsibility for the commission of murder and persecution as crimes against humanity from 15 February 2011 onwards throughout Libya in, inter alia, Tripoli, Benghazi, and Misrata, through the Libyan State apparatus and Security Forces” (ICC 2014). The Pre-Trial Chamber issued the warrant for the arrest of Said Al-Islam Gaddafi on 27 June 2011, considering, under article 25(3)(a) of the Rome Statute, that there are reasonable grounds to believe that he is criminally responsible as indirect co-perpetrator for two counts of crimes against humanity: murder and persecution (ICC 2014). Following the death of Muammar Gaddafi, the warrant for his arrest was withdrawn on 22 November 2011. The proceedings against Al-Senussi before the ICC ended on 24 July 2014 when the Appeals Chamber confirmed a decision by the Pre-Trial Chamber I declaring the case inadmissible before the ICC.

Article 19 of the Rome Statute, which establishes the grounds on which a case’s admissibility to the ICC may be challenged, is ambiguous regarding complementarity and UNSC referrals (Fairlie and Powderly 2011, 661). For situations of state referral or *proprio motu* trigger mechanisms, Article 18 applies to possibility of mounting an admissibility challenge. However, the first UNSC ICC referral, which came from the UNSC resolution in Darfur (Resolution 1593) “does not mandate prosecutions or order the Prosecutor to take any particular course of action, nor does it preclude Sudan from investigating or prosecuting matters that may be considered by the ICC Prosecutor” (Fairlie and Powderly 2011, 662-3).

The government of Sudan chose not to challenge the admissibility of the ICC cases, preferring to adopt a defiant stance that did not recognize the legitimacy or legality of the Court to investigate or prosecute its state officials. However, the Libyan government chose a different route, not questioning the legality of the UN Security referral. The determining fact that explain these two different attitudes towards UNSC ICC referrals has to do with the fact that the prosecution in Sudan targets incumbent government officials whereas in Libya, the fall of the Gaddafi regime prompted the rise to power of the National Transitional Council – the Libyan transitional government. And given that the ICC Prosecutor is going after former officials of the Gaddafi regime, the new authorities in Libya had no reason to stonewall the ICC. However, they introduced an admissibility challenge before the Court, arguing that they were willing and able to prosecute Saif Gaddafi and Abdallah Senussi before Libyan national courts.

The government of Libya challenges the admissibility of the Saif Gaddafi case before the ICC on 1 May 2012. The admissibility challenge was based on the principle
of complementarity. Pre-Trial Chamber I rejected the admissibility challenge of the Saif Gaddafi case on 31 May 2013, “determines the case against Saif al Islam Gaddafi is admissible [and reminds] Libya of its obligation to surrender [him] to the Court” (ICC-PTC I 2013 , 91). Having determined Libya is “unable genuinely to carry out the investigation or prosecution against Mr Gaddafi… [therefore], the Chamber need not address the alternative requirement of ‘willingness’ and, in particular, the issues raised by the Defence about the impossibility of a fair trial for Mr Gaddafi in Libya” (ICC PTC I 2013, para 216, p. 89). The Pre-Trial Chamber I concluded that “the Chamber has not been provided with enough evidence with a sufficient degree of specificity and probative value to demonstrate that the Libya and the ICC investigations cover the same conduct and that Libya is able genuinely to carry out an investigation against Mr Gaddafi. The Chamber finds that the present case is admissible before the Court and recalls Libya’s obligation to surrender the suspect” (ICC PTC I 2013, para 219, p.90).

The Appeals Chamber confirmed the ruling from the Pre-Trial Chamber I on the admissibility of Saif Gaddafi’s case before the Court on 21 May 2014 (ICC Appeals Chamber 2014a). The Appeals Chamber’s decision was in majority, with Judge Ušacka (2014) dissenting, and Judge Song (2014) issuing a separate opinion. The Appeals Chamber confirmed the decision of the Pre-Trial Chamber I, and dismissed the appeal.

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In its admissibility challenge, Libya had held that the domestic investigation in relation to Saif Gaddafi was initially conducted in respect of financial crimes and corruption, but later extended to “all crimes committed by Mr Gaddafi during the revolution… starting from 17 February 2011” (Admissibility Challenge, para 44). Libya also explained the investigative steps that have taken place so far and argued that the alleged crimes for which Mr Gaddafi was being investigated included those listed at paragraphs 36 to 65 of the Arrest Warrant Decision (ICC Appeals chamber 2014a, para 52). Libya further argued that its domestic investigation was “much broader than the ICC’s investigation, both in its temporal and geographical scope” (ICC Appeals chamber 2014a, para 52).

**The Al-Senussi Case: The Successful Admissibility Challenge**

The transitional government of Libya introduced another admissibility challenge in the case of Al-Senussi on 2 April 2013. Unlike in the case of Saif Gaddafi where the ICC chamber ruled that the case was admissible before the court, Pre-Trial Chamber I decided that the Al-Senussi case was inadmissible before the Court because it was currently subject to domestic proceedings and Libya was willing and genuinely able to prosecute him. Interestingly, Al-Senussi’s defense team appealed the ruling, showing its preference for their client to be taken to The Hague, rather than facing justice before the new Libyan authorities. The Appeals Chamber unanimously confirmed the Pre-Trial Chamber I’s ruling on 24 July 2014, which ended the proceedings against Al-Senussi before the Court (ICC Appeals Chamber 2014, doc No ICC-OI/II-OI/IIOA 6).39 The Appeals Chamber noted, in rejection Al-Senussi’s appeal, that its findings were not

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about whether the due process of the accused were violated (ICC Appeals Chamber 2014, 3).^40 One can then wonder why the ICC chambers ruled that Libya can try Al-Senussi but must surrender Saif Gaddafi to the ICC?

**Two Admissibility Challenges, Two Different Outcomes**

According to the preamble of the Rome Statute, the ICC was established with the aim of ending impunity for “the most serious crimes of concern to the international community as a whole”. The ICC is thus meant to be complementary to national judicial institutions, which have primacy of jurisdiction. The preamble of the Rome Statute stresses the “duty of every state to exercise its criminal jurisdiction over those responsible for international crimes” and that ICC’s jurisdiction “shall be complementary to national jurisdictions.” To that extent, a case shall be inadmissible before the ICC if a state is able and willing to investigate and prosecute it, according to Article 17 of the Rome Statute.

To that end, when the ICC decides to prosecute a case, it is up to the state to challenge that decision by arguing that the case is inadmissible to the ICC, in regards to Article 17. Therefore, the state has the burden to show that it is investigating the same

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^40 The Procedural history of the Al Senussi case, started with Libya filing an “Application on behalf of the Government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute” (“Libya’s admissibility challenge” on 2 April 2013 (ICC-01/11-01/11-309). On 24 April 2013, the Prosecutor filed the “Prosecution’s Response to “Application on behalf of the government of Libya relating to Abdullah Al-Senussi pursuant to Article 19 of the ICC Statute” (ICC-01/11-01/11-321-Conf. A public redacted version was registered on 2 May 2013 (ICC-01/11 01/11-321-Red)). After the Pre-Trial Chamber’s invitation, the Prosecutor, the Defense counsel of Al Senussi and the victims filed their responses to the Admissibility Challenge on 14 June 2013. And the Pre-Trial Chamber issued the “Decision on the admissibility of the case against Abdullah Al-Senussi” on 11 October 2013 (CC-01/11-01/11-466-Conf. A public redacted version was registered on the same date (ICC-01/11-01/11-466-Red). The Defence (Al-Senussi’s lawyer) filed an appeal on the PTC’s decision on 17 October 2013. The Appeals Chamber recalls that the Pre-Trial Chamber had found that the same proceedings against Al-Senussi brought before the ICC were being prosecuted before domestic jurisdictions and that Libya were neither unwilling nor unable to prosecute. (para 66, page 23). The Defence had requested the Appeals Chamber to consider new evidence of Al-Senussi being mistreated by Libyan authorities.
case (same person and same conduct), it is willing and able to bring the accused to justice.

The Trial Chamber arrived at two different conclusions when it ruled on the admissibility challenges introduced by the government of Libya regarding the cases against Saif Gaddafi and Al-Senussi. It declared that the Al-Senussi case was inadmissible before the ICC, thus granting the Libyan state the possibility of investigating and prosecuting him. But it declared the case against Saif Gaddafi admissible before the ICC, requesting the Libyan state to transfer him to ICC custody. The Appeals Chamber accepted that “distinctions between the two cases permitted the Pre-Trial Chamber to arrive at different conclusions” (ICC Appeals Chamber 2014, 35). Such distinctions between the two cases included the fact that the case against Saif Gaddafi concerned crimes allegedly committed throughout Libya while the case against Al Senussi was limited to crimes allegedly committed in Benghazi. Moreover, Libya submitted substantially more evidence supporting its admissibility challenge for the Al-Senussi case that it did for the Gaddafi case (ICC Appeals Chamber 2014, 35-36).

The ICC rejected Libya’s challenge to the admissibility of the Gaddafi case on 31 May 2013 by arguing that Libya failed to show enough evidence that its investigation covered the same case that the ICC (ICC Pre-Trial Chamber, 2013). The Pre-Trial Chamber also found that the state of Libya did not have the capacity to exercise custody on Saif Al-Islam and secure his transfer because he was in the hands of the

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41 Additionally, although Al-Senussi’s defense argued that Libya does know have a law allowing it to prosecute Al-Senussi for the international crime of persecution, the Appeals Chamber (2014, 45) “observes that Libya envisages charging Mr Al-Senussi with domestic offences that include civil war, assault the political rights of the citizen, stirring up hatred between the classes and ‘other crimes associated with fomenting sedition and civil war’” and these crimes are included in the Libyan Criminal Code (ICC Appeals Chamber 2014, footnotes 253, 254, and 255).
Zintan militia. The Appeals Chamber rejected Libya’s appeal on 21 May 2014 and found that Libya was not investigating the same case, which led the Chamber to not consider the arguments about Libya’s inability to carry out the domestic proceedings. In a separate opinion appended to the judgment, Judge Song argued that Libya was investigating the same case but the case was still inadmissible before the ICC because Libya was unable to exercise custody over Gaddafi. In a dissenting opinion, Judge Ušacka argued that the Pre-Trial Chamber’s decision should be reversed because it erred in its test for determining admissibility (Fertsman et al. 2014, 3). But for the Al Senussi case, the Pre-Trial Chamber decided on 11 October 2013 that the case was inadmissible before the ICC because Libya was the same case as the one before the ICC. Although the ICC Pre-Trial chamber acknowledged that Al-Senussi lacks legal representation before Libyan courts, and that the Libyan national authorities did not have effective control over the certain detention facilities, it nonetheless concluded that Libya was not unwilling or unable to genuinely carry out its investigations against Al-Senussi (Fertsman et al 2014, 3).

How does one explain the seemingly contradictory decisions of the Gaddafi and Al-Senussi cases? In a nutshell, the ICC has decided that Gaddafi must be tried in The Hague but Al-Senussi may be tried in Libya. As Fertsman et al (2014) show, there are differences in the Gaddafi and Al-Senussi case that may explain the different outcomes of the two cases before the ICC. The allegations against Saif Gaddafi cover a broader geographical and temporal scope; and Gaddafi was held prisoner by the Zintan militia whereas Al-Senussi was in custody in a facility controlled by the Libyan government.
Moreover, the ICC prosecutor supported the Libyan government’s petition to prosecute Al-Senussi (Fertsman et al 2014).

But in any case, the ICC has been inconsistent in matters of complementarity. For the self-referral situations – such as Uganda, DRC, CAR, complementarity challenges have not been raised by the states. However, with the first UNSC referral of Darfur, the ICC has stressed its jurisdiction in face of the absence of domestic investigations and prosecutions. The Court stressed also on the duty of States Parties to help enforce the warrants for arrest. In Kenya, the Court agreed to prioritize domestic proceedings, subject to conditions that were specified in Agreed Minutes, which set out clear benchmarks and timelines for investigation and prosecutions (Stahn 2012, 332; ICC OTP 2009, 1).42

For Libya, the National Transitional Council sent a letter dated on 23 November 2011 to the ICC, stating that “the Libyan judiciary has primary jurisdiction to try Saif-al-Islam and that the Libyan State is willing and able to try him in accordance with Libyan law.” Unlike for Darfur, in Libya, the OTP has proposed several options such as priority of domestic proceedings, a sequencing of proceedings, and the possibility of holding ICC proceedings in Libya (Stahn 2012, 355). But there are competing positions within the different organs of the ICC.43

42 See the Agreed Minutes of the meeting, available at http://www.icc-cpi.int/NR/rdonlyres/1CEB4FAD-DFA7-4DC5-B22D-E828322D9764/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele.pdf

43 The Office of Public Counsel for the Defense (OPCD) challenged the ICC’s position, arguing that the OTP’s position on admissibility was inconsistent with previous practice, whereas the Pre-Trial Chamber told the NTC that it was open to an admissibility challenge (Stahn 2012, 336).
Complementarity’s Blind Spot: The ICC Is Not a Human Rights Court

The defense team for Al-Senussi argued before the ICC that a trial in Libya would not guarantee the rights of their client to due process. Therefore, in their view, the ICC case against their client should be admissible, and his trial conducted in The Hague, rather than before Libyan national courts. However, Angela Walker (2014) argues that an analysis of the text, object and purpose of Article 17 on complementarity shows that the ICC lacks authority to rule on the presence or not of due process when determining admissibility. It is certainly paradoxical that an international tribunal which aims at ending impunity for crimes of concern to the international community does not take into consideration whether due process is guaranteed in national jurisdictions or not before deciding whether to defer to those courts.

On the other hand, Frédéric Mégret and Marika Giles Samson (2013) ask whether due process and its violation should be taken into consideration at all when the ICC is evaluating complementarity and admissibility. Mégret and Samson (2013) argue that the ICC is not a human rights court and should not behave like one. There is in fact a functional division of labor between international criminal and human rights courts. However, in instances where the violations of due process are so grave that the proceedings cannot be described as a trial or reveal an unwillingness to prosecute, the ICC may take that into consideration, but only at the end of the process, so as to allow the domestic judicial system to correct itself in the meantime (Mégret and Samson 2013). Along the same line of argument, the ICC Prosecutor has also said “[we] are not a human rights Court. We are not checking the fairness of the proceedings. We are
checking the genuineness of the proceedings.”

In any case, and despite the ruling of the ICC on the admissibility challenges presented by the Libyan state, there are clear signs of violation of due process for Saif Gaddafi by Libyan authorities. But Mégret and Samson (2013, 577-581) argue that the violation of the due process for Saif Gaddafi does not constitute grounds for the ICC to pass the admissibility test and they make the case for “letting flawed trials be” because, among other things, the ICC is a treaty court, there is an inherent value in local trials such as maximizing deterrence, a sense of ownership of the justice, and the administration of justice made easier, but also there is a tendency to exaggerate the distinction between flawed domestic proceedings and a pristine international criminal justice.

**Conclusion**

The UN Security Council is primarily tasked to maintain peace and security around the world, using specifically the Chapter VII powers under the UN Charter. The ICC, although an international court that is not a UN organ, aims at ending impunity by investigating and prosecuting those responsible for the most serious crimes that are of concern for the international community. The two institutions have a working relationship that is enshrined in the Rome Statute. The UNSC is the channel through which the ICC gains universal jurisdiction, giving that some states are have not ratified the Rome Statute. However, Security Council members may also use their veto power to stop the ICC from prosecuting crimes that would otherwise fall within its jurisdiction.

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44 Statement made by Ocampo during a visit in Libya in November 2011. The video is available at Aljazeera.com/news/Africa/2011/11/2011112395821170909.html

45 For example, his ICC-appointed lawyer was arrested and held for one month during a visit to Libya in June 2012.
It is therefore not sufficient to only argue that the relationship between the UNSC and the ICC is one concerned with the maintenance of peace and security. The ways in which the UNSC has deployed its power in using the ICC to intervene in Libya and Sudan but also rejecting Kenya’s request of a deferral of the proceedings against Kenyatta are example of such power dynamics. The UNSC failed attempts to pass a resolution to refer Syria to the ICC are also symptomatic of the politics plays between members of the Security Council. Such deployment of power in the use of Articles 13(b) and 16 of the Rome Statute undermine the judicial independence of the ICC (Clarke and Koulen 2014). Even the drafting negotiations that underpinned Article 16 show the powers at play and the “workings of the political origins of the law and the manner in which foundational inequalities were woven into the fabric of the Rome Statute” (Clarke and Koulen 2014, 297). As Mark Kersten (2013) argues that “R2P and ICC share a common political ethos, which is liberal cosmopolitanism that seeks to replace the nation state and national sovereignty with the individual human as the primary referent of international politics.” But power politics are preventing either R2P or ICC to achieve liberal cosmopolitan ends.

However, in addition the imbalance in power relations that link the UNSC and the ICC, this chapter has also shown that the ICC itself is not immune from making decisions that take into consideration those political outcomes. The speed with which the ICC prosecutor moved from the preliminary observation to the investigation phase in the Libyan case in the midst of the uprisings shows that the Office of the Prosecutor sought to have an effect in the ongoing events by issuing warrants for the arrests of the Tripoli-Three. The different outcomes of the two admissibility challenges that the NTC
introduced also reflect such political influence. It is indeed difficult to understand how the ICC Pre-Trial chamber was able to rule that Libya was willing and able to try Al-Senussi given that the state had collapse and no judicial institution functioned.
CHAPTER 5
THE LIMITS OF STATE COMPLIANCE

Introduction

The need for state compliance and cooperation constraints the ability of the International Criminal Court (ICC) to accomplish its mission, which is to end impunity for atrocity crimes, as outlined by the Preamble of the Rome Statute.\(^1\) Compliance of state parties to the Rome Statute and state cooperation are needed at every step of the ICC’s work, ranging from the OTP investigation to providing jail facilities for those convicted of crimes.\(^2\) However, compliance and cooperation of states with the ICC at any moment are not a given, although state parties to the Rome Statute are legally obliged to assist the Court. Moreover, by ratifying the Rome Statute, states delegate their power and privileges to an international institution, whose main purpose is to limit the sovereignty of said states, which raises questions about why states choose to delegate those powers. This chapter empirically puts to test the actions of states that, after having willingly delegated some of their powers and privileges to the ICC, have its officials or nationals become the target of an investigation. Whether the actions of States Parties to the Rome Statute are consistent with their avowed compliance and cooperation with the ICC is the focus of this chapter, which, by studying the Kenyan example, outlines the limits of state cooperation in the area of international criminal justice.

\(^1\) Rome Statute of the International Criminal Court http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb20e16/0/rome_statute_english.pdf

\(^2\) It is important to note that states that are parties to the Rome Statute – having ratified the treaty – are legally bound to comply and cooperate with the Court. States that are signatories to the Rome Statute without having ratified it are only bound not to impede the work of the Court.
Why Do States Delegate Authority to International Institutions?

The International Organization literature in IR has addressed extensively the reasons why and the conditions under which states delegate authority to international institutions. States, acting as principals, choose to delegate some powers to international organizations, which in this case are the agents. From a rational design perspective, the issues of agency and delegation are a cost/benefit analysis, states choosing the delegation option when the benefits of such delegation exceeds its costs (Koremenos 2008). Although external delegation involves “sovereignty costs,” it still remains a viable option for states, especially in the area of human rights and international criminal justice where states aim at increasing their credibility. This explains why states choose to ratify the Rome Statute and join the ICC, delegating some of their powers and prerogatives to an international tribunal. However, the ICC and other international institutions are also created by states, which discuss beforehand how much power they are willing to delegate, and such deliberations make their way into the framework or organizational structure of the international institutions. For instance, the fact that states’ domestic judicial systems have supremacy over ICC’s jurisdiction shows that states want to reserve to themselves the power of adjudicating judicial matters on their own if they wish to.3 This framework contrasts with that of the

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UNSC-created *ad hoc* tribunals for Rwanda and the Former Yugoslavia for example, which had given those courts the primacy of jurisdiction over domestic courts.\(^4\)

Koremenos (2008) suggests that the autonomy of agents (i.e. international organizations) is restricted and confined within the design that the principals (i.e. states) have set in, while Lake and McCubbins (2006) give much more leeway and independence to international institutions. But in any case, international organizations have a tendency to acquire their own identity in which agents gradually increase their autonomy and act against the interests of the principals, which Barnett and Finnemore (1999) have called a “pathology.” Barnett and Finnemore (1999) argue that as bureaucracies, international organizations are also creators of social knowledge; they create new interests for actors; and as such, they tend to become unresponsive to their environments, and obsessed with their own rules. It is also the case that international institutions have the propensity of taking a life of their own and although states may step in and take action to influence the international agents, that occurrence is rare due to legal restrictions and high information costs (Vaubel 2005). In the case of the ICC, this is particularly true given that the Court is a judicial body that operates within a legal culture, pursuant to the Rome Statute. Moreover, it is not always clear whether states have the full extent knowledge of the Court’s procedures when they opt to relinquish their jurisdiction to the ICC. In fact, the Kenyan state may not have had knowledge of the full extent of their action when the members of the parliament were chanting “Don’t

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\(^4\) One main difference between the ICC and these ad hoc tribunals is that the former is treaty-based, states deciding willingly to join the Court.
be vague. Let’s go to The Hague,” instead of passing the bill that would have created the domestic tribunal, as recommended by the Waki Commission.⁵

Given that human rights regimes empower citizens against their governments, creating such regimes challenges the Westphalian order. One may ask then, why do states create international human rights regimes that are designed to hold them accountable (Moravscik 2000). Whereas realists may argue that states join human rights regimes because they are coerced by great powers, liberal scholars retort that states join the regimes because of norms, and as a response to pressure from interest groups and civil society organizations. Focusing on the European Convention of Human Rights (ECHR) of 1953—the most elaborate and effective human rights regime in the world, Moravscik (2000) shows that the realist argument does not hold well because well-established democracies did not push anyone into joining the ECHR; they in fact even opposed it. The decision of newly established democracies to join ECHR regime is not a result of civil society pressure either, which refutes the liberal argument as well. In fact, the accession to the regime is based on domestic political self-interest, governments trying to reduce political uncertainty by constraining future governments, which the Moravscik (2000) calls a republican liberal explanation. One may also add that socialization theory helps shed some light on the reasons why states choose to join such international organizations as the ICC.

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⁵ Following the inquiry into the 2007-08 post-electoral violence, the Waki Commission recommended the creation of a domestic court that would investigate and prosecute the crimes committed during the violent episode. But the Kenyan Parliament failed to establish that court and many MPs voiced their preference to have the ICC investigate instead.
**International Institutions as Social Environments**

As Johnston (2001) argues socialization theory has not been fully incorporated in the cooperation scholarship and focuses on persuasion and social influence. Most IR scholars would agree that states join international institutions due to the incentives to be gained by doing so, and because of pressures from domestic interest’s groups (Towns 2010). Constructivists would add to that the question whether socialization process through the involvement in international institutions would change a state’s behavior. As Johnston (2001, 488) presumes, “actors who enter into a social interaction rarely emerge the same.” Neorealist scholars would agree with this statement insofar as the change of behavior is driven by exogenous forces in an anarchic world, whereas constructivists would argue that the change on the behavior of the actors in a social interaction is due to socialization (Kratochwil and Ruggie 1986).

**States’ Support of International Courts and The Erosion of Sovereignty**

Why would states support international courts that clearly erode their sovereignty? A classical realist views international judicial institutions as idealist wishful thinking whereas others may view international courts as part of an order established by a hegemon (Keohane 1984). Whereas Powell (2012) contends that states support international courts because they agree with the values of those institutions, international courts also provide avenues for states to make credible commitment (Simmons and Danner 2010). However, legitimacy, which can be defined as “the

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6 Noting that around the world, most states have now recognized equal voting rights for women, have national policy for advancement of women and/or gender quotas, Towns (2010) argues that the adoption of these norms rank states and established hierarchies in social orders for states.

7 For instance, Kratochwil and Ruggie (1986) propose treating international organizations as social institutions “around which actor expectations converge.”
normative belief by an actor that a rule or institution ought to be obeyed” (Hurd 1999, 381), also may ultimately lead to support for an international court such as the ICC. Additionally, the court’s or institutional design and its performance are key factors that shape state’s perception of its legitimacy (Powell 2012, 351).

But, as Simmons and Danner (2010) contend, the creation of the ICC is a puzzle unto itself because it begs the questions: why was it created and why do states chose to join it? To be sure, the ICC represents “a serious intrusion into a traditional arena of state sovereignty: the right to administer justice to one’s own nationals” (Simmons and Danner 2010, 225). Drawing on credible commitment theory, Simmons and Danner (2010, 225) argue that “the states that are the least and the most vulnerable to the possibility of an ICC case affecting their citizens have committed most readily to the ICC, while potentially vulnerable states with credible alternative means to hold leaders accountable do not.” Similarly, states join the ICC as tentative steps to reduce violence and engage in peaceful negotiations.

Knowing that the ICC will likely focus on the prosecution of high level officials, it seemed counterintuitive for states to join the Court. The establishment and adherence to the ICC is thus a conundrum because “[it] was established by governments, but it is not clearly in any government’s interest” (Simmons and Danner 2010, 226). In opposition to views that portray the court as merely symbolic, or detrimental to peace and stability, Simmons and Danner (2010) show that the Court is indeed useful for some governments credibly to tie their hands to foreswear certain modes of violent conflict. In other words, the theory of credible commitment “predicts that states that are at risk for committing the kinds of atrocities governed by the Court but that lack a
dependable domestic mechanism for holding government agents accountable are likely to be among the Court’s earliest and most avid subscribers” (Simmons and Danner 2010, 252). This would explain the early enthusiasm of African states in joining the Court.

**The Limits of State Cooperation**

For the ICC to be operational, it must rely on the willingness of states to comply with the Rome Statute and to assist the Court in its investigation and prosecution. As Peskin (2009) shows, there has been a shift in the ICC Prosecutor’s strategy from a cautionary stance to a confrontational pursuit which is due to the lack of cooperation from states in the case of Sudan and Uganda. In both instances, the ICC has failed to persuade states to arrest and hand over the suspects, and the lack of international support for the arrest warrants has been noticeable.Prosecutor Ocampo’s early sole focus on rebels instead of state officials showed his cautionary approach in seeking state cooperation. Moreover, by seeking state referrals instead of using his *proprio motu* powers, Ocampo was assured of state cooperation in the first situations that he was investigating (Peskin 2009). Indeed, because the first cases before the ICC (Uganda, DRC, and CAR) resulted from self-referrals, Ocampo was assured of the cooperation of those states, who had willingly invited an ICC investigation. As Peskin (2009, 656) writes, “Moreno-Ocampo’s apparent deference to the Ugandan government seemed part of a larger submission to state sovereignty aimed at receiving state cooperation in investigation and prosecutions.” Peskin (2009) asserts that the

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8 Since the ICC has issued a warrant for his arrest, President Bashir of Sudan has travelled to the following ICC member states: Chad, DRC, Djibouti, Kenya, Malawi, Nigeria and South Africa. All these states are in fact bounded by the Rome Statute to arrest Bashir and surrender him to the Court.
prosecutor was even cautious after the Sudan ICC referral – which came from the UN Security Council – trying not to antagonize and to seek state cooperation from the Sudanese government. Ocampo later shifted his course from his diplomatic caution, and took an adversarial turn in mid-2007, especially with his approach to Sudan – being openly critical of the non-compliance of Sudan and criticizing the international community for its failure to pressure Khartoum. Ocampo also later antagonized the government of Uganda by refusing to drop the bid for the arrest of the LRA leaders (Peskin 2009). As Peskin (2000, 662) notes, unlike the ICTR and the ICTY, the ICC cannot count on crucial international backing to press reluctant states to cooperate with its investigations. ICC Prosecutor Bensouda has criticized the UN Security Council for its lack of support in the Darfur situation. Bensouda said,

> Given this [UNSC]’s lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching. It should thus be clear to this Council that unless there is a change of attitude and approach to Darfur in the near future, there shall continue to be little or nothing to report to you for the foreseeable future. *(UN News Centre, 2014)*

As Chapman and Chaudoin (2012) rightly argue, the ICC is a regime that faces a “participation problem.” States for whom compliance with the ICC is the easiest, such as democracies with little internal violence are the most likely to ratify the Rome Statute. Alternatively, states that have the most to fear from ICC prosecutions, such as “non-democracies with weak legal systems and a history of domestic political violence” tend to not ratify the Rome Statute (Chapman and Chaudoin 2012, 400). These findings also lend support to the notion that states act strategically when deciding to join supranational judicial agreements or not. However, sub-Saharan Africa constitutes an exception in the ratification pattern since many non-democracies that experienced
recent civil wars have ratified the Rome Statute, which is highly anomalous when contrasted with the fact that only three non-democracies with past civil conflicts outside of sub-Saharan Africa have ratified: Afghanistan, Tajikistan, and Cambodia (Chapman and Chaudoin 2012, 404). This lends itself to the fact that in the current prosecutions in Africa, the target is non-state actors, except for Kenya – where the prosecutor used his own initiative – and Libya and Sudan, which are non-party states referred to the ICC by the UN Security Council. Kenya is thus the only case of an ICC member-state where the target for prosecution are state officials.

**The Situation in the Republic of Kenya**

The Kenya Situation before the ICC presents two defining features: it is the first instance of the ICC being involved in a situation with a relatively low number of victims, and it does not result from a civil conflict. The Kenya situation before the ICC is rather one of political violence in the aftermath of contested elections. Moreover, for the first time since the entry in force of the Rome Statute, the ICC Prosecutor has targeted both sides of the conflict simultaneously. The Pre-Trial Chamber II had authorized the ICC Prosecutor to open an investigation in the Kenyan post-electoral violence on 3 March 2010, and had ruled that since the Kenyan government was not investigating, the cases would be admissible before the Court.\(^9\) After the Pre-Trial Chamber gave the ICC Prosecutor the authority to open a full investigation in the Situation of Kenya, the Kenyan government introduced a challenge of admissibility before the Appeals

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Chamber, which subsequently rejected Kenya’s admissibility challenge under Article 19(2) (b) by a majority of 4-1, on 30 August 2011.\(^\text{10}\)

In its admissibility challenge, recalling that a situation is admissible before the ICC only in case of the state’s failure or unwillingness to investigate and prosecute, Kenya had argued that it was investigating the alleged offense. The Appeals Chamber contended that Kenya “bears the burden of demonstrating, by providing specific evidence with sufficient probative value, that it is investigating the case – a burden that Kenya had simply failed to discharge” (Jalloh 2012, 120-21). However, Judge Ušacka strongly dissented, arguing that she would have reversed the Pre-Trial Chamber’s decision because in her view, the Court did not account for Kenya’s arguments and it applies “an unduly high burden in its definition of ‘investigation’ and ‘case’ (Jalloh 2012, 121). Jalloh (2012) argues that the ruling of the Appeals Chamber rejecting the admissibility challenge by the Kenyan government on the basis of “same person, substantially same conduct” effectively redefines the rules of admissibility pursuant Article 17, by giving primacy to the international court. It effectively mirrors the primacy that was given to the UN ad hoc tribunals over domestic jurisdictions that obligated national courts to relinquish their cases upon request by an international court.

**Going after the Ocampo-Six**

The *Situation in the Republic of Kenya* before the ICC involved the indictment of six individuals for crimes against humanity. In 2011, at the request of the prosecutor,

the Pre-Trial Chamber judges summoned the famous Ocampo-Six who were then officials in the Kenyan administration to appear before the Court, in The Hague: Uhuru Kenyatta (deputy prime minister and minister of finance), Francis Muthaura (head of the public service and secretary to the cabinet), Mohammed Hussein Ali (former chief of police), William Ruto (minister of higher education, science, and technology), Henry Kosgey (member of parliament), and Joshua Arap Sang (head of the private radio station Kass FM). At the time, Kenyatta, Muthaura and Ali belonged to one side of the conflict, and Ruto, Kosgey and Sang were part of the opposing side of the electoral violence. The fact that the ICC investigation targeted high level officials in the Kenyan administration played an important role in Kenya’s refusal to comply with its obligations towards the Court, despite having ratified the Rome Statute.

Why Did Kenya Ratify the Rome Statute and Later Refuse to Comply?

While charged by the ICC for crimes against humanity, Uhuru Kenyatta and Samuel Ruto joined forces and launched a presidential bid for the 2013 elections, which was effectively a strategy to deflect the ICC and shield themselves once they won (Mueller 2014). Their strategy included delaying tactics, and pressures aimed at making sure the trials would not take place until after the elections, when their executive power would give them an extra layer of protection and a greater ability to undermine the ICC’s prosecution. Mobilizing international organizations such as the African Union against the ICC was also part of their tactics. Additionally, while delaying the ICC

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proceedings by mounting numerous legal challenges, Kenyatta and Ruto’s allies would also engage in intimidation of potential witnesses. Finally, through the demonization of opponents and the politicization of ethnicity, and portraying the ICC as a Western tool for subjugation, Kenyatta and Ruto mounted a successful presidential campaign that led them to victory in 2013 (Mueller 2014).

After Kenyatta and Ruto won the 2013 presidential election, they mounted another series of tactics aimed at shielding them from the ICC, based on their political power and claiming that their physical presence at the trials in The Hague would be impossible, in regards of their mandates as President and Deputy President of Kenya. While they have always expressed their cooperation with the ICC, their efforts to undermine the Court never waned, as ICC Prosecutor Bensouda “has [accused] Kenya of spying on its staff, not honoring promises for documents and interviews, interfering with witnesses, politicizing the law, and using frivolous delaying tactics to postpone trial” (Mueller 2014, 26).

However, one may ask why did Kenya join the ICC and then attempt to undermine the Court once the investigation on the 2007-08 post-electoral violence investigation started? Muller (2014, 25) contends that political economy theories do not offer satisfying answers to this question and proposes instead “an explanation related to changes in political risk, particularly in systems where the rule of law and institutions are weak and malleable.” Kenya’s rule of law index is low, and as post-ratification political risks for such countries increase, compliance is likely to be jeopardized (Mueller 2014, 25). Indeed, Kenya signed the Rome Statute in 1999 under President arap Moi and ratified it in 2005 under President Kibaki. It still begs the question why Kenya took
those steps that limit its sovereignty in the first place. The ICC does not have universal jurisdiction; it is a treaty-based court to which states willingly accede by signing and ratifying the Rome Statute. Although human rights treaties limit sovereignty, states adhere to them anyway since they typically do not have enforcing power. For instance, dictatorships sign the Torture Convention because they do not need to use torture (Vreeland 2008) and new democracies signed the Convention on Human Rights (ECHR) to “lock in” at the end of World War II (Italy, France, Germany) as a way not revert back to fascism (Moravcsik 2000). But as Mueller (2014) highlights, unlike these treaties, the Rome Statute has teeth as there is no head of state immunity, and those who are convicted by the ICC can be imprisoned up to 30 years, and state parties are required to cooperate with the Court.

Simmons and Danner (2010) argue that states that ratify the Rome Statute tend to be peaceful democracies or autocracies with recent histories of conflict whereas the states that refuse to sign are democracies engaged in wars (US, Israel) or unaccountable autocracies (China, Sudan). Violent autocracies sign the Rome Statute as a form of “credible commitment” but Chapman and Chaudoin (2012) find that Simmons and Danner (2010)’s theory does not hold; countries that have poor indices of rule of law and governance, and high indices of violence, are less likely to ratify the Rome Statute. But in both Simmons and Danner (2010)’s and Chapman and Chaudoin’s theories, Kenya would be an outlier that ratified the Rome Statute and would not have been expected to join the ICC because Kenya has a history of violence in the 1990s, with a mixed democratic credentials, lacking an independent judiciary, and never having been a violent autocracy engaged in civil war (Mueller 2014, 29). In fact,
Kenya ratified the Rome Statute because at the time, the ratification carried little political risk for the state. However, when compliance started carrying political risk, Kenya and the defendants became tempted to defy the Court rather than cooperate, and countries with poor governance scores such as Kenya are prone to halt compliance when the political context changes (Mueller 2014). This means that when political risks increased, Kenya’s response to the ICC changed.

**Reckoning with The Post-Electoral Violence at Home: The Waki Commission of Inquiry**

The Commission of Inquiry into Post-Electoral Violence (CIPEV) resulted from the Kenya National Dialogue and Reconciliation Accord, which was signed on 28 February 2008. The Waki Commission, named after its chairman Justice Philip Waki of the Kenya’s Court of Appeals, was also comprised of the foreigners Gavin McFayden of New Zealand and Pascal Kambale of DRC. Two Kenyans, David Majanja and George Kegoro were appointed as Counsel Assisting and Commission Secretary respectively. The CIPEV mandate included: 1) to investigate the facts and circumstances related to the violence that followed the 2007 presidential election; 2) to investigate the actions and state security agencies during the period of violence and make recommendations; 3) to make recommendations on legal, political and administrative measures, including bringing to justice the persons responsible for criminal acts. After a period of four months of investigations, the Waki Commission

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12 After post-electoral violence broke out in December 2007, the African Union mandated a Panel of Eminent African Personalities chaired by Kofi Annan to mediate a political solution to the crisis. The Panel brought together the two main political parties – the PNU and the ODM – into the Kenya National Dialogue and Reconciliation (KNDR) process, which led to the establishment of a Coalition Government with power sharing between the leaders of both parties and the creation of the CIPEV.
published a 539-page report on 15 October 2008, with records of 3,561 injuries, 117,216 instances of property destruction, and 1,133 deaths resulting from the post-electoral violence. The report suggests that police were responsible for 405 deaths, and found evidence of massive failures by state security agencies to anticipate and contain the violence. It also identifies land grievances and the centralization of power in the presidency and the deliberate weakening of public institutions as root causes of the violence.

Confronted with the need to determine whether to name the names, the Waki Commission took the middle ground, and explains that

[it] has decided against publishing the names of alleged perpetrators in its report. Instead, these names will be placed in a sealed envelope, together with its supporting evidence. Both will be kept in the custody of the Panel of African Eminent Personalities pending the establishment of a special tribunal to be set up in accordance with our recommendations. In default of setting up the Tribunal, consideration will be given by the Panel to forwarding the names of alleged perpetrators to the special prosecutor of the International Criminal Court (ICC) in The Hague to conduct further investigations in accordance with the ICC statutes. (Waki Commission 2008, 8)

In its report, the Waki Commission recommends that the government of Kenya establishes a Special Tribunal to seek accountability of the persons responsible for the crimes. The Special Tribunal shall be composed of six judges, three in the Trial Chamber and three in the Appeals Chamber, with the Presiding Judge of each Chamber being a Kenyan while the other four judges being non-Kenyans (Waki Commission 2008, 474). The jurisdiction of the Tribunal would include serious crimes committed during the post-electoral violence, particularly crimes against humanity (Waki Commission 2008, 475). As a precautionary measure, Judge Waki handed to Kofi Annan a sealed envelope containing the names of key persons believed to have
orchestrated the violence, and specified that the list would be forwarded to the ICC if an agreement establishing the Special Tribunal was not signed within 60 days. The Commission also recommended that “All persons holding public office and public servants charged with criminal offences related to post-election violence be suspended from duty until the matter is fully adjudicated upon” (Waki Commission 2008, 476). The Commission notes that election related violence has occurred in Kenya in five-year cycles since the establishment of multiparty politics in 1992, and the government has systematically failed to adequately investigate and prosecute the perpetrators of such pre- and post-electoral violence. Moreover, lack of political will and fear of the political establishment has hindered any serious investigation and prosecution of political violence.

**Undermining the Waki Commission**

The Waki Commission had received early support from politicians who felt they had nothing to fear. One of the main recommendations of the Commission is that Kenya set up a hybrid Special Tribunal comprised of domestic and international judges. The Kenyan parliament was expected to pass the bill establishing the hybrid tribunal by January 2009, but the bill was defeated on 12 February 2009. Two later attempts at passing the bill failed as well. At that point, Kofi Annan gave the parliament extensions twice, but he later concluded that government of Kenya was just buying time, and handed over the Waki Commission’s material to the ICC. Prosecutor Ocampo came to Kenya in November 2009, requesting a self-referral, but the government of Kenya refused. He subsequently asked the Pre-Trial Chamber for permission to open an investigation using his *proprio motu* powers – as requested by the Rome Statute, which was granted on 31 March 2010. It is important to note that although the suspects
identified by the Waki Commission were still unnamed at that point, the Kenyan government failure to take concrete steps to investigate the PEV and establish the hybrid tribunal as promised since such prosecutions would primarily target high level officials or their close allies. Hence, “the big fish won’t fry themselves” (Brown and Sriram 2012). Consequently, international justice, which is beyond the reach of the government, became the only means through which criminal accountability could be delivered in Kenya, albeit in a very limited way.

**Kenya’s Delaying Tactics and Outreach against the ICC**

As the political risk factor increased for Kenya once the ICC investigation started, the Kenyan government adopted the strategy of demonizing the ICC, and mobilizing support against the Court both domestically and internationally, in addition to making the argument that if trials were to happen, they should be held domestically (Mueller 2014). The Kenyan strategy succeeded in mobilizing domestic political support against the Court, ahead of the 2013 elections, and the candidates Kenyatta and Ruto were able to capitalize on that to win the presidential elections. As Kendall (2014, 405) argues, “The Kenyan intervention has contributed to recalibrations of the domestic political field, unifying formerly opposed groups of the electorate and deepening the rift between the Kenyan state and domestic civil society organizations.”

The indictment of Kenyatta and Ruto, which was at first a liability, was turned into a political gain, it became their most vital asset (Wolf 2015). They came together to form the Jubilee Alliance as a new political platform that would launch their presidential ticket. The Jubilee Alliance was an opportunistic alliance of convenience, put in place to gain political power, which would in turn be used as a shield against the ICC (Mueller 2014). It also targeted the Kenyan opposition and civil society groups as responsible for
the predicament of the indictees. As Wolf (2015, 164) notes, it is clear that after they were indicted by the ICC. Kenyatta and Ruto knew that their fate hinged upon the outcome of the 2013 elections, they recognized that running as a team was their safest bet, and they mobilized their ethno-political constituencies to ensure a victory of their ticket. And as the electoral data showed, they in fact obtained the vast majority of the votes from their “fellow-ethnics” (Wolf 2015, 165).

Kenya’s campaign against the ICC started as soon as Ocampo named the six defendants on 15 December 2010. A week later, members of Kenyan parliament passed a motion to withdraw from the ICC while the government started lobbying African countries and the African Union for support against the Court. When charges against the defendants were confirmed by the ICC Pre-Trial Chamber in February 2012, the political risk increased even more for the Kenyan elites because it meant that the Pre-Trial Chamber had found enough evidence that warrants moving the cases to the trial phase.

Kenya’s diplomatic offense against the Court resulted in the East African Legislative Assembly and the East African Community requested that the ICC cases be transferred to the East African Court of Justice (EACJ)14, whose mandate, ironically, did not include crimes against humanity (Muller 2014, 31). The defendants had also asked for their trials to be moved from The Hague to either Kenya or Arusha, Tanzania. At the time, the Arusha International Conference Center had been the seat for the International

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13 See also Mueller (2014).

14 The East African Court of Justice, based in Arusha Tanzania, is an organ of the East African Community which is comprised of Kenya, Uganda, Tanzania, Rwanda and Burundi.
Criminal Tribunal for Rwanda (ICTR) since its creation in 1994, but all of the remaining work of the ICTR had been transferred to a UN judicial body called the Mechanism for International Criminal Tribunals. It thus raised questions whether Arusha had adequate facilities to host the Kenya trials at that point. The ICC Assembly of State Party left it up to the judges to make a determination about the feasibility of relocating the trials in Kenya or Tanzania. But many factors influenced the reluctance of the judges to grant such requests, including the fact that the judges are also working on other cases located in The Hague, in addition logistical support, and safety concerns for the witnesses.

By the 2013 presidential elections, the remaining ICC cases were seen as part of a Western-driven conspiracy of the “three O’s” (i.e. Ocampo, Obama, Odinga) (Gabriella Lynch 2014, 106, cited in Wolf 2015, 180). But ironically, Uhuru and Ruto’s anti-Western campaign was devised by a prominent British public relation firm (BTP) that successfully turned them “from suspected perpetrators into victims” (Wolf 2015, 180). After they had won the 2013 elections, Kenyatta and Ruto used the Kenyan state to enlist the African Union to help its case. At the May 2013 African Union summit, which coincided with the 50th anniversary of the AU, Kenya pushed for its cause to be taken upon by the organization. Subsequently, the African Union Commission asked the UN Security Council to defer the Kenya cases, based on Article 16 of the Rome Statute.15 On 2 May 2013, Kenyan ambassador to the UN Macharia Kamau wrote a letter to the Security Council asking for a termination of the Kenya cases, arguing that

15 Article 16 of the Rome Statute allows the Security Council to defer cases before the ICC for 12 months, renewable.
“the ICC continues to be a hindrance and a stumbling block for the aspiration of the Kenyan people.”

The African Union sent a delegation to The Hague in August 2013, asking for the cases to be transferred back to Kenya, and convened a special summit in October 2013 to discuss a mass pullout of African states from the ICC.

Incidentally, the Al Shabaab terrorist attack on the Westgate Mall in Nairobi had given Kenyatta and Ruto more ammunition for their calls of their cases be dropped by the ICC or at least to have the Security Council defer their cases, pursuant Article 16 of the Rome Statute. Arguing that Kenya faces terrorism threat and needs its head executive to fully devote their time to their fight against terrorism, Kenya claimed that it cannot afford to be dragged through interminable legal proceedings before the ICC and that would violate the mandate that the Kenyan citizens bestowed upon their leaders. As Ruto was in The Hague during the attacks, his statement leaves no doubt that he suggests that the ICC proceedings against him and Kenyatta impedes their work as Kenyan leaders:

It’s really unfortunate that these terrorists attack was timed to coincide with my presence here at The Hague and the visit by His Excellency the president of Kenya to New York for the UN general Assembly. Meaning that both the president and myself would not have been in the country… We hope that some people will begin to contextualize what is going on and begin to appreciate the challenges that Kenya is going through, the region is going through, and the complications that are brought by what is going on here. We believe in justice, we believe in fair play and we have as a country, both the president and myself as individuals, we’ve committed ourselves to be present here in court so that we can clear our names but we have to counter balance our individual

16 See the letter here http://www.jfjustice.net/the-icc-is-a-hindrance-and-a-stumbling-block-for-the-aspiration-of-kenyan-people-amb-kamau-macharia/

17 In September 2013, the Somali militant group Al Shabab launched a terrorist attack in the Nairobi’s Westgate Mall, which resulted in 67 deaths.
responsibilities or responsibilities as individuals and legitimate constitutional requirements by 40 million Kenyans.\textsuperscript{18}

Kenya’s buying time with the ICC also included two strategies adopted by the defendants: The first one was the use of all legal means available to get the cases dismissed under Rome Statute’s admissibility and jurisdiction rules, with multiple processes and appeals. That strategy had the advantage of buying time to make sure that if the cases went to trial, it would be after the 2013 presidential elections, in which Kenyatta and Ruto were contenders. The second strategy was to engage the Kenyan state itself in the legal challenges, although the ICC went after individuals, not the state. The admissibility challenges started on 31 March 2011 and lasted until 31 August 2012, when the Appeals Chamber rejected them. Following the rejection of their admissibility challenge, the defendants raised jurisdiction challenges, questioning whether the Kenya situation met the threshold of crimes against humanity. In doing so, the Kenyan defendants invoked Judge Kaul’s dissenting opinion.\textsuperscript{19} This strategy worked in favor of Kenya because successive delaying tactics ensured that the trials would not take place until after the 2013 elections. As Mueller (2014, 33) notes,

Having initially been postponed from April until May and July 2013, additional defense appeals were successful in getting Ruto and Sang’s trial delayed until September 2013, and Kenyatta’s until November 2013 and then until January 2014, and once again until February 2014. Each delay was in part the result of

\begin{itemize}
\item \textsuperscript{18} “Shock: Ruto Claims West Gate Mall Attack was Arranged to Fix Him and President Kenyatta”, Kenya Today, 23 September 2013. Available at https://www.kenya-today.com/news/shock-ruto-claims-west-gate-mall-attack-pre-planned-occur-country
\item \textsuperscript{19} Judge Kaul had issued a dissenting opinion that differed from his colleagues of Pre-Trial Chamber II in which he argued that there was no evidence of an “organizational policy” of the violence and because the violence is not attributable to a state-like organization, it does not qualify as crimes against humanity. This means that the ICC would not have material jurisdiction over the Kenya cases. See Judge Kaul’s dissenting opinion at http://www.haguejusticeportal.net/Docs/ICC/Kenya/Justice%20Kaul%20Dissent%202015%20March%202011.pdf
\end{itemize}
witness intimidation. This occasioned the need for new witnesses, opening up the prospect of more witness intimidation and more delays.

In its filing request for a postponement of the trial until after the 2013 Kenyan presidential elections, Ruto’s defense had argued that the elections are “a significant step and important for both the democratic process and the Kenyan people… [It] provides an important and further opportunity for Mr Ruto to advance the process of reconciliation in that country and to help ensure the pacific nature of the election.”

Thus, it shows that Ruto had used the upcoming 2013 presidential elections and the need to avert potential violence as a leverage in his strategy to delay the proceedings against him before the ICC. If anything, Ruto would be in a better position defending himself before the ICC as an elected Deputy President, which would ensure him the backing of the Kenyan state apparatus. And sure enough, Kenyatta and Ruto were respectively elected as President and Deputy President of Kenya in 2013. Their strategy against the ICC included intimidating, bribing, and witnesses disappearing. As the trial neared, more witnesses dropped out, which led the ICC prosecution to seek more time to review the new evidence, and need for more witnesses. For instance, the ICC Prosecutor was able to submit to the court 21 items amounting to 288 pages of evidence of witness interference by Kenyan authorities.

Moreover, while running for office in the 2013 elections, Kenyatta and Ruto resorted to ethnic polarization, joining Kikuyus and Kalenjin – the two groups that


targeted each other in the 2007-08 PEV—against Odinga’s Luo ethnic group.\textsuperscript{22}

Kenyatta and Ruto’s political rhetoric included also attacking the ICC as a western, anti-African and colonial institution. Their strategy to enlist other voices across the African continent to portray the ICC as a political tool against African leaders was also successful. For instance, Ugandan President Museveni used the opportunity of Kenyatta’s swear-in ceremony to criticize the ICC. He said,

\begin{quote}
I want to salute the Kenyan voters for the rejection of the blackmail by the International Criminal Court (ICC)… I was one of those that supported the ICC because I abhor impunity. However, the usual opinionated and arrogant actors using their careless analysis have distorted the purpose of that institution. They are now using it to install leaders of their choice in Africa and eliminate the ones they do not like.\textsuperscript{23}
\end{quote}

As the Kenya cases show, prosecuting senior states officials before the ICC presents its own challenges, ranging from the African Union siding with the Kenyan government to questions of immunity, and jurisdiction, and physical presence at the Court, which hindered the ability of the court to successfully bring the Kenya cases to trial (Hobbs 2014). This, despite the fact that Kenya has also sought to reassure the ICC that Kenyatta and Ruto will be cooperative and follow the rules, respond to their summons. They assure also that the Kenyan government will be cooperative in submitting requested documents. On 8 April 2013, Kenya Attorney General Githu Muigai assured Trial Chamber V that as a member state to the ICC, Kenya will meet its

\begin{footnotes}
\item[22] Odinga was Ruto’s ally during the 2007 elections, but the later entered into a new alliance with Kenyatta after bot were indicted by the ICC, forming the Jubilee Alliance Party, which subsequently won the 2013 elections.
\end{footnotes}
obligations. However, the ICC’s OTP had very little room for maneuvering, in face of Kenya’s stonewalling, which ultimately would lead to the case against Kenyatta to be dropped before it reached the trial phase, and charges against Ruto and Sang to be vacated after the prosecution finished presenting its case. This ultimately leads to the issue of the limited power of the ICC to address political violence.

The Limits of ICC Prosecution in Addressing Political Violence

In other ICC situations in Africa such as in Uganda, the DRC, Central African Republic, Sudan, Libya, and Mali, the Court has opened investigations following a civil conflict. Kenya and Côte d’Ivoire are the only two instances where the investigation follows instances of political violence exclusively, in the aftermath of contested elections. That fact, combined with the relatively low number of victims compared to other situations, raises many questions about the material jurisdiction of the Court in the Kenyan case and whether the crimes committed in Kenya during the 2007-08 post-electoral violence amount to crimes against humanity. However, it raises also questions about the limits of ICC prosecution in addressing political violence. In fact, the ICC prosecution in Kenya may not represent a new beginning in Kenyan politics because it does not address the root causes of political violence, which requires political reform rather than criminal prosecution (Höhn 2014). ICC’s involvement in post-electoral violence in Kenya and Côte d’Ivoire indicated a new venture into unchartered territory for international criminal justice, which is not confined to armed conflict anymore. The ICC involvement in Kenya has the effect of representing the 2007 electoral violence as exceptional, when in reality, electoral violence in Kenya is hardly exceptional (Höhn
Höhn (2014, 567) argues that “Indeed, the relative calm of the 2013 elections was due less to the ICC process deterring instigators of violence than to the new constitution, fundamental institutional reforms and a profound public wish to avoid another bloodbath.” Kenya had in fact engaged in profound institutional reforms following the creation of the national unity government at the end of the 2007-08 PEV. The reforms included the adoption of a new constitution in 2008, a reform of the electoral system and the establishment of an independent electoral body, and ambitious devolution program and establishment of local government, and a new territorial organization that changed the pre-existing 8 provinces into 47 counties. All these reforms have certainly played a major role in the fact that the 2013 elections were peaceful, as many actors have pointed out. However, as the euphoria and renewed hope that accompanied these reforms are starting to wane in the lead of the next 2017 general elections, faith into the integrity of the electoral commission and the Supreme Court has dwindled, and signs of upcoming contentious elections that could potentially lead to violence are apparent. These are issues that an ICC prosecution is not able to deal with, for it lacks the jurisdiction and scope and means to address the root causes of political violence.

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As Ruteere and Kamau (2015, 120) argue,

[The] question of criminal justice accountability for elections-related violations requires a more nuanced approach. Unless such accountability is accompanied by a comprehensive restructuring and transformation of the state to ensure the equitable access to rights and new ways of political organizing, criminal trials may exacerbate the problems of ethnic and social divisions within a state even further. In countries like Kenya where electoral contests degenerate into ethnic conflict, it is much more than individual culpability that is at stake when individuals such as those indicted by the ICC in the Kenya case are brought to trial. Rather, such trials also serve to frame new narratives of victimhood – both individual and collective, which may reignite new cycles of violence.

Indeed, new narratives of victimhood were salient in the wake of the ICC indictment. Whereas Kenyatta and Ruto were able to frame their ICC indictment as an attempt of the Court to victimize Kenya as a nation, it was also clear that within Kenya, the ethnic communities to which the indictees belong also embarked into the victimhood narratives. Therefore, in addition to those who were victimized by the electoral violence, a new category of victims also emerged: those who were targeted by the ICC and the ethnic communities to which they belong.

For instance, a victim of the post-electoral violence who now lives in the Nakuru Pipeline IDP camp said, “How it came to be that Uhuru [Kenyatta] was in the list [of ICC suspects] is something we can’t understand. How come Raila [Odinga] was not in the list of suspects yet Uhuru and Ruto were suspects? Did you see any Luo in that list? Yet we had the Kikuyu and the Kalenjin. Where are the Luos?”26 Indeed, the three remaining ICC suspects at the time all belong to the Kikuyu and Kalenjin ethnic communities, and that Odinga who was the main challenger during the 2007 election belongs to the Luo ethnicity and no Luo was part of the ICC indictment. This statement

26 Personal interview, Nakuru Pipeline IDP camp, Kenya, February 2016.
from a victim of the violence, who in turn views the ICC as an institution that victimizes Uhuru and Kenya and the communities to which they belong, and has failed to target any individual from the Luo community. Along the same lines, another victim who now lives in the Subukia IDP camp in Nakuru said, “My own son was pierced by an arrow by one of his classmates. So, saying that Uhuru and Ruto were the perpetrators is sheer nonsense.”

Furthermore, the ICC involvement in the prosecution of political violence in Kenya did not trigger positive complementarity. In fact, by dismissing Kenya’s admissibility challenge, the ICC Appeals Chamber set a high threshold which may undermine national courts’ first right to prosecute (Jalloh 2012). To the extent that positive complementarity may trigger the state to address atrocity crimes domestically rather than ignore them, it poses also a dilemma to local NGOs, because if they insist on strengthening local judiciary, they will not be able to make the case of the state being unwilling or unable to prosecute. During the preliminary examination in Kenya, local NGOs did not advocate for domestic prosecutions, they instead lobbied for the opening of full investigation by the ICC (Bjork and Goebertus 2011). This in turn puts the local human rights NGOs in an uncomfortable situation as they were criticized for being the enablers of the ICC prosecutions. For instance, an IDP said, “the ICC is a political court. Because they did not come to get information from the grassroots. They got their statements from the human rights commission and the civil society. They also paid of

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27 Personal interview, Nakuru, February 2016.
people to give witness statements.”28 In the end, many factors contributed to the failure of the ICC to successfully prosecute the Kenyan cases.

The Kenya Cases: Prosecution Failed

The argument that I make here is not that the ICC has failed in delivering justice in the aftermath of the Kenyan post-electoral violence. One would need many other criteria to evaluate the success or failure of the delivery of justice. But also, justice for whom? Instead, I focus here on the failure of the Office of the Prosecutor – not the ICC writ-large – to show the extent to which it failed to successfully investigate and prosecute the Kenya cases. Such failures result from the challenges of prosecuting state officials in an instance where state compliance and cooperation is crucially needed. The investigations in the Kenya situation led to two cases before the Court: a joint case against Deputy President Samuel Ruto and former journalist Joshua arap Sang – who were on trial from September 2013 to April 2016, and a case against Kenyan President Uhuru Kenyatta, which has collapsed in December 2014, before reaching the trial phase. Ruto was charged as an indirect co-perpetrator of crimes against humanity of murder, forcible transfer, and persecution. Sang was charged for having contributed to the commission of those crimes. They both were summoned to appear before the ICC on 8 March 2011, and their trial begun on 10 September 2013.

On the other hand, Uhuru Kenyatta was charged as an indirect co-perpetrator of the crimes against humanity of murder, forcible transfer, rape, persecution, and other inhumane acts. He was first summoned to appear in court on 8 March 20122, but his case never reached a trial phase because the charges against him were dropped on 5

December 2014. For the other suspects in the Ocampo-Six group, charges against Henry Kosgey and Muhammed Hussein Ali were not confirmed by Pre-Trial Chamber II on 23 January 2012, because the Chamber found that the prosecutor did not provide sufficient preliminary evidence, and had relied on one anonymous witness in the case of Kosgey. The Chamber declined also to confirm charges against Ali, the former Commissioner of Kenya Police, because of insufficient evidence connecting Kenya Police to the attacks carried out by the Party of National Unity (PNU) supporters.

With two suspects out of the Ocampo Six, the remaining four were divided up into two cases: one involving the two members of the Orange Democratic Movement (ODM) lead by Raila Odinga: Ruto and Sang. Kenyatta and Muthaura made up the second case, as members of the Party of National Unity (PNU), which was the incumbent party during the 2006 elections. However, in March 2013, the ICC Prosecutor announced that she was dropping all charges against Muthaura because she lacked evidence for his probable conviction due to the loss of a key witness who had recanted testimony, the death of potential witnesses, and lack of cooperation from the Kenyan government. Therefore, the charges against Muthaura were withdrawn in March 2013. The charges against Kenyatta were also dropped by the Prosecutor’s office on 5 December 2014, after having failed to obtain the postponement of the trial. In fact, the Pre-Trial chamber had requested that the Office of the Prosecutor either proceed to trial, or drop the charges against Kenyatta. The prosecutor has cited lack of cooperation from the Kenyan government as a reason for the failure to obtain enough evidence to move to the trial phase.
The Kenyatta Case: Witness' Conundrum and Case Collapse

The collapse of the case against Uhuru Kenyatta that ended with the Prosecutor dropping the charges exemplifies the difficulty of prosecuting state officials at the ICC. It shows that state compliance and cooperation for a fruitful investigation is difficult to obtain if the target is a state official. It is even more so if the suspect is the sitting head of state. The Kenya situation shows the degree to which non-compliance of a state party to the Rome Statute and hostile action taken by the state against the Court resulted in the impossibility of gathering satisfactory evidence to go to trial. By early 2014, the Prosecutor’s office had withdrawn at least seven witnesses because they had either recanted their earlier testimonies, or feared testifying in the Kenyatta case.29 Because the prosecutor’s case relied heavily of witness testimonies rather than physical evidence, failure to secure the witnesses’ willingness to cooperate meant basically the unraveling of the cases against Kenyatta and Ruto. In a letter dated December 2013, Prosecutor Bensouda requested an adjournment of the trial, arguing that she needed more time, because the withdrawal of witnesses meant that the case against Kenyatta could not meet the threshold needed to secure conviction.30 In fact, a prosecutor witness had admitted that “he provided false evidence regarding the event at the heart of the Prosecution’s case against the [Kenyatta]” and another witness had informed the prosecution that he was no longer willing to testify at trial.31


31 Ibid., para 2
Facing what it viewed as the Kenya’s government obstruction and refusal to submit requested document for the investigation, the Prosecutor referred the matter to Trial Chamber V (B) in the Kenyatta case. The Trial Chamber then requested that the Kenyan government provide to the Prosecutor eight categories of records related to Uhuru Kenyatta that it had requested. The categories of documents that the Prosecutor had requested from the Kenyan Attorney General covered company records, land ownership and transfers, tax returns, vehicle registration, bank records, foreign exchange records, telephone records, and intelligence records. The Prosecutor hoped to be able to use such records for evidence to link Kenyatta to the post-electoral violence of 2007. But Kenya’s Attorney General Githu Muigai had argued that the prosecutor’s request was a “fishing expedition” because it lacked specificity, given that the prosecutor requested documents covering the period between June 2007 and December 2010. The Kenyan Attorney General argued that the registry of Kenyan companies was paper-based before 2009, making it difficult to conduct the searches.

Facing obstruction from the Kenyan state, witness withdrawal and recanting their testimonies, the ICC Prosecutor finally came to the conclusion that she did not have enough evidence to proceed. This decision came after the Office of the Prosecutor withdrew its charges against Kenyatta on 5 December 2014. The OTP cites its reason for withdrawing the charges as the obstruction from the Kenya state made that “The evidence has not improved to such an extent that Mr Kenyatta’s alleged criminal


responsibility can be proven beyond reasonable doubt.” Before deciding to drop the charges, the OTP had asked the Chamber for an indefinite adjournment of the case, until the circumstances changes to the point of making the Kenya state more willing to cooperate with the investigation. But the Trial Chamber requested that either the OTP move to the trial phase or dismiss the case against Kenyatta. In a unanimous decision, judges of Trial Chamber V (B) terminated the charges against Kenyatta on 13 March 2015.34 With the charges against Kenyatta dropped, there were only two suspects left on trial in relation to the 2007-08 post-electoral violence: Deputy President Ruto and former journalist Sang. They too, would later have the charges against them vacated.

The Pitfalls of the Ruto-Sang Trial: Witnessing the Problem

The extent to which the ICC faces challenges when prosecuting states officials is visible not only in how the Kenyatta’s case collapsed before going to trial, but also in the trial proceedings of the Ruto-Sang case. Because the OTP has failed to mount enough material evidence against the accused, it relied mostly on witness testimonies that it had collected during the investigation. But by the time the trial had started, most of the witnesses had either ceased to cooperate with the prosecution, or had recanted their testimonies to the point of being declared hostile witnesses. Declaring a witness hostile allows the prosecution to cross-examine its own witness to establish its incredibility, because of the extent to which the witness has refuted his/her earlier testimony. For instance, as Witness 727 was scheduled to testify via video link in the Ruto-Sang trial, he failed to appear and on 24 March 2015, his lawyers said that he was in hiding after a

Dutch court issued an order compelling him to appear before the ICC. In fact, he and his family had been granted asylum in the Netherlands. His Dutch lawyer said that he had been in hiding – in the Netherlands – because he fears testifying before the court.\(^{35}\) He went into hiding after the Dutch court threatened to jail him if he did not testify before the ICC. The law firm that represents him had said that “The witness…have received serious threats due to a potentially incriminating statement that [he] could make against Mr. Ruto before the International Criminal Court.”

In another interesting twist of events, the Prosecution calls its own witness “thoroughly unreliable and incredible” (Maliti 2015).\(^{36}\) The Prosecutor had previously submitted an application for the Chamber to declare Witness 743 hostile. Four other prosecution witnesses had also been declared hostile. Witness 800 has expressed how frustrated he was with the Prosecutor’s office and the witness protection program that gave him insufficient allowance for him and his family (Maliti 2014a). Witness 637 also was declared hostile, after he had said in court that three people had coached him to implicate Ruto and Sang (Maliti 2014b). Witness 516 was declared hostile as well, after having admitted that a promise of good life induced him to give false claims (Maliti 2014c). Witness 495 said that he never made statements to the prosecution, and that when he met the OTP staff in November 2012, he was given two statements and asked to copy them in his own hands as to make it look like his own statements (Maliti 2014d). Prosecutor Bensouda had also said that eight prosecution witnesses were unwilling to


testify in the Ruto-Sang trial: they are Witnesses 15, 16, 323, 336, 397, 495, 516, and 524.

All the above mentioned instances of witnesses recanting their testimonies or simply refusing to testify weakened the prosecution case to the point that the accused filed a motion of “no case to answer,” which calls for the judges to acquit them without them having to present their defense. In the end, the three judges ruled by a majority of 2-1 that the charges against Ruto and Sang should be dropped (ICC 2016). As Judge Eboe-Osuji writes in his judgment, “eight witnesses who potentially possess evidence that the prosecution considered relevant to the case never appeared before the Court” (ICC 2016, 128). He adds that even in the absence of proof that Ruto and Sang have personally engaged in meddling and witness intimidation, “It is enough that the atmosphere had been fostered – by persons and entities to have [Mr Ruto] and Mr Sang’s best interests at heart – in a way reasonably likely to intimidate witnesses” (ICC 2016, 128). Judge Fremr made a similar argument when he said that “Although it has not been shown, or argued, that the accused were involved in the interference of witnesses, they did profit from the interference, inter alia, by the falling away of several key witnesses that this Chamber found to have been interfered with.” He added that “there was a disturbing level of interference with witnesses, as well as inappropriate attempts at the political level to meddle with the trial and to affect its outcome.”

Judge Eboe-Osuji notes also that the government of Kenya was not a party to this trial, and the Court has indeed accommodated Ruto so he can carry on his duties as Deputy President during the trial, having granted him a continuous excusal from physically being present in The Hague. Therefore, “it is difficult to see where the good
faith lay in the Government’s involvement of itself in the campaign against the trial” (ICC 2016, 125). The judge also noticed that “there was an “openly aggressive campaign that the Government [of Kenya] and some opinion leaders in Kenya had mounted against the Court for the apparent purpose of ensuring that the case against the accused is peremptorily terminated” (ICC 2016, 115). It is clear that the legal process against Kenyatta, Ruto and Sang was tainted with political meddling and interference orchestrated from Nairobi as to ensure that the cases against the accused would collapse. The ICC may well wish to remove itself from political considerations, it is nonetheless evident that the Court must operate in a political world, which raises the question whether it is not time for the ICC to openly admit its political role as well.

**The Limits of a Professed Apolitical Court**

Successful ICC investigations and prosecutions of state officials are also hindered by other factors than just the limits if state cooperation. The extent to which a state is willing to go to protect its officials always constitutes a potential roadblock, but as Roach (2013) argues, the ICC’s professed vow not to venture into politics is also a problem. ICC officials have asserted that the Court is an impartial and apolitical institution. However, unlike national courts that can rely on police forces and enforcement mechanisms, therefore not needing to negotiate and persuade perpetrators, the ICC is constrained to do so to some extent to conduct affairs with state officials (Roach 2013, 508). Thus the court needs to develop “a (positive-oriented) political capacity to reach mutual accommodation” (Roach 2013, 508), which is inherently political and diplomatic in nature, rather than judicial. For Roach (2013), the ICC ought to stress on its soft power and use its resources to reach compromise and mutual agreements with states. For instance, in light of changing political context in
Kenya, the ICC could have used “a measured diplomatic response or the use of legal assets to attract Kenyan officials to accommodate the court’s demands” (Roach 2013, 517). Such measure could include for example a sequencing of trials, holding national trials for the perpetrators first, after which the ICC could hold its own trials, or delaying Kenyatta and Ruto’s trials and obtaining in return their cooperation for the trials of other defendants.

**Conclusion**

In the wake of the ICC’s Office of the Prosecutor abandoning pursuits against President Uhuru Kenyatta because its case was too weak to proceed, Mark Kersten writes, “Kenyatta has written the political manual on how to win an election, stay in power and simultaneously quash an ICC case against a sitting head of state.” A little over a year later, the ICC Trial Chamber V(A) would also dismiss the case against Ruto and Sang. It means that from the list of six suspects that were at first indicted for crimes against humanity in the wake of the 2007-08 PEV, none was convicted. In fact, none saw the proceedings against them unfold to its normal term. The collapse of the Kenya cases brings out questions on what it means for the ICC to investigate and prosecute states officials within a framework where state cooperation is needed, and state compliance is expected from state parties to the Rome Statute. In the Kenya cases, the ICC prosecutor had taken an unprecedented strategy in the short history of the Court: to investigate and prosecute both sides of the conflict simultaneously. Up to that point, the prosecutor had always targeted one side of the conflict – the rebels or political

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opponents – and had always claimed that what it calls the “sequencing” of investigations were a better strategy. Kenya was the first instance where the Prosecutor had not used a sequencing approach to investigation, but also the first instance where the prosecution targeted states officials, in the absence of a UN Security Council referral. Given the outcome of the Kenya cases, it raises questions whether the sequencing or one-sided investigations are not a better option for the prosecutor after all.

Moreover, as Kendall (2014, 401) argues, “the theoretical construction of international criminal law as a collective project of the international community, devoid of political interests and embracing the moral call to ‘end impunity’, contrasts with the field’s work in practice.” In practice, international criminal law is selectively enforced (Kendall 2014, 401). One may add also that states, despite making credible commitments by joining international institutions such as the ICC, also exercise discretionary power in relation to the extent to which they comply with the rules and cooperate with the Court. Although norms diffusion is important here, it is mitigated by calculations of political risks, that, if low, ensure state compliance. But when the political risks are high for the state, as in instances where states officials are the main suspects at an international court such was the case in Kenya, the state engages in acts that undermine the work of the court, to ensure that the prosecution would fail. Since it became operational in 2002, the ICC has gone to great length to portray itself as an institution that does not venture into the political, guided only by the rule of law. Prosecutors at the ICC have indeed repeatedly emphasized that they are “solely guided by the law” (Bensouda 2012); and Prosecutor Bensouda (2013) has said that “politics
have no place and will play no part in the decisions I take.” The reality is that the Court operates in a political world, and is shaped by political events. State compliance also results from political calculations, in addition to the widely accepted notion of norms diffusion.
CHAPTER 6
THE COURT IS THE POLITICAL ARENA

Introduction

The ICC is a lieu of staged performance where various actors deploy their political narratives. The Court in The Hague becomes a transposed arena where domestic politics are meted out and enmeshed with the rule of law and legal procedures. As such, *The Situation in the Republic of Côte d’Ivoire* is a prime example where the ICC is involved in a highly politically charged crisis that was set off by contested electoral results in December 2010. However, the crisis in Côte d’Ivoire is also the result of over two decades of political intrigues in the midst of power struggles between brokers in a climate where xenophobia and political exclusion had created the conditions for a rebellion that partitioned the country in half. After an attempted reunification and a presidential election organized in a bid to return to normal in 2010, the demons of political division resurfaced again in the aftermath of contested elections results, leading to a crisis that left over 3,000 people killed.

The ICC intervention in the Ivoirian political crisis hence becomes a stage of performative discourse where actors create, change, frame, make and unmake their political narratives. In The Hague, the defendants Laurent Gbagbo and Charles Blé Goudé used their appearance before the Court to not only address the Chamber, but also to speak to their compatriots and to a global audience to tell their (his)stories, which fit in the larger frame of the (dis)placement of the Ivoirian crisis into an international criminal justice apparatus (Ba 2015). The Court is therefore the domestic political arena for Ivoirian politics, when the current Ouattara administration is as much a political actor as the Court itself.
As of September 2016, the case of Côte d’Ivoire before the ICC involves the prosecution of three individuals for whom the ICC has issued an arrest warrant: former president Laurent Gbagbo, his wife, Simone Gbagbo, and Charles Blé Goudé, a former official in Gbagbo’s administration. The prosecution of these individuals by the ICC comes in the heels of the political crisis that engulfed the country, in the aftermath of the 2010 elections, which triggered six months of unrest and human rights abuses. Gbagbo had refused to leave power despite having been defeated by his opponent Alassane Ouattara. In the violence that followed the struggle for power, at least 3,000 people were killed by forces on both sides along political, ethnic, and religious lines (Human Rights Watch 2013). Although the ICC’s Office of the Prosecutor claims that the investigation is still ongoing, especially in the Ouattara camp now, it is evident that all the individuals who have been charged so far belonged to the Gbagbo camp. The OTP argues that it has adopted a ‘sequential’ approach in the situation of Côte d’Ivoire, unlike in the case of Kenya where the OTP went after both sides of the conflict simultaneously. Côte d’Ivoire and Kenya share the feature of political violence that led to the involvement of the ICC, unlike the other situations where the intervention followed a breakout of civil conflict. The prosecution of matters of political violence at the ICC comes with its own set of challenges, mainly domestic politics are transferred to the ICC, which I argue becomes a political arena where the actors deploy their own narratives.

Côte d’Ivoire: Anatomy of a crisis

Félix Houphouët-Boigny established his political pre-eminence already as a cocoa farmer and doctor in the 1940s and 1950s within French colonial politics and
became president of Côte d’Ivoire at independence in 1960 (McGovern 2011, 15-17).\(^1\) But he held onto the one-party state ruled by the Democratic Party of Côte d’Ivoire (PDCI), even when Laurent Gbagbo created his own opposition party, the Ivoirian Political Front (FPI) in 1982, and went to exile in France. The end of the Cold War, which saw France calling on its former colonies to democratize, pressured Houphouët-Boigny’s cult of personality and one-man rule. At the Ivoirian first multiparty election on 28 October 1990, Gbagbo won 18% of the votes against Houphouët-Boigny’s 82% and gained nine seats in the parliament against PDCI’s 163 seats (McGovern 2011, 113).

The decades 1960-1980 were a period of economic growth, with the “Houphouëtist compromise” under which political support was maintained through the economic opportunities afforded by the benevolent hand of Houphouët-Boigny’s charismatic father figure (Akindès, Fofana and Kouamé 2014). However, the economic hardships of the late 1980s eroded the foundations, plunging Côte d’Ivoire into a “post-miracle” period concomitant with demands of democratic openness. Houphouët-Boigny was a clever patriarch, avoiding any of his heirs amassing too much political power.\(^2\) When he called on Alassane Ouattara in 1990 to be his prime minister, Houphouët-Boigny wanted to benefit from Ouattara’s relations with the international financial structures.\(^3\) His other potential heir was Henri Konan Bédié, albeit uncharismatic, but a

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\(^3\) Ouattara has been Deputy Director of the International Monetary Fund (IMF).
member of the Baoulé group, which had ruled Côte d’Ivoire since independence (Banégas 2006). A brief succession struggle ensued between Bédié, then-President of the National Assembly, and Ouattara, then-Prime Minister at Houphouët-Boigny’s death in 1993. Bédié prevailed, as provided by the constitution.

As the Ivoirian economy entered a difficult phase in the 1990s due to the fall of the price of cacao and the devaluation of the CFA currency that lost half of its value, political tensions arose as well, and the concept of ivoirité – “voirianness” – entered the debate as Ouattara was excluded from the 1995 presidential elections. Ouattara’s exclusion was done through the Parliament passing a law that was just meant to do that, in the aftermath of the power struggle at the death of Félix Houphouët-Boigny. The law stated that only Ivoirian citizens by birth and of parents who were also born in Côte d’Ivoire would be allowed to run for the presidency. However, it was said that Alassane Ouattara’s father was born in 1888 in Upper Volta (now Burkina Faso), the colony of Côte d’Ivoire did not yet exist, and yet, the Supreme Court ruled that Ouattara’s father was not an autochthone, hence Ouattara would not be allowed to run for the 1995 elections. In fact, ivoirité “gave metaphysical and pseudo-intellectual justification to an instrumentalized xenophobia whose main object was keeping Ouattara and his RDR out of politics” (McGovern 2011, 17). The concept was first used by Ivoirian intellectuals as a cultural idea in the 1970s but did not become popular until Bédié made of it a political concept that redefines nationhood and citizenship (Förster 2013, 11). And in a country

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5 On the concept of Ivoirité, see also Cutolo (2010).
where 28% of the population were immigrants, mostly from Burkina Faso, Mali, and Guinea, *ivoirité* redefined exclusionary citizenship and nationality that excluded not only the immigrants but also other Ivoirian citizens (McGovern 2011, 14). This was compounded by the fact that Côte d’Ivoire was never a melting pot, but rather a cohabitation and division of labour between the communities (Banégas 2006, 540).

The “Christmas Eve coup” of 1999 put General Robert Guéï in power, as he promised to “sweep” the political scene and leave. General Guéï promised new elections, but in October 2000, the Constitutional Court once again rejected Ouattara’s bid for the presidency on the grounds that he has held a Burkinabé diplomatic passport during his career as an official of the International Monetary Fund (IMF) and that the new Ivoirian constitution included a clause disqualifying any candidate who has held a nationality other than Ivoirian (Cutolo 2010, 528). In fact, General Guéï had introduced in the new Ivoirian constitution the infamous Article 35 that required that both parents of any presidential candidate be Ivoirian citizens and the Supreme Court – whose members were appointed by Guéï – ruled that neither Bédié nor Ouattara were allowed to run for president, which basically left only Gbagbo standing for the opposition (McGovern 2011, 18). Naturally, Gbagbo won the election as Ivoirians were faced with few options, but Guéï declared himself the winner, which led to popular uprisings, and Gbagbo was eventually sworn in as the president in 2000.

Nearly two years after Gbagbo assumed power, the next major event would rock Côte d’Ivoire: on 19 September 2002, an attempted coup and rebellion was launched from the North, initiated by soldiers and citizens that felt excluded by the *ivoirité* policies of Bédié, Guéï, and Gbagbo, successively. In his testimony before the ICC, Joel
Kouadio N’Guessan, spokesperson of Ouattara’s Rassemblement des Republicains (RDR), reaffirmed that Ivoirité, had poisoned Ivoirian politics to the extent that Gbagbo himself had said in 2005 that he wanted to “disinfect” the voters’ lists, which according to N’Guessan, meant preventing the people from the North from voting (Panaïté 2016).6 The rebel forces failed to capture Abidjan, but they occupied Bouaké, the second largest Ivoirian city, and controlled the northern half of the country, as Guillaume Soro became the political leader of the rebellion that controlled half of the Ivoirian territory from 2002 to 2010 (Soro 2005). As McGovern (2011, xviii) has pointed out, between 2002 and 2010, the Ivoirian conflict was “a situation that has been perpetually tense, rather dismal, and characterized by frequent instances of violence, but never a full-blown war.” That was until the aftermath of the 2010 post-electoral crisis blew unto a level of violence that had not been reached before.

In fact, by January 2003, following the de facto partition of the country, the Economic Community of West African States (ECOWAS) had deployed an interposition force along the “zone de confiance,” which separated the Forces Nouvelles-controlled North and the South under the Gbagbo’s government control. The two sides held the Lina-Marcoussis talks outside of Paris on January 2003 and agreed to a power-sharing mechanism, but at the same time, pro-Gbagbo militants, the Young Patriots, were staging protests in Abidjan against France (McGovern 2011, 20). Prime Minister Seydou Diarra was picked to lead the coalition government, but the Forces Nouvelles ministers would later pull out, claiming obstruction from Gbagbo. The parties signed the Accra III

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6 N’Guessan was also former Gbagbo’s minister of Human Rights, in the government of national unity, between 2006 and 2007.
accords in July 2003 and agreed to a timetable for legislative reforms, which the government failed to enact, as the Forces Nouvelles refused to disarm (McGovern 2011, 21). When Gbagbo’s forces launched a military operation to reconquer the north in November 2004, while bombing Bouaké, they hit the French peacekeepers barracks, killing nine French soldiers. France retaliated by bombing and destroying Gbagbo’s military planes and helicopters. France’s involvement in the conflict then reached a point of no return.

Faced with another deadlock, Thabo Mbeki, as the African Union mediator, invited Soro, Bédié, Ouattara, and Gbagbo to Pretoria in March 2005 and “locked them in a conference room together for three straight days” (McGovern 2011, 23). Gbagbo subsequently signed a presidential decree under his exceptional powers to suspend the Article 35 of the Ivoirian constitution, which allows Ouattara to run for the October 2005 presidential elections. After some more violence, Mbeki convened the parties to the Pretoria II round of negotiations in June 2005, and Gbagbo promulgated revised versions of law on nationality and naturalization and created an independent electoral commission. But it was clear that Côte d’Ivoire was not ready to hold elections in October 2005, as the disarmament of the Forces Nouvelles and the Gbagbo militias proved impossible; the AU and the UN then gave Gbagbo a one-year grace period within which the presidential elections needed to be held (Toh and Banégas 2006; Banégas 2006; McGovern 2011). But elections could not be held in October 2006, either. In 2007, Soro and Gbagbo entered in direct dialogue, and the Ouagadougou Accords put forward a new peace plan that made Soro the Prime Minister of a unity government and scheduled elections for 2008. However, the elections did not take
place until November 2010, five years after Gbagbo had legally finished his elected term.

The 2010 Elections: Political Violence Unleashed

Three years after the signing of the Ouagadougou Agreement that paved the way for the 2010 presidential elections, the Ivoirians seemed eager to move on from the years of permanent crisis, as shown by the voter turnout that reached 80% (Banégas 2011, 457). However, the elections opened up the bloodiest episode of violence, with a “militianization” of the state and society (Banégas 2011, 457). In fact, the year 2010 marked the end of the second – unelected – Gbagbo’s term. After having commissioned opinion polls from the French firm TNS Sofres, Gbagbo was confident that he was in a position to win the elections (Piccolino 2012, 21). However, at the first round of the presidential elections on 28 October 2010, Gbagbo and Ouattara came ahead with 38 and 32% of the votes, respectively, which led to a run-off between the two candidates since none of them had won the required threshold of 50% of the votes. Ouattara’s RDR and Bédié’s PDCI joined forces for the second round. On 2 December 2010, The Independent Electoral commission (CEI) declared Ouattara the winner with 54.1% of the votes, after a series of incidents at its headquarters.7 Those results were immediately dismissed by the Constitutional Council – led by Gbagbo’s loyalist Judge Yao Ndré – which invalidated 600,000 votes cast in the Northern region, which were Ouattara’s stronghold. The Constitutional Council thus declared Gbagbo the winner with 51.45% of the votes. This led to the unusual scenario where the country had two

7 The spokesperson of Ivoirian Independent Electoral Commission (CEI) electoral began announcing the result of the election, but a pro-Gbagbo commission member tore the paperwork off his hands in front of cameras. The video is available at <www.youtube.com/watch?v=WjaWVyhs3qA>.
presidents, each claiming his legitimacy. Both men were sworn in and formed their governments (Akindès, Fofana and Kouamé 2014, 248-249). It is worth noting that the AU, ECOWAS, the UN, and the Carter Center observers said that despite some irregularities, the elections were globally free and fair and certified that the results delivered by the CEI that declared Ouattara the winner were correct.8

In the aftermath of the elections, Ouattara at first pursued a legalistic battle, isolating Gbagbo internationally and through financial asphyxia, and most of the actors in the international community recognized Ouattara’s victory and called on Gbagbo to step aside.9 Ouattara and Soro – who was Gbagbo’s Prime Minister in the unity government and had by that time defected to Ouattara’s camp – retreated to the secured Golf Hotel in Abidjan. By February 2011, Gbagbo had found it difficult to pay his soldiers and his administration, leading to more defections (Banégas 2011, 463). In March 2011, Ouattara renamed the Forces Nouvelles the Forces Républicaines de Côte d’Ivoire (FRCI) and launched an offensive at the end of March, which ended with the capture of Gbagbo on 11 April 2011 and his subsequent transfer to The Hague.

All international justice politics are local

When, with the help of the UN and French troops, the pro-Ouattara forces unseated Gbagbo in 2011 to install Ouattara in the presidency, the newly formed government faced a domestic challenge: a large portion of the Ivoirian population that


9 For instance, the UN, the AU, the EU, and ECOWAS had all deployed a wide range of measures designed to make Gbagbo relinquish power. See Banégas 2011, p. 458.
was pro-Gbagbo viewed Ouattara as imposed by the international community (Strauss 2014). Moreover, the Ouattara administration faced also other challenges in the post-conflict era, such as restructuring the military forces, rebuilding the economic infrastructure, re-establishing social cohesion, and the question of political inclusion, including the remnants of Gbagbo’s FPI party (Strauss 2014, 182-83). The government has also put also in place a disarmament, demobilization and reconstruction program, integrating many of the former FRCI government soldiers into the FRCI. However, national reconciliation and justice remained elusive.

**The Unfulfilled Promise of Transitional Justice**

Ouattara established the Dialogue, Truth, and Reconciliation Commission (Commission Dialogue, Vérité, et Reconciliation, CDVR) on 13 May 2011, which operated until December 2014, when it submitted its final report to the president. The Ivoirian CDVR follows the long list of truth and reconciliation commissions that have been set up in many post-conflict African countries. At the onset of the CDVR, President Ouattara appointed Charles Konan Bany to head the Commission, whose mandate ranged from investigating the root causes of the crisis to documenting the crimes committed, and identifying appropriate reparations for the victims. However, the Ivoirian transitional justice mechanism downplayed legal and transitional justice, focusing mostly on collecting testimonies from the victims (Straus 2014, 184). Moreover, the Commission was marred with controversies that ultimately rendered its work ineffective, despite the 15 million euro allocated to its budget (Calame and

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10 In Africa for instances, truth and reconciliation commissions have been set up in such countries as Chad, DRC, Kenya, Liberia, Nigeria, Rwanda, Sierra Leone, South Africa, Togo, Uganda, Tunisia, etc.
Hubrecht 2015). Its mandate was to initially last 2 years, but it didn’t finish its work and submit its final report until four years later. In total, the commission heard some 70,000 testimonies and held 80 public audiences (Calame and Hubrecht 2015). Its recommendations include a call for land reform, better regional development programs, a restructuring of the national army, and the establishment of “national days of memory and forgiveness” (Calame and Hubrecht 2015). But, its final report is yet to be made public.

Among the many failures of the Commission, one could note its lack of coordination between its work and the criminal investigations conducted by other branches of the government and the ICC investigations and prosecutions. Moreover, civil society organizations complained that they were not consulted by the CDRV and the concerns of the populations were not adequately taken into account (FIDH 2014). The chair of the Commission, Charles Konan Bany was a polarizing figure, having been a prime minister under Gbagbo and an adviser to Ouattara during the 2010 presidential elections. Konan Bany did not either hide the fact that he had political ambitions, eyeing for the presidential seat. Only 2 months after submitting the final report to the president, he declared his candidacy to the 2015 presidential elections, seeking the nomination of the PDCI. For reasons that are not clear, the report he submitted to President Ouattara has not been publicly released. At the end of the CDVR mandate, the Ivoirian government announced that a special fund of 15 million euros would be established as soon as 2015 for victims’ compensation. To that effect, the president signed a decree on 24 March 2015, establishing the National Commission for Reconciliation and
Compensation of Victims (Commission Nationale pour la Reconciliation et l'Indemnisation des Victimes, CONARIV).\textsuperscript{11}

In any case, the truth and reconciliation commission had little to no effect on either truth seeking or transitional mechanisms of justice. The judiciary in Côte d’Ivoire remains partial under Ouattara, still carrying a weak accountability performance (Bovcon 2015). And as Bovcon (2015, 186) contends, in Ivoirian political history, “laws and courts were used by political power-holders to buttress and legitimise their authority.” For instance, Bedié’s push for a new electoral law through the national assembly in December 1994 is one of the best examples of abuse of law for the purpose of political regime survival (Bovcon 2015, 187). In 2003, Gbagbo wrote an ad hoc declaration accepting ICC jurisdiction as a way to counter Soro’s rebel troops. Ouattara confirmed that declaration in 2011 as a way to outsource Gbagbo to the ICC.

Côte d’Ivoire and the ICC

In the aftermath of the November 2010 elections, up to 3,000 civilians were killed, most of the abuses imputable to the pro-Gbagbo forces and militias (HRW 2011). However, pro-Ouattara forces – renamed \textit{Forces Républicaines} when Ouattara launched an offensive to take over the country – also perpetrated large scale atrocities (HRW 2011). For instance, Human Rights Watch (2011, 5) investigation finds,

In Duékoué,\textsuperscript{12} the Republican Forces and allied militias massacred hundreds of people, pulling men they alleged to be pro-Gbagbo militiamen out of their homes and executing them unarmed. Later, during the military campaign to take over and consolidate control of Abidjan, the Republican

\textsuperscript{11} See Commission Nationale pour la Réconciliation et l'Indemnisation des Victimes des crises survenues en Côte d'Ivoire (CONARIV) http://conariv.ci/

\textsuperscript{12} Duékoué is a city in western Côte d'Ivoire.
Forces again executed scores of men from ethnic groups aligned to Gbagbo—at times in detention sites—and tortured others. Therefore, there are grounds to believe that both pro-Gbagbo and pro-Ouattara forces committed war crimes — and likely crimes against humanity, which fall within the material jurisdiction of the ICC (HRW 2011, 5).

Although Côte d’Ivoire did not become a state party to the Rome Statute until February 2013, it had already accepted ICC’s jurisdiction by lodging an ad hoc declaration during both Gbagbo and Ouattara presidencies. Through a declaration under Article 12(3) of the Rome Statute, Côte d’Ivoire accepted the ICC’s jurisdiction to investigate crimes that fall within the Court’s material jurisdiction, namely, genocide, war crimes, and crimes against humanity. Since assuming power, Ouattara has expressly invited the ICC prosecutor to investigate crimes in Côte d’Ivoire and stated an understanding and desire for the ICC to prosecute both sides’ crimes. However, Ouattara has also asked the court to restrict the investigation’s timeframe, limiting it to the post-electoral violence.

Côte d’Ivoire first accepted the ICC’s jurisdiction in a declaration dated April 18, 2003. Under Article 12(3) of the Rome Statute, Gbagbo’s then-Minister of Foreign Affairs, Mamadou Bamba, indicated that the government “accepts the jurisdiction of the Court for the purposes of identifying, investigating and trying the perpetrators and accomplices of acts committed on Ivorian territory since the events of 19 September 2002.” It is clear that the Gbagbo regime wanted at the time for the ICC to investigate the events stemming from the 2002 attempted coup and subsequent rebellion that divided the country in half. However, the ICC prosecutor failed to seriously investigate and the file remained dormant. After the 2010 elections that saw the defeat of Gbagbo
and his refusal to relinquish power and the post-electoral violence that ensued, then
President-elect Ouattara sent a new letter to the ICC on December 14 2010 in which he
“confirms the declaration of 18 Avril 2003” and he engages Côte d’Ivoire “to fully
cooperate and without delay with the ICC, especially regarding all the crimes and
abuses perpetrated since Mars 2004.”

**Ad Hoc Declarations to The ICC Jurisdiction by Non-States Parties**

More than 85 states have yet to ratify the Rome Statute. It follows then that the
relationship between these states and the ICC – which investigates and prosecutes
crimes that are of concern to the international community – matters a great deal. How
does the ICC exercise jurisdiction over the nationals or over territories of non-state
parties? In other words, what are the obligations if any of those states towards the
ICC? As Chapter 4 has made clear, states that are non-parties to the ICC can still be
brought within the Court’s jurisdiction through a UN Security Council resolution. The ICC
may also have jurisdiction over nationals of non-state parties if the state in which the
crime was committed is a party to the ICC or if a national of a state party commits a
crime in the territory of a non-state party, as outlined by Article 12(2) of the Rome
Statute.

Non-States Parties to the Rome Statute can lodge ad hoc declarations with the
ICC Registrar, as outlined in Article 12(3) of the Statute. Under such declaration, states
agree to cooperate with the ICC, an obligation they would not otherwise been subjected
to because of their non-member status. Moreover, declarations under Article 12(3) give

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13 See the referral letter here: http://www.icc-cpi.int/NR/rdonlyres/498E8FEB-7A72-4005-A209-C14BA374804F/0/ReconCPI.pdf
the ICC jurisdiction that the Court may not have had otherwise. Much like the state referrals under Article 14 of the Rome Statute, there are reasons to believe that ad hoc declarations by non-States Parties under Article 12(3) will be used more frequently in the future, and in ways that were not envisioned at the time of drafting the Rome Statute. The rationale for Article 12(3) is to extend the scope of the court’s jurisdiction by offering states an option to accept it on an ad hoc basis without having to accept the Rome Statute (Stahn, El Zeidy and Olásolo 2005, 422). The implications of such use is that Article 12(3) may be used “as a tool to influence the political landscape and balance of power of a society in transition, or to eliminate political opponents in the context of an ongoing internal armed conflict” (Stahn, El Zeidy and Olásolo 2005, 423). To this date, Uganda, Côte d’Ivoire and Palestine have made ad hoc declarations to the ICC under Article 12(3).  

Côte d’Ivoire’s Ad Hoc Declarations under Article 12(3)

Côte d’Ivoire signed the Rome Statute on 30 November 1998, but it did not ratify it until 15 February 2013. Yet, in 2005, while it was not a state party, Côte d’Ivoire lodged a declaration with the Court by which it accepted the Court’s jurisdiction for crimes committed in its territory since 19 September 2002, which at the time had gone unnoticed by international theory and practice (Stahn, El Zeidy and Olásolo 2005, 421). The Registrar of the ICC confirmed that it had received a declaration under article 12 (3) from the government of Côte d’Ivoire. A year later, in 2006, the Prosecutor said that he

14 The Minister of Justice of the Palestinian Authority lodged a declaration under Article 12(3) of the Rome Statue on 21 January 2009, following an Israeli campaign in Gaza. The Ugandan declaration is in support of the self-referral that Uganda made against the LRA. The declaration extends the temporal jurisdiction for the ICC, given that Uganda ratified the Rome Statute on 14 June 2002, and it entered in force with respect to Uganda on 1 September 2002. The declaration gives the Court jurisdiction over crimes committed since the entry in force of the Rome Statute, on 1 July 2002.
would send a mission to Côte d'Ivoire “when security permits” (Schabas 2010). And as Schabas mentions, in April 2009, the Deputy Prosecutor said that the situation in Côte d'Ivoire was “under analysis” the Prosecutor told the Assembly of States Parties in November 2009 that “preliminary examination” was underway. However, this was not the first instance of lodging of such declaration. Uganda had made a similar declaration, although under different circumstances. However, whereas in Uganda the OTP had moved swiftly, very little was done in Côte d'Ivoire during the early years of the declaration, and the situation had not been assigned to a Pre-Trial Chamber, which means there was no oversight of the OTP’s work in that situation.

During the post-2010 election crisis, and seven years after President Gbagbo “invited” the ICC, President Ouattara renewed the ad hoc declaration to the ICC declaration on 14 December 2010, and again on 3 May 2011, modifying the temporal jurisdiction of the investigation. In the December 2010 letter, Ouattara had promised cooperation with ICC investigations into “all crimes and acts of violence committed since March 2004.” Five months later, in confirming his previous request, Ouattara asked the ICC to investigate “the gravest crimes committed since November 28, 2010.” These dates are important as they aim to focus on the post-electoral crisis, thus putting the burden on the Gbagbo forces, and excluding the 2002 rebellions and subsequent conflict, in which pro-Ouattara and Guillaume Soro forces controlled the northern part of the country and faced the loyalist Ivorian armed forces.

15 In fact, Uganda became a state party in September 2002, and submitted a state referral under Article 14 to the Court on 16 December 2003. In conjunction with the state referral, Uganda lodged also a declaration accepting the court jurisdiction since the date of entry into force of the Rome statute (Freeland 2006, 212).
Following Ouattara’s letters, the ICC Prosecutor submitted a request to the Pre-Trial Chamber II to open an investigation, limiting the proposed period under investigation to the post-election period, which is an indication of a desire to focus on crimes committed following the 2010 post-electoral crisis (HRW 2011). The fact that Prosecutor Ocampo issued a statement on 21 December 2010 stating that “those leaders who are planning violence will end up in The Hague” was viewed as an attempt that undermines the political resolution of the crisis. As McGovern contends that “with one sentence, Moreno-Ocampo ensured that Gbagbo would reject any negotiated solution and instead fight to the end” (quoted in Bellamy and Williams 2011, 837).

When the ICC at first agreed with Ouattara’s request to limit the temporal scope of its investigation to the post-electoral crisis starting on 28 November 2010, it raised suspicions regarding the impartiality of the Court. Critics pointed to the fact that “[Ouattara] may have used the ICC as a tool against his political opponents” (Bovcon 2014, 193). It is because the post-electoral crisis that started in November 2010 is widely viewed as the result of Gbagbo losing the election and refusing to relinquish power. From that prism then, and with the support of most of the international community, Ouattara forces are viewed as fighting the good fight to unseat Gbagbo, which is the will expressed by the majority of Ivoirian voters. Therefore, an ICC

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16 The ICC decided to extend the temporary scope of its investigation to the period between 19 September 2002 and 28 November 2010.
investigation that focuses solely on the aftermath of the elections would fail to take into consideration the decade of civil conflict that punctuated Ivoirian political history.\footnote{Matt Wells of Human Rights Watch, for example, pointed to the ICC’s “unfortunate early decision to ‘sequence’ its investigation” by first looking only at the crimes committed by the Gbagbo side (Bovcon 2014, 193).}

To this point, it remains to be seen whether individuals from the pro-Ouattara camp will be either investigated or prosecuted by either the ICC or Ivoirian domestic courts. Key individuals from the Ouattara camp identified by Human Rights Watch reports to be implicated in human rights abuses during the crisis include Captain Eddie Médi, commander of the Republican Forces March 2011 offensive, Commander Fofana Losséni, overall commander of the Republican Forces March offensive in the west, Commander Chérif Ousmane, head of the Republican Forces operations in Yopougon during the final battle of Abidjan, and Commander Ousmane Coulibaly, the longtime Forces Nouvelles zone commander in Odienné (HRW 2011).\footnote{From the Gbagbo camp, HRW (2011) has identified Gbagbo, Blé Goudé, General Philippe Mangou (head of armed forces under Gbagbo), General Guiai Bi Poin (head of the security force unit CECOS), and General Bruno Dogbo Blé (head of the Republican Guard).} Domestically, military and civilian prosecutors had brought charges against at least 118 Gbagbo allies whereas no member of the Ouattara side or Republican Forces has been arrested or charged for crimes committed during the conflict (HRW 2011, 8).

**ICC’s Judicial Intervention in Côte d’Ivoire and Its Aftermath**

In the everlasting peace vs. justice debate, Akhavan (2009) argues that judicial intervention is more likely to prevent atrocities than to impede peace. In Côte d’Ivoire, Akhavan (2009, 624) writes, “the mere threat of an ICC investigation contributed to preventing escalation of an inter-ethnic war by putting an end to state-sponsored
incitement to hatred.” He adds, “In this instance, mere threats of ICC prosecutions may have resulted in the termination of hate broadcasts on the state-sponsored radio at a crucial point of escalating tensions” (Akhavan 2009, 637). However, the impact of Prosecutor Ocampo’s statements of the likelihood of ICC’s intervention in Côte d’Ivoire may actually have been marginal. As McGovern (2009) argues, the lessening of civilian abuses was due more to Ivoirian conceptions of justice than the pressure from external threats of prosecution. In fact, local political actors were aware that the blame of war crimes or crimes against humanity would strip them from their legitimacy as political actors, which led to some level of self-regulation. Discussions about human rights abuses has been political currency as much as debates about citizenship, ever since 2000 because Ivoirian politicians have realized the usefulness of such accusations against their opponents (McGovern 2009, 70). Gbagbo’s invitation to the ICC in 2002 was an attempt at recruiting international allies to cast his enemies as illegitimate actors (McGovern 2009, 73). The Ivoirian conflict – with its episodic outburst of violence over a decade that culminated in the post-electoral crisis – hasn’t blown into a widespread civil conflict; it was more like the South American dirty wars, with “both parties [working] hard to maintain the mantle of respectability while using a noxious mix of legalistic wrangling, persistent intimidation, and occasional spasms of extreme violence to achieve their ends” (McGovern 2009, 84).

**Gbagbo Goes to The Hague: A Narrative of the Politics of Crisis**

Laurent Gbagbo became the first former head of state to stand trial before the ICC, in The Hague. Gbagbo and his former ally Blé Goudé – who was the leader of his party’s youth wing and nicknamed the “street general” – each face four counts of crimes against humanity for their alleged role in the violence that followed the 2010 presidential
elections. Following the Ouattara forces final assault on the presidential palace in Abidjan on 11 April 2011, Gbagbo was captured and transferred to a prison in Bouaké, from where he was later handed over to the ICC on 30 November 2011. Blé Goudé was transferred to ICC custody in The Hague in March 2014. The ICC Trial Chamber I decided to join the two cases into a single trial because of their similarity.\textsuperscript{19} The case of the prosecution relied on the idea that Gbagbo used the armed forces and other youth militias to target Ivoirians that were perceived to be Ouattara supporters, mainly Ivoirians from the north, Muslims, and others labelled as “Ivoirians of West African descent.” The prosecution had identified 38 incidents that took place in or around Abidjan to argue that pro-Gbagbo attacks were widespread and systematic and five out of those 38 incidents are the focus of the charges against Gbagbo and Blé Goudé (Maliti 2016). At the opening statement of the trial, Prosecutor Bensouda said that she will prove to the court that Gbagbo and Blé Goudé were responsible for the deaths of 142 people and the rape of 24 girls in Abidjan. She added that the victims were killed and raped in five incidents between November 27, 2010 and April 12, 2011 (Maliti 2016a).

Gbagbo’s lead lawyer, Emmanuel Altit, described the trial as “essential” for history and the people of Ivory Coast (Maliti 2016b). Bensouda said at the opening of the trial, “We are here to send a very strong message to all those who plot to take power and maintain themselves in power … they must realise that they must and will be held to account in accordance with the provisions of the Rome Statute” (Maliti 2016a).

\textsuperscript{19} See the Trial Chamber I decision https://www.icc-cpi.int/Pages/record.aspx?docNo=ICC-02/11-01/15-1&ln=en
Yet, as the proceedings in the courtroom unfold, it is clear that the all actors involved in the trial deployed political narratives that find their precedent in the theatres of national politics in Côte d’Ivoire (Ba 2015). For instance, during the audience at the Confirmations of Charges at the ICC, Gbagbo made a statement in which he focused on Ivoirian domestic politics to make his claims that he followed the rule of law and upheld the constitution of his country. For Gbagbo, the ICC proceedings cannot be dissociated from the politics of Côte d’Ivoire. In that regards, he states,

Madam the Prosecutor has said a sentence that shocked me a bit, when she said that we are not here to discuss who won the elections and who did not win. But we cannot talk about, we cannot discuss the post-electoral crisis without discussing how the elections unfolded. Who won the elections? Because it is the one who did not win that has caused the troubles.

Gbagbo discussed the elections, noting that when he asked for the recount of the polls, he meant it, and that the court documents show that in Bouaké 100,000 votes were added to “[his] adversary.” The heart of the matter is the elections, Gbagbo argued. “When we were attacked in 2002,” he claimed, “I did what was needed because I never believed that Côte d’Ivoire could solve its problems through war.” He said that he had always favoured the dialogue, which is why he travelled all over Africa for peace talks with the rebellion. He gives the examples of the peace negotiations such as Lomé talks, Marcoussis-Kleber, Accra I, Accra II, Accra III, Pretoria I, and Pretoria II. He says that it is in Pretoria in 2005 that he asked President Thabo Mbeki to help him


21 Bouaké is the second largest city of Côte d’Ivoire, located in Ouattara’s stronghold.

22 This is a reference to the failed coup attempt against Gbagbo in September 2002, which resulted in the portioning of the state, the rebel forces occupying the northern part of Côte d’Ivoire.
find a “legal solution for Alassane Ouattara to be a presidential candidate.” And the legal solution was an amendment of the Ivoirian constitution by introducing Article 48, which he says “is similar to Article 16 of the French constitution. It gives extraordinary powers to the president, and that day, I took Article 48 of the Constitution, and I allowed Ouattara and Bédié to be candidates.”

Moreover, Gbagbo’s narrative at the ICC veers into a reflection on the meaning of a vote and democracy in the African context. Asking a rhetorical question, Gbagbo wonders how else a country like Côte d’Ivoire would pick a head of state, given the ethnic fractionalization. For him, democracy helps Côte d’Ivoire because it erases the ethnic fractionalization and allows each citizen one vote. But for Gbagbo, democracy is not limited to elections; it requires also the respect of the constitution. He asserts,

We need democracy, Madam, but democracy is not only the vote...It’s also who is allowed to announce the results of the votes. When at night one goes and pick up the president of the electoral commission, and take him to the electoral headquarters of a candidate, and invite a foreign TV channel, tell him to speak and record him, and broadcast it the following morning, it is not very democratic. That is not democracy. Democracy is the respect of the text, starting with the constitution. He who does not respect the constitution is not democratic. Madam, it is because I respected the Constitution that they want to bring me here [at the ICC]. So, I’m here but I trust you, because I wish that all Africans understand that the salvation of the African states lies in the respect of the constitutions that we choose, and the laws that stem from them.

The ICC stage is also a lieu of deployment of Gbagbo’s political legalist approach during the decade of crisis in Côte d’Ivoire. Gbagbo’s discourse at the ICC is consistent with the political legalist approach that he has adopted in Côte d’Ivoire since the beginning of

23 Article 16 of the French Constitution of the Fifth Republic was introduced in 1958 and gives “extraordinary powers” to the President in times of national crisis. See http://www.senat.fr/evenement/revision/texte_original.html
the crisis. One can easily notice the similarity between Gbagbo’s lecture before the Court about democracy and the need for constitutional order and his speech at his swear-in ceremony at the height of the post-electoral crisis, after the Constitutional Council had declared him the winner. The opening statement at his oath ceremony was,

Today, I understand better why there are so many crises in Africa ... What I would like to stress today is that these crises come out also from the fact that people are outside the law. People do not like to respect the law and the procedures that stem from it. There is no strong State, no strong Republic without laws and procedures ... The only strong Republic is the one that stands on legally established rules. Since I have become president, I have realized that all the crises that we have known have come out from the non-respect of the law, of the jurisdiction and of the procedures that this law produces. However, we cannot claim that we are building democracy and put aside the law and the procedures stemming from it. (Fraternité Matin, 6/9/2010, cited in Piccolino 2014, 46)

As Piccolino (2014) shows, the words law, legality, rules, and procedures, “recur in an almost obsessive fashion in this speech, especially in connection with democracy.” In another speech, Gbagbo insisted that “all the troubles that we are witnessing today in Côte d’Ivoire have come out from the refusal of my rival to abide by the laws, the rules and the procedures applicable in our country” (Gbagbo 2010, cited in Piccolino 2014, 47). For Gbagbo, the rule of law and the respect of the democratic procedures as outlined in the constitution are at the heart of the Ivoirian crisis. However, as Piccolino (2014, 54) argues, “The manipulation of democracy in Côte d’Ivoire has taken place to a large extent on the legal and constitutional terrain, through the manipulations of the key rules of eligibility and voting rights.” In fact, Bédié was the first to manipulate the

24 It is worth noting that no member of the diplomatic corps attended Gbagbo’s swearing in ceremony on 4 December 2010, at the presidential palace. But he still felt the need to cloth his claim of legitimately elected president with an enactment of a swearing-in ceremony before the Constitutional Court. See Piccolino (2014, 45).
constitution to prevent his rival Ouattara from running by introducing the “born from an Ivoirian mother and father” clause in the constitution. Guéï’s new constitution passed through referendum included Article 35 that was so vague that it was used to disqualify 12 candidates out of 17 from the 2000 elections (Piccolino 2014, 25).

Moreover, Gbagbo has been quick to represent the post-electoral crisis as a conflict between “legalists” and “those who have taken the road of illegality.” As Banégas (2011, 429) contends, Gbagbo relies on the Constitutional Council to give himself legitimacy in the post-electoral crisis, which is a way for him to claim the legalistic approach, which “has undeniable performative effects, compelling agents of the state (in particular the police) to respect ‘institutional order’ on pain of arrest for sedition.” As such, Gbagbo’s discourse “combined the legalistic exaltation of state sovereignty, a fierce anticolonial nationalism, and religious overtones in portraying the Ivoirian crisis as a ‘war of second independence’ against a wide range of international enemies” (Piccolino 2012, 1). From Gbagbo’s perspective, such enemies included first and foremost France. As his lawyer Emmanuel Altit asserted, the Gbagbo - Blé Goudé trial has a “fundamental” relationship to France (Panaïté 2016).

The ICC as A Political Actor

Not only have the Ivoirian state and its political actors displaced the Ivoirian political arena to The Hague courtroom, the ICC also has become a political actor whose intervention has affected the politics of Côte d’Ivoire. The ICC’s judicial

25 Gbagbo said, “I remind you that the IEC is an administrative authority, while the Constitutional Council is the highest jurisdiction of Côte d’Ivoire. The two institutions are not comparable, and it is illegitimate to compare them. Their decisions are of a different nature. They have neither the same foundation nor the same impact… I have waited for the voice of law to be expressed… They want to scare us, but they cannot expect that the legalists will surrender to those who have taken the road of illegality” (quoted in Piccolino 2014, p. 61).
intervention in the Ivoirian crisis, dating from the early years of the rebellion where it failed to take action after Gbagbo’s first invitation in 2003 to the issuance of warrants for the arrest of Laurent Gbagbo, Simone Gbagbo, and Charles Blé Goudé in 2011 is a major element in the political discourse and action in Côte d’Ivoire. Moreover, the ICC will remain a main political actor in Côte d’Ivoire for the years to come because any action it takes – or fails to take – will still resonate with the state and its political affairs. This section first shows the ways in which the ICC’s one-sided investigations and prosecution in Côte d’Ivoire – to date – play into a political agenda, just as the failure to act at Gbagbo’s request in 2003. And when the OTP decided to act in 2011, it used a “sequencing approach”, which played into Ouattara’s strategy of “outsourcing” Gbagbo to the ICC, while at the same time playing a double-jeu regarding its refusal to extradite Simone Gbagbo to The Hague.

**The ICC’s One-sided Prosecution and Sequential Approach in Côte d’Ivoire**

More than five years have passed since the end of the political crisis in Côte d’Ivoire. To this day, the ICC investigations have focused on the Gbagbo side of the conflict. All the three individuals that have been indicted by the ICC prosecutor come from the pro-Gbagbo camp. As Eric-Aimé Semien, director of the Ivorian Observatory of Human Rights, noted, the ICC prosecuted only one side, even though “All the observers noted that the different crimes were committed from both sides... And from this point of view, the ICC is disappointing expectations. Because what people want is that the ICC pursue prosecutions against the two different sides” (Birchall 2016). At a press conference before the start of the Gbagbo and Blé Goudé trial, Prosecutor Bensouda was asked about the one-sided investigations and prosecutions in Côte d’Ivoire. She responded that it was due to a lack of resources, and that in in 2015 she has intensified
investigations in the pro-Ouattara camp, without giving any more information (Maliti 2016). Although the OTP claims that its investigations in Côte d’Ivoire were not one-sided but it merely used a sequential approach\textsuperscript{26} – meaning focusing on the Gbagbo side, and shifting later to the Ouattara side – it remains that such strategy in itself poses many problems.

In Kenya for instance, the Prosecutor went after individuals from both camps in the post-electoral crisis, which ended up having the effect of leading the camps to join forces and band together against the ICC. Uhuru Kenyatta and Samuel Ruto joined forces to run for presidential elections on the same ticket, campaigning on an anti-ICC platform, which helped them win the elections. Later, using the Kenyan state apparatus to counter the Prosecutor’s case against them, Kenyatta and Ruto won the legal battle by having the case against the former dropped, and the latter terminated during trial. Therefore, this explains the cautious approach the OTP took in the Ivoirian case by prosecuting the Gbagbo side, with the knowledge that they could count on the Ouattara’s administration cooperation. However, many critics pointed out that the Ouattara camps was also accused of having committed atrocities. The ICC response was that the investigations and prosecutions were not one-sided, but they had opted for a sequential approach. That meant that at some point, investigations in the Ouattara camp and eventually prosecution were upcoming. However, as the Legal Officer of the Open Society Justice Initiative pointed out, “How do we determine sequencing? When does the sequencing come to an end? How do we ensure that sequencing is not

\begin{footnote}{\textsuperscript{26} Interviews with Dr. Rod Rastan, Legal Advisor in the ICC Office of the Prosecutor and Jennifer Schense, International Cooperation Adviser in the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor. The Hague, May 2014\}}
perceived as just going after one side? That is what we have seen in Côte d’Ivoire.”

Rod Rastan, Legal Adviser in the ICC’s Office of the Prosecutor responds that

Côte d’Ivoire lodged a declaration under Gbagbo and Ouattara afterwards confirmed the same. But we said that we [the Office of the Prosecutor] would investigate both sides. So far we investigated only the Gbagbo side, but we said we will also investigate the pro-Ouattara side. So at some point, the fact that Côte d’Ivoire lodged the declaration would be irrelevant, because we will investigate both sides.

Rastan argues that just because a state self-refers to the ICC doesn’t mean that it can dictate the conduct of the OTP. At most, that just assures that state’s cooperation for the investigations. Rastan’s explanation for the adoption of the sequential approach in Côte d’Ivoire and his response to criticism is that

In Kenya we went after both groups at the same time, and basically both cases had huge difficulties – the two sides cooperated together to block the ICC. We could have gone one case after the other, but if we do one case before the other, people would say the OTP is biased towards one side because they wouldn’t see the result of the other side until after one or 2 years. So we decided to go after the both sides at the same time. In Kenya, we thought that would be the best solution, it didn’t materialize in anything better. In the DRC we did the sequencing approach, Lubanga first, and then Katanga, also it wasn’t ideal but that’s what we did. In Côte d’Ivoire we decided to go after the pro-Gbagbo side first because it’s a lot more readily available, most of the perpetrators in the Gbagbo side were already arrested or available to us. We had access to the presidential palace and all the files from the Gbagbo regime, so easy to build up a quick case. We considered that we would do the allegations against the Ouattara side in a subsequent phase, which would involve much more

27 Interview with Alpha Sesay, Legal Officer for Open Society Justice Initiative, The Hague, May 2014.


29 Interview with Dr. Rod Rastan, Legal Advisor in the ICC Office of the Prosecutor. The Hague, May 2014

30 Interview with Jennifer Schense, International Cooperation Adviser in the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor. The Hague, May 2014
forensics. The criticism now can be why it’s taking so long? That’s fair enough, but we have always been committed to doing it.  

The ICC Failure to Act at Gbagbo’s Request in 2003

However, the perception of political bias in the ICC intervention in Côte d’Ivoire can even be traced to the period prior to the investigation and prosecution of the Gbagbo camp. In fact, after Gbagbo submitted the ad hoc declaration to the ICC in 2003, the prosecutor initiated a preliminary examination, which is the first step before a full investigation is launched. However, the Côte d’Ivoire situation remained just at the preliminary examination phase. As Alpha Sesay, Legal Officer for the Open Society Justice Initiative in The Hague said,

In various meetings, we [civil society organizations] kept asking the prosecutor [Ocampo]: ‘what’s happening to Côte d’Ivoire? He said “oh we are still looking [into it]. Then of course we move now to the [2010] elections that took place recently. Of course for all of us who follow the elections, we knew that Ouattara was the candidate of the West, then Gbagbo lost elections and stupidly [he] decided to hang on power... Immediately the prosecution changed [from preliminary examination] to investigations! You understand? So, somebody on the African continent who is critical of the Court, how is that person not going to accuse the court or the prosecutor as acting as political instruments? You understand? So, those are… very clear blunders that [the prosecutor] made. 

It is clear that the Côte d’Ivoire file remained dormant in the OTP’s cabinets from 2003 to 2010, when Gbagbo was in power and had called in the ICC to investigate the pro-Ouattara rebellion. Then, after the 2010 elections, the swiftness with which the OTP launched a full investigation before issuing warrants for the arrests of Laurent and Simone Gbagbo and Blé Goudé lends itself into criticism of lack of fairness and

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31 Interview with Dr. Rod Rastan, Legal Advisor in the ICC Office of the Prosecutor. The Hague, May 2014

32 Interview with Alpha Sesay, Legal Officer for Open Society Justice Initiative, The Hague, May 2014.
impartiality. That, coupled with the one-sided investigations and the sequential approach to prosecution in Côte d’Ivoire all play into the hands of the Ouattara administration, which also selectively engaged in cooperation with the ICC when it suited its agenda.

The Curious Case of Simone Gbagbo, or Ouattara’s Double-jeu

To-date, the ICC prosecution in Côte d’Ivoire involves three individuals: Laurent Gbagbo, Blé Goudé, and Simone Gbagbo, former First Lady of Côte d’Ivoire. Simone Gbagbo is charged as an alleged indirect co-perpetrator, for four counts of crimes of humanity, namely, murder, rape and other sexual violence, persecution, and other inhumane acts. The warrant for her arrest was issued on 29 February 2012, and unsealed on 22 November 2012. But, unlike Laurent Gbagbo and Blé Goudé, Simone Gbagbo is not in ICC custody, Côte d’Ivoire having refused so far to surrender her to the Court (Ba 2015). The Ouattara government had introduced before the ICC a challenge to the admissibility of the case against Simone Gbagbo, seeking to try her before Ivoirian courts. However, ICC Pre-Trial chamber I rejected the Ivoirian challenge on 11 December 2014. When challenging the admissibility of a case before the ICC, the state must prove that it is able and willing to try the case before it domestic courts, and the domestic prosecution must concern the same person and same conduct that the ICC is prosecuting. In its rejection to the admissibility challenge, the Pre-Trial Chamber judges argued that “Côte d’Ivoire’s domestic authorities were not taking tangible, concrete and progressive steps aimed at ascertaining whether Simone Gbagbo is criminally responsible for the same conduct that is alleged in the case before the Court” (ICC Pretrial Chamber I 2014). The Court reasoned that whereas the ICC OTP intended to prosecute Simone Gbagbo for crimes against humanity, the Ivorian court convicted her
for the ordinary domestic crimes of disturbing the peace, organizing armed gangs, and undermining state security (Heller 2016). By doing so, the ICC chamber reminds the government of Côte d’Ivoire of its obligation to surrender Simone Gbagbo to the ICC. The ICC’s Appels Chamber reasoned in its ruling that the Simone Gbagbo case is admissible before the ICC.

However, the Ouattara regime has instead opted to try Simone Gbagbo in Côte d’Ivoire, where in March 2015 she was convicted of undermining state security and disturbing the peace during the 2010 electoral crisis by distributing arms to pro-Gbagbo militias. She was subsequently sentenced to 20 years in prison, alongside some other 82 former Gbagbo allies who received various sentences (Reuters, 2015). Because Simone Gbagbo was tried and convicted in Abidjan for crimes against the state, the Ivoirian authorities initiated a second trial against her, this time, for crimes against civilians, namely, crimes against humanity, which started in May 2016. These new charges against Simone Gbagbo, which mirrors the charges she would face at the ICC, were initiated by the Ouattara government as a response to the rejection of the admissibility challenge that the ICC had rejected.

Despite the ICC’s call for the extradition of Simone Gbagbo, President Ouattara has vowed that he will not send any more Ivoirian to The Hague. Such decision underscores not only the inconsistent approach of the Ouattara administration towards the ICC, but also underlines political calculations that underpin the decision not to send Simone Gbagbo to The Hague.33 Moreover, Ouattara’s decision that no more Ivoirian

will be sent to The Hague deals a blow to the ICC prosecutor’s assertion that it is investigating the pro-Ouattara side. This clearly signals to the OTP that it cannot count on the Ivoirian state’s cooperation and compliance for its investigation and eventual prosecution of pro-Ouattara individuals. To that effect, it is clear that as far as the Ouattara camp and current Ivoirian government is concerned, the ICC’s work in the Côte d’Ivoire is done, and the case is closed with the Gbagbo-Blé Goudé trials. If anyone benefited from Gbagbo and Blé Goudé’s extradition to The Hague, it is the Ouattara’s camp and its allies. Ouattara simply outsourced a political problem to the ICC, in the aftermath of the Ivoirian electoral crisis.

**Conclusion: Outsourcing Justice to The ICC**

The fact that the Ouattara administration was quick and eager to transfer Gbagbo and Blé Goudé to The Hague for them to face justice at the ICC while at the same time refusing to abide by the ICC ruling to extradite Simone Gbagbo is symptomatic of political calculations transposed to international justice, which is in turn used to address domestic political questions. There is little doubt that Ouattara and his camp have a lot to gain in terms of political stability by quickly outsourcing the trials of Gbagbo and Blé Goudé to The Hague. Getting rid of political opponents who still have a large political base and still wield a lot of political and social capital is a safer and smarter strategy for the Ouattara’s administration rather than putting them to trial at home. As Kersten (2016) argues, “there is the issue of outsourcing — where a state chooses to simply and (almost) immediately flip its detainees to the ICC in order to get rid of them and ensure that they are no near their former bases of power.” In order to consolidate his political power, Ouattara found that his safer bet was to let the ICC handle his major political enemies. He was not the first one to use the ICC to outsource problems at home, as
discussed in the previous chapters. Self-referrals, as used by Uganda, DRC, and CAR are typical examples of outsourcing, although Ouattara’s government was the first one to use the ICC to handle political opponents turned enemies, rather than rebels or warlords.

In any case, Ouattara’s outsourcing option was successful, especially given the swiftness with which the ICC’s OTP acted in the initial phase of the investigation, having issued a warrant for the arrest of Gbagbo only within 2 months after it opened its investigations. Moreover, despite the protracted civil conflict that took hold of Côte d’Ivoire for almost a decade, Gbagbo and Blé Goudé are only charged for the involvement in five events that occurred in Abidjan in the aftermath of the 2010 elections. To date, no one else has been charged for other crimes committed outside of the area or time frame, which does not reflect the true scope of the post electoral violence (HRW 2015, 10).
CHAPTER 7
INTERNATIONAL JUSTICE IN A WORLD OF STATES

International justice has as much to do with the vagaries of global politics and our own moral strength as it does with treaties, courtrooms, prosecutors, judges and defendants.

—David Scheffer
All the Missing Souls¹

Introduction

Earlier this year, 14 years after it came into existence, the ICC moved its headquarters into its permanent premises, located in the dune landscape between the city of The Hague and the North Sea. The King of the Netherlands presided over the inauguration ceremony, during which the UN Secretary General Ban Ki-moon said that the new home represented a “milestone in global efforts to promote and uphold human rights and the rule of law.”² The president of the Assembly of States Parties (ASP), Senegalese Justice Minister Sidiki Kaba remarked that “It is a historic day but also a day of hope for all victims of mass crimes in the world,” and ICC President Judge Hernandez announced that the Court was “here to stay” (Charania 2016). Since it started operating in 2002, the ICC has achieved four convictions – former Congolese rebel leaders Thomas Lubanga and Germain Katanga, former DRC Vice-President Jean Pierre Bemba, and the guilty plea from Ahmad al Faqi for the destruction of religious edifices in Mali.³ The ICC has also opened its first investigation on a situation


² See “ICC Permanent Premises officially opened by His Majesty King Willem-Alexander of the Netherlands,” 20 April 2016. Available at http://www.icc-permanentpremises.org/news

³ Al Faqi’s trial concluded in August 2016.
outside of the African continent, in Georgia. There are also 9 situations that are currently at the preliminary examination phase. And the crime of aggression will likely become the fourth type of crimes that comes under ICC’s jurisdiction in the next few years when the Kampala Amendments gather enough ratifications, which will widen the material jurisdiction of the Court and open a new chapter in its work.

It is true that the ICC has achieved some successes, but it has also faced drastic failures, over its short mandate. Its work is still constantly in flux, as it is still setting its mark on global politics and conflict processes. As Carsten (2015, v) aptly put it, for the ICC, there are still many “knowns”, but also significant “known unknowns” and “unknown unknowns.” It still stands, despite critics and shortcomings, partly as a testament to hope and partly as a symbol of deception (Stahn, 2015a). The critiques that the ICC has faced have evolved in cycles (Stahn, 2015a), diagnosed as a “teething problem” at the opening of the Court (Cassese 2006), there were issues of timing and delayed action in Darfur, the conduct of investigations in Sudan, and mistakes made in the Ugandan referral. Among the many shortcomings of the ICC, one can also cite the fact that its performance is judged poor in comparison to ad hoc tribunals (Stahn 2015). The record shows also that the ICC so far lacks a deterrence capability. Preliminary examination cases have grown significantly over the years, some of them having

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4 This investigation concerns the 2008 conflict between Russia and Georgia regarding South Ossetia.

5 The ongoing preliminary examinations cover Afghanistan, Burundi, Colombia, Guinea, Iraq/UK, Nigeria, Palestine, the Comoros Vessels, and Ukraine.

6 As Professor Dov Jacobs said, “The Office of the Prosecutor has investigated Darfur without ever setting a foot there. I wonder how did they do it.” Interview with the author, The Hague, May 2014

7 For instance, the press conference that Prosecutor Ocampo and President Museveni held together to announce the referral of the “situation concerning the LRA.”
lingered for many years, without much progress. Charges were not confirmed at the pre-trial phase in some cases, such as Kenya, withdrawn by the prosecutor (case against Francis Muthaura)\(^8\), or lead to acquittal (the Mathieu Ndugjolo Chui case), charges dropped (Uhuru Kenyatta)\(^9\), or cases terminated (Ruto and Sang).\(^{10}\) The ICC is also criticized for its failure to take on “hard cases” that would threaten “powerful states” (Schabas 2015). The relation with the Security Council has been marred with disappointment and political wrangling. In many African countries, voices of concern critique the ICC as an instrument at the hand of western powers, pursuing neo-colonial agendas. However, this question goes beyond the ICC and is indeed symptomatic to the international justice in large.

**Outsourcing Justice and Norms Perversion**

The ICC, as the first *permanent* international criminal court, has the most expansive array of rules and regulations, in addition to the Rome Statute that is its founding document, which is a product of long and arduous negotiations, between stakeholders with competing interests. Because of its unique and complex architecture, the ICC comes with its own sets challenges. The ad hoc tribunals such as the ones for the former Yugoslavia or Rwanda had a limited temporal and territorial jurisdiction. But for the ICC, the ways in which its trigger mechanisms have been used have come to define the Court’s work over its first fourteen of years of existence. These trigger

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\(^8\) See ICC Trial Chamber V, “Decision on the withdrawal of charges against Mr. Muthaura.” Document No. ICC-01/09-02/11. Available at https://www.icc-cpi.int/CourtRecords/CR2013_02062.PDF

\(^9\) See ICC Press release, “Kenyatta Case: Trial Chamber V(B) terminates the proceedings.” Available at https://www.icc-cpi.int/pages/item.aspx?name=pr1099

\(^{10}\) See ICC Press Release, “Ruto and Sang Case: ICC Trial Chamber V(A) terminates the case without prejudice to re-prosecution in future.” Available at https://www.icc-cpi.int/Pages/item.aspx?name=PR1205
mechanisms, as I argued in the previous chapters, have empowered some states to use the Court in ways that were not anticipated. Therefore, weaker states in the international system, such as some African states, were able to devise strategies that allowed them to use international justice norms and institutions to defeat – whether militarily or politically – their adversaries or opponents, be they opposition leaders, warlords, or rebel groups.

Outsourcing justice becomes therefore a mechanism though which (African) states have used the Court. Such strategic use of the international justice system does not necessarily violate international law but it features new readings of the law and introduces new norms of behavior that deviate from the spirit of the law in the first place. Such mechanisms, including the use of self-referrals at the ICC are what I have termed perversion of international legal norms. However, the use of the term “perversion” does not necessarily imply a negative connotation; it simply denotes the use of tools – in this case, the ICC – for purposes different from their intended use. In this context then, the ICC becomes a tool that states use to advance their own political and/or military interests. Obviously, the fact that states use international institutions at their disposal to advance their interests is not in itself noteworthy. But, the fact that states that are weaker in the international system are able to use the international justice system for such ends, is what I argue to be worthy of noting.

Moreover, this instrumental use of norms of international justice shows that the argument of “justice cascade” may not be as convincing as previously thought. The supposedly widespread adoption of norms of individual criminal accountability and prosecutions in the wake of massive violation of human rights may actually just be
symptomatic of an instrumental adoption. In that sense then, norms are not adopted because states have been socialized in believing in the normative value of using prosecutions to respond to human rights abuses, but rather, they use instruments at their disposal – domestic, hybrid, or international courts in this case – to minimize the cost of and maximize the benefits of delivering justice that is underlined by political calculations.

**State-centered System, Individual-oriented Criminality**

This instrumental use of international legal norms and international tribunals is made possible by the fact that the international criminal justice system is strongly geared towards prosecuting the individual while absolving the state. One of the most enduring features of the ICC is that it is first and foremost a criminal court. As such, it places individuals on its docket, those deemed most responsible for atrocity crimes. Organizations, institutions, or states do not stand for trial at the ICC. However, atrocity crimes tend to occur in situations of conflict or unrest, and are likely to be committed by a large number of individuals. Therefore, the focus on individual criminal accountability comes with its own challenges. And quite ironically, states are the only entities that have a juridical standing to be able to join the ICC. But states *per se* can never be prosecuted by the ICC, only specific individuals can. This feature of the ICC raises questions about whether the current neoliberal international justice system is not working to disculpate states and discharge them of their responsibilities not only to provide safety and protection, but also not holding them responsible for the conduct of their agents.

For instance, the case of Dominic Ongwen is telling. Ongwen was abducted and enrolled as a child soldier and he would later move up the ranks of the LRA to become
a commander. Captured by the Seleka rebels in the Central African Republic, he was handed over to the US troops there and was later transferred to The Hague where he is currently on trial. As Lokwiya Francis, the Program Coordinator of the Acholi Religious Leaders Peace Initiative (ARLPI)\(^\text{11}\) in Gulu said, “we [the Acholi people] don’t say Kony and his commanders should be set free, that is not the case. But we say if real justice is to be done, then take into consideration the players because our constitution puts the government [of Uganda] in the position of protecting the lives and property of its citizens. So if the LRA comes and abducts 200 hundred people in this community, then it means the government failed in its role to provide security, to provide protection.”\(^\text{12}\)

As Chapter II of this work shows, the armed forces of Uganda have also committed many atrocities during their fight against the LRA. Prosecuting those crimes fits within the mandate and jurisdiction of the ICC, although the Court has focused only on the LRA. But beyond that issue, how to hold the Ugandan state accountable for its failure to protect the citizens against LRA abductions? Is the ICC equipped to hold states responsible for their inaction that victimized civilians? Is the state-centered international justice system a smokescreen that shields states and their responsibilities and criminalizes individuals deemed as enemies of the state instead? The reality is that states mold international institutions as instruments to further their interests, and the international justice system operates in a way that fits such description.

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\(^\text{11}\) The Acholi Religious Leaders Peace Initiative (ARLPI) is an interfaith organization in northern Uganda that has been active in peace processes for over 20 years.

\(^\text{12}\) Interview conducted by the author in Gulu, March 2016.
Moreover, the ICC interventions in Uganda, Kenya and Côte d’Ivoire show that the ICC is nearly incapable of successfully prosecuting high ranking state officials. This means that even in cases where the Court has jurisdiction, it has been unsuccessful in prosecuting states agents while they were in charge (Kenya). In the majority of the situations, the Court has not even shown any willingness to investigate and prosecute state officials. The focus has therefore been on either rebels (Uganda, DRC, CAR, Mali), political opponents (Côte d’Ivoire), and after a government overthrow (Libya).

**International Justice and Power Politics**

Although the ultimate goal of the ICC is to end impunity wherever atrocity crimes have been committed, it is apparent that international justice is selective and marked by double-standards. We live in a world in which there is no equal prosecution of those most responsible of atrocity crimes. The most powerful states are still out of reach of the ICC, so are their clients with whom they share economic and social ties (Dicker, 2015). Having used its referral authority twice (for Sudan and Libya) and rejected it once (for Syria), the UNSC’s practice shows the extent to which international justice is shaped by power politics, despite the claims of the literature on norms adoption and the justice cascade.

The UN Security Council – the P5 to be more precise – has sought to bring the ICC into its control from the beginning. As members of the highest political law-making body in the current international system, the permanent members of the Security Council saw in the ICC a tool that could be used and leveraged for other motives, as they also worked to protect themselves from unwanted interference from the nascent Court (Clarke and Koulen 2014; Scheffer 2012). The consensus that delegates found in the drafting of the relationship between the ICC and the UNSC rested on two pillars: a
‘positive’ one (the power to refer cases to the ICC), and a ‘negative’ one (the power to defer or suspend cases under investigation or prosecution for periods of 12 months (Verduzco 2015). As the examples of the Libya and Sudan referrals and the Syrian non-referral show, the UNSC has used the ICC as its instrument, which has undermined the Court’s institutional autonomy and legitimacy. The current relationship between the two institutions is one defined by friction (Verduzco 2015). For example, Prosecutor Bensouda openly criticized the UNSC for its inaction in Darfur to help the ICC carry out its mandate. She said,

It is becoming increasingly difficult for me to appear before you [the UNSC] and purport to be updating you when all I am doing is repeating the same things I have said over and over again, most of which are well known to this Council… To date, none of these individuals have been brought to justice, and some of them continue to be implicated in atrocities committed against innocent civilians… Given this Council’s lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases, especially those in which trial is approaching. It should thus be clear to this Council that unless there is a change of attitude and approach to Darfur in the near future, there shall continue to be little or nothing to report to you for the foreseeable future.13

The lack of support from the UNSC is even more perceivable when one takes into account the language that accompany the funding of ICC investigations and prosecution resulting from UNSC referrals.

The funding of referrals, or costs incurred by UNSC referrals is a major point of contention. The Rome Statute provides for the possibility of the ICC receiving funding from the UN, but all the cases of investigation and prosecutions including those referred by the UNSC have been paid for by the States Parties. This has in fact to do with the

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US position towards the Court. From the early days of the US opposition to the ICC, the US Congress passed the consolidated Appropriation Public Law of 2000, which prohibits any funds from being used by or in support of the ICC.\textsuperscript{14} The US has not vetoed the Sudan and Libya referrals – opting for an abstention and a favorable vote respectively. The US has conditioned its non-opposition to those referrals to the caveat that “none of the expenses incurred in connection with the referral… shall be borne by the United Nations…” This meant that all the costs associated with the Libya and Darfur referrals were borne by the ICC, which even led the Court to request access to considerable amounts from the contingency fund for its work in Libya (Verduzco 2015, 40). The lack of funding support, added to the issues of non-cooperation and enforcement following cases arising from UNSC referrals, have all made the work of the ICC more difficult, especially given that such referrals are likely to be made without the consent of the states targeted.

\textbf{The ICC and African States}

Earlier this year, the ICC prosecutor announced that she was opening a full investigation in Georgia, in relation to war crimes and crimes against humanity that may have been committed there during the Russia-Georgia conflict of August 2008. This step indicated an attempt, for the first time, of the ICC to take up a case outside of the African continent. As this work have shown, there are many criticism and skepticism surrounding the work of the ICC on the African continent. Whereas many critics tend to focus on the selectivity of the ICC prosecutor, an inquiry in the ICC’s intervention in Africa shows that African states are not passive targets of the ICC prosecutors. They

\textsuperscript{14} See Title VII, Section 75 of the Act, available at http://www.amicc.org/docs/PublicLaw106-113.pdf
are indeed actors who often times have invited the ICC and used the court for their own benefits. Even the African Union’s defiant stance against the ICC seems to hang on one specific issue: that of the immunity of heads of states.

Moreover, one must avoid the oversimplification of “African” views regarding the ICC as homogenous as Maunganidze and du Plessis (2015) have argued. There has been African efforts that are aimed at strengthening international justice, both in areas of investigations, prosecution, complementarity and adjudicating international crimes. Individual states have taken bold steps in domesticating the Rome Statute, incorporating international crimes into their judicial architecture. Even in instances where political will has gone against the spirit of law, domestic courts have chastised the executive branch. For instance, President Bashir travelled to Johannesburg in 2015 to attend the African Union summit. The South African High Court issued a ruling, demanding the arrest of Bashir. But the South African government had let Bashir “escape” a few hours earlier, through a military base airport. A South African Court in Pretoria ruled that Bashir should not have been allowed to leave the country, and the South African Supreme Court later upheld that ruling. The South African Supreme Court, in rejecting the government’s appeal, ruled that the failure to arrest Bashir “was inconsistent with South Africa’s obligations in terms of the Rome Statute...and unlawful.”

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15 Interviews conducted by the author in The Hague, in Kenya, and Uganda also have shown the complexity and diversity of “African” views regarding the ICC.

International Courts Are Not Epiphenomenal

International criminal tribunals are often put in place with a deterrent objective. As embodied in the Rome Statute preamble, it is assumed that establishing criminal tribunals would prevent crimes to be committed in the future, ending impunity, and deter those who would be inclined to commit atrocity crimes. It is clear that the ICC has thus far failed in that regard. For instance, the fact that the ICC had to open a new round of investigations in the Central African Republic speaks to the failure to deter future crimes in this specific country. However, one has to also wonder if it is reasonable to expect the ICC to have a deterrent effect, due to the nature of the crimes that it prosecutes. In fact, war crimes and crimes against humanity may be resistant to deterrence through prosecution (Grono and Wheeler 2015, 1226). Additionally, atrocity crimes often involve large populations and dynamics to the point of prosecuting a few individuals may not have an effect on would-be perpetrators. Further, so far, prosecution has offered little hope in preventing future atrocities and has indeed been linked to the prolongation of conflicts (Branch 2007).

Moreover, the wheels of international justice turn at a very slow pace. As the works of the tribunals for the former Yugoslavia and Rwanda show, investigations and prosecutions operate at an extremely slow speed. Fourteen years later, the ICC has only achieved four convictions, and its first trial took six years to be completed. There is also the slow pace of prosecutions, the difficulties of enforcement, the selectivity of

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17 Following a self-referral introduced by the government of the Central African Republic in 2004, the ICC opened investigations on the civil conflict, which led to the arrest and conviction of former DRC Vice-President Jean Pierre Bemba. In 2014, the ICC opened a new case, called CAR II, which focuses on crimes committed in the new conflict that started in 2012.
prosecutions all mitigate any potential deterrent effect that the Court may have had. The limited reach of the Court also hinders its potential deterrent effect. Today, some two-third of all states have joined the ICC. However, these states still represent less than half of humanity, given that the most populous countries of the world have not ratified the Rome Statute.\textsuperscript{18} Even more significantly, three of the P5 are not members of the ICC. These states that have not ratified the Rome Statute have virtually no obligation to help the Court.\textsuperscript{19} But this does not mean that international law and international courts are epiphenomenal. They are indeed at the center of power politics with wide-ranging implications. The fact that even weaker states in the international system are able to instrumentalize international courts shows that their existence must be taken seriously by IR scholars. Moreover, even if one believes that the concept of international justice is in itself a utopia, maybe it is as one worth realizing after all (Cassese 2012).

\textbf{Conclusion}

Although African states have been socialized to engaging with international courts and integrating human rights normative discourse and practices, a careful analysis of the engagement with the ICC shows that such socialization is embedded in strategic calculations from the states. These strategic calculations take into consideration cost and benefits of such engagements in deciding the extent of and the limits to such compliance and cooperation with the ICC and the adoption of norms of

\textsuperscript{18} Those countries include China, India, the United States, Indonesia, Russia, and Pakistan.

\textsuperscript{19} As Article 34 of the Vienna Convention on the Law of Treaties (VCLT) provides, “[a] treaty does not create either obligations or rights for a third State without its consent”. The practice at the ICC has shown fidelity to that principle (Cryer 2015, 261).
international criminal justice. In fact, the adoption of norms of international criminal justice and compliance and cooperation with international court is characterized in self-interested political preferences and strategic instrumental action.

One could argue that African states, constituting the largest regional bloc in the ICC membership, show a widespread adoption of the norm of individual criminal accountability in the face of international crimes. But as I argue in this study, such claims rest on shaky grounds if we take into consideration the ways in which these states, although appearing to have adopted the norm, nonetheless devise strategies to circumvent it and bend the rules to fit their calculations. Joining the ICC and working with international tribunals can be a mere cost and benefit analysis for states that are eager to find avenues to prosecute their enemies while at the same time shielding their agents. As I have argued in this study, states also, while interacting with international organizations, re-arrange those values to retrofit them with their interests derived from political calculations and cost-benefit analysis. Focusing on norms of international criminal justice, I have shown the ways in which states who have come to establish some working relationship with the ICC, adopt discursive strategies and courses of actions that allow them to pursue their interests, even when such strategies means that they will subvert the norms while doing so.


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