SOVEREIGNTY AS RESPONSIBILITY AT THE INTERNATIONAL CRIMINAL COURT.
THE “FRONTIERS” OF INTERNATIONAL JUDICIAL INTERVENTION

Emanuela Koskimies

ACADEMIC DISSERTATION

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Helsinki 2020
Abstract

This doctoral dissertation investigates the development of the norm of sovereignty as responsibility by focusing on its institutionalization in the framework of the International Criminal Court (ICC). Prominent observers have regarded the emergence of a new norm of sovereignty as responsibility as one of the most significant normative shifts in international society since the aftermath of World War II. Against this backdrop, accounts have proliferated situating the ICC at the cutting edge of normative change. The present study critically engages with the whole set of theoretical foundations underlying this view, including the conventional constructivist understanding of norm development upon which the latter is premised. This, on the one hand, emphasizes the importance of norm institutionalization within “tangible” sets of rules or organizations. On the other, it understands institutionalization itself as a moment of clarity and stabilization, thus largely reducing it to an end-point of the norm emergence process. In other words, norm institutionalization is confined to a positivist view in which institutions fall back to the role of neutral fora. The result is a linear, static, and largely depoliticized account of norm content, which, while yielding to the traditional lack of communication between normative and empirical studies, ends up reiterating a dichotomic and simplistic view in which norms are scripts of emancipation, and power a practice of domination. The dissertation aims to unravel this dilemma altogether by offering a step forward in the development of a post-positivist constructivist approach. In other words, it takes a genuinely trans-disciplinary perspective and delves into the configuration of normativity as part of institutional practice, paying special attention to how the relative power of relevant actors reconstitutes norms during norm negotiation and implementation. Hence, the study unfolds from an unusual location – at the intersection between normative international theory and the politics of international criminal law; and from there, it seeks to revive discussions about the power-laden nature of the normative fabric of international society, its own dis-symmetries, and its outright hierarchies. To this end, the dissertation asks
two major sequential questions: how the overarching system negotiated by states at the Rome Conference affects the selection of situations and cases before the ICC and their outcomes; and how the selection of situations and cases and their outcomes, in turn, “feeds back” to the norm of sovereignty institutionalized through the Court's practice. The resulting analysis shows the following. While the Rome Statute reflects the persistence of the state as the primary site of political authority and coercion, it also cuts against the normative aspirations of sovereignty as responsibility by leaving the Court specifically ill-equipped to break with a notorious pattern of hyper-protected sovereignty. Outstanding issues such as the ICC’s selectivity and African bias, as well as the Court's future prospects, are then reconsidered under this light. Those findings are then discussed in the final part of the study. Focusing on questions of delegation to international institutions, this ends with a note of caution. It concludes that the prospects of sovereignty as responsibility, as well as the broader discussion about cosmopolitan governance, lie more with the re-politicization of the debate than a straightforward invocation of greater forms of supranationalism.
Acknowledgements

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Contents

Chapter 1 – Introduction. Beyond the Practice-Norm Gap ........... 13
  1.1 The Research Puzzle ........................................................................................................... 13
  1.2 The Current Practice-Norm Gap .................................................................................... 18
  1.3 Redressing the Gap ............................................................................................................ 22
  1.4 Methodology and Structure of the Dissertation ............................................................ 32

Chapter 2 - Sovereignty and the Life-Cycle of Norms Revisited ...34
  2.1 Introduction .................................................................................................................... 34
  2.2 Sovereignty: Beyond the Norm/Fact Incommensurability ........................................... 36
  2.3 The Westphalian Model of Sovereign Equality Discarded Once and for All . 46
    2.3.1 The Peace of Westphalia .......................................................................................... 46
    2.3.2 The United Nations and Decolonization .................................................................... 51
  2.4 Norm Development in International Society ................................................................. 58
    2.4.1 Constructivism and Norm Development: Strengths and Shortcomings .................. 59
    2.4.2 Beyond Critique: Norm Development Re-Apprised ................................................. 64

Chapter 3 – Shaping Sovereignty as Responsibility at the ICC (Part I): The Rome Statute ................................................................. 74
  3.1 Introduction: Between “Sovereignty-Limiting” Rationale and “Sovereignty-Based” Operation ................................................................. 74
  3.2 The Institutional Architecture of the Rome Statute: Kowtowing to State Sovereignty .................................................................................. 76
    3.2.1 A Consent Regime ........................................................................................................ 76
    3.2.2 The Role of State Parties in Financial Oversight: From the Withholding of Resources to the Steering of Prosecutorial Discretion ........................................... 80
    3.2.3 The Lack of a Reliable International Enforcement Mechanism ............................... 84
  3.3 Selecting Situations and Cases before the ICC: The Contours of the Problem ................................................................. 88
    3.3.1 Gravity and its Muddy Waters: Between Legal Minimum Threshold and Discretionary Criterion .......................................................................................... 92
    3.3.2 The Inescapable Ambivalence of Complementarity .................................................. 102
    3.3.3 The Role of Judicial Review: Between Statutory Shortcomings, Missed Opportunities, and Inescapable Limits ................................................................. 110
  3.4 Conclusions: The Untenability of Pure Legalism ......................................................... 117

Chapter 4 - Shaping Sovereignty as Responsibility at the ICC (Part II): The Test of Institutional Practice ................................................. 119
  4.1 Introduction: From Sovereignty as Responsibility to Irresponsible Sovereignty ................................................................. 119
4.2 A Tilt Toward “Sovereign-Backed” Situations .............................................. 123
4.3 Case Selection and the Court’s Blind Eye ..................................................... 133
  4.3.1 Self-Referrals and the Hobbesian Turn Laid Bare .................................. 134
  4.3.2 An ad hoc Court of the UNSC ................................................................. 147
4.4 The Persistent Failure to Successfully Prosecute State Actors and their Protégés ................................................................................................................ 152
  4.4.1 (Recalibrating the Critique of) African Bias .......................................... 159
  4.4.2 A New Course in the ICC’s Prosecutorial Strategy? More “Willing” but Not Any More “Able” ........................................................................................ 162
4.5 Conclusions: A Full-Blown Short-Circuit ...................................................... 171

Chapter 5 – Conclusions. Irresponsible Sovereignty: A Dead-End? ................................................................. 176
  5.1 In Defence of a Greater Supranationalism? .................................................. 176
  5.2 The Role of Coercion in International Law: Another Round-Up .................. 178
  5.3 Sovereignty as Responsibility: A Re-Politicized Perspective ......................... 185
    5.3.1 The Slippery Slope of Supranationalism ................................................. 193
  5.4 Closing Remarks ........................................................................................... 196

Annex I - Semi-structured Interviews Grid..................................................... 202
Annex II – Semi-structured Interview Notes................................................. 203
References ........................................................................................................ 240
List of Original Publications

## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tr>
<td>App</td>
<td>Appeal</td>
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<td>Apr.</td>
<td>April</td>
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<td>ASP</td>
<td>Assembly of States Parties</td>
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<td>AU</td>
<td>African Union</td>
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<td>BIS</td>
<td>Bank for International Settlements</td>
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<td>CAR</td>
<td>Central African Republic</td>
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<td>CAH</td>
<td>Crimes against humanity</td>
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<td>CAICL</td>
<td>Critical Approaches to International Criminal Law</td>
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<tr>
<td>CBF</td>
<td>Committee on Budget and Finance</td>
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<tr>
<td>CITES</td>
<td>Convention on International Trade in Endangered Species of Wild Fauna and Flora</td>
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<td>Dec.</td>
<td>December</td>
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<td>DRC</td>
<td>Democratic Republic of Congo</td>
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<td>ECHR</td>
<td>European Court of Human Rights</td>
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<td>ECJ</td>
<td>European Court of justice</td>
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<td>ed(s)</td>
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<td><em>e.g.</em></td>
<td><em>exempli gratia</em></td>
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<td>EIC</td>
<td>European Investigative Collaborations</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<tr>
<td>EISA</td>
<td>European International Studies Association</td>
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<td>ES</td>
<td>English School</td>
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<td><em>etc.</em></td>
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<td>Feb.</td>
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<tr>
<td>FICHL</td>
<td>Forum for International Criminal and Humanitarian Law</td>
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<td>FIDH</td>
<td>International Federation of Human Rights</td>
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<tr>
<td>FRPI</td>
<td>Forces de Résistance Patriotique d’Ituri</td>
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<td>HRC</td>
<td>Human Rights Council</td>
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<td>Abbreviation</td>
<td>Description</td>
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<tr>
<td>ODM</td>
<td>Orange Democratic Movement</td>
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<td>OTP</td>
<td>Office of the Prosecutor</td>
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<td>OUP</td>
<td>Operation Unified Protector</td>
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<td>P-5</td>
<td>Permanent members of the United Nations Security Council</td>
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<td>para.</td>
<td>Paragraph</td>
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<td>PEs</td>
<td>Preliminary Examinations</td>
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<td>PEV</td>
<td>Post-electoral violence</td>
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<td>PrepCom</td>
<td>Preparatory Committee on the Establishment of the ICC</td>
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<td>PNU</td>
<td>Party of National Unity</td>
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<td>PTC</td>
<td>Pre-Trial Chamber</td>
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<td>PKOs</td>
<td>Peace-keeping Operations</td>
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<td>Rep</td>
<td>Reparations</td>
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<td>R2P</td>
<td>Responsibility to Protect</td>
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<td>RPE</td>
<td>Rules of Procedure and Evidence</td>
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<td>Term</td>
<td>Termination</td>
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<td>Tot.</td>
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<td>TWAIL</td>
<td>Third World Approaches to International Law</td>
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<tr>
<td>UNHCR</td>
<td>UN High Commissioner for Refugees</td>
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<tr>
<td>UNFCCC</td>
<td>UN Framework Convention on Climate Change</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>UPC</td>
<td>Union des Patriotes Congolais</td>
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<td>v.</td>
<td>versus</td>
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<td>WC</td>
<td>War Crimes</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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<td>WWII</td>
<td>World War II</td>
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Chapter 1 – Introduction. Beyond the Practice-Norm Gap

Norms lie in the practice
Antje Wiener

1.1 The Research Puzzle

At the end of the Cold War, normative inquiry once again raised its voice amidst the clamour of contending accounts of the international order. Whereas the conditions for a revival of normative inquiry were clearly propitious at that time, it is interesting to note that competing claims of change and continuity are still at the centre of heated debates today, three decades later. Against this backdrop, prominent observers have regarded the emergence of a new norm of sovereignty as responsibility as one of the most significant normative shifts in international society since the aftermath of World War II. In 2005, Anne-Marie Slaughter referred to the latter as a...
‘tectonic shift’\textsuperscript{5} that reinterprets ‘the very act of signing the Charter in ways that will create a new legal and diplomatic discourse about member states’ obligations to their own people and to one another’.\textsuperscript{6} Today, nearly 15 years after Slaughter’s celebratory statements, we live in a world where the liberal discourse on the domestication of the international domain has clearly shifted onto the defensive.\textsuperscript{7} Yet, supported by the Kantian maxim of humanity’s ongoing moral progress, the idea of a progressive recharacterization of sovereignty as responsibility seems able to withstand the current setbacks; and, actually, it is still a cornerstone of many accounts of the world order.\textsuperscript{8}

Having said that, whereas the resilience of the concept may be interpreted as corroborating its own theoretical strength, the present study goes exactly in the opposite direction. It questions the set of theoretical foundations that underlies current narratives of sovereignty as responsibility. Furthermore, by delving into the intersection between normative and empirical studies, it critically engages with the popular view that situates the International Criminal Court (ICC) at the cutting edge of normative change.

This dissertation moves from the assumption that the current debate about sovereignty has responsibility is hampered by a limited – more to the point, positivist – understanding about the development of norms within international society. Coming from the Latin \textit{positum}, i.e. put or set, “positivism” generally designates any system that confines itself to the data of experience. In the 1980’s, Jean-François Lyotard wrote that ‘we are all stuck in the positivism of this or that discipline of knowledge’.\textsuperscript{9} Today, almost 40 years later, a substantial part of social theory is still modelled on positivism. Yet, what I have in mind when speaking of positivism is not a fully-fledged and self-reflexive line of thought,\textsuperscript{10} but rather a broadly meant attitude of thought

\begin{thebibliography}{10}
\bibitem{6} Ibid.
\bibitem{8} See: Bellamy (n 4); Evans (n 4); Sikkink (n 4); and Teitt (n 4).
\end{thebibliography}
which underlies an empiricist reduction of knowledge to observation,\textsuperscript{11} with a consequent curtailment of the depth of theoretical perception.\textsuperscript{12}

The current dominant understanding of norm development was developed by Martha Finnemore and Kathryn Sikkink two decades ago within constructivist IR theory,\textsuperscript{13} before being rapidly mainstreamed all across the discipline. In line with the positivist reductionism summoned above, Finnemore and Sikkink’s model lends itself to the ‘naturalization [in this context, meaning primarily depoliticization] of what is being observed’,\textsuperscript{14} thus prompting a premature closure of the analysis.\textsuperscript{15} More to the point, yielding to a ‘positivistic, static account’\textsuperscript{16} of law which understands rules as generating determinant and predictable outcomes over the course of their application,\textsuperscript{17} Finnemore and Sikkink regard norm institutionalization within “tangible” sets of rules or organizations as a moment of clarity and stabilization.\textsuperscript{18} The task of norm research is, hence, deemed to be complete once states have ratified treaties.\textsuperscript{19} That is to say, norm institutionalization is reduced to an end-point of the norm emergence process, and is thus ultimately displaced from its role as a creative juncture.\textsuperscript{20}

It is from the standpoint just outlined that many observers have acclaimed the entry into force of the Rome Statute as an unequivocal success of justice and protection over sovereignty. By contrast, the following chapters aim to overcome the underlying positivism of the conventional constructivist

\textsuperscript{11} Ibid.
\textsuperscript{15} Ibid.
\textsuperscript{18} Jennifer Welsh, ‘Norm Contestation and the Responsibility to Protect’ (2013) 5(4) \textit{Global Responsibility to Protect} 365, 380.
\textsuperscript{19} Ibid, 1.
account by advancing a critical qualification thereof, whereby the adjective “critical” evokes the undertaking of critical international theory, meant as the spectrum of “post-positivist” and “post-rationalist” strands of IR that emerged in the 1980s to challenge the dominance of neorealism and neoliberalism.21 These encompass post-Marxist scholarship influenced by the Frankfurt School, as well as postmodernist approaches.22 Constructivism can also be regarded as an outgrowth of so-called “Third Debate critical theory”,23 but with an important caveat. To the extent that constructivism creates distance – theoretical, epistemological, and methodological – between itself and its origins in critical theory, it becomes “conventional”.24 While Finnemore and Sikkink have opted for the conventional route, reaffirmed nowadays by most of the voices within the sovereignty as responsibility debate, this dissertation seeks to realign the latter to a critical – and, more to the point, post-modern – sensitivity.25 Such sensitivity implies, first and foremost, the displacement of the universal, rational subject who can act as an autonomous and self-willed agent in the political realm.26 The so-called “humanist subject” is, hence, decentered and reimagined as ‘a site of disarray and conflict inscribed by multiple contestatory discourses’27 and intersecting power circuits, the unmasking of which becomes central to the research endeavour. From such a genealogical deconstruction of subjectivity, a radical break with ‘totalizing, universalizing “metanarratives”’ also follows,28 including the rationalist epistemologies and positivist beliefs which, prompted by the Enlightenment,

22 Ibid.
24 Hopf (n 14) 181.
25 For a discussion about the differences between the modernist and post-modernist orientation within critical theory, see Price & Reus-Smit (n 21) 261-262. The authors see the former as embracing a posture of ‘minimal foundationalism’ (quoting from Mark Hoffman, ‘Restructuring, Reconstruction, Reinscription, Rearticulation: Four Voices in Critical International Theory’ (1991) 20 (2) Millennium: Journal of International Studies 169, 170), while the latter as rejecting all foundationalism.
28 Ibid.
have become the trademark of modernity.\textsuperscript{29} Finally, a post-modern approach cannot fail to question liberalism as the political correspondent to the epistemology of the Enlightenment.\textsuperscript{30} In other words, it is keen on challenging liberalism’s assumed neutrality and universality, by uncovering the ‘relations of power, discipline and exclusion through which liberal identities are constituted’.\textsuperscript{31}

Having sketched both the shortcomings of the conventional constructivist understanding of norm development on the one hand, and the broad theoretical, epistemological, and methodological framing of the present research on the other, it is now easier to enter into a discussion of the substance of its aim as well. This doctoral dissertation intends to interrogate the dominant narrative about sovereignty as responsibility by offering a post-positivist qualification of the conventional constructivist understanding of norm development. In other words, it reverses the standard tendency to reduce norm institutionalization to an end-point of the norm emergence process, by delving into the ‘configuration of normativity in and through practice’.\textsuperscript{32} More to the point, the analysis explores the “reconstitution” of norms as part of institutional practice, hence the focus on the ICC’s lived practice. Importantly, by paying special attention to how the relative power of relevant actors reconstitutes norms during norm negotiation and implementation, the following chapters seek to revive discussions about the power-laden nature of the normative fabric of international society,\textsuperscript{33} and its own dis-symmetries and outright hierarchies. However, let me be clear on this point: the dissertation does not aim to merely track how power and interests

\textsuperscript{29} Newman (n 26) 4.
\textsuperscript{30} See Ben Golder, ‘Foucault and the Unfinished Human of Rights’ (2010) 6(3) Law, Culture and the Humanities 354, 355; and Newman (n 26) 2 – 16.
\textsuperscript{31} Ibid, 28.
\textsuperscript{32} See the “Towards a New International Relations Theory (NIRT)” research project, launched in 2017 by the University of Hamburg, under the coordination of Antje Wiener. More information about the project is available at https://www.wiso.uni-hamburg.de/en/fachbereich-sowi/professuren/wiener/forschung/aktuelle-forschungsprojekte/nirt.html.
constrain international institutions in practice. This task, indeed, has already kept realists and neoliberals alike busy for several decades. Instead, by overcoming the traditional lack of communication between normative international theory and empirical international studies and, the present study makes an analytical leap beyond the study of how norms are applied in practice. That is to say, while retaining the conventional definition of norm as a “standard of appropriate behaviour for actors with a given identity”, the dissertation takes a genuinely trans-disciplinary perspective and explores the following: how institutional practice “feeds back”\textsuperscript{34} to the normative structure by impinging on the shared expectations of relevant actors.

1.2 The Current Practice-Norm Gap

The idea of sovereignty as responsibility has been made popular by the Responsibility to Protect (R2P) report.\textsuperscript{35} This was published by the International Commission on Intervention and State Sovereignty (ICISS) in 2001,\textsuperscript{36} in the wake of the “ideational turn” emphasising the capacity of norms to shape state behaviour. According to the document, sovereignty is not an absolute right of governments. Instead, it is an earned right, based upon the fulfilment of the government’s responsibility to protect its people. Hence, when governments fail to protect their people, a residual responsibility to protect befalls the international community. At the same time, in an attempt to dispel the concerns raised by the earlier doctrine of humanitarian intervention, the report has sought to ensure that such a recharacterization of

\textsuperscript{34} See Jennifer M. Ramos, Changing Norms through Actions: The Evolution of Sovereignty (Oxford: Oxford University Press, 2013), 144. See also Amitav Acharya, The R2P and Norm Diffusion: Towards A Framework of Norm Circulation 466: The case of R2P calls for greater attention to agency and feedback in norm dynamics.


\textsuperscript{36} See Chris Brown, ‘The Antipolitical Theory of Responsibility to Protect’ (2013) 5(4) Global Responsibility to Protect 423. Brown has noted that the ‘ICISS was technically an initiative of the Canadian Government, but from the beginning its work had a quasi-official relationship with the UN – the Co-Chair, Mohamed Sahnoun, was a Special Adviser to the UN Secretary General, another member, Ramesh Thakur, was Vice-Rector of the UN University in Tokyo’ (ibid, 433).
sovereignty does not entail any transfer or dilution of state sovereignty, a claim whose validity, as we shall see, is radically questioned in the present work. The R2P report was published a few months after 9/11, when the over-optimistic mood of the 1990s had already started its retreat. And yet, the 2005 World Summit resulted in the formal acceptance of the notion of sovereignty as responsibility by more than 150 states. By the time of this writing, the UNSC has passed several tens of resolutions reminding states of their protection responsibilities under R2P. These culminated in UNSC Resolution 1973, which authorized the 2011 intervention to protect Libyan populations in the context of the civil war that had erupted in the country. At the same time, however, R2P has not been immune from critique and setbacks, especially outside the liberal internationalist elite. In particular, according to some observers, the version of R2P adopted in 2005 was only “R2P Lite”. They have noted that, while the 2001 report was ambiguous on the question of auctoritas, the World Summit made it clear that the international community may only act through the Security Council. A further change concerned the formulation of jurisdiction. In an attempt to limit what otherwise seemed to be an open-ended authorization of international involvement for protective purposes, feared by most countries of the South, intervention was limited to specific crimes and organized around the subject matter jurisdiction of international criminal law, i.e. “genocide, war crimes, ethnic cleansing and crimes against humanity”. It should also be noted that Russia and China have sent mixed signals. On the one hand, they accepted the wording of the 2005 World Summit and let Resolution 1973 pass in 2011; on
the other, they are responsible for the Security Council’s later paralysis over robust action in the Syrian crisis.\footnote{See: Thomas Weiss, ‘After Syria, Whither R2P?’, in Robert W. Murray and Alasdair McKay (eds) Into the Eleventh Hour: R2P, Syria and Humanitarianism in Crisis, E-International Relations, January 2014, 34, 35, available at http://www.e-ir.info/wp-content/uploads/R2P-Syria-and-Humanitarianism-in-Crisis-E-IR.pdf (last visited 30 September 2018); and Aidan Hehir, ‘Syria and the Dawn of a New Era’, in Robert W. Murray and Alasdair McKay (eds) Into the Eleventh Hour: R2P, Syria and Humanitarianism in Crisis, E-International Relations, January 2014, 72, 73-74, available at http://www.e-ir.info/wp-content/uploads/R2P-Syria-and-Humanitarianism-in-Crisis-E-IR.pdf (last visited 30 September 2018). For a cautionary tale of the Libyan intervention and its aftermath, see also Aidan Hehir and Robert Murray (eds), The Responsibility to Protect and the Future of Humanitarian Intervention (Basingstoke: Palgrave Macmillan, 2013).} Having said that, the terms in which R2P was reformulated in 2005 still envisage a broad role for the international community in policing governments’ actions.\footnote{Orford (n 43) 1007.} What is more, even states originally more hostile to R2P have themselves begun to expressly refer to it as the “norm”.\footnote{See Bellamy (n 4) 161-162. Bellamy has noted that at the 2014 General Assembly Sixth Informal Interactive Dialogue on the Responsibility to Protect, China described R2P as a “prudential norm”, suggesting that “states should establish relevant policies and mechanisms” for implementing it, including the use of force as a “last resort”. Similar words of support have been expressed by Argentina, India, Indonesia, Iran, Nigeria, and the Philippines, among other others.} All things considered, lite or heavy, the notion of sovereignty as responsibility is clearly the new “mantra” within the UN system.\footnote{Brown (n 36) 440. See also Outi Korhonen and Toni Selkälä, ‘Theorizing Responsibility’, in Anne Orford and Florian Hoffmann (eds), The Oxford handbook of the theory of international law (Oxford University Press, 2016) 844, 850.} As Chris Brown has put it, R2P language has been mainstreamed in UN discourse ‘to such an extent that it has driven out other vocabularies for describing the appropriate ways of reacting to gross violations of human rights or mass atrocity crimes’.\footnote{Ibid.} 

The debate around sovereignty as responsibility, hence, provides a unique opportunity to glean a sense of international society’s present status and future prospects in a way that raises direct and pressing questions about the justification and waging of public authority.\footnote{See Stahn (n 40) 45; and Anne Orford, From Promise to Practice; the legal significance of the Responsibility to Protect (2011) 3(4) Global Responsibility to Protect 400, 419-424.} Such an inquiry appears even more compelling in the face of some recent geopolitical trends. The current climate is, in fact, caught between cosmopolitan visions, on the one hand, and technocratic trends and populist - when not clearly authoritarian - challenges, on the other. Indeed, at a time when states have withdrawn, or are considering...
withdrawing, from international institutions such as the European Union and the ICC itself, a profound engagement with the concept of sovereignty, its current status, and future prospects is particularly needed.52

What is more, as anticipated at the onset of this introduction, the need for such a study is heightened by the shortcomings in the dominant understanding of norm development. Clinging to the seminal model developed by Finnemore and Sikkink,53 it is popular to suggest that the development of international social norms goes through three stages: “norm emergence”, “norm cascade”, and “internalization”. “Norm cascade” can only occur after a critical mass of states have endorsed the emergent norm (the “tipping point”), and it is often facilitated by the “institutionalization” of the norm in specific sets of rules or organizations. This model acknowledges that the completion of the life-cycle is not an inevitable process. In other words, the norm life-cycle can stop at any time, with emergent norms thus failing to reach a tipping point.54 Yet, one can hardly discard the impression of an inexorable “win or fail” trajectory. Norms merely either go all the way from emergence to internalization or not. Furthermore, the vantage point is the moment of state consent.55 Accordingly, it is common to hold that when an overwhelming number of states have given their consent to an international norm (by ratifying a treaty, for example), the content of that norm crystallizes, being thus ready to promote norm cascade and internalization. However, no matter how significant the ratification and entry into force of a treaty may be, these cannot be assumed to equate to interpretation, implementation, or compliance.56 The latter, instead, all take place ‘at a distance from the context in which the norm originated and was negotiated’,57 and they are crucial to observe as creative junctures where environmental and operational conditions come forcefully into play. Not to mention that institutionalization understood

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52 Similar considerations have inspired the 27th Annual SLS/BIICL Workshop on Theory & International Law, ‘The Return of the “S” Word: Sovereignty in Contemporary International Law’, held on 16th May 2018 at the British Institute of International and Comparative Law.
53 Finnemore & Sikkink (n 13).
54 Ibid.
55 Liste (n 34) 3.
56 Betts & Orchard (n 20) 2.
in its narrower sense amounts to a form of depoliticization - the institutionalized norm enters the zone of law, where it remains as long as states comply with it.\textsuperscript{58} Institutionalization so conceived not only entails a deterministic understanding of law which neglects that the interpretative powers of legal professionals or civil servants may, in fact, be decisive in determining what the law is;\textsuperscript{59} but, more to the point, it is functional to a dichotomic view in which norms are scripts of emancipation and power, at the opposite end of the spectrum, a practice of domination.\textsuperscript{60}

Summing up, norms are misconstrued as prefabricated scripts.\textsuperscript{61} Instead, they are part of ongoing social processes, and ‘tend to be vague, enabling their content to be filled in many ways and thereby to be appropriated for a variety of different purposes’.\textsuperscript{62} To reference a norm, thus, may always add a moment of “reconstitution” of its original but never fixed meaning,\textsuperscript{63} all the more so during the everyday practice that bring norms to life. This is precisely what mainstream norm research tends to overlook, positing instead a linear, static, and largely depoliticized view of norm content.

\section*{1.3 Redressing the Gap}

In their article ‘From Idea to Norm—and Action?’, Ramesh Thakur and Thomas Weiss have argued that the ICC’s permanent, institutionalized [emphasis mine] identity, and universal jurisdiction is specifically designed to escape the tyranny of episodic and politically motivated investigations and selective justice’.\textsuperscript{64} Similarly, in 2012, expressly clinging to Finnemore and

\begin{thebibliography}{99}
\bibitem{Liste} Liste (n 33) 4.
\bibitem{Liste2} Liste (n 33) 1.
\bibitem{Ibid} Ibid, 2.
\bibitem{Wiener} Wiener (n 1) 35.
\end{thebibliography}
Sikkink’s norm life-cycle, Michael Contarino, Melinda Negrón-Gonzales and Kevin Mason argued that ‘[t]o the extent that ICC actions help to delineate and define both the norm’s content and the appropriate international mechanisms for its application, the ICC may help advance norm cascade and consolidation’, and ‘the ICC is well-positioned to play a critical role, through its actions and jurisprudence, in clarifying the meaning and boosting the enforcement of R2P’. A year later, in 2013, Contarino and Negrón-Gonzales offered a more critical reappraisal of the ICC’s potential, focusing on ‘the Court’s inherent enforcement weaknesses and the political constraints it faces’. Nonetheless, they did not take the further step of channelling that effort into a revised understanding of norm development. In the same year, Kathryn Sikkink and Hun Joon Kim argued that the ‘justice cascade is nested in a larger norm cascade around accountability for past human rights violations’, and ‘[m]any critics of the ICC or the specialized courts have not understood the role of these courts as backup institutions in a global system of accountability’.

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66 Ibid.
Admittedly, in accordance with the voices above, the claim that the Rome Statute opens up an unprecedented scope for international authority is, in several respects, hard to rebut.\textsuperscript{70} In defiance of the principle of domestic jurisdiction enshrined in the UN Charter (Article 2.7),\textsuperscript{71} the Rome Statute affirms that if domestic courts fail to genuinely prosecute those guilty of genocide, crimes against humanity, or war crimes,\textsuperscript{72} the ICC will prosecute them in \textit{lieu} of the state itself. Importantly, no exception is contemplated for representatives of state power, including heads of state or government (Article 27), who, as Richard Falk has put it, ought no longer to be above international law, not even in the way in which they treat their own citizens.\textsuperscript{73} What is more, although the ICC’s jurisdiction arises from the delegation of jurisdiction by the states parties, the scope of the latter is worth of attention,\textsuperscript{74} having the Court been empowered to carry out both autonomous and binding decision-making.\textsuperscript{75} In fact, the Prosecutor is formally able to investigate both situations and cases without political direction. Furthermore, the Court is the ultimate judge of whether a case is of sufficient gravity to warrant the attention of the Court, and whether the territorial state has genuinely exercised (or is genuinely exercising) jurisdiction over a case (Article 17 of the Rome Statute). Accordingly, in a dispute over jurisdiction between the territorial state and the ICC, the latter has authority to override the territorial state’s claims and seize jurisdiction.\textsuperscript{76} In other words, ‘[w]here genocide, war crimes or crimes against


\textsuperscript{71} Article 2.7 of the UN Charter grants to states the right to exercise criminal jurisdiction over acts within their jurisdiction.

\textsuperscript{72} At the end of 2017, the 16th Assembly of States Parties also activated the ICC jurisdiction with respect to the crime of aggression, with effect from 17 July 2018, on the basis of the definition and ratification process previously agreed at the Kampala Review Conference in 2010. However, for an account of the limits of this achievement, see section 3.2.1 of Chapter 3 in the present study.

\textsuperscript{73} Falk (n 69) 341.

\textsuperscript{74} Morris (n 70) 188.


\textsuperscript{76} Morris (n 70) 189.
humanity are alleged, there is now to be an authority higher than the state. Such supranational authority is further enhanced by the Court’s jurisdiction over non-party nationals. Article 12(2) of the Rome Statute, in fact, allows the ICC to exercise jurisdiction over nationals of non-party (i.e. non-consenting) states if the state where the crime is alleged to have occurred is a state party (or has consented to the Court’s jurisdiction). Moreover, the ICC can intervene irrespective of any consent for cases referred by the UN Security Council (Article 13(b)). A final consideration relates to Article 127, on state withdrawal. Albeit state-parties may withdraw from the Rome Statute, the withdrawal takes effect one year after the date of receipt of the notification. It follows from here that state withdrawal from the Rome Statute does not affect any cooperation with the Court in connection with investigations and proceedings initiated prior to the date on which the withdrawal became effective; nor does withdrawal from the Rome Statute prejudice the continued consideration of any matter which was already under the attention of the Court prior to that date. It may, hence, be argued that membership to the Rome Statute implies ‘sovereign costs’, insofar as it entails the generation of rules or decisions that states cannot veto ex post.

The common normative structure and commitments of ICC and R2P are also clear. Indeed, as pointed out above, since 2005 there is even an

77 Ibid, 188.
express overlapping between the protective jurisdiction of the international community under R2P and the Court’s jurisdiction, meaning that R2P is meant to be triggered (only) by the risk that the crimes enumerated in the Rome Statute may be committed. Add to this that the 2009 UN Secretary General’s report on implementing R2P has further reinforced the R2P-ICC synergy. The report has elaborated three pillars, with these stressing, respectively, the state’s primary responsibility to protect its population, the preventive commitment of the international community, and the responsibility of the international community to react to a state’s manifest failures. The same report has mentioned the ICC under pillar three, in addition to pillar one (the Rome Statute being presented as a key step in fulfilling the state’s primary responsibility to protect).

Taking the commonalities between R2P and the ICC further, several prominent commentators have deemed the Court well-equipped to overcome the collective actor problem that hinders the implementation of R2P more broadly. While the latter is contingent on a coincidence of major powers’ interests, as Jason Ralph has noted, the nature of the ICC as a permanent judicial institution entrusted with the residual responsibility to prosecute has been celebrated as a crucial change of course. In other words, many have regarded the Court as apt to deliver concrete and impartial action by putting “real people in real jails”, and discriminating among the range of states according to legal criteria.

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81 Orford (n 43) 1007.
83 See Ralph (n 80) 638. See also Orford (n 43) 1008.
84 See Ralph, ibid.
In light of all the above, the entry into force of the Rome Statute has raised hope - more than any prior international regime - that the weak and arbitrary nature of the ‘Hobbesian order established by the politics of States’ has been left behind. However, today, more than 15 years since its establishment, the path forward for the ICC has proved much bumpier. Indeed, the blind spots and complicities of the Court have become a popular topic, especially, even though not exclusively, within legal scholarship.

Critical questions about the R2P/ICC relationship are also being raised from both legal and International Relations (IR) perspectives.

And yet, the attention for the Court’s arduous course decreases dramatically as we move from the domain of empirical studies to normative inquiries about the current status and prospects of sovereignty. To put it differently, claims that the ICC represents the cutting-edge of normative change can be formulated precisely to the extent they struggle – if not avoid altogether – to make sense of the Court’s lived practice. Lamented by Allen Buchanan already in the early 2000s as a general predicament in normative international theory, such a ‘lack of institutional focus’ has its deepest roots in the assertion of a moral theorizing which purposely abstracts from the particular and the limits of practice.

Today, after 15 years, the same lack of institutional focus is still a major source of blind spots and complicities of the Court.

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86 Sadat (n 69) 41.
of slippage in the sovereignty as responsibility debate. Indeed, within the latter, the classical practice-norm gap has found a staunch ally and established toolkit in the dominant positivist understanding of norm development, and it is further fuelled by the official “anti-political” framing of R2P - expressly designed by its creators to avoid ‘the toxic politics of previous approaches to interstate intervention’.\(^9^0\) The overall result is a dominant analytic template that avoids a critical question: whether/under which conditions is it possible for sovereignty as responsibility to be institutionalized and still retain a critical stance vis-à-vis power.

What this dissertation tries to do is to reverse this entire concoction altogether, by reconceptualizing norm development as inextricably tied to the institutions that bring norms to life.\(^9^1\) However, it is important to highlight that such a theoretical move does not stand in isolation, but is in line with a new, rising post-positivist agenda critical of the practice-norm gap. In particular, so-called “norm contestation” is sparking growing interest, especially with respect to the role of local actors - and hence cultural and institutional diversity - in the co-constitution of global norms. Some change of course is even noticeable within the more recent R2P literature. Edward Luck has been one of the first R2P scholars to express doubts as to the ‘certain, sequential, chronological, and unidirectional’\(^9^2\) conventional life-cycle (but, then, he reiterated that Finnemore and Sikkink’s life-cycle ‘succeeds admirably’\(^9^3\) in simplifying complex processes). Jason Ralph, in an article published in 2018, has invoked the rise of a ‘pragmatic constructivist ethics’.\(^9^4\) Most recently, Aidan Hehir has expressly sought to offer a post-positivist constructivist account of R2P in a book-length treatment currently in press.\(^9^5\)

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\(^9^0\) Brown (n 36) 425.
\(^9^3\) Ibid.
\(^9^5\) Aidan Hehir, Hollow Norms and the Responsibility to Protect (Springer International Publishing, in press).
This dissertation builds on this momentum, while also charting its own distinctive trajectory. In particular, research on norm contestation has so far been primarily interested in the relationships between global and local norms. Accordingly, the emphasis has been placed on issues of “cultural feedback” and “cultural validity” as opposed to the “formal validity” that emerges from institutionalization; or, on how international norms are implemented within domestic politics. The present study is motivated by a different concern. The focus is placed on how interests and power - notably, the relative power of relevant actors during norm negotiation and implementation - “reconstitute” norms through institutional practice. Furthermore, the effort of theoretical reconsideration is not limited to norm development. In other words, the dissertation seeks to re-orientate the whole set of questionable and in some respect contradicting foundations upon which the sovereignty as responsibility debate is premised. These include the concept of sovereignty, as well as the specific model of sovereignty assumed as the benchmark for assessing change.

Summing up, the analysis unfolds from an unusual perspective – at the intersection between normative international theory and the politics of international criminal law. From there, it addresses two major sequential questions: firstly, it asks how the overarching system negotiated by states at the Rome Conference affects the selection of situations and cases before the Court and their outcomes; secondly, it explores how the selection of situations and cases and their outcomes, in turn, “feed back” to the norm of sovereignty institutionalized through the Court’s practice. The outcome is an innovative and carefully-informed study, both theoretically and empirically. By digging into under-explored areas of knowledge between disciplines, it provides a

97 Welsh (n 18) 381-382.
98 See Betts and Orchard (n 20).
more accurate understanding of normative change and, notably, a well-grounded picture of the current status of sovereignty and its prospects.

A final caveat needs to be addressed. While it may already sound obvious at this point, the endeavour undertaken by this study is different from a “truth-telling” mission aimed at uncovering how “politics infiltrates the legal process”. The latter approach, in fact, would reinforce precisely what this study intends to dispel - a dichotomic view of ideas, norms, and law and institutions, on the one hand, and power and interests, on the other. Rather, the ensuing analysis delves into the “conditions of possibility” of sovereignty as responsibility by addressing the mediations that occur in the process of negotiating normative “ideals” and their concrete manifestations.\(^{100}\) With this in mind, institutionalization is brought back to centre stage. Importantly, it is also assumed that legalization\(^{102}\) - as a particular from of institutionalization - is no exception to the inevitable reconstitution of norms ‘through interaction in a context’.\(^{103}\) Legalization is, thus, reconsidered in its dialectic relation with politicization. Accordingly, the hope that the ICC would sublimate the political element of international society into serene legal puzzle-solving\(^{104}\) is put aside. Instead, (international criminal) law is understood as a ‘process of articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made’.\(^{105}\) It also follows that, contrary to much research that quickly dismisses the role of state power and interests, the present study looks at states as central actors that still coordinate and legitimize the work of other bodies carrying out governance

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\(^{104}\) Mégret (n 87) 210.

functions.\textsuperscript{106} States, in other words, are regarded as having a crucial impact, e.g. on questions of institutional design as well as their practical outcomes,\textsuperscript{107} including states that may appear sceptical or openly resistant to the establishment of a given international institution (such as the USA vis-à-vis the ICC).\textsuperscript{108} Judicial institutions are not immune, notwithstanding the fact that justice is something which a wide array of stakeholders are struggling and competing to define. Indeed, even once established, international institutions – without exception for judicial ones - necessarily operate within political restraints.\textsuperscript{109} It could hardly be otherwise, for states carry the crucial function of providing institutions with ongoing political and material support. Finally, it is important to highlight that, as also noted by Finnemore and Goldstein, a focus on power is inherently tied to the analysis of inequality.\textsuperscript{110} Again, this may sound obvious, but much IR has diverted attention from this,\textsuperscript{111} including - if not especially - the fact that international law’s impulse to reform may be easily placed in the service of existing inequalities.\textsuperscript{112} A basic part of the puzzle, therefore, is to understand to what degree the ICC, acclaimed as the most accomplished step towards setting a “principle of legitimate difference” as a \textit{Grundnorm} for international society,\textsuperscript{113} really ‘upgrades the role of law in structuring relations among participants in international life, thereby diminishing the influence of unequal power, wealth, and capabilities’.\textsuperscript{114} To


\textsuperscript{108} Ibid.


\textsuperscript{113} Anne-Marie Slaughter, \textit{A New World Order} (Princeton, NJ: Princeton University Press, 2005), 247–50. See also Buchanan (n 90) 35; and Peters (n 42) 513–544.

\textsuperscript{114} Falk (n 73) 346.
this end, in the pages ahead the experience of the ICC is dissected by locating it within a political arena shaped by uneven power relations.

1.4 Methodology and Structure of the Dissertation

Within-case analysis is the main methodological strategy employed, and it covers the full range of situations and cases brought before the ICC up to the time of writing.\textsuperscript{115} Fostering in-depth understanding and description, within-case analysis allows us to discern how the disclosed processes and patterns fit with those predicted in the literature, and to develop theoretical propositions that apply to other cases.\textsuperscript{116} The comprehensive analysis of (i) the Rome Statute, (ii) strategic and policy documents, as well as statements and other public communications, issued by the Court’s organs, in particular by the Office of the Prosecutor (OTP), and (iii) case law has been complemented by (iv) field-research carried out in the Netherlands between August 2016 and January 2017. Following what has been termed an ‘ethnographic turn within international relations’,\textsuperscript{117} the field-work was geared towards gaining a greater proximity to the Court’s everyday life, and hence a deeper understanding that was potentially able to unsettle prior findings. To this end, the field-work has encompassed the attendance to a broad range of events – notably, the Court’s public hearings, the fifteenth annual session of the Assembly of States Parties (ASP),\textsuperscript{118} as well as workshops, seminars, exhibitions, etc. organized either by the Court or other relevant bodies. Finally, I have also had the opportunity to carry out conversations - held in the form of semi-structured, in-depth interviews - with a number of experts (14). Following the submission of approximately 60 interview requests to either organs of the Court (e.g., Office of the Prosecutor, judicial divisions, etc.) or professionals in close proximity to

\textsuperscript{115} 30 September 2018.
\textsuperscript{117} Betts & Orchard (n 20) 19.
\textsuperscript{118} This was held at the Hague between 16 to 24 November 2016.
the Court itself (e.g., members of the ICC Defense Counsel, NGOs’ representatives and international criminal law practitioners), the 14 interviewees have been selected on the basis of their privileged vantage point on the activity of the ICC, in addition to their willingness to be interviewed, as well as with a view to professional and geographical diversity. In light of the roles held by the interviewees and, hence, in order to protect them from public exposure, all the interviews have taken place under a confidentiality agreement and have not been recorded. The interview guide, containing a broad outline of the questions, is attached as an annex to the dissertation (See Annex I). The resulting notes are made available in Annex II, where they appear redacted from all identifying information and coded according to 32 emerging themes listed at the beginning of Annex II. References to the interviews and their corresponding codes are made in the text of the dissertation.

The ensuing analysis unfolds in three main parts. Chapter 2 aims to re-orientate the foundations on which the claim that sovereignty is undergoing profound change hinges. These include the concept of sovereignty and the model of sovereignty assumed as a benchmark for assessing change, in addition to the understanding of norm development. The central part develops the case of the ICC. Both the analysis of the Rome Statute (Chapter 3) and the Court’s practice in its first fifteen years of activity (Chapter 4) illustrate a full-blown short-circuit: between the Court’s potential to hold power to account, on the one hand, and the institution’s profound entanglement with the very power it is meant to constrain, on the other. This short-circuit, in turn, ends up institutionalizing a norm of sovereignty that radically cuts against the normative aspirations of sovereignty as responsibility. The concluding chapter (Chapter 5) discusses the above-mentioned findings in light of the theoretical framework laid out in Chapter 2, and, while drawing special attention to questions of delegation to international institutions, it advances a critical reconsideration of the idea of sovereignty as responsibility itself.
Chapter 2 - Sovereignty and the Life-Cycle of Norms Revisited

’Sovereign equality and inequality alike rest on the decisions of states to recognize certain formal (in)equalities and then participate in institutions that constitute and reproduce these (in)equalities’

Jack Donnelly

2.1 Introduction

The claim that sovereignty is undergoing a major transformation hinges on a set of questionable - and in some respect contradicting - foundations. These are the result of an inadvertent collusion of “normativistic” and “descriptivistic” fallacies. To begin with, such an argument has been greatly facilitated by the relatively recent “linguistic turn” in the social sciences. This has enabled theorists to define sovereignty as a ‘bundle of rights, duties, and competencies’ whose conceptual redefinition, hence, amounts to change tout court. At the same time, though, there is a tendency to turn to the contested and contingent nature of sovereignty on a selective basis. In other words, the “new” norm is framed as a ground-breaking departure from a de-historicized and reified model of sovereign equality, i.e. Westphalian sovereignty, thus forgetting that the exercise of sovereignty is, in fact, typically subject to a

4 See The Responsibility to Protect: Research, Bibliography, Background (Ottawa: International Development Research Centre, 2001), 11, according to which sovereignty has shifted from a Westphalian emphasis on the ‘absolute rights of state leaders, to respect for the popular will and internal forms of governance based on international standards of democracy and human rights’.
normative order dictating states’ evolving range of rights and responsibilities. It goes without saying that even more neglected is the intimate relationship between the qualifications of and restrictions on sovereignty operating at any given time and the existing international distributions of power. In addition, the Westphalian model of sovereign equality is also the taken-for-granted template for several critiques of sovereignty as responsibility. These, for their part, by emphasizing the corrosive effects of supranational authority on the society of sovereign equals, inspire nostalgia for an order that may never have existed outside our theoretical categorizations. Finally, the claim that a new norm of sovereignty is on the rise is supported by an understanding of norm development that goes back to the norm life-cycle developed in 1998 by Martha Finnemore and Kathryn Sikkink. Albeit commendable in several respects, the model advanced by the two constructivist scholars yields to an inexorable “win or fail” trajectory that falls short of accounting for the role that practice and especially institutions play in the configuration of normativity. In summary, the sovereignty as responsibility debate is premised on a combination of “normativistic” and “descriptivistic” flaws – about (i) the concept of sovereignty, (ii) the model of sovereignty as an assumed benchmark for assessing change, and (iii) the development of norms in international society – which this chapter aims to re-orientate.

2.2 Sovereignty: Beyond the Norm/Fact Incommensurability

To start with, I suggest that the concept of sovereignty does not sit easily with either the normative-legal or the pure fact approach. Accordingly, the debate should be reset from a purely normative understanding of sovereignty to a reconceptualization receptive of the liminal nature of the concept. Let it suffice for now to recall the paradoxical possibility that, precisely when illegality becomes extreme, then ‘it can convert itself into a new standard of legality’. Successful revolutionary movements are a clear example of how sovereignty originates from a “founding transgression”, in that, as Frantz Fanon has put it, they negate the entirety of the law in order to institute a new one. Hence, what this section proposes is a shift towards the concomitant acknowledgment of the normative and the factual side of sovereignty. The normative side qualifies sovereignty as a socially constructed - and thus historically grounded - claim to supreme ordering (or regulatory) power. Here, “supreme” refers to the relative place on a scale. It connotes, in other words, a relationship between a superior and a subordinate. At the same time, the normative side of sovereignty stands in conjunction with a factual side. This pertains to two central features that the definition of sovereignty as merely a discursive claim tends to obfuscate. Firstly, claims to sovereignty do not arise in a political

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10 Kalmo, ibid, 114. See also Jeremy Moses, ‘Sovereignty as irresponsibility? A Realist critique of the Responsibility to Protect’ (2015) 39 Review of International Studies 113. Moses has noted that liberal theory, in particular, notions of “popular sovereignty” that claim to distribute power amongst the people, has ‘served to disguise the continued existence of a sovereign power that is not itself subject to the law that is made and enforced in its name’ (ibid, 126). See also Bartelson (n 2), who has argued that sovereignty is an incoherent concept, encompassing both the political power constituting and enforcing the law, and the law restraining that very power (ibid, 468).
vacuum; namely, their content necessarily stems from an existing configuration of power. Secondly, any such claim raises the question of the material capabilities on which the enforcement of the claim itself depends. Summing up, any attempt to portray sovereignty as either a discursive claim or an empirical attribute or state of affairs will inevitably leave something important amiss, thereby offering a distorted account. Instead, it is preferable to reset the foundations of the debate on a more well-rounded understanding, which, while remaining far from discarding the force of sociological dynamics, also revives questions about the power through which the content of any claim to sovereignty is both established and enforced.

Given the complexity of the issue, a set of caveats needs to be addressed, and some further theoretical reasoning is necessary. Firstly, it bears emphasising that reckoning with the factual reality of sovereignty - alongside its normative dimension - shall by no means amount to thinking of sovereignty in terms of “absolute power”. Rather, to the extent that the factual side of sovereignty refers to the material capabilities of an entity to enforce its claim to supreme ordering power, it is also an essentially relative condition. As Michel Foucault has suggested in another context, it is a mistake to conceive power merely as something that can be possessed, or somehow contained. Instead, power is something that circulates through networks, discourse, knowledge, attitudes, bodies, etc. Perfectly epitomising this nature of power, sovereignty has an inescapable relational or societal aspect. This is attested

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14 Michael Keating, ‘Sovereignty and Pluri-national Democracy: Problems in Political Science’, in Neil Walker (ed) Sovereignty in Transition (Hart Publishing, 2003) 191, 195. The power through which sovereignty is enforced is similar to what Held and Gareth have labelled as autonomy. According to the authors, autonomy is ‘the actual power the nation-state possesses to articulate and achieve policy goals independently’. In their view, autonomy differs from sovereignty, for the latter is ‘the entitlement to rule over a bounded territory’ and is eroded ‘only when such an entitlement is displaced by forms of ‘higher’ and/or independent authority which curtail the rightful basis of decision-making within a national framework’. See David Held and Schott Gareth, Models of Democracy (Cambridge, UK/Malden MA, USA: Polity Press, 2006) 307-308.


by the fact that states’ internal sovereignty is a corollary of states being recognized as sovereign by other states. In other words, the scope and meaning of sovereignty is, ‘bound up with the development of international law as a whole’. It follows that sovereignty endows states with certain rights and powers, but also puts them under the obligation to respect the rights of other states. Under this light, sovereignty may be appreciated as a political entity’s externally recognized right to exercise certain rights to rule. Indeed, at a closer look, one can also hardly fail to notice that the social recognition of a state as sovereign constitutes a particular identity that is endowed with certain rights, even if their exercise is constrained in practice. A number of the world’s 190-odd states are, in fact, ‘problematic sovereigns in some way’. For instance, many states that are universally recognized do not have effective domestic sovereignty. While so-called “failed states” are the extreme case, weak domestic sovereignty vis-à-vis portions of the territory or certain policy

18 Bartelson (n 6) 259.
19 Wouter G. Werner, ‘State Sovereignty and International Legal Discourse’, in Ige F. Dekker and Wouter G. Werner (eds), Governance and International Legal Theory (Leiden, NLD: Martinus Nijhoff Publishers 2004) 125, 156. On the relationship between sovereignty and international law, see also Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (New York: Knopf, 1960), in particular Chapter 19 on sovereignty. According to the author, sovereignty is ‘not at all inconsistent with a decentralized, and therefore weak and ineffective international legal order; indeed, it is the source of such decentralization, weakness, and ineffectiveness’ (ibid, 288).
20 Werner ibid.
21 Ibid, 132. As Werner has put it, ‘the concept of sovereignty is used to attribute a status (the status of “sovereign and independent statehood”) and to endow entities with this status with certain basic rights and powers (their “sovereign rights”)’ (ibid). See also Friedrich Kratochwil, ‘Leaving Sovereignty Behind? An Inquiry into the Politics of Post-modernity’, in Richard Falk, Mark Juergensmayer, and Vesselin Popovski (eds), Legality and Legitimacy in Global Affairs (Oxford University Press, 2012) 127. In line with Werner, Kratochwil has suggested that sovereignty ‘has to be understood as a status ascription bounded by institutional rules rather than as a possession of certain palpable capabilities’ (ibid, 143).
22 Weber & Biersteker (n 5) 279.
24 Stephen D. Krasner, ‘Recognition: organized hypocrisy once again’ (2013) International Theory 170, 172. See also Martti Koskenniemi, ‘Conclusion: vocabularies of sovereignty: the powers of a paradox’, in Hent Kalmo and Quentin Skinner (eds), Sovereignty in Fragments: The Past, Present and Future of a Contested Concept (Cambridge: Cambridge University Press, 2010) 222. According to Koskenniemi, ‘[i]t is one of the major paradoxes of sovereignty that, while its core sense points to the possession of absolute and endless power, in practice, sovereignty may even be linked with the complete absence of any such power’ (ibid, 232).
areas or sectors of the population is a common reality. What is more, even strong states face trade-offs in managing different aspects of sovereignty, on the one hand, and power, on the other. In other words, maximizing sovereignty/autonomy does not necessarily amount to maximizing power. By the same token, reductions in sovereignty/autonomy do not necessarily result in reductions in power, for greater power can paradoxically require greater receptivity to reduced autonomy, and hence sovereignty compromises. If we go further down this line of thought, we may even concede that sovereignty, like all authority, is always contingent and negotiated with the collectivity that grants the “sovereign” certain limited rights to command. In fact, we have had centuries of disaggregating sovereignty into several forms. Consider the paradigmatic case of decolonization. As a result of the latter, entities with limited ability to enforce rules over their territory and/or to maintain a monopoly of the means of violence were recognized as sovereign states by the international community, and successfully assumed the right to speak for the populations they were largely unable to govern. More generally, a variety of instances of hybrid sovereign relations continue to exist in the world today, where ruling authorities may grant some sovereign rights to another entity (another state or an international organization) because of the perceived gains resulting from the transaction, or because the restrictions are imposed from the outside. In particular, strong states may explicitly threaten sanctions in

30 Ibid.
response to uncooperative behaviour;\(^32\) but also, weaker states may yield to pressures simply because the costs deriving from their defection would be too high. Finally, we can be even more audacious and move beyond the level of anecdotes to reveal how systematic patterns of deviance may be.\(^33\) While the analytical and substantial importance of hierarchy in international society is too often overlooked,\(^34\) we may acknowledge that the qualifications of and restrictions on sovereignty operating at any given time are both the product of existing hierarchies and the medium of their continued survival. This also means that, albeit in a basic epistemic sense sovereignty is a particular way of making sense of world - i.e. it is before politics - moving beyond the epistemic dimension, sovereignty looms as a process of framing the polity precisely by means of enabling specific forms of politics.\(^35\) Finally, with this in mind, we may further refine the normative side of sovereignty in terms of a practical discourse that justifies certain relations of power by recasting them into a set of rights, responsibilities, and limitations concerning the exercise of power itself.

I have just argued that sovereignty is not only inherently relational, but also that it can even be disaggregated; that is, divided between several institutions,\(^36\) hence giving rise to complex constellations of power.\(^37\) And yet, albeit “sovereignty” is not synonymous with “absolute power”, the acknowledgement of the sociological dynamics\(^38\) should not be at the expense of the likewise crucial acknowledgment of the factual side of sovereignty. Indeed, to develop a theory of sovereignty (as responsibility) without also addressing the factual side as well is ‘akin to trying to climb a ladder that has

\(^{32}\) Hathaway, ibid.


\(^{36}\) See Edward Keene, Beyond the Anarchical Society: Grotius, Colonialism and Order in World Politics (Cambridge: Cambridge University Press, 2002) 3.

\(^{37}\) This point is illustrated at more length at the end of this section.

\(^{38}\) Ibid, 30.
only one side’.\textsuperscript{39} This is what Jeremy Moses has already suggested in his attempt to offer a critique of R2P ‘from a \textit{de facto} sovereignty perspective’.\textsuperscript{40} The view advanced here, however, also differs from Moses’ critique in some important respects.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{sovereignty_diagram.png}
\caption{Sovereignty}
\end{figure}

According to Moses, in line with classical political realism, sovereignty is primarily defined in terms of coercive power, and thus as an (indivisible) attribute which an institution either enjoys or not.\textsuperscript{41} By contrast, as \textit{Figure 1} above suggests, I deem it more appropriate to frame coercion within a broader and multifaceted understanding of sovereignty. This is at odds with a purely normative understanding; and yet, it eschews the reductionist approach typical of more traditionally realist views.\textsuperscript{42} More to the point, while coercion

\textsuperscript{39} Moses (n 10) 132.
\textsuperscript{40} Ibid, 127.
\textsuperscript{41} Ibid, 114. See also David Chandler, \textit{Peacebuilding: The Twenty Years’ Crisis, 1997–2017} (Cham, Switzerland: Palgrave MacMillan 2017), 76-77.
is, admittedly, the component through which sovereignty most tangibly projects itself, it is also precisely (only) one dimension of sovereignty itself. A further point of contention pertains to the factual side itself. As illustrated in the figure above, the factual side of sovereignty is not merely about coercion, but also about authority, which in turn entails different - albeit largely overlapping - dimensions, such as legal and political authority. The distinctive element of authority, in contrast to coercion, is that it claims to be legitimate. In other words, authority is a kind of power that can plausibly connect to the consent of the addressee in a way that coercion cannot. At the same time, though, coercion and authority are deeply intertwined. In fact, if we confined our conception of coercion to the power that passes through the barrel of a gun and imposes one’s will against resistance, we would be unable to distinguish between the robber and the police. Similarly, while authority rests on a moment of consent, an addressee of authority might later disagree with its exercise. Accordingly, albeit emanating from consent, authority must also be able to constrain. The reconceptualization advanced here also entails the following crucial implication: the normative and the factual sides do not necessarily covary. This opens up the possibility that a shift may be taking place at the normative level - because of the critical “norm entrepreneurship” of relevant agents, without being matched by a corresponding one at the factual level - due to the reluctance of critical actors. Similarly, one may expect authority and coercion to covary, in line with the intimate relationship between the two pointed out above; and yet, this is often not the case, given the competing pressures through which change usually has to make its way. Nor do the different dimensions of authority, albeit largely overlapping, necessarily covary either.

To the extent that such a reading of sovereignty makes it possible to unpack the different layers of sovereignty and their mutual relationships, it also opens the door to a more elaborated understanding of change as far

44 Ibid, 358.
sovereignty is concerned. Focusing on the Rome Statute, for instance, we may be able to see that the latter is caught within several “misalignments”. On the one hand, states have delegated to the Court an inventive mixture of legal and political authority. That is, the OTP is empowered to decide whether to investigate or prosecute formally without political direction, and the Court is the ultimate judge as to the gravity of crimes and whether states are willing and able to genuinely investigate and prosecute. On the other hand, states themselves have retained their primacy as political actors, including their monopoly on coercion (see Chapter 3). And yet, the limited achievement of the Court (see Chapter 4) seem to suggest that to successfully redefine sovereignty so as to deny states exclusive jurisdiction over their territory would require compromising a greater share of their internal sovereignty. Such an upshot is also entailed by a dynamic understanding of authority, which distinguishes between the delegation of authority and its exercise. In other words, as pointed out above, authority needs to persist even if/when, in defiance of the founding moment of consent, it is not met by the agreement of the addressee. As shown in the following chapters, this is exactly where the delegation of authority from states to the ICC finds its limit, or “frontiers”, as the title of this dissertation suggests. Indeed, the Court’s questionable performance lays bare that separating authority from power is often highly idealized and ineffectual, even in the context of a judicial institution. As further discussed in Chapter 4, this is especially true in the context of criminal law, whose duty-imposing nature presupposes a vertical system in which a superior gives orders to an inferior and threatens sanctions for non-compliance.

In the final analysis, the view just outlined is in clear defiance of the R2P report’s assumption that the recharacterization does not entail a transfer or dilution of state sovereignty. At the same time, though, the classical realist

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47 Venzke (n 43) 364.
48 Ibid, 373.
framing of sovereignty as an “all or nothing” type of affair is also discarded in
favour of a reinterpretation in terms of ongoing struggles to resituate
power.50 This takes up Foucault’s idea that unless we are looking at it from a
great height and a very great distance, power is never something that can be
exclusively localized in the hands of some, and which all the others are merely
devoid of and subject to.51 Hence, it goes without saying that the theoretical
move proposed herein remains evasive on the longstanding question of final
authority. And yet, this is exactly the point. Think of the messy separation of
the lines of authority in the Rome Statute.52 It is true that the ICC does not
have the power to compel state compliance with its orders. In addition, state
parties can always withdraw from the Rome Statute. At the same time, though,
state withdrawal becomes effective only one year after the notification of
withdrawal, thus leaving unaffected any investigation opened before the
effective date of withdrawal. What is more important, non-compliance by
certain states, such as, e.g., a state failing to cooperate with the Court by
obstructing the collection of evidence or offering protection to an ICC suspect,
is insufficient to fully undo the final and legally-binding nature of the Court’s
decisions. The Rome Statute, in fact, envisages that external states may
pressure resistant states (even non-party states, under certain conditions)53 to
comply with or give effect to the Court’s request, against the consent of the
resistant states themselves. In other words, if the system of surrogate
enforcement envisioned by the architects of the Rome Statute was consistently
applied, the balance of power would shift from non-compliant states to the
Court. As if this were not enough, the Rome Statute is also a stark reminder
that we live in a world where the territorial differentiation into distinct states
is increasingly challenged by a functional differentiation into issue areas.54

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50 See Robert B. J. Walker, ‘Polis, Cosmopolis, Politics’ (2003) 28 Alternatives: Global, Local,
Political 267. According to Walker, ‘it is a great mistake to assume that our futures lie either
with the polis or with the cosmopolis. We confront, rather, ongoing struggles to resituate and
politicize sites of political authority’ (ibid, 284).
51 Foucault (n 16) 19.
52 Antonio Franceschet, ‘The International Criminal Court’s Provisional Authority to Coerce’
(2012) 26(1) International Affairs 93, 94.
53 The ICC can intervene irrespective of any consent for cases referred by the UNSC; and, in
the absence of a UNSC referral, the Court can exercise its jurisdiction if either the territorial
state or the state of the suspect’s nationality has accepted its jurisdiction.
54 Bartelson (n 2) 474. See also Amitai Etzioni, ‘Sovereignty as Responsibility’ (2006) 50(1)
Orbis 71.
While conventional definitions of sovereignty still run along the lines of “the highest supreme authority to issue and enforce laws within a certain territory”, their explanatory currency is out of phase vis-à-vis a fragmented international system that consists of functionally defined polities. The latter, in fact, do not claim supreme authority over all matters within a territory, but only as far as the functions that fall under their asserted competence are concerned. As Heikki Patomäki has put it:

> When the state is understood as a trans-historical universal notion, there is no reason to reduce it to one particular instance such as territorial nation-state. Different overlapping forms of modern state authority can coexist within the same space.

So, for instance, it is plausible for the European Union to claim sovereignty over a range of competences that were previously within the exclusive jurisdiction of its member-states, to the extent that such a claim does not seriously question the continuing sovereignty of the member-states themselves vis-à-vis their remaining areas of territorial jurisdiction. Importantly, the fact that non-state polities (even the most mature and “state-like” ones, such as the EU) remain discursively ambiguous about their claims to authority (and even purposely shy away from such sovereignty jargon) is surely an element to consider; but it should not be overestimated. After all, it is not hard to see why these kind of polities may have an interest in formally keeping a low profile. Consider the paradigmatic case of international courts. If these shook off their legalist feathers, they would be confronted with the hard (though, arguably, no less liberating in the longer run) task of re-establishing their legitimacy along radically new lines. It follows that while recognition as sovereign is a crucial aspect of sovereignty itself, the lack of formal recognition should not make us blind to the power wielded by organs

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58 Ibid, 27.
other than the state. Regrettably, the failure to appreciate this point has already established a juncture where the apparently antithetic positions of traditional realists and post-sovereignists converge: the former insisting on the continuing states’ monopoly of coercion, and the latter being dismissive of the conceptual currency of sovereignty vis-à-vis emergent patterns of political authority. Hence, there is a need for the conceptual structure of sovereignty to be adjusted so as to make sense of the latter, no longer as an “absolute” and “unitary” or “indivisible” attribute, but in non-exclusive terms.

2.3 The Westphalian Model of Sovereign Equality Discarded Once and for All

The understanding of sovereignty outlined above also offers a way out of the ‘de-historicization’ and ‘reification’ of the model of sovereign equality assumed as a benchmark for assessing change. Following those who have already attempted to discredit the still popular myth of Westphalia, the paragraphs below suggest that by portraying sovereignty as responsibility as a radical break with a previous norm of equality and non-intervention, the dominant narrative ends up obscuring the continuities (and discontinuities) with previous forms of inequality and intervention. It is impaired, in other words, by what Noam Chomsky has summarized as ‘the rattling of a skeleton in the closet: history, to the present moment’.

2.3.1 The Peace of Westphalia

To start with, neither the provisions of the treaties signed in Westphalia, nor

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59 Ibid, 189.
61 Glanville (n 5) 88. See also Weber & Biersteker (n 5) 283.
62 Glanville, ibid.
the ensuing order, support the claim that the Peace of Westphalia constitutes a paradigm shift towards sovereign equality and non-intervention. 64 A first basic consideration is that the Peace of Westphalia consisted of two bilateral treaties: one between Sweden and the German Emperor and the other between France and the German Emperor. This already casts doubt on the conventional portrayal of the Peace of Westphalia as a treaty between sovereign states acknowledging their exclusive spheres of authority. Secondly, while the treaties did not explicitly mention sovereignty, they reaffirmed the constitution of the Holy Roman Empire, which lasted for a further 158 years, until 1806. In fact, although the estates of the Empire were given new rights 65 and often functioned as independent units after 1648, they still recognized the Emperor as their overlord, sent representatives to the Diet, paid common taxes, and even raised a joint army. 66 In addition, it is true that the principle of “cuius regio, eius religio”, enshrined in the treaties, granted rulers in the Empire the right to choose the religion of their subjects. Nonetheless, before regarding this as crucial evidence for the end of the medieval system of overlapping authorities, we should also consider that not only had the same principle already been proclaimed by the Peace of Augsburg (1555); but in 1648 the rule of “cuius regio, eius religio” was actually mitigated by the provision of protections for minorities and equality guarantees (for Catholics and Protestants). 67

Moreover, it was not until the mid-18th century that Emeric de Vattel clearly articulated for the first time the right of non-intervention. 68 Yet, even


65 The estates obtained a territorial right of superiority within their own dominions. In addition, even though they had been making alliances with outside powers long before 1648, their right to do so was formally acknowledged by the treaties.

66 Croxton (n 64) 574.

67 Beaulac (n 64) 204.

68 Emmerich de Vattel, Droit des Gens (London [Neuchâtel], 1758).
then, he balanced the right of non-intervention with the claim that tyrannical
and oppressive states were illegitimate and should be denied protection from
external interference.69 In this respect, Vattel’s formulation was actually
receptive of rising ideas of popular sovereignty, which tied the mutual
recognition of claims to sovereign authority to the capacity of sovereign
representatives to secure the “rights of man”.70 Finally, and crucially, the
explicit formulation of the sovereign prerogative to non-intervention did not
actually end intervention. In fact, albeit sovereignty - and popular sovereignty,
in particular - entails ‘a logic that points towards legal and political equality’,71
it has always been accompanied, in practice, by a substantial element of
hierarchy.72

In Europe, while the French Revolution and Napoleon brought an end
to the Holy Roman Empire, the ‘revolutionary rhetoric of equality was almost
immediately contrasted with French hegemonic ambitions’.73 Napoleon
‘carved up, annexed, reconfigured, partitioned, and sold territory as if it were
a personal possession.’74 After the Napoleonic Empire was defeated, the 1815
Congress of Vienna restored the Austrian Empire and expanded the Russian
one. In 1867 the Austrian Empire became the Austrian-Hungarian Empire,
and, since 1871, the monarchs of Germany had also styled themselves
emperors. Add to this that the dissolution of the European Empires after
World War I was followed by Hitler’s attempt to unify Europe by force of arms.
What had changed from earlier times was the basis on which the claim to
hierarchic rights was made: from dynasticism to a new form of legitimized
hierarchy based on the idea that great powers have special rights as well as

69 Luke Glanville, Sovereignty and the Responsibility to Protect: A New History (Chicago:
The University of Chicago Press, 2014) 6-7.
1913). Contrary to conventional wisdom, constraints on sovereignty were contemplated even
by earlier ideas of absolute sovereignty, which subjected the authority of sovereigns to moral,
juridical, and divine responsibilities.
72 Ibid.
73 Peter Stirk, ‘The Westphalian Model and Sovereign Equality’ (2012) 38 Review of
International Studies 641, 651.
74 Kalevi J. Holsti, ‘The Decline of Interstate War: Pondering Systemic Explanations’, in Raimo
Väyrynen, (ed) The Waning of Major War: Theories and Debates (London and New York:
Routledge, 2006) 135, 137.
responsibilities. As Gerry Simpson has seminally noted, after 1815, the international order was premised on a strong form of “legalized hegemony”. According to this, great powers regarded themselves, and were recognized by others, as having ‘managerial responsibility for international order’. This practice continued through the League of Nations and the UN, both embodying a ‘hybrid structure with sovereign equality recognized in a general assembly of all members, and the legalized hegemony of the great powers in a smaller council’.

 Allegedly Westphalian norms applied even less – actually did not apply at all - to the relationship between Europe and the rest of the world. It is the bitterest irony of all, indeed, that precisely at the time when popular sovereignty was taking root in Europe and sovereign equality is conventionally held to have been gaining its full momentum, nearly all the rest of the world was coercively subjected to a European standard of civilization and intervention. European intervention in the rest of the world culminated in a phenomenon of tremendous proportions: by the beginning of the 20th century, more than the 80% of the world’s surface was under European colonial rule. As again eminently captured by Simpson, the abstractions of “Christianity”, “civilization”, “family membership”, and “savagery” were ‘the substance of “effectiveness”, “territory”, and “statehood”’. Accordingly, the world beyond Europe was arrayed along a spectrum of ‘divided sovereignty’, from outright colonies, to a handful of non-Western countries nominally independent but subjected to unequal extraterritorial treaties (e.g. Japan, China, the Ottoman

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75 Buzan (n 71) 235.
77 Buzan (n 71) 236.
79 Ibid, 233-234. In the words of Buzan, ‘Western countries were now able to dominate, and to occupy if they wanted, almost anywhere’ (ibid).
81 Buzan (n 71) 227.
Empire, Egypt).

In conclusion, the international order that emerged from the Peace of Westphalia is better understood as one in which the Empire remained a key-actor, and medieval hierarchies were recast so as to guarantee the right of the more powerful to intervene in the affairs of others,\textsuperscript{82} notably beyond Europe. It follows that, especially by acknowledging the historical weight of colonialism, we can see that, for much of the world, inequality and intervention have actually been the norm rather than the exception.\textsuperscript{83} What is more, at least from the 19th century, responsibility has been clearly construed as ‘the counterpart of special rights’,\textsuperscript{84} these being directly correlated with material capabilities. This also means that, while being renegotiated throughout history,\textsuperscript{85} the concept of responsibility has served as one of the main concepts through which international hierarchy has been conventionally legitimated. So, for example, the forms of criminal behaviour that justify infringing on the rights of its members in any particular international society reflect and institutionalize specific hierarchies.\textsuperscript{86} The ensuing analysis shows that ‘an implicit standard of civilization’\textsuperscript{87} was even reaffirmed as a result of decolonization. Indeed, sovereignty itself, while being the favoured aspiration of anti-colonial movements, has been a primary effect of empire. This has not only left behind its maps, clients, and racial classifications (e.g. some nations acquired sovereignty through decolonization and many others did not),\textsuperscript{88} but most crucially the existence itself of post-colonial states reflects the structural power of the West.

\begin{thebibliography}{9}
\bibitem{82} Piirimäe (n 64) 65.
\bibitem{85} Ibid, 248.
\bibitem{86} Donnelly (n 1) 147. See also Martti Koskenniemi, ‘Between Impunity and Show Trials’ (2002) 6, 1 \textit{Max Planck Yearbook of United Nations Law Online} 1, 17-18.
\bibitem{87} Tanja E. Aalberts, ‘Rethinking the Principle of (Sovereign) Equality as a Standard of Civilisation’ (2014) 42 \textit{Millennium} 767, 788-789.
\bibitem{88} Simpson (n 80) 280.
\end{thebibliography}
2.3.2 The United Nations and Decolonization

The supposedly traditional principle of “sovereign equality” was only firmly formalized in international law in the UN Charter in 1945.\(^8^9\) It is also popular to suggest that the same principles were universalized over the following two decades through the process of decolonization. Does this mean that the era of “Westphalian sovereignty” finally arrived, three centuries later, with the establishment of the United Nations and the ensuing process of decolonization? Both the UN Charter’s qualification of sovereignty and the resulting international order present ‘a series of puzzles and paradoxes’\(^9^0\) that point towards a more prudent conclusion.

In the first place, it remains unclear to what extent a norm of equality ‘can mitigate the inequalities resulting from asymmetrical power relations’.\(^9^1\) On the one hand, in the post-WWII era, the normative presumption in favour of equality apparently discredited principled arguments for hierarchy,\(^9^2\) including – if not especially - the notion that states were externally accountable for the treatment of their populations.\(^9^3\) The UN General Assembly declarations regularly asserted that differences in state capacity could never serve as justification for the unequal treatment of sovereign equals, as most notably confirmed by the UN General Declaration on the Granting of Independence to Colonial Countries and Peoples of 14 December 1960. According to this, ‘[a]ll peoples have the right to self-determination; by

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\(^{8^9}\) The exact phrase “sovereign equality” first appeared in the Moscow Declaration (October 1943), in which the governments of the US, the UK, the Soviet Union, and China agreed ‘[t]hat they recognise the necessity of establishing at the earliest practicable date a general international organisation, based on the principle of the sovereign equality of all peace-loving states, and open to membership by all such states, large and small, for the maintenance of international peace and security’. See Bardo Fassbender, ‘Sovereignty and Constitutionalism in International Law’, 125.


\(^{9^2}\) See Anne Peters, Humanity as the A and Ω of Sovereignty (2009) 20 European Journal of International Law 513.

virtue of that right they freely determine their political status and freely pursue
their economic, social and cultural development’, and ‘inadequacy of political,
economic, social or educational preparedness should never serve as a pretext
for delaying independence’.94 And yet, albeit the Declaration was passed in the
General Assembly by a vote of 89 to 0 (with 9 abstentions, however none of
the colonial powers rejected it),95 one can hardly ignore that ‘in the post-WWII
the discrepancy between the doctrine of equality and the real distribution of
powers was as great, if not greater, than ever’.96 Not to mention that despite
the proclaimed equality of its members, the UN notoriously rests on the
institutionalization of their political inequality,97 as most clearly attested by
the veto power of the Security Council’s permanent members.98 Similarly, the
letter of the Charter has not restrained powerful states from intervening in the
internal affairs of other countries. So, during the Cold War, the interference of
the two super-powers was systematically pursued over nearly the entire world
- albeit intervention for human protection purposes was, admittedly, very
rare.99 This does not mean that great powers could use their capabilities in a
totally unrestricted way. If they fully shattered the fiction of sovereign equality,
they would have undermined ‘the fundament of international order as such’.100
Nonetheless, the broad point is that, even in its “golden age” – between the
end of WWII and the 1980’s – sovereign equality was undercut by the
Persistence of ‘great power prerogative’,101 ‘cultural and economic markers’,102

94 United Nations (UN) General Assembly Resolution 1514 (XV) Declaration on the Granting
of Independence to Colonial Countries and Peoples.
95 Chandler (n 41) 79.
96 Stirk (n 73) 658. See also Chandler, ibid. Chandler has argued that the existence of vast
power inequalities, in the international sphere, was one of the reasons that ‘state sovereignty,
held to be unconditional and indivisible, was the founding principle of international society’
(ibid, 79); and ‘it was only on this basis, of formally upholding the equality and autonomy of
states and the sovereign rights of non-intervention, that post-colonial societies could be
guaranteed the rights to self-government’ (ibid).
97 See Frederick Cowell, ‘Inherent Imperialism. Understanding the Legal Roots of Anti-
imperialist Criticism of the International Criminal Court (2017) 15(4) Journal of
International Criminal Justice 667, 672.
98 Buzan (n 71) 237. See also Anne-Marie Slaughter, ‘Security, Solidarity, And Sovereignty:
The Grand Themes of UN Reform’ (2005) 99,3 American Journal of International Law 619,
630.
99 ICISS (n 49) 12. See also Martti Koskenniemi, ‘International Law and Hegemony: A
same point see Glanville (n 93) 157.
100 Scheipers (n 57) 22.
101 Simpson (n 80) 279.
102 Ibid.
and ‘civilizational residues’.

In other words, the distribution of sovereignty resulting from decolonization has, in fact, inscribed some extraordinarily resilient hierarchies into the fabric of global society.

The picture just outlined becomes even more vivid - and complex - if we bring into play the relationship between the principle of sovereign equality and human rights. Since 1945, we have been confronted with the institutionalization of both the principle of sovereign equality and an increasingly popular understanding of sovereignty that subordinates equality to the protection of fundamental human rights. This is attested by the growing relevance of international human rights, especially after 1989-90, when ‘deference to sovereignty has been increasingly seen as a backward obstacle against humanitarian objectives’. Many authoritative observers have pointed out that qualifying sovereignty and human rights as clearly differentiated, or even mutually antagonistic regimes, misunderstands their inherent connection. Such an approach would, in fact, disregard at least two crucial factors, namely that, since the emergence of popular sovereignty, sovereignty has been increasingly justified on the grounds of individual rights, and that decolonization was about the universalization of the right to sovereign independence.

The same line of thought has been expressly endorsed by the ICISS in the R2P report. According to this, ‘the globalization of the post-1945 sovereignty and human rights regimes occurred through complementary rather than competing processes’.

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\text{(103) Ibid.}\]
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\text{(104) Ibid, 280.}\]
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\text{(106) Koskenniemi (n 99) 203. See also Ramesh Thakur and Thomas G. Weiss ‘R2P: From Idea to Norm—and Action?’, (2009) 1(1) Global Responsibility to Protect 22. The authors have pointed out that, since the end of the Cold War, gross violations of human rights, such as the ones taking place in Liberia, the Balkans, Somalia, Kosovo, and East Timor, have been explicitly recognized as threats to international peace and security requiring and justifying forcible responses. When the Security Council was unable to act due to lack of enforcement capacity, it subcontracted the military operation to UN-authorized coalitions. And if it proved unwilling to act, sometimes groups of countries forged coalitions of the willing to act anyway even without Security Council authorization’ (ibid, 36).}\]
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\text{(108) Glanville (n 93) 157.}\]
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\text{(109) Teitt (n 105) 327.}\]
one hand one can hardly deny that the trajectory of sovereignty and human rights are deeply intertwined, on the other hand this framing of the sovereignty/human rights relationship sounds too apologetic. Most crucially, it neglects the fact that human rights have become a part of the calculus of everyday legitimization practices. More specifically, they grant legitimacy to ‘claims and acts of power that constitute global politics’, including, of course, the basic norm of sovereignty. As the most widely referenced standard of civilization, they have in fact been crucial to enabling the framing of sovereignty in terms of a sliding scale of “capacities”, as opposed to self-government and non-intervention. In this guise, the idea of human rights has underpinned a variety of forms of intervention, ranging from e.g. the inclusion of human rights clauses in the EU trade and association agreements112 to military interventions, such as the more recent NATO intervention in Libya in 2011 to “protect Libyan civilians” or the earlier U.S. invasion of Iraq in 2003 (which the United Stated sought to recast in humanitarian terms after the justification premised on the possession of weapons of mass-destruction by the Iraqi regime fell apart).

The reading of sovereign equality offered by Tanja Aalberts lends itself particularly well to a more disenchanted understanding of the complex interplay between human rights and sovereign equality. According to this, ‘sovereign equality is not just a liberal right to individuality, but by the same token operates as a norm to be equally sovereign, that is to say, to be a sovereign of a similar - i.e. liberal - kind’.113 In other words, being a sovereign equal recoils to the validation of equality on the basis of an ‘underlying meta-

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112 See Hartmut Behr, ‘The European Union in the Legacies of Imperial Rule? EU Accession Politics Viewed from a Historical Comparative Perspective’ (2007) 13(2) European Journal of International Relations 239. According to Behr, the ‘accession politics of the EU and the standards of civilization’ developed by European nations in the 19th century evince strong commonalities’ (ibid). Furthermore, “human rights” are one of the most recurring expressions in the historic terminology of “civilization” (ibid, 254).

value of legitimate (or “normalized”) statehood’. These arguments calls to mind the critique of the disciplinary and normalizing tendencies of liberalism advanced by Max Stirner already in the 19th century. Stirner was a German anti-statist philosopher that inspired many anarchists of the late 19th and the 20th centuries. One of the philosopher’s fundamental insights was that the discourse of political liberalism, while apparently being about rights and individual freedom from political oppression, impels a compelling form of subjectivity. At the domestic level, such subjectivity amounts to the creation of the “bourgeois citizen”. The underside of political liberalism is, to put it differently, a rational, normative, and legal absolutism. This denies difference and inequality by establishing allegedly universal norms and legal rules that exclude certain identities and are, ultimately, meant as ‘the great civiliser of all’. Moving further along those lines, we may recast decolonization in terms of a process of expanding this specific form of subjectivity of the liberal state, as a collective counterpart to the liberal individual subject. So, as Aalberts has put it, after decolonization, we can identify the imposition of an implicit “standard of – liberal – civilization” ‘as the paradoxical outcome of the universalization of the principle of sovereign equality’. Similar views have also been advanced by several other critical observers, in particular, but not exclusively, by TWAIL scholars. The latter, in fact, have firmly challenged the alleged neutrality of the doctrine of sovereignty and international law as a whole, by placing the ‘distinction between the civilised and the uncivilised’ at their very core.

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114 Ibid.
117 Ibid, 18.
118 Ibid.
119 Ibid.
121 Aalberts (n 87) 788-789.
123 Anghie, ibid, 742. Beyond TWAIL scholarship, see: Navid Pourmokhtari, A Postcolonial Critique of State Sovereignty in IR: The Contradictory Legacy of a ‘West-centric’ Discipline
Against the backdrop just outlined, the progressive emphasis on human rights and the expanding international criminal law regime can, hence, be understood as a component of that conception of international order that Simpson has labelled as “liberal anti-pluralism”, and which the end of the Cold War has provided with fresh, undisguised impetus. From here, it also follows that contemporary calls for a ‘normativized practice of conditional, provisional recognition’ should no longer appear to be game-changing as such. Instead, they should be re-evaluated against a persisting backdrop of core/periphery relations and West’s assumed position of superiority. This conclusion is also confirmed by the analysis of the ICC case in the following chapters, insofar as crucial factors of continuity between the “old” and the “new” order are brought to light. In particular, it is shown that, while expectations were high for the Court’s ability to finally “square the circle” between the primacy of states and human rights, the ICC is, instead, the institution on which the persisting schizophrenic role of states as supporters, breakers, and enforcers has most powerfully backfired.

2.3.2.1 (In)equality

Summing up, even in the golden era of sovereign equality, sovereign equals were ‘unequally equal’, with weaker states being traditionally subject to compulsory, institutional, structural, and even productive powers. These conclusions firmly challenge the conventional framing of sovereignty as responsibility as a radical break with a previous order of equal sovereigns. What is more, they are an invitation for mainstream theories of international

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124 Simpson (n 80). At the core of “liberal anti-pluralism” lies the idea that ‘the internal characteristics of a state has the potential to determine the state’s standing in the family of Nations’ (ibid, 76).
125 On the continuing timeliness and relevance of the standard of civilization see Behr (n 112).
128 Parfitt (n 122), 5.
129 Krasner (n 42) 356.
society more broadly to carefully reckon with the deeper normative meaning of inequality. This is not to say that the scholars of the English School, for example, did not contemplate the idea of an order beyond Europe based on colonial and imperial systems until the second half of the 20th century. Indeed, lines of inquiry such as the “expansion of international society” and the potential “revolt against the West” following decolonization were in fact promoted by the very founders of the English School. With respect to international inequality more broadly, it should also be recalled that Hedley Bull’s expressly ranked “great power management” among the fundamental institutions of international society. According to Bull, order has to be managed; and, given the greater capacities of the most powerful states, this “responsibility” inevitably falls disproportionately on their shoulders. What is more, this very research project is greatly indebted to Barry Buzan and Cornelia Navari’s insights about how normative change is inescapably tied to the distribution of power, as discussed more thoroughly in section below. But while the awareness of the link between power inequalities and the normative fabric of international society surfaces here and there, and even provides important cues, it is not hard to see that the study thereof has quite remained on the fringes of orthodox theories. Instead, the latter have been centred on a pattern of peaceful co-existence between equal and mutually independent sovereign states that negotiate the rules of international society. Admittedly, in recent times, some progress has been made. This advancement has been owed especially to the growing influence of critical scholarships, notably Post-Colonial Studies and TWAIL. As a result, historical narrations of international society have been readjusted so as to include more careful accounts of the period of formal colonial rule. And yet, it is interesting to note how the effort at critical revaluation usually stops at the threshold of decolonization. The latter is, in fact, commonly inscribed as the process that finally ‘delegitimated

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133 An example is Buzan (n 71).
the normative basis of colonialism and ushered in a pluralist society'\textsuperscript{134} and made sovereign equality ‘more or less universal’.\textsuperscript{135} In other words, decolonization is seen as marking the advent of ‘shared practices’\textsuperscript{136} ‘rooted in values held commonly by the members of interstate societies’;\textsuperscript{137} and little regard is paid to the ‘dynamic of difference’,\textsuperscript{138} the civilising impulse and mechanisms of exclusion that governed the extension of sovereignty to decolonial states\textsuperscript{139} and still persist to this day. In other words, what is still eluding mainstream theories of international society is a firm effort to bring the subject of inequality from the fringes to the core of the concepts of sovereignty and sovereign equality itself. This means rethinking the latter as a principle that structurally accommodates inequality; that is, as a hegemonic norm of normalized sovereignty against which external recognition as a sovereign “equal” is contingent on some set of criteria reflecting the institutional structures and interests of dominant states.\textsuperscript{140}

\textbf{2.4 Norm Development in International Society}

Challenging neorealism and neoliberalism’s determinism on matters of agency,\textsuperscript{141} constructivism has stressed the socially constructed nature of the world we live in and the individual-level mechanisms that drive change, thus

\begin{itemize}
\item \textsuperscript{134} Shahar Hameiri, ‘The domestic politics of international hierarchy: Risk management and the reconstitution of international society’ (2011) 49(1) International Politics 59.
\item \textsuperscript{135} Buzan (n 71) 237.
\item \textsuperscript{137} Ibid.
\item \textsuperscript{138} Anghie (n 122) 742.
\item \textsuperscript{139} Ibid., 741.
\end{itemize}
being in line with the broader “linguistic turn” in the social sciences. Against this backdrop, norm development is understood to go through a three-stage process. In the first stage, “norm emergence”, norm entrepreneurs introduce a new idea into significant arenas, attempting to persuade others to adopt the idea. The second stage, called “norm cascade”, can occur only once the previous stage has reached a “tipping point”, that is, after a critical number of states have endorsed the emergent norm. In many cases, the “norm cascade” is facilitated by the institutionalization of the norm in specific sets of rules or organizations. In the final “internalization” stage, the norm becomes an accepted rule of behaviour.142 At the same time, Finnemore and Sikkink have acknowledged that completion of the life-cycle is not an inevitable process, and many emergent norms fail to reach a ‘tipping point’.143 While this model has rapidly established itself as the toolbox for the analysis of international norm development, several aspects thereof deserve a more careful appraisal.

2.4.1 Constructivism and Norm Development: Strengths and Shortcomings

A key premise of constructivism is that international organizations (IOs) respond not only to other actors pursuing material interests in the environment, but also to normative, cultural, and institutional forces that shape how organizations see the world and conceptualize their own missions.144 This is an important step ahead of economic approaches to IOs. Economic approaches are interested in why IOs are created in the first place, and generally understand the environment wherein organizations operate as socially thin and ‘devoid of social rules, cultural content, or even other actors beyond those constructing the organization’.145 Accordingly, competition, exchange, and the promotion of efficiency are the dominant environmental

142 Finnemore & Sikkink (n 7) 895.
143 Ibid.
145 Ibid.
characteristics driving the IOs’ formation and behaviour. In open defiance of this perspective, constructivists emphasize that we must attend to normative and cultural factors and their role in determining outcomes, and the diversity of powerful non-state agents and ‘autonomous institutions’, that is, independent from the states that may have created them. In particular, from a constructivist perspective, social norms ‘shape or constitute the basic features of politics that most IR theory takes as given - what states want and even who or what states are’. They ‘involve reconfigurations of interests and even actors in ways that cannot be accommodated within the agent-oriented perspectives that dominate political science and economics’. They ‘are “constitutive” in the sense that they constitute, create, or revise the actors or interests which agent-oriented approaches take as given’. Put in a nutshell, the overarching objective of the constructivist agenda has been to challenge neorealism and neoliberalism’s determinism on matters of agency by placing the constitutive power of social norms back onto the research agenda.

Having said that, constructivism has also promised to account for both ‘agency and politics’ by remaining vigilant of the pressures which agency is subject to. Hence, the attention to IOs’ everyday outcomes and the questions of whether they really do what their creators intend them to do, or what they claim to do, or whether they do it efficiently. Indeed, it may even be argued that constructivism’s concern with normative, cultural, and institutional

146 Ibid.
148 Finnemore & Goldstein (n 23) 4.
149 Barnett & Finnemore (n 144) 707: ‘IOs can become autonomous sites of authority, independent from the state “principals” who may have created them, because of power flowing from at least two sources: (1) the legitimacy of the rational-legal authority they embody, and (2) control over technical expertise and information’.
150 Martha Finnemore, National interests in international society (Cornell University Press, 1996) 130.
151 Ibid., 129.
152 Ibid.
153 Kowert (n 141) 157. By determinism is broadly meant the idea that every event is necessitated by antecedent events and conditions. It follows that, knowing the latter, one could in principle be able to predict human agency.
154 Finnemore (150) 137.
155 Barnett & Finnemore (n 144) 699–700.
forces makes it well-placed to investigate features that other approaches
cannot, and thereby escape ‘uncritical optimism about organizational
behaviour’. In particular, constructivists have explicitly committed
themselves to exploring how intentionality may be “filtered” through
organizational practice in ways that change norms and their effects in ways not
intended or anticipated. Along these lines, constructivist scholars have
conceded that the “fit” of new normative claims within existing normative
frameworks may influence the likeliness of their influence (so called,
“adjacency claim” or “path dependence”). From here it follows that
environments favour and even select organizations for reasons other than
efficient or responsive behaviour. It has also been acknowledged that
tensions and contradictions among norms leave room for different
arrangements and outcomes. Indeed, social institutions have been regarded
as being continually contested. The role of states in striking bargains to
reshape IOs has also been raised; so has IOs’ propensity for dysfunctional,
even pathological, behaviour. Drawing on the study of bureaucracies,
constructivists have, hence, agreed with realists and neoliberals that there may
be occasions when overall organizational dysfunction is, in fact, functional for
certain members, and IOs often engage in policies not because they are strong
and have autonomy, but because they are weak and have none. In other
words, constructivists have recognized that power asymmetries may influence
IOs’ operation and effects, and deviance may even be normalized.

In view of the above, the constructivist agenda appears adequately set
to explore not only the structuring power of norms – long overlooked by
realists and liberals alike - but also their constructed nature. Having said that,
I am going to show that Finnemore and Sikkink’s popular norm life-cycle has,

156 Ibid, 726.
157 Finnemore (n 150) 36.
158 Finnemore & Sikkink (n 7) 908.
159 Barnett & Finnemore (n 144) 703.
160 Finnemore (n 150) 136.
161 Ibid, 135.
162 Barnett & Finnemore (n 144) 726.
163 Ibid, 716-717.
164 Henry Farrell and Martha Finnemore, ‘Global Institutions Without a Global State’, in Orfeo
Fioretos (ed) International Politics and Institutions in Time (Oxford: Oxford University Press,
2017) 144, 151.
165 Barnett & Finnemore (n 144) 721.
nevertheless, yielded to a far less sophisticated trajectory. In particular, I am referring to the fact that their three-stage model has ended up emphasizing agency and the structuring power of norms at the expense of a more complex process of the mutual constitution of structure and agency, whereby norms are in fact constructed in the first place.\textsuperscript{166} Let me explain this more clearly. As already anticipated in the Introduction to this dissertation, in order to successfully challenge neorealism and neoliberalism’s determinism on matters of agency, it is not enough to shift the focus from “structural constraints” to “normative, cultural and institutional forces”,\textsuperscript{167} as if a clear separating line could be drawn between the two. Rather, the challenge is to hold on to the recursive nature of the relationship between agency and structure as the source from which – and not from either structure or agency – social reality more conceivably originates. To be sure, Finnemore and Sikkink’s norm life-cycle attends to the mutual constitution of structure and agency, to a certain degree. It concedes that, at the emergence phase, ‘efforts to promote a new norm take place within the standards of “appropriateness” defined by prior norm’\textsuperscript{168} (these standards of appropriateness being precisely what is being contested).\textsuperscript{169} It also acknowledges that, in most cases, for an emergent norm to move towards norm cascade, it must become institutionalized in specific sets of international rules and organizations.\textsuperscript{170} Institutionalization, in turn, requires political support and resources from relevant actors, which may be granted on the basis of pressures for conformity or desire to enhance international legitimation, among other things.\textsuperscript{171} It even matters which states adopt the norm. Some states are, in fact, crucial to a norm’s adoption; namely, without their support the achievement of the norm goal would be compromised.\textsuperscript{172} What is more, norms upheld by states viewed

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{167} See Kowert (n 141) 159.
\item\textsuperscript{168} Finnemore & Sikkink (n 7) 897.
\item\textsuperscript{169} Ibid, 898.
\item\textsuperscript{170} Ibid, 901.
\item\textsuperscript{171} Ibid, 905
\item\textsuperscript{172} Ibid, 901.
\end{enumerate}
\end{footnotesize}
as successful and desirable models are more likely to become prominent and diffuse (consider, for example, Western norms).\textsuperscript{173} Finally, norm consolidation may stop at any time, presumably if the required support and resources are lacking, or if the emerging normative claim hardly fits within the existing normative framework.\textsuperscript{174} Having said that, Finnemore and Sikkink’s critical focus largely drops on the threshold of institutionalization and organizational practice. This is, indeed, quite surprisingly, considering constructivism’s own declaration of intent. And yet, whether inadvertently or not, institutionalization is confined to a positivist view in which IOs fall back into the role of neutral fora. As Finnemore and Sikkink have put it:

institutionalization contributes strongly to the possibility for a norm cascade both by clarifying what, exactly, the norm is and what constitutes violation (often a matter of some disagreement among actors) and by spelling out specific procedures by which norm leaders coordinate disapproval and sanctions for norm breaking.\textsuperscript{175}

What these words imply is a “win or fail” dichotomy in which norms merely either proceed all the way from emergence to internalization or not, with no reference to the everyday organizational practices that bring norms to life.

To counter the criticism being voiced here, one could argue that Finnemore and Sikkink’s foundational contribution should be seen has having set the groundwork, perhaps rudimentary in some respect, for a toolbox that has been meaningfully refined over the following decades. And yet, we would still have to confront two major facts. Firstly, we could not avoid noting that even more recent works have refrained from problematizing institutionalization. For instance, in 2013, at a time when the ICC was already being subject to intense scrutiny and critique, Sikkink and Kim argued that ‘[t]he justice cascade is nested in a larger norm cascade around accountability for past human rights violations’,\textsuperscript{176} and ‘[m]any critics of the ICC or the

\textsuperscript{173} Ibid, 906.
\textsuperscript{174} Ibid, 908.
\textsuperscript{175} Ibid, 901.
specialized courts have not understood the role of these courts as backup institutions in a global system of accountability’.\(^\text{177}\) A further decisive aspect is that, regardless of whether the constructivist toolbox has become more sophisticated over time, Finnemore and Sikkink’s norm life-cycle today remains the model of norm development - employed not only within the closest constructivist circle, but by scholars all across IR.

### 2.4.2 Beyond Critique: Norm Development Re-Apprised

Constructivism and, in particular, the “return to norms” held ‘immense promise for shaking up the IR research agenda and opening up exciting new avenues for inquiry’.\(^\text{178}\) For decades, IR research had been divorced from political theory on the grounds that what “is” in the world and what “ought to be” are and must be kept separate.\(^\text{179}\) At the end of the 90’s, in line with a progressive renaissance of normative political theory,\(^\text{180}\) constructivism instead promised a bloom of empirical research on norms aimed precisely at showing how ‘people’s ideas about what is good and what “should be” in the world become translated into political reality’.\(^\text{181}\) However, my claim is that the conventional constructivist account will continue to fall short of fulfilling its commitment as long as it streamlines institutionalization as an end-point, rather than delving into the latter as a creative juncture. Against this backdrop, the remaining part of the chapter seeks to update the conventional trajectory from “norm emergence” to “internalization”, so as to reflect a more complex configuration. At the same time, it should be clear from the onset that this endeavour is far from incompatible with constructivism. Instead, it is a post-positivist qualification of Finnemore and Sikkink’s norm life-cycle that emphasizes aspects that the latter has left underdeveloped, such as the

\(^\text{177}\) Ibid, 272.

\(^\text{178}\) Finnemore & Sikkink (n 7) 915.

\(^\text{179}\) Ibid.

\(^\text{180}\) Normative political theory started re-emerging already in the 1980s. Chris Brown’s early 1990s’ book, *International Relations Theory: New Normative Approaches* (New York: Columbia University Press, 1992), for example, was part of the establishment of that scholarly discourse.

\(^\text{181}\) Finnemore & Sikkink (n 7) 915.
intuition that ‘intentionality is always filtered’. More to the point, building on the growing research agenda on norm contestation, the proposed reconfiguration brings the recursive nature of the relationship between agency and structure to the forefront of the analysis - notably, the “reconstitution” of norms as part of institutional practice - by linking current debates in normative theory and empirical international studies. However, while research on norm contestation tends to focus on issues of “cultural feedback” and “cultural validity” as opposed to the “formal validity” that emerges from institutionalization, the effort undertaken here concentrates on how power reconstitutes norms, referring in particular to the relative power of actors during norm negotiation and implementation. To this end, the ensuing analysis builds on the recent work of post-positivist constructivist scholars by engaging with different theoretical perspectives, such as Anthony Giddens’ structuration theory and the English School of IR.

### 2.4.2.1 Structuration Theory and the Dual Quality of Norms

Crucial to the idea of structuration, as developed by Giddens in the 1980s, is the “theorem of the duality of structure”. This posits that the constitution of agents and structure are not two independently given set of phenomena; rather, the structural properties of social systems are both the medium and the outcome of the practices they recursively organize. Let me explain this more clearly. Human agency is frequently defined only in terms of intentions; and, indeed, there are certain acts that cannot occur unless the agent intends them. However, agency is more thoroughly understood as referring not to

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182 Finnemore (n 150) 36.
186 Ibid, 8.
the intentions that people have in doing things, but to their capability to do those things in the first place.\textsuperscript{187} Capability in turn implies power, which, within complex social systems, 'presumes regularized relations of autonomy and dependence between actors in the context of social interaction'.\textsuperscript{188} An agent can, thus, be defined as “one who exerts power to produce an effect”\textsuperscript{189} From this triad of agency-capability-power it follows that agency necessarily implies some level of reproduction of the conditions that have made agency possible in the first place.\textsuperscript{190} This is so even in the most radical forms of social change.\textsuperscript{191} In other words, the moment of the production of action is also one of “reproduction”. In sum, structure is by no means “external” to agents, nor it is to be equated with constraint, but is always both constraining and enabling.\textsuperscript{192} More recently, building upon structuration theory, Antje Wiener has argued that ‘norms entail a dual quality’,\textsuperscript{193} namely ‘they are both structuring and socially constructed through interaction in a context’.\textsuperscript{194} They are ‘stable and structuring’,\textsuperscript{195} serving as standards or reference frames for behaviour on the one hand, and are ‘flexible and constructed’\textsuperscript{196} through social interaction on the other. By reducing institutionalization to a moment of clarity and stabilization, it is precisely this constructed dimension of norms that Finnemore and Sikkink’s model overlooks, along with the recursive quality of the relationship between agency and structure from which the constructed nature of norms derives.\textsuperscript{197}

\textsuperscript{187} Ibid, 9.
\textsuperscript{188} Ibid, 16.
\textsuperscript{189} Ibid, 9.
\textsuperscript{190} Ibid, 26.
\textsuperscript{191} Ibid.
\textsuperscript{192} Ibid, 25.
\textsuperscript{193} Wiener (n 166) 49.
\textsuperscript{194} Ibid.
\textsuperscript{195} Ibid, 51.
\textsuperscript{196} Ibid.
2.4.2.2 The English School and the Relationship between “Primary” and “Secondary Institutions”

The argument that agents reproduce the conditions that make their actions possible in the first place can be further illustrated and developed by appealing to the English School’s insights into the relationship between “primary” and “secondary Institutions”.

As captured in the title of Bull’s book, “The Anarchical Society”, the central tenet of the English School is that the international system has evolved “institutions” that govern the interrelations of its units and signal its social dimension, despite its anarchical or decentralized structure.\(^{198}\) English School theorists have also distinguished between “primary” and “secondary institutions”. Secondary institutions are the institutions commonly identified as such, e.g. the UN, the World Bank, the ICC, etc. While these are (for the most part) consciously designed by states,\(^{199}\) primary institutions are a mix of norms, rules, and principles ‘constitutive of both states and international society in that they define the basic character and purpose of any such society’.\(^{200}\) As such, they undergo a historical pattern of rise, evolution, and decline.\(^{201}\) Barry Buzan has also pointed to a close relationship between the type of primary institutions an international society has (or how it interprets any given institution), and where that international society is located on a “pluralism-solidarism” spectrum.\(^{202}\) Finally, according to the English School scholar, primary and secondary institutions can be theorized as blocks in a ‘nested hierarchy of international institutions’.\(^{203}\) This entails that the material institutions consciously designed by states (secondary institutions) are

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\(^{198}\) Bull (n 131).

\(^{199}\) Buzan (n 136) 166.

\(^{200}\) Ibid.

\(^{201}\) Ibid.

\(^{202}\) Ibid, 161. Pluralism is about the principles of sovereignty and non-intervention restricting ‘international society to fairly minimal rules of coexistence’ (ibid, 8). Solidarism ‘defines international societies with a relatively high degree of shared norms, rules and institutions among states, where the focus is not only on ordering coexistence and competition, but also on cooperation’ (ibid, 49). Finally, world society is a third analytical concept that ‘takes individuals, non-state organizations and ultimately the global population as a whole as the focus of global societal identities and arrangements, and puts transcendence of the state-system at the centre of IR theory’ (ibid). International system, international society, and world society ‘are in continuous coexistence and interplay, the question being how strong they are in relation to each other’ (ibid, 10).

\(^{203}\) Ibid, 187.
“nested” inside the basic constitutive norms, rules, and principles of international society (primary institutions). Through his nested hierarchy, Buzan has sought to offer a reconsideration of the debate about constitutive and regulatory rules, this having failed, according to the English School scholar, to address the question of hierarchy within constitutive rules, or primary institutions in Buzan’s terms. To this end, Buzan has distinguished between “master primary institutions” - that is, primary institutions that ‘stand alone’ - and “derivative primary institutions” that are unable to do so. According to this categorization, as shown in Table 1 below, sovereignty is a master primary institution; non-intervention and international law are derivative primary institutions nested in sovereignty; and, the ICC is a secondary institution nested in international law.

204 Ibid, 182.
205 Ibid, 184.
206 Ibid, 182.
207 Ibid.
Table 1. Buzan’s nested hierarchy of international institutions

<table>
<thead>
<tr>
<th>PRIMARY INSTITUTIONS</th>
<th>SECONDARY INSTITUTIONS (examples of)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>SOVEREIGNTY</strong></td>
<td></td>
</tr>
<tr>
<td>Master</td>
<td>Derivative</td>
</tr>
<tr>
<td>Non-intervention</td>
<td>UN General Assembly</td>
</tr>
<tr>
<td>International law</td>
<td>International Court of Justice (ICJ), ICC</td>
</tr>
<tr>
<td><strong>TERRITORIALITY; DIPLOMACY</strong></td>
<td></td>
</tr>
<tr>
<td>Boundaries</td>
<td>Some peace-keeping operations (PKOs)</td>
</tr>
<tr>
<td>Diplomats; Diplomatic language</td>
<td>Embassies</td>
</tr>
<tr>
<td>Multilateralism</td>
<td>UN, Most intergovernmental organizations (IGOs), Conferences/Congresses</td>
</tr>
<tr>
<td>Arbitration</td>
<td>International Court of Arbitration</td>
</tr>
<tr>
<td><strong>BALANCE OF POWER</strong></td>
<td></td>
</tr>
<tr>
<td>Alliances</td>
<td>NATO</td>
</tr>
<tr>
<td>War</td>
<td>UN Security Council</td>
</tr>
<tr>
<td>Great power management</td>
<td></td>
</tr>
<tr>
<td>Anti-hegemonism</td>
<td>UX</td>
</tr>
<tr>
<td>Guarantees</td>
<td>UN High Commissioner for Refugees (UNHCR), UN Human Rights Council (HRC), European Court of Human Rights (ECHR), African Court on Human and Peoples' Rights, Inter-American Court of Human Rights (IACHR)</td>
</tr>
<tr>
<td>Neutrality</td>
<td></td>
</tr>
<tr>
<td><strong>EQUALITY OF PEOPLE</strong></td>
<td></td>
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<tr>
<td>Human Rights</td>
<td></td>
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<tr>
<td>Humanitarian intervention</td>
<td></td>
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<tr>
<td><strong>INEQUALITY OF PEOPLE</strong></td>
<td></td>
</tr>
<tr>
<td>Colonialism</td>
<td></td>
</tr>
</tbody>
</table>

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208 Buzan (n 136) 187.
209 Following the original table compiled by Buzan, “colonialism” and “dynasticism” are the only primary institutions derivative of “inequality of people” listed in the table above, and no secondary institution at all is mentioned. This is indicative of the English School’s limited attention to the role of inequality in shaping the institutions of international society. In contrast, it may be argued that the institutionalization of political inequality between states – and, hence, largely between people as well, may actually be regarded as a likely – perhaps even necessary - outcome of the operation of virtually all international institutions. See on this
Buzan himself, however, has warned us to regard the table above more as a ‘preliminary’ grid aimed at stimulating the debate than as a way of closing it off. In particular, the author has explicitly contemplated that drawing any distinction between master and derivative primary institutions in a definitive way is difficult, and lends itself to endless dispute, and the readers may
hence find the dispositions in the table ‘controversial’.\textsuperscript{212} For example, from where I stand, Buzan has not made explicit to what degree his own idea of a nested hierarchy between primary institutions is compatible with a logic of mutual constitution between them.\textsuperscript{213} Such logic is, instead, more clearly embraced in the present study, according to which, as suggested earlier on in this chapter, the scope and meaning of sovereignty is ‘bound up with the development of international law as a whole’.\textsuperscript{214}

At the same time, notwithstanding the potential disagreement with Buzan in that respect, I fully endorse Buzan’s argument that primary institutions “contain” secondary ones, and the implications ensuing from that. International law, for instance, may be regarded as the container of the ‘potentially endless particular laws about a wide variety of specific issues that can be built up within it’;\textsuperscript{215} namely secondary institutions, which in turn can be analysed as an empirical reference of change in both international law and sovereignty (given their intimate connection). In other words, it is following Buzan’s nested hierarchy of international institutions that the present work analyses the ICC as empirical reference of change in sovereignty. Furthermore, it does so in line with the specifications provided by another leading English School scholar, Cornelia Navari.\textsuperscript{216} These can be summarized as follows. The claim that secondary institutions are “contained” in primary ones implies that secondary institutions draw a significant inheritance from primary ones; an inheritance which, in turn, constrains the secondary institutions’ room for manoeuvre, and ultimately their ability to catalyse fundamental change. In other words, as Navari has put it, we may reasonably expect that at each round of renegotiation of any primary institution, this, nevertheless, inevitably instantiates a balance of power resulting from a previous round of negotiation.\textsuperscript{217} Such balance of power, in turn, cannot but impinge on the

\textsuperscript{212} Ibid.
\textsuperscript{213} See ibid, 176. According to Buzan: ‘the idea of a “primary” or “master” institution implies that one deep practice essentially generates or shapes all of the others. The idea of two layers of primary institutions implies that some are ‘deeper’ than others’ (ibid).
\textsuperscript{214} Werner (n 19) 156.
\textsuperscript{215} Buzan (n 136) 182.
\textsuperscript{216} Cornelia Navari, Modeling the Relations of Fundamental Institutions and International Organizations. Paper given at the 8th PanEuropean Conference on International Relations, Warsaw, 18–21 September 2013.
\textsuperscript{217} Ibid.
secondary institutions that are achieved. As a result, secondary institutions’
entanglement with prior rounds of negotiation and the established balance of
power implies that their margins for manoeuvre are always compressed in the
tight, grey area between old and new, continuity and change. This pattern is
clearly discernible when looking at the Rome Statute more closely. The latter
is both largely a re-enactment of pre-existing international human rights and
humanitarian law, 218 and, more to the point, is deeply entangled with the very
norm of sovereignty that it seeks to rearrange, as Chapter 3 and 4 of this
dissertation will thoroughly describe.

Summing up, the idea of nesting excludes – if only semantically – the
plausibility of incommensurable leaps from primary to secondary institutions.
Hence, the conclusion that the ability of secondary institutions to bring about
change in primary institutions should be carefully framed and delimited.

2.4.2.3 Summary: Defying Linearity

The linear trajectory from “norm emergence” to “internalization” should, in
sum, be updated to reflect two levels that the “win or fail” dichotomy neglects.
The first level is about how agency cannot be separated from the conditions
that make it possible in the first place. Hence, it is of crucial importance to
observe how the existing distribution of power among international actors
impinges both on norm negotiation and institutional designs in particular, as
well as on norm implementation. This also means that the constructivist
emphasis on IOs’ autonomy should be tempered by the fact that IOs’ room for
manoeuvre is directly related to the states that create and make them
operational through funding and enforcement. The second level is about how
the agents’ choices and their outcomes feed back to the normative structure -
or, in other words, “reconstitute” norms. The result of these two levels together
is that ideational factors, agency, and intentionality are set and diluted in a
more complex framework. More to the point, the life-cycle of a norm is not
merely liable to stop at any time; instead, it also potentially opens itself to

Journal of International Law 21925, 961.
substantial diversions. Indeed, unintended results may even be normalized, especially if deviance is crucial for obtaining the support of critical actors, with fateful consequences for the expectations of the relevant actors.

Following the thus updated norm life-cycle, the next chapter will explore, firstly, how the overarching system negotiated by states at the Rome Conference affects the selection of situations and cases brought before the ICC, and their outcomes; and, secondly, how the selection of situations and cases and their outcomes, in turn, “feed back” into the norm of sovereignty institutionalized as part of the Court’s practice.
Chapter 3 – Shaping Sovereignty as Responsibility at the ICC (Part I): The Rome Statute

The powers of the court are not as strong as many had hoped [...], the issue is now to ensure that future proposals will not result inadvertently in sheltering the very perpetrators of the crimes described in the statute.

Philippe Kirsch and John T. Holmes

3.1 Introduction: Between “Sovereignty-Limiting” Rationale and “Sovereignty-Based” Operation

The ICC is the first permanent court for the prosecution of war crimes, crimes against humanity, genocide, and aggression. While the road to Rome spans over more than a century, its first predecessors were the Nuremberg and Tokyo tribunals, set up by the Allies in the aftermath of World War II to try Axis war criminals. Several decades later, in the early 1990s, they were followed by two other ad hoc tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Both the ICTY and the ICTR were established by the UN Security Council acting under Chapter VII of the UN Charter. It was only in 1994 that the International Law Commission (ILC) presented a version of a draft statute for a permanent international criminal court to the UN General

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2 Efforts to create a global criminal court can be traced back to 1872, when, Gustav Moynier, one of the founders of the International Committee of the Red Cross, invoked the establishment of a court in response to the crimes perpetrated during the Franco-Prussian War. Similarly, a few decades later, in 1919, the drafters of the Treaty of Versailles envisaged a court to try the Kaiser and German war criminals of World War I.
Assembly. From 1996 to 1998 a Preparatory Committee on the Establishment of the ICC (PrepCom) met several times to discuss major substantive issues and finalize the draft statute. This was opened to final discussion and deliberation at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, known as the “Rome Conference”. Convened by the UN General Assembly, the Conference took place from 15 June to 17 July 1998 in Rome, Italy. More than 160 governments participated, in addition to more than 200 NGOs. At the end of the five weeks of intense deliberations, 120 nations voted in favour of the adoption of the Rome Statute; 7 nations voted against; 21 countries abstained. The Statute was then opened for signature and ratification. At the time of writing, 123 countries are states parties to the Rome Statute. Out of these, 33 are African states, 19 are Asia-Pacific states, 18 are from Eastern Europe, 28 are from Latin American and Caribbean states, and 25 are from Western European and other states. States such as the United States and Israel have signed the Rome Statute, but not ratified it. Russia had signed it, but withdrew its signature in 2016. China, India, Pakistan and Turkey are, in contrast, among the states that have not even signed the Rome Statute.

While a reconstruction of the Rome negotiations falls outside the scope of this chapter, the paragraphs below focus on the provisions finally enshrined in Statute – notably, on issues of institutional design and the mechanism for the selection of situations and cases that ultimately emerged in Rome. More to the point, it is argued that the Rome Statute ends up relocating the “unwillingness” and “inability” of states to investigate and prosecute to the ICC, as long as it places the Court in the pressing need to enlist state power to its cause.4 To put it differently, the Rome Statute is built around a basic tension

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3 See Kirsch and Holmes (n 1) 3. Kirsch and Holmes have noted that, as the conference began its work, ‘the task awaiting the negotiators was daunting’, and the draft statute that emerged from the PrepCom ‘was riddled with some fourteen hundred square brackets, i.e. points of disagreement’ (ibid), ‘with any number of alternative texts’ (ibid), which the conference could not have possibly resolved systematically within the time available. Following the Rome Conference, a Preparatory Commission (PrepCom) was charged with completing the negotiation of subsidiary and complementary documents, i.e. the Rules of Procedure and Evidence (RPE); the Elements of Crimes; the Relationship Agreement between the Court and the United Nations; the Financial Regulations; and the Agreement on the Privileges and Immunities of the ICC.

- between “sovereignty-limiting” rationale and “sovereignty-based” operation\textsuperscript{5} - which crucially impinges on the Court’s own “ability” and “willingness” to investigate and prosecute.

3.2 The Institutional Architecture of the Rome Statute: Kowtowing to State Sovereignty

3.2.1 A Consent Regime

A crucial difference between the ICC and its predecessors is that the previous international criminal tribunals were imposed on states by international bodies or powers. The Rome Statute, instead, is a treaty; that is, a voluntary agreement. In these circumstances, ‘states negotiating the treaty had to decide to what extent they were willing to give up their sovereign right to exercise criminal jurisdiction over their own territory and their own nationals regarding certain crimes’.\textsuperscript{6} It is, hence, unsurprising that jurisdictional issues were at the centre of heated debates throughout the drafting process. Even in Rome they ‘remained subject to many options as long as possible’.\textsuperscript{7} One of the major points of contention during the Conference was precisely whether the Court would operate on a restrictive consent basis and with strict Security Council control (as the 1994 Draft Statute had envisaged). On this and other issues, participating states coalesced into several groups. The “like-minded group” (LMG) was the most organized.\textsuperscript{8} It was composed of middle powers and developing countries. Several of these had directly suffered from some of the crimes encompassed by the draft statute, and the group as a whole favoured a strong and independent court.\textsuperscript{9} Germany and South Korea played leading roles in the LMG. Germany put forth the proposal of a court with


\textsuperscript{7} Kirsch and Holmes (n 1) 8.

\textsuperscript{8} Ibid, 4.

\textsuperscript{9} Ibid.
universal jurisdiction. South Korea, slightly mitigating the German proposal, advanced the idea of a court able to exercise jurisdiction if any of four states - the territorial state, the state of nationality of the accused or the victim, and the custodial state - were party to the Rome Statute. At the opposite end of the spectrum sat the permanent members of the Security Council (P-5). They envisaged a strong role for the Council vis-à-vis the court and wanted its jurisdiction to be carefully delimited. In particular, the United States vehemently opposed the idea of a Court that could exercise its jurisdiction against the consent of the state of nationality without prior political sanction by the Security Council. The United Kingdom and France, although initially allied with the US and the other P-5, changed sides and joined the LMG by the end of the conference. Given the striking disagreements between delegations, in addition to the wide-ranging implications of the matter under debate, the final package was completed only on the final day of the conference.\textsuperscript{10} What is more, since the positions of some delegations had actually proved to be irreconcilable, the consensus approach to adoption was thwarted and the delegates were called to vote. The LMG supported the final package (albeit having concerns about certain aspects); other blocs were split, and countries were left to determine their own positions.\textsuperscript{11}

According to the set of provisions finally approved, the ICC can intervene irrespective of any consent for cases referred by the UN Security Council (Article 13(b)). Furthermore, in the absence of a UNSC referral, any state party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed; or, alternatively, the OTP can proceed on its own initiative, provided that, in both instances, either the territorial State or the state of nationality of the suspect are party to the Rome Statute (Article 12(2)). This means that Article 12(2) allows the Court to reach over third-party nationals, when they commit crimes on the territory of one or more member-states, without requiring UNSC’s authorization. It is also important to recall that in a dispute over jurisdiction

\textsuperscript{10} Ibid, 11.
\textsuperscript{11} Ibid.
between the territorial state and the ICC, the Court has the authority to override the claims of the territorial state and seize jurisdiction.\textsuperscript{12}
Considering the above, and as already illustrated in Chapter 1, the Rome Statute may be regarded as opening up an unprecedented scope for international authority. Unsurprisingly, the provision of the Court’s potential reach over third-party nationals without prior political sanction has been at the heart of the US rejection of the Rome Statute. Having said that, the scope of the ICC’s supranational authority shall not be exaggerated. To start with, in fact what has emerged from the Rome negotiations is largely a consent regime based on territoriality and nationality.\textsuperscript{13} In particular, the breadth of the ICC jurisdiction is mostly determined by states’ decisions to accept the jurisdiction of the Court (Article 12(1)) as well as their decisions to withdraw (Article 127). This means that, absent a Security Council referral, the Court’s jurisdictional reach is limited to those situations occurring on the territory of state parties, or in which the state of nationality of the accused is party to the Rome Statute. However, state parties are also free to withdraw from the Rome Statute if their discontent with the Court’s decisions were to prevail. Furthermore, as Chapter 4 will show, states have been particularly reluctant to refer situations other than ones taking place on their own territory. Out of the 11 referrals received by the OTP since 2002, only one has been submitted by a group of state parties concerning a situation in the territory of another state party (i.e. crimes against humanity allegedly committed in the territory of Venezuela since 12 February 2014), whereas the remaining ten have been referred by either the territorial states themselves (Uganda, DRC, CAR I, Mali, Comoros, CAR II, Gabon, Palestine) - so-called “self-referrals” - or by the Security Council (Sudan and Libya). Those figures clearly suggest that the power of referral held by state parties is severely constrained in practice, due to the political costs perceived by states, the Rome Statute thus being caught on the same hurdle that has

hampered the fate of universal jurisdiction. A comparable reluctance emerges also from the limited number of investigations opened *proprio motu* by the Prosecutor, as also argued in Chapter 4. Finally, a special note should be made of the ambivalent role of the Security Council, which, all things considered, remains far from tipping the scale in favour of genuine supranationality. In other words, on the one hand the powers allocated to the Council may be crucial to extending the Court’s jurisdiction to situations otherwise out of its reach. On the other hand, the privilege granted to the UNSC to refer a situation to the Court, as well as to defer an investigation or prosecution for a renewable period of 12 months, is very similar to the veto power of the five permanent members of the UN Security Council. Therefore, the political interests of any individual permanent member can prevent the Council from either referring a situation to the Court or going ahead with an investigation or prosecution, even in cases where the Court has genuine jurisdiction.

What is more, a ‘special irony’ of the Council’s referral-deferral authority, as Hans Koechler has put it, lies in the fact that ‘it is bound to the political will of states that are not even parties to the Rome Statute’ (at the moment three permanent members out of five), who, ‘with their own and their allies’ leaders and personnel being shielded from the Court’s jurisdiction, can use the Court to advance their own political agenda’. Finally, the recent activation of the crime of aggression has even reinforced the role of the UNSC and, with it, the logics of sovereignty. Absent a UNSC referral, the ICC will have jurisdiction only when a state party perpetrates the crime against another state party, and only provided that both have ratified the aggression amendment. In addition to this, even those states that have ratified the aggression amendment (presently only 36 of the 123 states parties) can elect, at any time, to opt out of

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14 The author wishes to thank Jason Ralph for his helpful advice on this point. See Jason Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and Its Vision of World Society* (Oxford: Oxford University Press, 2007).


16 Ibid.

17 Ibid.

18 Ibid, 5.

19 Ibid.
the aggression jurisdictional regime. The Security Council, instead, has the power to refer both state parties (irrespective of ratification) and non-state parties to the Court. As a result, the most likely scenario of an aggression prosecution is not a situation involving states parties. Rather, the P-5 may unite to target a common enemy.20

In short, the basic jurisdictional features of the Rome Statute laid out above already prompt a reconsideration of the expectation of a Court able to act unrestrainedly against the interests of states. Recent developments, discussed at more length in Chapter 4, seem to be adding other irons to the fire. Suffice it for now to recall the withdrawal of Burundi from the Rome Statute, which has unequivocally materialized the ultimate backlash that may emerge if states see their mandate being stretched too far beyond what they intend to accept.21

### 3.2.2 The Role of State Parties in Financial Oversight: From the Withholding of Resources to the Steering of Prosecutorial Discretion

State parties are also the financial patrons of the ICC, being the Court primarily funded through their contributions. As has already been poignantly noted in the literature, ‘the elective nature of their involvement produces a role akin to a shareholder evaluating an investment’.22 However, the broad point I am submitting here is not that state parties directly influence the decisions of the Prosecutor. A crucial consideration in this respect is that the Assembly of State Parties, the Court’s management oversight and legislative body, is not tasked with prosecutorial decisions, but with management oversight of the


“administration” of the Court (Article 112 of the Rome Statute). Indeed, the ICC involves a high degree of delegation; and the fact that the Court works in the service of its members may be denied – occasionally even vigorously - by some states parties themselves. At the same time, though, while the economies of the ICL are often overlooked, these play a critical role in shaping the activities of their respective courts. More to the point, international prosecutors do need resources to investigate crimes and build cases; therefore, states - state parties, in the case of the ICC - may meaningfully steer prosecutorial discretion by withholding the necessary financial resources.

The OTP itself has admitted that the scarcity of resources threatens the Office’s impartiality, by pushing it to prioritize investigations portending higher rates of success:

Faced with resource constraints, the Office has had to make difficult decisions by not starting certain investigations or placing others on hold. This has damaged the Office’s ability to respond to evolving situations (e.g. Libya, Darfur, Mali), and impacted negatively in terms of perception.

This statement certainly raises serious concerns. And yet, it is also hardly surprising, if we consider that on a per-situation basis the ICC has a small

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23 See Jonathan O'Donohue, ‘Financing the International Criminal Court’, in Dawn Rothe, James Meernik and Thordis Ingadóttir (eds) Realities of International Criminal Justice (Leiden, The Netherlands: Brill 2013) 269, 288. According to O'Donohue, the ‘drafting history shows that the term “administration” was specifically selected to avoid a broader interpretation that could interfere with judicial independence’ (ibid).


27 OTP, ‘Strategic Plan 2016 – 2018’, 16 November 2015, para. 35, available at https://www.icc-cpi.int/iccdocs/otp/070715-otp_strategic_plan_2016-2018.pdf (last visited 30 September 2018). In addition to the OTP’s public acknowledgement, several respondents to the interviews carried out for the purpose of this dissertation have expressly regarded the “scarcity of resources” as one of the most pressing problems the ICC faces (see Annex II, code: “scarcity of resources”).
fraction of the resources that were available to the previous *ad hoc* tribunals:28 approximately EUR 147 million for ten situations and eight to ten preliminary examinations (in 2018), against the approximately USD 120 million allocated annually to each tribunal, both dealing with a single situation only. Accordingly, the ICC has not only had to select situations to pursue, but, within each situation, it has also to be more selective than past institutions.29 The ICC is also enormously under-resourced compared to domestic mass-atrocity investigations in Western Europe and the United States. These ‘usually have tens to hundreds of times more resources available to them than the average ICC investigation’,30 thus raising serious doubts as to whether the ICC actually has the resources needed ‘to conduct the kind of investigations that are necessary to respond to mass atrocity crimes’.31

Since the emergence of the global financial crisis in 2008, things have become even harder for the Court. At its seventh session, in 2008, the Assembly took the unprecedented step of cutting the ICC’s budget beyond the amount recommended by the Committee on Budget and Finance (CBF),32 a group of 12 independent experts elected by the ASP and tasked with making “the relevant recommendations to the Assembly concerning the proposed programme budget”. Within two years, a group of the highest paying states - encompassing France, Germany, Italy, Japan, and the United Kingdom - had adopted a common position of “zero-growth”, regardless of whether the Court’s activities would have increased, or other costs risen. This approach has been opposed by many state parties and NGOs,33 in addition, of course, to the Court’s organs themselves. In 2011, in his opening statement to the 10th ASP

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29 Ibid.
31 Ibid, 66. According to Ford, several cases at the ICC ‘were compromised by the lack of investigative resources’ (ibid), and ‘by increasing the ICC’s investigative resources, states can improve the Court’s likelihood of success and thereby derive greater benefit from membership in the Court (ibid, 70). Hence, ‘by focusing on the relationship between investigative resources and success, it may be possible to convince states that increasing the ICC’s investigative resources is in their own interests’ (ibid).
32 O’Donohue (n 23) 280.
33 Ibid.
session, the President of the ICC stated that imposing the proposed cuts ‘would be profoundly damaging to the Court’s ability to deliver fair and expeditious justice’. Yet, the 10th ASP session deliberated cuts beyond those recommended by the Committee. Downwards adjustments have continued until most recently. In 2017, the Coalition for the ICC’s key recommendations to the 16th ASP session reiterated the warning that ‘states Parties should oppose arbitrarily limiting the Court’s 2018 budget, which would undermine the Court’s ability to deliver fair, effective, and efficient justice’. According to the Coalition, states ‘cannot expect and demand the Court to do more each year, while simultaneously reducing its resources’. Nevertheless, out of a proposed budget of EUR 151,475,700 million, EUR 147,431,500 million were allocated to the Court. In tandem with downwards budget adjustments, since 2008 efforts have also ‘intensified to find efficiencies in the ICC’s work as a way to keep costs to a minimum and to establish more confidence in the ICC’s financial practice’. So, for example, since 2009 the ICC has been working with the CBF to improve its internal efficiency. Furthermore, since 2014 the budget has been explicitly linked to the OTP strategic plan ‘through the expected annual level of activities and the main improvement projects derived from the strategic plan’. And yet, such a link is problematic, for the lack of progress may also be due to states themselves failing to cooperate with the

36 Ibid.
39 O’Donohue (n 23) 281.
40 Ibid, 281.
41 OTP (n 27) para. 36.
Court in the collection of evidence, or arrest and surrender suspects (as discussed in more detail in the section below).

In conclusion, on the one hand the Rome Statute excludes oversight of the substance of the ICC’s prosecutorial or judicial functions; nor does it contemplate that the OTP and the judges’ decisions depend on the resources available. On the other hand, the ASP’s role in financial oversight and, in particular, the current trend towards the withholding of resources, sheds further light on the gap between the expectations and ‘practical realities’ faced by the Court in its work. Indeed, this becomes a pivotal issue especially at a time when the OTP might expand the number and geographic spread of its investigations, which is even more against the interests of states themselves.

3.2.3 The Lack of a Reliable International Enforcement Mechanism

A further ‘decisive structural weakness’ of the system negotiated in Rome is that the Court does not have the power to enforce its own decisions. While criminal prosecution is inherently tied to the control over territory and persons, under the system established by the Rome Statute such control remains firmly in the hands of sovereign states. In other words, the ICC lacks both the authority to execute requests directly on the territory of a state without that state’s consent, and police powers (save within the limited confines of its premises). Therefore, state parties’ obligations to cooperate with the Court are essential to the Court’s ability to function, meaning that the

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45 See ibid, where Maogoto also offers an overview of the exceptions to this general arrangement.
46 Ibid, 284.
ICC relies on state cooperation for all matters related to the entry and presence of staff on the territory of states, the questioning of witnesses, the provision of official records, the interception of communications, the preservation of evidence, and the arrest and surrender of suspects. What is more, whereas several of the challenges faced by the ICC are common to the field of mutual legal assistance between states, the ICC is further disadvantaged due to the fact that it operates without the apparatus of the sister institutions that exist within each state, such as police, defence, intelligence, and border and immigration services. In line with this state of affairs, Philippe Kirsch, first president of the ICC, has described the overall system negotiated in Rome in terms of a two-pillar system: a judicial pillar represented by the Court itself; and an enforcement pillar that relies on states.

At the same time, though, the scope of states parties’ obligations to cooperate with the ICC on their own territories is precisely an issue of sovereignty. Hence, not surprisingly, Part 9 of the Statute on “International Cooperation and Judicial Assistance” is one of the most complex of the Rome Statute. Indeed, while proponents of a strong ICC favoured a duty to “comply” with the Court’s orders, rather than an obligation of “cooperation”, Part 9 is also the least supranational section of the entire Statute. In particular, Article 86 requires states parties to “cooperate fully with the Court in its investigation and prosecution of crimes”; but the Articles that follow

48 Ibid.
50 Maogoto (n 44) 282.
51 Ibid, 283.
52 Ibid.
53 See Rastan & Turlan (n 47), where the authors have clarified that ‘the same duties also apply to non-Party States that have lodged a declaration accepting the exercise of jurisdiction by the Court under Article 12(3)’ (ibid, 32). Furthermore, ‘a similar situation arises with respect to States that have been placed by the United Nations Security Council under Chapter VII obligations to cooperate fully with the Court, thereby binding the UN Member State so directed to cooperate. Such a State, even if not a Party to the Statute nor a State that has consented by an ad hoc declaration to be so bound, is subject to the Court’s cooperation regime by virtue of their membership of the UN Charter system’ (ibid). However, it bears emphasizing
are actually riddled with qualifications and exceptions. Hence, the resulting cooperation system is a compromise, a hybrid that, as judge Kaul has put it, contains ‘a mix of elements of vertical and horizontal criminal cooperation of both the supranational and inter-state model of cooperation’. This means that, although states parties have a general obligation to cooperate with the Court, in practice, there remains a lot of discretion. The Court, in fact, may not compel state compliance with its orders; the Rome Statute merely provides for consultations in cases of problems arising in the context of cooperation requests. Nor is the ICC allowed to sanction states directly for non-compliance. Rather, the Court can make findings of non-compliance and direct those to the ASP, or to the Security Council (in the case of a UNSC referral). As a further option, external states may pressure resistant states to comply, or even give effect to the Court’s requests against the consent of the territorial states. But, as the following chapter shows, whereas this scenario was meant to become standard practice by the architects of the Rome Statute, states have proved reluctant to fill in the gap of a dedicated law-enforcement agent.

As a result, on the one hand, in defiance of state-centric assumptions of world order, the Rome Statute gives the ICC the entitlement to ultimately decide on the “ability” and “willingness” of national authorities and to intervene accordingly - even in cases where states or the Security Council have not requested its intervention. On the other hand, states retain a general coercive authority within their own territory. This means that the ICC’s intervention will only become effective if states are “willing” and “able” to act

that neither of the two UNSC referral-resolutions - Resolution 1593 on Darfur (Sudan) and Resolution 1970 on Libya - contained a general obligation for UN member states to cooperate with the Court.

54 Maogoto (n 44) 282-283. See also Jerry Fowler, ‘Not Fade Away: The International Criminal Court and the State of Sovereignty’ (2001) 2 San Diego Journal of International Law: 125. At the same time, as Fowler has noted, in ‘an art form solution, however, specific articles on surrender of suspects and other forms of cooperation require States to ‘comply with requests’ from the ICC’ (ibid, 146).

55 Kaul (n 43) 87.

56 Ibid.

57 Ibid.


as the ‘proxy-enforcement arm of the Court’.\textsuperscript{60} As Rod Rastan and Pascal Turlan have put it:

[i]n the absence of judicial powers to directly compel state cooperation under threat of penalty, and without the availability of the Security Council as a routine enforcement agent, compliance will tend to fall back on the discrete decisions of individual States or on the Security Council to uphold the law.\textsuperscript{61}

What is more, this state of affairs entails the paradoxical result that the same institutions that were deemed “unwilling” or “unable” are required to cooperate with the ICC in order to achieve effective investigations and prosecutions.\textsuperscript{62} It also follows that, while the exercise of jurisdiction by the ICC in the absence of state consent is the most visible manifestation of the Court’s supranational authority, this is also the situation in which the Court’s intervention is most likely to remain symbolic. In fact, absent extraordinary international pressure or military intervention, the very unwillingness of the regime to prosecute will also prevent the ICC from securing custody over alleged criminals who remain under the regime’s protection.\textsuperscript{63} Finally, such tension is even magnified by the fact that the ICC operates in contexts where there has not yet been a transition, namely where local authorities are likely to be involved themselves in the crimes investigated by Court.\textsuperscript{64} This is a blatant difference between the former tribunals and the ICC. In the context of the Nuremberg tribunal, the obstacle of the sovereignty of the German state had been removed by its capitulation in May 1945.\textsuperscript{65} In Rwanda, the domestic legal system had collapsed altogether.\textsuperscript{66} In the former Yugoslavia, the ICTY could largely count on the NATO forces operating on the ground to enforce its arrest

\textsuperscript{60} Rastan & Turlan, ibid.
\textsuperscript{61} Ibid, 65.
\textsuperscript{64} Robinson (n 28) 333.
\textsuperscript{65} Maogoto (n 44) 287.
\textsuperscript{66} Ibid, 288.
warrants. In contrast, it remains unclear how a criminal justice system can operate alongside likewise operational national legal systems without considerable political difficulty.67

As the above overview has just shown, the tensions between the ICC’s mandate and its reliance on the enforcement power of states are striking. The ICC is a territorially disembodied court devoid of independent executive power.68 Metaphorically, the Court is a child - especially if compared to domestic criminal justice systems, which, having evolved over many years, have the advantage of a territorial base and a police force. Moreover, in any state that adheres to the rule of law, the exercise of judicial power is normally separate from the legislative and executive branches.69 Yet, the Court is expected to act as an adult,70 and, actually, even achieve objectives the attainment of which would be a serious challenge even for the most powerful states.71

### 3.3 Selecting Situations and Cases before the ICC: The Contours of the Problem

While the institutional architecture outlined above already looks not very favourable for a strong and independent Court, the picture does not get any more encouraging if we look at the complex and controversial mechanism underlying the selection of situations and cases.

Prosecutorial discretion is generally defined as “the authority not to assert power, or not to assert it to the full extent authorized by law’.72 Hence,
Prosecutorial discretion – to choose whether to launch investigations, to bring charges, to select who is to be charged and for which crimes – is an essential means of rationalizing the scarce resources and/or accommodating circumstances ‘in a manner which assures that crimes of greatest priority are investigated and prosecuted’. It follows from here that prosecutorial discretion is particularly relevant for an international criminal court whose jurisdiction extends over a great number of potential crimes and perpetrators. Therefore, the Prosecutor of the ICC enjoys broad autonomy regarding the selection of cases and the framing of the charges. The OTP, in fact, is not duty-bound to investigate and prosecute all crimes within the ICC jurisdiction, but it must focus its investigation and prosecution. This requires making choices relating to the selection of regions, incidents, groups, persons, counts, and charges. The Statute provides only limited guidance in this regard, leaving considerable margin for interpretation and prosecutorial policy. Furthermore, the role of the judges in shaping the charges is more limited than at the ICTY. The ICC has no equivalent of the ICTY’s rule allowing judges to shape the number of incidents and counts the Prosecutor pursues at trial, and the ability of the Courts judges to change the legal characterization of the facts is limited to those facts and circumstances described in the charges. Additionally, while all the other international and mixed courts possessed jurisdiction over a specific situation, the ICC must select not only which cases

73 Ibid.
74 Ibid.
76 Ibid.
77 Ibid.
78 See Margaret M. deGuzman and William A. Schabas, ‘Chapter 2. Initiation of Investigations and Selection of Cases’, in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds) International Criminal Procedure: Principles and Rules (Oxford: Oxford University Press, 2012) 131, 147. deGuzman and Schabas have noted that according to the ICTY’s RPE, ‘when it is in the interests of a fair and expeditious trial, the judges may “invite” the Prosecutor to reduce the number of charges and may limit the number of crime sites and incidents about which the Prosecutor can present evidence’ (ibid, 138). Furthermore, after hearing the parties, the judges ‘may direct the Prosecutor to select the counts in the indictment on which to proceed’ (ibid). See Helen Brady, Matteo Costi, Håkan Friman, Fabrizio Guariglia, Carl-Friedrich Stückenberg, ‘Chapter 4. Charges’, in Göran Sluiter, Håkan Friman, Suzannah Linton, Sergey Vasiliev, and Salvatore Zappalà (eds) International Criminal Procedure: Principles and Rules (Oxford: Oxford University Press, 2012) 381 for the argument that ICC Regulation 54 could be understood to provide the judges with similar powers.
to prosecute (i.e. which persons to indict and what charges to bring), but also the situations to investigate. These are identified through one of the three modes or “trigger mechanisms” set out in the ICC Statute: Security Council referral (Article 13(b)), state party referral (Article 14), and prosecutorial initiative (also said “proprio motu”) (Article 15). The latter mode of selection was one of the greatest and most controversial innovations of the Rome negotiations in 1998.\(^79\) In the initial draft statute prepared by the ILC, the jurisdiction of the Court was to be triggered by referral of a state party or the Security Council. Furthermore, not only did the OTP have no authority to initiate investigations in the absence of referral, but also the Office had no discretion to refuse to proceed (provided that referrals were adequately formulated).\(^80\) One of the most radical changes to the ILC draft was the recognition of prosecutorial discretion with respect to the selection of situations. According to this discretion, the OTP is able to act in situations where neither states nor the Security Council have requested intervention, and it may also refuse to proceed with situations that are referred by a state or the Security Council. In fact, neither a state party nor even a Security Council referral automatically triggers an investigation. This will only start when the Prosecutor finds that there is a “reasonable basis” to proceed.\(^81\) The existence of the latter is ascertained by the Prosecutor on the basis of the following parameters: jurisdiction, admissibility, and interest of justice. The jurisdictional test comes first and pertains to the existence of jurisdiction. The OTP has to determine whether the alleged crimes fall within both the Court’s subject-matter (or \textit{ratione materiae}) and temporal (or \textit{ratione temporis}) jurisdiction; that is, whether they respectively fall under the crimes listed in Article 5 of the Rome Statute (Article 12(1)), and have occurred after the date of entry into force of the Statute (Article 11). Furthermore, while the UN Security Council can refer any situation to the Court irrespective of any


\(^80\) Ibid.

\(^81\) At the same time, though, as discussed further in the text, the Prosecutor’s decision is subject to a degree of judicial review by a Pre-Trial Chamber (PTC), both in case of exercise of \textit{proprio motu} powers and referral.
consent (Article 13(b)), the two remaining triggers are equally subject to limitations at the level of personal (or ratione personae) and (or ratione loci) jurisdiction. This means that in the absence of a UNSC referral, the OTP has to ascertain that the alleged crimes have been or are being committed either by a national of a state party (Article 12(2)(a)) or on the territory of a state party (Article 12(2)(a)). Having determined that one or more crimes falls within the ICC jurisdiction, it follows the admissibility test. According to this, the Court can effectively exercise its jurisdiction only if the “case” fulfils the admissibility criteria set out by Article 17, namely provided that: the alleged crimes are of “sufficient gravity” to justify the intervention of the Court, and they are not being, or have not been, genuinely investigated or prosecuted at the domestic level (complementarity). Finally, the Prosecutor has to decide whether the investigation would be against the interests of justice.

We have just seen that the ICC Prosecutor uses prosecutorial discretion when deciding whether to trigger the Court’s jurisdiction, as well as when the Court’s jurisdiction has been triggered, in order to decide whether to open an investigation, whom to prosecute, and what charges to bring. At the same time, however, the exercise of prosecutorial discretion is subject to constraints under the Rome Statute. This follows a multi-layered model of accountability that combines professional responsibility with elements of judicial review. The latter is the strongest form of formal prosecutorial accountability, as it allows judges to assess or reverse prosecutorial choices, either proprio motu or through challenge by a participant. Indeed, while the selection decisions rest primarily with the ICC Prosecutor, as they do at the ad hoc tribunals, the Rome Statute - supported by the Rules of Procedure and Evidence and the OTP strategy and policy papers - subjects such decisions to even greater constraints and judicial oversight. In particular, Article 53 is meant to prescribe the

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82 Finally, a crime may also fall within the jurisdiction of the Court if it has been committed by a national of a state not party that has lodged a declaration accepting the jurisdiction of the Court, or on the territory of a state not party that has lodged a declaration accepting the jurisdiction of the Court (Article 12(3)).

83 In addition, as Goldston has noted, the Prosecutor uses discretion when deciding whether to challenge a state’s assertion of inadmissibility. See Goldston (n 72) 391.

84 Stahn (n 75) 250.

85 Ibid.

86 Ibid 264.

87 See deGuzman & Schabas (n 78) 149; and Stahn (n 75) 250.
breadth and limits of prosecutorial discretion, and judicial review is provided for at several junctures, such as: (i) the decision to authorize the opening of a new investigation in the context of *proprio motu* proceedings under Article 15; (ii) the decision to grant a warrant or summons requested by the OTP after an investigation; (iii) the decision to confirm the charges against a suspect; (iv) the decisions on an admissibility challenge; (v) the decision not to investigate or prosecute.

The situation just outlined is only a hint of the elaborate architecture for the selection of situations and cases established by the Rome Statute. The ensuing analysis illustrates the overall system in more detail, while teasing out some its most controversial knots. In particular, it shows that albeit the Rome Statute has extended the avenues for judicial review, the ICC Prosecutor still enjoys considerable leeway to develop policy principles on the basis of its charging discretion. In fact, such discretion applies not only to “interests of justice” determinations - the most clearly discretionary - and gravity considerations; but also to complementarity, often considered of a more technical nature. Hence, in open defiance of the belief that prosecutorial decision-making is merely about the application of the law, the chapter concludes that the Rome Statute establishes a system of broad and largely undefined prosecutorial discretion that lays the Court extraordinarily open to the powers and interests of states.

### 3.3.1 Gravity and its Muddy Waters: Between Legal Minimum Threshold and Discretionary Criterion

Gravity is of decisive importance for the exercise of prosecutorial powers, but, like the “interests of justice” criterion, the Statute offers no indication at

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88 See Stahn (n 75) 257.
89 See, for example, Maria Varaki, ‘Introducing a fairness-based theory of prosecutorial legitimacy before the International Criminal Court’ (2016) 27(3), *European Journal of International Law* 769, 776.
90 Ibid.
91 Stahn (n 75) 267.
all as to how to assess “gravity”, and several pivotal questions remain largely unsettled.  

A first major point of contention is that, while determination of whether to initiate an investigation is made before any particular case has been identified, Articles 17 and 53 both address gravity solely at the level of individual “cases”. In 2006 the OTP sought to shed light on the matter by circulating a draft paper on the criteria for selection of situations and cases, in which it attempted to clarify the criteria taken into account when judging the gravity of cases, as well as situations. Under “Criteria for Selection”, the OTP indicated both quantitative criteria, such as the scale of the crimes, and qualitative ones, i.e. the nature of the crimes, the manner of their commission, and their impact. While this paper remained unpublished, the OTP further elaborated upon these four criteria in a draft paper on preliminary examinations released in 2010. This paper, however, was no longer speaking of both situations and cases, but only about situations. Three years later, the OTP released a fully-fledged policy paper on preliminary examinations. The 2013 paper reprised the approach laid out in the 2010 draft, including the mixed qualitative-quantitative approach. The latter approach was confirmed by the Chambers in their decisions authorizing the opening of proprio motu investigations. In the same context, the judges clarified that the reference of Articles 17 and 53 to the admissibility of a “case” shall be interpreted to include

92 See ibid.
93 Ibid, 269.
96 Schabas (n 79) 371.
the “potential cases” within the proposed situation’. In other words, the Chambers stated that, at the stage of preliminary investigation, gravity should be assessed against the backdrop of the likely set of cases of “potential cases” that would arise from the investigation of the situation.

The recent OTP’s decision on the closing of the Preliminary Examination in the Comoros situation (more commonly known as the Mavi Marmara situation) has, however, reopened the debate. The source of debate is the Prosecutor’s reference to the gravity of “any potential case” instead of “the potential case(s)”. As a careful commentator such as Kevin Jon Heller has noted, this wording may be interpreted as requiring the OTP ‘to investigate any situation in which there is at least one potential case that is grave enough to be admissible’. The OTP still needs to clarify its position. For example, the OTP may have referred to the gravity of “any potential case” instead of “the potential case(s)” merely because there is only one potential case in the whole situation. But, if the standard articulated in the Mavi Marmara decision is that the OTP is bound to open a fully-fledged

99 deGuzman & Schabas (n 78) 144.
100 ICC, Pre-Trial Chamber II, Kenya Authorization Decision (n 98) paras. 41–50; ICC, Pre-Trial Chamber III, Côte D’Ivoire Authorization Decision (n 98) para. 18; ICC, Pre-Trial Chamber I, Georgia Authorization Decision (n 98) paras. 36-37; ICC, Pre-Trial Chamber III, Burundi Authorization Decision (n 98) para. 184.
101 On 14 May 2013, a law firm acting on behalf of the Government of the Union of the Comoros referred to the OTP the situation concerning the 31 May 2010 Israeli raid on the Mavi Marmara, a humanitarian aid flotilla bound for Gaza Strip. On the same day, the Prosecutor announced the opening of a preliminary examination on the referred situation. After approximately three years of preliminary examination, on 6 November 2013, the Office made public its decision that the requirements for opening an investigation into the situation had not been met, because the potential case(s) that would likely arise from an investigation were of insufficient gravity. On 16 July 2015, following a request for review presented by the Government of the Union of the Comoros, Pre-Trial Chamber I requested the OTP to reconsider its decision. See Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic, and the Kingdom of Cambodia, ‘Decision on the request of the Union of the Comoros to review the Prosecutor’s decision not to initiate an investigation’, ICC, Pre-Trial Chamber I, ICC-01/13-34, 16 July 2015. The Prosecutor appealed the decision of the Trial Chamber. However, on 6 November 2015 the Appeals Chamber decided by majority to dismiss the Prosecutor’s appeal against the decision of Pre-Trial Chamber I requiring the Prosecutor to reconsider the decision. On 29 November 2017, the OTP issued its final decision, announcing the closing of the PE in the Comoros situation. See Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, ‘Final decision of the Prosecution concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA), dated 6 November 2014’, ICC-01/13, 29 November 2017, Annex 1.
103 Ibid.
investigation as long as even one potential case within a situation would be sufficiently grave, it is questionable that such an approach could ever be workable.\textsuperscript{104} In fact, within a broader situation being considered during a PE, there will always be at least one case of sufficient gravity.\textsuperscript{105} So, for instance, it is highly likely that each of the situations currently under preliminary examination contains at least one case of sufficient gravity (albeit complementarity issues may arise in some of them). In other words, the standard advanced in the Mavi Marmara final decision would warrant the opening of a formal investigation in all of the current preliminary examinations (provided the absence of genuine proceedings at the domestic level). However, given the OTP’s limited resources, such an approach would simply be ‘practically impossible’.\textsuperscript{106}

An interconnected point of contention is whether gravity should be assessed by looking merely at potential cases within each situation in some absolute sense, or, as suggested by Heller, by ‘comparing the gravity of different situations by examining all of the potentially admissible cases’.\textsuperscript{107} A plausible option may be to consider that both routes are available, provided that they are kept clearly separate. This is what Margaret deGuzman has propounded, suggesting that considerations of relative gravity should be applied merely as policy considerations (in order to determine whether to open a formal investigation), while playing no role in the assessment of gravity as a component of the admissibility test. According to deGuzman, the text of the Statute (“not of sufficient gravity to justify further action”) indicates that, for admissibility purposes, gravity should be treated as a threshold (‘a theoretically static line’),\textsuperscript{108} aimed at excluding only cases of \textit{de minimis} conduct that do not “warrant trial at the international level”, and not as a relative determination. In other words, the ‘gravity of other cases or situations

\textsuperscript{104} Ibid.
\textsuperscript{106} Heller (n 102).
\textsuperscript{107} Ibid.
unrelated to those in question should have no bearing on the gravity threshold determination. The latter, instead, would entail a ‘relatively straightforward factor-based analysis’ premised on the four main indicators contemplated by the mixed qualitative-quantitative approach officially laid out in 2013 and confirmed by the judges.

That being said, deGuzman has argued that while considerations of relative or comparative gravity should play no role for admissibility purposes, they may factor into the Prosecutor’s discretionary selection of both the situations and cases to pursue. The application of ‘situational gravity’ has also been invoked by Heller, especially in light of the fact that the OTP can investigate only a limited share of the situations in which admissible crimes have been allegedly perpetrated. According to Heller, the application of situational gravity would also have the merit of extricating debates over case gravity. Consider the Mavi Marmara situation. Even if we assume that the attack on the Flotilla is sufficiently grave to be admissible, the overall situational gravity of the situation (which involves only one case), is, arguably, lower compared to other situations under preliminary examination (including the Palestine situation as a whole). However, given the decisive importance of situational gravity, Heller has suggested that the judges should be allowed to review all prosecutorial decisions not to pursue a situation based on the Prosecutor’s discretionary considerations of relative gravity, importantly, including decisions not to initiate investigations proprio motu due to a lack of reasonable basis, which, as discussed further below, according to a literal reading of the Rome Statute, are not covered by judicial review (proprio motu review of negative decisions based on interests of justice is the only form of review available in the context of decisions not to initiate investigations

109 Ibid, 1457
110 Ibid, 1404.
112 deGuzman (n 108) 1405. See also Jacobs (n 105).
114 Heller (n 113).
115 Ibid.
116 Heller (n 113).
proprio motu).\textsuperscript{117} deGuzman and other commentators, however, have been sceptical about the practicability of this option, on the grounds that the judges do not actually have access to all of the information relevant to making selection decisions (indeed, providing them with such access might be incompatible with defendants’ rights),\textsuperscript{118} and it is thus unclear whether an increased judicial role in this respect would yield benefits in practice.\textsuperscript{119} What deGuzman has emphasized, instead, is that the assessment of gravity as an admissibility threshold and the exercise of the Prosecutor’s relative gravity discretion should not be conflated.\textsuperscript{120} In fact, the application of gravity as a selection criterion is not only a more complex matter than gravity threshold determinations, but also more controversial. Nothing in the Rome Statute addresses whether or when the Prosecutor should consider relative gravity when selecting either situations or cases.\textsuperscript{121} Indeed, the Statute is particularly ambiguous about prosecutorial discretion to reject potential situations.\textsuperscript{122} Added to this is the fact that the question of relative gravity is rarely susceptible to objective decision-making,\textsuperscript{123} and it generally requires the OTP to prioritize certain ICC goals, and thus gravity factors, over others. In relation to the OTP’s decision not to investigate the British soldiers in Iraq, deGuzman has pointedly noted that:

the Prosecutor explicitly prioritized the number of victims over other factors such as the fact that the crimes were (arguably) committed as part of an aggressive war. This decision appears to privilege the legitimacy perspective of powerful Western States. The decision also suggests the Prosecutor does not view deterring wars of aggression as an important goal for the ICC, although this may change when a definition of aggression is added to the Statute. In contrast, in deciding

\begin{itemize}
  \item \textsuperscript{117} Ibid.
  \item \textsuperscript{118} deGuzman (n 108) 1462.
  \item \textsuperscript{119} deGuzman & Schabas (n 78) 169.
  \item \textsuperscript{120} deGuzman (n 108) 1432-1433.
  \item \textsuperscript{121} Ibid, 1405-1406.
  \item \textsuperscript{122} Ibid, 1406.
  \item \textsuperscript{123} In the view of Dov Jacobs, it is gravity as whole – and not only relative gravity – that, given its own highly discretionary nature, should be removed from the formal admissibility test and applied merely in the context of the OTP’s discretionary decision whether to initiate a formal investigation. See Jacobs (n 105).
\end{itemize}
to focus the Court’s resources on attacks affecting a relatively small number of peacekeepers in Sudan, the Prosecutor subordinated the number of victims to the impact of the crimes. Again, he appears to privilege the perspective of Western States that engage in most peacekeeping missions over that of local populations who may well question why the rape or murder of hundreds in their village is less pressing.\(^{124}\)

Hence, acknowledging that a heavy burden falls on the shoulders of the Prosecutor, deGuzman has agreed with Heller that ‘it might be preferable to relieve the Prosecutor of some of this burden’.\(^{125}\) In particular, considering that relevant audiences can reasonably differ about the ICC’s priorities, and that the selection of situations and cases strongly affects the Court’s sociological legitimacy, a more viable option may be to allow state parties and other openly political actors to give ‘additional input in the process’.\(^{126}\)

Given the uncertainties emerging from the Rome Statute and the ensuing interpretative controversies, it is not surprising that the OTP’s pronouncements and practices have not been exactly consistent over the years. With regard to situations, the Office has oscillated from pole to pole: from claiming it would proceed more or less automatically once the criteria of scale, nature, and impact of the crimes and their manner of commission are fulfilled,\(^{127}\) to the opposite argument that its selection decisions are required by the Statute’s gravity threshold for admissibility,\(^{128}\) passing through the occasional acknowledgment that some choices have to be made because of the scarcity of resources.\(^{129}\) Admittedly, though, in more recent years the OTP’s policy statements have excluded any official references to the prioritization of

\(^{124}\) deGuzman (n 108) 1460.  
\(^{125}\) Ibid, 1465.  
\(^{126}\) Ibid.  
\(^{127}\) See Schabas (n 79) 371. Before the first Prosecutor took office, lawyers in the OTP had prepared a draft regulation that approached the question of situation selection in a manner that suggested the OTP would proceed with everything that was admissible; but the Prosecutor did not adopt the draft.  
\(^{128}\) See deGuzman (n 108) 1432.  
\(^{129}\) See OTP (n 94), where the OTP openly admitted that the policy of the Office was ‘to respond to serious situations, while maximising the use of its available resources’ (ibid, 11-12).
resources, and to considerations of feasibility more broadly.\(^{130}\) In the 2016 paper on case selection and prioritization, the Office even expressly affirmed ‘the non-applicability of “feasibility” as separate legal factor for determining the opening of investigations’,\(^ {131}\) while conceding that operational feasibility does, instead, become a relevant factor at the level of case prioritization, i.e. ‘the process by which cases that meet the selection criteria are rolled-out over time’.\(^ {132}\) And yet, given the scarcity of the Court’s resources, it is simply unthinkable that the OTP would convert all admissible situations into fully-fledged investigations. Indeed, the OTP practice itself suggests that, rather than considering for prosecution all admissible situations, the Office actually conflates the gravity threshold for admissibility with the relative gravity discretion – notably, by treating the admissibility threshold as a relative analysis based primarily on the number of victims in each situation.\(^ {133}\) So, in 2006, in declining to pursue the situation of alleged British war crimes in Iraq, the Prosecutor argued that although there was a reasonable basis to believe British soldiers had committed war crimes, the situation did not meet the gravity threshold for admissibility, because the number of victims alleged was “of a different order” than that in other situations before the Court. Except that, for a decision to be inadmissible on the basis of the gravity threshold for admissibility, the Prosecutor should have explained, following deGuzman, why the potential cases involved were insufficiently grave to be admissible (for example, it might have been argued that ‘isolated individual murders in war are outside the purview of the Court’),\(^ {134}\) rather than comparing the number of victims in different situations. Similarly, when assessing the scale of the alleged crimes in its 2017 final decision announcing the closing of the PE in the in the Mavi Marmara situation, the OTP reiterated that, ‘the total number of victims of the flotilla incident reached relatively limited proportions as compared, generally, to other cases investigated by the Office’.\(^ {135}\) Moreover,

\(^{130}\) The 2013 policy paper on preliminary examinations nowhere suggested that the OTP makes a selection from among the eligible situations. See OTP (n 97).

\(^{131}\) OTP (n 42) 16.

\(^{132}\) Ibid, 15.

\(^{133}\) deGuzman (n 108) 1432.

\(^{134}\) Ibid, 1433.

\(^{135}\) OTP, Comoros Final Decision (n 101) para. 77.
the OTP’s efforts to distinguish the Mavi Marmara case from other cases - such as the Abu Garda and the Al Mahdi cases, characterised by a relatively limited scale of violence and yet deemed sufficiently grave - appear mostly subjective and result-driven. The Abu Garda and the Al Mahdi cases concerned, respectively, the allegation of a single attack against international peacekeeping forces involving a relatively low number of victims, and attacks on property protected the Rome Statute (Article 8(2)(e)(iv)). Nonetheless, both cases were considered sufficiently grave because of the nature and impact of the alleged crimes. In particular, when assessing the impact of the alleged crimes, the OTP expressly considered the message sent by their perpetrators to the broader the international community. Instead, in the Mavi Marmara case, the Prosecutor excluded any reference to the - arguably unequivocal - message that the Israeli government sought to send by attacking an international flotilla willing to break the illegal blockade in Gaza.

The OTP’s approach to case selection has been firmer. Contrary to the (untenable) claim that all admissible situations will be investigated, there is no such pretence as far as cases are concerned. In line with the practice of other national and international jurisdictions, the OTP adopted the policy of selecting persons “most responsible for most serious crimes”. It also specified that selection would focus on groups that are responsible for “the gravest crimes”. The “greatest responsibility” criterion cannot be found in the ICC Statute, but guidance is given in the Preamble and in articles 5 and 17 of the ICC Statute. In the 2016 paper on case selection and prioritization, the OTP

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136 Heller (n 102).
137 Ibid.
138 Ibid.
139 Ibid.
140 See also OTP (n 94). According to the OTP, the “greatest responsibility” criterion ‘may comprise commanders and other superiors if their effective subordinates are involved in the crimes, those playing a major causal role in the crimes, and notorious perpetrators who distinguish themselves by their direct responsibility for particularly serious crimes’ (ibid, 13). However, as the OTP has conceded, investigations may also include perpetrators lower down the chain of command when necessary for the entire case. It is also interesting to note that, while the rank or role of an accused person has been found not to be relevant to the gravity of a case, it was factored into the assessment of “situational gravity” in the PTC authorization decisions of proprio motu investigations. See Kenya Authorization Decision (n 98) para 198; Côte D’Ivoire Authorization Decision (n 98) paras. 205; Burundi Authorization Decision (n 98) para 187. In contrast, in its request to the Prosecutor to reconsider her decision on the opening of an investigation in the Comoros situation, PTC I noted that the Prosecutor did not
also mentioned the role of potential charges (in addition to the gravity of the crimes\textsuperscript{141} and the degree of responsibility of alleged perpetrators), stating that the ‘Office will aim to represent as much as possible the true extent of the criminality which has occurred within a given situation, in an effort to ensure, jointly with the relevant national jurisdictions, that the most serious crimes committed in each situation do not go unpunished’.\textsuperscript{142} In the same paper, the OTP expressly conceded that, from among the cases selected within any given situation and across them, it will ‘prioritize those cases in which it appears that it can conduct an effective and successful investigation leading to a prosecution with a reasonable prospect of conviction’.\textsuperscript{143} This will be done, the OTP clarified, on the basis of identified strategic and operational criteria. The latter, in particular, take into account the ‘practical realities’\textsuperscript{144} faced by the Office in its work, and the vast scale, nature, and complexity of the OTP’s work compared to its circumscribed budget and limited resources.\textsuperscript{145} Operational criteria encompass: the quantity and quality of evidence; international cooperation and judicial assistance to support the Office’s activities; the Office’s capacity to effectively conduct the necessary investigations within a reasonable period of time; the potential to secure the appearance of suspects before the Court; the ‘impact and the ability of the Office to pursue cases involving opposing parties to a conflict in parallel or on a sequential basis’.\textsuperscript{146}

\textsuperscript{141} OTP (n 42) paras 6 and 32. This paper reprised the mixed qualitative-quantitative approach laid out by the 2013 policy paper on preliminary examinations in relation to situations. See n 94. Furthermore, as far as the impact of the crimes is concerned, the paper added that the OTP ‘will give particular consideration to prosecuting Rome Statute crimes that are committed by means of, or that result in, inter alia, the destruction of the environment, the illegal exploitation of natural resources or the illegal dispossession of land’ (ibid, para 41).

\textsuperscript{142} Ibid, para 8. As Brady and Guariglia have pointed out, the OTP committed itself to paying particular attention to crimes that have been traditionally under-prosecuted, such as ‘crimes against or affecting children; rape and other sexual and gender-based crimes; attacks against cultural, religious, historical and other protected objects; and attacks against humanitarian and peacekeeping personnel’. See Helen Brady and Fabrizio Guariglia, ‘An Insider’s View: Consistency and Transparency While Preserving Prosecutorial Discretion’, 15 December 2016, International Criminal Justice Today, available at https://www.international-criminal-justice-today.org/arguendo/an-insiders-view/ (last visited 30 September 2018).

\textsuperscript{143} Ibid, para 8.

\textsuperscript{144} See Brady and Guariglia, ibid.

\textsuperscript{145} See Brady and Guariglia, (n 141).

\textsuperscript{146} OTP (n 42) para 50.
The OTP has expressly justified the orientations just outlined on the grounds of prosecutorial discretion; that is, as policy choices outside the “legal threshold” that arise once the Article 17(1)(d) gravity threshold is passed, and are indeed needed to preserve flexibility. At the same time, one can hardly ignore that when gravity is interpreted less as a minimum requirement and more as a parameter for selecting and prioritizing situations and cases, the discretionary element is stronger.147 But the major problem is that the OTP has tended to conflate different inquiries by treating the Article 17(1)(d) gravity threshold as a selection criterion to compare the relative gravity of different situations and cases.148 In particular, this may have serious consequences for the reach of judicial review. In fact, as discussed more in detail in section 3.3.1 below, one of the major shortcomings of the Rome Statute is that decisions not to proceed due to lack of reasonable basis are not covered by judicial review when taken in the context of proprio motu investigations. The only form of review available in that respect is proprio motu review by the Chamber, uniquely of decisions taken “solely” on the basis of the “interests of justice”. It follows from here that the OTP may eschew judicial review if it refrains from invoking the “interests of justice”, while instead basing its decisions not to investigate or prosecute on broadly defined gravity considerations.149 In other words, by incorporating a highly discretionary determination into the “reasonable basis” analysis, the Prosecutor’s gains increased discretion not to proceed.150

3.3.2 The Inescapable Ambivalence of Complementarity

After illustrating several points of contention arising from the interpretation and application of gravity, the analysis turns now to complementarity. The aim

149 Stahn (n 75) 270.
150 deGuzman & Schabas (n 78) 144.
of this section is to illustrate that, contrary to prevailing understanding, both complementarity per se and its application are highly ambivalent. As a principle meant to strike a proper balance between effective prosecutions and safeguarding sovereignty, complementarity inconclusively affirms both the primacy of states and the supranational authority of the Court. This inherent ambiguity is compounded by statutory loopholes about the meaning of “unwilling” and “unable”, which leave complementarity exceptionally open to interpretation and strategic considerations. This line of thought has also been confirmed by several respondents to the interviews in Annex II (see code 20: “controversial application of (positive) complementarity”).

Already in 1998, Immi Tallgren had envisaged that complementarity ‘will remain open to contrasting interpretations from various viewpoints’, and ‘linguistic indeterminacy will reopen the field for politics as soon as “application” begins’. To date, the prevailing interpretation of complementarity within the Court has been in terms of a so-called “two-step approach”, though not without problems. The “two-step approach” was expressly laid out for the first time by the Appeals Chamber in the Katanga case, when the defence presented the Court with its first chance to consider an admissibility challenge based on complementarity. The defence’s admissibility challenge was premised on the idea that the ICC case was inadmissible, because the DRC was manifestly “willing” to try Katanga at the time of his arrest, having charged him with crimes against humanity. In response to the defence’s admissibility challenge, the Trial Chamber II argued that the DRC authorities, by referring their situation to the ICC, had signalled that they had no intention of investigating or prosecuting Katanga, so the state was “unwilling” to do so. The judges explained that there were two kinds of unwillingness: unwillingness aimed at obstructing justice, and unwillingness aimed at ending impunity. According to the Trial Chamber, the DRC showed the second type, for the reason behind the DRC’s unwillingness was to enable

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151 See, e.g., Varaki (n 89) 776.
153 Ibid, 110.
154 Ibid.
the ICC to try Katanga. In the appeal phase, the ICC Appeals Chamber again found that the case was admissible, but for different reasons. It argued that a case before the ICC may proceed in one of two circumstances: not only (i) where domestic proceedings are vitiated by an inability or unwillingness to conduct them genuinely; but also (ii) where there is an absence of relevant domestic proceedings.\(^{155}\) Indeed, willingness or ability of the state should only be assessed if there are ongoing investigations or prosecutions, or if there have been investigations and the state decided not to prosecute. ‘It is only when the answer to these questions is in the affirmative’,\(^{156}\) the Appeals Chamber asserted, ‘that one has to look at the question of unwillingness and inability’;\(^ {157}\) ‘to do otherwise would be to put the cart before the horse’.\(^ {158}\) Based on that reasoning, the judges found that the case was admissible due to the “\textit{inactivity}” of domestic authorities.

At the time of writing, more than ten years after that judgement, several of its aspects remain in question. A first critical consideration is that the “two-step approach” has the advantage of accommodating cases that arrive at the ICC through state self-referrals.\(^ {159}\) In particular, the ‘inactive gloss’\(^ {160}\) on Article 17 allows the ICC to exercise jurisdiction in cases of voluntary inactivity,\(^ {161}\) such as the one signalled by domestic authorities referring their own situations to the Court. It also fits very nicely with the OTP’s strategy of inviting state self-referrals.\(^ {162}\) Considering that the latter allows the Prosecutor to avoid the judicial review that would otherwise arise if the Office opened the investigations \textit{pro proprio motu}, the overall result is a form of negotiated \textit{ad hoc}


\(^{157}\) Ibid.

\(^{158}\) Ibid.


\(^{162}\) Schabas (n 159) 757.
primacy. However, whereas the use of the two-fold test in the context of self-referrals may be in line with pragmatic purposes (by allowing the Court to exercise jurisdiction in cases where the Court could rely on the support and cooperation of the relevant governments),\textsuperscript{163} it remains unclear whether the idea that a state might refer its own a situation was ever contemplated.\textsuperscript{164} In 2009, in the Katanga case, the Appeals Chamber argued that there may be merit in the argument, elaborated by Trial Chamber II in the same case, that ‘the sovereign decision of a State to relinquish its jurisdiction in favour of the Court may well be seen as complying with the “duty to exercise [its] criminal jurisdiction” as envisaged in the [...] Preamble’.\textsuperscript{165} In 2010, the defence in the Bemba case challenged this position, pointing to the risk that self-referring governments may attempt to manipulate the Prosecutor and ‘exploit the Court in order to eliminate their enemies’.\textsuperscript{166} Therefore, the defence also invited the OTP to reconsider its own policy of encouraging state self-referrals rather than more duly activating the Court jurisdiction on its own initiative.\textsuperscript{167} Similarly, in 2013, the defence of Laurent Gbagbo contended that self-referrals jeopardize the basic principle of complementarity,\textsuperscript{168} which instead requires the prioritization of domestic proceedings, in particular, as a way to ‘involve the affected communities as part of the overall process of reconciliation and peace building’.\textsuperscript{169} Indeed, in line with the criticism raised by the Bemba and Laurent Gbagbo cases, it may even be argued that by practically exempting self-referrals from complementarity assessments the Appeal Chamber fundamentally undermined the status of complementarity itself. We should not forget, in fact, that in the majority of ICC decisions addressing complementarity to date, the Court has not begun to assess states’ “willingness” or “ability” to conduct genuine proceedings. Rather, the Court has found that the inactivity of the

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{163} Hansen (n 158) 221.
\item\textsuperscript{165} ICC, Appeals Chamber (n 155), para 85.
\item\textsuperscript{166} The Prosecutor v. Jean-Pierre Bemba Gombo, ‘Decision on the Admissibility and Abuse of Process Challenges’, ICC, Trial Chamber III, ICC-01/05-01/08, 24 June 2010, para. 75.
\item\textsuperscript{167} Ibid.
\item\textsuperscript{168} The Prosecutor v. Laurent Gbagbo, ‘Decision on the “Requête relative à la recevabilité de l'affaire en vertu des Articles 19 et 17 du Statut”’, ICC, Trial Chamber I, ICC-02/11-01/11, 11 June 2013, para. 12.
\item\textsuperscript{169} Ibid.
\end{itemize}
\end{footnotesize}
competent domestic authorities rendered those situations and cases admissible before the Court.\textsuperscript{170}

The decision to “export” the two-fold test from the context of the self-referrals - where governments wanted the ICC to intervene - to others where local authorities claimed to be willing and able to investigate and prosecute, has not been without problems.\textsuperscript{171} Indeed, matched with the requirement that domestic investigation cover exactly the same acts under the OTP’s attention, known as the “same person/substantially the same conduct” test, the two-fold test has led to a jurisdictional regime which simply runs counter to the circumstances where the potential suspects are likely to be investigated or prosecuted domestically for different crimes or incidents.\textsuperscript{172} To explain my point better, let me illustrate the paradigmatic case of Saif Al-Islam Gaddafi. On 1 May 2012, the Government of Libya challenged the admissibility of the case concerning the suspect, submitting a wealth of information about its ongoing proceedings, and expressing its “willingness” to investigate and prosecute the same suspect as the Court. Nonetheless, the Pre-Trial Chamber found that the evidence, taken as a whole, did ‘not allow the Chamber to discern the actual contours of the national case against Mr Gaddafi such that the scope of the domestic investigation could be said to cover the same case as that set out in the Warrant of Arrest issued by the Court’.\textsuperscript{173} According to the dissenting opinion of judge Anita Usacka, this finding contained ‘numerous confusing aspects’.\textsuperscript{174} Firstly, ‘no further explanation was given as to why the material provided by Libya did not meet the “same person/substantially the same conduct” test’.\textsuperscript{175} Secondly, it was ‘unclear what the Pre-Trial Chamber meant with respect to terms such as “actual contours of the national case against Mr Gaddafi”, “scope of the domestic investigation”, and “means of

\textsuperscript{170} Nouwen (n 62) 45.

\textsuperscript{171} Hansen (n 158) 122.

\textsuperscript{172} Ibid.


\textsuperscript{174} Ibid, para, 44.

\textsuperscript{175} Ibid.
evidence of a sufficient degree of specificity and probative value”’.

Judge Usacka, in another dissenting opinion in the Kenyan situation, recalled that the ‘drafters of the Statute agreed to establish a high threshold when they drafted the legal and factual requirements for unwillingness and inability in paragraphs 2 and 3 of article 17’. Hence, the ‘Court should not circumvent this threshold created by unwillingness or inability by requiring a State to prove e.g. the existence of a full-fledged investigation or prosecution of a case in order to establish that there is no situation of inactivity’. We may also add that the rigid standards required by the “two-step approach” appear especially problematic when weighed against the flexibility accorded to the OPT when reaching complementarity determinations at the situation level. At the situation level, in fact, the Prosecutor is allowed not to open a formal investigation on the grounds that there are actual domestic proceedings concerning the wider regions and incidents under consideration, provided that proceedings relate to the potential categories of crime (e.g. most responsible) that are likely to form the object of the Court’s investigations. Such flexibility arises especially in the context of a proprio motu investigation, in which a Prosecutor’s decision not to proceed based on lack of reasonable basis eschews judicial review. On the other hand, in those instances in which the OTP has decided to open a fully-fledged investigation and brought a case before the judges, the requirement of a precise coincidence of criminality in form and substance makes impossible for domestic authorities to successfully challenge

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176 Ibid. Furthermore, according to the dissenting judge, ‘the Pre-Trial Chamber was not even itself entirely certain about its finding that Libya was not investigating the same case’ (ibid). In fact, the Pre-Trial Chamber held that ‘serious concerns’ (ibid, para. 45) remained with respect to the second limb of the admissibility test, namely Libya’s ability genuinely to carry out the investigation or prosecution against Gaddafi. In other words, according to the Chamber Libya was, in any case, genuinely unable to investigate the case against Gaddafi, the suspect being detained by the Zintan militia and not by the central authorities. By stating so, the Chamber arguably left open ‘whether it had actually made a definitive conclusion on the first limb of the test’ (ibid, para. 44).


178 Ibid.

179 As for gravity, Articles 17 of the Rome Statute addresses complementarity solely at the level of individual “cases”. See Stahn (n 75) 269.
its admissibility on the same grounds which, in principle, may allow the Prosecutor not to open a formal investigation. In this sense, the Appeals Chamber’s Katanga judgement has also ended up providing a crucial avenue for double standards in the Court’s practice. In this connection, judge Sang-Hyun Song also noted that ‘require that the national investigation cover exactly the same acts of murder and persecution would make the national investigators’ task impossible, and, as a result, the complementarity principle, an essential element of the Statute - featuring prominently in both its Preamble and first article - would almost certainly become redundant’. In fact, it is difficult to understand how national courts could predict the exact charges eventually brought by the Prosecutor, especially considering that the ICC often intervenes in situations of mass-atrocities, and that, within the ICC itself, there has been tension over specific charges. In its Article 19 application relating to Mr Al Senussi, the Government of Libya submitted that, ‘[w]hilst the “substantially the same conduct” test enumerated by the Appeals Chamber may be the correct test in principle, it remains to be precisely defined. In particular, it ‘needs to be interpreted to avoid the demand for a rigid correspondence between the incidents under examination by the state and the ICC’, particularly in light of the fact that the ICC intervenes in relation to conducts ‘stretching over a period of time and over varying geographical locations, [...] committed [...] through numerous individual acts by numerous people, within the context of a policy or plan’. In other words, a narrow interpretation and application of the “same person/same conduct test” yields the problematic outcome of rendering a case admissible even ‘if the relevant domestic proceedings address only a representative sample of the incidents under investigation by the ICC, or focus on different but equally, if not more, grave criminal conduct’. What is more, as the Government of

182 ICC, Pre-Trial Chamber I (n 160) para. 64.
183 Ibid, para 65.
184 Ibid.
Libya pointed out, ‘the question of “inability” in the Libyan context and the Court’s admissibility decision will have far-reaching consequences’, for ‘[i]n the vast majority of situations, States emerging from mass atrocities will not possess a sophisticated or functional judicial system’. Indeed, ‘the purpose of transitional justice is to provide an opportunity for post-conflict judicial capacity building in the broader context of national reconciliation and democratization’. It was perhaps in the light of these and other similar considerations that the Court reversed itself in the Al-Senussi case, after arguably succumbing ‘to a false sense of entitlement’ over the Gaddafi case. In other words, the Court found that the Libyan authorities were both willing and able to carry out proceedings against Al-Senussi. This was despite the fact that the factual situation was similar in both cases. As judge Usacka has put it, ‘at least some of the distinctions drawn by the Pre-Trial Chamber between the cases of Mr Al-Senussi and of Mr Gaddafi appear to be far-fetched and are not particularly convincing’.

All things considered, it is not hard to see that the “two-step approach” endorsed by the judges risks projecting the ICC as an institution eroding the pressure on states to discharge their responsibility to investigate and prosecute, by taking this over from the states themselves. More to the point, it looms as a crucial permissive condition of prosecutorial “hyperactivity” as far as case selection is concerned. In fact, on the one hand the decision to

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186 Ibid.
187 Ibid.
189 Ibid. The PTC found Libya able to genuinely to carry out its proceedings in relation to the case against Mr Al-Senussi, on the grounds that the central authorities had custody of Mr Al-Senussi. Furthermore, according to ICC judge Trendafilova, ‘some aspects deemed compelling in the decision on the admissibility of the Gaddafi case (the precarious security situation, the absence of effective witness protection programs, the lack of control over certain detention centers) did not have the same impact on the investigation of Mr Al-Senussi’. See Ekaterina Trendafilova, ‘Africa and the International Criminal Court: A Judge’s Perspective’, in Gerhard Werle Lovell Fernandez Moritz Vormbaum (eds) Africa and the International Criminal Court (Justice Series, Volume 1, TMC Asser Press: The Hague, 2014) 21, 26.
191 Nouwen (n 62) 408.
initiate an investigation does sit with the OTP. It also bears recalling in this respect that judicial authorization only arises in the context of *proprio motu* investigations. Similarly, the application of “positive complementarity” also rests with the Prosecutor. This, in contrast to the admissibility rule, stresses the responsibility of states to investigate and prosecute, and thus envisages a Prosecutor actively supporting and inducing national proceedings. On the other hand, though, and specifically at the case level, the Rome Statute entitles the Pre-Trial Chamber to exercise some scrutiny. For instance, it is only after the PTC confirms the charges that a case is committed for trial. Indeed, the holding of a confirmation hearing before the opening of the trial is a unique feature of the Court. By the same token, judges are entitled to rule on admissibility challenges. And yet, judicial deference to prosecutorial “hyperactivity” has clearly prevailed so far. The next section further delves into the shortcomings of judicial review. More to the point, it paves the way for arguing that, as illustrated in Chapter 4, the combination of judicial deference to prosecutorial “hyperactivity” on the one hand, and prosecutorial inaction on the other, has led to a highly controversial application of both complementarity and gravity.

### 3.3.3 The Role of Judicial Review: Between Statutory Shortcomings, Missed Opportunities, and Inescapable Limits

Notwithstanding the fact that the Rome Statute has expanded the avenues for judicial review in comparison to previous practice, the scope of judicial review remains a major matter of contention. This section calls attention to two issues

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192 Ambos & Stegmiller (n 163) 427.

193 In addition to agreeing or not to confirm the charges, the Pre-Trial Chamber may disagree with the charges being brought against a particular suspect or the way the charges are framed, i.e. the judges may request the Prosecution to consider providing further evidence or amending the charges. Before that, the PTC may also grant an arrest warrant or summons in different terms than what was requested by the Prosecutor. For a more comprehensive overview of the PTC’s powers, it shall also be considered that after the charges are confirmed, the Prosecutor may not withdraw or amend them without judicial authorization.

194 Nouwen (n 62) 395.
in particular. Firstly, the Rome Statute provides different levels of review according to the mechanism that has triggered the Court jurisdiction. More to the point, UNSC and state referrals enjoy a favoured position compared to Article 15 communications. Secondly, several of the triggers and modalities of review are open to interpretation. As a result, in practice, several manifestations of prosecutorial discretion have eschewed judicial review, especially in the area of prosecutorial inaction.

### 3.3.3.1 A Privileged Position for “Sovereign-Backed” Investigations

A first basic consideration is that once the OTP has received a referral, by either the UNSC or a (group of) state(s), it must initiate an investigation unless it determines that “there is no reasonable basis to proceed”. In contrast, when the Prosecutor receives Article 15 communications (from either individuals or non-governmental organizations), the test is the same, but the starting point is reversed: the Prosecutor shall not seek to initiate an investigation without first concluding that there is a “reasonable basis” to proceed. In other words, the Rome Statute is premised on a heavy presumption that the Prosecutor is to open formal investigations in the context of “sovereign-backed” investigations. What is more, it provides a “fast track” for these. So, if the OTP has received a referral, its decision to open an investigation is final. But if the OTP wants to open an investigation *proprio motu*, it needs the authorization of the Pre-Trial Chamber. This requirement was included to ease concerns about the danger of an “unchecked prosecutor”. Article 15 is, in fact, one of the most delicate provisions of the Rome Statute, being the

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195 Bådagård & Klamberg (n 146) 683.
196 Stahn (n 75) 267.
197 Ambos & Stegmiller (n 163) 420. According to the ICC Report on Preliminary Examination Activities 2017, the OTP has received a total of 12590 Article 15 communications since July 2002. It may, therefore, be assumed that the assessment of the vast information received under article 15 made it necessary to introduce a pre-filter mechanism.
199 Ibid.
200 ICC, Pre-Trial Chamber II, Kenya Authorization Decision (n 98) para. 17.
product of extensive debates until the end of the Rome Conference. Both proponents and opponents of the idea of *proprio motu* investigations feared the risk of a “politicized” Court, and this concern prompted the drafters to seek a balanced approach that rendered the *proprio motu* trigger acceptable to those who feared it. As a result, unlike in referral situations, the OTP conducts its preliminary examinations knowing that it must present evidence to a panel of judges in order to be able to launch a fully-fledged investigation.

Procedural distinctions also apply when the Prosecutor decides not to seek a full investigation, or not to prosecute. Both the UNSC and member states are entitled to require the PTC to review the OTP’s decisions not to investigate or prosecute. Whereas negative decisions are the only decisions subject to review in referred situations – i.e. as seen above, positive decisions do not require judicial authorization – this state of affairs is reversed in the context of *proprio motu* investigations. Senders of Article 15 communications are unable to challenge the OTP’s decisions not to investigate, and only decisions not to proceed based on the “interests of justice” may be subject to *proprio motu* review by the Chamber. It follows that the OTP’s decisions not

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201 Ibid.
202 Ibid, para 18. However, there is disagreement among the judges as to whether the Chamber may go beyond the submissions of the Prosecutor while exercising its supervisory role. See ICC, Pre-Trial Chamber II, Kenya Authorization Decision (n 98) paras. 21-24, in which Pre-Trial Chamber II argued that the judges are called to apply the same “reasonable basis to proceed” standard applied by the Prosecutor. Differently, according to judge Fernandez de Gurmendi, ‘the Chamber should not attempt to duplicate the preliminary analysis conducted by the Prosecutor [...]’, in particular by seeking to identify additional alleged crimes and suspects on its own’. See Pre-Trial Chamber III, “Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, Partially Dissenting Opinion of Judge Fernandez de Gurmendi”, ICC-02/11, 5 October 2011. In fact, the judge added, whereas the analysis by the Prosecutor is an inseparable part of his exclusive investigative functions, the PTC could only base its findings on a fragmentary approach to the supporting material presented by the Prosecutor and victims’ representations’ (ibid, para. 19), and, therefore, could not be considered to be ‘sufficiently substantiated’ (ibid, para. 43). A diametrically opposite approach was taken by judge Kovács in his separate opinion to the decision on the authorization of an investigation in Georgia. See Pre-Trial Chamber I, ‘Decision Pursuant to Article 15 of the ICC Statute on the Authorization of an Investigation into the Situation in Georgia’, ICC-01/15, 27 January 2016. According to judge Kovács, ‘[i]t is not only “necessary” but also “appropriate” to go beyond the submissions of the Prosecutor’ (ibid, para. 26). This ‘assessment should be carried out thoroughly and the decision should demonstrate the thoroughness of the assessment conducted by the Chamber’ (ibid, para. 11).
203 Bosco (n 197) 399.
204 Ibid.
to proceed due to lack of reasonable basis eschew judicial review. It may also be noted that such a broad discretion over negative decisions is in stark contrast with the higher degree of judicial control required for decisions to proceed under Article 15.205

Finally, Article 18 also distinguishes between the three triggers. It requires the Prosecutor to notify states about the opening of an investigation only when acting upon state referral or *proprio motu*. The omission of the Security Council trigger entails that, when the UNSC has referred a situation, states cannot challenge admissibility (at least, they cannot do so at an early stage).206 This has the effect of removing a significant hurdle for the OTP, which does not need to conduct a full admissibility assessment during the preliminary examination.207

Summing up, state and even more UNSC referrals give rise to fast-track proceedings, requiring, respectively, no PTC authorization, and neither PTC authorization nor state notification. What is more, both states and the Security Council are entitled to require the PTC to review OTP’s decisions not to investigate or prosecute,208 meaning that while the OTP enjoys broad prosecutorial discretion when it affirmatively decides to pursue a situation referred by states and the Security Council, it faces, instead, enhanced scrutiny when it decides not to proceed in the context of a referral. This state of affairs is reversed in *proprio motu* investigations. These, in fact, require both PTC approval and state notification (the latter may lead to preliminary objections on admissibility, as in state referrals). That is to say, the OTP faces enhanced scrutiny when it affirmatively decides to pursue a *proprio motu* situation. Furthermore, contrary to states and the Security Council, senders of Article 15 are unable to challenge decisions not to proceed, and the PTC can review only when based on the interests of justice.209 This means that in *proprio motu* investigations, negative decisions due to lack of reasonable basis are exempted

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205 Bosco (n 197) 399.
206 Ibid, 398.
207 Ibid.
208 Bådagård & Klamberg (n 146) 683.
209 Ibid However, deGuzman and Schabas have clarified that ‘[t]he Statute is unclear about whether this judicial review of decisions not to investigate applies to proprio motu investigations, and some commentators argue that it does not’. See deGuzman & Schabas (n 78) 146.
from judicial review, with the OTP thus exercising broad influence over decisions not to investigate.\footnote{Bosco (n 197) 399.}

### 3.3.3.2 The Limits of Judicial Review of Prosecutorial Inaction

While the power not to act may, arguably, bear greater significance than the power to act,\footnote{Stahn (n 75) 250.} the Rome Statute provides only for limited power of judicial review of inaction.\footnote{Ibid, 270.} This is the result of diverging conceptions about the modalities of review during the Rome Conference, as well as specific issues of the feasibility of challenging and reviewing an inaction. Furthermore, some of the drafters may have assumed that the situations the ICC should investigate would be obvious, i.e. those resembling Nazi Germany or genocidal Rwanda. However, reality has turned out to be more complicated, and disagreement has actually arisen about when it is appropriate for the Court to act.\footnote{deGuzman & Schabas (n 78) 168.}

As seen above, decisions not to initiate investigations \textit{proprio motu} due to a lack of reasonable basis are not covered by judicial review, and \textit{proprio motu} review of negative decisions based on interests of justice is the only form of review available in the context of \textit{proprio motu} investigations. In this regard, it should be noted that the OTP has thus far refrained from invoking the “interests of justice”. For example, the opening of an investigation in relation to Article 15 communications regarding the situation in Iraq was declined on the basis of “insufficient gravity”; therefore, there was no option for judicial review under Article 53.\footnote{Ibid, 273.} Decisions not to prosecute certain groups of persons, or certain crimes, also eschew judicial review. Indeed, ‘the most evident shortcoming’\footnote{Ibid.} of the Statute may well be that it does not clarify what is meant by a decision not to prosecute. Article 53(2) uses the expression “not a sufficient basis for a prosecution”. However, it does not identify the relevant object of prosecution, albeit the wording leaves room for at least three
possible interpretations. Prosecutorial inaction may relate to (i) a decision not to prosecute a specific individual; (ii) a decision not to prosecute a certain group of persons or certain crimes in a given situation; (iii) a decision not to prosecute at all, that is the absence of any cases in a situation being investigated. This distinction has crucial implications for the exercise of judicial review. Interpretation (i) would open the door to the review of a vast number of ‘individualized and sensitive decisions’, while, in contrast, the option of judicial scrutiny would be reduced to a bare minimum if a decision not to prosecute covered only scenarios of the complete absence of prosecution (proposition (iii)). Proposition (ii) is more balanced, for it would grant the judges the power to exercise scrutiny over selective prosecution, without involving the review of individualized decisions. In particular, as noted by Carsten Stahn, it would enable the judges ‘to address challenges of one-sided investigation or selective charging’, such as ‘the closure of the investigation or its limitation to specific historical incidents or crime patterns’. However, while the Rome Statute may arguably be interpreted so as to allow for judicial review of decisions not to prosecute a certain group of persons or certain crimes in a given situation, it does not expressly provide for it; nor have the judges moved in that direction. The PTC has, in fact, failed to interpret affirmative decisions pertaining to the persons being prosecuted and the selected charges as tacit prosecutorial decisions not to investigate, or prosecute other persons or other crimes. In other words, the judges have held that if no explicit negative decision is reached by the Prosecutor, the review foreseen in Article 53(3) is not triggered. As a result, judicial deference to

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216 Ibid.
217 Ibid.
218 Ibid 270-271.
219 Ibid 271. What is more, Stahn has noted, ‘[g]iven the limited resources of the Court and the careful selection of situations and cases by the OTP, it is very unlikely that the Prosecutor would first select a situation for investigation and then decide not to prosecute a single case in the entire situation. Article 53 review would thus remain a very rare exception’.
220 Ibid.
221 Ibid.
222 Ibid.
223 Ibid.
prosecutorial inaction has been just as dominant as judicial deference to prosecutorial “hyperactivity”. A further shortcoming in the system of judicial review set out by the Rome Statute is that the Prosecutor has no time limit for deciding whether to open an investigation.\textsuperscript{225} In fact, albeit fixed time limits may prove too rigid, especially in light of the complexity of the Court’s investigations, the complete absence of any time limit ‘creates legal insecurity’.\textsuperscript{226} Attention should also be called to a broader transparency dilemma.\textsuperscript{227} In fact, while Article 53 makes supervision formally dependent on the prior notification of a decision by the Prosecutor (both when triggered by the referring authorities or activated \textit{proprio motu} by the Chamber),\textsuperscript{228} many aspects of prosecutorial decision-making are not publicly recorded.\textsuperscript{229} In particular, if the Prosecutor does not even seek authorization to open an investigation under Article 15, article 15(6) simply requires the Prosecutor to notify information-providers of inaction. To put it differently, the Pre-Trial Chamber is not involved unless a request for authorization under Article 15 is made.\textsuperscript{230} Similarly, there is no available information on cases that have deselected or deprioritized.\textsuperscript{231}

A final consideration should go to the specific issues of feasibility of challenge and review that arise with regard to review of inaction. It cannot be overlooked that the PTC has no independent investigative powers at its disposal. These are exclusive to the Prosecutor, and extending them to the judges might arguably be incompatible with the rights of defendants. It should also be considered that, even if the judges could impose additional charges, the Prosecutor should only fail to adduce relevant evidence on the unwanted charges.\textsuperscript{232} As a result, no matter how sympathetic one may be about the

\textit{Practice of the International Criminal Court} (Leiden, The Netherlands: Brill | Nijhoff, 2009) 209. According to Guariglia, the PT Chamber, ‘refused to engage in an exercise of “judicial creation” of a non-existent Art. 53 (2) (c) decision, triggered by a third party’s disagreement with the prosecutorial choices made by the OTP’ (ibid).
\textsuperscript{225} Stahn (n 75) 276.
\textsuperscript{226} Ambos & Stegmiller (n 163) 422.
\textsuperscript{227} Stahn (n 75) 271.
\textsuperscript{228} Ibid.
\textsuperscript{229} Ibid.
\textsuperscript{230} Ibid. 272.
\textsuperscript{231} Bådagård & Klamberg (n 146) 725.
\textsuperscript{232} As already noted, different considerations apply to certain forms of prosecutorial “hyperactivity”. In particular, considering that it is only after the PT Chamber confirms the
prospect of a greater role for judicial review under the Rome Statute, the potential improvements that would follow should not be exaggerated.

3.4 Conclusions: The Untenability of Pure Legalism

The first part of the chapter has drawn attention to the Court’s dependence on the elective involvement of sovereign states to (establish and) accept its jurisdiction, and to give it access to the resources and tools which are needed to achieve successful investigations and prosecutions, chiefly financial resources and state cooperation. It has, hence, concluded that albeit the Rome Statute strives to bring about a paradigm shift in the normative fabric of international society, it does so while relying on a largely unchanged structure, that is, by placing some of its major functions at the disposal of states’ processes and decisions. The second part turned to the mechanism underlying the selection of situations and cases before the ICC. This has shown that, no matter how prosecutorial decision-making unmarred by pragmatic, strategic, and political considerations may sound appealing, such a perspective unduly simplifies what is at stake. In fact, statutory loopholes and uncertainties not only leave several pivotal questions unsettled in the first place, but also leave unanswered complex ‘questions of institutional strategy and policy, if not politics as such’, which inevitably arise when selecting both situations (either proprio motu and through referral) and cases. This view is corroborated by the interviews undertaken as part of the present study. These, in particular, have pointed to the weight of considerations of “effectiveness”, especially in terms of the OTP’s attraction to cases that can be successfully prosecuted (see Annex II, code 15: “(cost-)effectiveness”). Indeed, the OTP...
itself has publicly clarified that the effectiveness of the institution depends on ‘external critical resources factors’, such as cooperation and external relations, resources, and security.\textsuperscript{236} Furthermore, focusing on cooperation, the Office has conceded that the latter requires an ‘alignment of interests’\textsuperscript{237} between partners, and even admitted that the Office will prioritize those cases in which it can conduct an effective and successful investigation, leading to a prosecution with good prospects of conviction.\textsuperscript{238} The OTP’s own statements thus describe a Court that is itself more or less “willing” and “able” to investigate and prosecute depending on considerations of feasibility and political opportunity.\textsuperscript{239}

All these things considered, it may be concluded that the statutory provisions regulating the selection of situations and cases sit at the crossroads between the ‘idealistic vision of a global court designed to prosecute the cases that domestic jurisdictions cannot or will not prosecute’,\textsuperscript{240} and the pragmatic - when not plainly political - constraints of an institution placed in the pressing need to enlist state power to its cause.\textsuperscript{241} At the end of the Rome Conference, Kirsch and Holmes sought to warn us about the Rome Statute ending up sheltering the very perpetrators of the crimes it is meant to sanction.\textsuperscript{242} The following chapter shows that this warning has, in some important respects, become reality.

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\textsuperscript{238} OTP (n 42) 49.

\textsuperscript{239} Nouwen (n 62).


\textsuperscript{241} Mégret (n 4) 34.

\textsuperscript{242} Kirsch & Holmes (n 1) 12.
\end{flushleft}
Chapter 4 - Shaping Sovereignty as Responsibility at the ICC (Part II): The Test of Institutional Practice

[O]ne cannot avoid asking whether the states that established this permanent institution, which is aimed at the universality of criminal justice, have not put the cart before the horse.

Hans Koechler1

4.1 Introduction: From Sovereignty as Responsibility to Irresponsible Sovereignty

To date, about 15 years since the entry into force of the Rome Statute, 26 cases in 11 situations have been brought before the ICC, as illustrated in Table 1 and Table 2. Four state parties have referred situations occurring on their territories to the Court: Uganda, the DRC, the CAR,2 and Mali. The UN Security Council has referred the situations in Sudan and Libya, both non-party states to the Statute. The Prosecutor has initiated investigations proprio motu in Kenya, Côte d’Ivoire, Georgia, Burundi. 36 arrest warrants have been issued for 33 individuals and summonses to nine others, making up for a total of 42 publicly indicted people. Four convictions and two acquittals have been reached; three trials are ongoing, and one is in preparation; 13 suspects have had their cases closed, and 15 remain fugitives (see Table 2). Finally, ten situations remain under preliminary examination: Afghanistan, Colombia, Guinea, Iraq, Nigeria, Palestine, Philippines, Ukraine, and Venezuela, to which should be added the recent decision to open a preliminary examination into the alleged deportation of the Rohingya people from Myanmar to Bangladesh (see Table 3).

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2 The Government of the Central African Republic has referred two situations to the Court, in Dec 2004 and May 2014. The ICC has opened an investigation into both of them.
The following analysis covers the full range of situations and cases brought before the ICC, as well as their outcomes. It shows that the tension between “sovereignty-limiting rationale” and “sovereignty-based” operation described in the previous chapter cuts utterly against the normative aspirations of sovereignty as responsibility, specifically by leaving the Court practically ill-equipped to break with a notorious pattern of hyper-protected sovereignty.
<table>
<thead>
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<th>SITUATION</th>
<th>OPENED</th>
<th>SCOPE</th>
<th>TRIGGER</th>
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<tr>
<td>KENYA</td>
<td>Mar. 2010</td>
<td>CAH in the context of 2007-8 post-election violence (PEV), with regional focus in six of eight provinces: Nairobi, North Rift Valley, Central Rift Valley, South Rift Valley, Nyanza Province, and Western Province</td>
<td>Proprio motu (Mar. 2010)</td>
</tr>
<tr>
<td>LIBYA</td>
<td>Mar. 2011</td>
<td>WC &amp; CAH in Libya since 15 February 2011. Regional focus throughout Libya in, inter alia, Tripoli, Benghazi, and Misrata</td>
<td>UNSC referral (Feb. 2011)</td>
</tr>
<tr>
<td>CÔTE D’IVOIRE</td>
<td>Oct. 2011</td>
<td>CAH in the context of 2010-11 PEV, mainly 16 December to 12 April, but also 19 Sep. 2002 to present; throughout</td>
<td>Proprio motu (Oct. 2011)</td>
</tr>
<tr>
<td>CAR II</td>
<td>Sep. 2014</td>
<td>WC &amp; CAH in the context of renewed violence since August 2012, mainly between Séléka and anti-balaka groups</td>
<td>State referral (self-referral) (May 2014)</td>
</tr>
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### Table 2. ICC Cases per Trial Stage

<table>
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<th>SITUATIONS</th>
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<th>Nº OF CASES PER TRIAL STAGE</th>
<th>Nº OF SUSPECTS</th>
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<td>Trial</td>
<td>Appeal</td>
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<td>1⁴</td>
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<td>UGANDA</td>
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<td>1⁴</td>
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<tr>
<td>DARFUR</td>
<td>5</td>
<td>3⁶</td>
<td>1⁸</td>
</tr>
<tr>
<td>CAR I</td>
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</tr>
<tr>
<td>KENYA</td>
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<tr>
<td>LIBYA</td>
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<td>CÔTE DIVOIRE</td>
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<tr>
<td>MALI</td>
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<td>(tot.)</td>
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</tbody>
</table>

4 The Prosecutor v. Sylvestre Mudacumura.  
5 The Prosecutor v. Bosco Ntaganda.  
6 The Prosecutor v. Thoma Lubanga Dylo (sentenced to 14 years of imprisonment); The Prosecutor v. Germain Katanga (sentenced to 12 years of imprisonment).  
7 The Prosecutor v. Mathieu Ngudjolo (acquitted); The Prosecutor v. Callixte Mbarushimana (charges not confirmed).  
9 The Prosecutor v. Dominic Ongwen.  
12 The Prosecutor v. Bahar Idriss Abu Garda (charges not confirmed).  
14 The Prosecutor v. Jean-Pierre Bemba Gombo (acquitted).  
18 The Prosecutor v. Simone Gbagbo.  
19 The Prosecutor v. Laurent Gbagbo and Goudé.  
20 The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud.  
21 The Prosecutor v. Ahmad Al Fqai Al Mahdi (sentenced to nine-years imprisonment).  
22 11 suspects out of 12 remain fugitives.  
23 Three are the ongoing trails, since Abdallah Banda (Sudan) remains at large after voluntarily appearing before the ICC during the Pre-Trial stage of his case, on 11 September 2014 and the ICC does not try individuals in their absence.
Table 3. Preliminary Examinations (PEs) by Current Status

<table>
<thead>
<tr>
<th>CLOSED</th>
<th>ONGOING</th>
<th>CONVERTED TO FULL INVESTIGATION</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Subject Matter Jurisdiction</td>
<td>Admissibility</td>
</tr>
<tr>
<td>Comoros</td>
<td>Gabon</td>
<td>Afghanistan</td>
</tr>
<tr>
<td>Honduras</td>
<td>Palestine</td>
<td>Colombia</td>
</tr>
<tr>
<td>Korea</td>
<td>Philippines</td>
<td>Guinea</td>
</tr>
<tr>
<td>Venezuela</td>
<td>Ukraine</td>
<td>Iraq/UK</td>
</tr>
<tr>
<td></td>
<td>Venezuela</td>
<td>Nigeria</td>
</tr>
<tr>
<td></td>
<td>Bangladesh/Myanmar</td>
<td></td>
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<tr>
<td></td>
<td></td>
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</tbody>
</table>

4.2 A Tilt Toward “Sovereign-Backed” Situations

To start with, the data on the outcomes and duration of preliminary examinations suggests that the OTP may have articulated a preference for opening fully-fledged investigations in “sovereign-backed” situations; in other words, situations in which either the territorial state or the UNSC have expressly endorsed the ICC’s intervention through a referral to the Court. This claim is supported by the apparent disparities in the outcomes and duration of PEs initiated by state and UNSC referrals on the one hand, and by the OTP proprio motu on the other hand, as illustrated in Table 4 and Table 5 below.24

24 An earlier version of the two tables was already offered by David Bosco in 2017. See David Bosco, ‘Discretion and State Influence at the International Criminal Court: The Prosecutor’s Preliminary Examinations’ (2017) 111, 2 American Journal of International Law 395, 400-401.
Table 4. Preliminary Investigations Initiated by the Prosecutor Proprio Motu

<table>
<thead>
<tr>
<th>SITUATION</th>
<th>DATES</th>
<th>DURATION</th>
<th>STATUS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Cote d’Ivoire</td>
<td>May 2003–June 2011</td>
<td>8 years</td>
<td>Full investigation</td>
</tr>
<tr>
<td>Venezuela</td>
<td>July 2003–Feb. 2006</td>
<td>2.5 years</td>
<td>Closed</td>
</tr>
<tr>
<td>Iraq/United Kingdom</td>
<td>2004–Feb. 2006; May 2014–present</td>
<td>&gt;6 years</td>
<td>Closed, then reopened</td>
</tr>
<tr>
<td>Colombia</td>
<td>2004–present</td>
<td>&gt;14 years</td>
<td>Continuing</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>2007–Nov. 2017</td>
<td>&gt;11 years</td>
<td>Waiting for PTC authorization</td>
</tr>
<tr>
<td>Kenya</td>
<td>Jan. 2008–Nov. 2009</td>
<td>&lt;2 years</td>
<td>Full investigation</td>
</tr>
<tr>
<td>Georgia</td>
<td>Aug. 2008–Oct. 2015</td>
<td>&gt;7 years</td>
<td>Full investigation</td>
</tr>
<tr>
<td>Guinea</td>
<td>Oct. 2009–present</td>
<td>&lt; 9 years</td>
<td>Continuing</td>
</tr>
<tr>
<td>Honduras</td>
<td>Nov. 2010–Oct. 2015</td>
<td>&lt;5 years</td>
<td>Closed</td>
</tr>
<tr>
<td>Nigeria</td>
<td>Nov. 2010–present</td>
<td>&lt;8 years</td>
<td>Continuing</td>
</tr>
<tr>
<td>Korea</td>
<td>Dec. 2010–June 2014</td>
<td>3.5 years</td>
<td>Closed</td>
</tr>
<tr>
<td>Ukraine</td>
<td>Apr. 2014–present</td>
<td>&gt;4 years</td>
<td>Continuing</td>
</tr>
<tr>
<td>Palestine</td>
<td>Jan. 2015–present</td>
<td>&lt;4 years</td>
<td>Continuing</td>
</tr>
<tr>
<td>Burundi</td>
<td>Apr. 2016–Oct. 2017</td>
<td>1.5 year</td>
<td>Full investigation</td>
</tr>
<tr>
<td>Philippines</td>
<td>Feb. 2018–present</td>
<td>&lt;1 year</td>
<td>Continuing</td>
</tr>
<tr>
<td>Bangladesh/Myanmar</td>
<td>Sept. 2018 –present</td>
<td>&lt; 1 month</td>
<td>Continuing</td>
</tr>
</tbody>
</table>

On 22 May 2018, the OTP received a referral from the Palestinian authorities regarding the situation in Palestine since 13 June 2014, with no end date. Following this referral, the preliminary examination opened in January 2015 will continue to follow its normal course. However, should the Prosecutor ultimately determine that the situation referred warrants an investigation as a result of this referral, the Statute does not require the Prosecutor to seek authorization from the Pre-Trial Chamber in order to proceed with an investigation.
Table 5. Preliminary Investigations Initiated by State or UNSC Referral

<table>
<thead>
<tr>
<th>SITUATION</th>
<th>DATES</th>
<th>DURATION</th>
<th>STATUS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Uganda</td>
<td>Jan. 2004–July 2004</td>
<td>6 months</td>
<td>Full investigation</td>
</tr>
<tr>
<td>DRC</td>
<td>Apr. 2004–June 2004</td>
<td>&lt;3 months</td>
<td>Full investigation</td>
</tr>
<tr>
<td>CAR I</td>
<td>Jan. 2005–May 2007</td>
<td>&gt;2 years</td>
<td>Full investigation</td>
</tr>
<tr>
<td>Sudan</td>
<td>Mar. 2005–June 2005</td>
<td>&lt;4 months</td>
<td>Full investigation</td>
</tr>
<tr>
<td>Libya</td>
<td>Feb. 2011–Mar. 2011</td>
<td>2 weeks</td>
<td>Full investigation</td>
</tr>
<tr>
<td>Mali</td>
<td>July 2012–Jan. 2013</td>
<td>6 months</td>
<td>Full investigation</td>
</tr>
<tr>
<td>Comoros</td>
<td>May 2013–Nov. 2015; Nov. 2015–Nov. 2017</td>
<td>4.5 years</td>
<td>Closed, then reopened, and definitely closed</td>
</tr>
<tr>
<td>CAR II</td>
<td>May 2014–Sept. 2014</td>
<td>4 months</td>
<td>Full investigation</td>
</tr>
<tr>
<td>Venezuela</td>
<td>Feb. 2018–present</td>
<td>&lt;1 year</td>
<td>Continuing</td>
</tr>
</tbody>
</table>

Looking at Table 4, we can see that preliminary examinations initiated by the Prosecutor *proprio motu* have rarely led to full investigations: only four out of a total of 16. Before the recent opening of investigations into Burundi (October 2017) and Georgia (January 2016), the Prosecutor had exercised the power to open an investigation *proprio motu* very cautiously - in only two situations. One of these, Côte d’Ivoire, may be considered functionally equivalent to a self-referral. The sitting government of Côte d’Ivoire, in fact, sought the ICC investigation through the use of an Article 12(3) declaration. The other situation, Kenya, while being likewise far from the interests of major powers and their allies, is also characterized by relatively limited violence. Alleged crimes against humanity committed in the context of post-election

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26 In several situations, including Afghanistan, the OTP has disclosed only the date or period when the preliminary examination was “made public” rather than when it was opened, thus leaving uncertainty about when the Office has actually opened certain PEs.
27 On 27 September 2018, the Office received a referral from a group of states parties - the Republic of Argentina, Canada, the Republic of Colombia, the Republic of Chile, the Republic of Paraguay and the Republic of Peru - regarding the situation in Venezuela since 12 February 2014. This is the first referral submitted by a group of states parties concerning a situation on the territory of another state party.
28 Ibid, 401.
29 Bosco (n 24) 401.
30 Article 12(3) of the Rome Statute enables a state not party to the Statute to accept the exercise of ICC jurisdiction.
violence in Kenya between 2007 and 2008 had resulted in over 1000 dead, 600,000 displaced, and hundreds sexually assaulted. The Pre-Trial Chamber’s decision to authorize this investigation was not unanimous, as judge Hans–Peter Kaul claimed that the violence was not part of a state or organizational policy, thus falling outside the ICC subject-matter jurisdiction. Furthermore, at a later stage, judge Anita Ušacka dissented from the Pre-Trial Chamber’s application of “complementarity”. She argued that the Chamber had applied ‘an unduly high burden’ in its definition of “investigation” and “case”, thereby unnecessarily hastening the requirements of admissibility. In addition to Kenya, Côte d’Ivoire, Georgia, and Burundi, by the end of 2017 the OTP had requested judicial authorization to open a fully-fledged investigation into the situation of Afghanistan, which is currently under discussion in the Pre-Trial Chamber.

Hence, while only 25% of the total PEs opened proprio motu have been converted into full investigations, the percentage increases to as high as approximately 70% when looking at those initiated by referral, i.e. seven out of ten. As illustrated by Table 5, only the Comoros examination - concerning the Israeli raid on the Humanitarian Aid Flotilla registered to the Union of the Comoros and bound for the Gaza Strip - and the self-referred situation of Gabon have been closed, while the recently opened Venezuelan preliminary examination is still ongoing. As a result, referrals compose the striking majority of the situations before the Court. Out of a total of 11 situations, five

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33 See section 4.2 below for a discussion about whether the current Prosecutor has set a “new course” in the Court’s prosecutorial policies.
34 Situation on the Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia, ‘Final decision of the Prosecution concerning the “Article 53(1) Report” (ICC-01/13-6-AnxA), dated 6 November 2014’, ICC-01/13, 29 November 2017. For a discussion on the reasons put forward by the OTP in support of its decisions, see Chapter 3, n 122.
35 On 21 September 2018, the OTP concluded that the information available did not provide a reasonable basis to believe that the acts allegedly committed in Gabon in the context of the 2016 post-election violence and the preceding election campaign amount to crimes falling under ICC jurisdiction. See OTP, ‘Situation in the Gabonese Republic, Article 5 Report’, 21 September 2018, available at https://www.icc-cpi.int/itemsDocuments/180921-otp-rep-gabon_ENG.pdf (last visited 30 September 2018).
are state self-referrals, (DRC, Uganda, CAR, Mali); two were referred by the
UNSC (Sudan, Libya); and one amounts to a de facto self-referral (Côte
d’Ivoire).

Additionally, Table 4 and Table 5 show that the pace at which the final
determination is made has also greatly varied between the two sets of situations.36 The average duration of a preliminary examination initiated by
state or Security Council referral is around 13 months. In cases of referral by
the UNSC, the OTP has moved exceptionally fast. The Darfur preliminary
examination lasted about three months, while the Libyan one became a full
investigation in a matter of days. Vis-à-vis such extraordinary speed, it has
even been suggested that a UNSC referral may have the practical effect of
creating a kind of jurisdictional primacy similar to that enjoyed by the ad hoc
tribunals.37 By contrast, the average duration of a preliminary examination
initiated by the OTP on its own initiative is around five years. In other words,
cling to “positive complementarity”, the Prosecutor has normally spent
significant time and effort monitoring and encouraging domestic
proceedings.38 Colombia is a case in point. Here, for around 15 years, the OTP
has been choosing to focus on the potential of the preliminary examination to
bring about domestic prosecutions,39 albeit, by the Office’s own admission,
there are substantial grounds to believe that the Colombian investigations and
prosecutions do not actually satisfy Rome Statute requirements.40 It may also
be noted that, as a side-effect of the OTP’s longstanding interaction with
Colombian authorities, the latter have been placed in the position of asserting
control over other parties in the ongoing power struggles over the shaping of
the conflict narrative, thus solidifying their position as the “victor”.41 Indeed,
the rhetoric of the duty to prosecute international crimes has ended up

36 Bosco (n 24) 401.
37 Michael A. Newton, ‘The Complementarity Conundrum: Are We Watching Evolution or
38 Bosco (n 24) 401.
39 Jennifer Easterday, ‘Beyond the “shadow” of the ICC. Struggles over control of the conflict
narrative in Colombia in Contested Justice’, in Christian M. d. Vos, Sara Kendall and Carsten
Stahn (eds) Contested justice: The politics and practice of the International Criminal Court
40 OTP, ‘2017 Report on Preliminary Examination Activities’, 4 December 2017, paras. 144,
available at https://www.icc-cpi.int/items/Documents/2017-PE-rep/2017-otp-rep-
PFE_ENG.pdf (last visited 30 September 2018).
41 See Easterday (n 39) 454.
energizing a right-wing “law-and-order” agenda, for which the need to prosecute and punish the FARC (the Revolutionary Armed Forces of Colombia) has served as a powerful rhetorical device.42

Upholders of a legalist view of the Court – including several of the experts I have come across during the field-work – insist that disparities in the outcomes and duration of PEs are merely the direct result of differences in the gravity of the alleged crimes, or of whether a state has genuinely investigated them or is undertaking tangible efforts in that direction.43 So, in keeping with this line of thought, the OTP would have solicited state referrals precisely in situations that the Prosecutor had already determined to be grave enough to warrant Court involvement.44

However, as already discussed at length in the previous chapter, determinations of both gravity and admissibility can hardly be regarded as “purely legal”. Not to mention that preliminary examinations are actually a complex stage of activity,45 informed by strategic assumptions about the Court’s interventions, targets, interests, and desired impacts.46 Instead, it


43 Ibid, 405. See also The Prosecutor v. Uhuru Muigai Kenyatta, ‘Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute”’, ICC, Appeals Chamber, ICC-01/09-02/11-274, 30 August 2011. In an effort to rebut Kenya’s reference to the careful preliminary examination by the Prosecutor in relation to situations other than Kenya (e.g. Colombia and Afghanistan), the Appeals Chamber dismissed such reference as ‘unpersuasive’ (ibid, para 44), stipulating that ‘the proceedings in relation to those situations are simply at a different stage than the proceedings in the case at hand’ (ibid).

44 See also Bosco (n 24) 402.


appears more reasonable to argue that there may be, in fact, a range of possible explanations for the differences in outcomes and duration of PEs initiated by the OTP on its own initiative, on the one hand, and PEs initiated by referral, on the other.\footnote{Bosco (n 24) 401.} A first factor may be the “fast track” enjoyed by referred situations under the Rome Statute.\footnote{Ibid, 405.} As illustrated in Chapter 3, affirmative decisions to pursue a situation referred by either a state or the UN do not require judicial authorization, contrary to \textit{proprio motu} investigations. In a ‘context of limited resources and situations of comparable gravity’,\footnote{Ibid.} such a procedural shortcut may lead to the OTP favouring referrals ‘as the path of lesser resistance from the judges’\footnote{Ibid.} The so-called “two-step approach” to complementarity, as described in Chapter 3, may also facilitate the move to a full investigation in the context of self-referrals, insofar as domestic inactivity is deemed sufficient to make the case admissible.\footnote{Ibid, 406.}

In addition to the above, there may be a further order of explanations, namely those departing from the domain of procedural requirements and pertaining, instead, to considerations of political opportunity and feasibility. \textit{Proprio motu} investigations may be rarely converted into fully-fledged investigations because the absence of referral portends the lack of political and logistical support from key state actors, which, in turn, negatively affects the OTP’s own “ability” and “willingness” to prosecute in that context.\footnote{Ibid.}

In this connection, it is interesting to note that, as shown in Table 4 above, the OTP’s unwillingness to open \textit{proprio motu} fully-fledged investigations peaks outside Africa, and all the more so in situations impinging on the interests of major powers and their allies. Of a total of 11 \textit{proprio motu} investigations outside Africa, the one in Georgia is the only that has been converted into a fully-fledged investigation, three have been closed (Honduras; Korea; Venezuela), while seven (Afghanistan; Colombia; Iraq/UK; Bangladesh/Myanmar; Palestine; Philippines; Ukraine), i.e. about 65%,
remain at the stage of preliminary examination. Furthermore, among the latter, Afghanistan and Iraq, in addition to Colombia, have been protracted as preliminary examinations exceptionally long after they have been made public. The OTP has justified this state of affairs as resulting from the application of the “legal” requirements of jurisdiction and admissibility. And yet, considering that Georgia is the only non-African full ICC investigation, as well as the protracted length of preliminary examinations implicating governments of major states, it is hard not to suspect the ICC Office of the Prosecutor may end up promoting unequal standards of justice in accordance with the existing international distribution of political power.

At the opposite end of the spectrum to the *proprio motu* investigations that encroach upon the interests of great powers, we find African self-referrals. All but one of the latter have been converted into fully-fledged investigations, and what is more, even relatively swiftly. Nobody could doubt, in fact, that state self-referrals have been an ideal venue of intervention for the Court. They not only provided the institution with its ‘first work’, but also, since the territorial states agreed with the Court’s intervention, they did so while promising state cooperation and enhanced legitimacy for the Court. It is, therefore, unsurprising that self-referrals have been warmly encouraged by the OTP itself. And yet, while being clearly in line with pragmatic purposes, self-referrals also stand in clear tension with the formal framework of complementarity, as already argued in Chapter 3. This has been clearly exemplified by the case of Uganda. The Ugandan judiciary, one of the most robust in Africa, was not “unable” to prosecute LRA commanders, except that it had failed to arrest them. Nor was it “unwilling” to prosecute, except that it wanted the Court’s intervention to externalize the political costs that

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53 In contrast, out of a total of five investigations opened in Africa by the OTP on its own initiative, three have been converted into fully-fledged ones (Burundi, Cote d’Ivoire, Kenya), i.e. 60%, and two are ongoing (Guinea and Nigeria).
55 Ibid.
58 Ibid.
hindered domestic proceedings,\textsuperscript{59} and to use the ICC as ‘another instrument to defeat its enemy’,\textsuperscript{60} as made clear by the language of the referral itself:

Having exhausted every other means of bringing an end to this terrible suffering, the Republic of Uganda now turns to the newly established ICC and its promise of global justice. Uganda pledges its full cooperation to the Prosecutor in the investigation and prosecution of LRA crimes, achievement of which is vital not only for the future progress of the nation, but also for the suppression of the most serious crimes of concern to the international community as a whole.\textsuperscript{61}

Following Museveni’s earlier attempts to brand the LRA as “irrational”, “religious fundamentalists”, or “terrorists”, a referral to the ICC could now transform the LRA from enemies of the Ugandan government into enemies of the entire international community.\textsuperscript{62} Not to mention that the ICC itself has its own institutional interest in intensifying friend–enemy distinctions. Given the Court’s dependence on state cooperation, the more its suspects are widely recognized as “enemies of mankind”, the greater the likelihood that external states will mobilize to assist the Court, for instance by executing its arrest warrants.\textsuperscript{63} And yet, this is exactly the point. Lacking a police force or military capacity, the ICC was (and is) not any more able than the Ugandan government to arrest LRA rebels. Accordingly, it is far from surprising that all ICC Ugandan suspects have been at large since the issuance of the arrest warrants against them in July 2005, except for Dominic Ongwen. The latter was transferred into ICC custody in 2015 following his surrender to the US taskforce established to hunt down LRA fighters, “Operation Observant Compass” (no longer operational since the US military shut it down in March 2017). What I am arguing here is that the ICC opened an investigation on

\textsuperscript{59} Nouwen (n 54) 394.


\textsuperscript{61} See Government of Uganda, ‘Referral of the Situation Concerning the Lord’s Resistance Army’, Kampala, December 2003, para. 6, cited in Branch (n 57) 196 (footnote 14).

\textsuperscript{62} Nouwen & Werner (n 60) 949-950.

\textsuperscript{63} Ibid, 963.
grounds for which it was not properly equipped to address. According to the law professors Arsanjani and Reisman, ‘in strict legal terms, a voluntary referral such as the one by Uganda appears to fail to satisfy the threshold for admissibility set out in Article 17 of the Statute’. They have also suggested that the ‘innovative allowance of voluntary referral’ ‘may take the ICC into areas where the drafters of the Rome Statute had not wished to tread’, such as into being manipulated by anti-democratic ruling elites. All this was not subject to critical reflection by the OTP, whose resolute approach, instead, gave the impression that the requirements of complementarity could actually be (easily) bypassed in favour of a ‘mutually beneficial cooperation’. It is also important to recall that the policy of inviting self-referrals allows the OTP to avoid the judicial authorization that would be otherwise necessary if the OTP had acted on its own initiative.

As described at length in section 4.3.2 below, the OTP has also adopted a similarly resolved approach in the context of the two UNSC referrals - Resolution 1593 and Resolution 1970, respectively referring the situations of Darfur (Sudan) and Libya to the Court. Albeit both resolutions contained striking political biases to the advantage of the UNSC permanent members and their allies, Prosecutor Moreno Ocampo spared them from even the slightest critical remark. Indeed, the OTP carried out both preliminary

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66 Ibid, 397.
67 Ibid.
68 Ibid.
69 Nouwen (n 54)120.
72 These are further discussed in section 3.2 below.
examinations at an exceptionally fast pace - faster than on any other occasion.73

In conclusion, while the OTP has firmly insisted that it conducts the same type of preliminary examination regardless of the trigger mechanism, it appears that the Office has developed two quite different processes, one for state and UNSC referrals, and another for proprio motu investigations. For the former, it conducts a review clearly tilted towards opening a fully-fledged investigation.74 In the latter, the presumption appears to be inverted,75 and a far more painstaking scrutiny is applied. This section has also argued that considerations of political opportunity and feasibility – notably, the criterion of “sovereign backing” – are a decisive factor behind the disparities in the OTP’s approach to the two set of situations. To be sure, the relevance of such a criterion is easily understandable from a practical point of view; that is to say, the effectiveness of the Court’s interventions is inescapably tied to the “ability” and “willingness” of states to act as the “limbs” of the Court itself.76 Nevertheless, this state of affairs paints a very different picture of the ICC from the one advanced by the vast majority of its supporters: from an institution expected to entail an unprecedented encroachment upon state sovereignty,77 to one clearly unable to eschew the latter.

4.3 Case Selection and the Court’s Blind Eye

The criterion of “sovereign backing” has also come to the fore regarding whom to subject (or not) to ICC jurisdiction within selected situations. Focusing on situations that were referred to the Court, this section shows that the selection of cases in state and UNSC referrals has been vitiated by double standards and

73 A UNSC referral, it bears recalling, does not automatically trigger an investigation (which can only start if and when the OTP finds that there is a “reasonable basis” to proceed).
74 Bosco (n 24) 395.
75 Ibid, 396.
76 See Antonio Cassese, ‘On Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ (1998) 9 European Journal of International Law, who has seminally described the ICC as a ‘giant without limbs’ (ibid, 13).
77 Sibylle Scheipers, Negotiating Sovereignty and Human Rights: International Society and the International Criminal Court (Manchester, GBR: Manchester University Press, 2010), 52.
impunity gaps reflective of the interests of the referring authorities and their closest allies.

### 4.3.1 Self-Referrals and the Hobbesian Turn Laid Bare

State self-referrals are, as already pointedly noted by Darryl Robinson, perhaps the situations that have most unequivocally exposed the ‘tensions of independence versus dependence, coercion versus consensus, and effectiveness versus legitimacy’. 

Every time a state has referred itself to the ICC, in fact only individuals in the bad graces of their government, and in particular rebel forces, have been targeted for prosecution by the Court, despite evidence that the government authorities may have also committed crimes under ICC jurisdiction in virtually all the situations. 

This is shown in the table below, which classifies ICC defendants according to their status. Importantly, the table considers their status at the time when the (first) arrest warrant or summons to appear was sought by the OTP (or, as clarified below, shortly thereafter). Yet it should be noted that the ICC intervenes in volatile contexts of political turmoil and power struggles. Therefore, the status of a suspect may have been different at the time when the crimes are alleged to have taken place, or it may change after the issuance of the ICC arrest warrant or summons, or several changes may take place over time. However, focusing on the time when the (first) arrest warrant or summons to appear was sought enables us to capture the existing distribution of power within a given situation at the time when the OTP decided to intervene. Consider the paradigmatic case of Jean-Pierre Bemba Gombo. Between 26 October 2002 and 15 March 2003, Bemba helped the then CAR President Ange-Félix Patassé resist a coup attempt by François Bozizé, who later became president. At that time, which is the time when Bemba is alleged to have committed his crimes, he was the

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79 An exception has been the transitional government of CAR led by Catherine Samba-Panza. On 30 May 2014, the CAR interim president referred the situation of the country to the ICC in relation to crimes committed in the country since 2012, and which she has apparently not been embroiled with.
leader of the Mouvement de Libération du Congo (MLC). A few months later, Bemba gained a governmental position, being elected as vice-president of the DRC from July 2003 to December 2006. However, the OTP sought an arrest warrant against him only on 9 May 2008, when both Bemba and Patassé had become private citizens. A comparable turn of events (even if less convoluted) has taken place in relation to the Libyan suspect Al-Tuhamy Mohamed Khaled. The ICC has indicted the latter for crimes allegedly perpetrated in the context of the 2011 civil war, as a Lieutenant General of the Libyan army and the head of the Libyan Internal Security Agency (ISA) under the Gaddafi regime. But at the time of the arrest warrant, 27 March 2013, the Gaddafi regime had been ousted, and Khaled, like Bemba, had become a private citizen. Other similar cases are the ones against Laurent Gbagbo and his inner circle in the Côte d’Ivoire situation. Gbagbo has been indicted by the ICC for crimes allegedly committed during the 2010/2011 post-electoral violence, when he was the country’s incumbent president. However, the arrest warrants against Gbagbo and his entourage were all sought by the OTP after Gbagbo’s rival, Ouattara, had assumed the presidency of the country and secured their arrest. The ICC investigation in Kenya has also focused on alleged crimes committed in the context of the post-electoral violence that erupted in the country between 2007 and 2008. But, differently from the Ivorian situation, at the time of the summons/arrest warrants, all the Kenyan suspects were either government members (Uhuru Kenyatta and Francis Muthaura), members of parliament (Henry Kosgey and William Ruto), or individuals under the protection of the government (Joshua Sang, Mohammed Hussein Ali, Walter Osapiri Barasa, Paul Gicheru, and Philip Kipkoech Bett). Finally, specific classificatory difficulties arise with regard to the status of Muammar Gaddafi, Saif Al-Islam Gaddafi, and Abdullah Al-Senussi in the Libyan situation. Technically, they were all top-ranking officials of the Gaddafi regime at the time when the OTP sought their arrest warrants (16 May 2011). At the same time, however, the regime appeared close to falling apart under pressure from the joint action of Libyan rebels and a NATO military operation, which had begun earlier (23 March). Shortly thereafter, in fact, the National Transitional Council (NTC) was recognized by the UN as the representative of Libya (16 September), thus
officially replacing the Gaddafi government. Muammar Gaddafi was captured and killed on 20 October 2011. On 23 October, the NTC declared “the liberation of Libya” and the official end of the war. Summing up, Muammar Gaddafi, Saif Al-Islam Gaddafi and Abdullah Al-Senussi were ousted from power only four months after the OTP had requested their warrants of arrest. What is more, considering that the regime was already apparently under assault by both domestic and international forces when the OTP submitted its request, the three Libyan suspects are listed as “rebel forces & private citizens” for the purpose of the table below.
Table 6. ICC Defendants per Status and Trial Stage

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<tr>
<th>REBEL FORCES &amp; PRIVATE CITIZENS</th>
<th>STATE ACTORS &amp; PROTÉGÉS</th>
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<td><strong>Trial / App/Rep</strong></td>
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<td>Mali</td>
<td>1.Al-Hassan</td>
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<td>1. Al-Mahdi</td>
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<td>Libya</td>
<td>1.Saif Al-Islam Gaddafi;</td>
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<td>Sudan</td>
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<tr>
<td>Côte d’Ivoire</td>
<td>1.Simone Gbagbo</td>
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<td>1.Laurent Gbagbo;</td>
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<td>(7 at large &amp; 1 in ICC custody)</td>
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80 The same suspect, Bemba, has been indicted in two different cases.
The Ugandan government was the first to refer a situation to the ICC. Museveni, the President of Uganda, hoped that the ICC’s investigations into the LRA would cause ICC supporters (especially European governments) to cease treating the government and the LRA as equals; instead, they would replace their criticism about the failures and abuses of the government against the Acholi ethnic group in northern Uganda – whose interests the LRA claims to defend - with renewed support for a legitimate government fighting a hostis humani. The OTP, for its part, has shown a discernible bias towards the self-referring government of Museveni from the outset. On 29 January 2004, ICC Prosecutor Moreno Ocampo infamously held a joint press-conference with Ugandan president Museveni to announce that Kampala had referred “the LRA” to the ICC. The referral was amended shortly thereafter so as to cover the “situation in northern Uganda”. Nonetheless, serious harm to the independence and legitimacy of the Court had already been done. What is more, the following year the OTP issued five arrest warrants, all for senior LRA commanders. Around 13 years have passed since then, and the ICC has not opened any investigation into alleged crimes by the Ugandan government. At first, on the basis of a dubious application of the gravity criterion, Prosecutor Ocampo intimated that LRA crimes were of such “gravity” compared to alleged UPDF crimes that the Court had to prioritize their investigation. A later statement by Mochochoko Phakiso, head of the OTP “Jurisdiction, Complementarity and Cooperation Division”, instead suggested that investigators did not have the evidence to prosecute UPDF crimes. And yet, evidence of UPDF crimes appears to be ‘supported by heaps of substantive

81 Nouwen & Werner (n 60) 950.
82 Ibid.
84 Ibid.
85 Ibid.
86 Nouwen & Werner (n 60) 951.
Starting from the second half of the 1990s, the government had instituted a policy of forced displacement of Acholi peasants, driving hundreds of thousands of them into camps, whose total population had grown to nearly a million by the time of the ICC’s intervention. The internment of the Acholis was achieved ‘through a campaign of murder, intimidation, and the bombing and burning of entire villages’. There is also evidence that the camps have been ‘tragically unprotected’; and authorities have ‘failed to provide adequate relief aid to the camps, leading to a massive humanitarian crisis with excess mortality levels of approximately 1,000 per week’. Albeit with the exception of the internment of the Acholis, the level of government violence is lower compared to that of the LRA (although murder, torture, rape, enlistment of children, and arbitrary arrests have been regularly perpetrated by the government forces), the Ugandan government policy of forced displacement surely amounts to a grave violation of the laws of war falling within ICC jurisdiction.

Similarly, in the DRC, the Prosecutor deliberately left all the political and military leaders in the DRC, as well as in Uganda and in Rwanda, in the shadows. The six cases opened so far exclusively target rebels, all operating in the Eastern part of the country (in the Ituri region and Kivu provinces). The cases against Thomas Lubanga Dyilo and Germain Katanga, which led to the Court’s two first convictions in 2012 and 2014, have raised particularly severe criticism. Lubanga, leader of the rebel Union des Patriotes Congolais (UPC)

90 Branch (n 57) 181.
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
95 Ibid, 181-182.
97 In addition to Lubanga and Katanga, cases have also been opened against Bosco Ntaganda (trial), Mathieu Ngudjolo Chui (acquitted in 2012), Callixte Mbarushimana (charges not confirmed), and Sylvestre Mudacumura (at large since 2012). The Ntaganda trial has entered
operating in the district of Ituri, was found guilty by the ICC of enlisting and conscripting children under 15, and sentenced to 14 years of imprisonment. There is widespread acknowledgment that, no matter how worthy of sanction, the charges of recruitment and use of child-soldiers fail to reflect both the full scale of criminality in the country and the very crimes allegedly committed by Lubanga and his troops.98

To start with, the Lubanga case does not take into account that the district of Ituri was actually the battleground for a war between the governments of the DRC, Uganda, and Rwanda, all motivated by the desire to maintain/obtain political power and control over the significant natural resources of the region.99 In other words, the UPC’s operations were first under the effective control of the Ugandan army, and then of the Rwandan army, as was the case with most of the militia in the region.100 This view was expressly upheld by the judges of Pre-Trial Chamber I. In a unique leap of judicial activism, the Chamber contended that the Prosecutor’s charges against Lubanga failed to recognize the “international” nature of the Ituri conflict, being thus insufficient.101 PTC I reiterated a similar view in the course of the proceedings against Katanga, commander of another armed rebel group fighting for political and military control in Ituri (Forces de Résistance Patriotique d’Ituri [FRPI]). In that occasion, the judges referred to the UNSC’s
special report on the events in Ituri between 2002 and 2003. According to this:

Ituri’s natural wealth has driven the conflict in the district. [...] The competition for control of resource-rich centres [...] by the combatant forces and their allies - Uganda, Rwanda and the Kinshasa authorities - has been a major factor in the prolongation of the crisis since they provide those who control production and export with very considerable profits.

Yet, later in the Lubanga case, Trial Chamber I rejected the reading advanced by PTC I, contending that the UPC ‘was involved in an internal armed conflict against the Armée Populaire Congolaise [...] and other Lendu militias, between September 2002 and 13 August 2003’. As a result, the Trial Chamber realigned the position of the Court with the view of the Prosecutor, who never showed hesitation in presenting the Ituri conflict as predominantly of an ethnic nature, and firmly ignored the implication of the governments of the DRC, Rwanda, and Uganda. Indeed, Ocampo’s narrative of “tribal warfare” motivated by ethnic identity did not show the slightest change, even after another court, the International Court of Justice, concluded that the Ugandan authorities were highly likely to have been involved in the very crimes investigated by the OTP in Ituri. A different approach was taken by ICC judge Van den Wyngaert. In her minority opinion attached to the judgement in the Katanga case, the judge bitterly noted that ‘we will never fully understand what happened [...] and especially who did what to whom and why’, making it also explicit that, in her view, the Majority Opinion had attached ‘too much importance to the ethnic aspects of this case’.

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104 *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Summary of the “Judgment pursuant to Article 74 of the Statute”’, ICC, Trial Chamber I, ICC-01/04-01/06, 14 March 2012, para 22.
105 Ibid, 185.
106 Ibid, 195; and Clark (n 56) 41.
108 Ibid, para 318.
As just seen, the current selection of cases in the DRC situation may be aptly regarded as paradigmatic of the “inadmissibility” of socioeconomic contributors to violence in the international criminal justice we know today.\textsuperscript{109} But the shortcomings of Ocampo’s approach in the Lubanga case do not end here. As described below, Ocampo’s decision to prosecute Lubanga for the conscription of child-soldiers, appears to have been based more on ‘expediency’\textsuperscript{110} rather than gravity. The OTP, by its own admission,\textsuperscript{111} dropped the investigation of a wider range of crimes upon learning that Lubanga was about to be released, due to lack of sufficient evidence, by the Congolese authorities that were holding him in preventive detention on different counts of war crimes and crimes against humanity.\textsuperscript{112} In other words, while Lubanga hardly fits into the category of persons bearing “the greatest responsibility”, the OTP decided to focus its investigation on the ‘more manageable crime of enlisting and conscripting children’\textsuperscript{113} so as to prevent Lubanga’s release by DRC authorities. A group of international NGOs sent a letter to the OTP, expressing their disappointment with the fact that “conscription of child-soldiers” was all that the OTP was able to point to as “the worst crimes” committed by Lubanga.\textsuperscript{114} In a similar effort, the Women’s Initiatives for Gender Justice warned that ‘a failure to add more serious charges would result in “offending the victims and strengthen the growing feeling of mistrust of the

\begin{footnotes}
\item[113] Kambale (n 96) 180.
\item[114] Ibid, 181.
\end{footnotes}
work of the ICC in the DRC and of the work of the prosecutor especially'.\textsuperscript{115} However, none of these attempts was successful.

Finally, there is a further problematic aspect in Ocampo’s decision to prosecute Lubanga for the conscription of child-soldiers. The latter may be considered as a ‘textbook case of abusive complementarity’,\textsuperscript{116} resulting from the pernicious combination of prosecutorial “hyperactivity” and judicial deference summoned in Chapter 3. A case against Lubanga was, in fact, opened before the domestic court. It follows from here that the OTP could have used the complementarity mechanisms set out in the Rome Statute to help the Congolese justice system to address existing obstacles to the effective prosecution of crimes under the ICC jurisdiction.\textsuperscript{117} The judges, for their part, on the one hand conceded that in light of the existence of domestic proceedings against Lubanga, the OTP’s statement that the DRC national judicial system continues to be unable did ‘not wholly correspond to the reality any longer’,\textsuperscript{118} On the other hand, the same PTC I concluded that the case was admissible before the Court. Such conclusion was made possible through the application of a very narrow interpretation of the “same conduct test”, that is, by requiring a precise coincidence of criminality in form and substance. In other words, the Chamber contended that the charges against the suspect before the Congolese court did not include child-soldier offences, and therefore the DRC could not be said to be acting in relation to the specific case before the Court.\textsuperscript{119} The Katanga case is another example of the opportunities missed by the OTP to make good use of complementarity. Having been found guilty by the ICC as an accessory to one count of a crime against humanity and four counts of war crimes, a case against him was already before the Congolese courts, including charges of crimes against humanity and even genocide.\textsuperscript{120}


\textsuperscript{117} See Kambale (n 96) 187.

\textsuperscript{118} The Prosecutor v. Thomas Lubanga Dyilo, ‘Decision on the Prosecutor’s Application for a warrant of arrest, Article 58’, ICC, Pre-Trial Chamber I, ICC-01/04-01/06, 10 February 2006, para 36.

\textsuperscript{119} Ibid, para 39.

\textsuperscript{120} Kambale (n 96) 183.
The ICC’s involvement in Côte d’Ivoire and Mali have also confirmed the ‘tactical’ relationship between the OTP and government authorities. With respect to the situation in Côte d’Ivoire, the OTP has always insisted that it would first focus on the pro-Gbagbo circle, which refused to cede power after the 2010 election, and later extend investigations to the alleged crimes of the side led by Alassane Dramane Ouattara, the incumbent president. It has also emphasized that the “sequenced” approach would not be at the cost of impartiality. However, at the time of writing, no public arrest warrants have been issued as a result of investigations into the side now in power. According to the OTP, such investigations would have been put on hold due the scarcity of the Office’s resources. Laurent Gbagbo and Charles Ble Goude, a former pro-Gbagbo political youth movement leader, are instead currently on trial before the ICC for crimes against humanity; and a warrant of arrest has been issued for ex-first Lady Simone Gbagbo, who remains a fugitive (under Ivorian custody).

Moving to the Malian situation, which focuses on the armed conflict between central authorities and rebel groups, the former are also suspected of having committed crimes under the jurisdiction of the Court. In 2013, Prosecutor Bensouda herself warned the Malian authorities that her Office was aware of reports that Malian forces may have committed crimes under the

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122 Ibid, 472.


125 Simone Gbagbo has been in Ivorian custody since April 2011, where she is already serving a 20-year prison term for undermining state security. The Ouattara government has refused to transfer her to the ICC, in violation of its legal obligation under the Rome Statute, arguably in an attempt to defend ‘its legitimacy as a government capable of steering the country through the post-crisis transition’. See Rosenberg (n 121) 485. However, in March 2017, in a process marred by fair trial concerns and a lack of evidence, the Abidjan Assize Court acquitted the former first lady of crimes against humanity.

Court’s jurisdiction, urging them to investigate and prosecute those responsible. Up to the time of writing, Malian authorities had made little effort to secure accountability. And yet, no case concerning abuses allegedly carried out by government forces has been opened so far by the Court.

ICC Deputy Prosecutor James Stewart has insisted that the OTP would be impartial, but ‘[s]ometimes [y]ou have to make a choice between action and paralysis and between pragmatism and ideals. And I think if you choose pragmatic action, you really shouldn’t be criticized’. The above overview has shown that, in line with the views put forward by the Deputy Prosecutor, the maintenance of cooperative relations with the government of the territorial state is at the top of the Court’s pragmatic concerns. Indeed, hardly anyone can deny that the surest way to sabotage the ICC’s ability to build cases (including protecting evidence and witnesses), enforce arrest warrants, and conduct outreach programmes is precisely by targeting the same powers that are meant to act as “limbs” of the Court. And yet, the fact remains that the prioritization of pragmatic concerns - such as ‘issues of political will, state cooperation, and protection of client states and state actors’ - has led to a highly controversial - if not paradoxical - application of both complementarity and gravity. The Prosecutor has taken over from self-referring states cases of only relative “unwillingness” and “inability” on the part of the domestic authorities, i.e. cases concerning alleged crimes of rebel/opposition forces. For the latter, in fact, the Court can usually count on the support and cooperation of local authorities, from which follow greater chances of arrest and effective prosecution. However, not only may such cases ‘bear an inverse correlation with the degree of responsibility’, but they are also precisely the instances in which the chances of catalysing genuine domestic proceedings are also greater. By contrast, the ICC has ended up encouraging domestic proceedings in relation to the very crimes that, no matter how grave, domestic

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127 James Stewart cited in Kersten (n 123).
128 Kersten (n 87).
129 Sara Kendall, “UhuRuto” and Other Leviathans: The International Criminal Court and the Kenyan Political Order” (2014) 7(3) African Journal of Legal Studies 399, 403
130 Nouwen (n 54) 392-405.
131 Goldston (n 98) 395.
132 Nouwen (54) 13-14.
authorities were plainly “unwilling” prosecute, such as the alleged crimes of the self-referring authorities themselves. At the same time, though, while portending little chance of success for the Court, such cases are also the ones in which “positive complementarity” is least likely to be effective.\textsuperscript{133} It goes without saying that the absence of ICC cases against executive branches has ended up entrenching their authority and power - against the very interests of their people - by providing external (symbolic) resources, mobilising internal support, and, arguably, even enhancing the militarization of the state. Indeed, these impunity gaps may be regarded as complicit in the increase in sovereign power among actors competing over resources and regional control.\textsuperscript{134} In conclusion, the ICC’s turn against non-state actors - and hence implicitly in favour of the state – suggests a much more Hobbesian version of international criminal law than the one traditionally envisaged:\textsuperscript{135} one in which states are helped to exercise criminal repressive powers against their enemies.\textsuperscript{136} The widespread concern during the process that led to the entry into force of the Rome Statute had been about a court that, by imposing its jurisdiction, could run roughshod over state sovereignty.\textsuperscript{137} State self-referrals have made evident that problems relating to the ICC and state sovereignty may end up being quite the opposite from what had been expected.\textsuperscript{138}

\textsuperscript{133} Ibid.  
\textsuperscript{134} Ibid, 96.  
\textsuperscript{135} Frédéric Mégret, ‘Is the International Criminal Court Focusing Too Much on Non-State Actors?’, in Diane M. Amann D and Margaret deGuzman (eds.) \textit{Arcs of Global Justice: Essays in Honor of William A. Schabas} (Oxford: Oxford University Press 2018) 173, 199.  
\textsuperscript{136} Ibid.  
\textsuperscript{137} Branch (n 57) 190.  
\textsuperscript{138} Ibid, 189.
4.3.2 An *ad hoc* Court of the UNSC\(^{139}\)

As already anticipated, both Resolution 1593 and Resolution 1970 made substantive concessions to UNSC permanent members and their allies.\(^{140}\) In fact, not only has the UNSC referred Sudan and Libya to the Court while failing to refer other situations,\(^ {141}\) but – crucially – the Court’s intervention in those two *peripheral* states could take place only at the ultimate price of *major* states having their military personnel, political elites, and allies shielded from ICC jurisdiction.

The preamble of Resolution 1593 did not even cite Article 13(b) of the Rome Statute, according to which the Security Council, using its powers under Chapter VII of the UN Charter, may refer situations to the ICC regardless of whether the concerned states are parties to the Rome Statute. But it cited only the power of deferral under Article 16,\(^ {142}\) which entitles the Council to defer an investigation or prosecution for the renewable period of one year, if either is considered as a threat to international peace and security. Presumably under the latter, the resolution excluded nationals of non-party states other than Sudan (participating in any UN or AU operations in the country) from the Court’s jurisdiction.\(^ {143}\) Indeed, as a permanent - rather than one-year - deferral

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\(^{141}\) A glaring example of the UNSC’s failure to refer situations to the Court has been Syria. In contrast, according to an analysis combining the data of three widely accepted databases (the Uppsala Conflict Database, Political Terror Scale and Failed State Index) the UNSC referred situation of Libya, ‘would not even rank amongst the ten gravest situations in its worst years (2010 and 2011)’, and yet, it rapidly became of unanimous concern within the international community. See Alette L. Smeulers, Maartje Weerdesteijn and Barbora Hola, ‘The selection of situations by the ICC: An empirically based evaluation of the OTP’s performance’ (2015) 15 *International Criminal Law Review* 1, 32.


\(^{143}\) Moss (n 140) 6.
and by giving blanket immunity from ICC jurisdiction to a wide range of actors, such an application of Article 16 went beyond even the powers granted to the UNSC by the article itself.\textsuperscript{144} Furthermore, the preamble of the resolution “noted” – and thereby legitimized - the bilateral agreements concluded by the US with several states in an attempt to shield US citizens from ICC jurisdiction. US authorities have insisted that such bilateral agreements are in line with Article 98(2) of the Rome Statute. This precludes the Court from proceeding “with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements”. However, while Article 98(2) is intended to cover existing agreements between states (so as to prevent legal conflicts which might arise because of existing agreements), the US bilateral immunity agreements were geared towards gaining prospective impunity for US nationals, being thus contrary to the intention of the Rome Statute (and even ‘violating principles of equality before the law’).\textsuperscript{145} Resolution 1593 also barred the UN from paying any of the ICC’s costs arising from the Court’s proceedings, requiring that the parties to the Rome Statute bear those costs. Finally, unlike the resolutions that established the ad hoc tribunals, the resolution did not establish the obligation for all UN member states to cooperate with the Court. Rather, it simply “urged” their cooperation, while clearly stipulating that states that are not parties to the Rome Statute have “no obligation”. As Lawrence Moss has noted, the greater part of this extensive list of concessions was geared towards the actually rather theoretical value of establishing immunity from the ICC for US nationals. The likelihood of any US national committing crimes under the jurisdiction of the Court in Sudan is, in fact, remote.\textsuperscript{146} While such concessions nevertheless proved crucial to persuading the US to abstain and allow the resolution to pass, the UNSC also exacted a serious toll on its own credibility, as well as the Court’s independence and legitimacy.\textsuperscript{147}

\textsuperscript{144} Ibid. In this respect, Resolution 1593 had a predecessor in UNSC Resolution 1422, which, in 2002, right after the entry into force of the Rome Statute, requested the ICC to defer potential prosecutions of peacekeepers from non-state parties for a 12-month period.

\textsuperscript{145} Ibid.

\textsuperscript{146} Ibid.

\textsuperscript{147} Ibid.
Six years after the referral of Sudan, on 26 February 2011, the Security Council unanimously adopted Resolution 1970 referring the situation of Libya to the ICC. This was followed, on 17 March 2011, by Resolution 1973 authorizing “all Necessary Measures to protect” Libyan civilians. Operation Unified Protector (OUP) started only few days later, on 23 March 2011. The decision to refer Libya to the ICC resulted from a convergence of strategic interests among the UNSC members, several of which had maintained close relationship with Gaddafi until not long before. The language of the Darfur referral was used again, largely unchanged, due to the ease and exceptional speed with which Resolution 1970 was adopted. Like Resolution 1593, the Libyan referral excluded non-party states nationals (other than Libya, in this case) from ICC jurisdiction. What is more, it even went further than its archetype, restricting the ICC jurisdiction to events post-15 February 2011 to preclude even state parties to the Rome Statute from having their affairs with Libya come under scrutiny. As a result, the states that had been entangled with the Gaddafi regime until very recently could now help overturn it while having their military personnel and political elite mostly exempted from the Court’s jurisdiction. Finally, Resolution 1970 also reiterated the reference to the Security Council’s power of deferral, the exemption of the UN from paying the costs of the investigation, and the stipulation that ICC non-member states have no “obligation” to cooperate with the Court.

None of the conditions and double standards contained by both referral-resolutions were subject to critical scrutiny by the OTP, whose selection of cases, instead, fully complied with them. As a result, the Office has been careful not to draw any attention to the abuses committed by the international military forces that supported the anti-Gaddafi factions, as well

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148 UNSC, Security Council Resolution 1973 (2011) [on the situation in the Libyan Arab Jamahiriya], 17 March 2011, S/RES/1973 (2011), para 4, available at http://www.refworld.org/docid/4d885fc42.html (last visited 30 September 2018). The resolution was passed with five abstained (Brazil, Germany, and India, and permanent members China and Russia) and none opposed. OUP involved 18 participating countries (14 NATO member-states and four partners): Belgium, Bulgaria, Canada, Denmark, France, Greece, Italy, Jordan, Netherlands, Norway, Qatar, Romania, Spain, Sweden, Turkey, United Arab Emirates, United Kingdom, and the United States.


150 Moss (n 140) 9.
as by the domestic combatants themselves. This is despite the fact that Operation Unified Protector had started after the 15 February 2011 threshold established by Resolution 1970, and crimes allegedly committed by ICC state parties would therefore fall within the temporal jurisdiction of the Court. It is estimated that OUP’s air-strikes killed at least 55 to 72 civilians, many of them children under the age of 18. According to Human Rights Watch, questions arise

as to whether the attacking forces acted fully in accordance with their obligations under the laws of war to exercise “constant care to spare the civilian population” and take “all feasible precautions” to minimize loss of civilian life.151

As to domestic forces, the Misrata militia, accused by the Commission of Inquiry on Libya of serious crimes,152 was even praised by former Prosecutor Luis Moreno-Ocampo as an ‘example for the world’.153 As noted by “Lawyers for Justice in Libya” and “Redress Trust”, the disparity between the prosecution of Gaddafi loyalists and members of revolutionary brigades has been striking: the latter received ‘blanket amnesty’;154 the members of the Gaddafi regime, instead, were subjected to rigorous scrutiny by the Court, as

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illustrated by the controversial rejection of the Libyan government’s admissibility challenge in the Gaddafi case recalled in the previous chapter. It should also be noted that the recent indictment of Mahmoud Mustafa Busayf Al-Werfalli (2017), who fought against the Gaddafi regime back in 2011, actually means little with regard to the absence of prosecutions - domestically or internationally - for crimes perpetrated by anti-Gaddafi forces in the 2011 Libyan civil war. Nowadays a brigade commander active within the Libyan National Army (LNA), the ICC has charged Al-Werfalli for war crimes allegedly committed not during the fight against Gaddafi, but between 2016 and January 2018. Furthermore, the LNA commander General Khalifa Haftar publicly expressed his gratitude for the ICC indictment of Al-Werfalli, thus pointing to a troublesome alignment of interests between the OTP and Libyan authorities. Haftar himself, in fact, has had a career as a warlord. He emerged as the new strongman in Eastern Libya after Gaddafi’s defeat, by 2015, and there were already suspicions that war crimes may have been committed by his heavily armed troops. What is more, Haftar’s rise to power had been supported by Hassan Tatanaki, a Libyan oil billionaire deeply involved in the Libyan civil war, and also a key figure in the recent “Ocampo Affair”. This blew up in September 2017, when tens of thousands of previously unknown documents, including ICC internal documents, were obtained by Mediapart, a French investigative website, and a DER SPIEGEL team, who analysed them in partnership with the European Investigative Collaborations (EIC) reporting network. According to the leaked documents, near the end of his term the ex-Prosecutor was apparently to be paid 2.55 million euros to advise Tatanaki. The documents also contain allegations concerning the role of current staff


157 Peter Cole and Brian McQuinn (eds), The Libyan Revolution and Its Aftermath (Oxford: Oxford University Press, 2015).

members of the OTP,\textsuperscript{159} including the sharing of potentially confidential information with the former Prosecutor. While the latter were promptly rebutted by Bensouda, how “willing” her Office has been to look into the conduct of Haftar and his closest circle remains dubious.

4.4 The Persistent Failure to Successfully Prosecute State Actors and their Protégés

The analysis of the ICC’s practice so far has painted a picture of a court largely “unwilling” to investigate and prosecute alleged crimes of representatives of state powers. As illustrated in Table 6, most of the individuals indicted by the Court were affiliated to rebel/opposition forces at the time of the issuance of the ICC arrest warrants (or shortly thereafter), i.e. about 70%. This percentage rises to as much as 100% if we consider only self-referrals. But the picture becomes even grimmer if we move on to consider the outright failures of the few attempts to prosecute state actors and their protégés. More than 15 years since its establishment, the ICC has still to apprehend a single state actor or protégé, with such an inability looming as perhaps the clearest sign of the enduring force of state sovereignty.

In Sudan, Prosecutor Ocampo opened five cases targeting both rebel forces and state actors, for a total of seven suspects. Three rebels were charged with orchestrating an attack against the African Union (AU) Mission in Sudan that led to the deaths of 12 peacekeepers. The Pre-Trial Chamber did not confirm the charges against one of the individuals, Bahar Idriss Abu Garda. Another, Abdallah Banda Abakaer Nourain, remains at large, after voluntarily appearing before the ICC at the pre-trial stage. Proceedings against another suspect, Saleh Mohammed Jerbo Jamus, were terminated following his passing. The Sudanese state actors indicted by the Court are Ali Muhammad Ali Abd-Al-Rahman (“Ali Kushayb”), alleged commander of the Janjaweed militia acting in coordination with the Sudanese armed forces as part of the

counterinsurgency campaign; Ahmad Muhammad Harun (“Ahmad Harun”), Minister of the State for the Interior of the Government of Sudan; Abdel Raheem Muhammad Hussein, current Minister of National Defence and former Minister of the Interior and former Sudanese President’s Special Representative in Darfur; and, finally, Sudan’s sitting head of state, President Omar Al-Bashir. The case against the latter, it should be noted, is the sole case in the history of the ICC involving charges of genocide. In the first months of his investigations, Prosecutor Ocampo approached the Sudanese government ‘with velvet gloves’. In his first reports to the UNSC, he emphasized the instances in which Sudan cooperated with the Court, while glossing over any refusal to cooperate. When bringing his first case in 2007, the Prosecutor continued his efforts not to alienate the Sudanese government by initially focusing on two senior, but not top-level officials, Harun and Kushayb. The OTP also requested that the judges consider issuing summonses to appear as a less confrontational alternative to arrest warrants. Up to that time, the Sudanese government had continued its cooperation with the ICC in its case against the LRA, and even allowed ICC officials into the country for the purpose of admissibility assessments. It was only after the indictment of Harun and Kushayb that Khartoum broke off all cooperation, and the OTP, in turn, also changed its policy into one of full confrontation. The result has been a decade-long stalemate, in which all the state actors indicted by the ICC remain fugitives. It bears recalling that this is so despite the unparalleled gravity of their alleged crimes - both when compared to the charges brought against the three rebels indicted in the same situation, i.e. the killing of 12 peacekeepers, and all other ICC situations.

But Khartoum’s strenuous opposition to the Court’s intervention is not the only factor to blame for the ICC’s failure to discharge its mandate in Sudan. A crucial role should be attributed to the lack of cooperation of several states,

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150 Nouwen & Werner (n 60) 958.
151 Ibid, 959.
153 Nouwen & Werner (n 60), 958. The OTP’s request, however, was rejected by the PTC, which on 27 April 2007 issued Harun and Kushayb’s arrest warrants.
154 Ibid, 959.
155 Ibid.
in addition to the UNSC itself, whose referral has been followed by inactivity. Since the issuance of the first ICC arrest warrant against him, Al-Bashir has travelled to several countries, some of which are states parties and all of which are UN members. The list of states allowing Al-Bashir to enter their territory and failing to surrender the suspect to the Court includes a number of state parties: the Republic of Chad (July 2010, August 2011, February 2013, December 2017); the Republic of Kenya (August 2010); Djibouti (May 2011 and May 2016); Malawi (October 2011); DRC (February 2014); South Africa (June 2015); Uganda (May 2016 and November 2017); Jordan (March 2017).

In accordance with Article 87(7) of the Rome Statute, these states were all referred to the Assembly of States Parties and the Security Council, with the exception of South Africa, in respect of which only non-cooperation proceedings have been undertaken. All the referred states, and South Africa, supported by the African Union, have contended that competing obligations under customary international law trump obligations under ICC law, notably the obligation to provide state officials with immunity from foreign criminal jurisdiction. The Rome Statute, for its part, while clearly waving any immunities for senior government officials of state parties (Article 27), leaves room to interpretation as far as government officials of non-party states are concerned. More to the point, on the one hand Article 27 states that official capacity shall, in no case, exempt a person from criminal responsibility under the Rome Statute; on the other hand, Article 98(1) requires the Court not to issue requests for cooperation that would result in states parties violating their obligations to provide immunities to senior officials of third states under customary international law. To complicate things further, the question whether a state party must respect the immunity of the head of state of a non-party state when the arrest of the latter is sought by the Court has been the subject of a series of conflicting decisions by the Pre-Trial Chambers. On 12 March 2018 Jordan appealed the decision rendered by the PTC.


the Chamber, Al-Bashir does not enjoy immunity because the UNSC referral has had the effect of placing Sudan in a position analogous to a state party, with the consequence that article 98(1) of the Statute is not applicable to the case.168 This is the first time that the Appeals Chamber is considering the matter of a referral of a state party’s non-compliance to the ASP and the UNSC. During the hearings, which took place from 10 to 14 September 2018, the Appeals Chamber received oral submissions on legal matters raised in this appeal from representatives of Jordan, the ICC Prosecutor, and amici curiae including representatives of the AU, the League of Arab States, and international law professors. After years of legal wrangling around the execution of the Court arrest warrants for Sudanese President Al-Bashir, the expectations are high that the Appeals Chamber will finally issue a decision that will definitely settle the position of the ICC.169 Furthermore, Jordan’s appeal was preceded in January 2018 by the AU’s decision, taken during the 30th session of the AU Summit of Heads of State and Government in Addis Ababa, to seek an advisory opinion from the ICJ on the question of the relationship between Article 27 and Article 98 and the obligations of ICC states parties under wider international law.170 The ICJ has not pronounced itself yet;

168 See Prosecutor v. Al-Bashir, ‘Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir’, ICC, Pre-Trial Chamber II, ICC-02/05-01/09, 11 December 2017, para. 37. The PTC 6 July 2017 decision concerning South Africa’s non-cooperation had already put forward this view. See The Prosecutor v. Al-Bashir, ‘Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir’, ICC, Pre-Trial Chamber II, ICC-02/05-01/09-302, July 6, 2017, para 88. A minority opinion was attached by judge Bichambaut to both those decisions. According to the judge, if a UNSC referral triggers the applicability of the entire Statute, it logically follows that the referral also activates provisions relevant to non-party states, and states parties are thus able to invoke Article 98(1). At the same time, though, while Article 98(1) continues to apply regardless the UNSC role in the situation, Sudan is a party to another treaty, the Genocide Convention, which does include a permanent waiver for Al-Bashir’s immunities. Accordingly, Omar Al-Bashir would not enjoy personal immunity, having been charged with genocide within the meaning of article VI of the Genocide Convention ibid, para. 100. See Prosecutor v. Al-Bashir, ‘Decision Under Article 87(7) of the Rome Statute on the Non-compliance by South Africa with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir’, Minority Opinion of Judge de Bichambaut, ICC, Pre-Trial Chamber II, ICC-02/05-01/09-302, July 6, 2017, para 56; and Prosecutor v. Al-Bashir, ‘Decision under article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender or Omar Al-Bashir, Minority Opinion of Judge de Bichambaut’, ICC, Pre-Trial Chamber II, ICC-02/05-01/09, 11 December 2017.

169 Akande (n 167).

and while we also await for the ICC Appeals Chamber’s decision, the scope of the obligation of states parties to arrest al-Bashir, and the heads of states of non-party states more broadly, remains surrounded by uncertainty. What is already clear, though, is that the lack of state cooperation has been a decisive weakness even in the context of UNSC referrals. In fact, while the effective power to arrest ICC suspects solely rests with states, neither state parties nor the Council have taken any ‘tangible action’. But with no follow-up action on the part of the international community, the practical limitations of going after heads of states are possibly insurmountable, and any referral involving the alleged crimes of the latter would hence become ‘futile’.

The Court’s efforts to prosecute state actors and their protégés in Kenya, a state party to the Rome Statute contrary to Sudan, have not been much more successful. Following the 2007-2008 post-election violence in Kenya, ICC Prosecutor Ocampo visited Kenya to discuss the proceedings with President Kibaki and Prime Minister Odinga, in an effort to secure their cooperation – and perhaps even a referral. However, when it became clear that the government would not make such move, the Prosecutor asked and obtained authorization from the Pre-Trial Chamber to open an investigation proprio motu. As a result of the Prosecutor’s investigations, the ICC opened cases against suspects from both sides of the contested elections. In March 2011, six individuals, equally divided between the Party of National Unity (PNU) and Orange Democratic Movement (ODM), were summoned to appear.


Triponel & Williams (n 149) 808.
Charges were confirmed against four of the six, still equally divided between political parties - Uhuru Muigai Kenyatta and Francis Kirimi Muthaura for PNU, and William Samoei Ruto and Joshua Arap Sang for ODM - and were subsequently dropped against Francis Muthaura, the former head of the civil service for the PNU. In 2013 arrest warrants (no longer summons) were issued for Walter Osapiri Barasa, and in 2015 for Paul Gicheru and Philip Kipkoech Bett, all allegedly responsible for offences against the administration of justice. In the meantime, Kenyatta (PNU) and Ruto (ODM) had joined forces under their shared opposition to the ICC,178 running jointly in Kenya’s 2013 presidential election. Following the elections, they assumed office as, respectively, President and Deputy President of Kenya. That is also when the vehement opposition to the Court’s proceedings by the newly established government started turning into a criminal scheme geared towards corruptly influencing witnesses and persuading them to withdraw. Shortly thereafter, this plan proved successful in undermining the OTP’s capacity to collect and preserve the evidence it needed to build cases bearing reasonable prospects of conviction. Since Kenyatta and Ruto’s election, the issue of Kenyan sovereignty has also become a prominent theme. This, indeed, has progressively grown into an existential threat to the ICC, as African leaders started mobilizing around the claim of neo-colonialism and threats to African sovereignty and self-determination more broadly,179 driven, among other things, by the Court’s ‘selective geographies of intervention’.180 At Kenyatta’s inauguration ceremony in April 2013, President Museveni of Uganda, previously a convinced ally of the Court, noted that “the usual opinionated and arrogant actors” are using the ICC “to install leaders of their choice in Africa and eliminate the ones they do not like”.181 Not even the collapse of the ICC cases against Kenyatta in March 2015 and Ruto and Sang in April 2016 due to lack of sufficient evidence182 has done much to keep the tensions between

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178 Kendall (n 129) 426.
179 Ibid, 419.
180 Ibid, 418.
181 Ibid, 418
182 The charges against Kenyatta and Ruto were, respectively, withdrawn by the Prosecutor and vacated by the Trial Chamber, in both cases due to lack of evidence. Barasa, Gicheru, and Bett currently remain fugitives under Kenyatta and Ruto protection.
African states and the ICC at bay. Rather, contestation of the Court’s prosecutorial choices has continued to be played out through the language of sovereignty. Tensions culminated in the withdrawal of Burundi from the Rome Statute in late 2016. Burundi’s withdrawal was echoed by a broader pushback over the prosecution of sitting leaders, this leading to, among other things, the filing of a notice of withdrawal by South Africa (albeit found constitutionally invalid by the South African High Court due to lack of parliamentary approval), originally a staunch supporter of the Court, and even threats of mass-withdrawal by the AU.

Summing up, it appears that the ICC has two kinds of relationships with states on whose territory it is investigating crimes: cooperative, when states refer situations on their territory, and adversarial, where it examines official wrongdoing by an entrenched regime. In the former, as seen in the previous section, the ICC’s dependence on domestic authorities has resulted in the Court’s catering to the interests of domestic authorities themselves. In the latter, as shown just above, cooperation by domestic authorities is unlikely. The prospects for prosecution are, hence, tied to the willingness of external actors to deploy coercive instruments to change the balance of power against the government whose practices are under ICC scrutiny.

183 Kendall (n 129) 426.
184 Burundi’s decision to withdraw from the Rome Statute in October 2016 came after the Court had publicly announced its preliminary examination of the situation in the country in April 2016, and after the UN Human Rights Council had resolved, at the end of September 2016, to create a commission of inquiry that would have identified alleged perpetrators and recommend steps to guarantee their accountability.
189 Ibid.
may be considered, to date, an isolated case. What is more, it has also remained a far from successful one, considering that the participating states soon proved to be more interested in following-up on their own interests in the region, and Gaddafi’s ICC arrest warrant is thus still pending. In line with these considerations, the element of “top-down” enforcement has been severely restricted, ‘if not exactly trivialized’,¹⁹⁰ in the Court’s practice, either already at the level of selection and prioritization choices, or subsequently at the level of outcomes, meaning that the Court has proved unable to effectively investigate and prosecute.

4.4.1 (Recalibrating the Critique of) African Bias

A further significant pattern, which we have already touched upon and on which this section focuses, is their apparent accordance with the existing distribution of political power among states, in addition to within them. At the time of writing, Georgia is the only fully-fledged investigation outside Africa, and every single person indicted by the OTP is African and black.¹⁹¹ While, as discussed in the section below, such a state of affairs may be expected to undergo some change, this consideration does not spare us from asking why the selection of defendants has been so stark as to suggest that Africans have a “monopoly” on international crime.¹⁹² Indeed, not even a radical change - which, at any rate, is hardly likely to take place - could undo the ICC’s record so far, let alone at a time when the ICC “African bias” is at the centre of the quarrel between a number of African member-states and the Court.¹⁹³

Both during the interviews undertaken for the purpose of this study (see Annex II, code 2: “compliance of the ICC’s decisions with the Rome Statute”) and elsewhere, the OTP and some of the Court’s staunchest supporters have been keen on emphasizing that, of a total of ten African situations currently under ICC investigation, only on two occasions has the ICC become involved

¹⁹⁰ Mégret (134) 173.
¹⁹² Ibid, 892.
¹⁹³ Ibid.
by the OTP on its own initiative (Kenya and Burundi). In contrast, in six instances the Court’s intervention was required by the state parties themselves (Uganda, DRC, CAR – which has requested the Court’s intervention in two instances – Côte d’Ivoire, and Mali); in two other situations, the ICC became involved at the request of the UNSC (Sudan and Libya). Much has already been said in this chapter, and the previous one, to shed light on the complex and, more to the point, highly discrentional character of the OTP’s selection choices. Suffice it to recall the most basic fact that a state party referral does not automatically trigger an investigation, which will only start when the Prosecutor finds that there is a “reasonable basis” to proceed. But a crucial point still needs to be articulated clearly and brought to the forefront of the critique. The ICC’s African focus is, at a closer look, a focus on African rebels. In other words, African rebels – and not African state actors – do make up for both the majority of the ICC suspects and the totality of the individuals successfully prosecuted. Acknowledging this qualifications is of crucial importance if we do not want to feed the highly unlikely expectation of a reversal of the Court’s African bias. In fact, the overwhelming focus on African rebels is in line with the very structure of the Rome Statute. That is to say, by placing some of the Court’s major functions at the disposal of states’ processes and decisions, the Statute itself has laid the ground for a Court largely “unwilling” and even more “unable” to successfully prosecute state actors and their protégés. At the same time, in more stabilized societies, state actors and their protégés are highly more likely than rebels to commit crimes under ICC jurisdiction.

But there is also a further structural reason why we should not feed ill-placed expectations in the future of the Court. Such reason lays deeper than the everyday functioning of the institution and even pre-dates the Rome negotiations, that is, the ICC regime is ab initio built on the structural inequality between centre and periphery. More to the point, the Court’s – subject matter, personal and temporal – jurisdiction reflects a certain view of

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justice that entrenches existing divides by steering judicial intervention towards the periphery of the world.\textsuperscript{195} I am referring to a set of interconnected and mutually-reinforcing biases,\textsuperscript{196} such as political-economic and civilizational biases, which, in turn entail a ‘global epistemic hierarchy’\textsuperscript{197} to which the distribution of symbolic value and resources are inescapably tied.\textsuperscript{198} The ICC jurisdiction has thus been tailored so as to focus on “atrocity crimes” - less likely to take place in stabilized societies - and on those particularly “savage” individuals\textsuperscript{199} bearing the “greatest responsibility” thereof. Less spectacular forms of domination, violence, and inequality, as well as complex stories of complicity and entanglement, have been placed beyond the scope of justice as defined in the Rome Statute.\textsuperscript{200} An ‘entire history of Western

\textsuperscript{195} Ibid In this respect, Stahn has also highlighted that the ICC ‘has adopted a rather strict approach towards the required degree of symmetry between domestic and ICC action’ (ibid, 70). The case before the ICC ‘serves as main point of comparison’ (ibid). Hence, one may fear that ICC policies will end up marginalising ‘domestic agency and foster ICC-centric imitation’ (ibid), thus ‘entrenching inequalities in international society’ (ibid, 72), and making it ‘even harder for conflict-torn societies to take justice in their own hands’ (ibid).

\textsuperscript{196} See Christine Schwöbel-Patel, ‘The Core Crimes of International Criminal Law’, in Kevin Jon Heller, Frédéric Mégret, Sarah Nouwen, Jens David Ohlin and Darryl Robinson (eds) The Oxford Handbook of International Criminal Law (Oxford: Oxford University Press, forthcoming). For further analysis on the ‘political economy of human rights’, see Clarke (n 109) 6-8. According to Clarke, such economy is centred on ‘the interrelationship between the specter of justice – the victim’ (ibid, 6) and ‘draws its power from ritual spectacles, funded through donor capitalism’ (ibid, 8). The specific connections between international criminal law and the logics of neoliberalism are at the centre of Christine Schwöbel-Patel, ‘The Rule of Law as a Marketing Tool: The International Criminal Court and the Brand of Global Justice’, in Christopher May and Adam Winchester (eds), Research Handbook on the Rule of Law (Edward Elgar 2018 Forthcoming). Finally, for a focus on the social and political hierarchies and unequal conditions of discourse in international criminal law, see Immi Tallgren, ‘The Voice of the International Who is Speaking’ (2015) 13(1) Journal of International Criminal Justice 135. According to Tallgren, no matter how sincerely the “we” of the international criminal law discourse ‘gets dressed as the manager of the only possible moral order, […] defects and dissymmetry may render the “ICL we” incomplete, if not “sick”’ (ibid, 154).


\textsuperscript{199} Adam Branch, “What the ICC Review Conference Can’t Fix,” African Arguments, 11 March 2010, available at https://africanarguments.org/2010/03/11/what-the-icc-review-conference-cant-fix/ (last visited 30 September 2018). See also Martti Koskenniemi, ‘International Law and Hegemony: A Reconfiguration’ (2004) 17(2) Cambridge Review of International Affairs 197: ‘To focus on individual guilt instead of, say, economic, political, or military structures, is to leave invisible, and thus to underwrite, the story those structures have produced by pointing at a scapegoat’ (ibid, 210). Similarly, according to Clarke (n 106): ‘The problem is that the reassignment of the guilt of thousands of people to a single chief commander and a few of his top aides neither ends violence nor captures adequately the complicity of multiple agents involved in the making of war’ (ibid, 19).

\textsuperscript{200} Schwöbel-Patel (n 197). On the topic of “spectacularization” and “victimization” in international criminal law see Clarke (n 109) 42; and Christine Schwöbel-Patel, ‘Spectacle in
violence’, ‘colonial subject formation’, and economic exploitation in Africa are all striking examples that fall all outside the Court’s jurisdiction. To these, we should add persisting postcolonial histories, e.g. the criminal responsibility of Western states, corporations, as well as donors and aid agencies, even in those episodes of violent atrocity that the ICC is willing to investigate. Hence, in line with the existing international institutions, the Rome Statute mandates intervention in the outskirts of the world, thus having ‘the incidental effect of seeming to legitimate the social evil that it does not condemn’; and, perhaps more than any other institution, as Antonio Franceschet has already bitterly noted, the ICC has been tacitly given the task of managing the effects of inequality in international society. In short, while most of the attention is placed on the Court’s daily prosecutorial choices, both their implementation and, most fundamentally, the idea of justice itself set forth in the Rome Statute are even more inescapably bound up with a fact which is as fundamental as it is overlooked: the more we insist on the technical character of international criminal law, the more we look away from its role in ratifying ‘the hegemony of that on whose shoulders justice sits’.

4.4.2 A New Course in the ICC’s Prosecutorial Strategy?

More “Willing” but Not Any More “Able”

Several observers have pointed to a reorientation of the Court’s prosecutorial policies since the current Prosecutor, Fatou Bensouda, took office in mid-2012. The preceding term of Luis Moreno Ocampo has been poignantly summarized by Hans Koechler in terms of a ‘sharp discrepancy between

201 Branch (n 200).
202 Clarke (n 109) 19.
203 Branch (n 200).
206 Koskenniemi (n 200) 210.
hesitation, even inaction, on the one hand and decisive, bold prosecutorial initiatives on the other – depending on the political circumstances’.207 Leading to the opening of 19 cases – all against Africans – and only a single verdict for a mid-level warlord at the end of his term (Lubanga), Ocampo’s prosecutorial policies were geared towards the questionable twofold objective of showcasing the ICC’s “industriousness” while at the same time appeasing the diffidence of powerful states.208

Bensouda seems to be heading towards a different path in several respects. Her approach is more understated and careful,209 as attested by the limited number of cases (i.e. seven) opened up to the time of writing (that is, less than three years from the end of her mandate). One of these cases led to the conviction of Ahmad Al-Faqi Al-Mahdi, sentenced to nine-years imprisonment for intentionally directing attacks against historic monuments and religious buildings. Three other cases concern offences against the administration of justice in the Kenyan and CAR situation, one of which led to a guilty verdict for Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu, and Narcisse Arido. Two other cases in the Libyan situation involve, respectively, Al-Tuhamy Mohamed Khaled, a former official in the Gaddafi regime, and the already mentioned Al-Werfalli. Both suspects remain at large. Finally, on 31 March 2018 the Malian authorities surrendered Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud to the ICC, a Malian member of Ansar Eddine and the de facto chief of the Islamic police, whose arrest warrant had been issued by the PTC only a few days before.

Part of Bensouda’s mandate has, hence, been ‘to clean the slate after a number of bungled investigations and prosecutions’,210 while making the ICC’s Office of the Prosecutor ‘increasingly strategic and opportunistic in its decision-making’.211 For instance, let us consider that when the OTP sought

207 Koechler (n 1).
210 Ibid.
211 Ibid.
Al-Mahdi’s arrest, he had already spent one year in a prison in Niger and pledged to cooperate with legal proceedings. Not to mention that the Prosecutor could even count on video evidence showing Al-Mahdi committing the acts he was accused of. To be sure, all of this made the case particularly expeditious. On the other hand, Al Mahdi is also suspected to have committed other crimes under the jurisdiction of the Court (murder, rape, and torture); but he was not prosecuted for them – perhaps, we can speculate, because the OTP could not find sufficient evidence to make this case, or because abstaining from pursuing such a case was part of the plea bargain.

In the Al Hassan case, the Malian authorities surrendered the suspect to the Court exceptionally swiftly - only few days after the issuance of his arrest warrant. Finally, turning to the Al-Werfalli case in the Libyan situation, whereas the suspect is currently still at large, the top tier of the Libyan National Army at least paid lip service to the ICC indictment of the commander.

However, there are more nuances to Bensouda’s “new course”. The pursuit of (the bulk of) cases that can be adjudicated efficiently has coexisted with the opening of a number of investigations (to be sure, especially preliminary examinations) that, while running counter to the interests of both powerful and less powerful states, may help the ICC ‘regain the active support of the thousands of civil society groups that supported its establishment’.

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212 Ibid.
214 Ibid.
215 See ibid, 604, where de Hoon has concluded that ‘the legal process inevitably distorts the wider context of what has occurred by reducing facts and circumstances down to the particular events that make up the particular criminal charge of the particular individual that is in the dock’.
216 See Kersten (n 210).
April 2014, the OTP opened *proprio motu* a preliminary examination into the situation in Ukraine, which, if turned into a formal investigation, may implicate alleged crimes of Russian forces. The following month, upon receipt of new information, the Office re-opened the preliminary examination of the situation in Iraq, including allegations of war crimes by British troops, initially terminated on 9 February 2006. At the beginning of 2015, the OTP made public its preliminary examination into alleged crimes committed by Israeli and Palestinian forces in the occupied Palestinian territory. One year later, the Prosecutor launched the Court’s the first full-blown investigation outside of the African continent - in Georgia - which also marked the first time that the ICC is dealing with international crimes.218 Before that, the Court had not dealt with the international aspects of internal conflicts it has investigated, such as in the DRC and Libya.219 On 25 October 2017, the Pre-Trial Chamber authorized the Prosecutor to open a *proprio motu* investigation in Burundi for alleged crimes against humanity committed by the government and affiliated groups. While Burundi is not a major power, the opening of such an investigation is at odds with the OTP’s disinclination to target state actors. Indeed, it resulted in Burundi withdrawing from the Rome Statute, the only state to ever leave the Court. But it was less than one month later, on 20 November 2017, that the OTP took a momentous - if long overdue - decision.220 After a decade-long preliminary examination, Bensouda put an end to the era of warming relations between the Court and US authorities221 by requesting judicial authorization to commence an investigation into alleged crimes committed on the territory of Afghanistan since 3 May 2003, and other

dependence undercuts the ICC’s flexibility to manage the conflicting interests of its different constituencies’ (ibid, 277).


219 Ibid.


alleged crimes linked to the armed conflict in Afghanistan and committed on the territory of other states parties since 1 July 2002. Following Bensouda’s move, the ICC may become the first international organization to put the alleged war crimes of senior American officials under judicial scrutiny.222 The OTP’s new course against state actors did not end here. At the beginning of the following year, in February 2018, the OTP announced the opening of two preliminary examinations in the situations of the Philippines and Venezuela, two state parties to the Rome Statute, both targeting alleged crimes of government forces. Only two months later, vis-à-vis the UNSC’s failure to refer Myanmar to the Court, in an unprecedented bid, Bensouda asked the Court’s judges to rule on whether the ICC could exercise jurisdiction over the alleged deportation of the Rohingya people from Myanmar, a non-party state, to Bangladesh, which is a state party. This is one of the well-documented crimes attributed to Myanmar’s armed forces against the Rohingya. Upon confirmation by PTC I, on 18 September 2018, the OTP announced the opening of a preliminary examination of the situation. In addition to all of this, the Prosecutor has repeatedly launched appeals to state parties to increase the budget allocated to the OTP and thus enable it to catch up with the ‘delay in investigating both sides’, such as in Côte d’Ivoire, for instance.223

Many commentators have welcomed these OTP’s moves as a good way to react to the ICC’s legitimacy crisis and, notably, to rebut the critique of a court focusing only on weak (African) countries.224 What is perhaps underestimated is that these moves were largely inevitable.225 In Georgia, the OTP delayed making a decision for seven years. In Afghanistan, it waited for 10 years. But, in both cases, it could not continue delaying forever.226 Some of the victims may have died and some of the potential witnesses may be very elderly people; not to mention that such a delayed intervention is likely to have

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223 See OTP (n 124) para. 145.
224 See O’Donohue (n 218).
226 Ibid.
undermined the trust of the affected communities in the process.\textsuperscript{227} In the case of Burundi, in contrast, delay was not an option.\textsuperscript{228} The Rome Statute in fact sets a one-year deadline, providing that the withdrawing state continues to have a legal obligation to cooperate with any investigation opened before the effective date of withdrawal, that is, one year after the notification of withdrawal (Article 127).\textsuperscript{229} Another example is the public opening of the preliminary examination into the Palestinian situation. The latter followed Palestine’s accession to the Rome Statute and its lodging of an Article 12(3) declaration accepting the Court’s jurisdiction, which in turn had been made possible by the earlier upgrade of Palestine to “non-member state” observer status at the UN.

There are also other reasons to be less enthusiastic about what these investigations will mean for the ICC.\textsuperscript{230} In particular, even if there may be legitimacy gains, these may be short-lived.\textsuperscript{231} Above all, it should be recalled that the investigations in Georgia, Burundi, and Afghanistan were or will be opened on the Prosecutor’s own authority. In other words, since no state party has asked for an investigation, there are reasons to doubt that the countries involved will be cooperative. This means that, even if – at the very best – the Court manages to gather enough evidence, the prospects for arrests are dim.\textsuperscript{232}

For example, while the Georgian government has so far largely cooperated with the Court, things might change if there is an arrest warrant against a Georgian, ‘depending on whether it is against a member of the military, the previous government or the current government’.\textsuperscript{233} Far from promising is Russia’s withdrawal of signature from the Rome Statute (following the OTP’s allegations of crimes committed by Russian forces on Ukrainian territory).\textsuperscript{234}

\textsuperscript{227} Maupas (n 219).
\textsuperscript{228} Whiting (n 226).
\textsuperscript{229} Ibid.
\textsuperscript{230} Pomper (n 222).
\textsuperscript{231} Ibid.
\textsuperscript{233} Maupas (n 219).
which certainly does not bode well in terms of cooperation by Russian authorities (involved in both the Georgian situation and in the Ukrainian preliminary examination). By the same token, turning to Burundi, cooperation is the last thing we may reasonably expect from the government that pulled out of the Court right after the opening of a preliminary examination into the country. Nor can we reasonably expect self-incriminating cooperation from the government of the United States, as resoundingly emphasized by US national security adviser John Bolton during a virulent attack on the Court in September 2018. It is also doubtful whether the ICC will have ‘the political juice’ to persuade its most staunch supporters in Europe to cooperate with the Court while incurring the wrath of the current US government. Hence, the question arises of what would be left of the Court’s standing if European countries break in favour of the US. Add to this that Taliban crimes constitute most of the crimes that fall under ICC jurisdiction. In this respect, it bears recalling that the 2017 Report on Preliminary Examinations excludes that there exists a reasonable basis to believe that civilian deaths resulting from the military operations of international forces amount to war crimes. All these things considered, there is, as Mark Kersten has concluded, nearly ‘every chance that the Court’s investigation into Afghanistan will never result in a successful ICC prosecution of a US official’.

By the same token, the prospect of lack of cooperation is also likely to daunt the Prosecutor in the context of other preliminary examinations implicating government forces. To put it differently, there is the risk that several of them will be added to the list of “extended” preliminary
examinations. Palestine is a case in point. The Prosecutor, in fact, will have to settle several daunting legal questions before opening a formal investigation. In an attempt to speed up the clock, on 22 May 2018 the Palestinian Authority referred the situation of Palestine to the ICC. The referral came after more than 100 Palestinians were killed and 10,000 injured by Israeli troops during six weeks of protests along the border between the Gaza Strip and Israel. However, although a state referral makes it much harder for the OTP to protract the preliminary examination phase for years, it is unlikely that Bensouda will rush into the opening of a formal investigation. Rodrigo Duterte, Philippines’ President, has announced that he will seek to withdraw the country from the Rome Statute. Myanmar has also promptly stated its firm opposition to the Court’s preliminary examination. Even the UK authorities, while boasting one of the strongest legal systems in the world, have never shown any genuine attempt to prosecute high-ranking military commanders and senior officials who ordered and/or were complicit in the commission of war crimes in Iraq. Their willingness to do so appears even more remote now that the Iraq Historical Allegations Team (IHAT) has been permanently shut down by the government. Hence, the extent to which the latter will meet its commitments under the Rome Statute in the case of a fully-fledged investigation remains unclear. A nuanced position has been apparently taken by Venezuelan authorities, who have been under ICC attention for crimes allegedly committed in the context of demonstrations and related political unrest in country since, at least, April 2017. While rejecting


244 Despite the resources poured by the government into IHAT, about £60 million, there have been multiple investigations (including criminal ones) but not a single prosecution of UK armed forces personnel. Now that IHAT has been closed (since 30 June 2017), the few investigations that remain open will be transferred to a less independent process – reportedly, the Airforce police will be leading the investigations, overseen by the Provost Marshal of the [Royal Air Force]. This, director of Redress Carla Ferstman has continued, ‘ignores the appellate ruling in respect of IHAT which required that the investigators be hierarchically, institutionally and practically independent from those they were investigating’. See Carla Ferstman, ‘Why the ICC must investigate UK crimes in Iraq’, Coalition for the International Criminal Court, available at http://www.coalitionfortheicc.org/news/20170719/opinion-why-icc-must-investigate-uk-crimes-iraq (last visited 30 September 2018).
the opening of the preliminary examination, the government has reiterated its commitment to the Rome Statute. It has also guaranteed its cooperation with the Court in order to achieve a swift closure of the inquiry.245

To conclude, many ICC supporters had expected that the Court’s problems would greatly improve once the new Prosecutor took the reins.246 However, we should still ask to what degree even the most upright prosecutor can do away with the more structural weaknesses of the Court.247 While the Court has reached an unprecedented involvement in situations where it may take on the interests of “unwilling” states,248 major powers included, the question we cannot exclude is whether the Court has become any more “able”, let alone vis-à-vis the current wave of sovereignism. To date, the ICC has reached four convictions249 and two acquittals (see Table 2).250 Fifteen suspects remain at large, including all state actors and protégés with a pending ICC warrant of arrest, i.e. 8/15 as shown in Table 6. Considering that the ICC has already underperformed by comparison with the other existing institutions - notably as far as its ability to discharge its mandate against “unwilling” states is concerned - the more likely outcome is that we will see years of investigations while the Court’s docket will undergo a ‘considerable shrinkage’.251 On the other hand, the international criminal law project is full of stories of unexpected twists.252 For example, as has already happened in a few instances, ICC’s suspects may always surrender themselves to

246 Branch (n 200).
247 Koechler (n 139).
249 The Prosecutor v. Thomas Lubanga Dyilo (DRC); The Prosecutor v. Germain Katanga (DRC); The Prosecutor v. Ahmad Al-Faqi Al-Mahdi (Mali); The Prosecutor v. Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido (CAR).
250 The Prosecutor v. Mathieu Ngudjolo Chui (DRC); The Prosecutor v. Jean-Pierre Bemba Gombo (CAR).
251 William A. Schabas, ‘International Criminal Courts’ in Cesare P. R. Romano, Karen J. Alter and Yuval Shany (eds) The Oxford handbook of international adjudication (Oxford: Oxford University Press, 2014) 2015, 223. There are three cases in trial at the moment – Gbagbo and Blé Goudé (Côte d’Ivoire), Ongwen (Uganda), and Ntaganda (DRC), which has entered its final phase. In addition to this, the confirmation of charges hearing in the Al-Hassan case (Mali) is scheduled for Spring 2019. The OTP has also recently made public arrest warrants against two Libyan suspects, who are currently at large. Finally, there may also be warrants under seal.
252 Whiting (n 226).
the Court.\textsuperscript{253} International criminal justice is also known for alternating periods of quiescence and intense activity.\textsuperscript{254} What is more, challenging times may actually yield creative efforts to fill the gaps or, at minimum, keep the project alive.\textsuperscript{255} And yet, there is always the risk that states will seize on the hurdles that may lie ahead of the Court to justify their retreat from the institution.\textsuperscript{256} They may push towards further cuts to the Court’s budget.\textsuperscript{257} Or, if the ICC takes on big powers and fails, some states may even definitely pull out from a jurisdiction that major powers continue to eschew.\textsuperscript{258} Summing up, the near future awaiting the Court will be an important test of the limits of international adjudication,\textsuperscript{259} especially considering that the very investigations expected to restore the ICC legitimacy may, instead, end up exposing and exacerbating its weaknesses.\textsuperscript{260}

\section*{4.5 Conclusions: A Full-Blown Short-Circuit}

This chapter has shown that most of the situations before the ICC are situations enjoying some sort of “sovereign backing”, namely in which either the UNSC or a state has expressly endorsed the Court’s intervention through a referral (or, in the case of Côte d’Ivoire, through an Article 12(3) declaration). The view that the OTP has articulated a preference for opening fully-fledged investigations in “sovereign-backed” situations is also supported by the fact that, while almost all the preliminary examinations initiated by referral (70\%) have been converted into investigations, this percentage drops to only 25\% in the context of Prosecutor’s \textit{proprio motu} preliminary examinations. What is more, the average duration of the latter is as longs as around five years. This is in stark contrast with an average duration of approximately a year for referred situations, which again drops to an average of less than two months for UNSC referrals. Furthermore, 70\% of the individuals indicted by the Court were

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{253} Ibid.
\item \textsuperscript{254} Ibid.
\item \textsuperscript{255} Kersten (n 223).
\item \textsuperscript{256} Whiting (n 226).
\item \textsuperscript{257} Ibid.
\item \textsuperscript{258} Ibid.
\item \textsuperscript{259} Kersten (n 223).
\item \textsuperscript{260} Whiting (n 226).
\end{itemize}
\end{footnotesize}
affiliated to rebel/opposition forces at the time of the issuance of the ICC arrest warrants or shortly thereafter, this percentage rising to 100% if we look at self-referrals only. Add to this that the few state actors and protégés that have been publicly indicted by the ICC are all from - three - African countries: Sudan, Kenya, and Libya. It also bears recalling that, while the Kenyan situation enjoyed the non-opposition of major powers, it was the only opened proprio motu by the Prosecutor. The Court’s interventions in Sudan and Libya, instead, were expressly endorsed by the UNSC through its referrals. Indeed, they could take place only at the ultimate price of major states having their military personnel, political elite, and allies shielded from ICC jurisdiction. Finally, there is even a more striking fact than the already markedly different proportion of rebel/opposition forces on the one hand, and state actors and protégés on the other. To date, all the efforts of the ICC to prosecute the latter have failed - eight remain fugitives, four have had their charges withdrawn/vacated, and two were not confirmed (see Table 6). This means that all the individuals who are or have been in the Court’s custody are associated with African rebel/opposition forces.

Some may argue that, by “rendering services” to (African) states “in need”, that is, (supposedly) “unable” to prosecute crimes of rebel/opposition forces, the ICC is still playing a full part in the project of “civilising” sovereignty. To be sure, a tendency to more easily bypass a traditional focus on the state (than public international law generally or international human rights law) is already inscribed at the heart of international criminal law. This, in fact, is committed to a (decontextualizing) model of individual responsibility that makes all individuals equally worthy of the attention of international criminal law. Nevertheless, the fact that all the suspects who are or have been in the Court’s custody are associated with non-state actors should no longer be overlooked, especially considering that states - with their organs, such as army, police, paramilitary groups, bureaucracy, etc. – are particularly well-equipped to perpetrate the crimes under the Court’s

262 Mégret (n 135) 180.
jurisdiction. Indeed, albeit states are certainly not the only actors capable of international crimes, ironically, the issue of non-state actors’ criminal responsibility was actually far from the minds of the architects of the Rome Statute. Nor should we downplay that the individuals who are or have been in the Court’s custody are all from African countries.

Importantly, if we are genuinely interested in gleaning a sense of the Court’s prospects, we cannot merely translate ‘the gap between the ICC’s current - partial - practice and impartial justice’ into ‘a temporal gap between the imperfect present and perfect future’, no matter how tempting it may be to envision (international criminal) law as able to eschew politics and its arbitrariness. What we need, instead, is a deeper anchoring into the political conditions that made it possible for the ICC to be established and that, as a result, frame its daily operation. The process of delegating legal authority to the Court is, in fact, an intensely political one, which while situating the ICC closer to the mechanisms of political diplomacy also reinforces existing interests and power relations by giving them the “force of law”. As illustrated at length, such a process unfolds through the selection of a particular institutional design, besides certain definitions of what is “justice”, “legal” and “illegal” in the first place; through the translation of prosecutorial selection and prioritization choices into judicial process; and, ultimately, through the consolidation of certain narratives and actors at the expense of others. In particular, the present study has shown that while reflecting the persistence of the state as the primary site of political authority

264 Branch (n 200).
265 Ibid.
266 See de Hoon (n 214) 594.
268 See de Hoon (n 214) 610.
269 See de Hoon (n 214) 610.
270 See ibid, 614. See also Michael Zürn’s concept of “legal stratification”, in Michael Zürn, ‘Institutionalized Inequality. The Current World Order is Neither Imperial nor Constitutional but a Hybrid of Legal Stratification’ (2007) (39)2 Internationale Politik 260.
and coercion, the overarching system of the Rome Statute also cuts against the
normative aspirations of sovereignty as responsibility - by leaving the Court
ill-equipped to break precisely with a notorious pattern of hyper-protected
sovereignty. This also means that the ICC selectivity debate should be
reframed from a focus on the adverse influence of major powers and the UNSC
- still overwhelmingly dominant today\textsuperscript{271} - to the terms of a full-blown short-
circuit: between the Court’s ambition to hold power to account on the one
hand, and the institution’s enmeshment with the very same power it is meant
to constrain, on the other. In other words, the current tribunalization of a
highly selective range of violence, and the sanctioning of an even more
restricted selection, should be expressly related to the Court’s subjection to the
existing distribution of political power both within and among states. Such a
perspective, finally, also has the merit of unequivocally dismissing the delusion that
international society has transformed into an international legal order where the
factual conditions of power politics are sublimated into ‘serene legal puzzle-solving’\textsuperscript{272}
Indeed, the Court’s severe selectivities – in its normative and institutional
conceptualizations as well as operational practice\textsuperscript{273} - strike a hard blow to the liberal
ambition of containing inequality through the ‘equalising remit of international

\textsuperscript{271} Michael Contarino, Melinda Negron-Gonzales and Kevin T. Mason, ‘The International
Criminal Court and Consolidation of the Responsibility to Protect as an International Norm’
(2012) \textit{4 Global Responsibility to Protect} 275; Gareth Evans, ‘R2P: The Next Ten Years’ in
Alex Bellamy and Tim Dunne (eds) \textit{The Oxford Handbook of the Responsibility to Protect}
(Oxford University Press, 2016) 913, 923; Aidan Hehir and Anthony Lang, ‘The Impact of the
Security Council on the Efficacy of the International Criminal Court and the Responsibility to
Protect’ (2015) 26(1) \textit{Criminal Law Forum} 153, 155; Selena Lucent and Michael Contarino,
‘Stopping the Killing: The International Criminal Court and Juridical Determination of the
Responsibility to Protect’ (2009) \textit{1 Global Responsibility to Protect} 560, 576; Jeremy Moses,
\textit{Sovereignty and Responsibility: Power, Norms and Intervention in International Relations}
(Houndmills: Palgrave Macmillan, 2014); Jason G. Ralph, ‘The International Criminal Court’,
in Alex Bellamy and Tim Dunne (eds) \textit{The Oxford Handbook on the Responsibility to Protect}
(Oxford: Oxford University Press, 2016) 638, 643-650; Philipp Rotmann, Gerrit Kurtz and
Sarah Brockmeier, ‘Major powers and the contested evolution of a responsibility to protect’
(2014) \textit{14(4) Conflict, Security & Development} 355, 359; Ramesh Thakur and Vesselin
Popovski, ‘The Responsibility to Protect and Prosecute: The Parallel Erosion of Sovereignty
and Impunity’, in Giuliana Ziccardi Capaldo (ed) \textit{The Global Community Yearbook of
39, 59; Vinjamuri (n 217) 277.

\textsuperscript{272} Frédéric Mégret, ‘Three Dangers for the International Criminal Court: A Critical Look at a
Consensual Project’ (2001) \textit{12 Finnish Yearbook of International Law} 195, 210. See also
Nouwen (n 209) 154.

\textsuperscript{273} John Reynolds and Sujith Xavier, ’The Dark Corners of the World’ (2016) \textit{14(4) Journal
of International Criminal Justice} 959.
law and normative structures applicable to all’.274 A way forward can be to take this reality as the starting point for a more honest assessment of the prospects of both the ICC and sovereignty as responsibility, to which the following and conclusive chapter is, hence, dedicated.

274 Jabri (120) 111.
Chapter 5 – Conclusions. Irresponsible Sovereignty: A Dead-End?

‘Rights claims performatively reinforce the sovereignty which they purport to limit, contest, or displace.’

Ben Golder1

5.1 In Defence of a Greater Supranationalism?

The previous chapters have resorted to a post-positivist qualification of the conventional constructivist account of norm development in an effort to challenge the dominant narrative about the ongoing recharacterization of sovereignty as responsibility. More to the point, they have drawn attention to the reconstitution of norms as part of institutional practice in order to question the popular view that situates the ICC at the cutting edge of normative change. Covering the overall system established by the Rome Statute, the resulting analysis has painted a complex architecture that, while restating the prominence of the state as the primary site of political authority and coercion, remains deeply colluded with a “traditional” pattern of irresponsible sovereignty both in its institutional design and functioning. Hence, Chapters 3 and 4 have proposed a reconsideration of the scope of the ICC’s authority and power. On the one hand, a coalition of small and medium powers, in open defiance of UNSC’s domination of international criminal justice, successfully campaigned for a court with a formally independent prosecutor; that is, formally independent from political direction when opening investigations and building cases.2 What is more, the OTP’s formal independence is complemented by the final and legally-binding nature of the Court’s decisions.

In other words, in a dispute over jurisdiction between the territorial state and the Court, the latter has authority to override the territorial state’s claims and seize jurisdiction. Furthermore, external states may pressure resistant states to comply with the Court’s decision, and even act as surrogate enforcers against their consent. At the same time, though, Chapters 3 and 4 have been unequivocal in framing the Court’s supranational authority within a largely unchanged structure of international law. States, in fact, firmly remain the pillars upon which the Court’s reach, resources, and effectiveness are fundamentally built, although their self-interested agendas are still often at odds with international accountability. In particular, even when national authorities have been declared unwilling or unable to deal with certain crimes, no higher authority has been delegated the power to force state compliance. To put it differently, the Rome Statute is no exception to the “rule” that, albeit courts are commonly said to “enforce the law”, it is always states, with a monopoly on the legitimate use of force, that do so. Once recast in this light, the Court’s stark failure to establish accountability for representatives of state power appears largely predictable. Moreover, such failure corroborates the thesis, anticipated in Chapter 2, that separating authority from power is often highly idealized and ineffectual even in the context of a judicial institution.

Some readers may now be prone to conclude that the solution to the ICC’s apparently inextricable conundrum is, at least in theory, within easy reach. In other words, they may join the already broad chorus of observers urging that the gap between international law and enforcement finally be filled. Even a critical international scholar such as David Kennedy has openly

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3 Rodman ibid. 440.
embraced a disenchanted, ‘muscular pragmatism’, by invoking the reconciliation of the human rights movement with its own ‘decisionistic responsibility’ and ‘governmental power’. That is to say, moving from the idea that human rights are a key modality of global governance, only masqueraded as an anti-politics, Kennedy has concluded that human rights institutions need to pragmatically come out of the shadows and become able to exercise their ‘will to power’. However, while subscribing to the political nature of human rights in full, and actually while building exactly on the latter, the analysis below departs from the more straightforward conclusions reached by Kennedy and others. Instead, it offers a problematization of questions about the feasibility and desirability of a greater transfer of authority and coercive capabilities to the supranational level. The chapter ends with a critical reconsideration of the idea of sovereignty as responsibility, as well as a broader discussion about cosmopolitan governance.

5.2 The Role of Coercion in International Law: Another Round-Up

Reflection about the feasibility and desirability of a greater supranational transfer of authority and coercive capabilities starts from the old, and yet still burning question about the role of coercion in international law. A wide array of prominent scholars has suggested that international law is ‘inherently a non-coercive kind of law, or is moving towards such a state of affairs’. It has been argued that ‘the character of a rule as law is not determined by its enforcement, but rather because of compliance by the majority of the society

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8 Ibid, 105.
9 Ibid.
10 Ibid, 83.
11 Ibid, 86.
in which the law applies’, 14 and that a narrow view of law as requiring enforcement by a coercive sovereign should be finally discarded.15 This view is largely indebted to H.L.A Hart’s seminal intuitions. According to Hart, the classical idea of law as a set of commands from a coercive sovereign16 offers a reductive picture that conflates one form of power with the richer phenomenon that, at a closer look, is the law.17 In particular, an exclusive focus on law in its duty-imposing or vertical mode neglects two major features of law. Firstly, it misses the normative aspects of law that exist independent of the imposition of coercion.18 Law, in other words, seeks to establish a framework of norms for how people “ought” to behave,19 and as such it can be distinguished from orders backed by force.20 Secondly, the classical understanding overlooks a variety of law which is actually extensively present in all advanced legal systems: power-conferring legal rules.21 These rules are not concerned with establishing duties or prohibiting actions.22 Rather, they enable individuals to arrange their lives by creating or varying legal relations.

14 Edwin Egede and Peter Sutch, The Politics of International Law and International Justice (Edinburgh, Great Britain: Edinburgh University Press, 2013), 116. See also Abram Chayes and Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (Cambridge, Mass.: Harvard University Press, 1995). According to the authors, maximising compliance with international law is a task more of management than of enforcement, ensuring that all parties know what is expected of them, have the capacity to comply, and receive the needed assistance. Seen from this perspective, efforts to improve compliance by adding sanctions appear to be a ‘waste of time’ (ibid, 2). In a similar vein, see Sandra Raponi, ‘Is Coercion Necessary for Law? The Role of Coercion in International and Domestic Law’ (2015) 8, 1 Washington University Jurisprudence Review 35. Raponi has argued that several elements are more important for a viable global system of law than a strong supranational system of coercive enforcement. In particular, states, international bodies, officials, and other agents must regard international legal rules as generally binding on them, and the rules of international law must be determined and applied impartially (ibid, 58).
18 Yankah, ibid, 1214.
19 Ibid, 1196.
20 Ibid, 1208.
21 Schauer (n 17) 3.
22 Ibid.
Think of the law of contracts and wills, or the conferring of public power on judicial, legislative, and administrative bodies.\textsuperscript{23} It should also be noted that these “permissive” norms are not directly backed by sanctions, though failing to meet adopted obligations may result in sanctions.\textsuperscript{24} And, yet, they thrive independently from coercion, thus pointing to the effectiveness of means other than coercion (e.g. communication, persuasion, give-and-take, welfarism, etc.)\textsuperscript{25} to ensure compliance. In sum, according to Hart, a focus on coercion is distorting, because it ignores the normative, empowering, non-hierarchical, and ultimately non-coercive nature of much of law as it actually exists.\textsuperscript{26}

In line with Hart’s view, Jürgen Habermas has regarded European law as the most advanced example of the ongoing the shift in the balance between, on the one hand, the enforceability of the law, and the recognition of its legitimacy, on the other hand.\textsuperscript{27} He has noted that:

supranational law, insofar as it is not rejected by national constitutional courts in eligible exceptional cases, enjoys priority over the national law of the member states, even though the latter continue to exercise a monopoly over the means of the legitimate use of force.\textsuperscript{28}

Karen Alter has reached similar conclusions while expressly focusing on delegation to international courts. According to Alter, sanctioning power would not be the key, because actors tend to follow international courts’ rulings simply because such courts are acknowledged as the authoritative body charged with interpreting the law.\textsuperscript{29} Furthermore, ‘the stronger the enforcement mechanism, the less likely it is to actually be used’.\textsuperscript{30} Alexandra


\textsuperscript{24} Yankah (n 17) 1215.


\textsuperscript{26} Schauer (n 17) 9.

\textsuperscript{27} Jürgen Habermas, ‘Plea for a constitutionalization of international law’ (2014) 40(1) Philosophy & Social Criticism 5, 6.

\textsuperscript{28} Ibid.

\textsuperscript{29} Alter (n 5) 74.

\textsuperscript{30} Ibid. Alter has stressed that international legal systems with sanctioning mechanisms, such as the World Trade Organization (WTO) and the European Court of Justice (ECJ), ‘rarely invoke the sanctioning mechanisms, nor is it clear that the mere possibility of appealing to sanctions systematically increases compliance with legal rulings’ (ibid). The rulings of the International Court of Justice, too, ‘can be backed up by the use of force, but the United
Huneeus has also expressly criticized the concept of compliance itself for being too narrow. She has argued that, no matter which definition you choose, compliance cannot tell us the full extent of a law’s impact, because it excludes other important effects that a law may have. In fact, whereas a state may fail to comply with a particular court ruling, there may be ways in which that ruling nonetheless alters its behaviour, or it may have effects on non-party states and non-state actors.31 Thinking further along this line, Laurence Helfer has emphasized the distinction between compliance and effectiveness, suggesting that international courts’ rulings with low compliance rates may still be quite effective if they generate ‘some modification of state behaviour’.32 Hence, the real effectiveness test would not be compliance, but the counterfactual of what the outcome would have been, absent the court.33

At the other end of the spectrum, several other observers have recently revived calls for the building of coercive international institutions. According to Carmen Pavel:

a small number of strong, well-circumscribed international institutions, which can evolve independently to provide minimal policing, protection and criminal responsibility functions, may be sufficient to prevent some of the most severe violations.34

Similarly, Anne Peters and Aidan Hehir and Anthony Lang have suggested that it is time to fill in the ‘missing link’35 between international law and

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enforcement.\textsuperscript{36} In Heather Roff’s view, the ‘lack of coercive power is the largest and most problematic factor for international right’.\textsuperscript{37} Similar positions have also been echoed within the ICC debate. It has been argued that where a state has been deemed “unwilling”, ‘the Court could be placed in the paradoxical situation of having to depend upon the same institutional and procedural weaknesses’\textsuperscript{38} deemed incapable of supporting domestic proceedings in the first place. While a non-compliance referral to the ASP or UNSC is likely to be the Court’s only available recourse, the ICC should be able to ‘rely on the effectiveness of the collective international response to cajole or coerce compliance’.\textsuperscript{39} In other words, the only way the ICC can be effective vis-à-vis non-compliant states ‘is by persuading powerful third parties to act as surrogate enforcers’,\textsuperscript{40} on the model of the cooperation between the ICTY and NATO forces in the former Yugoslavia.\textsuperscript{41} Furthermore, it is all the more necessary, as has been stressed, when the perpetrators are still in power,\textsuperscript{42} which is often the case in the ICC’s interventions. Against this backdrop, the R2P doctrine has been expressly pinpointed as the ‘conceptual framework to contextualise the obligations incumbent on States to fulfil the goals of the Rome Statute’.\textsuperscript{43} As Rod Rastan has put it, unless the Rome Statute is viewed

\begin{thebibliography}{99}
\bibitem{roff} Heather M. Roff \textit{Global Justice, Kant and the Responsibility to Protect: A Provisional Duty} (Abingdon, Oxon: Routledge, 2013) 106.
\bibitem{rastan2} Ibid. With regards to the failure of states and the UNSC to cooperate in the Darfur situation, Bensouda, has similarly argued that ‘[c]oncerted and uniform efforts should be made to discuss the Court’s referrals of State Party non-compliance to the Council with the aim of exploring the options available to compel the States concerned to comply with their statutory obligations’. See OTP, ‘Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)’, 12 December 2017, para 31, available at https://www.icc-cpi.int/Pages/item.aspx?name=180620-otp-stat (last visited 30 September 2018).
\bibitem{rastan3} Rodman (n 2) 455.
\bibitem{rastan4} Ibid.
\bibitem{rastan5} Ibid, 442-443.
\end{thebibliography}
as a system in which the international community assumes “responsibilities”, should an individual state fail in its duties to cooperate with the Court then ‘the enforcement pillar simply will not hold’. This view has also been upheld by more than 1/3 of the respondents to the semi-structured interviews undertaken for the purpose of this study (see Annex II, code 11: “lack of state cooperation”).

It bears clarifying, though, that invoking the establishment of coercive institutions is not the same as regarding coercion as offering an exhaustive account of the nature of law. Indeed, the idea that coercion by itself does not explain the law is conventional wisdom even among staunch advocates of coercive international institutions. Yet, one may still argue that dismissing coercion too quickly leaves something important amiss.

Derrida has offered a poignant line of thought to the debate. He has argued that there are laws that are not enforced, but there is no law without “enforceability”. According to the philosopher, enforceability is not an exterior to law and, indeed, there is no such thing as law that doesn’t imply in itself, a priori, in the analytic structure of its concept, the possibility of being enforced. So, for example, in a state where no kidnapping has occurred, ‘it is nevertheless true that if someone commits this crime - or even contemplates committing it - the potential for enforcement is ever-present’.

Similar premises may lie behind the claim that between an authoritative normative system that is obeyed without coercion (meaning voluntarily - think, e.g., of religion and morality) and one that can be coercively enforced, the latter intuitively matches our idea of law.

As explained here below, this argument proves compelling especially when narrowed down to criminal law. On the one hand, in fact, the “force” implied in the Derridean concept of “enforceability” does not necessarily need
to be coercive, but may also be indirect, symbolic, interior, discursive, etc. Yet, on the other hand, it is hard to imagine how criminal law could retain its duty-imposing nature in the absence of a vertical coercive system in which a superior gives orders to an inferior and threatens sanctions for non-compliance. To put it differently, it is true that the multiple dimensions of law cannot be forced into a single coercive model; but the coercive model is the only one fit for criminal law. Hart was aware of that; and, on that basis, he has also expressed his own reservations about the cost-efficiency of the criminal justice system. In a similar fashion, Philip Allott, has defined criminal law as ‘the most primitive, the least efficient, and the most morally dubious of systems for socialising human beings’. This is especially true in view of criminal law’s decontextualizing tendencies. Such tendencies are already evident in contemporary forms of “penal populism” at the domestic level, the latter being utterly neglectful of the inherent connection between criminal security and social security. But, according to Allott, they are extreme when transposed at the international level:

[the international rule of law will follow, but cannot precede, the coming-to-consciousness of the idea of human sociality, the species-consciousness of the human species.]

The considerations laid out about the duty-imposing nature of criminal law have major implications for the future of the ICC. In fact, it seems plausible to argue that unless a greater turn towards a more accomplished vertical system takes place, the ability of the Rome Statute to live up to its most basic goal – to investigate and, where warranted, try individuals charged with the “gravest”

50 Derrida (n 47), 925-926.
54 Allott (n 52).
crimes of concern to the international community\textsuperscript{55} - will remain seriously impaired; that is, limited to individuals designated by governments for ICC prosecution. This also means that, when repeated across a number of situations, the defiance of the Court’s authority by governments will make the crisis of the latter irremediable.\textsuperscript{56} In sum, the view of international prosecutions as a stark alternative to forcible kinds of intervention needs to be reviewed.

At the same time, though, my point is that it is precisely the acknowledgment above that – if taken seriously – leaves no margin for the kind of a(anti-)political quick fix underpinned by the “technocratic solutionism” of Pavel, Peters, and Rastan, among others. As Martti Koskenniemi has famously put it, ‘in the real world’\textsuperscript{57} there is no technical, juridical, or other language in which such questions ‘would have “already” been resolved so that the only questions would be limited to those of technical application’.\textsuperscript{58} In line with Koskenniemi’s warnings, the following paragraphs conclude that the prospects of sovereignty as responsibility, as well as the broader discussion about cosmopolitan governance, lie more with the repoliticization of the debate – whose specific terms are laid down below – than a straightforward invocation of greater forms of supranationalism.

### 5.3 Sovereignty as Responsibility: A Re-Politicized Perspective

The creators of sovereignty as responsibility have expressly designed the concept as ‘inherently anti-political’.\textsuperscript{59} By insisting on humanitarian ethics, they have sought to decouple the issue of transfer of functional capacity

\begin{itemize}
  \item Other - even loftier - objectives of the Rome Statute are to help prevent the crimes that fall under ICC jurisdiction from happening again (deterrence), and to contribute to long-term peace and stability in post-conflict societies.
  \item Antonio Franceschet, ‘The International Criminal Court’s Authority Crisis and Kant’s Political Ethics’ (2016) 16(2) International Criminal Law Review 201, 207.
  \item Martti Koskenniemi, ‘What use for sovereignty today’ (2011) 1, 1 Asian Journal of International Law 61, 67.
  \item Ibid.
\end{itemize}
(protection, in the case in point) from questions of shifting constellations of power, let alone sovereignty. The official narrative is, thus, aligned with the ambiguous (to say the very least) consensus of states about supranational institution-building. While this is far from surprising, what appears especially unwarranted is that a large share of the academic debate has remained inattentive to the discontinuities of what is being propounded.

The picture I am painting here is quite different. Questioning the purportedly beneficent nature of emergent normative grids of international relations, I suggest that once questions of delegation of both authority and coercive capabilities are genuinely and fully allowed to resurface, no straightforward solution looms on the horizon. The debate is free to unfold in all its quintessentially political character. More to the point, the trajectory of sovereignty (as responsibility) can unequivocally disclose itself in terms of ongoing struggles to relocate power. What is more, while these processes take place at the level of issues-areas and may lead to messy separations of lines of authority, they nevertheless raise the critical question of how it is possible to relocate power without relocating the permanent possibility of its irresponsible exercise. Importantly, “power” here refers specifically to the modes of power that are constitutive of sovereignty: (i) a claim to supreme authority (or ordering power) bounded by territory and function; and (ii) the power to exercise such a claim in practice, which, in turn, involves both the dimensions of (a) authority and (b) coercion (see Chapter 2). Even a (critical) cosmopolitan such as Heikki Patomäki has come closer to this view, by suggesting that ‘at least some elements of world statehood exist already, involving the possibility of making binding collective decisions and creating

61 See Robert B. J. Walker, ‘Polis, Cosmopolis, Politics’ (2003) 28 Alternatives: Global, Local, Political 267. See also Birgit Peters and Johan Karlsson Schaffer, ‘The Turn to Authority beyond States’ (2013) 4(3) Transnational Legal Theory 315, 318: ‘the temptation to re-describe global governance in terms of authority—with all its ambiguous normative baggage—may also make it more difficult to speak truth to global power’.
new law’;63 Neil Walker has also expressly admonished that we should be more aware of the various sites – e.g. supranational and functional, in addition to subnational – at which sovereignty may be located or shared.64

That being said, it is important to place a caveat on my argument. The claim that the “new” patterns of legal and political authority have much to do with the matrix of sovereignty does not presuppose a unitary account of “power-as-sovereignty”, such as the one that Derrida, for example, has come close to in his late reading of sovereignty. In the latter, the French philosopher has broadened the concept of sovereignty so as to encompass any ‘power or potency that transfers and realizes itself’.65 Accordingly, not only sovereigns would be public officers, nor even those who invest them with sovereign power, but we are all sovereigns, without exception, for all ‘the fundamental axiomatics of responsibility or decision (ethical, juridical, political) are grounded on the sovereignty of the subject, that is, the intentional auto-determination of the conscious self’.66 Before Derrida, while writing about decolonization and “post-colonial regeneration”, Fanon had emphasized the importance of ‘the practice of teaching the people a remembrance of their sovereignty’,67 and even theorized sovereignty as a mode of recalling dignity for oneself.68 Yet, no matter how one may be tempted to regard sovereignty as a category that pertains to life as such, I acknowledge the risks entailed by locating sovereignty virtually everywhere. In particular, I worry about the potential weakening of the conceptual currency of sovereignty to the point of turning it into more of fetish than an effective analytical tool. Instead, I am more sceptical about the warning that conceptually extending the locations of sovereignty has the counter-productive effect of hindering our efforts to think

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68 Ibid, 203.
outside sovereignty itself. In fact, especially in this basic formulation, this admonition detracts from the enormous barriers that inevitably stand in the way of imagining post-sovereign or non-sovereign political subjects. Whether we like it or not, sovereignty is at the heart of modern political imagination. Its matrix is a haunting presence in reflections about (the transformation of) politics. But let me be clear on this point. I am not implying that we should enslave ourselves to the current object-language of sovereignty just because it is the current organizing grid for both constitutional and international politics. This would be no less a mistake, and one with clearly conservative consequences. Instead, what I am arguing, following Neil Walker’s reasoning, is that anyone who is dissatisfied with the adequacy of the possibility of transformation within the framework of sovereignty must ask a formidable set of questions about any alternative. Chiefly, they should ask how it is possible to think beyond the grid of sovereignty in terms which, nonetheless, epistemically and operationally begin with this matrix, and the forms and subjects of authority which it sustains.

Admittedly, several theoretical accounts have already sought to conceive templates of political agency in which sovereignty does not figure prominently, or, more radically, does not figure at all. Among the most outspoken contemporary advocates of this line of thought, Neil MacCormick has suggested that we should think of sovereignty as we think of virginity, that is, ‘something that can be lost by one without another’s gaining it’. In the early 2000s Michael Hardt and Antonio Negri advanced the concept of the “multitude”, which is still a popular idea today within the critique of sovereignty. The multitude, as a form bringing into being a political subject, is

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71 Ibid.
72 Walker (n 60) 17.
73 Ibid.
74 Walker (n 64).
75 Walker (n 60) 18.
a spontaneous and disruptive expression of the popular will (or “constituent power”), operating as such outside of institutionalized politics (or “constituted power”). In 2004, having in mind the concept of “multitude”, Patomäki and Teivo Teivainen described the World Social Forum (inaugurated in Porto Alegre, Brazil, a few years before) as a platform providing global civil society with new forms of agency and politics in the form of collective transformative actions. Calls for ‘a non-sovereign or anti-sovereign politics’ have also been advanced from post-modern philosophers, as well as by post-anarchist political theorists. So, for example, Giorgio Agamben has seen in the figure of the refugee or stateless person both the embodiment of a politically disqualified existence and the harbinger of a new horizon of political existence (while yet remaining vague about the shape of this “coming political community”). Saul Newman has pointed to a “politics of post-anarchism” which, albeit unable to transcend power entirely, ‘can radically modify this field of power through ongoing practices of freedom’. According to Newman, the practices of resistance of e.g. indigenous groups, anti-capitalist networks, environmental activists, anti-war movements, etc. all take place outside the ontological order of state sovereignty (even if, as the authors themselves have acknowledged, all such actors impose demands upon the state). Newman and John Lechte have also put forward the concept of ‘inoperativity’. Contrary to any political project of “emancipation”, which always risks a new founding of violence and is hence a form of sovereignty, inoperativity is, according to the authors, ‘an affirmation of our ever-present humanity, an affirmation of the freedom, equality and justice that we already live’. Finally, it should be noted that these arguments testify to a longer-term

79 Ibid, 19.
80 Ibid.
82 Ibid, 14.
83 Lechte & Newman (n 78) 184.
84 Ibid.
In particular, at the beginning of the 1960s, Hanna Arendt had already reserved the term “sovereignty” for “constituted power”, to which the “constituent power” is no longer recognized as having a claim, thus subsuming sovereignty/“constituted power” into the classical category of “tyranny”. Hence, according to Arendt, ‘if men wish to be free, it is precisely sovereignty they must renounce’,

while restoring the “political-as-public-and non-sovereign-sphere”.

The demands for post-sovereign or non-sovereign political subjects are understandable from a normative point of view, especially if we focus on the always potentially authoritarian face of sovereignty. Indeed, such face of sovereignty serves as a compelling incentive to hold on to those interstices that we may deem “political-as-public-and non-sovereign-sphere”. And yet, desirable though one may find it to “cut the head off the sovereign”, several seemingly anti-sovereign movements do not go beyond sovereignty. For example, the attractive – but equally vague – concept of an anti-sovereign multitude shies away from inevitable questions, such as who decides, or how decisions will be imposed on those who might disagree. Other forms of radical politics are also caught within the logics of sovereignty. Think of successful revolutions. The latter, as anticipated in Chapter 2, amount to a “founding transgression” which negates the entirety of the law in order to institute a new one. Finally, coming back closer to the specific subject of this dissertation, similar considerations also apply to human rights. Rights are often regarded as the expression of universal moral claims that transcend and restrain the political. Nonetheless, once we genuinely leave rhetoric aside, rights loom up as ‘intrinsically partial and political’. According to Foucault, formal regimes of rights are fundamentally implicated in relations of power –

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86 Hannah Arendt, Between Past and Future: Six Exercises in Political Thought (New York: Viking, 1961), 165.
87 Hannah Arendt, The Human Condition (Chicago, University of Chicago Press, 1998[1958]).
88 Chowdhury & Duvall (n 85) 219.
89 Newman (n 81) 95.
90 Lechte & Newman (n 78) 127.
92 Ibid.
‘facilitating, transmitting and naturalizing relations of domination even as, indeed especially as, they claim to emancipate’.93 To be sure, one need not be an expert Foucauldian analyst to see that formal rights are the result of certain political values (i) being granted legal recognition, often through a transgression of – or the placing of a different claim above - the existing law,94 and (ii) being protected by governing authorities.95 As Louiza Odysseos has put it, the juridical act of codifying moral rights into legal entitlements ‘is an exercise in sovereign power and the resulting, legally endowed rights are its “product”’.96

The above considerations have a crucial significance for the theorization of sovereignty and its alternatives. The contemporary discussion is largely dominated by the question whether one is “for” or “against” sovereignty.97 As a result, an inquiry that seeks to understand what sovereignty is has become exceptionally difficult - and for this reason all the more necessary.98 To this end, appreciating sovereignty as the juncture where power and rights meet gets us right to the heart of sovereignty and its fundamental ambivalence. In other words, sovereignty is better understood as an apparatus not only capable of the greatest oppression, but also underlying the enshrinement of rights in positive law, in addition to their enforcement.99

In other words, even when rights are protected, it can only be at the behest of some sort of sovereign power, which determines their content and mode of implementation.100 It follows that, contrary to the thesis advanced by MacCormick and other post-sovereignists, sovereignty does not dissolve, but becomes vested in those authorities charged with their definition,

95 Loughlin (n 91) 73.
98 Ibid.
99 Odysseos (n 96) 755.
100 Lechte & Newman (n 78) 24.
enshrinement in law and implementation. Furthermore, the irreducible nature of sovereignty as being both inside and outside the law at the same time unequivocally reveals the aporetic nature of law, whose foundation, even before its enforcement, derives from something which exists outside the law itself, and therefore cannot be fully subsumed in it. Therefore, in agreement with Foucault and Derrida, we can speak of a law ‘contaminated by its own foundational violence’, and which, as such, ‘can never reign absolute’. Having said that, as already cautioned above, the outspoken acknowledgment of the intimate relationship between rights and sovereignty does not amount to ruling out altogether the possibility of non-sovereign modes of agency and power in the (supranational) public sphere. This is, indeed, an important and challenging question, which nevertheless falls beyond the scope of the present dissertation. The point I am making is more circumspect; namely, that projects of the kind of a global power to prosecute cases and punish criminals, such as embodied in the ICC, are more about “traditional” sovereignty – or, to be more precise, about the relocation of sovereign functions – than they are about representing any real alternative.

103 Ibid.
104 Ibid.
105 Ibid.
106 Jabri ibid. 109.
5.3.1 The Slippery Slope of Supranationalism

Having recast the trajectory of sovereignty as responsibility in terms of the relocation of sovereign functions, the final step of the analysis consists of explicitly considering to what degree and under which conditions a further relocation of sovereign functions to the supranational level may be feasible and desirable.

Since the late 1990s, international society has shown several signs of retreat from the early and mid-1990s’ triumphalism about an imminent “cosmopolitanization”. Both the ICC and R2P were thus born posthumously;\(^\text{107}\) that is, into a world where the liberal discourse of the domestication of the international domain had already shifted onto the defensive.\(^\text{108}\) And, whereas the tale of the Rome Statute is already more of a story about the demise of a global sovereign than about its rise,\(^\text{109}\) at the time of writing this retreat has only deepened. We are witnessing a world-wide proliferation of populist, nationalist, and xenophobic tendencies, the rise of actual authoritarianisms in countries such as Hungary, Poland, the Philippines, and Turkey, as well as worrying departures from the commitments of states in the field of climate change, among other things.\(^\text{110}\)

As Patomäki has recently put it, at the heart of all this, we may arguably find the heightened insecurity and existential uncertainty resulting from the uneven growth and deep contradictions of the neoliberal planetary economy. These, in fact, can trigger various social-psychological mechanisms, such as resentment, anger, emotional distancing, and even hatred.\(^\text{111}\)

Against this backdrop, it is not surprising that of the approximately 60 UN resolutions that

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\(^{108}\) Ibid, 6.

\(^{109}\) Ibid.


have so far invoked R2P, only five have acknowledged the existence of Pillar three, i.e. the external responsibility of the international community.112

Notwithstanding the current bleak state of affairs, one may argue that the preconditions for a greater supranationalism may resurge once again in the future.113 In this respect, it is interesting to note that the authority of the international courts has often developed gradually through a series of progressive changes - each involving greater sovereignty costs (e.g. the European Court of Justice and the Court of Justice of the Andean Community),114 while the ICC is a relatively young institution. Taking this point further, we may even expressly contemplate a future scenario in which state-parties become more available to act as the Court’s surrogate, or even allow the ICC to be equipped with its own police force. And yet, in both of these cases, we would still have to ask how international institutions/agents may take on functions of the sovereign state without perpetuating the same situations that they try to eliminate.115 Foucault has been categorical in this respect: seizing the “centres of power” reproduces old patterns of government and domination instead of changing them.116 Hence, Foucault’s invitation to always politically question things that are conventionally assumed to be “beyond” all suspicion and look ‘as if they have nothing to do with power’117 - such as institutions that are only ‘apparently neutral and independent’118 - and to deconstruct them ‘in such a way that the obscured political violence within them would be unmasked’.119 The risk, otherwise, is to remain blind to and

112 Aidan Hehir, “‘Utopian in the Right Sense”: The Responsibility to Protect and the Logical Necessity of Reform’ (2017) 31(3) Ethics & International Affairs 335, 342.
113 Alter (n 5) 65. See also Schabas (n 2): ‘I have seen some progress over the years. It is enough to convince me that there will be more in the future’ (ibid, 289).
115 See Susan McManus, ‘Cosmopolitan Exception’ (2013) 9, 2 Journal of International Political Theory 101; and Queiroz (n 15): ‘Were they endowed with a sovereignty thus far restricted to the states, these institutions would transform into sovereign, self-interested entities, which would therefore be unable to make decision on global problems with impartiality’ (ibid 169).
118 Ibid.
119 Ibid.
hence subdued by their waged political violence. At the other end of the spectrum, the concern that the ‘potential for abuse is latent in the very structure of power that enables state [emphasis mine] authorities to perform their functions’\(^{120}\) sounds particularly narrow. It exemplifies the tendency, widespread among liberal cosmopolitans, to see the state, especially the post-colonial state, ‘as the primary locus of threat to human rights’,\(^{121}\) and the “international” or “supranational” as a ‘sanitized space populated by heroic actors ready to rescue people in these benighted locales’.\(^{122}\) The underrating of the operation of power beyond the state goes hand-in-hand with the lack of a serious reflection about international agency, often sublimated into a discrimination in favour of the – invariably Western, liberal – “good” deemed in possession of the material, epistemological, and moral resources to drive progress towards a cosmopolitan order.\(^{123}\) Except that moving beyond the state does not sublimate the problem of agency, let alone its entanglement with power and power inequalities. Instead, it makes such problems exceptionally more complex, and ends up casting serious doubts about the desirability of a cosmopolitan reconfiguration of the international space. Such a slippery slope is clearly epitomized by the selectivities of ICC intervention, and, in particular, by the failures of the system established by the Rome Statute to go against the existing distribution of power, both at the domestic and international level. After all, the case of the ICC has shown that empowering an international court means creating a “legal” sovereignty that is likely to be as arbitrary as, in addition to being generally weaker and less accountable than, the “political” sovereignty it supposedly displaces.\(^{124}\) Hence, the conclusion that the prospects of sovereignty as responsibility can only be validly assessed from an analytic standpoint genuinely critical of liberal depoliticization; that is,  

\(^{122}\) Ibid, 172. See also Fine (n 94) 185; and Costas Douzinas, ‘Humanity, military humanism and the new moral order’ (2003) 32(2) *Economy and Society* 159.  
\(^{123}\) See, on this point, Jabri (n 106) 121-122 and Anthony Pagden, ‘Stoicism, Cosmopolitanism and the Legacy of European Imperialism’ (2000) 7(1) *Constellations* 3. According to Anthony Pagden, the discrimination in favour of “the good” has been inscribed at the heart of cosmopolitanism since its inception.  
\(^{124}\) See Bellamy (n 101) 180.
receptive to the modes of power that are tied to the protection of rights even in a supranational and cosmopolitan order, and able to address them as both a tool and potential curse for the enforcement of such an order.\textsuperscript{125}

5.4 Closing Remarks

To be sure, the conclusions expounded above are quite a long shot from the popular expectation that the ICC would mark a major advance for the legalist worldview against the traditional concept of sovereignty. Indeed, using a creole vocabulary – derived chiefly from post-positivist constructivist scholars, post-modernism, post-colonial studies and TWAIL scholarship – the present study is intended to radically call into question the dominant narrative about the ongoing recharacterization of sovereignty as responsibility in its entirety.

To start with, the dissertation has sought to re-orientate the whole set of foundations upon which the sovereignty as responsibility debate is premised. As a whole, it has challenged any reading of international society that either deliberately or inadvertently ends up collapsing on either the realm of “ideas”, “agency” and “intentionality”, or the domain of “the material”. Instead, it has brought to centre stage the recursive quality of the relationship between agency and structure, and, in particular, its implication in the reproduction of unequal international – social, political, and juridical – realities. Moving along these lines, Chapter 2 has offered a reconceptualization of sovereignty as both norm and fact at the same time. In the effort to equally eschew both the normative-legal approach and that of pure fact, sovereignty has been acknowledged as both a socially constructed claim to supreme ordering power and the power through which any such claim is established and enforced. Importantly, “power” is meant not only in its standard coercive function, but also in its productive and institutional (chiefly, power as authority) dimensions. As a result, to the extent that such a reading of

sovereignty makes it possible to unpack the different layers of sovereignty and their mutual relationships, it also paves the way for a more elaborated understanding of change as far as the norm of sovereignty is concerned. More to the point, it opens up the possibility that a shift may be taking place at the normative level without (still) being matched by the corresponding set of changes at the factual level. Indeed, receptive of the competing pressures through which change arguably makes its way in real life, such a perspective would have proved crucial to make sense of the significance of the ICC against the current state and prospects of sovereignty as responsibility, as seen in the Chapters 3 and 4. After advancing this conceptual reappraisal of sovereignty, Chapter 2 clung to the latter to offer a way out of the conventional model of sovereign equality commonly assumed as a benchmark for assessing change, namely the so-called “Westphalian sovereignty”. More to the point, it has criticized the standard narrative for portraying sovereignty as responsibility as a radical break with a (dehistoricized and reified) previous norm of equality, and obscuring, as a result, the continuities with longstanding forms of inequality and intervention. Finally, building on the work of post-positivist constructivist scholars, Chapter 2 has sought to offer a qualification of the dominant understanding of norm development, i.e. the conventional constructivist norm life cycle proposed by Finnemore and Sikkink. In defiance of constructivism’s declared ambitions, Finnemore and Sikkink have ended up positing a linear, static, and largely depoliticized “win or fail” trajectory, which has blatantly missed the opportunity of channelling agency and the structuring power of norms into a more complex process of mutual constitution. Notably, I am referring to Finnemore and Sikkink’s reduction of norm institutionalization as an end point of the norm emergence process. In fact, their failure to acknowledge institutionalization as a crucially originative juncture lends itself to a dichotomic view in which norms as scripts of emancipation, and power a practice of domination at the opposite end of the spectrum. In contrast, in Chapter 2 I have proposed an updated version of the norm life-cycle that focuses on the “reconstitution of norms as part of institutional practice”, and particularly on how the relative power of relevant actors reconstitute norms during norm negotiation and implementation. In
the specific context of the ICC/sovereignty as responsibility debate, this has meant asking two major sequential questions: firstly, how the overarching system negotiated by states at the Rome Conference has affected the selection of situations and cases before the ICC and their outcomes; and secondly, how the selection of situations and cases and their outcomes, in turn, have “fed back” to the norm of sovereignty institutionalized as part of the Court’s practice.

The remaining three chapters have been devoted to the unravelling of the two questions outlined above. Hence, Chapters 3 and 4 have depicted a Court caught within a full-blown short-circuit – between a “sovereignty-limiting” rationale and a “sovereignty-based” mode of operation. Such a state of affairs is unequivocally reflected in the “tribunalization” of a highly selective range of violence and the sanctioning of an even more restricted selection, which both lay bare the Court’s subjection to the existing distribution of power both among states and within them. Special attention has been called to the fact that, to the degree that the Rome Statute places the Court in the pressing need to enlist state power to its cause, it also relocates the “unwillingness” and “inability” of states to investigate and prosecute to the ICC. This is most clearly exemplified by the fact that, to date, the few efforts of the Court to prosecute state actors and protégés have failed, and all the individuals who are or have been in the Court’s custody are associated with rebel/opposition forces. But, the selectivity of the Court’s intervention looms even more severely if we consider that all the rebel/opposition forces in the Court’s custody are black and from Africa, a fact that powerfully exposes the continuing rac(ial)ism, civilizing impulse, and coloniality of the liberal international project.126

Finally, these findings have been discussed in this conclusive chapter, which has channelled them into a critical reconsideration of the idea of sovereignty as responsibility itself. This has drawn attention to the transformation and integration of technologies of sovereignty into the

126 The author wishes to thank Outi Korhonen for her helpful advice on this point.
‘complex economies of power’\textsuperscript{127} that are \textit{inherent} to the supranational expansion of rights.\textsuperscript{128}

The next logical step is, hence, to firmly discard the common, oversimplistic dichotomy between “state-centred” and “supranational, cosmopolitan”. In other words, the conventional dichotomic framing should give way to a more cautious “cosmo-political” horizon, receptive of the strained liaison which, upon more careful consideration, is already found in the term “cosmopolitanism” itself: between \textit{cosmos} and \textit{polis}, combined in an aporetic movement toward both the dispersal and concentration of the political order of the polis.\textsuperscript{129} This is not to ignore that any progress in that direction requires daunting theoretical efforts, given the present centrality of the polis \textit{v.} cosmopolis contraposition in theories of world order. Nor should we overlook the risk of inadvertently slipping back into it.\textsuperscript{130} Nonetheless, the legacy of experiences such as those of the ICC may serve as a powerful reminder. In particular, bearing the latter in mind, institutional cosmopolitans may consider disallowing themselves from imagining superior institutions as entirely immune from the tension between “sovereignty-limiting” rationale and “sovereignty-based” operation in the first place. Rather, perhaps less ambitiously, they may ask under which conditions could such tension be handled to the advantage of collective forms of agency. Indeed, recast under this light, the turn to authority beyond states looms as a more accurate and productive research programme, with the potential to link current debates in normative and empirical international studies, such as discussions about sovereignty and the development of international norms on the one hand, and conversations about the rise of non-state actors, human rights, and the use of coercion, on the other.\textsuperscript{131} But the remit of the present work also extends beyond the institutional cosmopolitan perspective, and even the liberal paradigm

\footnotesize{\textsuperscript{127} Verena Erlenbusch, "The Concept of Sovereignty in Contemporary Continental Political Philosophy" (2012) 7(6) \textit{Philosophy Compass} 365, 368.}
\footnotesize{\textsuperscript{128} See \textsuperscript{n} 106.}
\footnotesize{\textsuperscript{129} Jabri (n \textsuperscript{106}) 109.}
\footnotesize{\textsuperscript{130} See Nick Vaughan-Williams, \textit{Border politics: the limits of sovereign power} (Edinburgh: Edinburgh University Press, 2009).}
\footnotesize{\textsuperscript{131} Peters & Schaffer (n \textsuperscript{61}) 335.}
itself. Let me digress a little here just to say that the critique of liberalism has been a fundamental theme of Western thought for more than a century, but has rarely ushered in a basic shift. This is evident in the resilience of the classical liberal framing of human rights in terms of law and legal institutionalization. Indeed, this framing has hardly been questioned even within much of the critical theorising about human rights; although it has powerfully exposed, for example, the narrow legalistic, as well as Eurocentric and rudimentarily retributive, core of international criminal justice. Reversing this trend, future research may engage in the rethinking of human rights in terms other than law and legal institutionalisation, while clinging, instead, to their political ethos of contestation with practices of domination. Perhaps this is something similar to what Foucault had in mind when the philosopher famously – albeit no less elliptically – called for a ‘new right that is both anti-disciplinary and emancipated from the principle of sovereignty’. Or, more radically, future research programs may embrace a more overtly anarchist orientation and displace the human rights project altogether in favour of some alternative political imaginary.

In conclusion, this dissertation has sought to make its contribution to the ‘unravelling of power’ by focusing on its manifold articulations and operations within norms, as well as within laws, institutions, and practices, wherein - to quote Antje Wiener once again - ‘norms lie’. Importantly, this has been pursued not as an end in itself, nor as a way of deprecating political agency; but, quite to the contrary, as an essential analytical endeavour, if we are to glean both theoretical and practical margins of resistance. Indeed, it is precisely the postmodern sensitivity and its underlying genealogical outlook that militates against reducing the history of international society to a ‘tragedy

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133 See, on this point, Golder (n 7).
134 Lechte &Newman (n 78) 183.
135 Newman (n 102) 29.
137 See Golder (n 7).
138 Jabri (n 106) 110.
of endless repetition'\textsuperscript{140} – or equally so a simple story about the inevitable moral progress of humanity. This means not only firmly discarding the idea of transhistorical essences and teleological successions in favour of particular trajectories and accidents,\textsuperscript{141} but also reserving some space for a ‘future-oriented reflexive self-regulation’\textsuperscript{142} that ‘may intervene – recursively – in the social conditions that constitute and determine the sphere of human freedom’.\textsuperscript{143} In other words, acknowledging that norms, laws, institutions, and practices contain within themselves the power relations that traverse society is a crucial step towards transforming these same power relations and the norms, laws, institutions, and practice they underpin.


\textsuperscript{141} Heikki Patomäki, ‘Back to the Kantian “Idea for a Universal History”? Overcoming Eurocentric Accounts of the International Problematic’ (2007) 35(3) \textit{Millennium} 575, 576.

\textsuperscript{142} Patomäki (n 140) 339.

\textsuperscript{143} Ibid.
Annex I - Semi-structured Interviews\textsuperscript{144} Grid

(1) On which grounds, if any, does it make sense to speak about the “politics of international criminal law” at the ICC?
   a. Which are the main elements we should factor in?
      i. Do these elements also affect the OTP/Court’s decisions, in addition to their outcomes?
         1. If yes, do they affect both case selection and situation selection choices?
   b. In which respects, if any, can we view positively the interplay between law and politics in international criminal justice?

(2) How do you assess the critique of the ICC being a neo-colonial actor in Africa?
   a. Is the Rome Statute more neo-colonial than other international regimes?
      i. If yes, how?

(3) Looking at the ICC’s achievements in its first 15 years of activity, which have been the major shortcomings, and which kind of institutional changes may help the Court overcome them?
   a. Are there significant changes between Ocampo and Bensouda’s approaches?
   b. How should we interpret the Court’s utter failure at establishing accountability for state actors?
   c. How do you realistically see the ICC in the near future? And what about in around 30 years from now?

\textsuperscript{144} Most of the interviews were carried out in person, in The Hague or in Amsterdam, between August 2016 and January 2017. On a few occasions, the interviews took place via Skype/phone in order to accommodate the availability of the interviewees. In addition, in some instances further contacts followed via Skype/phone after the formal conclusion of the fieldwork.
Annex II – Semi-structured Interview Notes

CODE LIST:

[1] LAW v. POLITICS
[3] EVIDENCE
[5] ICC’S ARDUOUS MISSION
[7] ROLE OF STATE PARTIES/INTERNATIONAL COMMUNITY
[8] CONSSENSUAL NATURE OF THE ROME STATUTE v. SUPRANATIONAL AUTHORITY
[9] ICC’S LIMITED JURISDICTIONAL REACH
[10] ICC’S LACK OF AUTONOMOUS ENFORCEMENT POWERS/DEPENDENCE ON GOVERNMENTS
[12] ICC’S INSTITUTIONAL INTERESTS/POLITICS
[13] PRAGMATIC CONSIDERATIONS
[14] SCARCITY OF RESOURCES
[15] (COST-)EFFECTIVENESS
[16] ICC’S EAGERNESS TO PROSECUTE
[17] ICC’S BIAS v. AFRICA
[18] ICC’S BIAS IN FAVOUR OF SELF-REFERRING GOVERNMENTS
[19] ICC’S DEFERENCE TO MAJOR POWERS
[20] CONTROVERSIAL APPLICATION OF (POSITIVE)COMPLEMENTARITY
[21] ICC SUBJECTION TO THE EXISTING LOCAL AND GLOBAL DISTRIBUTION OF POWER
[22] ICC-UNSC RELATIONSHIP
[23] VICTORS’JUSTICE
[24] STATUTORY LOOPHOLES/LEGAL UNCERTAINTY
[25] EXPERTISE OF ICC STAFF
[26] ICC LEGITIMACY (CRISIS)
[27] DIFFERENCES OCAMPO/BENSOUDA
[28] AFRICAN GOVERNMENTS’ENGAGEMENT WITH THE ICC
[29] NEED FOR GEOGRAPHICAL DIVERSIFICATION (BEYOND AFRICA) OF ICC CASES
[31] NEED FOR A MORE REALISTIC VIEW OF WHAT THE ICC CAN ACHIEVE
[32] CHALLENGES TO ICC REFORM
QUESTION (1): On which grounds, if any, does it make sense to speak about the “politics of international criminal law” at the ICC?

Respondent 1 (R-1)

[R-1 argues that ‘politics is all outside the Court’.]

[At the same time, though, ‘the Court needs political support from all state parties’.]

[The respondent adds that most of the criticism against the Court is ‘speculative’, and ‘there is a tendency to blame the Court for the failures of states’.]

[R-1 also stresses that the decision whether to open an investigation or a prosecution depends on whether the legal criteria set by the Rome Statute concerning jurisdiction and admissibility are met.]

[Another factor is the available evidence. For example, referring to the Ugandan situation, R-1 stresses that ‘there was a great deal of evidence about LRA crimes’, while ‘the Court has insufficient evidence about alleged crimes of the UPDF [Ugandan People Defence Force]’.]

[The criterion of state cooperation, instead, does not play any role for admissibility purposes, while lack of state cooperation and other difficulties in enforcing arrest warrants are, nevertheless, crucial issues]
for the Court. In this respect, the respondent recalls that the first trial in the Ugandan situation could start only when the suspect (Ongwen) surrendered himself 13 years after the referral by the Ugandan government.

Moving to the level of situation selection decisions, R-1 invites us to consider that ongoing preliminary examinations do not amount to decisions not to investigate, but simply mean that the preliminary examination phase has not been completed yet.

**Respondent 2 (R-2)**

According to R-2, ‘political factors may have consequences at the implementation level’, e.g., ‘because states fail to cooperate with the Court’;

but political factors ‘do not affect in any way the decisions of the Court’.

The Court’s selection of situations and cases, instead, follows from ‘the legal criteria set in the Rome Statute about jurisdiction and admissibility,

and the available evidence’.

The respondent clarifies that ‘the Court does its own part by opening each case that warrants intervention according to the Rome Statute’;

but, after that, ‘states have to do their part, otherwise the system established in Rome will simply not hold’.

R-2 also stresses that disparities in the outcomes and duration of PEs are not due to political considerations and double standards, but are the result of ‘differences in the
gravity of the alleged crimes or whether a state has genuinely investigated them or is undertaking tangible efforts in that direction’. Similarly, the absence of cases against self-referring governments can be explained in terms of their ‘insufficient gravity’. In this respect, R-2 suggests that governments would never request the Court’s intervention if they committed crimes serious enough to be prosecuted by the Court. At the same time, the respondent notes that the OTP’s investigations are still ongoing in all self-referred situations, meaning that cases against members of self-referring governments may still be opened. With respect to the situation in Côte d’Ivoire (opened proprio motu by the OTP, but a de facto self-referral), R-2 refers to ‘technical delays’ in the opening of ICC cases against pro-Ouattara forces.

Having said that, R-2 concedes that ‘the importance of developing partnerships and relationships with state authorities cannot be underestimated’, for states have a ‘crucial role’ as far as the collection of evidence and the enforcement of arrest warrants are concerned.

Accordingly, R-2 concludes that if both self-referring governments and rebels have committed crimes of “sufficient gravity”, it may be more effective to prosecute rebel crimes first and governments’ crimes after.

**Respondent 3 (R-3)**

According to R-3, there are many grounds on which it does make sense to speak of “politics of international criminal law” at the ICC.
To start with, ‘the ICC has been created by states’. ‘Most basically, this means that the Rome Statute is the result of negotiations among states’. Furthermore, ‘states decide whether to be part of the Rome Statute, and they can decide to withdraw’. Hence, ‘political pressures arise in particular from the ASP, the political organ of the Court’. Another factor having crucial political ramifications is, according to the respondent, the ‘state-based character of enforcement under the Rome Statute’.

Against this backdrop, the Court’s selection decisions should be understood in relation to the Court’s ‘policy considerations’, and we should openly speak of the ‘institutional politics of the ICC’.

According to the respondent, ‘the OTP is especially interested in achieving successful prosecutions’. In support of this thesis, R-3 recalls that the ICC has proved to be reluctant to intervene in situations of the “unwillingness” and “inability” of state authorities. While these are the only situations in which the Rome Statute clearly mandates intervention, most of the situations before the Court have been found admissible due to inaction at the domestic level, which is not even expressly contemplated in the Rome Statute. The respondent also refers to a ‘politcization-effectiveness nexus’: ‘the more the Court’s intervention is politicized the more it is likely to result in successful prosecutions; and vice versa’.

R-3 also highlights ‘the OTP’s eagerness to intervene in African situations’, showing ‘little respect for domestic proceedings’ (the respondent cites the examples of the Lubanga and
Katanga cases), and thus ultimately bypassing complementarity.

**Respondent 4 (R-4)**

R-4 suggests that ‘criticizing each decision taken by the Court for being political is simply too simplistic and inappropriate, no matter how popular in these days’. The respondent argues that while certain individuals may feel threatened by the Court and undertake an offensive against it on many levels, ‘it is important to distinguish between self-interest and other kinds of more legitimate criticism’.

R-4 clarifies that ‘determinations of admissibility follow the legal standards set by the Rome Statute’. Yet, the respondent distinguishes between admissibility and selection, as well as between situations and cases,

conceding that ‘pragmatic considerations may influence case selection’.

In this respect, R-4 refers to ‘effectiveness’ as an ‘important factor for the credibility of the institution’.

The respondent adds that ‘the ICC is still a young institution and is still learning lessons’. Accordingly, ‘it should not be condemned’. Instead, we should focus on the fact that enough states joined the Rome Statute, making a permanent global court – ‘with a formally independent prosecutor’, and, what is more, ‘formally in the position to investigate and prosecute also state officials’ - finally possible.
Respondent 5 (R-5)

[4] R-5 argues that ‘nowadays it is quite popular to interpret in some political sense whatever the OTP does or not; yet, such an attitude is, at best, a great misunderstanding’.

[2] ‘There is no attempt to please one side or the other’. Instead, ‘the Court is guided by the law and evidence’.

[2] Accordingly, the respondent notes that the length and outcomes of preliminary examinations are due to the specific features of each situation in terms of “sufficient gravity”, and whether there are ongoing domestic proceedings. By the same token, the respondent suggests that not too much should be read into the absence of cases against state actors, for this, too, ‘is the result of the application of “gravity” and “complementarity” as mandated by the Rome Statute,

[3] as well as of the available evidence’.

[11] Yet, the respondent concedes that the lack of cooperation is and will be a ‘crucial problem’ for the Court, as it may ‘dramatically hamper’ its work.

Respondent 6 (R-6)

[6] According to R-6, law and politics are always inextricably linked. In particular, the exercise of prosecutorial discretion is necessarily informed by policy and political considerations. The respondent also invites
us to consider that the ICC has to balance numerous -
often conflicting - interests,

while, at the same time, proving its ‘effectiveness to the
world’. R-6 adds that it is precisely in the attempt to
be/appear effective that

the ICC has been ‘too reliant on governments’.

A related problem has been the Court’s sense of
entitlement over cases which seemed easier to prosecute,
coupled by the reluctance to go against the interest of
major states and their allies, from Afghanistan and
Colombia to Iraq and Palestine. R-6 emphasizes that such
deferece to major states had been particularly clear
during the first term of Prosecutor Ocampo,

while nowadays, ‘something seems to be moving’ - at
least, at the level of preliminary examinations. R-6 suggests that Prosecutor Bensouda may be very close (‘in
a matter of days or weeks’) to requesting judicial
authorization for the opening of a preliminary
examination in Afghanistan.

The respondent also invokes ‘a more disenchanted
view about what the ICC can do and what it cannot’.

Respondent 7 (R-7)

Each case has its own ‘political aspects’, and, according
to R-7,

it is also ‘extremely complex’. It requires delving into a
wide range of complexities - ranging from the domain of
history, to cultural, ethnic, religious, as well as political issues. In particular, we cannot ignore the highly politicized climate of crisis and post-crisis situations, as well as the geographical, cultural, and linguistic remoteness of the crime scenes from the seat of the Court and its investigators. Managing these complexities requires ‘a lot of efforts’, and ‘it can be incredibly time-consuming and labour-intensive’.

Particularly daunting and crucial is the question of evidence. The ICC is a criminal court, which means that ‘the prosecution must provide evidence that sustains convictions beyond a reasonable doubt’. Hence, R-7 suggests that we should raise questions about ‘how evidence is collected, through which expertise and contextual knowledge, which evidence is lost, presented to judges, withhold’, etc. In this respect, the respondent clarifies that the ICC Prosecutor has a greater room for manoeuvre than the defence, e.g., it can withhold evidence and choose to not call witnesses. Furthermore, R-7 refers to the serious challenges that may arise from the outsourcing of evidence collection to intermediaries or third-party organizations, such as, e.g., UN peace-keeping operations. On the one hand, when building international criminal cases, some level of outsourcing is justified and even potentially effective, especially in light of the ‘contextual knowledge of local intermediaries’. On the other hand, the ‘large extent of outsourcing and the lack of supervision by the OTP have proved to be a major problem’. For instance, in the Lubanga case, not even one of the nine witnesses who claimed to have been child soldiers in the Forces Patriotiques pour la Libération du...
Congo (FPLC) was considered reliable by the judges. R-7 emphasizes that the issue of ‘manipulation of witnesses’ – for example, upon financial compensation or other benefits, such as relocation - is a real one. The respondent also adds that, while inefficient investigations are among the causes that had led to the collapse of several ICC cases, it is still not clear today to what extent the OTP is interested in more efficient investigations. R-7 cites the Kenyan situation as a case in point: whereas no real security threat would have stood in the way of ICC investigators obtaining certain relevant evidence (i.e. transcripts or videos of public speeches), no step in that direction ever took place. Another example is the situation in Darfur, in which the OTP expressed willingness and ability to conduct effective investigations without ever sending investigators to Darfur.

**Respondent 8 (R-8)**

[41] According to R-8, ‘accusing the Court of being merely driven by politics cuts a very complex story out’.

[42] Rather, ‘it is time to do a reality check’, by genuinely assessing ‘what the Court can realistically achieve, and to re-calibrate expectations where necessary’.

[61] According to the respondent, as a matter of fact, the Court deals with ‘highly charged political issues’. Furthermore, its work involves several stakeholders – with very different, indeed, often diverging expectations – and different values to be combined. We should also consider that ‘prioritization must happen in any criminal law response to mass-atrocities’,
and that the ICC is evidently ‘under-resourced’.

Therefore, the OTP is called to take ‘incredibly difficult decisions’. This also means that ‘whatever the OTP chooses to do is going to be criticized’.

R-8 notes that the OTP is continuously subject to ‘unsubstantiated allegations of politicization’,

to which the Court and its supporters respond – likewise simplistically – in terms of the ‘mechanic application of the law’. This politicization v. mechanic application of the law is precisely the simplistic dichotomy that, according to R-8, we ought to discard, while, instead, giving way to a ‘middle standpoint’ – ‘not fully legal or political’. That is to say, we need to create more room for a thorough and open discussion about the different colliding values inherent in the use of prosecutorial discretion, and we need to become more available to the idea of different criteria - other than either legal or political - being considered and applied.

Another aspect we should consider, according to R-8, is that several pivotal issues were hotly debated at the Rome Conference without being clearly settled. Therefore, in the daily practice of the Court, a lot is left to interpretation and several issues remain uncertain. R-8 cites complementarity as a case in point, which, while being a pillar of the system negotiated in the Rome, is also a new principle - unknown at the ICTY and ICTR. This state of affairs is also compounded by the fact that the ICC judges do not share a single, common legal tradition. Hence, the laborious and sometimes dissonant jurisprudence of the ICC should not come as a surprise.
Respondent 9 (R-9)

[16] According to R-9, politics is an inescapable component of international criminal law, albeit the system established by Rome Statute seeks to constrain it.

[17] The respondent cites as an example the election of ICC judges. ‘Candidates are nominated by state parties’, meaning that, for example, ‘the government of Uganda would do anything in its power to prevent the nomination of a judge expected to go against the government's own interests’. More broadly, the ICC’s dependence on states may cause the Court to work in the interests of governments.

[18] This is how, R-9 continues, the absence of ICC cases against Ugandan government authorities has been interpreted by some communities - especially in Northern Uganda, where there is ‘substantive evidence that the government has committed crimes under the jurisdiction of the Court’.

Respondent 10 (R-10)

[19] The ‘politics of prosecutions’, the respondent suggests, is particularly evident if we look at ‘case selection’. In particular, whereas the ICC is meant to be ‘a court of last resort under the Rome Statute’, in practice, it has visibly displayed a certain ‘eagerness to have successful cases in order to justify its own existence’.
This is the backdrop, R-10 continues, against which we should understand the one-sided prosecutions (only against rebels) in self-referred situations. R-10 refers to the Ongwen case. Questions may be raised as to whether Ongwen fits the criterion of “the most responsible person”, especially if we consider that the suspect himself had been a child-soldier.

Furthermore, considering the capacities of the Ugandan judiciary and the ongoing domestic prosecution of another LRA member, i.e., Kwoyelo, we should also ask whether, in the Ongwen case, the Court has acted as a court of last resort in compliance with the principle of complementarity.

Political sensitivity is also at play behind the ‘huge disparities in the duration of preliminary examinations’. ‘Think of how long’, R-9 continues, ‘the OTP has waited for before asking judicial authorization to open a proprio motu investigation in Afghanistan’. Moreover, R-10 adds, this figure becomes even more unsettling when compared to the ‘fast pace at which the OTP has made its determinations in referred situations.’

Respondent 11 (R-11)

R-11 defines themselves as one of the pioneers of the political critique of the ICC. According to the respondent, ‘international justice is determined by international politics’. ‘The ad hoc tribunals have made this clear already in the 1990s, starting from the basic fact that they were established at the behest of the UNSC’.

The respondent also cites in support of their thesis the ‘striking selectivity of the ICTR’. The Tribunal ‘left
unaddressed all the crimes committed by the Rwandan Patriotic Front’ (RPF), despite the existence of ‘well-documented evidence’ about crimes committed by the latter, including the report of a UN Commission of experts. R-12 considers the above as ‘a clear case of “victor’s justice”’, for ‘only the vanquished’ (Hutus) were indicted by the Tribunal, but not the Rwandan Patriotic Front, which was led by Kagame and came into power in the aftermath of the civil war in the country. This selective approach continues nowadays at the ICC, both across situations and within them. The respondent explains that the ICC ‘has been only an African Court for its first 15 years’, while being ‘careful not to encroach upon US hegemony’.

Against this backdrop, we should understand the OTP’s decision to uphold positive complementarity in Colombia, but not in Libya, for example.

What is more, within the African situations the ICC is investigating, the Court has sided with ‘those holding positions of power’, by shielding self-referring governments and other actors, e.g., ‘Western multinational companies and Western governments’, from prosecution.

Focusing on self-referrals, R-11 suggests that these are a paradigmatic example of the politics of international criminal law at the ICC.

More to the point, the respondent stresses that African governments have referred their own situations ‘to solve internal political problems, and the ICC has played their game by indicting only their enemies’. Furthermore, widening the focus to the broad participation/support of
African governments to the establishment of the Court, R-12 suggests that this, too, had deep political roots. In particular, African governments regarded the negotiations of the ICC Statute as an opportunity to negotiate an international treaty in a framework of equal standing with their European ex-colonizers, and as a great opportunity to improve their international standing.

**Respondent 12 (R-12)**

According to R-12, ‘all justice, not only justice at the ICC, is political’. Justice is about ‘manufactured truth’, and it always involves some level of ‘transfiguration’. The political element in the ICC is even heightened by the fact that

the Rome Statute establishes a system ‘at the intersection between individual responsibility and state responsibility’.

To this we should add the ‘controversial relationship between the ICC and the UNSC as set forth in the Rome Statute, in particular, in Article 16’. In this respect, R-13 recalls UNSC Resolution 1422, in 2002, yielding to US demands, requested the ICC to defer potential prosecutions of peacekeepers from non-state parties for a 12-month period.

The respondent also argues that looking at the OTP’s selection decisions, ‘it looks like the OTP censors itself in accordance with political considerations’.

More to the point, the OTP has set ‘a very high admissibility bar for situations impinging upon the interests of major powers and their allies, for example, in...
the Comoros situation’. At the same time, R-12 warns ‘not to be surprised about this state of affairs’.

[8] The Rome Statute must be understood within a ‘consensual paradigm’. This means that ‘the ICC acts within the limits and the rules set by states during the negotiations’; and it is far from surprising that ‘states have opted for an institution with limited powers, unable to override states’. Against this backdrop, ‘there is not much reason to expect anything different from what we have now’.

**Respondent 13 (R-13)**

[6] According to R-13, people that look at the ICC primarily as a criminal court may be ‘phobic about the idea of a “politics of international criminal law”

[12] However, the respondent continues, this is precisely where a change of perspective is most pressingly needed, for ‘the ICC is not only a criminal court, but also an international institution’. In particular, as such, the ICC has to protect its own ‘ICC’s institutional interests’, in order to ensure that it is not fundamentally undermined and the story it tells remains compelling.

[21] Selection decisions at the ICC may, hence, be traced back to the Court’s own ‘political sensitivity’, which, in particular, tends to reflect the ‘local and global distribution of power’. According to the respondent, this is particularly clear as far as case selection choices are concerned;

[20] but is also reflected in the OTP’s different approaches to positive complementarity across situations.
Respondent 14 (R-14)

R-14 invites us to be cautious about speaking of the “politics of international criminal law”. The OTP does some politics to the extent that the Office is not subject to the principle of mandatory jurisdiction, meaning that the Prosecutor makes choices as to whether investigate/prosecute or not.

Other factors to consider are: issues of evidence, in particular ‘whether there is available evidence and its quality’;

the ‘limited resources available to the Court’;

and the ‘support and cooperation – or lack thereof – by the international community’. The ICC, for example, R-14 notes, has attempted to target a few high-ranking government authorities, but the international community has proved reluctant to assist the Court in that respect.

R-14 also argues that ‘it comes handy to have a Court not posing any real threat to those in power’.

On the other hand, with respect to the decisions rendered by the ICC’s Chambers, the respondent stresses that the story of the ICC is full of ‘excellent decisions - by no means affected by political considerations’.
QUESTION (2): How do you assess the critique of the ICC being a neo-colonial actor in Africa?

Respondent 1 (R-1)

[2] As a ‘firm supporter of the ICC’, R-1 ‘would never stand up for an institution that unfairly targeted Africans’. ‘Neither the Rome Statute nor the OTP’s decisions to investigate and prosecute subscribe in any way to an anti-African bias’.

[28] Instead, there is ‘overwhelming evidence about the ongoing support to the Court by African states’. Senegal, R-1 notes, was the first country ever to ratify the Rome Statute; and, ever since then, the African continent has been ‘firm in its commitment to international criminal justice’, as attested by ‘the routine enforcement of the Court’s cooperation requests’ as well as by ‘the number of African state referrals’, which, nowadays, are ‘the majority of the situations before the Court’.

Respondent 2 (R-2)

[4] According to R-2, the critique of African bias ‘rests on misunderstandings about how the Court’s jurisdiction is activated, as well as its limits’.

[9] In particular, ‘the ICC does not have universal jurisdiction’,

[22] and ‘it can only investigate situations in non-party states if the UNSC refers their situations to the Court’. So, for example, ‘the UNSC should be blamed for not
referring Syria, rather than criticizing the Court for targeting only African states’.

Furthermore, referring to the admissibility criteria set by the Rome Statute, the respondent argues that ‘all the African situations currently before the Court are distinguished by the gravity of the crimes and inability or unwillingness of domestic authorities to investigate and prosecute’.

**Respondent 3 (R-3)**

According to R-3, ‘it is a bit of a stretch to accuse the ICC of racism, as someone is doing’. Yet, ‘it is a fact that - with the exception of Georgia - the ICC is intervening only in Africa. The respondent also argues that this state of affairs ‘must change if the Court wants to redress its serious legitimacy crisis’.

**Respondent 4 (R-4)**

According to R-4, the critique of African bias is easily confuted by the fact that only two situations were opened *propris motu* by the Prosecutor (Côte d’Ivoire and Kenya). Instead, the Court intervened in CAR, DRC, Mali and Uganda at their own request through self-referrals’; and in Libya and Sudan as a result of Security Council referrals.

What is more, all the states where the ICC has intervened ‘score very poorly on indexes such as the
Failed State Index’, and several of them are, indeed, ‘among the “most critical” situations’.

R-4 also notes that ‘of all the cases currently under investigation, only the Libyan government has challenged the jurisdiction of the Court’, which confirms that the Court’s interventions in Africa enjoy widespread support from local authorities. Furthermore, ‘there is plenty of evidence that African civil society, too, strongly supports the work of the Court’.

Moving the attention towards the situations which the Court is not investigating, R-4 points out that ‘several situations of concern just do not fall within the Court’s jurisdiction’;

and the ‘Court’s jurisdiction could be activated only via Security Council referral’, which, yet, is ‘subject to political calculations’. ‘This is a huge problem’.

The respondent also rejects the idea that the OTP decisions not to open investigations in Iraq and in the Mavi Marmara situation were based on questionable gravity determinations by the OTP, emphasizing instead their compliance with the Rome Statute.

However, R-4 concedes that ‘it is vital that the ICC keeps up and expands its efforts to combat the perception of African bias’.

Respondent 5 (R-5)

According to R-5, the very mission and work of the Court may place the institution on a ‘collision course with several actors, especially government authorities
adamant to remain beyond the law’. ‘Much of the critique of African bias must be understood against this background’. While a few actors may be ‘particularly interested in discrediting the ICC in whatever way’, it must be clear that

[2] the Court’s decisions to investigate and prosecute follow from ‘the mandate of the Rome Statute’.

[9] In particular, they are tied to the territorial and personal jurisdiction of the Court,

[20] and whether the UNSC refers a situation to the Court’, in addition to questions of admissibility. So, for example, ‘many people ignore that Syria is not a state party and the ICC could intervene only via a UNSC referral’.

**Respondent 6 (R-6)**

[26] R-6 affirms that the ICC must expand its focus beyond Africa, if it wants to tackle the current legitimacy crisis.

[30] Some new positive developments - towards a geographical diversification of the ICC’s docket -

[27] are emerging from the preliminary examinations opened by Prosecutor Bensouda.

[17] Yet, with regard to the Malian situation, one may raise the question ‘whether the ICC really needed yet another African situation’, as well as whether the al-Mahdi case – about the destruction of historic monuments and religious buildings in Timbuktu – ‘is really in line with the prosecutorial strategy laid in the 2014 OTP policy paper’.


[19] ICC’S LIMITED JURISDICTIONAL REACH

[22] ICC-UNSC RELATIONSHIP

[26] ICC LEGITIMACY (CRISIS)

[29] NEED FOR GEOGRAPHICAL DIVERSIFICATION (BEYOND AFRICA) OF ICC CASES

[27] DIFFERENCES OCAMPO/BENSOUDA

[17] ICC’S BIAS v. AFRICA
With regard to the current unease of several African state parties in their relationship with the Court, the respondent suggests that, in order to overcome the latter, the ICC should make itself available to ‘genuine dialogue and political solutions’. In particular, rather than merely insisting on the obligation of African state parties’ to cooperate with the Court, the ICC must take in due account the concerns raised by the African Union, in particular as far as the issue of state immunity is concerned.

Finally, according to R-6, it is of crucial importance that the OTP ‘definitely puts an end to the special treatment so far accorded to major powers’. This is ‘the greatest challenge’ awaiting Bensouda, and much of the Court’s credibility depends on that.

Respondent 7 (R-7)

According to R-7, ‘it is clear that the lack of involvement beyond Africa is putting strains on the legitimacy of the Court’.

However, the respondent also notes that, looking at the current list of preliminary examination, ‘things seem to be changing’, meaning that non-African situations may land in the Court’s docket.
According to R-8, while African states themselves have requested the intervention of the Court, the legitimacy of the ICC and the overcoming of the current crisis are inescapably tied to the ‘inclusion of non-Africa situations in the Court’s docket’.

According to R-9, the charge of neo-colonialism is premised on a limited understanding of the Court’s jurisdiction as established by the Rome Statute. In particular, whereas Western powers may have committed serious crimes in the past, such crimes date back far beyond the entry into force of the Rome Statute, meaning that they fall outside the temporal jurisdiction of the Court. As to crimes which are being committed nowadays, Western legal systems are able to deal with those crimes themselves, contrary to African countries, where, R-9 continues, impunity for serious crimes is exceptionally widespread.

According to R-10, the fundamental principle of complementarity - upon which the Rome Statute is premised - is meant to function as bulwark against unwarranted investigations and neo-colonialism. In this sense, the respondent argues, the Rome Statute is not neo—colonial. Indeed, the Statute in itself can be
considered quite an improvement compared to other international regimes – ‘precisely thanks to the original nature of the ICC as a court of last resort’. On the other hand, the present striking disparities in the duration and outcomes of preliminary examination disclose, rather clearly, the eagerness of the OTP to intervene in certain situations and in certain cases, as well as its own reluctance to do so in others, such as in Afghanistan and other situations impinging on major states.

This is becoming everyday clearer to observers across the world. Accordingly, the legitimacy of the Court is being seriously undermined by the shortcomings of the OTP’s approach. The respondent adds that ‘the very relevance of the Court is being questioned from many quarters, both within and outside Africa’.

At the same time, though, R-10 invites us to acknowledge that most of the African situations currently before the Court have been referred by African states themselves. Furthermore, as to the two UNSC referrals, the respondent notes that they have been ‘broadly supported by African countries themselves’.

Respondent 11 (R-11)

According to R-11, the ICC’s current African focus ‘seriously undermines the quality of justice upheld by the ICC’, as it ‘amounts to a violation of a fundamental principle of customary international law – the principle of non-discrimination’.
Having said that, the Rome Statute is not a neo-colonial instrument, according to the respondent. Instead, ‘the Rome Statute is a very complex and ambitious document, which draws from and seeks to combine a wide range of different fields of law’.

Hence, the critical question we should raise is whether the OTP, the judges, and the Court’s staff more broadly ‘have the expertise needed to handle such high level of complexity’.

**Respondent 12 (R-12)**

According to R-12, ‘it is hard to tell whether the Rome Statute is more neo-colonial than other existing international regimes’. ‘At first glance, at least, one has the impression that all existing regimes are just as much neo-colonial, even the often-acclaimed institute of universal jurisdiction’. R-12 suggests that ‘universal jurisdiction will be really universal only when we will see a Belgium criminal under a Rwandan prosecutor’.

**Respondent 13 (R-13)**

R-13 invites us to approach the neo-colonial critique of the ICC with a certain cautiousness. On the one hand, the Rome Statute emanates from ‘a Western philosophy of justice’. For example, the respondent refers to ‘Western ideas of individuality and responsibility’, and ‘the Western tradition of liberal cosmopolitanism’. On the other hand, this state of affairs brings us back to the
‘power relationships’ in which international law generally is produced.

[28] The respondent also invites us not to overlook the role of non-Western states, and in particular ‘former colonies’, in the process that has led to the creation of the ICC.

**Respondent 14 (R-14)**

[20] R-14 is sceptical of the neo-colonial critique of the ICC. The respondent, on the one hand, acknowledges that ‘the ICC waited too long to intervene outside Africa’. For example, ‘questions may be raised about the OTP’s approach to the Colombian situation’, which the Office has been choosing not to convert into a fully-fledged investigation for more than 15 years.

[28] On the other hand, R-14 points out that African states themselves have referred their own situations to the ICC.

Furthermore, the current African focus of the ICC is also the result of the ‘Court’s limited jurisdictional reach’ and the failures of the UNSC to refer situations beyond Africa. The respondent cites Syria as a case in point.
QUESTION (3): Looking at the ICC’s achievements in its first 15 years of activity, which have been the major shortcomings, and which kind of institutional change may help the Court overcome them?

Respondent 1 (R-1)

[5] According to R-1, there are ‘several challenges ahead’. In particular, ‘as the ICC focuses on non-party states, we may expect very hard cases’.

[8] Referring to the relationship between the Court and state sovereignty, the respondent argues that ‘states have created the ICC out of their sovereign decisions’. R-11 adds that it is a mistake to argue that the ICC was ever supposed to constrain sovereignty, for ‘the Rome Statute is about individual criminal responsibility and not about sovereignty’.

[4] Another shortcoming in the debate about the Court, R-1 continues, is that ‘critics fail to acknowledge that the Rome Statute has created a system, not only a court’.

[11] Instead, criticism should be more firmly directed at those ‘states that fail to comply with their cooperation duties’, since ‘we can have an effective Court only to the extent that states are willing to enforce the Court’s decisions’. The ICC of the future is, hence, a court that can firmly count on state cooperation’.
Respondent 2 (R-2)

[15] R-2 notes that ‘the Rome Statute is in a tough spot’, as it aims to strike a balance between the sovereign right of domestic jurisdiction and the responsibility of the international community to end impunity.

[11] Furthermore, according to R-2, ‘the lack of state cooperation is one of the most pressing problems the Court faces’, and ‘without on-site cooperation and enforcement of the Court’s requests there is not much that the Court can achieve on its own’. In this respect, R-2 recalls the crucial support provided to the Court by peace-keeping forces, e.g. in the DRC, in terms of the protection of ICC staff, the collection of evidence, and the enforcement of arrest warrants.

[17] R-2 concludes that it is time for the entire international community to live up to its responsibility to fight impunity by providing the Court with adequate support and cooperation; ‘otherwise, the system established by the Rome Statute will simply not hold’.

Respondent 3 (R-3)

[25] Speaking of the future/reform of the Court, according to R-3, ‘both technical and structural changes are needed’. Starting from the former, a major problem today is the lack of investigators, as well as their limited expertise. The current investigators are ‘generalists’ who move across all situations and spend only very little time on site (a few days at a time). As a result, they are ‘largely unable to provide a deep contextual knowledge’.

[15] ICC’S ARDUOUS MISSION


[17] ROLE OF STATE PARTIES/INTERNATIONAL COMMUNITY

[25] EXPERTISE OF ICC STAFF
Another connected problem is the ‘low standard of evidence’, which is one of the reasons behind the collapse of many cases.

Moving to more structural problems, one of the most serious lies in the current prevailing interpretation of complementarity, which has brought the ICC far from the Court of “last resort” that it was meant to be. The current version of the “same person/same conduct test” should be reconsidered and give way to a more deferential approach towards domestic courts.

Affected communities in Africa are also particularly disappointed by the lack of ICC cases against members of self-referring governments.

Finally, given the ‘deep political implications’ of the Court’s activities, ‘the ICC may well do better to openly acknowledge the them’.

**Respondent 4 (R-4)**

According to R-4, ‘we should not be too pessimistic about the future of the Court’, as ‘the story of international criminal law and the ICC itself are full of twists and turns and unexpected success’.

The respondent adds that albeit the ICC is still young and has a lot to learn, it is, nonetheless, ‘the cornerstone of a global legal order’;

and ‘it is the responsibility of states and civil society to nurture such an order by fully supporting the Court’.
Respondent 5 (R-5)

[1] According to R-5, it is important that the ICC carries out its work ‘without fear – undeterred or favour’, while ‘focusing on the victims and being firm in its fight against impunity’.

[7] However, states, too, ‘should be resolute in their fight against impunity, and aptly cooperate with the Court’.

[30] Against this backdrop, an important factor for the future success of the ICC is a ‘greater engagement with and outreach to local communities’.

Respondent 6 (R-6)

[27] According to R-6, several positive developments have already taken place since Bensouda has taken office in 2012. A number of prosecutorial strategies and policies have been reconsidered. In particular, investigations have become more in-depth and cases are being built more carefully, as we can see, the respondent notes, from the limited number of cases being opened by Bensouda.

[26] Yet, the persisting absence of cases outside Africa is ‘particularly detrimental to the Court’s legitimacy’.

[24] On the other hand, the respondent notes that if the Court enlarges its focus beyond Africa - and, notably, if it turns to powerful states which are not even party to the Rome Statute, such as the US, Russia, Israel – we must expect non-cooperation and a serious backlash against the Court.
**Respondent 7 (R-7)**

R-7 points to two major avenues of improvements for the Court. Firstly, from the OTP’s side, we should expect more careful and efficient investigations and case-building,

in addition to a diversification of the geographical scope of the cases.

Outside the Court, greater cooperation by both states and the UNSC is needed.

In this regard, according to R-7, more pressure needs to be put on uncooperative state parties: not only can and should they be reported to the ASP; but, following the ICTY model, uncooperative state parties may also be subjected to both political and economic pressure by the international community. The success of the system established by the Rome Statute, hence, ‘depends on the willingness of the international community to genuinely support the Court’, something which has been ‘largely unsatisfactory so far’.

**Respondent 8 (R-8)**

R-8 reiterates that the Court ‘needs to re-calibrate expectations’ as a basic component of its strategy to address the current legitimacy crisis. It is important to have an honest discussion about ‘which goals to prioritize’.
‘in light of the extremely limited capacities and budget of the Court’.

For example, the ICC may – and, according to R-8, should - decide to focus and invest on its ‘expressive function’.

Another important improvement would be to engage in open discussions with the local communities and the individuals directly affected from the work of the ICC, and to take in due account their responses when deciding whether/how to intervene in a certain situation/case.

On the other hand, ‘state parties and the UNSC have to increase their support’, in particular ‘financial support’ as far as state parties are concerned.

Respondent 9 (R-9)

According to R-9, while the ICC has achieved a number of exceptionally important goals, there are still things that can be improved and crucial challenges ahead. One of the avenues for improvement is about how the ICC engages and communicates with local affected communities and individuals. Much has already been done - notably, in terms of outreach and management of the expectations of victims. So, for example, thanks to the outreach activities carried out by ICC local offices, affected communities are starting to understand that ‘reparations are not for everyone, but only for whom has been directly involved in the Court’s
cases’. It is also becoming clearer that the Trust Fund’s reparations mandate is related only to those specific judicial proceedings that result in a conviction. People, the respondent continues, have also understood that it takes several years before proceedings before the Court reach the reparation stage. The issue of reparation is a very sensitive one, since a major reason behind the strong support of the Court by African communities has been precisely their ‘hope to get reparations’, and it thus requires timely and effective solutions. For example, nowadays, due to the limited logistic capacities of the ICC, many victims remain excluded from the Court’s proceedings, for instance, because the Court fails to register them or because there are missing data in their registration. The respondent recalls, in this respect, the fact that victims may be illiterate and thus in need for special support. Special support – much more of what is being granted nowadays – is also needed for severely traumatized victims, such as victims of sexual violence. All these things considered, according to R-9, we should ask whether and to what degree the ICC is able to provide that kind of reparative justice which victims expect. The support to the Court by African communities may decrease dramatically if the ICC will fail in this. A further cause of disappointment among affected communities is that not all hearings before the Court are public, raising, therefore, an issue of lack of transparency. Some Ugandan communities have also alleged that closed sessions may take place as the result of agreements between the Court and the government of Uganda.

Furthermore, according to R-9, the ICC should put more effort into its cooperation with local domestic
judiciaries and their capacity-building. For example, The Ugandan judicial system has the potential for great improvement. The respondent refers to the fact that in Uganda the lack of communication between the ICC and the criminal division of the Supreme Court – which is also dealing with LRA crimes - has been striking. According to R-9, there is also the widespread impression that the two courts ‘are sending different messages’. The respondent suggests that an in-situ court may solve several of the problems the ICC currently faces in Uganda.

Finally, R-9 turns to the problem of the ICC’s lack of enforcement power, which has caused many suspects to remain at large. The respondent argues that the relevance and the legitimacy of the Court are inescapably tied to its capacity to enforce arrest warrants and thus be effective. If non-compliant states continue to defy the Court’s authority - for example, by welcoming visits by the president of Sudan rather than fulfilling their obligation to arrest him– it is very hard to envision a positive future for the Court.

Respondent 10 (R-10)

R-10 suggests that the Court most urgently needs to return to its own role as a court of last resort.

Furthermore, ‘some fresh air’ and ‘new perspectives’ at the Office of the Prosecutor could be very useful. The OTP, according to R-10, needs more careful and effective case-building. In particular, the respondent points to the need for greater expertise in the collection and preservation of evidence, including ‘more thorough
knowledge of and respect for the local cultural contexts and traditions’.

**Respondent 11 (R-11)**

According to R-11, the Court has turned into a ‘complex and cost-ineffective bureaucratic structure’, which has proved ‘particularly unable to live up to the fundamental principle of complementarity - let alone positive complementarity - laid down in the Rome Statute’. Hence, the respondent invokes a ‘radical change of direction’.

The Court of the future ought to become a ‘much more streamlined and cost-effective institution’, and especially, ‘it ought to reconnect itself to the spirit of complementarity’. ‘When states created the Court, they wanted to establish a Court of last resort’. This idea has been reaffirmed through the concept of positive complementarity. In other words, ‘the Court should intervene only when really needed’, while, instead, engaging more and more openly in diplomatic and capacity-building activities’.

**Respondent 12 (R-12)**

According to R-12, ‘what would be mostly needed for the Court is a radical change of political approach’. And yet, ‘we see the Court going in the opposite direction’.

The respondent recalls in this respect the amendments to the crime of aggression - which have expanded ‘the consensual nature of the Court’s
jurisdiction’, to the detriment of its supranational authority

- and the decision not to open an investigation in the Comoros situation.

**Respondent 13 (R-13)**

According to R-13, whereas reform at the ICC is needed, a conversation about reform is also a very difficult one to have, especially in the current political climate, which appears far less well-disposed than in the 90s, when the Rome Statute was drafted. The respondent explicitly cites the current rise of populism - as well as the growing barriers to cooperation - around the globe; and argues that if we now opened a discussion about how to fix problems at the ICC, we would risk going from bad to worse.

Speaking of the ICC of the future, R-13 suggests that it is difficult to make any predictions. At the same time, ‘much depends on the kind of aspirational story that the Court itself wants to tell’. Having said that, the Court may benefit from ‘a greater involvement of local communities and youth in its work’.

**Respondent 14 (R-14)**

According to R-14, the future of the Court lies in its capacity to ‘carry out a deep self-reflection and live up to its own nature as a judicial institution unfettered by political considerations’. In particular, the ICC has to stand up to its responsibility to ‘investigate and
prosecute wherever is warranted by the Rome Statute - irrespective of the existing distribution of power'.

Furthermore, the respondent notes that not only state parties, but also the UN and the broad international community, have to ‘urgently increase their level of support to the ICC'.
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259 | P a g e


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