

ODD FRIENDS: RETHINKING THE RELATIONSHIP BETWEEN THE ICC AND STATE SOVEREIGNTY

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I. INTRODUCTION

Why do states invite judicial scrutiny by the International Criminal Court (ICC or the Court)? As sovereignty-valuing units of the international system, should they not fend off, rather than welcome, external interference in their internal

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affairs?¹ What are the benefits of ICC involvement in war-torn countries? And how can ICC scrutiny enhance, rather than undermine, state sovereignty? Fifteen years into the ICC's operations, these key questions remain unanswered. Seeking plausible answers requires scholars and legal experts alike to reconsider and eventually cast aside some of the working assumptions thus far employed in their analyses.² That entails turning upside down the conceptual relationship between state sovereignty and the first permanent international criminal tribunal—from “sovereignty-costly” to “sovereignty-enhancing.” This re-conceptualization is the necessary first step towards building mid-level theories able to explain why, against predictions to the contrary, national governments have proved eager to outsource criminal jurisdiction to the point of filling the Court's docket.

The puzzle raised by the wide gap between theory (i.e., how the ICC was thought to operate before the Rome Statute³ entered into force) and practice (i.e., how the Statute has actually been “co-opted” by national governments since it began its operations) has distant roots. Since its drafting was finalized in the summer of 1998, it was apparent to all that the Rome Statute was about to mark a “point of no return” in the relationship between treaty law and state sovereignty. Never before had a treaty envisaged that provisions would apply to non-party states against their sovereign will. Accordingly, it is not an exaggeration to describe the compulsory extension of ICC jurisdiction *via* a United Nations Security Council (UNSC) resolution, permitted under Article 13(b) of the Rome Statute,⁴ as an unprecedented—perhaps even revolutionary—legal provi-

1. Mohamed M. El Zeidy, *Principle of Complementarity: A New Machinery to Implement International Criminal Law*, *The*, 23 MICH. J. INT'L L. 869, 870, 883 (2002) (arguing states have historically fended off external attempts that would encroach upon their sovereignty, the establishment of international criminal tribunals being regarded as one such attempt).

2. Similarly, CHRISTOPHER CLAPHAM, *AFRICA AND THE INTERNATIONAL SYSTEM: THE POLITICS OF STATE SURVIVAL* 4 (1996).

3. Rome Statute of the International Criminal Court, July 7, 1998, 37 I.L.M. 999 [hereinafter ‘Rome Statute’].

4. Rome Statute, art. 13 (“The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if: [. . .] (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.”).

sion.⁵ This novelty did not go unnoticed by legal experts, policymakers, or academics, and has ever since shaped the mainstream understanding of how the ICC relates to—and affects—the fundamental principle regulating international politics: state sovereignty.⁶

There is broad scholarly consensus that voluntary membership in the Rome Statute entails outstanding sovereign costs.⁷ While treaty ratification is itself an expression of sovereignty,⁸ it clearly does not account for why certain countries⁹ have actually invited ICC judicial scrutiny through either the trigger mechanism commonly referred to as self-referral¹⁰ or the declaration of acceptance of jurisdiction envisaged by Arti-

5. DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 73, 177 (2014).

6. See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999); see also Stephen D. Krasner, *Sharing Sovereignty: New Institutions for Collapsed and Failing States*, 29 INT'L SECURITY 85, 98 (2004); ZACHARIAH C. MAMPILLY, *REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR* (2011).

7. Scott Cooper et. al., *Yielding Sovereignty to International Institutions: Bringing System Structure Back in*, 10 INT'L STUD. REV. 501, 507 (2008); Yvonne M. Dutton, *Explaining State Commitment to the International Criminal Court: Strong Enforcement Mechanisms as a Credible Threat*, 10 WASH. U. GLOBAL STUD. L. REV. 477, 483–85 (2011); Terrence L. Chapman & Stephen Chaudoin, *Ratification Patterns and the International Criminal Court*, 57 INT'L STUD. Q. 400, 400–01 (2013). On the delegation of sovereign authority to international institutions, see Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 437 (2000).

8. KRASNER, *supra* note 6, at 224–25.

9. To date, five state parties to the Rome Statute have referred their domestic situations to the ICC (Uganda, the Democratic Republic of the Congo (DRC), the Central African Republic (CAR), Mali, and Gabon), while three non-party states have invited its judicial scrutiny by lodging Article 12(3) declarations with the Registrar (Côte d'Ivoire, Ukraine, and twice Palestine). The Government of Uganda employed both legal mechanisms, but the Article 12(3) declaration was ancillary to the self-referral. See Steven Freeland, *How Open Should the Door Be? – Declarations by Non-States Parties Under Article 12(3) of the Rome Statute of the International Criminal Court*, 75 NORDIC J. OF INT'L L. 211, 212–14 (2006). The Union of the Comoros also invited ICC scrutiny, but the case occurred on vessels registered to the Comoros rather than on its soil. Since this case presents no sovereignty costs, it is therefore excluded from the situations and preliminary examinations considered by this Article.

10. See Rome Statute, art. 13(a), 14.

cle 12(3) of the Rome Statute.¹¹ Acceptance of jurisdiction is particularly problematic for drawing a causal link between state preferences or behavior and the formal undertaking of legal obligations, for it allows states that are not parties to the Rome Statute to accept ICC jurisdiction on an ad hoc basis. Interestingly, diplomats and legal experts who participated in drafting the Rome Statute thought self-referrals “ha[d] little potential to be utilized,”¹² and it can be readily inferred that they also foresaw little use for Article 12(3). Since many of the official investigations and preliminary examinations undertaken by the Office of the Prosecutor (OTP) have been initiated by unilateral acts of states, such eagerness to involve the ICC in their internal affairs constitutes an empirical puzzle which ratification scholars have struggled to solve.

In addition to ratification patterns, scholars and legal pundits have paid significant attention to the analysis of the situations brought before the ICC through self-referral and Article 12(3) declarations.¹³ Ratification scholars have relied on

11. On the technical differences between these two legal institutes, see Andreas Th. Müller & Ignaz Stegmiller, *Self-Referrals on Trial: From Panacea to Patient*, 8 J. INT'L CRIM. JUST. 1267, 1277–78 (2010); S. Freeland, *supra* note 9; William A. Schabas, *First Prosecutions at the International Criminal Court*, 27 HUM. RTS. L. J. 25, 39 (2006).

12. Müller & Stegmiller, *supra* note 11, at 1268–69; Ignaz Stegmiller, *The International Criminal Court and Mali: Towards More Transparency in International Criminal Law Investigations?*, 24 CRIM. L. F. 475, 478 (2013).

13. On the Uganda situation, see, for example, Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403 (2005); Kenneth A. Rodman & Petie Booth, *Manipulated Commitments: The International Criminal Court in Uganda*, 35 HUM. RTS. Q. 271 (2013). On the DRC, see William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. OF INT'L L. 557 (2005). On both the CAR and DRC, see Marlies Glasius, *A Problem, Not a Solution: Complementarity in the Central African Republic and the Democratic Republic of Congo*, in INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY; FROM THEORY TO PRACTICE 1204 (Carsten Stahn & Mohamed El-Zeidy eds., 2011); Steven D. Roper & Lilian A. Barria, *State Cooperation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects*, 21 LEIDEN J. OF INT'L L. 457 (2008). On Mali, see Stegmiller, *supra* note 12. On Côte d'Ivoire, see Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q. 624 (2009); Marco Bocchese, *Coercing Compliance with the ICC: Empirical Assessment and Theoretical Implications*, 24 MICH. ST. INT'L L. REV. 357 (2016).

large-*N* statistical analysis, while scholars with in-depth knowledge of one or more particular situations have utilized case studies. In theory, these two methodologies can complement one another and enhance the general understanding of the role played by the ICC in international politics. In practice, however, attempts towards reconciling these two methodologies into a coherent and systematic debate about the ICC have been few and ill-conceived.¹⁴

The aim of this Article is two-fold. First, it seeks to bring together these two methodologies so as to finally move beyond ratification and toward the analysis of state agency in actually dealing with the ICC. Currently, the state of the literature does not yet include detailed cross-case analysis of the different situations pending before the Court. This deficiency is one of the main reasons for the absence of mid-level theories explaining why and under what circumstances sovereign states invite, rather than ward off, ICC scrutiny. Second, this Article situates the use of self-referrals within a larger governmental strategy to enhance state sovereignty by reducing the gap between the *de jure* and *de facto* sovereignty governments enjoy in war-torn or otherwise weak (or failed) countries.¹⁵

While the small number of self-referrals and declarations of ad hoc acceptance of ICC jurisdiction recommends caution in extrapolating general rules by way of induction,¹⁶ the main preliminary finding of this Article concerns the recurring instrumental use of international law by state authorities in the pursuit of extra-legal objectives.¹⁷ In analyzing why national

14. A notable recent exception to the above claim is David Bosco's *Rough Justice*. Bosco, *supra* note 5.

15. Regarding the profound—and somewhat inevitable—impact of civil war on *de facto* sovereignty, Stathis Kalyvas identifies situations of multiple sovereignty and categorizes them into two types: segmented and fragmented. “Sovereignty is segmented when two political actors (or more) exercise full sovereignty over distinct parts of the territory of the state. It is fragmented when two political actors (or more) exercise limited sovereignty over the same part of the territory of the state.” STATHIS N. KALYVAS, *THE LOGIC OF VIOLENCE IN CIVIL WAR* 88–89 (2006). For historical examples, see Payam Akhavan, *Self-Referrals Before the International Criminal Court: Are States the Villains or the Victims of Atrocities?*, 21 *CRIM. L.F.* 103, 114 (2010).

16. Müller & Stegmiller, *supra* note 12, at 1272.

17. See Catherine Gegout, *The International Criminal Court: Limits, Potential and Conditions for the Promotion of Justice and Peace*, 34 *THIRD WORLD Q.* 800, 805 (2013).

governments decide to involve the ICC in their domestic situations, it is possible to group all instances of self-referrals and Article 12(3) declarations into two categories. Cases in which global governance and global justice norms complemented one another belong to the first category (Uganda, Central African Republic (CAR), Mali, Palestine, and Ukraine); cases in which these two sets of norms instead collide with one another belong to the second (the Democratic Republic of the Congo (DRC) and Côte d'Ivoire). This categorization is instrumental to isolating the effects of ICC involvement from broader calls by governments for foreign intervention in state affairs. The factor determining whether one case falls in the first or the second category is international legitimization.¹⁸ When the international community "sided" with the incumbent in condemning non-state armed groups, state invitation of ICC scrutiny complemented a broader global governance strategy whereby the pursuit of international justice usually took place alongside other political or military initiatives. Conversely, when international action conferred legitimacy on rebel groups or political rivals national governments attempted to "use" the ICC for criminalizing—and therefore delegitimizing—military and political adversaries.¹⁹ In doing so, state authorities purposely exacerbated the tension between accountability and peace so as to undermine internationally-sponsored

18. On the inherently political meaning of the International Criminal Court's judicial interventions, see Sarah M.H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. OF INT'L L. 941 (2010).

19. On state use of the ICC to criminalize its enemies, see ADAM BRANCH, *DISPLACING HUMAN RIGHTS: WAR AND INTERVENTION IN NORTHERN UGANDA* 186, 191 (2011) (arguing criminalization of the LRA leadership "denies the rebels the possibility of political relevance or of becoming a political force"); William A. Schabas, *Complementarity in Practice: Some Uncomplimentary Thoughts*, 19 CRIM. L.F. 5, 16 (2008). On the criminalization of political rivals by the incumbent government, see the latest instance of self-referral by the Gabonese government, dated September 20, 2016, and received by the ICC chief prosecutor on the following day. The Gabonese government herein states Mr. Jean Ping, who lost the presidential elections held on August 27, 2016 to the incumbent president Mr. Ali Bongo Ondimba, has incited genocide. République Gabonaise, *Requête aux Fins de Renvoi D'une Situation par un Etat Partie Aupres du Procureur de la Cour Penal Internationale* [Request for Referral of a Situation by a State Party to the Prosecutor of the International Criminal Court], Sept. 20, 2016, <https://www.icc-cpi.int/iccdocs/otp/Referral-Gabon.pdf>.

(oftentimes imposed) power-sharing agreements. As Matthew Brubacher pointed out, it is problematic to broker a peace accord when the government's interlocutors are indicted by an international criminal tribunal.²⁰

This Article is organized as follows. Part II offers a survey of the relevant literatures with the aim of putting them in conversation with one another. The first literature addresses international law and politics, and in particular the competing theories of ratification patterns; the second concerns the political dimension of an operating ICC; the third helps connecting the previous two by providing the larger political structure within which states conceive of legal means as appropriate and viable options in the pursuit of extra-legal objectives. It does so by exploring the politics of international intervention and how "subaltern" states in the international system react to intervention.²¹ In particular, it investigates the conditions that have contributed to making Sub-Saharan Africa a "living laboratory" developing and testing new political strategies for emerging security threats.²² Part III first presents the theoretical argu-

20. Matthew R. Brubacher, *The ICC Investigation of the Lord's Resistance Army: An Insider's View*, in *THE LORD'S RESISTANCE ARMY: MYTH AND REALITY* 262, 264 (Tim Allen & Koen Vlassenroot eds., 2010); see also José E. Arvelo, *International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization Process*, 37 *Geo. J. Int'l L.* 411, 473 (2005).

21. On subaltern realism as a critical response to Kenneth Waltz's neorealism, see Mohammed Ayooob, *The Third World in the System of States: Acute Schizophrenia or Growing Pains?*, 33 *Int'l Stud. Q.* 67 (1989) [hereinafter *System of States*]; Mohammed Ayooob, *Inequality and Theorizing in International Relations: The Case for Subaltern Realism*, 4 *Int'l Stud. Rev.* 27 (2002) [hereinafter *Inequality and Theorizing*]; Mohammed Ayooob, *Third World Perspectives on Humanitarian Intervention and International Administration*, 10 *Global Governance* 99 (2004) [hereinafter *Third World Perspectives*].

22. On sub-Saharan Africa as a political laboratory, see Mark Mazower, *Governing the World: The History of an Idea* 372 (2012) (arguing the African continent remains "a laboratory and reality check for the UN's new development strategies"). Similarly, Richard L. Sklar described Africa as a "workshop of democracy," whose major contribution to modern governance lies in "the persistence alongside Western-type political orders of traditional systems of authority such as chieftaincy institutions." Richard Joseph, *Democracy and Reconfigured Power in Africa*, 110 *Current Hist.* 324, 324 (2011). According to Adam Branch, through the ICC investigation, "Africa is once again serving as a guinea pig for the West." Adam Branch, *The ICC Should Stop its African Experimental Investigations Now*, *The Monitor*, 13 January 2005. Lastly, Parvathi Menon recalls that "Africa has been called the guinea pig for post-Cold War humanitarianism," in Parvathi Menon, *Self-Referring to the Inter-*

ment that national governments resort to the ICC as one of the few options available to forestall power-sharing agreements and the legitimization of rebel leaders as trustworthy partners in peace. Part III then continues by setting forth the research design and justifying the selection of the two case studies presented in this Article. In Part IV, the case of the DRC is examined, demonstrating how ICC scrutiny plays into a larger governmental political and legal strategy of “resistance.” In Part V, the case study of Côte d’Ivoire provides empirical evidence upholding Part III’s theoretical claim. Finally, this Article concludes that a better understanding of the ICC’s political dimension is needed to make sense of why certain states invite judicial scrutiny by the Court. Unable to militarily defeat their opponents and pressured by international organizations (IOs) and major powers to behave “appropriately,” national governments have learned how to use international law instrumentally, turning the legalization of international politics to their advantage.²³ From this point of view, the ICC has become the latest setting for interstate and internal “lawfare.”²⁴

national Criminal Court: A Continuation of War by Other Means, 109 AJIL UNBOUND 260, 261 (2016).

23. See Menon, *supra* note 22, at 260–61. On the ongoing legalization of international politics and codification of international law as a means to regulate inter-state affairs, see generally LEGALIZATION AND WORLD POLITICS (Judith Goldstein et. al eds., 2001); YVES DEZALAY & BRYANT G. GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE 8, 172 (2010); Tanisha M. Fazal, *The Demise of Peace Treaties in Interstate War*, 67 INT’L ORG. 695, 697, 701 (2013). On the construction of the international criminal law (ICL) regime, see Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 INT’L ORG. 655 (2001).

24. Charles Dunlap defines lawfare “as the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.” Charles J. Dunlap Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 146 (2008). I hereby employ a slightly-different and broader definition of the term, whereby international law can be used to achieve also political objectives, albeit related to a conflict or post-conflict environment. For a study on how lawfare applies to the DRC case study, see Christine Gray, *The Use and Abuse of the International Court of Justice: Cases Concerning the Use of Force after Nicaragua*, 14 EUR. J. INT’L L. 867 (2003).

II. LITERATURE REVIEW

A. *Situating the ICC in the “Law and Politics” Literature*

If ratifying the Rome Statute entails outstanding costs to sovereignty, why did 124 states²⁵ opt for membership therein? Unlike other international multilateral instruments, the Rome Statute does not allow for reservations²⁶—a circumstance which has made ratification costlier, and thus less likely in comparative terms.²⁷ Scholars looking at the Rome Statute’s ratification pattern have offered several, sometimes conflicting, answers to this question; yet, they tend to agree that democracies, for whom the specter of civil war and mass atrocities is remote, are the most likely countries to ratify. From a methodological standpoint, most of these scholars employ large-*N* statistical analysis—an option made possible by using ratification as a proxy for state commitment to *ex post* compliance with the legal obligations set by the Rome Statute.

Arguably the most influential contribution to this debate is Simmons and Danner’s explanation based on credible commitment theory.²⁸ They explain that, apart from democracies, “states that are at risk for committing the kinds of atrocities governed by the [ICC] but that lack a dependable domestic mechanism for holding government agents accountable are

25. 122 U.N. members plus the Cook Islands and Palestine.

26. “[N]o reservations are allowed (Article 120), but a state party may opt out of the provision giving the ICC jurisdiction over war crimes for a period of seven years (Article 124).” Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT’L L. 22, 41–42 (1999).

27. While not a reservation in strict legal terms, Article 124 of the Rome Statute is a transitional provision “allow[ing] States to choose not to have their nationals subject to the Court’s jurisdiction over war crimes for a seven year period after ratification. . . . Only two states, France and Colombia, have made use of this Article.” *Article 124*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/?mod=article124> (last visited Sept. 10, 2015). For a legal analysis of Article 124 of the Rome Statute, see Shana Tabak, *Article 124, War Crimes and the Development of the Rome Statute*, 40 GEO. J. INT’L L. 1069 (2009).

28. To enhance cooperation between distrustful parties, “[c]redible commitments theory emphasizes the need to raise the cost of defection *ex post*.” Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT’L ORG. 225, 232 (2010). Hence, the ICC operates as an independent third party that monitors state compliance with treaty provisions and, in case of non-compliance, can take decisions affecting the credibility-challenged actor’s authority.

likely to be among the Court's earliest and most avid subscribers."²⁹ Self-binding (or, more precisely, tying hands)³⁰ is central to their argument, as it explains why states with a recent past of civil strife become party to the Rome Statute, since "the most important audience for this commitment . . . is, in fact, domestic."³¹ Accordingly, these states seek to trade long-run legal commitments for short-run public support, while external actors serve as guarantors of ex post state compliance. Self-binding is also central to Andrew Moravcsik's democratic "lock-in" theory. Under this theory, transitional democracies have agreed to bear the costs intrinsic to human rights treaties in order to make it costlier for future governments to subvert democracy.³² Democratic "lock-in" differs from credible commitment in that the incumbent government aims to transfer to its successors, rather than bear itself, the costs associated with ratification. Still, not every scholar has accepted the credible commitment or democratic "lock-in" theories. Building on credible threat theory, Yvonne Dutton, Terrence Chapman, and Stephen Chaudoin reach the opposite conclusion: countries with a history of civil war or weak political and judicial institutions are significantly less likely to ratify the Rome Statute.³³ In other words, "ICC ratification is largely explained by the potential costs facing governments."³⁴

Starting from the same premise—that ICC membership entails sovereignty costs—reward theorists have tried to explain ratification patterns through issue-linkage. These scholars ask, what do states gain in return for joining the ICC? Military assistance, political patronage, foreign aid, and access to international credit can become either appealing rewards or sources of leverage to coerce certain countries into ratifying human rights instruments, including the Rome Statute.³⁵ Ac-

29. *Id.* at 252.

30. James D. Fearon, *Signaling Foreign Policy Interests Tying Hands Versus Sinking Costs*, 41 J. OF CONFLICT RESOL. 68 (1997).

31. Simmons & Danner, *supra* note 28, at 234.

32. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

33. Dutton, *supra* note 7, at 520; Chapman & Chaudoin, *supra* note 7, at 401, 405.

34. *Id.* at 409.

35. Sebastian Mallaby famously defined foreign aid as "the chief alternative to imperialism." Sebastian Mallaby, *The Reluctant Imperialist: Terrorism, Failed States, and the Case for American Empire*, 81 FOREIGN AFF. 2, 3 (2002).

cording to Heather Smith-Cannoy, “commitment to [human rights] treaties is correlated with economic need.”³⁶ In brief, the more states need foreign aid, the more likely they are to enforce legal provisions they have previously adopted. By way of analogy, her argument can apply to situations where aid-dependent countries are persuaded to undertake new legal obligations. Similarly, James Meernik and Jamie Shairick find that “the more susceptible a nation is to economic pressure from strong supporters of the ICC, the more likely it is to ratify the treaty.”³⁷ Thus, they regard the interests of economically powerful states as the driving force supporting the ratification of the Rome Statute across world regions.³⁸

Reward theorists also include Eric Posner, who notices that international organizations frequently tie foreign aid to adequate human rights performances by recipient states,³⁹ and Joel Trachtman, who finds that no alternative explanation for human rights treaty ratification is more plausible than the logic of rewards.⁴⁰ But rewards are not necessarily tangible, as Emilie Hafner-Burton, Kiyoteru Tsutsui, and John Meyer point out. In their argument, repressive regimes, constantly under scrutiny for their practices, eagerly seek the legitimacy they expect to obtain from the ratification of human rights treaties.⁴¹ Despite the widely-accepted conjecture that states receive rewards in return for ratification, the theory has also been challenged. Richard Nielsen and Beth Simmons have tested empirically the claim and found very little evidence to support the

36. HEATHER SMITH-CANNOY, *INSINCERE COMMITMENTS: HUMAN RIGHTS TREATIES, ABUSIVE STATES, AND CITIZEN ACTIVISM* 167 (2012).

37. James Meernik & Jamie Shairick, *Promoting International Humanitarian Law: Strong States and the Ratification of the ICC Treaty*, 14 INT’L AREA STUD. REV. 23, 23 (2011).

38. *Id.* at 43.

39. Eric A. Posner, *Human Welfare, not Human Rights*, 108 COLUM. L. REV. 1758, 1796-97 (2008).

40. Joel P. Trachtman, *Who Cares About International Human Rights: The Supply and Demand of International Human Rights Law*, 44 NYU J. INT’L L. & POL. 851 (2012).

41. Emilie M. Hafner-Burton, Kiyoteru Tsutsui & John W. Meyer, *International Human Rights Law and the Politics of Legitimation: Repressive States and Human Rights Treaties*, 23 INT’L SOC. 115 (2008).

expectation that states will obtain increased tangible or intangible rewards after ratification.⁴²

Finally, Eamon Aloyo, Yvonne Dutton, and Lindsay Heger aim to solve a different puzzle: why do states ratify the Rome Statute when other international instruments already prohibit the same conduct? Focusing on torture specifically, they find that state parties to the Rome Statute show a decreased incidence of torture vis-à-vis non-party states—a conclusion suggesting that “stronger enforcement mechanisms may deter some potential perpetrators.”⁴³ This contribution is particularly salient because it pinpoints the deterrent effect resulting from the threat of ICC prosecution after controlling for reputational concerns and sanctions (e.g., naming and shaming).

Ratification scholars leave many crucial questions unanswered. First, they offer no compelling explanation as to why state parties to the Rome Statute have not refrained from engaging in new conflicts and episodes of mass atrocities after ratification.⁴⁴ This limitation is likely a consequence of employing ratification, rather than domestic practices, as a proxy for state commitment to the international criminal law (ICL) regime. Second, they fail to address the conundrum of why states have actually decided to invite ICC scrutiny over their internal affairs. Third and relatedly, they almost entirely overlook the presence of insurgencies and, consequently, ignore how internal threats shape state calculations and preferences regarding the ICC. This state-centered view of international relations represents a significant theoretical hurdle for ratification scholars for at least two reasons. On one hand, it dictates the choice of the state as a unit of analysis; on the other hand, it depicts the state as a unitary actor and, in so doing, it confuses the state as a whole with those who legally represent it at the international level—the government.

42. Richard A. Nielsen & Beth A. Simmons, *Rewards for Ratification: Payoffs for Participating in the International Human Rights Regime?*, 59 INT'L STUD. Q. 197 (2015).

43. Eamon Aloyo, Yvonne M. Dutton & Lindsay Heger, *Does the International Criminal Court Deter Torture?* 22 (March 27, 2013) (unpublished draft manuscript), http://oneearthfuture.org/sites/oneearthfuture.org/files//documents/publications/ICC-and-Torture_working-paper.pdf.

44. See, e.g., Gegout, *supra* note 17, at 809 (arguing the ICC does not seem to have prevented potential criminals from acting violently).

B. *Whose Agency? State Referrals and the Strategic Use of the ICC*

ICC scholars have not limited themselves to the study of ratification patterns. Another major body of the literature on the ICC explores the various situations and cases pending before the Court. The great majority of these works employ qualitative methods with a marked preference for within-case analysis. This scholarly approach is all but surprising, as the results are heavily influenced by legal research canons: once the OTP identifies a situation worthy of scrutiny, scholars and legal professionals alike start investigating the relevant empirical and juridical circumstances presented. In effect, the OTP has had an indirect agenda-setting power in directing the work of these scholars and experts. As a result, the first two situations investigated by the OTP, Uganda and the DRC, have received much greater attention than later ones, such as Côte d'Ivoire, CAR, and Mali.

Many situation or case-driven studies share a common feature: national governments successfully manipulated the ICC—the OTP in particular—and used it instrumentally in the pursuit of domestic political ends.⁴⁵ Contrary to the claims of ratification scholars, however, their situation-driven peers find that ICC intervention has actually enhanced the position of the governments who invited its judicial scrutiny.⁴⁶ Sarah Nouwen, for instance, argues that “[r]ather than considering ICC intervention as costly to its sovereignty and reputation, the [government of Uganda] expected, and obtained, dividends from the intervention.”⁴⁷ Phil Clark underscores:

[T]he ICC’s investigations into [the Lord’s Resistance Army (LRA)] and not [the Ugandan People’s Defense Force (UPDF)] crimes create[d] a perception of the ICC as one-sided and heavily politicized to

45. See MAMPILLY, *supra* note 6, at 44; Gegout, *supra* note 17, at 802, 805; BRANCH, *supra* note 19, at 186; Adam Branch, *Uganda’s Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT’L AFF. 179 (2007).

46. Similarly, see Asad G. Kiyani, *Third World Approaches to International Criminal Law*, 109 AJIL UNBOUND 255, 258 (2016).

47. SARAH M.H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYZING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* 114 (2013).

the point that local politicians began to mock the Court as President Museveni's political tool.⁴⁸

Others have stressed the logic of inviting ICC investigations as a means for enhancing the international legitimacy of Museveni's regime, criminalizing the LRA, undermining peace talks, marginalizing those actors calling for a political solution to the conflict, or catering to the neopatrimonial dynamics of Ugandan domestic politics.⁴⁹

The above arguments also apply to situations other than Uganda. Kenneth Rodman and Petie Booth find that both the DRC and CAR self-referrals "bear some striking similarities to the Ugandan case."⁵⁰ William Burke-White argues that "the existence of the ICC has offered a politically expedient solution for the Congolese president to deal with potential electoral rivals, resulting in the somewhat surprising referral of the situation to the Court by the Congolese government itself."⁵¹ Felix Ndahinda reports speculations on the alleged political, rather than legal, nature of Jean-Pierre Bemba Gombo's prosecution before the ICC. According to these speculations, Bemba Gombo was targeted because he represented President Kabila's "most credible political opponent" in the 2006 general election and afterward.⁵² Similarly, Thomas Obel Hansen observes that Bemba Gombo's indictment "ma[de] some note that the ICC ended up promoting the political interests of incumbent DRC President Kabila."⁵³ Lastly, David Bosco re-

48. Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, in *COURTING CONFLICT: JUSTICE, PEACE AND THE ICC IN AFRICA* 37, 42 (Nicholas Waddell & Phil Clark eds., 2008); see also Kiyani, *supra* note 46, at 255.

49. See Branch, *supra* note 45; Brubacher, *supra* note 20; Nouwen & Werner, *supra* note 18; Hans Peter Schmitz, *Rebels Without a Cause? Transnational Diffusion and the Lord's Resistance Army (LRA), 1986-2011*, in *TRANSNATIONAL DYNAMICS OF CIVIL WAR* 120, 120-148 (2013); Valerie Freeland, *Rebranding the State: Uganda's Strategic Use of the International Criminal Court*, 46 *DEV. & CHANGE* 293 (2015).

50. Rodman & Booth, *supra* note 13, at 296.

51. Burke-White, *supra* note 13, at 559.

52. Felix Mukwiza Ndahinda, *The Bemba-Banyamulenge Case Before the ICC: From Individual to Collective Criminal Responsibility*, 7 *INT'L J. OF TRANSITIONAL JUST.* 476, 491 (2013) (noting that "[s]ome of [Bemba Gombo's] Congolese supporters believe that his prosecution is more political than legal").

53. Thomas Obel Hansen, *Africa and the International Criminal Court*, in *HANDBOOK OF AFRICA'S INTERNATIONAL RELATIONS* 171 (Tim Murithi ed., 2014).

minds that “[p]rosecution officials were keenly aware of the perception that they were doing the bidding of Kabila and, more broadly, the Western countries backing his government.”⁵⁴

As noted earlier, situation-driven and ratification scholars are seldom in conversation with one another. This lack of conversation hampers the development of a comprehensive scholarly and policy debate on the ICC which might benefit from the insights of the two bodies of literature surveyed here. Rodman and Booth’s critique of Simmons and Danner’s argument exemplifies this struggle for systematization for at least three reasons. First, their method can at best complement, not confute, Simmons and Danner’s findings. Concluding that Simmons and Danner’s argument does not explain Uganda (or any other case pending before the ICC), does not prove Simmons and Danner wrong; rather, it only shows that Uganda is an outlier in their statistical analysis.⁵⁵ Second, these two studies employ different proxies for state commitment to the ICL regime. Simmons and Danner adopt ratification, which is temporally and logically prior to ICC involvement via self-referral, which is used by Rodman and Booth. Third, these two studies employ different units of analysis. Simmons and Danner adopt the state as their unit of analysis, whereas Rodman and Booth opt for the regime.⁵⁶

But changing the unit of analysis from state to government proved crucial for Rodman and Booth to explain why state authorities decided to refer their domestic situations to the ICC. Rather than self-binding, national governments conceived of self-referrals as a legal institute applying to others and, in particular, as a brand-new means for stigmatizing insurgent groups at both the national and international level. Changing the unit of analysis provides a timely opportunity for determining the agency at play whenever a self-referral or Article 12(3) declaration takes place. The aim of this brief literature review is thus to dispel confusion about who is both the beneficiary and subject of the provisions envisaged by the Rome Statute by distinguishing between the state as a unitary actor and the government as legitimate state representative

54. Bosco, *supra* note 5, at 142.

55. Rodman & Booth, *supra* note 13, at 296.

56. *Id.* at 272, 296.

and acting sovereign. Empirically, this distinction is even more salient because, at the moment they invited ICC scrutiny, all of the national governments who referred their domestic situations to the Court were facing either a conflict or post-conflict scenario wherein major threats to government survival were internal.⁵⁷

C. *The Weapon of the Weak? The Extra-Legal Use of the ICC in an Increasingly Legalized International System*

While this literature review is necessarily incomplete, as it provides just a glimpse of the ICC's political dimension, a preliminary observation of the genesis of self-referrals and Article 12(3) declarations suggests that incumbent regimes are mostly concerned with their own survival.⁵⁸ Accordingly, they conceive of the ICC as simply another instrument to be used for the two-fold aim of maintaining power and frustrating insurgents' political and military ambitions. That political elites are first and foremost interested in prolonging their tenure in power is quite intuitive; what is yet to be fully explored is how the ICC has thus far played into this strategy. Legal scholars correctly note that only governments in their capacity as legitimate state representatives hold the authority to trigger ICC jurisdiction through the mechanism of self-referral,⁵⁹ while also noting that governments do exploit this asymmetry to their advantage.⁶⁰

Relevant to this Article is therefore the literature on sovereignty and statehood. Stephen Krasner claims that "[r]ulers have almost universally sought international legal recognition," even at the cost of compromising the core principle of

57. Séverine Autesserre shows how the distinction between conflict and post-conflict scenarios might prove, and in the recent past has proven, misleading and pregnant of negative consequences. Séverine Autesserre, *Hobbes and the Congo: Frames, Local Violence, and International Intervention*, 63 INT'L ORG. 249 (2009).

58. On survival, Christopher Clapham argues that "[i]n the great majority of cases rulers seek to assure their personal survival by seeking the survival and indeed strengthening of their states. They can on the whole best protect their own security by preserving and enhancing the power of the states which they rule." CLAPHAM, *supra* note 2, at 4–5.

59. For a critical analysis of state referrals, see Darryl Robinson, *The Controversy Over Territorial State Referrals and Reflections on ICL Discourse*, 9 J. INT'L CRIM. JUST. 355, 371–72 (2011).

60. Müller & Stegmiller, *supra* note 11, at 1270.

Westphalian sovereignty—the autonomy of domestic structures.⁶¹ In his words, “rarely does [international legal] recognition carry costs,” rather “[it] has provided [rulers] with resources and opportunities that can enhance their chances of remaining in power.”⁶² In his seminal work, Christopher Clapham highlights how Third World state elites have “commodified” and traded sovereignty in return for economic, political, or military pay-offs. “[I]nternational relations,” he argues, “actually was important to [Third World] rulers, because their access to international resources played a critical role in their own survival strategies.”⁶³ Relatedly, Jean-François Bayart highlights the agency of state elites in purposely transforming the international environment into “a major resource in the process of political centralization and economic accumulation.”⁶⁴ Like Clapham, Bayart holds that African rulers’ power hinges on the control and exploitation of exterior relations.⁶⁵ Lastly, William Reno stresses the importance of asking whose survival is at stake, that of the state or the ruler, for “[r]ulers manipulate definitions of sovereignty and statehood to protect their personal authority” and “to serve their own private interests.”⁶⁶ But while states’ interests and state leaders’ interests do conflate to a significant extent, there is more than leaders’ self-interest at stake when governments decide to invite ICC scrutiny over their domestic situation. National governments’ chief concern is to fend off sovereign competition by non-state actors, preserve territorial integrity, and avoid power-sharing arrangements that undermine their domestic and international reputation.⁶⁷

61. KRASNER, *supra* note 6, at 223.

62. *Id.*

63. Christopher Clapham, *Degrees of Statehood*, 24 REV. INT’L STUD. 143, 145 (1998); *see also* CLAPHAM, *supra* note 2.

64. Jean-François Bayart & Stephen Ellis, *Africa in the World: A History of Extraversion*, 99 AFR. AFF. 217, 219 (2000).

65. *Id.*

66. WILLIAM RENO, *WARLORD POLITICS AND AFRICAN STATES* 8–9 (1998).

67. Charles Tilly defines government as “a substantial, durable, bounded organization that exercises control over the major concentrated means of coercion within some territory.” CHARLES TILLY, *THE POLITICS OF COLLECTIVE VIOLENCE* 9 (2003). While his definition allows for small-scale collective violence to occur outside the range of government, the concept of “government” loses its significance when competition over the means of coercion

Finally, the theoretical argument set forth below draws a causal link between power-sharing agreements and the use of self-referrals and Article 12(3) declarations. National governments deem ICC involvement to be the appropriate action for either forestalling or undermining externally-imposed power-sharing accords. Thus, the question remains—what notions about power-sharing are relevant to this Article? To begin, Rodman and Booth remind that “negotiated resolutions of civil wars are most likely when there is a ‘mutually hurting stalemate’ in which all of the parties recognize that they cannot win and will be worse off the longer the war continues.”⁶⁸ Similarly, Fazal observes a decline of definitive victories in both inter-state and civil wars; these conflicts “are much more likely to end in draws today.”⁶⁹ By the same token, Maria Eriksson Baaz and Judith Verweijen note that “military realities have sharply reduced the government’s options to defeat armed groups”—a situation due not only to the military weakness of national armies, but also other factors such as the technologies of rebellion or geography.⁷⁰

On third-party intervention in internal conflicts, Jack Snyder and Robert Jervis list the reasons for which “civil wars are so rarely resolved by mutual agreement between the warring factions, unless powerful outsiders intervene to guarantee the settlement.”⁷¹ Denis Tull and Andreas Mehler claim that, after some failed democratization experiments, “Western governments and organizations shifted their priorities in Africa from support of democracy to the fields of prevention and conflict management.”⁷² As a result, “[p]olitical power-sharing agreements have become an almost standard ingredient of negoti-

within a defined territory becomes substantial and durable, leading to situations of “contested sovereignty.” See MAMPILLY, *supra* note 6, at 4.

68. Rodman & Booth, *supra* note 13, at 293; see also Denis M. Tull & Andreas Mehler, *The Hidden Costs of Power-Sharing: Reproducing Insurgent Violence in Africa*, 104 AFR. AFF. 375, 386 (2005).

69. Fazal, *supra* note 23, at 706.

70. Maria Eriksson Baaz & Judith Verweijen, *The Volatility of a Half-Cooked Bouillabaisse: Rebel–Military Integration and Conflict Dynamics in the Eastern DRC*, 112 AFR. AFF. 563, 578–579 (2013).

71. Jack Snyder & Robert Jervis, *Civil War and the Security Dilemma*, in CIVIL WARS, INSECURITY, AND INTERVENTION 19 (Barbara F. Walter & Jack L. Snyder eds., 1999); see also Autesserre, *supra* note 57, at 250.

72. Tull & Mehler, *supra* note 68, at 385.

ated settlements to civil wars in Africa, as elsewhere.”⁷³ External actors, including NGOs and international organizations, overwhelmingly focus on the important short-term goal of stopping the killing as soon as possible,⁷⁴ but often fail to address the lasting causes of conflict and set the conditions for durable peace.⁷⁵ Moreover, external interveners hold a marked preference for maintaining the territorial integrity of conflict-ridden countries.⁷⁶ When shifting time horizons from the short-term to the long-term, however, external and domestic actors alike tend to regard power-sharing agreements and other political solutions engineered to reduce the security dilemma as second-best solutions.⁷⁷

In considering the effects of power-sharing, it must be noted that such a political solution “reifies the contending groups,” maintaining territorial integrity at the cost of “perpetuat[ing] the mutual interdependencies and vulnerabilities that heighten the security dilemma.”⁷⁸ But the term “reifying” risks downplaying the costs imposed on state sovereignty, for external efforts to broker political settlements entail “conceiv[ing] all the parties [to a civil conflict] as subsisting on a more or less equal footing.”⁷⁹ This process has had the side-effect of greatly enhancing the international standing of insurgents.⁸⁰ Lastly, Autesserre finds that “most negotiated peace agreements fail during the implementation phase.”⁸¹ Considering the sovereignty costs intrinsic to power-sharing and the fact that many such agreements are de facto

73. Eriksson Baaz & Verweijen, *supra* note 70, at 564. For a list of recent African peace agreements since 1999, see Andreas Mehler, *Peace and Power Sharing in Africa: A Not So Obvious Relationship*, 108 AFR. AFF. 453, 457–61 Table 1 (2009).

74. See Roy Licklider, *Ethical Advice: Conflict Management vs. Human Rights in Ending Civil Wars*, 7 J. HUM. RTS. 376, 376–77 (2008).

75. See Tull & Mehler, *supra* note 68, at 395 (suggesting that outside actors need to recognize that the short-term quelling of conflicts in the guise of power-sharing is not to be confounded with peace); Mehler, *supra* note 73, at 455.

76. Michael Niemann, *War Making and State Making in Central Africa*, 53 AFR. TODAY 21, 24 (2007); Tull & Mehler, *supra* note 68, at 376.

77. Snyder & Jervis, *supra* note 71, at 19.

78. *Id.*

79. Clapham, *supra* note 2, at 153.

80. *Id.*

81. Autesserre, *supra* note 57, at 250.

imposed by external actors, it is not surprising that national governments rather than insurgent groups have been responsible for jeopardizing their implementation.

As these scholars show, incumbent governments can use—and have used—the ICC to criminalize undesired partners in peace, thus forestalling externally-sponsored power-sharing arrangements and undermining their implementation. Power-sharing arrangements, especially when guaranteed by powerful outsiders, can lead to durable political solutions to systemic tensions by overcoming the problem posed by the lack of trust between rival actors. As the case studies discussed below demonstrate, however, these arrangements are doomed to fail when national governments are unwilling to negotiate a political solution to ongoing conflicts rather than just distrustful of their counterparts' good faith.

III. THEORY, RESEARCH DESIGN, AND CASE SELECTION

A. *The Legalization of State Resistance to External Conflict Resolution Efforts*

This Section theorizes that the sovereign gap states experience as a result of civil war and their invitation of ICC scrutiny are causally connected. More specifically, causality runs between external attempts to institutionalize such a gap by brokering power-sharing deals and the government decision to get the ICC involved in otherwise internal affairs. While in abstract both instances carry outstanding sovereignty costs, in practice the ICC becomes a means to enhance state sovereignty by forestalling the negotiation of power-sharing accords or undermining their implementation. To date, five state parties to the Rome Statute have referred their domestic situations to the ICC (Uganda, the DRC, the CAR, Mali, and Gabon),⁸² while three non-party states have invited its judicial scrutiny by lodging Article 12(3) declarations with the Regis-

82. See *supra* note 9 and accompanying text. The Government of Uganda actually employed both legal institutes, but the Article 12(3) declaration was ancillary to the self-referral. See Freeland, *supra* note 9, at 212–14. Gabon is excluded from my analysis on the ground that the self-referral was received by the OTP on September 21, 2016, and made available online on September 29, 2016.

trar (Côte d'Ivoire, Ukraine, and twice Palestine).⁸³ When these countries requested ICC scrutiny, all of them faced either a domestic conflict or post-conflict scenario.⁸⁴ This observation is in itself noteworthy, for it draws an empirical—albeit not necessarily causal—link between internal wars and ICC involvement. A second preliminary observation shows that ICC involvement is never a stand-alone plan of action, but rather a piece of a much larger strategy.

International legitimization determines how and the purpose for which states invite ICC scrutiny. Criminalization is the mechanism through which governments attempt to steer legitimization in the desired direction. In the majority of the self-referral and Article 12(3) situations, incumbents were able to align their interests with the ICC's, and in so doing they captured the narrative of global justice and deployed it against their enemies.⁸⁵ Despite their competitive advantage vis-à-vis opposition parties and insurgents in getting access to the ICC, incumbents did not always succeed in securing international legitimacy. Failure to obtain international legitimacy might hinge on a panoply of exogenous or endogenous factors whose analysis lies beyond the scope of this paper. External efforts to broker a power-sharing deal between the incumbent government and insurgents imply the legitimization of the latter at the expense of the former.⁸⁶ In case of failure, incumbent governments can—and in fact did—resort to their privileged access to the international system⁸⁷ and strategically use

83. The Union of the Comoros also invited ICC scrutiny, but the case occurred on vessels registered to the Comoros rather than on its soil. Since this case presents no sovereign costs, it is therefore excluded by the situations or preliminary examinations hereby considered. For an overview of the ongoing preliminary examination referred by the Union of the Comoros, see Russell Buchan, *The Mavi Marmara Incident and the International Criminal Court*, 25 CRIM. L.F. 465 (2014).

84. Asad Kiyani similarly observes that “the ICC and the war it adjudicates become surprising bedfellows, repurposed by local elites for the consolidation of domestic power.” Kiyani, *supra* note 46, at 255.

85. Not without a certain degree of irony, Sarah Nouwen went as far as calling the ICC involvement in Uganda a “joint enterprise” between Museveni’s regime and the OTP. NOUWEN, *supra* note 47, at 114.

86. For historical examples, see WILLIAM RENO, *WARFARE IN INDEPENDENT AFRICA* 202 (2011); MAMPILLY, *supra* note 6, at 187.

87. See CLAPHAM, *supra* note 2, at 73, 83–84.

the specter of ICC prosecution as a means to forestall power-sharing projects.

In *all* of the self-referral and Article 12(3) country situations, the ICC has contributed to enhancing, rather than further eroding, state sovereignty. What differs across situations, depending on whom is being conferred international legitimization, is how the ICC enhances state sovereignty. When incumbents align their domestic interests with the ICC's, the latter fits into a larger state strategy of mobilization of global governance norms and institutions. Put simply, incumbents invite not only ICC scrutiny, but also military and economic assistance, peace-keeping operations under the aegis of international or regional organizations, and political patronage by major powers.⁸⁸ Conversely, when incumbents fail to secure international legitimization, they usually "deploy" the ICC (and other international tribunals) in opposition to other global governance institutions. In so doing, they purposely seek to create the conditions for a clash between global justice and global governance, whereas the former is normally conceived as a subset of the latter.⁸⁹

This theory has far-reaching policy implications, for it maintains that all incumbents who have thus far invited external judicial scrutiny by the ICC have done so mainly—if not

88. Mali aptly exemplifies this first set of cases. Islamist groups affiliated with al-Qaeda were responsible for the outbreak of violence in northern Mali in January 2012. The international community, spearheaded by France, intervened in Mali at the request—and in support—of the government of Bamako. In this context, no international actor supported the insurgent's grievances and claims against the legitimate Malian government. On the Mali situation, see Stegmiller, *supra* note 12; Dan E. Stigall, *The French Intervention in Mali, Counter-Terrorism, and the Law of Armed Conflict*, 223 MIL. L. REV. 1 (2015); Aning Kwei & Fiifi Edu-Afful, *African Agency in R2P: Interventions by African Union and ECOWAS in Mali, Cote d'Ivoire, and Libya*, 18 INT'L STUD. REV. 120, 127–28 (2016).

89. For an example of this strategy aimed at undermining "coordination across and outside the UN system," see Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect*, 87 INT'L AFF. 825, 837 (2011). Referring to the statement issued by the ICC prosecutor on the situation in Côte d'Ivoire on December 21, 2010, Mike McGovern claimed that "with one sentence, Moreno-Ocampo ensured that Gbagbo would reject any negotiated solution and instead fight to the end." Mike McGovern, *The Ivorian Endgame: Can Ouattara Rebuild a Shattered Country?*, FOREIGN AFF. (Apr. 14, 2011), <http://www.foreignaffairs.com/articles/67728/mike-mcgovern/the-ivorian-endgame>.

exclusively—for strategic reasons. This is not to say that normative considerations do not play a role in such a strategy. To the contrary, socialization and norm internalization are crucial tenets thereof, for governments' success hinges on the ability to play global justice norms and narratives against internationally-held preferences and practices of conflict resolution. In theory, the claim that strategic, rather than normative, reasons better account for why certain governments opted for ICC involvement is supported by the fact that non-party states have conceived of the ICC as way to defend their sovereignty. This circumstance distinguishes the normative commitment to the global justice regime (using ratification of human rights instruments as proxy) from the strategic use thereof. In practice, moreover, a detailed analysis of any of the above-listed situations would provide evidence in this sense. This assertion carries a precise implication: while this Article cannot provide a detailed analysis of all of the eight above-listed situations, I contend the theoretical argument set forth in this Article applies to situations not addressed in the empirical Sections below.

B. *Research Design and Case Selection*

Given space constraints, this Article explores in detail only two situations among those voluntarily referred to the ICC—the DRC and Côte d'Ivoire. In the other five situations, governments successfully aligned with the ICC and seized international narratives of global governance and justice. And in Uganda, the self-referral amounted to President Museveni's latest attempt to appear as a champion of human rights and economic liberalism.⁹⁰ In the CAR, the *interim* government conceived of the self-referral as a means to boost its international legitimacy and make it costlier for Congolese armed groups to carry out cross-border operations.⁹¹ The Malian government resorted to the ICC as a means to criminalize and

90. On President Museveni's lasting "PR" strategy, see Schmitz, *supra* note 49; BOSCO, *supra* note 5, at 96–97.

91. It also bears noting that the government of Bangui, in power since March 2003 after yet another *coup d'état*, was under severe international pressure to hold acceptable elections, undertake comprehensive governance reforms, and "show concrete progress in macroeconomic management." DEBORAH BRÄUTIGAM, *THE DRAGON'S GIFT: THE REAL STORY OF CHINA IN AFRICA* 126 (2009).

further marginalize Islamist rebel groups controlling the northern part of the country.⁹² In Ukraine, ICC involvement is but one measure undertaken by the government of Kiev in its effort to make it costlier for Russia to annex Crimea and militarily assist insurgents in the eastern provinces.⁹³ Palestine's situations at the time it lodged its first Article 12(3) declaration in January 2009 was somewhat unique, but only because ICC involvement was instrumental to obtaining, rather than exploiting, international legal recognition. If Palestine was recognized as a sovereign state, a legal test that Palestine failed at the time, the logic of the Article 12(3) declaration would have been the same as above. This is evident by the lodging of a second Article 12(3) declaration in January 2015 by the de facto government of Palestine, done as part of a larger strategy aimed at internationalizing the lasting armed struggle with Israel and pursuing top Israeli civilian and military leaders for alleged war crimes.⁹⁴

A number of considerations informed the selection of the cases examined in Parts IV and V. First and foremost, the study of the DRC and Côte d'Ivoire duly highlights the causal role of ICC involvement. These two situations allow a proper assessment of the ICC's contribution to enhancing state sovereignty exclusive of other intervening global governance institutions. Second, this case selection allows for variation in the legal mechanisms employed for obtaining ICC involvement; the Congolese government used self-referral to trigger ICC jurisdiction, whereas its Ivorian equivalent lodged an Article 12(3) declaration. Third, these case studies demonstrate how a functioning ICC has changed the incentive structure for incumbents; before the Rome Statute entered into force, other state

92. Kersten, Mark. *The ICC in Mali: Just Another ICC Intervention in Africa?*, JUST. IN CONFLICT (July 19, 2012), <http://justiceinconflict.org/2012/07/19/the-icc-in-mali-just-another-icc-intervention-in-africa/>; see also Kwei & Edu-Aful, *supra* note 88, at 127–28.

93. Interview with an Eastern European diplomat, in New York, N.Y. (June 17, 2016); see also Robin Geiß, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91 INT'L L. STUD. 425, 430–31 (2015).

94. *Will ICC Membership Help or Hinder the Palestinians' Cause?*, BBC (Apr. 1, 2015), <http://www.bbc.com/news/world-middle-east-30744701>. On the 'hostile' nature of Palestine's acceptance of ICC jurisdiction, see Eugene Kontorovich, *Israel/Palestine—The ICC's Uncharted Territory*, 11 J. OF INT'L CRIM. JUST. 979, 980 (2013).

leaders, such as President Kabbah of Sierra Leone, faced similar domestic political and military conditions but could not resort to an already-established permanent international criminal tribunal.⁹⁵ Fourth, the DRC case study shows why and how the ICC differs from other international tribunals, specifically the International Court of Justice (ICJ). In particular, ICC involvement entails more than simply naming and shaming human right abusers; the threat of criminal sanctions for insurgent leaders is key in forestalling or undermining power-sharing deals. Finally, the Côte d'Ivoire case study focuses on the timing of ICC involvement; it shows how the Ivorian government invited ICC scrutiny when it was no longer able to resist external pressures and wanted to delay the implementation of peace accords.

Finally, the above case studies are selected as they bring state agency to the fore. National governments in both Abidjan and Kinshasa, as shown below, expected the ICC to investigate rebel groups only. These expectations were grounded in the government capacity to manipulate ICC operations at both the local and international level. There are three main reasons for why such confidence is warranted. First, a cross-case analysis of state invitation of ICC scrutiny shows that incumbent governments skillfully “played” with the Court’s temporal and territorial jurisdiction so as to direct investigations into enemies’ (mis)conduct. Article 12(3) communications provide compelling examples of this trend.⁹⁶ Sec-

95. DANNY HOFFMAN, *THE WAR MACHINES: YOUNG MEN AND VIOLENCE IN SIERRA LEONE AND LIBERIA* 49 (2011). By January 2002, when Sierra Leone’s decade-long civil war formally ended, the Rome Statute had not yet entered into force. On President Kabbah’s plea to the United Nations to establish an international criminal tribunal to deal with the atrocities perpetrated in Sierra Leone after the Abidjan Peace Accord of 1996, see Tim Kelsall, *Politics, Anti-politics, International Justice: Language and Power in the Special Court for Sierra Leone*, 32 REV. OF INT’L STUD. 587, 590–91 (2006).

96. For the procedural history of the ongoing preliminary examinations of Ukraine and Palestine, see Office of the Prosecutor, Report on Preliminary Examination Activities, 11–12, 18 (Nov. 12, 2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf>. On the investigation of the situation in Côte d’Ivoire, see *Côte d’Ivoire: Situation in the Republic of Côte d’Ivoire*, ICC-02/11, INT’L CRIM. CT., <https://www.icc-cpi.int/cdi> (last visited Jan. 18, 2017). As noted above, national governments tailored the Court temporal and territorial jurisdiction bearing in mind the time and whereabouts of international crimes allegedly committed by enemies.

ond, national governments seek to regulate the Court's access to evidence gathering.⁹⁷ While in theory governments must "cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court,"⁹⁸ in practice state cooperation has been highly selective. Unsurprisingly, national governments have proven willing to cooperate when ICC investigations targeted their enemies or political rivals. But when the OTP has shifted its focus onto state actors, cooperation suddenly stops. In Kenya, moreover, state authorities not only failed to comply with OTP's demands, but intentionally undertook to hamper investigations.⁹⁹ Finally, national governments can take diplomatic action to frustrate and delay Court operations. In November 2013, a resolution seeking deferral of Kenyan leaders' trial according to Article 16 of the Rome Statute¹⁰⁰ was tabled and eventually rejected by the UNSC.¹⁰¹ Furthermore, many countries worldwide have systematically ignored Rome Statute provisions on cooperation by failing to arrest Sudanese President al-Bashir and other indictees.¹⁰² These concerted efforts aim to exert undue pressure on the OTP and constrain its discretion by threatening the Court's legitimacy and authority at the political level.

97. See Paola Gaeta, *Is the Practice of Self-Referrals a Sound Start for the ICC?*, 2 J. INT'L CRIM. JUST. 949, 950–51 (2004). On the DRC situation more specifically, see Janine Natalya Clark, *Peace, Justice and the International Criminal Court: Limitations and Possibilities*, 9 J. INT'L CRIM. JUST. 521, 529 (2011).

98. Rome Statute art. 86 ("States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.").

99. *Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on the Status of the Government of Kenya's Cooperation with the Prosecution's Investigations in the Kenyatta Case*, INT'L CRIM. CT (Dec. 5, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=stmt-05-12-2014>.

100. Rome Statute art. 16 ("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.").

101. Meetings Coverage, Security Council Resolution Seeking Deferral of Kenyan Leaders' Trial Fails to Win Adoption, with 7 Voting in Favour, 8 Abstaining, SC/11176 (Nov. 15, 2013), <https://www.un.org/press/en/2013/sc11176.doc.htm>

102. Gegout, *supra* note 17, at 806; Bosco, *supra* note 5, at 158.

IV. CASE STUDY: THE DEMOCRATIC REPUBLIC OF THE CONGO

Over the last few decades, policy and academic circles alike have referred to the DRC (formerly Zaïre) as the epitome of a failed state.¹⁰³ The internal situation, awful as it was under Mobutu Sese Seko's rule, did not significantly improve by the early 2000s when Joseph Kabila assumed the presidency after his father's assassination.¹⁰⁴ During the three-year transition period (2003–2006), the extent of external interference in domestic affairs was such that “numerous top Congolese political leaders, international actors, and journalists equated the situation in the Congo to that of a ‘protectorate.’”¹⁰⁵ Under heavy external pressures and unable to reestablish effective control over the entire national territory, the government of Kinshasa had virtually no choice but to sign the Sun City Agreement and Pretoria Accord.¹⁰⁶ These internationally-brokered agreements envisaged not only political, but also military concessions to insurgent groups in order to maintain ter-

103. For René Lemarchand, “the Democratic Republic of the Congo (DRC) . . . was not just a failed state in 2002; it was the epitome of the failed state, whose descent into hell has loose a congeries of rival factions fighting proxy wars on behalf of six African states.” René Lemarchand, *The Democratic Republic of the Congo: From Failure to Potential Reconstruction*, in *STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR* 29, 29 (Robert I. Rotberg ed., 2003). To better understand the actual breadth of the “failed states” problem, see MAZOWER, *supra* note 22, at 390.

104. Joseph Kabila succeeded his father, Laurent-Désiré, as President of the DRC in January 2001, *i.e.* in the midst of the Second Congo War (1998–2003).

105. Autesserre, *supra* note 57, at 258.

106. Denis M. Tull and Andreas Mehler aptly summarized the events leading to the above-mentioned power-sharing agreement and the transitional government: “In spite of military support from Namibia, Angola and Zimbabwe, the government of President Laurent Kabila proved unable to crush the rebellion of the Rwandan-backed RCD [Congolese Rally for Democracy or RCD-Goma] that began in August 1998. A year later, significant pressure from regional and Western governments resulted in the Lusaka agreement which foresaw the holding of a national dialogue, the envisaged outcome of which was a ‘new political order’ for the Congo. This so-called inter-congolese dialogue was based on the principle that all the participants in the negotiations ‘shall enjoy equal status’. After significant delays, and the emergence of further rebellions, the dialogue was finally concluded in late 2002.” Tull & Mehler, *supra* note 68, at 377. For a more detailed account of the Second Congo War (1999–2003), see MAMPILLY, *supra* note 6, at 185–90.

ritorial integrity and a facade of sovereignty.¹⁰⁷ Politically, President Kabila's government was coerced into ushering former enemies into key governmental positions. Economically, access to state power provided former insurgent leaders lucrative sinecures and the constant opportunity to exploit public resources.¹⁰⁸ Militarily, power-sharing accords required the government of Kinshasa to integrate insurgent armed groups into the brand-new national army.¹⁰⁹

The Congolese government did not enjoy greater freedom of action or agency when confronting the decision of whether to invite judicial scrutiny from the new-born tribunal. During his first press conference as ICC Prosecutor (eight months before President Kabila's government officially referred its domestic situation to the ICC), Luis Moreno-Ocampo "announced that he would examine closely the situation in eastern Congo."¹¹⁰ Unwilling to escalate confrontation with state authorities, Moreno-Ocampo developed a "signal strategy" whereby he invited state referrals instead of opening investigations *proprio motu*.¹¹¹ Simply put, Moreno-Ocampo's working strategy consisted of publicly announcing which situations he deemed worthy of ICC scrutiny and offering governments the chance to "save face" by making use of the self-referral provision of the Rome Statute.¹¹² Regarding the situation in the DRC, however, the OTP did more than merely suggesting a course of action to state authorities. Instead, "the OTP was in fact involved in the drafting of letter by which the DRC referred the situation on its territory to the Court."¹¹³

107. For a distinction between different levels of power-sharing, see Matthew Hoddie & Caroline Hartzell, *Power-sharing in Peace Settlements: Initiating the Transition from Civil War*, in SUSTAINABLE PEACE: POWER AND DEMOCRACY AFTER CIVIL WAR 103 (Philip G. Roeder & Donald Rothchild eds., 2005); see also Franzisca Zanker, Claudia Simons & Andreas Mehler, *Power, Peace, and Space in Africa: Revisiting Territorial Power Sharing*, 114 AFR. AFF. 72 (2014).

108. Rebel groups capitalized on the international recognition obtained in the aftermath—and as a result—of peace talks and negotiations to exploit natural resources, signing lucrative deals with foreign corporations. MAMPILLY, *supra* note 6, at 187. On power-sharing and sinecure distribution, see Mehler, *supra* note 73, at 471–72.

109. Eriksson Baaz & Verweijen, *supra* note 70, at 565–66.

110. Bosco, *supra* note 5, at 90.

111. *Id.* at 91, 96.

112. *Id.* at 96.

113. NOUWEN, *supra* note 47, at 113 n.9.

But the situation in the DRC was like no other, and Moreno-Ocampo was fully aware that external actors had high stakes therein;¹¹⁴ the unparalleled commitment of political and economic resources by the international community as a whole turned the DRC into a test case for humanitarian intervention and peace-keeping operations.¹¹⁵ Against this backdrop, the specter of ICC prosecution loomed large over the implementation of the peace process.

Acknowledging that the political conditions and empirical circumstances severely constrained state agency is not tantamount to claiming that the Congolese government placed itself at the mercy of an externally-determined fate. In the past, Mobutu Sese Seko proved willing and able to seize the opportunities offered by international legal sovereignty in order to attract support and foreign aid.¹¹⁶ Similarly, President Kabila's government aimed to use the ICC instrumentally when it formally referred its domestic jurisdiction to the Court on March 3, 2004.¹¹⁷ The question is why and how the Congolese govern-

114. Bosco, *supra* note 5, at 100; Interview with a European diplomat, in Addis Ababa, Ethiopia (Aug. 12, 2014) (arguing the OTP was well aware that the success of then-ongoing peacemaking efforts hinged on the political co-optation of Kabila's main rivals and serving vice presidents in the transitional government, Azarias Ruberwa and Jean-Pierre Bemba Gombo).

115. Autesserre, *supra* note 57, at 258, 266 (recalling that "MONUC . . . progressively became the largest and most expensive UN mission in the world").

116. RENO, *supra* note 86, at 148, 152. Mobutu Sese Seko was neither the first nor the only to cash in on international legitimacy and sovereign access to foreign aid, Uganda's Yoweri Museveni being another prominent example. According to Sarah Nouwen and Wouter Werner, at one point "[i]nternational donors . . . fund[ed] between 35 and 50 per cent of Uganda's budget." Nouwen & Werner, *supra* note 18, at 948. On the correlation between international legitimacy and government (or insurgent) access to international donors' generosity, see MAMPILLY, *supra* note 6, at 113 (Sri Lankan government), 150 (Sudan People's Liberation Movement/Army, or SPLM/A).

117. The time factor is key to understand such a sudden change in state interests. By March 2004, indeed, circumstances had significantly improved for the Congolese government. Back in 2002, when foreign-brokered peace negotiations were not yet finalized, the so-called "Second Congo war" was still ongoing and regime survival at stake. Following the formation of an interim government in June 2003, the UNSC authorized the increase in the military strength of the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) up to 10,800 units and urged Ugandan and Rwandan troops to withdraw from the eastern regions. S.C.

ment conceived of the self-referral as a means of enhancing state sovereignty. On the causes underlying the self-referral, President Kabila's personal motives can be distinguished from impersonal considerations about state sovereignty. The self-referral was certainly instrumental to the furtherance of both agendas, yet scholars have paid little attention to the consequences it had on state sovereignty excluding President Kabila's gamesmanship with ICL norms.

To start, the DRC case study aptly shows how the ICC differs from other legal and quasi-legal institutions whose scrutiny state leaders can invite as well as how the latter fits into a broader "lawfare" strategy.¹¹⁸ At the time the Congolese government decided to refer its domestic situation to the ICC, it had already filed a complaint with the African Commission of Human and People's Rights¹¹⁹ and submitted three virtually identical legal disputes to the ICJ against the Republics of Uganda, Rwanda, and Burundi.¹²⁰ In each of those submissions, the government of the DRC lamented the unlawful presence of foreign troops on its national territory and requested these institutions expose the crimes allegedly committed by foreign soldiers on Congolese soil.

Res.1493 ¶ 3 (July 28, 2003). The withdrawal of Ugandan and—especially—Rwandan troops, mostly completed by May 2003, significantly affected the RCD's military capacity and, in turn, strategies. In particular, while the RCD command held constant its ultimate military objective over time (*i.e.* capturing the capital and overthrowing President Kabila, *see* MAMPILLY, *supra* note 6, at 215), its ability to consolidate power in the easternmost regions suffered from the end of Rwandan military assistance. Tull & Mehler, *supra* note 68, at 379.

118. *See* NOUWEN, *supra* note 47, at 111–12 (showing that the government of Kinshasa commenced legal proceedings before several international courts and quasi-courts, the ICC being the latest of these).

119. Afr. Comm. Hum. & People's Rights, D.R. Congo v. Burundi, Rwanda, Uganda, Comm. No. 227/99 (2003). <https://www1.umn.edu/humanrts/africa/comcases/227-99.html>.

120. Application Instituting Proceedings, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Burundi) (June 23, 1999), <http://www.icj-cij.org/docket/files/117/7071.pdf>; Application Instituting Proceedings, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda) (June 23, 1999), <http://www.icj-cij.org/docket/files/117/7071.pdf>; Application Instituting Proceedings, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda) (June 23, 1999), <http://www.icj-cij.org/docket/files/116/7151.pdf>.

Situating the role played by the ICC within the broader lawfare strategy is relevant to the argument set forth in this Article for it shows that the criminalization mechanism is the most effective “weapon” available to governments in their efforts to delegitimize former enemies and political rivals in the eye of an international community “seeking to be engaged at low cost.”¹²¹ First, the recurring appeals to legal and quasi-legal institutions demonstrate the Congolese government’s already-established competence in strategically using international law in the pursuit of extra-legal objectives and, in particular, in defense of state sovereignty.¹²² Second, the prior appeals to other non-criminal tribunals suggest that there was no specific need for the ICC to garner further international attention on Congolese security challenges or to name and shame foreign leaders for allegedly violating international law. If naming and shaming was the main objective, the self-referral of March 2004 would have been at best redundant.¹²³ It is thus possible to conclude that, in the DRC case, the utility of inviting ICC scrutiny lay in leveraging the threat of criminal, rather than reputational, sanctions when liaising with external and internal enemies. Third, the ascertainment of individual, rather than state, responsibility carried out at the ICC affords national governments an unprecedented legal means to target internal enemies. Conversely, non-criminal tribunals like the ICJ can only settle legal disputes between states or between states and IOs; other non-state actors cannot be parties in such disputes.¹²⁴

The analysis of how the self-referral came about further underscores the centrality of state agency in the decision to get the ICC involved in Congolese internal affairs. Scholars have thus far emphasized President Kabila’s brinkmanship in outsourcing criminal jurisdiction to the ICC.¹²⁵ Simply put, he skillfully minimized the risk of being indicted by the Court

121. Tull & Mehler, *supra* note 68, at 386.

122. See Gray, *supra* note 24, at 878.

123. On conceiving of stigmatization as the proposed primary goal of international criminal tribunals, see Frédéric Mégret, *Practices of Stigmatization*, 76 L. & CONTEMP. PROBS. 287 (2013).

124. On the ICJ’s history of settling disputes between African states, see RENO, *supra* note 86, at 21, 23.

125. See Burke-White, *supra* note 13, at 565; P. Clark, *supra* note 48, at 40; J. Clark, *supra* note 97, at 529; Rodman & Booth, *supra* note 13, at 297.

himself thanks to considerations concerning temporal jurisdiction and case selection.¹²⁶ Yet these scholars overlook an interesting puzzle: Was President Kabila's intent to minimize his own risk of being indicted, and thus delegitimized, by the ICC through the exploitation of the asymmetry of self-referral,¹²⁷ and why did he eventually give the Court jurisdiction over the entire national territory, instead of limiting it to the eastern provinces?¹²⁸ As mentioned earlier, the personal and state agendas complement, rather than exclude, one another.¹²⁹ From an individual level of analysis, President Kabila's decision attunes with his intention to criminalize his two main rivals in the 2006 presidential elections, former insurgent leaders, and then vice-presidents of the DRC—Azarias Ruberwa and Jean-Pierre Bemba Gombo.¹³⁰ Switching to the national level of analysis, the self-referral served the dual purpose of enhancing governmental control over remote regions fallen

126. In this regard, William Burke-White noted that “Kabila is unlikely to be the subject of any ICC investigation, yet two of his potential electoral opponents—Vice Presidents Jean Pierre Bemba of the MLC [Movement for the Liberation of the Congo] and Azarias Ruberwa of the RCD—are among those most likely to be the subject of any early investigation. Though Kabila's hands are not clean, it is unlikely that he has committed significant crimes within the jurisdiction of the ICC. He was a relative newcomer on the political scene when his father died in January 2001 and has not been directly involved in the ongoing conflict in Ituri and South Kivu. Any crimes against humanity committed by Kabila likely occurred prior to 1 July 2002 and, as yet, there is little evidence that he has been directly involved in any of the major massacres in Congo within the Court's temporal jurisdiction.” Burke-White, *supra* note 13, at 565; see Rodman & Booth, *supra* note 13, at 297.

127. The above-mentioned asymmetry lies in the different standing governments (as legitimate state representatives) and rebel groups (as well as other non-state actors) enjoy in international law. See MAMPILLY, *supra* note 6, at 34–35, 245; CLAIRE METELITS, *INSIDE INSURGENCY: VIOLENCE, CIVILIANS, AND REVOLUTIONARY GROUP BEHAVIOR* 171 (2009); Daragh Murray, *How International Humanitarian Law Treaties Bind Non-State Armed Groups*, 20 J. CONFLICT & SECURITY L. 101 (2015). This different legal standing characterizes the Rome Statute too, for only states (*i.e.*, national governments) can opt for the ratification thereof, request the OTP to investigate a situation *ex art. 14*, and bear legal obligations to cooperate with the Court.

128. Office of the Prosecutor - Press Release (ICC-OTP-20040419-50): “Prosecutor receives referral of the situation in the Democratic Republic of Congo,” issued on April 19, 2004 (on file with author).

129. See, *e.g.*, Niemann, *supra* note 76, at 30.

130. See Burke-White, *supra* note 13, at 565; Rodman & Booth, *supra* note 13, at 297.

under rebel rule and co-opting international actors in the strengthening of the government's position vis-à-vis rival factions and hostile armed groups.

Because of Jean-Pierre Bemba Gombo's political clout, the self-referral served an additional purpose. Antipathy against both Laurent and Joseph Kabila is well documented for all western provinces of the DRC, including the capital district. The capital itself has witnessed several rounds of riots and clashes between locals and police forces since Laurent Kabila's troops entered Kinshasa victoriously.¹³¹ Predictably, Bemba Gombo achieved a solid victory in both the first round and run-off of the 2006 presidential elections in all of these provinces—popular support he retained even after losing his presidential bid.¹³² This situation posed a direct and ever-present threat to the security of both Joseph Kabila personally and the Congolese government collectively. Bemba Gombo's criminalization through the medium of the ICC is therefore best seen as a survival strategy distinct from—and logically prior to—governmental efforts to consolidate state control in eastern Congo. And President Kabila's fears were well-grounded. On March 28, 2004, less than ten days after the ICC Prosecutor publicly announced he had received a state referral from the Congolese government, a coup attempt against President Kabila took place in Kinshasa.¹³³ There is no evidence supporting the existence of a causal nexus between the self-referral and the coup attempt, yet the latter event validates a key premise upon which the Congolese government eventually opted for the self-referral.

Perhaps the key tenet of the lawfare strategy adopted by the Congolese government was to get external actors to do its bidding. Inviting ICC scrutiny was the pivot around which the entire strategy was built, as it was instrumental in creating a tension between global governance and global justice norms. On the one hand, the international community had a strong interest in the democratization of the DRC, and to this end it

131. Maria Eriksson Baaz & Maria Stern, *Making Sense of Violence: Voices of Soldiers in the Congo (DRC)*, 46 J. MOD. AFR. STUD. 57, 65 (2008).

132. Ndahinda, *supra* note 52, at 491.

133. Nilima Fox, *Congolese Troops Snuff Out Coup Attempt*, INDEPENDENT (Mar. 28, 2004), <http://www.independent.co.uk/news/world/africa/congolese-troops-snuff-out-coup-attempt-66493.html>.

invested enormous political and economic capital in guaranteeing political stability during the transition period and organizing free and fair elections in 2006.¹³⁴ On the other hand, the international community, spearheaded by the countries leading peacekeeping operations and bearing the greatest financial burden, was normatively committed to the furtherance of the ICL regime. The internationally-held assumption was that these two sets of norms would go hand in hand, not conflict, with one another, yet it had never been tested before the DRC state referral.¹³⁵ This observation carries significant theoretical implications, for it urges reconsideration of the role of state agency as currently described in the “peace v. justice” debate.¹³⁶ In the Uganda case, the OTP is commonly held re-

134. P. Clark, *supra* note 48, at 40.

135. David Kaye and Kal Raustiala, for instance, conclude that “[f]or all its power and promise, the ICC functions in a larger framework of global governance.” David Kaye & Kal Raustiala, *The Council and the Court: Law and Politics in the Rise of the International Criminal Court*, 94 TEX. L. REV. 713, 740 (2016). Furthermore, it would be impossible to fully appreciate how the ICC operates without considering its relationship with other global governance tenets like fact-finding mandates, whose mission is to gather information on alleged ICL violations, and humanitarian intervention, whose purpose is to stop the very violations that would likely fall in the jurisdiction of the ICC. See Bellamy & Williams, *supra* note 89; Rob Grace, *From Design to Implementation: The Interpretation of Fact-Finding Mandates*, 20 J. CONFLICT & SECURITY L. 27 (2015).

136. The scholarly debate commonly referred to as “peace v. justice” investigates the relationship between establishing justice and promoting peace in war-torn countries. In particular, scholars disagree as to whether or not the prosecution—or threat thereof—of state or rebel leaders responsible for mass atrocities undermines the conclusion of peace deals. See generally Cherif M. Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 L. & CONTEMP. PROBS. 9, 12 (1996) (arguing the relationship between peace and justice is a false dichotomy, “because justice is frequently necessary to attain peace”); Charles Villa-Vicencio, *Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet*, 49 EMORY L.J. 205, 220 (2000) (expressing worry that “[t]he duty to prosecute, which defines the ICC, can shipwreck non-prosecutorial initiatives by nations seeking seriously to move away from past gross violations of human rights”); Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT’L L. 7, 9 (2001) (recalling that “[t]he empirical evidence suggests that [international criminal tribunals] have significantly contributed to peace building in postwar societies, as well as to introducing criminal accountability into the culture of international relations.”); Michael P. Scharf, *From the eXile Files: An Essay on Trading Justice for Peace*, 63 WASH. & LEE L. REV. 339 (2006) (noting that peace and justice

sponsible for forestalling attempts at national reconciliation by domestic and external actors alike. In the DRC case, conversely, it was the central government who proactively tried to hijack democratic transition from the onset.

Given its means and scope, the governmental strategy turned out to be quite successful. French collaboration was at best ancillary in transferring Thomas Lubanga Dyilo to the Hague in March 2006,¹³⁷ but it became necessary in 2010 when the French police arrested Callixte Mbarushimana on French soil. By the same token, in May 2008 the Belgian police arrested Jean-Pierre Bemba Gombo in his house near Brussels.¹³⁸ Cooperation between Congolese police forces and the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) contingent is also documented with regard to the arrests of Mathieu Ngudjolo Chui and Germain Katanga in October 2003 and March 2005 respectively.¹³⁹ Despite its formerly hostile relations with the ICC, the United States has recently—and somewhat unwittingly—played a minor role in this plot by accommodating Bosco Ntaganda's request to be transferred to the Hague to face trial upon his spontaneous surrender to the U.S. embassy in Kigali.¹⁴⁰ All in all, the strategic use of international law provided the Congolese government with a powerful tool against the major rebellions it faced as well as an internationally-accepted means to resist external pressures.

V. CASE STUDY: CÔTE D'IVOIRE

The government of Côte d'Ivoire (GoCI) was the first to invoke ICC jurisdiction for investigating atrocity crimes allegedly committed within its own national borders. On April 18, 2003, the incumbent government formally invited ICC scrutiny despite the fact the Côte d'Ivoire had not yet ratified the Rome Statute. It did so by lodging a declaration under Article

can be incompatible goals when negotiating a political conclusion to ongoing hostilities).

137. Schabas, *supra* note 11, at 36.

138. Bosco, *supra* note 5, at 141.

139. *Id.* at 140–41.

140. *Id.* at 175.

12(3) of the Rome Statute with the Office of the Registrar,¹⁴¹ thus accepting ICC jurisdiction “with respect to the crime in question.”¹⁴² One key advantage of examining this case study is that its timeline is clearly delimited by the declaration itself; the GoCI invited the ICC to examine events that occurred beginning September 19, 2002—when rebel forces launched a coup d’état against the national government seated in Abidjan.¹⁴³

On the above date, a number of loosely organized insurgent groups—which later merged into the Forces Nouvelles de Côte d’Ivoire (FN)—unsuccessfully tried to oust President Gbagbo from power.¹⁴⁴ Ivorian armed forces successfully resisted rebel attacks in the southern regions, whereas they lost control of the northern half of the country without much fighting.¹⁴⁵ With remarkable readiness, the French government launched Operation Licorne, deploying troops on the ground within three days of the failed coup d’état¹⁴⁶ with the initial mission to protect and evacuate French nationals and other foreigners.¹⁴⁷ It was against this backdrop that, at the beginning of October 2002, Gbagbo formally requested

141. Rep. de Côte d’Ivoire, Déclaration de Reconnaissance de la Compétence de la Cour Pénale Internationale [Declaration Accepting the Jurisdiction of the International Criminal Court], Apr. 18, 2003, www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf. According to Payam Akhavan, the above-mentioned declaration “in substance amounted to a self-referral.” Akhavan, *supra* note 15, at 106. Similarly, Rodman & Booth assert that “triggering the Court’s *ad hoc* jurisdiction effectively giv[es] it the same authority as it would have over a state party.” Rodman & Booth, *supra* note 13, at 299.

142. Rome Statute, art. 12(3).

143. On Gbagbo’s decision to invite ICC scrutiny, see Mike McGovern, *Proleptic Justice: The Threat of Investigation as a Deterrent to Human Rights Abuses in Côte d’Ivoire*, in *MIRRORS OF JUSTICE: LAW AND POWER IN THE POST-COLD WAR ERA* 79 (Kamari Maxine Clarke & Mark Goodale eds., 2009).

144. See, e.g., Bellamy & Williams, *supra* note 89, at 830.

145. On the *de facto* partition of Côte d’Ivoire following the September 19 rebel offensive, see RENO, *supra* note 86, at 186; Daniel Chirot, *The Debacle in Côte d’Ivoire*, 17 *J. DEMOCRACY* 63, 71–72 (2006). The rebels’ political agenda included “Gbagbo’s resignation, the organization of free and fair elections, and the end of discriminatory politics based on the concept of *Ivoirité*.” Maja Bovcon, *France’s Conflict Resolution Strategy in Côte d’Ivoire and its Ethical Implications*, 11 *AFR. STUD. Q.* 1, 6 (2009).

146. PAUL COLLIER, *WARS, GUNS AND VOTES: DEMOCRACY IN DANGEROUS PLACES* 163 (Harper Collins, 2009).

147. *Id.*

French military assistance in quashing the insurgency. Gbagbo's request came just few days after he claimed foreign actors were backing the insurgency (September 27)¹⁴⁸ and thus purported to activate bilateral defense accords with France, who pledged to intervene if an external threat to Ivorian sovereignty arose.¹⁴⁹ Despite acknowledging that his request of military assistance later backfired, it is worth emphasizing that President Gbagbo had no doubt whom to ask for help—France's assertiveness in the African continent is well-documented across time and states.¹⁵⁰ Based on these historical and geopolitical considerations, Gbagbo's government was reasonably certain that France was willing to intervene and resolve a situation of domestic turmoil. On October 17, 2002, when the rebels agreed to cease hostilities, President Gbagbo conditioned his assent to having French troops police the

148. Historical evidence supports Gbagbo's allegations of foreign involvement in Ivorian internal affairs. See Bovcon, *supra* note 145, at 6–7; RENO, *supra* note 86, at 186 (recalling how both Burkina Faso's President Blaise Compaoré and Liberia's President Charles Taylor became involved in the Ivorian civil war by militarily and financially supporting armed rebel groups opposing Gbagbo's regime).

149. Bovcon, *supra* note 145, at 6; see also Marco Wyss, *The Gendarme Stays in Africa: France's Military Role in Côte d'Ivoire*, 3 AFR. CONFLICT & PEACEBUILDING REV. 81, 91 (2013).

150. According to Christopher Griffin, "[b]etween 1960 and early 2008, France launched 43 military operations in Francophone Africa." Christopher W. Griffin, *French Grand Strategy in Africa in the Fifth Republic* (Mar. 28, 2009) (unpublished Ph.D. dissertation, University of Southern California) (on file with the University of Southern California Library System), <http://digitallibrary.usc.edu/cdm/ref/collection/p15799coll127/id/218417>. Griffin's list, however, needs updating as to include more recent interventions, like those in Chad, Libya, Mali and again in the Central Africa Republic. On France's status in the African continent, pundits have observed that France "wields a level of influence in sub-Saharan Africa that it cannot command anywhere else in the world. In crisis situations, it is still seen as a key source of diplomatic, military or even financial pressure on or support for the countries in the region." Paul Melly & Vincent Darracq, *A New Way to Engage? French Policy in Africa from Sarkozy to Hollande*, CHATHAM HOUSE, Africa 2013/01, May 2013; see also Wyss, *supra* note 149, at 88 (noting that France maintained the military capacity to intervene rapidly in conflicts in Africa); Arnim Langer, *Horizontal Inequalities and Violent Group Mobilization in Côte d'Ivoire*, 33 OXFORD DEV. STUD. 25, 30 (2005) (explaining that France maintained a considerable military presence in Cote d'Ivoire, which acted as a deterrent against military insurgencies).

ceasefire.¹⁵¹ By mid-December 2002, over two thousand French troops had deployed on the ground, creating a buffer zone to keep warring parties apart and provide logistical assistance to incoming Economic Community of West African States (ECOWAS) peacekeepers.¹⁵² Up until this moment, Gbagbo had reasons to believe that French military intervention played in his favor.¹⁵³ Indeed, despite its supposed neutrality:

France still provided the Ivorian National Army with logistical support and agreed to open the so-called “confidence zone.” This allowed the governmental forces to attack the rebel positions in Bouaké. After failing to conquer the town, the governmental forces withdrew and Licorne closed the passage again.¹⁵⁴

In Gbagbo’s mind, French troops were necessary to shift the balance of power in favor of governmental forces. Indeed, as a consequence of the aforementioned Franco-Ivorian defense accords, “the National Army of Côte d’Ivoire (FANCI) was reduced to a simple gendarmerie unable to defend its own territory.”¹⁵⁵

However, Gbagbo’s confidence in French military assistance began to fade following two episodes that transpired

151. Agence France-Presse, *Chronology of Four Months of Crisis in Ivory Coast* (January 15, 2003), www.reliefweb.int/report/côte-divoire/chronology-four-months-crisis-ivory-coast; see also Tull & Mehler, *supra* note 68, at 385 (describing Gbagbo’s military dependence on France, who protected his government during the 2002 crisis).

152. Prior to Operation Licorne, “France had approximately 500 troops stationed in Côte d’Ivoire. In January 2003, the Economic Community of West African States (ECOWAS) placed approximately 1,500 peacekeeping troops from five countries—Senegal (commander), Ghana, Benin, Togo, and Niger—on the ground beside the expanded French force.” INTERNATIONAL BUSINESS PUBLICATIONS USA, COTE D’IVOIRE (IVORY COAST) CONSTITUTIONAL AND CITIZENSHIP LAWS HANDBOOK: STRATEGIC INFORMATION AND BASIC LAWS 36 (updated reprt. 2014). On the number of French troops on the ground, see *France Sending More Troops to Ivory Coast as Peace Talks Falter*, N.Y. TIMES (Dec. 13, 2012), www.nytimes.com/2002/12/13/world/france-sending-more-troops-to-ivory-coast-as-peace-talks-falter.html.

153. COLLIER, *supra* note 146, at 163; Tull & Mehler, *supra* note 68, at 390.

154. Bovcon, *supra* note 145, at 13–14; see also Tull & Mehler, *supra* note 68, at 385.

155. Bovcon, *supra* note 145, at 9; see also, Chirot, *supra* note 145, at 70.

shortly thereafter.¹⁵⁶ On January 4, French foreign minister De Villepin met with the Patriotic Movement of Cote d'Ivoire (MCPI)¹⁵⁷ in Bouaké, the rebel stronghold. This was an unprecedented move for a foreign senior official, and international media further amplified its symbolic meaning to the dismay of Ivorian authorities.¹⁵⁸ At the peace talks held in Paris starting on January 15, Gbagbo's suspicion proved correct. First of all, the negotiations leading to the Linas-Marcoussis agreement conferred international recognition upon the rebellion and quite explicitly upheld most of its grievances.¹⁵⁹ Further, the agreement's power-sharing component envisaged "the nomination of a transitional Prime Minister endowed with special powers, risked reducing Gbagbo to a symbolic figure head—the expression 'Queen of England' was used in the media—deprived of the bulk of his powers."¹⁶⁰ Relatedly, the agreement's final draft stated that "the two key ministries of Defense and the Interior would also have gone to the FN."¹⁶¹ In addition, before and during peace negotiations French President Jacques Chirac did little to hide his aversion to Gbagbo, and even threatened to hold him accountable before the ICC for crimes allegedly committed at his behest since the outbreak of the civil war.¹⁶² Domestically, Gbagbo reacted by portraying himself as the champion of state sovereignty against French neocolonial ambitions and accordingly purported to mobilize soldiers and citizens by evoking a "second war of independence."¹⁶³ Incendiary rhetoric notwithstanding, peace

156. According to Mike McGovern, "[b]y 2003, France had changed direction, essentially insisting that Gbagbo form a new government that included those players who had been excluded (with their blessing) in 2000—a situation that had led not to the hoped-for result of (authoritarian) stability, but toward civil war." McGovern, *supra* note 143, at 83.

157. Patriotic Movement of Cote d'Ivoire (MCPI), also known as *Mouvement Patriotique de Côte d'Ivoire*, MPCPI is a main rebel group formed in 2002 under the leadership of Guillaume Soro. On MCPI's political agenda, see Langer, *supra* note 150, at 35; Abu Bakarr Bah, *Democracy and Civil War: Citizenship and Peacemaking in Côte d'Ivoire*, 109 AFR. AFF. 597, 604 (2010).

158. Giulia Piccolino, *David Against Goliath in Côte d'Ivoire? Laurent Gbagbo's War Against Global Governance*, 111 AFR. AFF. 1, 7–8 (2012).

159. *Id.* at 8.

160. *Id.*

161. *Id.*; see also Bah, *supra* note 157, at 608.

162. Akhavan, *supra* note 13, at 640.

163. Piccolino, *supra* note 158, at 6–7.

negotiations proved President Gbagbo utterly weak vis-à-vis French pressure—weakness confirmed by the fact that he eventually, albeit unwillingly, agreed to sign the agreement on January 23, 2003.

Events precipitated immediately after that signature, when Gbagbo and key domestic constituencies undertook to undermine an accord that was de facto imposed upon the GoCI. On January 27, national and international media reported mobs reacting against the accords by attacking the French embassy in Côte d'Ivoire.¹⁶⁴ On January 29, the Côte d'Ivoire army publicly rejected power-sharing deals with the rebels.¹⁶⁵ On February 1, pro-government protesters stormed Abidjan airport as French citizens fled the country.¹⁶⁶ These events had the effect of further narrowing Gbagbo's set of options,¹⁶⁷ as they clearly signaled the preferences upheld by societal groups whose loyalty was necessary for Gbagbo to maintain power. Constrained by opposite pressures, during the month of February Gbagbo essentially played politics and tried to buy time.¹⁶⁸ On February 8, he publicly called on his supporters to give the peace accord a chance.¹⁶⁹ On February 11,

164. *Angry at Accord, Mobs Attack French Embassy in Ivory Coast*, N.Y. TIMES (Jan. 27, 2009), www.nytimes.com/2003/01/27/world/angry-at-accord-mobs-attack-french-embassy-in-ivory-coast.html; see also Chirot, *supra* note 145, at 72.

165. Somini Sengupta, *Ivory Coast Army Rejects Power-Sharing Deal With Rebels*, N.Y. TIMES (Jan. 29, 2003), <http://www.nytimes.com/2003/01/29/world/ivory-coast-army-rejects-power-sharing-deal-with-rebels.html>.

166. Somini Sengupta, *Protesters Storm Abidjan Airport as French Citizens Leave*, N.Y. TIMES (Feb. 1, 2003), www.nytimes.com/2003/02/01/world/protesters-storm-abidjan-airport-as-french-citizens-leave.html.

167. Robert Putnam would view this in terms of “win-set(s)”, defined as the gamut of possible outcomes that key domestic interest groups would likely accept. However, Putnam's account applies at the treaty bargaining phase, whereas in the cases we examine domestic actors exert pressure aimed at undermining its implementation. Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 437 (1988).

168. Emily Wax, *Pledging Peace, Creating Chaos: Ivory Coast Leader Said to be Behind Anti-French Protests*, WASH. POST FOREIGN SERV. (Feb 16, 2003), www.genocidewatch.org/images/Cote_D_Ivoire_16_Feb_03_Pledging_Peace,_Creating_Chaos_Ivory_Coast_Leader_Said_to_Be_Behind_Anti-French_Protests.pdf. On the role of time in Gbagbo's resistance strategy, see COLLIER, *supra* note 146, at 164.

169. Somini Sengupta, *Ivoirian Leader Urges Supporters To Give Peace Accord a Chance*, N.Y. TIMES (Feb. 1, 2003), www.nytimes.com/2003/02/08/world/ivoirian-leader-urges-supporters-to-give-peace-accord-a-chance.html.

Gbagbo announced that his government was finally undertaking measures to allow rebel representatives to sit in the government of national reconciliation mandated by the Linas-Marcoussis Agreement,¹⁷⁰ while on February 13 he balked and complained about the Ministries of the Interior and Defense being assigned to the rebels.¹⁷¹ In the second half of February, the rebels tried to break this stalemate and finally take over their ministerial positions. On February 17, rebels threatened to resume hostilities, but only to suspend their ultimatum one day later.¹⁷² On February 22, the rebellion tried an alternative strategy, yielding on the previously demanded cabinet posts, but asking for two ministries of equal importance in return.¹⁷³ Rebels' political efforts eventually did not prove effective, as they merely provided Gbagbo with more opportunities for buying time. Rebels' patience wore out in early March, when hostilities renewed throughout the country. Media reported all warring parties engaging in fighting and allegedly committing war crimes and crimes against humanity. On March 9, rebels attacked French troops policing the buffer zone;¹⁷⁴ the same day, mercenaries allied with loyalist troops reportedly murdered up to two-hundred civilians in western Côte d'Ivoire.¹⁷⁵ On March 26, loyalists and rebels blamed one another for the death of forty-two civilians in a western village, then on the following day media reports blamed local militias for con-

170. *Ivory Coast Leaders Start Task of Making Room for Rebels*, N.Y. Times (Feb. 11, 2003), www.nytimes.com/2003/02/11/world/ivory-coast-leaders-start-task-of-making-room-for-rebels.html.

171. *Ivory Coast's Leader Balks, and So Do Rebels, on Cabinet Posts*, N.Y. Times, (Feb. 13, 2003), <http://www.nytimes.com/2003/02/13/world/ivory-coast-s-leader-balks-and-so-do-rebels-on-cabinet-posts.html>.

172. *Rebels Threaten to Renew Ivory Coast Civil War*, N.Y. Times (Feb. 17, 2003), www.nytimes.com/2003/02/17/world/rebels-threaten-to-renew-ivory-coast-civil-war.html.

173. *Ivory Coast Rebels Yield Demand On Cabinet Jobs to Ease Accord*, N.Y. Times (Feb. 22, 2003), www.nytimes.com/2003/02/22/world/ivory-coast-rebels-yield-demand-on-cabinet-jobs-to-ease-accord.html.

174. Somini Sengupta, *As Peace Accord is Fleshed Out, Ivory Coast Fighting Resumes*, N.Y. Times, (Mar. 9, 2003), www.nytimes.com/2003/03/09/world/as-peace-accord-is-fleshed-out-ivory-coast-fighting-resumes.html.

175. *French Soldiers Find Bodies in Ivory Coast Town*, REUTERS, Mar. 9, 2003, www.genocidewatch.org/images/Cote_D_Ivoire_9_Mar_03_French_Soldiers_Find_Bodies_in_Ivory_Coast_Town.pdf.

scripting and hiring child soldiers amidst its rank and file.¹⁷⁶ Lastly, on April 9 the rebels accused army troops of killing fifteen unarmed civilians.¹⁷⁷ While hostilities took place, domestic and international actors grew concerned about the feasibility of a unity government and the overall implementation of peace accords.¹⁷⁸ Accordingly, they warned both warring parties against insisting on a military confrontation.¹⁷⁹ On April 13—five days before the government lodged the Article 12(3) declaration accepting ICC jurisdiction—Gbagbo was on the brink of capitulating, as five of the nine rebel representatives were traveling to Abidjan to assume their positions as cabinet members. FN leader, Guillaume Soro, was not among these representatives, as he distrusted Gbagbo and feared the latter would carry out action against his life.¹⁸⁰ On April 17, just as rebel ministers took office in the unity government, the army carried out a helicopter raid against a western village controlled by rebels.¹⁸¹ Finally, on April 18, 2003, the Ivorian Minister of Foreign Affairs signed and mailed the letter accepting ICC jurisdiction.¹⁸² Unlike in the Ugandan case, where the referral underwent several drafts and took months before landing on Moreno-Ocampo's desk,¹⁸³ the declaration drafted by

176. *42 Die In Ivory Coast Raid*, REUTERS, Mar. 26, 2003, <http://www.nytimes.com/2003/03/26/world/42-die-in-ivory-coast-raid.html>; Somini Sengupta, *The Child Soldiers of Ivory Coast are Hired Guns*, N.Y. TIMES (Mar. 27, 2003), www.nytimes.com/2003/03/27/world/the-child-soldiers-of-ivory-coast-are-hired-guns.html.

177. Silvia Aloisi, *Rebels Accuse Army of Killing 15 Ivoirians*, IOL (Apr. 9, 2003), www.iol.co.za/news/africa/rebels-accuse-army-of-killing-15-ivoirians-1.104529.

178. *Ivory Coast: Renewed Clashes Threaten Unity Government*, THE INDEP., Apr. 8, 2003 at 13 (on file with author).

179. For instance, on April 3rd, Ivory Coast's insurgents ended their boycott of a new unity government and sat down for their first cabinet meeting in the nominal capital, Yamoussoukro (whereas cabinet meetings normally take place in Adidjan). ECOWAS and French peacekeepers guaranteed the security for said meeting. *World; in Brief*, WASH. POST, Apr. 3, 2003, at A17.

180. *5 Rebels Join Peace Coalition in Ivory Coast*, N.Y. TIMES (Apr. 14, 2003), www.nytimes.com/2003/04/14/world/5-rebels-join-peace-coalition-in-ivory-coast.html.

181. Silvia Aloisi, *Ivory Coast Toll Rises as New Cabinet Meets*, PHILA. INQUIRER, Apr. 18, 2003, at A06. On April 17, the Ivory Coast's new unity government held its first Cabinet meeting (in Abidjan) with newly sworn-in rebel ministers, even as the rebels accused the government of new attacks. *Id.*

182. Rep. de Côte d'Ivoire, *supra* note 141.

183. NOUWEN, *supra* note 47, at 111–113.

the GoCI was just a few lines long and ready for use.¹⁸⁴ The Ivorian government's strategy to undermine the power-sharing agreement by making institutional co-existence with the rebellion impossible eventually—and formally—succeeded on September 23, 2003, when rebel ministers resigned and quit the unity government.¹⁸⁵

Gbagbo's government resorted to the ICC within a broader strategy aimed at undermining the implementation of French-brokered power-sharing agreement. Politically, the Ivorian government's strategy was never overtly to challenge peace accords. It was meant to buy time while undertaking measures aimed at hampering, rather than easing, the implementation of the accords. The only constant over time was Gbagbo's preference for neither relinquishing nor sharing power.¹⁸⁶ In Paul Collier's words, "as president, [Gbagbo's] continued survival in power *depended* upon avoiding a further election. This in turn depended on the situation becoming and remaining sufficiently perturbed that elections could not be held."¹⁸⁷ In the same passage, Collier also noted that "[i]n 2001, there was the first of thirteen internationally brokered efforts at reconciliation, all of which failed."¹⁸⁸ This account demonstrates how ICC scrutiny merely provided Gbagbo with another means to sabotage conflict resolution initiatives. Militarily, government actions systematically forestalled any attempts to cease hostilities. With cease-fires repeatedly violated, the chosen ways and means of waging war were aimed at exacerbating resentment on the rebels' side, further narrowing windows of opportunity for peace. Finally, in Gbagbo's mind the April 18 declaration directly targeted Soro and other FN military leaders.¹⁸⁹ As previously recounted, Soro refused to

184. Rep. de Côte d'Ivoire, *supra* note 141.

185. *Blaming Gbagbo, Rebels Quit Government*, CHI. TRIB. (SEP. 24, 2003), http://articles.chicagotribune.com/2003-09-24/news/0309240284_1_french-brokered-rebel-leader-guillaume-soro-president-laurent-gbagbo; see also *Rebels Abandon Government Posts*, THE GAZETTE, Sept. 24, 2003 at A20.

186. Sean Butler, *Separating Protection from Politics: The UN Security Council, the 2011 Ivorian Political Crisis and the Legality of Regime Change*, 20 J. CONFLICT & SECURITY L. 251, 262 (2015).

187. COLLIER, *supra* note 146, at 162.

188. *Id.*

189. Mike McGovern notes that "Gbagbo's mis-recognition of the fact that he might be putting himself at risk of future prosecution is similar to the same 'mistake' made by Uganda's Yoweri Museveni, who hoped to use the

travel to Abidjan to take his seat in the unity government, as he mistrusted Gbagbo and feared attempts to be either killed or apprehended he once arrived in government-held territory. All in all, an ICC arrest warrant against Soro would have definitively legitimized government measures aimed at his incapacitation.

The Côte d'Ivoire case shows how the ICC can be—and has been—used “in action.” The naming and shaming of political and military adversaries was not Gbagbo’s ultimate objective, but rather the tile of a broader political and military plan to systematically undermine externally-imposed power-sharing agreements. This government plan highlights the importance of international legitimization in a civil conflict in which external constraints limited the set of options available to the regime in resisting the insurgency. It also stresses the necessity for the incumbent to take into account normative and legal considerations in shaping the state’s response to internal threats. In the end, this Part shows the instrumentality of ICC scrutiny in Gbagbo’s master plan, that is to hold on to power and preventing new elections to be held for as long as he could. Legal scholars have long debated about the potential impact of ICC arrest warrants upon peace talks and reconciliation efforts. With regard to the Uganda case, for instance, Nick Grono and Adam O’Brien referred to the ICC indictment of the Lord’s Resistance Army leadership as a “complicating factor” during the Juba peace negotiations.¹⁹⁰ President Museveni’s regime lamented that the political spillover following the ICC indictments was unforeseen and unwelcomed, but the same cannot be said about what happened in Côte d'Ivoire. Unlike in the Uganda case, the Ivorian government exploited its sovereign prerogative to invite ICC scrutiny in hopes of exacerbating the tension between peace and justice and driving a wedge between themselves and the insurgents, international diplomatic efforts notwithstanding.

ICC to flush out LRA rebels after 20 years of using a military option had failed to yield results.” McGovern, *supra* note 143, at 73 n.16.

190. Nick Grono & Adam O’Brien, *Justice in Conflict? The ICC and Peace Processes*, in *COURTING CONFLICT: JUSTICE, PEACE AND THE ICC IN AFRICA*, *supra* note 48, at 13, 15.

VI. CONCLUSIONS AND POLICY IMPLICATIONS.

The analysis of the above case studies lends support to several scholarly arguments under debate in the “law and politics” literature and adds to the mainstream understanding of the strategic use of international law—and ICL specifically—by offering plausible answers to the questions of why states invite ICC scrutiny and how the latter differs from other legal and quasi-legal institutions whose scrutiny states can invoke.

First, governments that asked for ICC involvement master ICL norms and rules to such an extent that they successfully made a strategic use thereof. Rather than suffering as defenseless victims of an international system biased against them, these countries reacted to structural constraints by subverting international norms and rules. In so doing, they also exposed the contradictions intrinsic to the system of global governance. Simply put, state agency has a significant role over the structure defined by international law. From this perspective, state (ab)use of ICC provisions is simply the latest application of a strategy already observed for different sets of norms and rules.¹⁹¹ The necessary premise for devising and carrying out such a strategy lies in the government’s privileged access to the international sphere by virtue of its status as a legitimate state representative.¹⁹² While legal scholars have long noticed the asymmetric nature of state referrals and Article 12(3) declarations, they have so far overlooked its enhancing effect on state sovereignty.

Second, sovereignty concerns are central to the understanding of why Third World countries—particularly African countries—behave differently towards the ICC depending on whether they act unilaterally or collectively.¹⁹³ There is stark

191. On the instrumental use of international norms, see, for example, STEPHEN D. KRASNER, *STRUCTURAL CONFLICT: THE THIRD WORLD AGAINST GLOBAL LIBERALISM* 7–8, 16 (1985) (discussing Third World use of international legitimation of national controls in dealing with multinational corporations); Ian Hurd, *The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003*, 59 *INT’L ORG.* 495, 495 (2005) (describing Libya’s appropriation of symbols and norms of liberal internationalism against UN sanctions in early 1990s).

192. See generally CLAPHAM, *supra* note 2; Clapham, *supra* note 63.

193. *System of States*, *supra* note 21, at 68–69 (noting that Third World states’ external behavior is the function of two, often competing, roles—namely the individual and the collective).

political opposition to the ICC in Africa, so much so that the African Union called an extraordinary meeting in October 2013 to discuss the ICC and lament its contested focus on the continent.¹⁹⁴ Against this backdrop, the expectation was that no African country would voluntarily invite judicial scrutiny by the ICC, yet history offers abundant evidence to the contrary.¹⁹⁵ Mohammed Ayoob's claim that international neglect drives African perspectives on humanitarian intervention can also be applied to the strategic use of the ICC.¹⁹⁶ Thus, inviting ICC scrutiny might be seen as another tool available to incumbent governments for raising international attention on neglected internal situations.¹⁹⁷ This is the case with the six situations investigated by the ICC at state's behest, which are not analyzed in this article due to space constraint (namely Uganda, the CAR, Mali, Palestine, Ukraine, and now Gabon). These governments rightly conceived of the ICC as a means of enhancing, rather than further eroding, state sovereignty.

But salient is the political effects of ICC involvement in those country situations where global governance and global justice norms collide with, rather than complement, one another. The research design of this Article is tailored as to highlight the causal connection within the use of a legal means to obtain a political objective in the least likely cases. Especially in the DRC, the international community and those acting on its behalf had a vested interest in promoting the global governance agenda onto the lasting Congolese crisis. When global governance and global justice norms conflict, however, upholding the latter to the detriment of the former became very costly for external interveners. The Congolese government's decision to get the ICC involved raised a dilemma in determining which norms to follow in case of conflict. The government

194. African Union, *Decision on Africa's Relationship with the International Criminal Court (ICC)*, Ext/Assembly/AU/Dec. 1(Oct.2013) (Oct. 12, 2013), http://www.iccnw.org/documents/Ext_Assembly_AU_Dec_Decl_12Oct_2013.pdf.

195. Of particular interest is the conclusion "that any AU Member State that wishes to refer a case to the ICC may inform and *seek the advice* of the African Union." *Id.* para. 10(viii) (emphasis added).

196. *Third World Perspectives*, *supra* note 21, at 105, 110.

197. *See, e.g.*, Nouwen & Werner, *supra* note 18, at 948 (noting the Ugandan government's perception of a referral to the ICC as a means of drawing attention to the forgotten Ugandan internal conflict).

of Kinshasa won its bet insofar as it de facto coopted powerful external actors in the endeavor of enhancing state control over remote regions and, indirectly, undermined the power-sharing agreement upon which the peace process rested.¹⁹⁸

The observation that only countries facing a domestic conflict, post-conflict, or low-intensity conflict scenario have thus far invited ICC scrutiny carries far-reaching policy implications. First of all, it raises an important problem of perceptions. The realization that “perceptions of legitimacy are crucial to international institutions” is even more important when applied to courts of all kinds, for it should drive their daily operations.¹⁹⁹ Indeed, “justice must not only be done, but must also be seen to be done.”²⁰⁰ But the strategic invitation of ICC scrutiny by national governments has almost inevitably undermined perceptions about ICC’s legitimacy and impartiality.²⁰¹ National governments have actively tried to co-opt the ICC into multi-faceted legal, political, and military struggles against internal threats, and they have been quite successful in this endeavor. Furthermore, changes in state practices are unlikely to occur in the near future, for the ongoing global trend commonly known as the “legalization of international politics” is likely to further incentivize, rather than discourage, states resorting to international legal and quasi-legal institutions in settling disputes. In this regard, the recent referral from the Gabonese government further supports the foregoing conclusion.²⁰²

The second and last major policy implication concerns resource scarcity and how this affects case selection and management. To date, the OTP has exerted far less agency over the Court’s docket than normally assumed. Out of the nine coun-

198. And the extra-legal effects of the DRC self-referral continue to unfold. In 2013, the UNSC established an “Intervention Brigade” as part of the UN’s peacekeeping force in the country. The afore-said brigade, as David Kaye and Kal Raustiala correctly point out, “represents a rare form of concrete support for the work of the ICC.” Kaye & Raustiala, *supra* note 135, at 730.

199. Hurd, *supra* note 191, at 496.

200. J. Clark, *supra* note 97, at 524.

201. P. Clark, *supra* note 48, at 41–42; Eriksson Baaz & Verweijen, *supra* note 70, at 573.

202. République Gabonaise, *supra* note 19.

try situations currently under investigation,²⁰³ the OTP has used its *proprio motu* powers only with regard to Kenya (2009) and Georgia (2016), and did so only after the unwilling Kenyan government decided not to make use of the self-referral mechanism.²⁰⁴ Still, “even with respect to this triggering mechanism, the Prosecutor relie[d] heavily on State cooperation in a manner similar to self-referrals.”²⁰⁵ This sovereignty-friendly atmosphere, adopted since the early days of Moreno-Ocampo’s tenure, has brought about dramatic change in determining which preliminary examinations are worth developing into official investigations. The key metric for selecting the DRC and Uganda to be the first investigations before the ICC was “violent deaths in the last several years.”²⁰⁶ By the opposite token, in the recent case of Mali it appears that formal state abdication of criminal jurisdiction, manifested through the self-referral, was deemed sufficient for opening an official investigation despite the low number of war casualties.²⁰⁷ While enhancing state cooperation with the Court, the OTP’s sovereignty-friendly approach to case selection has made it easier for national governments to co-opt the ICC and devise the lawfare strategy discussed above.

Now that the Court’s survival is no longer in peril, the OTP can—and should—switch approach and priorities from minimizing state confrontation to defending ICC’s legitimacy and impartiality. As Andreas Müller and Ignaz Stegmiller also argue, henceforth *proprio motu* investigations should become the rule for case selection,²⁰⁸ and this recommendation stands still despite the recent prosecutorial fiasco in the trials of

203. *Situations Under Investigation*, INT’L CRIM. CT., <https://www.icc-cpi.int/pages/situations.aspx> (last visited Feb. 13, 2017). There are currently two distinct official investigations open on the situation of the Central African Republic, both referred to the ICC by different governments at different times—namely on December 2004 and May 2014. For the purpose of this Article, they still count as one country situation.

204. On the legal genesis of the Kenya case, see Müller & Stegmiller, *supra* note 11, at 1294. For a diachronic analysis of the Kenyan government’s stance on the ICC, see Susanne D. Mueller, *Kenya and the International Criminal Court (ICC): Politics, the election and the law*, 8 J.E. AFR. STUD. 25 (2014).

205. Akhavan, *supra* note 15, at 107.

206. Bosco, *supra* note 5, at 90.

207. See generally Stegmiller, *supra* note 12.

208. Müller & Stegmiller, *supra* note 11, at 1271.

Kenyan President Uhuru Kenyatta²⁰⁹ and Deputy-President William Samoei Ruto.²¹⁰ Needless to say, the suggested approach entails high political costs and frustrates the Court's ambition to move towards universal jurisdiction, yet the OTP can no longer cast aside legitimacy concerns. From this perspective, the Prosecutor's request to proceed with an investigation into the situation in Georgia should be considered favorably.²¹¹ Perceptions matter, and a Court seen as lacking legitimacy and impartiality may become a liability, rather than an instrument, in the normative quest for ending impunity for atrocities.

209. Prosecutor v. Kenyatta, ICC-01/09-02/11-1005, Decision on Withdrawal of Charges Against Mr Kenyatta (Mar. 13, 2015), <http://www.icc-cpi.int/iccdocs/doc/doc1936247.pdf>

210. *Questions and Answers Arising from the Decision of No-Case to Answer in the Case of Prosecutor v. Ruto and Sang*, INT'L CRIM. CT., <https://www.icc-cpi.int/iccdocs/PIDS/publications/EN-QandA-Ruto.pdf> (last visited May 16, 2016); see also Pierre Hazan, "Nobody Should Be Above the Law," Says ICC Prosecutor, June 07, 2016, www.justiceinfo.net/en/les-unes/"nobody-should-be-above-the-law,"-says-icc-prosecutor.html (last visited Feb. 13, 2017).

211. INT'L CRIM. CT., <https://www.icc-cpi.int/georgia> (last visited Feb. 13, 2017).

