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Abstract

This dissertation analyzes state cooperation with the International Criminal Court (ICC, or the Court). State cooperation is the precondition for the Court to bring perpetrators of genocide, war crimes, and crimes against humanity to justice. The Court does not have a police force of its own to enforce its arrest warrants and court requests. Consequently, the ICC depends on the cooperation and assistance of states and international organizations to arrest suspects and facilitate the Court's work in various ways. Through qualitative methods, including case studies, content analysis, and process tracing, I investigate how states support or undermine the Court's work through mandatory compliance as well as voluntary cooperation.

Based on in-depth case studies of two African ICC states parties—South Africa and Kenya—I develop a new framework to classify states into four types of cooperators (model cooperators, pro forma cooperators, cheap talkers, and non-cooperators) based on whether they engaged in mandatory compliance and/or voluntary cooperation for institution weakening or institution strengthening. While mandatory engagement refers to specific compliance requirements governments take on when they join the Court as states parties, such as complying with court requests, voluntary cooperation refers to support behavior that goes beyond the Rome Statute, such as diplomacy and public statements.

In the case study chapters, I trace South Africa and Kenya's cooperation behavior longitudinally to describe their shifts from model cooperators to pro-forma and non-cooperators and explain these countries' cooperation behavior in the *al-Bashir* and *Kenyatta* court cases. While South Africa failed to arrest Sudanese President Omar al-Bashir when he visited the country in June 2015, the Kenyan government cooperated to some extent with the ICC while also undermining the Court regionally and domestically. I complement these case studies with a content analysis of what states say about the Court at the UN to show how discourse about the ICC has developed over time and what states like and dislike about the Court's work. I contrast this venue with the African Union's (AU) position on the Court. While more critical of the ICC, the AU's focus lies on the Court's charges against sitting African heads of state rather than the overall portfolio of ICC situations.

The dissertation's findings relate to how states parties cooperate with the ICC and when and why they cooperate. First, I find that states can simultaneously cooperate with the Court while undermining it in other forums. Kenya engaged in a multifaceted strategy that included mandatory cooperation but also diplomacy and statements against the Court. Second, I find that the AU plays an important role as a mediator in the state-ICC relationship. The AU functioned as a forum for ICC-critical African leaders and contributed to the stalling of progress in the *al-Bashir* case by passing a non-cooperation policy that provided countries with a legal 'out' if they did not want to arrest a fellow African leader. Moreover, the organization called repeatedly for the deferral of cases and that sitting heads of state should be immune from prosecution. Third, I find that domestic-level factors help explain cooperation behavior. Most importantly, I argue that governments cooperate with the ICC when their interests are aligned with the Court; cooperation is not forthcoming or is undermined when the interests are misaligned. Moreover, reputation concerns can help explain cooperation decisions.

The dissertation contributes to ongoing debates in International Relations (IR) on global governance, transitional justice norms, and compliance with International Law. The cooperation

framework that I introduce expands on existing accounts of state cooperation with the ICC by including a wider array of state behaviors. While existing accounts either focus on mandatory cooperation *or* on political support for the ICC, I combine these behaviors into one framework. Beyond the ICC, this framework has the potential to travel to other international courts and organizations. Second, the crucial role of the AU in the state-ICC nexus challenges common accounts of Global South countries and the AU as weak actors in the international system. In the court cases against sitting heads of state, the AU's involvement suggests that a regional organization can counteract a global institution's work and purpose. Thus, when analyzing compliance, we need to expand our focus beyond domestic-level explanations to include regional actors that may impact compliance and create loyalty conflicts for states parties. The longitudinal analyses reveal that states can shift their cooperation behavior over time. This attests to the value added of in-depth case studies for our understanding of the temporal variation of compliance. It complicates existing compliance studies that analyze compliance through ratifications and domestic implementation of international treaties. These studies represent the compliance behavior of countries at a specific point in time but they cannot tell us about the degree to which a state will honor its legal commitment when called on to fulfill a specific task years or decades after the initial commitment. In addition, the empirical chapters add to the second image and second image reversed traditions in IR. On the one hand, the case studies show that these countries' domestic politics can impact the functioning of an international organization. On the other hand, they contribute to our understanding of the ICC's impact on domestic politics in South Africa and Kenya. Lastly, the dissertation attests to the formidable hurdles in prosecuting suspects of mass atrocities when those perpetrators are sitting heads of state. When equipped with the resources and powers of office, sitting leaders can easily circumvent international justice and might even be supported by important allies in their endeavors. This casts doubt on more optimistic accounts that posit an increasing trend toward accountability for all perpetrators.

ENABLING JUSTICE: STATE COOPERATION WITH
THE INTERNATIONAL CRIMINAL COURT

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Chapter 1: Introduction

Two episodes illustrate the importance of state cooperation for the functioning of the International Criminal Court (ICC, or the Court). On 24 November 2013, authorities of the Democratic Republic of the Congo (DRC) arrested Congolese legislator Fidèle Babala Wandu. Babala Wandu has been charged by the ICC for conspiring with others to coach and bribe witnesses in the ICC trial of former Congolese vice president Jean-Pierre Bemba. The Congolese authorities acted on the ICC's arrest warrant and detained Babala Wandu. North of the DRC, in the Sudan, President Omar al-Bashir is still in power—eight years after the ICC issued two arrest warrants for crimes against humanity, war crimes, and genocide. Despite these high-profile charges, al-Bashir continues to travel around the globe, including to many ICC states parties (i.e. states that have ratified the Rome Statute) that have failed to follow up on their commitment despite their legal obligation to arrest him.

The ICC lacks its own police force, and so it depends on the cooperation and assistance of states parties, non-member states, and international organizations (IOs) to put suspects on trial. State cooperation is *the* pre-condition for the achievement of the Court's mission to end impunity. In contrast, the *absence* of cooperation leaves suspects at large, makes evidence unattainable, and obstructs the Office of the Prosecutor's (OTP) efforts to build successful cases. An ICC official phrased the importance of state cooperation in the following way:

Without the support of states, this court is basically just us in a building. We can issue any statement or decision or whatever we want but as soon as we step outside the doors of this building, we need the cooperation of states, the host state, the Netherlands, and to go anywhere else, every step of the way, even to enter a country, we need the consent of the state.¹

¹ Interview 004.

Critics posit that the high hopes that accompanied the Court’s creation—that it would deter mass atrocities and end impunity—have failed to materialize. They point to the limited number of cases and completed trials at the ICC. Since the Court’s formal establishment in 2002, ICC judges have issued arrest warrants and summons to appear against 40 suspects in 24 court cases. 12 of 40 have been detained in the ICC detention center and have appeared before the Court. 11 persons remain at large and are not in the Court’s custody. Charges have been dropped against five individuals due to their deaths. Charges were either not confirmed or were dropped or vacated against eight persons. ICC judges have issued five verdicts: four guilty verdicts (Jean-Pierre Bemba, Thomas Lubanga Dyilo, Germain Katanga, and Ahmad al-Faqi) and one acquittal (Mathieu Ngudjolo Chui). For many observers, this record paints the picture of an ineffective institution that has achieved little in 15 years of operation. Table 1 presents the current situation countries, the number of issued arrest warrants and summons to appear (thus representing the total number of *potential* trials), and the number which have been executed and remain open.

Table 1: Overview of Arrest Warrants (AW) and Summons to Appear (SA)

Situation Country	Number of AW and SA	Executed AW and SA (accused in ICC custody or on trial)	Open AW or SA (minus deaths, charges dismissed, vacated)
Georgia	0	0	0
Mali	1	1	0
Côte d’Ivoire	3	2	1
Kenya	9	6	3
Libya	4	1	2 (1 died)
Sudan	7	0	5 (1 died)
DRC	6	5	1
CAR (I and II)	5	5	0
Uganda	5	1	1 (4 died)
TOTAL	40	21	13 (6 died)

In addition to the meager record of trial completion, the ICC has drawn criticism for its prosecution focus. Of currently ten situations (Court parlance for a time-bound event in a country, such as a conflict), only one is not in Africa. For 14 years, until January 2016 when the ICC's OTP opened an investigation into Georgia, all ICC situations had been in Africa. Despite conducting preliminary examinations (a pre-investigation phase) in other continents that occasionally involved Western powers, the OTP has declined to open official investigations outside of Africa. In addition, the OTP has charged heads of state and leading state officials, which has prompted a stark backlash from some African countries, accusing the Court of bias against Africa and derailing fragile peace processes.

This dissertation does not deny that the Court bears responsibility for its litigation mistakes, slow trials, and political backlash. Important research has highlighted the political underpinnings of ICC decision-making.² However, this research contributes to an emerging topic in ICC research that takes the role of states' support for the Court seriously.³ While much scholarship has studied the creation of the Court and its impact on justice and peace,⁴ compliance with the Rome Statute has only recently been examined more closely. Often it is not the Court that breeds its own bad record but actually the states in charge of enforcing arrest warrants and bearing the legal responsibility to comply with ICC decisions.⁵ Critics' arguments about the lack of Court ineffectiveness are intimately tied to the lack of state cooperation in vital areas such as arrests and surrender.

² E.g. Bosco 2014; Tiemessen 2014.

³ Bosco 2014; Hillebrecht and Straus 2017.

⁴ To name a few: Schiff 2008; Deitelhoff 2009; Simmons and Danner 2010; Chapman and Chaudoin 2013.

⁵ This point was also made by Meernik 2008.

Compliance and cooperation with the ICC is an inherently political question.⁶ Per the Court's founding treaty, the Rome Statute, all ICC states parties are legally obliged to cooperate with the Court. However, while the Court has the *legal* power to demand a state's cooperation, it is less powerful politically. The Court's judicial chambers can make findings of non-compliance against states parties and can refer the matter to the Court's legislative body, the Assembly of States Parties (ASP), and the UN Security Council (UNSC). The ICC can also persuade state leaders and other international actors of its effectiveness and work. But beyond, the Court cannot coerce states into action. The *politics of compliance and cooperation* lie at the heart of the state-ICC nexus. My dissertation provides insight into this important topic by analyzing compliance and non-compliance with the Rome Statute and by examining how states support the Court through Court-supportive discourse and diplomacy.

This research thus acknowledges the deeply political nature of international courts.⁷ On the one hand, international courts are IOs created through multilateral treaties. However, they can act more independently of member states, thus functioning less like agents of state but rather as trustees.⁸ Once created, the ICC's Chief Prosecutor can initiate cases on her own will, a power which opens up the Court to more critique from states. International courts are created to be independent and neutral⁹ and this is sought to be ensured through their international makeup, legal professionalism,¹⁰ their location away from conflict area, all to "trump national

⁶ I use the terms 'cooperation' and 'compliance' interchangeably here. While 'cooperation' can be defined more broadly politically, this dissertation is concerned with rhetoric as a form of cooperation as well as compliance with arrest warrants (Art. 89). This compliance is contained as 'cooperation' in the Rome Statute's Part IX 'International cooperation and judicial assistance.'

⁷ Nouwen and Werner 2011.

⁸ Alter 2008.

⁹ This is the Court's rational-legal authority, which make it an attractive organization to which states delegate: Alter 2008; Barnett and Finnemore 2004.

¹⁰ ICC officials point out the strictly legal reasoning that guides their decision-making: Interviews 002, 003, 004, 006.

sovereignty.”¹¹ However, despite these efforts at insulation, other political actors may want to exert control over them and may want to “hamper investigations and block indictments by withholding valuable evidence in their possession.”¹² The dissertation speaks to this debate as I chronicle states’ efforts at bypassing the Court’s decisions or hampering its work.

This Introduction is divided into several sections: The next two sections present the two main research questions driving this dissertation. In them, I present my answers to the research questions on which I will further elaborate in the following chapters. Then, I sketch out the dissertation’s contributions to ongoing debates in International Relations (IR) about norm resistance and compliance with International Law (IL). Next, I describe the methodology used for answering the questions. The last sections provide some background on the importance of state cooperation for the Court, existing research on the Court, the legal controversies surrounding it, and an overview of upcoming empirical chapters.

Main Questions and Arguments

This dissertation is about the ICC and the institutional context in which it operates. I investigate ways in which states parties to the Court have lent support to the Court or not. The goal of the dissertation is two-fold. First, I engage in theory building by developing a cooperation framework that can help researchers categorize a country’s cooperation behavior toward the Court at a specific point in time as well as longitudinally. The framework has been created inductively based on the two case studies in this dissertation. In addition, I engage in theory testing of common compliance explanations. In charting two states’ cooperation behavior over time, I seek to explain why South Africa and Kenya cooperated the way they did.

¹¹ Peskin 2008: 6.

¹² Ibid.

Going beyond existing accounts of state cooperation with the ICC and criminal tribunals,¹³ I combine legal and non-legal means of engagement with the Court in a new cooperation framework. While legal means refer to mandatory obligations states take on as states parties to the Rome Statute, including ratification, domestic implementation, and compliance with court requests, non-legal means are voluntary behaviors that occur outside of the Rome Statute framework but that can nonetheless have an important impact on the Court. States can encourage other states to join the ICC, thus enlarging the Court's territorial jurisdiction, and attest to its important work, thereby strengthening the Court's profile and legitimacy. But states can also undermine the Court by lobbying against, fostering counter-narratives, or advocating for withdrawal from the ICC. This range of behaviors reflects more accurately the multifaceted relationship between the ICC and its states parties.

Depending on the extent to which states support the Court through diplomacy and statements (non-legal, voluntary means) and compliance with the Rome Statute's legal obligations (legal, mandatory means), states can be separated into four categories: model cooperators (high legal and non-legal cooperation), cheap talkers (low legal cooperation but pro-ICC statements), pro-forma cooperators (legal cooperation but low non-legal cooperation), and non-cooperators (low legal and non-legal cooperation). Table 2 displays these behaviors and types.

¹³ Peskin 2008; Bosco 2014; Hillebrecht and Straus 2017.

Table 2: Overview of Cooperation Types

	Compliance with the Rome Statute	Non-Compliance with the Rome Statute
Pro-Court diplomacy and statements	<i>Model Cooperators</i>	<i>Cheap Talkers</i>
Anti-Court diplomacy and statements	<i>Pro-Forma Cooperators</i>	<i>Non-Cooperators</i>

While I elaborate on how the case studies fit into the framework in the ‘methodology’ section below, three caveats are in order. First, the framework does not assume that states remain one type of cooperator over time. Rather states can shift from one cell to another as they come to differently assess their relationship with the Court. Second, the framework takes seriously that states can be simultaneously cooperating through one means but fail to cooperate in the other. The ‘pro-forma cooperators’ and ‘cheap talkers’ categories exemplify this reality. On the one hand, states may issue pro-Court statements but when it comes down to executing a court request, they may fail to comply. On the other hand, states may comply with court requests and signal a veneer of cooperation while at the same time undermining the Court through diplomacy or discourse. Third, while presented as distinct cells here, the borders between compliance and non-compliance as well as between pro-Court and anti-Court diplomacy and statements are not as rigid as implied in the typology. Rather, they can be seen as ends of a spectrum as I present below. However, for analytical clarity, I introduce the types here in this table.

Country Statements about the ICC

In Chapter 3, I investigate the discursive aspect of non-legal engagement and how states have expressed loyalty and critique of the Court over the years. Using statements and rhetoric as one form of cooperation builds on the idea of concordance as one indicator for norm robustness.

Concordance refers to the extent to which rules are accepted “in diplomatic discussions and treaties (that is, the degree of intersubjective agreement).”¹⁴ Concordance then seeks to capture the extent to which states agree that the norm and rules are acceptable. Thus, I include discourse and rhetoric here to achieve a fuller picture of state cooperation with the ICC since it has been used as an important indicator for norm acceptance and adoption.¹⁵ Moreover, it aligns with how ICC officials perceive state cooperation, namely to include broader political support for the Court such as public statements.¹⁶

In the case of the ICC, we can gauge this support through analyzing what states say about the ICC in another forum, the UN. Here, many states affirm their approval or air critiques of the Court. Through public expression of support they tie their reputation to the Court. My analysis does not suggest that country statements about the ICC have concrete effects. Rather, I highlight that what countries say about the Court is one indicator of support for the Court. If ICC states parties widely criticize the Court for its actions, this points to serious institutional problems of legitimacy and effectiveness.

The content analysis of country statements at the UN about the Court shows that states support the Court and the accountability norm for which it stands. Rhetoric from African states parties has been overwhelmingly positive, pointing repeatedly to the continent’s early support for and continued loyalty to the Court. Expressions of loyalty outnumber critical statements. Interestingly, the most frequently voiced critique is not of the Court itself but of the lack of cooperation by other states, mostly concerning the non-execution of arrest warrants. Rather than shaming peers by calling them out in public, states often used their statements to highlight the consequences of non-cooperation. This suggests that speech acts are seen as a vehicle to air

¹⁴ Legro 1997: 35.

¹⁵ Dixon 2017; see also the Chapter 2.

¹⁶ Interviews 001, 002, and 004; see also Chapter 2.

grievances and maybe persuade other states that Court reform is necessary. This other-blaming defies common perceptions of the Court as the source of inefficiency and illegitimacy. However, states also raise critiques of the Court, most importantly its finances and its prosecution focus on Africa. Budgetary critiques are however also often calls for the UN to help fund those ICC cases that were initiated by UN Security Council (UNSC) referrals.

This supportive environment at the UN contrasts starkly with the increasingly critical environment at the AU. An analysis of AU Assembly summit decisions shows that the AU Assembly only started passing ICC-critical decisions once al-Bashir was charged. As long as the Court charged rebel leaders, no AU decision had been devoted to the Court. Pre-2009 decisions on justice relate to the merger of the AU's Court of Justice with the African Court on Human and People's Rights. Starting with the AU's two 2009 decisions expressing regret over the al-Bashir charges and calling on AU member states *not* to cooperate with the ICC's arrest warrant for al-Bashir, the organization has become more vocal on the Court's record. From here on, the AU tried to delay the Sudan and Kenya cases for one year through the UN (deferral), directly criticized the first ICC Chief Prosecutor Luis Moreno-Ocampo, and condemned the selective prosecution of Africans. These statements and actions by the AU laid the groundwork for a discourse in which non-compliance with the al-Bashir arrest warrant has become acceptable and common arguments about the detrimental impact of prosecuting sitting leaders on peace processes became widely circulated.

The analyses at both venues present some noteworthy differences. While at the UN, states widely admonish the non-arrests of al-Bashir in some African states, these non-arrests are applauded at the AU as African countries were merely implementing prior AU decisions. Second, while states at the UN emphasize the mutual importance of peace and justice, AU decisions

repeatedly prioritize peace over justice. Third, immunity of heads of state presents a particularly controversial issue at the AU. The analyses attest to the contrasting environments and ‘moods’ toward the ICC at these venues and they show that despite continuing African support for the ICC at the UN, this African support for the ICC fails to materialize in AU Assembly decisions.

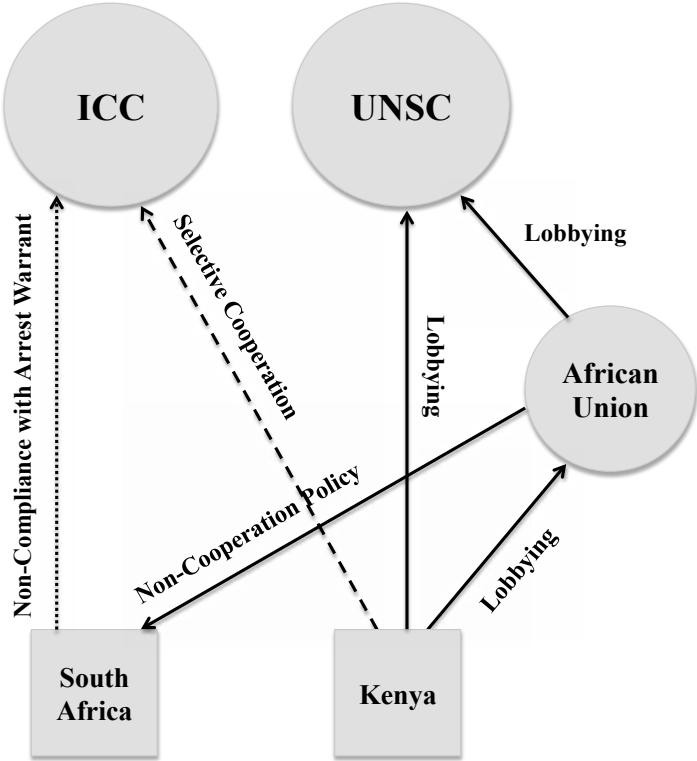
Explaining Cooperation Behavior

In addition to analyzing the grievances and praise states have levied at the ICC, this dissertation investigates the cooperation behaviors and the rationales of two states parties, South Africa and Kenya. In these two case studies, I trace the engagement between the respective governments with the Court and seek to explain why they behaved the way they did. Whereas the content analysis chapter provides a very positive picture of cooperation through a high level of public support for the Court at the UN, these cooperation incidents reveal a bleaker picture. Cooperation incidents are concrete state decisions about complying or not with a court request issued by the ICC, such a request for arrest and surrender. On the one hand, requests for arrest and surrender are arguably the most important court request a state can be called on to execute because they directly bring suspects into the courtroom. However, arrest and surrender are not the only court requests that states are obliged to execute, among them also providing access to witnesses, bank records, sites, etc.

The case studies provide a bleaker picture of cooperation with the Court because both involve prosecutions against current leading state officials. In these court cases, the interests between the domestic elites and the ICC are not aligned, making cooperation less likely. In both court cases, ICC-critical governments, such as Sudan, Rwanda, Kenya, Ethiopia, and Uganda, have succeeded in fostering anti-ICC decisions at the AU. As Chapter 4 shows, the AU’s non-cooperation policy has propelled African states into loyalty conflicts when al-Bashir has visited

their territory: They have to choose between staying loyal to the AU, thus bolstering their continental reputation, and the ICC and arrest al-Bashir, thus likely compromising their reputation in Africa. Chapter 5 highlights the Kenyan government’s behavior, which has included leveraging the AU to amplify its anti-Court message and delegitimizing the Court domestically. The AU has emerged as an important intermediary actor in the ICC-state cooperation context. Thus, two compliance factors situated at the domestic level (elite interest alignment and reputation concerns) are important but also the regional organization’s role in amplifying grievances against the Court. Figure 1 visualizes this cooperation context.

Figure 1: Cooperation Context for South Africa and Kenya



The AU’s resistance efforts have been successful as the South Africa and Kenya chapters show: In both the Sudan and Kenya court cases, current ICC Chief Prosecutor Fatou Bensouda

has suspended further action and dropped charges, basing her office's decisions on the lack of cooperation by the Sudan, the UNSC, and other countries who have failed to arrest al-Bashir and the selective lack of cooperation by the Kenyan government. As a result of AU action then, we can observe other ICC states parties, who have been in a position to arrest al Bashir, take advantage of an existing Court-critical discourse and AU decisions to not cooperate in his arrest, effectively providing justifications for non-arrest, sanctioned by the regional organization, in direct contrast to the ICC.

While the case studies illustrate the explanatory power of compliance explanations focused on interest-alignment and reputation, several prominent explanations prove less useful in explaining South Africa and Kenya's behavior. International-level compliance theories fail to convincingly explain compliance decisions with ICC arrest warrants as the enforcement mechanisms are notoriously weak in human rights treaties, and the ICC has no enforcement power itself. While there is some evidence that outside pressure by major trade partners had some effect on African leaders moving summits to avoid hosting an ICC suspect, no country or organization has tied the execution of ICC arrest warrants to substantial benefits to incentivize compliance as had been the case with arrest warrants for the International Criminal Tribunal for the Former Yugoslavia (ICTY). Moreover, some prominent domestic-level theories do not satisfactorily explain why South Africa, often seen as a poster child for compliance, failed to arrest al-Bashir and why Kenya partly cooperated with the ICC in the court case against Uhuru Kenyatta. For instance, lack of state capacity could be seen as a reason for non-compliance. However, while the cases represent Global South countries, compliance decisions were made at the highest level of government rather than by some ministries, as is the case in other

international agreements. Here, we see the South African executive disregarding domestic pro-compliance court decisions and the Kenyan executive mobilizing state resources against the ICC.

Table 3 presents the explanations for cooperation and non-cooperation in each of the case studies. Bolded are the explanations that feature in both cases. What stands out as shared are interest misalignment and the importance of reputation. In both cases, the interests of the sitting government and the ICC differed: While the ICC wanted al-Bashir arrested and wanted to see Kenyatta on trial for the crimes he committed, the sitting governments had no interest in delivering al-Bashir to The Hague or to cooperate fully with the ICC, thus incriminating themselves more in the *Kenyatta* case. Moreover, both countries feature important regional outlooks. For South Africa, its foreign policy shifted since the 1990s toward a more Africa-centered foreign policy. Thus, South Africa had much to lose in terms of its regional reputation had it arrested al-Bashir. Not arresting him allowed the country to act in line with AU policy and fellow African ICC states parties. In turn, Kenya's actions against the Court also feature an important regional dimension as the Kenyan government led the continental movement against the Court and for mass withdrawal. In contrast to South Africa's puzzling *non-cooperation*, the Kenyan government's *cooperation* seems puzzling.¹⁷ Given that the interests between the government and the ICC were so diametrically opposed, why did the government cooperate at all? I argue that the Kenyan government cooperated to some degree because outright cooperation refusal would have hurt the government's reputation for compliance with IL and because Kenyatta and Ruto promised during the 2013 election that they would continue their good faith cooperation with the Court.

¹⁷ On the usefulness of puzzling cases, see Klotz 2008: 51.

Table 3: Overview of Compliance Explanations in the Case Studies

	Compliance	Non-Compliance	Alternative Explanations
South Africa	Early: global reputation concerns	Interest misalignment Regional reputation concerns and foreign policy priorities	Lack of state capacity Domestic civil society
Kenya	Reputation concerns Dependence networks Domestic support for ICC	Interest misalignment Absence of international accountability pressure Domestic mandate against ICC	Lack of state capacity Domestic civil society

Contributions of the Dissertation

The project contributes to several scholarly debates on global governance, transitional justice norms, and compliance with IL. First, by introducing a new cooperation framework, I add to the conversation about how to properly classify state behavior toward the Court. I argue that states can openly seem to be supportive of the Court by engaging in pro-ICC discourse or complying with court requests while at the same time undermining the Court and its associated norms through other channels. In a departure from previous scholarship, I include discourse and statements as a distinct form of cooperation. These deserve attention as they can have serious implications for the Court’s legitimacy. Supportive Court discourse signals to other states that the Court is seen as a legitimate actor and is trusted by states parties. Statements of principled support for the Court help build and sustain an ‘enabling environment,’ which grants the Court legitimacy. In contrast, statements critical of the Court can undermine the Court’s legitimacy and thus harm cooperation further. The Court-discourse emanating from the AU and some African capitals has often been described as a ‘backlash’ against the Court, and trumps the Court-supportive rhetoric from other African states in many media accounts. However, I find evidence of high support from most African ICC states parties—findings that cast doubts on frequent

media accounts of the troubled ‘ICC-Africa relationship.’ Moreover, African leaders’ decisions at the AU show that their criticism of the Court relates exclusively to charges against sitting heads of states and not overall ICC action.

Second, the dissertation highlights the AU’s agency in global governance. In much research, Africa becomes the passive recipient of Western or Chinese actions and norm diffusion efforts. The dissertation contributes to research highlighting African agency by showing how individual African states and the AU in particular play powerful roles in shaping states’ interaction with the ICC. The AU can be said to function as a norm ‘antipreneur’ to the ICC’s accountability for heads of state norm by providing a stage for ICC-critical African leaders and a venue where ICC-critical decisions could be passed that provide legal justifications for non-compliance with ICC arrest warrants. Through their regional organization, ICC-critical states were able to engage in institution weakening of the Court. All three empirical chapters attest to the AU’s important role by tracing its actions and positions on the ICC over time. These regional political dynamics are overlooked in the theories focusing on the domestic level, on bilateral and international pressure and legitimacy theories. This regional level—a meso-level between the domestic and international—does not feature prominently in existing compliance studies.

With regard to compliance explanations, the chapters lend support to domestic-level explanations, especially rationalist arguments about interest alignment between state leaders and the ICC as well as reputation concerns. This means that compliance is strategic rather than caused by managerial problems as suggested by the management approach to compliance.¹⁸ Cooperation is forthcoming when the interests of the ICC and the government in charge of making cooperation decisions are aligned. This has been the case in the early years of the Court’s existence when both South Africa and Kenya supported the Court through legal and non-legal

¹⁸ Chayes and Chayes 1993.

means, thus placing them in the ‘model cooperators’ category. In these earlier court cases, rebel leaders and the domestic political opponents of incumbents were charged, hence posing little risk to sitting governments. However, this changed in 2009 when the Court started charging leading state officials in the Sudan and in Kenya. Cooperation with the Court by these two countries declined and we see increasing efforts to weaken the Court. In that sense, the charges against al-Bashir represent an ‘exogenous shock’¹⁹ that changed the cooperation trajectory between several African countries and the ICC.

Moreover, the dissertation’s case studies reveal the methodological utility of studying specific compliance incidents *years after* a state’s initial commitment, ratification, and domestic implementation. This unit of analysis provides purchase on two aspects compliance scholars are interested in: time and causal factors. Investigating cooperation incidents takes seriously that compliance does not end with ratification or the passage of domestic implementation legislation. The ICC represents a useful institution to study when we are interested in the temporal dimension of compliance as states are called on to perform specific compliance actions after years or decades have passed. Moreover, a longitudinal focus on concrete compliance behavior can shed light on whether other considerations by the current government might impact compliance as other leaders might calculate costs and benefits differently or might be differently influenced by international peers or regional organizations. These longitudinal analyses contribute to filling an existing gap in the literature on compliance that has not taken time into account sufficiently: “[T]he time dimension is crucial for compliance, and yet it is hardly addressed or incorporated in empirical studies of compliance.”²⁰

¹⁹ For the methodological usefulness of ‘exogenous shocks’ in longitudinal analyses, see Klotz 2008: 53.

²⁰ Lutmara, Carneiro, and McLaughlin Mitchell 2016: 560.

The largely negative compliance record that I seek to explain in the case study chapters adds to more skeptical studies about the ICC's potential for justice and deterrence. In cases when leading state officials are charged, the ICC has faced serious obstacles. Some states, like Sudan, have openly refused to cooperate with the ICC. Others, many of them ICC states parties, have declined to arrest al-Bashir during his visits to their countries, justifying their non-arrests with the contradictory AU non-cooperation policy. Kenya, with its own leaders charged by the Court, has walked a middle path of selective cooperation in which some requests were complied with while others were not, all the while the government sought to discredit the Court's Kenyan cases. The range of these behaviors shows that when charges are levied against powerful state officials, these are unlikely to go far at the Court. While the Court has an incentive to issue charges against sitting heads of state—after all it is supposed to charge those 'most responsible' regardless of official capacity—the reality of these cases has shown the formidable challenges they entail, especially when they go against the policy of the AU.

Methodology

To answer the research questions of when and why states cooperate with the ICC, I use a qualitative methodology that combines a comprehensive content analysis with two in-depth case studies. The content analysis of country statements analyzes how rhetorical support for the Court has developed temporally and regionally. The case studies allow me to assess the explanatory power of various compliance factors through process tracing. As data sources, I rely on UN and AU records, ICC documents, newspaper sources, and elite interviews with Court officials, researchers, and NGO officials. These interviews were conducted in The Hague in January and June 2015, in South Africa in July 2015, and in Kenya in October/November 2016.

I operationalize cooperation in two ways: 1. Voluntary non-legal means of engagement, and 2. mandatory compliance with Rome Statute obligations. First, to analyze how ICC support and critique have developed temporally and regionally, I completed a content analysis, coding countries' expressions of public support for the Court at the UN. These statements represent the 'Court discourse'—the way state leaders and officials talk about the Court—and it tells us about the expectations that states have of the Court and the reasons for continued support for or critique of the Court. I created a dataset of ICC-related statements made at the UN General Assembly, coding a total of 605 statements by countries and regional groupings of states. I coded all countries' statements from 2002 to 2016 with the qualitative data analysis software NVivo. The unit of analysis is references that either express support, critique, or threaten exit. Moreover, based on a textual analysis of AU Assembly decisions, I created a timeline of ICC-related decisions passed by the AU Assembly to chart when and why the regional organization became critical of the ICC. I explain the coding and analysis process in more detail in Chapter 3.

In addition to a Court-supportive discourse, states can cooperate with the Court more tangibly through concrete compliance actions. This type of cooperation is codified in the Rome Statute and can be measured by looking at instances in which countries have complied with court requests, i.e. official letters demanding concrete state action, such as providing evidence or arresting charged persons. Data analysis of court requests is complicated by the confidentiality requirement. States are to keep court requests confidential and arrest warrants often remain sealed for years. However, arrest warrants are the most accessible requests to study because they are ultimately unsealed, and the outcome—transfer of a suspect to the Court—is clearly observable. In addition, non-compliance with arrest warrants and other court requests can be traced through ICC litigation. However, this litigation only serves as an indicator for non-

compliance once the ICC starts legal proceedings against a state, suggesting that a certain threshold of delay in execution of that request has been crossed.

Of this universe of 40 charged individuals, I chose two court cases that represent variation on the dependent variable (non-cooperation and selective cooperation): 1. the ICC arrest warrants for al-Bashir in June 2015 and South Africa's non-compliance with them, 2. Kenya's oscillation between non-compliance and compliance in the investigation against Kenyan President Kenyatta. I argue that the outcomes vary because when the governments of South Africa and Kenya were called on to execute a specific court order, their behaviors varied. The outcome I am interested in explaining in South Africa is the non-arrest of al-Bashir, which I label non-compliance because the South African executive's actions ran counter to the ICC arrest warrant. Kenya's assessment is based on the government's multiple actions toward the Court in the investigation against Kenyatta. I argue that Kenya engaged in selective cooperation because it can be situated between the pro-forma and non-cooperators.

While the outcomes differ, the two case studies also share important similarities. Most importantly, both cooperation incidents involve sitting heads of state. From a domestic cost-benefit analysis of the leader, cooperating with the Court when it investigates state officials of the leader's own circle or party or the leader him/herself, is very costly. In contrast, cooperating with the ICC in a court case against a domestic rival can yield important potential benefits, such as that person's arrest and removal from domestic power struggles. In light of these considerations and since previous research has suggested the more forthcoming cooperation record of countries in which rebel leaders and domestic political are subject to ICC arrest warrants,²¹ this presents an important shared characteristic between the two countries. Thus, both cases studies are instances of state cooperation under 'difficult' conditions, i.e. when we would

²¹ Interviews 001, 004; Hillebrecht and Straus 2017.

expect non-cooperation to be forthcoming. Moreover, both are states parties to the ICC as well as AU member states, hence both states are subject to similar regional and international pressures for compliance. Considering these aspects, they represent a ‘most similar design’ that were chosen to tease out relationship between domestic politics and compliance pressure and factors.²²

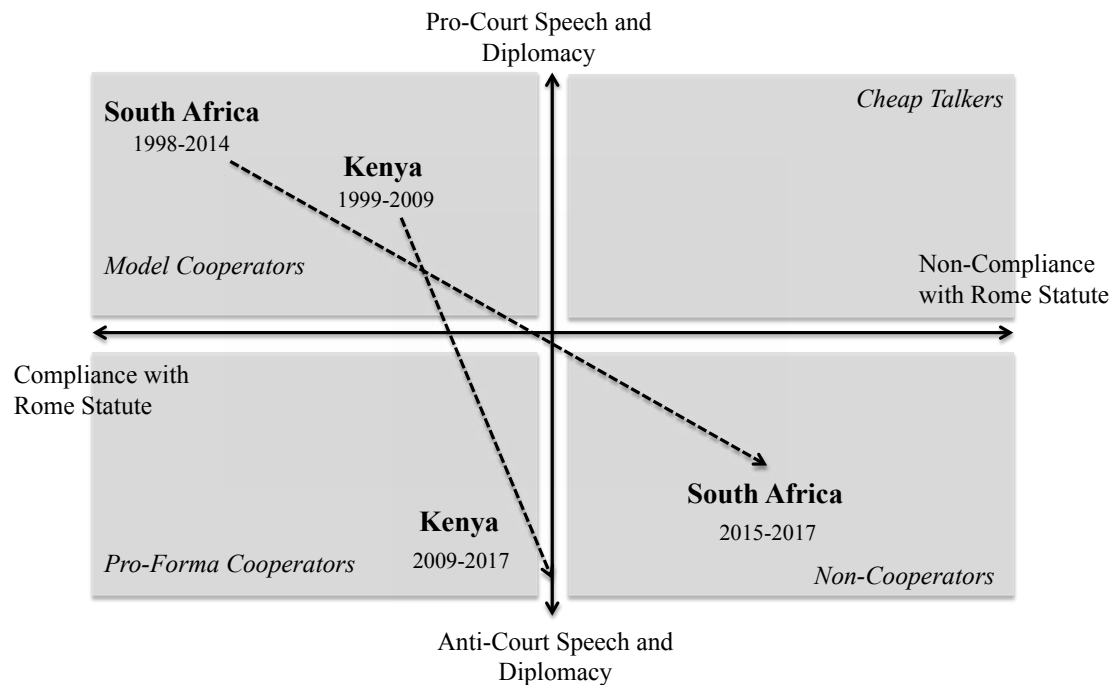
However, both countries differ in some important ways, which suggests that the explanations between the two will differ and they can yield insights into the explanatory leverage of common compliance theories. South Africa is not a situation country, hence its citizens do not face ICC charges. However, it plays an important role as a potential country to arrest ICC suspects should they enter South African territory. In terms of domestic-level factors, South Africa represents ‘likely’ case for compliance given its independent judiciary, active civil society, and high democracy scores. Moreover, South Africa can be called a model cooperator for the early years of the Court’s existence. This makes the non-compliance all the more puzzling at first sight. In Chapter 4, I explain the country’s shift. In the Kenya case study, leading state officials were charged in 2010 and two of those indictees then became head of state and Deputy President in 2013. In contrast to South Africa, Kenya has been rattled with several election violence episodes and ethnic tensions. Corruption runs high and the judiciary is less independent and thus provides less of a check on the executive than in South Africa. Both case studies thus explore puzzling cases: South Africa was a ‘likely’ case for compliance yet it failed to arrest al-Bashir; Kenya was a ‘likely’ case for non-compliance yet the government complied to some extent.

While my focus lies on explaining concrete cooperation decisions, I trace each country’s cooperation record over time. This tracing highlights shifts in cooperation behavior. The explicit shift in behavior happens in South Africa with the non-arrest of al-Bashir despite rising dissatisfaction with the ICC in the African National Congress (ANC) in earlier years. In Kenya,

²² Levy 2008.

the shift occurs with the charges against leading Kenyan officials in 2009 and 2010 when the government starts to lobby the UNSC and other African countries to delay the cases and then oppose the cases on various grounds. Rather than outright refusal to cooperate, Kenyatta repeatedly promised to keep cooperating with the Court and partially complied with some court requests, thus making the country a middle form between ‘pro-forma cooperators’ and ‘non-cooperators.’ Figure 2 presents visually these shifts over time. Notice that this typology only refers to different cooperation indicators and types, not to explanations of cooperation and compliance.

Figure 2: Cooperation Shifts by South Africa and Kenya



Let me briefly illustrate how I conducted the case analyses using the example of South Africa. First, I used primary and secondary sources, such as ICC publications and legal documents as well as scholarly and policy publications, news articles, and reports by civil society

organizations to construct a timeline of how South African officials have described the Court over time and the steps they took to comply with the Rome Statute. This preliminary work suggested a high support for the Court. To study the path to non-compliance, I completed an in-depth case analysis through process tracing with the help of primary, secondary, and elite interview data to assess whether other factors than the ones theorized in existing research had impacted the executive's decision.²³ Fieldwork in South Africa that allowed for semi-structured interviews with experts on South African foreign policy and a workshop with the Deputy Minister of Justice and Constitutional Development helped to shed light on the events.

These two case studies present a rather bleak picture of compliance. However, I do not wish to present this non-cooperation as a homogenous African phenomenon. There is no continental consensus on the ICC in Africa: Many African countries continue to support the Court, several attempts at mass exit failed, and despite all the AU exit efforts and rhetoric only Burundi is actually following through with exit as of May 2017. However, I show that the AU represents an important node in the resistance network. The Conclusion contrasts the AU's involvement in these cases against sitting heads of state briefly with other court cases in which the trial completion record has been better.

The International Criminal Court: State Cooperation, Jurisdiction, and Controversies

ICC and State Cooperation

The treaty establishing the ICC, the Rome Statute of the International Criminal Court, was adopted in Rome on 17 July 1998 by 120 states. It entered into force on 1 July 2002 after having been ratified by 60 states. The 63-page document sets out the institutional design of the Court, its jurisdiction, crimes covered, funding, etc. and contains detailed provisions pertaining

²³ George and Bennett 2005; Levy 2008.

to state cooperation and the distinct obligations of states parties and non-member states. Pursuant to Article 86, “[s]tates Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.” States can assist the Court in various ways including identifying and locating witnesses, evidence gathering, questioning persons, examining sites and exhuming graves, conducting searches and seizures, or protecting victims and witnesses and preserving evidence, as well as the identification, tracing, and freezing of assets and instruments of crime, such as weapons or vehicles.

Legally, ratification of the Rome Statute is the official step to becoming a state party to the ICC. Beforehand, states sign the treaty that obliges them, in good faith, to refrain from actions that go against the purpose or spirit of the treaty; however, they are not legally bound by it. After ratification or accession, a state’s full cooperation ability hinges on the adaption of domestic law. For instance, the crimes covered under the statute must be criminalized domestically. To do that, domestic penal codes may have to be changed to ensure that domestic law enforcement can actually arrest a suspect or that a state actually possesses legal authority to transfer arrested individuals to the Court.²⁴ Hence, a country’s domestic implementation is a crucial step to a state’s compliance with its legal obligations under the Statute.

Jurisdiction and Triggers

The ICC has jurisdiction over three international crimes: crimes against humanity, war crimes, and genocide—which the Rome Statute deems “the most serious crimes of concern to the international community as a whole.”²⁵ Articles 6 through 8 specify the three crimes. In addition,

²⁴ Schiff 2008: 153.

²⁵ Rome Statute of the International Criminal Court, Article 5(1).

countries wanted to include aggression as a crime but failed to reach a consensus on its definition in 1998. It was only in 2010 during the Review Conference in Kampala when states parties adopted amendments to the statute defining aggression and deciding on the conditions for the exercise of jurisdiction. Hence, the Court cannot exercise jurisdiction over the crime of aggression until at least 30 states parties have ratified or accepted the amendments and two-thirds of all states parties decide to activate the jurisdiction at any time after 1 January 2017.

The Court currently has ten situations. Table 4 presents these in reverse chronological order. After the ICC opens an investigation into a country for a specific situation, the OTP can bring specific charges against responsible persons in that situation.

Table 4: Overview of ICC Situations and Triggers

Situation Country	Date ICC opened investigation	Trigger
Georgia	January 2016	proprio motu
Central African Republic II	September 2014	State self-referral
Mali	January 2013	State self-referral
Côte d’Ivoire	October 2013	proprio motu
Libya	March 2011	UNSC referral
Kenya	March 2010	proprio motu
Darfur/Sudan	June 2005	UNSC referral
Central African Republic	May 2007	State self-referral
Uganda	July 2004	State self-referral
Democratic Republic of the Congo	June 2004	State self-referral

Cases can reach the ICC in three different ways. First, a state party can refer a situation within its own state to the Court. Five of the ICC’s ten current situations have reached the Court this way. A second trigger for ICC action is a referral by the UNSC. While ICC jurisdiction relies on nationality and territory, a non-member state’s situation can be referred to the Court by the UNSC through a binding resolution under Chapter VII of the UN Charter. In that case, the

country, by virtue of being a UN member state, has to comply with the ICC's investigation. The Council referred the situations in Sudan and Libya to the Court in 2005 and 2011. The third trigger is for the ICC Chief Prosecutor to act on her own initiative (*proprio motu*). This has happened three times so far: Kenya, Côte d'Ivoire, and Georgia.

Controversies: Counter-Movement, Head of State Immunity, and ICC Effects

To set the stage for the following chapters, I want to highlight three important controversies surrounding the ICC. A first controversy relates to the countermovement to the Court, which provides the backdrop to this dissertation and which is detailed in the coming chapters. Spurred by the ICC's issuance of arrest warrants against sitting heads of state, several African countries, led by Sudan, Kenya, Uganda, and non-member states such as Rwanda and Ethiopia started issuing ICC-critical statements. Several arguments have been made. First, heads of state should be immune. The argument holds that in customary IL sitting heads of state enjoy immunity, and that by legally obliging states to arrest sitting leaders, these states are forced to act contrary to customary IL. The second argument relates to the Court's decision-making. Critics posit that the ICC is not independent but instead acts as an extended arm of its funders, mainly Western European states. Third, much criticism against the ICC is actually criticism of the Court's ties to the UNSC. Different sets of states have criticized how the UNSC failed to refer some cases to the Court, most prominently Syria in recent years, how it failed to act on repeated non-compliance with arrest warrants, and it fails to defer ongoing cases for one year. This linkage between the Court, a judicial organ supposed to apply neutral rules across cases, and a political organ such as the UNSC has important implications for the perception of the Court's work and states' cooperation with it.

A common critique of the Court has been its decision to not investigate the actions of Western governments, such as the actions of UK troops in Iraq, but focusing its energy on cases arising in Africa.²⁶ This inconsistent application of legal standards, i.e. selective prosecution, has cost the Court dearly in the public perception of its legitimacy. For instance, Ethiopian foreign minister Tedros Adhanom Ghebreyesus is quoted as saying in 2013 that “[t]he Court has transformed itself into a political instrument targeting Africa and Africans”²⁷ and that it was “condescending” toward Africa.²⁸ Other leaders who often engage in this rhetoric are Uganda’s President Yoweri Museveni and Zimbabwe’s Robert Mugabe as well as those charged by the Court, Kenyan President Kenyatta and al-Bashir. Often this has been depicted as the common African position against the Court: “Unfortunately this view has gained traction over the past few years and, through concerted and self-interested political machinations by the ICC’s opponents on the continent, has been marshalled into an institutional position against the court at the level of the AU.”²⁹ Thus, it is important to note the enormous variation of African views vis-à-vis the ICC. ICC officials often point out the good cooperation they receive from most African states despite the media’s (and this dissertation’s) attention on cases of non-cooperation:

Well, my impression is that most of our African states parties respond very well to our cooperation requests and indeed are very cooperative. And the loud criticism that you hear very often from Africa mainly originates from a small number of African states, a number of African leaders, many of which are actually not states parties to the Rome Statute. There is a very small number of states parties among those that are critics of the ICC. On the whole, our African constituency remains very supportive of the court just that that support is not often heard publicly that much. Much of the criticism is based on what we would see as a distortion or misunderstanding of facts or a one-sided view of the reality.³⁰

²⁶ Schabas 2014; Bosco 2014: 123.

²⁷ Taylor 2015.

²⁸ Hickey 2013.

²⁹ du Plessis and Gevers 2011: 2.

³⁰ Interview 004. The sentiment was also expressed in Interview 001.

In addition to ties to the UNSC and lack of independence, the Court has been criticized for its handling of cases against heads of state. It has long been a part of customary IL that senior government officials enjoy immunity, and for the longest time state officials were deemed immune even for the gravest breaches of IL (impunity model). However, this has changed in recent decades as leading officials have increasingly been brought to justice, a process Sikkink has called the ‘justice cascade.’³¹ However, legal debate continues on whether this immunity exists for international crimes such as those covered in the Rome Statute and whether it exists for heads of state of third parties—states that have *not* committed to the Rome Statute. This legal controversy goes beyond the confines of this dissertation.³² Suffice it to say that some argue that al-Bashir remains immune from prosecution because he is a sitting head of state of a third party.

In addition, and with this legal argument in mind, the AU has argued for head of state immunity and has passed a non-cooperation policy. This non-cooperation policy has been used as legal justification for non-arrests of al-Bashir across several African countries. On the one hand, AU decisions are not explicitly deemed ‘binding’ in the AU’s Constitutive Act. However, one can argue that these decisions are indeed binding. First, Article 23 spells out the consequences for failing to abide by AU decisions, hence suggesting that the AU indeed intends these decisions to be binding. Second, under the implied powers doctrine, one can argue that the broad objectives of the AU imply that “the organisation cannot fulfil its purpose absent the ability to make binding decisions in respect of its member states.”³³ Thus, African countries were under two competing legal obligations—to arrest al-Bashir via the ICC arrest warrant and to not

³¹ Sikkink 2011.

³² For a legal discussion on whether heads of state are immune from prosecution for international crimes in *foreign domestic courts*, see Akande and Shah 2010; Wardle (2011) argues that sitting heads of state continue to enjoy immunity.

³³ du Plessis and Gevers 2011.

arrest him as per the AU decision. This provided them with the legal ‘out’ for the preferred political decision to not arrest a fellow African leader.

It is important to highlight that I do not wish to portray the AU as an enemy of the ICC. I argue that with regard to immunity of sitting heads of state, some African countries and the AU have taken positions counter to the ICC. However, this does not necessarily translate into other areas. I emphasize in Chapter 3 that the AU has not taken a more general position on the ICC outside of the Court’s cases against sitting heads of state. In fact, the AU cooperates with the ICC to some extent in other regards. According to an ICC official, the AU support has been reluctantly forthcoming in cases against AU peacekeepers:

We had difficulty for many years to get the AU to distinguish between the Bashir/Darfur government file and the other ones. While we don’t agree with their opposition to this file, we try to say ‘irrespective of your opposition on Bashir and the rest, this case is about an attack on AU peacekeepers, surely you have an interest in cooperating.’ So finally, recently they have started to cooperate a little bit on this and they provided us a few items, both Registry and OTP, Registry was dealing on behalf of defense, which was publicly known, so we have some cooperation, a little bit from AU.³⁴

Chapter Outline

The following chapter will delve more deeply into the theoretical underpinnings of this dissertation. I will present the two literatures from which I draw and to which I seek to contribute—transitional justice norms and compliance with international law—and discuss the cooperation framework that I propose in greater detail. The first empirical chapter, Chapter 3, presents states’ expressions of support for and critique of the Court at the UN as well as the development of the AU’s stance on the Court. The chapter shows that rhetoric about the Court has remained overwhelmingly positive and that instead of faulting the Court, many states fault

³⁴ Interview 006.

one another's lack of state cooperation with arrest warrants as one reason for the ICC's meager trial record. The chapter also shows that the AU has become increasingly critical of the ICC since 2009 and that criticism has been restricted to the court cases against sitting heads of state.

Chapters 4 and 5 are devoted to the case studies on two countries' engagement with the Court over time with the goal to explain their ultimate compliance decisions. First, I analyze the rationales behind South Africa's non-arrest of al-Bashir in June 2015, arguing that the decision needs to be understood in light of a loyalty conflict between the country's commitment to the AU and the ICC. In addition, I briefly contrast the South Africa case with other African countries that failed to arrest al-Bashir, suggesting that the AU's non-cooperation policy played an important role in hampering progress in the *al-Bashir* court case. In Chapter 5, I shift to Kenya's selective cooperation record with the Court, showing how the country turned to the AU to diminish the ICC's legitimacy and to stymie progress on the ICC's Kenyan court cases.

In Chapter 6, I summarize the main findings and discuss their implications for broader theoretical discussions and the future of the ICC and transitional justice. I contrast the findings of the South Africa and Kenya case studies with other ICC cases in which cooperation has been more forthcoming. These brief analyses provide a window into future avenues for research and they attest to the leverage of the interest alignment argument so that state cooperation has been more forthcoming in ICC cases against rebel leaders. While this presents the cases under analysis in this dissertation as more anomalous, they show the political obstacles the ICC can encounter when running contrary to states' interests.

Chapter 2: Compliance, Norms, and Cooperation Types

The dissertation investigates the extent to which two African states have cooperated with the International Criminal Court (ICC, or the Court) and the reasons behind cooperation and non-cooperation. This chapter situates the dissertation's findings and arguments and its contributions within the International Relations (IR) literature. The first section outlines my arguments that tie together the three empirical chapters. Then, I present in more detail the framework I developed to analyze cooperation with the ICC. The third section presents the two literatures from which I draw and to which I contribute: the norms literature with a substantive focus on accountability and transitional justice norms, and the literature on compliance with international law (IL). Afterwards, I present three alternative explanations that I found to be less compelling in explaining the two case studies. The last section highlights the dissertation's contributions to these literatures, thus drawing more concrete connections between my arguments and the main contentions of previous scholarship.

Arguments

Based on the empirical analyses in the following chapters I make five distinct yet related arguments about the multifaceted ways in which states have sought to strengthen and weaken the Court, the central role of African Union (AU), the salience of domestic politics for compliance, and the value added of analyzing cooperation behavior over time. First, I develop a framework to describe and analyze state cooperation with the ICC. I argue that we have to consider the full spectrum in which states can strengthen and weaken an institution and its associated norm. In the ICC context, just as compliance with legal obligations helps to strengthen the Court and the accountability norm, diplomacy and statements attesting to the ICC's positive effects and work

can help bolster the Court's image. I consider both legal and non-legal ways—those that are proscribed in the Rome Statute and those that go beyond it—through which states have sought to support or weaken the Court. Thus, merely looking at whether states have ratified does not tell us about their level of 'buy in' to the underlying norm and organization. The following section expands on this cooperation framework.

Second, the dissertation attests to the important role of the AU in understanding African states' cooperation with the ICC. Cooperation between states and the ICC is not merely a two-actor relationship but the AU acts an important mediator. In the Sudan and Kenya cases, the AU has taken up its members' wishes to rally other African states to support common positions at the UN Security Council (UNSC) to defer cases against Sudanese President Omar al-Bashir, Kenyan President Uhuru Kenyatta, and Kenyan Deputy President William Ruto. Moreover, the AU Assembly passed non-cooperation decisions that directly counteract ICC arrest warrants for al-Bashir. In turn, African states that have hosted al-Bashir have used this decision as a legal justification for their non-arrests. The dissertation traces the AU's actions over time and chronicles the counter-movement and norm resistance from several African states and the AU as the venue and forum for that resistance.

Third, and in line with previous compliance research, I argue that domestic politics help explain cooperation decisions. When the interests of the ICC and the government in charge of making cooperation decisions are aligned, cooperation is forthcoming. This has been the case in the early years of the Court's existence when both South Africa and Kenya supported the Court by ratifying the Rome Statute, implementing it domestically, and supporting the Court through diplomacy and statements. However, this changed when the Court started charging heads of state

and leading state officials in Sudan and in Kenya in 2009 and 2010, after which cooperation with the Court by these two countries declined and we see increasing efforts to weaken the Court.

Fourth, in addition to interest alignment, reputation concerns help explain cooperation decisions. While this factor also plays out domestically, I argue that we have to take seriously states' multiple reputations in various forums. The South Africa and Kenya chapters show that states may signal their commitment to various peer groups. The ICC and associated Western states and the accountability norm represent but one of possible groups in which states may seek a 'good' reputation. When studying reputation, scholars have to consider not just the reputation concerns associated with the ICC 'peer group' and Western states but also those associated with alternative social groups. In the ICC context, the AU stands out as an important intermediary actor and South Africa and Kenya's prioritization of the AU and its fellow African peer group can outweigh its concerns for a good reputation among Western states. Moreover, while reputation concerns are usually theorized to foster compliance, they can also hamper compliance. When a state is forced to choose between its regional reputation and its global reputation, it may choose the former and decide to defy IL.

Five, I argue that tracing these legal and non-legal means of engagement over time contributes to our understanding of institutional and normative development. I trace the engagement between the respective South African government and the Kenyan government with the ICC over time to ultimately explain the non-arrest of al-Bashir in South Africa and Kenya's selective cooperation in the Kenyatta case. This approach contrasts with many studies that analyze compliance through statistical analysis of post-ratification human rights records. This research takes seriously that compliance encompasses a range of actions: signing, ratification, passing domestic legislation. But in the case of the ICC compliance actions also include

complying with court requests, such as requests for arrest and surrender, that a country is demanded to execute years or even decades after joining the Court. Hence, we need to study compliance actions beyond the initial moment of ratification. The ICC represents a useful institution to study when we are interested in the temporal dimension of compliance as states are called on to perform specific compliance actions after years or decades have passed and different administrations lead the country. This unit of analysis then extends on compliance studies that look at treaty ratification as *the* signature moment.

A Framework to Analyze Cooperation with the ICC

Means of Engagement

Tracing the South African and Kenyan governments' engagement with the ICC over time allowed me to notice changes in support and resistance. Based on these longitudinal analyses, I created Table 5 inductively. The table displays the various ways in which states engage with the Court.

Table 5: Overview of Means of Engagement

	Institution and Norm Strengthening	Institution and Norm Weakening
legal	Compliance with treaty obligations <ul style="list-style-type: none"> • Ratification • Domestic implementation • compliance with court requests 	Non-compliance with treaty obligations <ul style="list-style-type: none"> • failure to implement Rome Statute • non-compliance with court requests • admissibility challenge
Non-legal	Diplomacy and statements pro Court <ul style="list-style-type: none"> • encouraging other states to commit to the ICC • reinforcing value of ICC and accountability norm 	Diplomacy and statements against the Court <ul style="list-style-type: none"> • discouraging other states to commit to the ICC • advocating for exit

‘Legal actions’ refer to mandatory state actions that originate in the Rome Statute, i.e. actions mostly referred to as legal compliance. This includes ratification of the Rome Statute and domestic implementation of the treaty as well as compliance/non-compliance with court requests such as those for arrest and surrender, summonses to appear, or for providing records to the court. If states fail to execute court requests, the Court’s judicial chambers can make a finding to that effect and refer the non-compliant state to the Assembly of States Parties (ASP) or the UNSC. I also include admissibility challenges as legal means, i.e. instances when states argue that the Court lacks jurisdiction,³⁵ because they are meant to draw the situation away from the Court and into domestic jurisdiction but they occur within the Rome Statute framework.³⁶ Labeling these means of engagement ‘legal’ does not mean that political considerations do not affect the likelihood with which governments will ratify or implement a treaty domestically. Rather, ‘legal’ connotes that these measures are proscribed in the treaty whereas non-legal means of engagement occur voluntarily and do not originate in the treaty itself.

With ‘non-legal means of engagement,’ I refer to voluntary cooperation through means of engagement that do not originate in the Rome Statute, so are not required by the treaty. This can happen when the government reaches outside of the ICC system by engaging other political actors either in support of the Court or against it, such as international organizations. In addition, states can take on voluntary commitments such as signing witness relocation agreements with the ICC. It also includes statements of support for the Court that reiterate the importance of the Court as they are seen as strengthening the institution’s legitimacy. Norms scholarship has long

³⁵ Article 17(1) regulates the relationship between the Court and national legal systems. A case can be ruled inadmissible when it is being dealt with appropriately by domestic justice systems, when the state that has jurisdiction has already prosecuted the same person for the same conduct, and when the state has decided not to prosecute the case unless that decision stems from “the unwillingness or inability of the State genuinely to prosecute.”

³⁶ Admissibility has only been challenged in the Kenya, Sudan, and Libya situations. The paucity of these challenges likely stems from the fact that a majority of ICC situations come to the Court via self-referrals by states so they are subsequently less likely to challenge the ICC’s jurisdiction if they actively sought them beforehand.

highlighted speech as an indicator for norm acceptance (I elaborate on this point below). Using speech as one form of cooperation builds on the idea of concordance as an indicator for norm robustness. Concordance refers to the extent to which rules are accepted “in diplomatic discussions and treaties (that is, the degree of intersubjective agreement).”³⁷ Concordance then seeks to capture the extent to which states agree that the norm and rules are acceptable. In contrast, repeated and harshly critical statements point to institutional problems of legitimacy and effectiveness. While the Rome Statute does not require states parties to issue Court-supportive statements, these statements enhance knowledge of the Court and are venues where states may offer support or criticisms of the ICC. Including this type of cooperation also resonates with practitioners as ICC officials interpret cooperation to go beyond judicial compliance to also include political support to create what they call an ‘enabling environment.’³⁸

And that is where the question of political support comes in because political statements, whether in bilateral, multilateral and regional settings, they affect other states’ calculations. If states show clearly that they attach great importance to full cooperation and any state that does not fully cooperate would be seen as not doing the right thing, then that would raise the threshold for any state not to cooperate.³⁹

Cooperation Types and Chronological Variation

The longitudinal analyses of South Africa and Kenya’s cooperation behavior also revealed that the actions described in the various cells are not mutually exclusive. That means that states can simultaneously engage in compliance as well as in diplomacy against the Court. This occurred when Kenyatta and Ruto appeared before the ICC in compliance with the summons to appear while at the same time lobbying against the Court at the AU and fostering an anti-ICC narrative in African institutions. This cooperation behavior contrasts with the early

³⁷ Legro 1997: 35.

³⁸ Interviews 002, 001, and 004.

³⁹ Interview 004.

years of Kenya’s engagement with the Court when the country voiced strong support for the ICC, passed domestic implementation legislation, and refused to sign a Bilateral Immunity Agreement (BIA) with the US.

Based on these insights about simultaneous cooperation and non-cooperation, Table 6 presents the types of cooperators with the Court. Depending on the extent to which states support the Court through diplomacy and statements (non-legal means) and compliance with the Rome Statute’s legal obligations (legal means), states can be separated into four categories: model cooperators (high legal and non-legal cooperation), cheap talkers (low legal cooperation but pro-ICC statements), pro-forma cooperators (legal cooperation but low voluntary cooperation), and non-cooperators (low legal and non-legal cooperation).

Table 6: Overview of Means of Engagement and Cooperation Types

	Compliance with Rome Statute	Non-Compliance with Rome Statute
Pro-Court diplomacy and statements	<i>Model Cooperators</i>	<i>Cheap Talkers</i>
Anti-Court diplomacy and statements	<i>Pro-Forma Cooperators</i>	<i>Non-Cooperators</i>

‘Model Cooperators’ are those that comply with their Rome Statute obligations and engage in pro-Court diplomacy and issue pro-Court statements. They are models for what an international organization would want from its member states. ‘Cheap talkers’ issue pro-Court statements and may engage in low-cost pro-Court diplomacy but when it comes to executing arrest warrants, they fail to comply. In contrast, ‘pro-forma cooperators’ comply with their legal obligations and may execute court requests but in other forums and in bilateral relations are engaging in institution-weakening efforts through anti-court diplomacy. Non-cooperators lie at

the extreme ends of negative discourse, diplomacy, and compliance. They engage in active institution weakening through diplomacy and discredit the Court while also failing to execute court requests.

For analytical purposes, these categories are presented as separate in Table 6. However, they more accurately represent ends of a continuum. On the one hand, mandatory compliance is more clean-cut. Whether a state ratifies and implements the Rome Statute is officially documented. We can also trace through litigation to what extent states have executed court requests, and if a government arrests someone on their territory, this becomes public. Thus, compliance and non-compliance with the Rome Statute is rather clear. On the other hand, overall compliance is harder to determine because a state may execute some requests and not others or may only execute them partially or in a delayed fashion. This complicates an overall assessment even of a seemingly clear-cut behavior.

In contrast, non-legal engagement is even more fluid between the cells. A state may issue pro-Court statements but engage in no pro-Court diplomacy and vice versa (albeit less likely). In turn, to what extent a state engages in one or the other can vary. Taking these considerations into account, Figure 3 presents the cases and different time periods with the categories displayed as continuums.

Figure 3: Shifts in Cooperation Behavior over Time

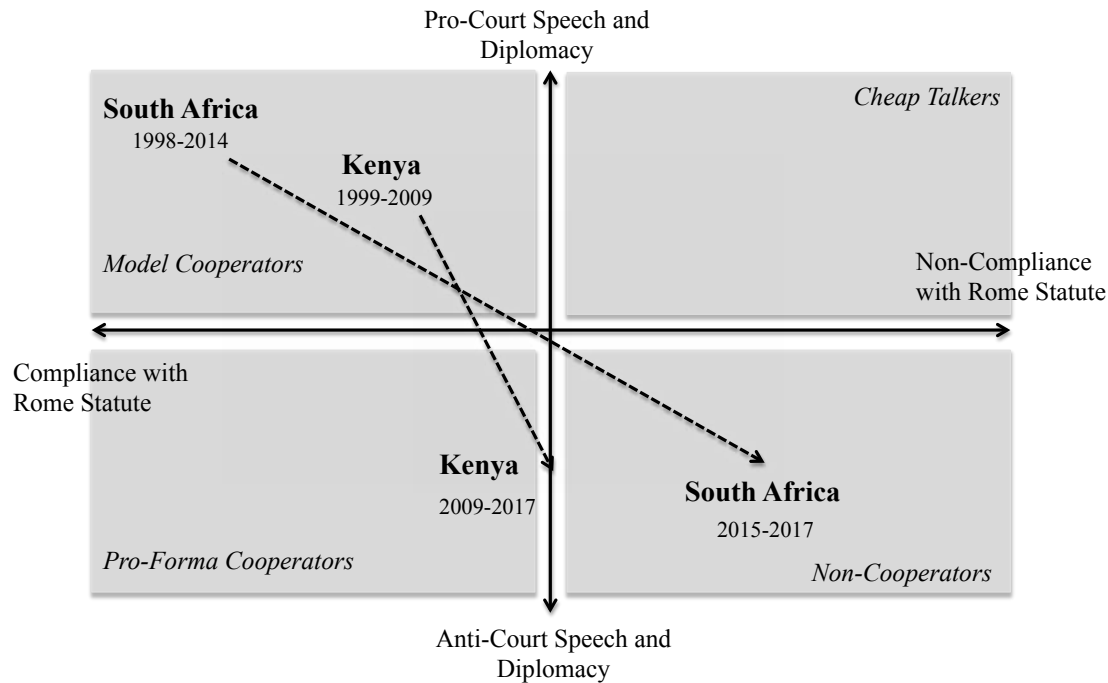


Figure 3 illustrates the ‘movement’ over time from South Africa and Kenya from ‘model cooperators’ to ‘non-cooperators.’ South Africa shifted its position over the years. South Africa can be placed at the higher end of the left upper quadrant due to its intensive regional lobbying for the ICC and implementation in Southern Africa and its early and strong implementation of the Rome Statute. However, in 2015, South Africa became a non-cooperator when it failed to arrest al-Bashir and issued critical statements about the Court and joined in several Court-critical arguments previously put forth by Court critics. While the executive refused to arrest al-Bashir when he visited South Africa, the country did not engage in outright anti-Court diplomacy and statements right away. Kenya’s cooperation behavior shifted from a model cooperator to a mix of pro-forma and non-cooperator. That is why Kenya is placed to the left in the lower right quadrant. On the one hand, its compliance record can be called selective in that some requests were complied with while others were delayed or disregarded. Hence, the country ‘hovers’

around the compliance/non-compliance axis. On the other hand, it engaged in intensive anti-Court lobbying at the AU, thus justifying its placement on the lower end of the y-axis.

Comparing the Framework to Other Works on Cooperation with Tribunals and the ICC

The framework was built inductively because no comprehensive framework existed when I started the research. However, three previous works on state cooperation with international courts by Peskin, Bosco, and Hillebrecht and Straus stand out. Drawing on Peskin's work on state cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR),⁴⁰ this dissertation also chronicles 'virtual trials,' two forms of political drama outside of the courtroom itself: 1. "the political struggles and negotiations *between* tribunal, state, and powerful international community actors that occur prior to as well as during the courtroom trials" and 2. "the political struggles and negotiations *within* states."⁴¹ As for relationships between the court, states, and the international community (international level), these are "virtual trials of their own that determine a state's response to tribunal demands for cooperation" and they are "essential in establishing the level of cooperation the tribunals will ultimately receive from states and, consequently, the nature and outcome of the actual courtroom trials of individuals."⁴² Hence, while international courts are meant to be insulated to some extent from power and politics, the idea of the virtual trial encapsulates the power struggles between states, tribunals, and other actors. One way in which states seek to delegitimize the court if it is acting contrary to their wishes is to engage in counter-shaming "by magnifying its shortcomings and mistakes."⁴³

⁴⁰ Peskin 2008.

⁴¹ *Ibid.*, 6.

⁴² *Ibid.*, 9.

⁴³ *Ibid.*, 11.

Peskin's work is highly relevant to this dissertation. As he does, I investigate the interactions between a court—the ICC—and the states and I also consider the state's internal dynamics to help explain cooperation with the Court. Both Peskin's accounts and mine share an interest in the political dynamics behind state cooperation with international criminal courts at the international and domestic levels. Moreover, he identified the same set of actors that are relevant for the ICC context: the court, the respective states but also external actors, the AU and the UNSC in my cases. I include his notion of counter-shaming in the non-legal means of engagement, specifically anti-Court statements.

However, important differences exist. First, Peskin's work is more motivated by how the ICTY and ICTR were able to differently use their soft power to incentivize state cooperation. While the ICTY was more successful in “completing trials, maintaining professionalism in court operations, and obtaining frequent and favorable international press coverage,” the ICTR was troubled by “a series of administrative scandals, the slow pace of trials, and negative media coverage that have undermined its reputation as well as its capacity to persuade international actors to intervene on its behalf when the Rwandan government withholds cooperation.”⁴⁴ In contrast, my focus is on seeking to explain state cooperation and I do not assess the Court's extent of and use of soft power. Second, my research complicates the ‘virtual trial’ metaphor because the AU counteracted the ICC's work and helped African states escape their obligations. This departs significantly from the ICTY where the European Union was a powerful pro-ICTY compliance actor that was able to use the institutional leverage of future EU membership for cooperation with the tribunal. Instead, in my research, the AU furnished African states with political arguments and legal counter-arguments against the ICC.

⁴⁴ Ibid., 7.

Bosco analyzed the behavior of major powers toward the ICC. He distinguished between marginalization (active and passive), control, and acceptance. States who feel most threatened by the ICC's work "may actively work against the institution, seeking to limit its reach and delegitimize it through formal and informal means" and discourage other states from joining.⁴⁵ When states engage in passive marginalization, they do not actively undermine the Court but merely "consciously avoid deploying their resources to support the institution." Control, in contrast, means that states try to "keep the court within its mandate" and to ensure that it "does not interfere with important state political or diplomatic interests."⁴⁶ This can be done through political or economic influence such as through the UNSC or by threatening exit from the court. Control differs from marginalization because control-oriented states do not want to undermine the Court's work as it may at some point serve their interests. A last form of cooperation behavior is acceptance when states embrace the Court for various reasons; this would be equivalent to the 'model cooperators' in my framework. Possible reasons include rationalist arguments that the states deem the benefits of its support for the Court to outweigh the costs of support, that being a state party to the ICC makes their commitment more credible, or that they are influenced by a normative belief in the accountability norm.

Bosco's characterizations are a useful starting point as these major powers' behaviors can theoretically be applied to the states under analysis here. Marginalization can occur from all ICC states parties and is similar to the behaviors exhibited by 'non-cooperators' in my framework as they either actively use legal or non-legal means to engage in institution weakening. Acceptance corresponds to the behaviors exhibited by 'model cooperators.' Control is harder to do by the smaller and weaker states that I investigate. They cannot exercise control via their permanent

⁴⁵ Bosco 2014: 12.

⁴⁶ Ibid., 14.

seats on the UNSC. However, they may engage in control through other means such as threatening exit, using political leverage elsewhere, or reminding the Court of its original mandate. This type of control can be seen in the AU's efforts to resist the accountability for heads of state norm and efforts to resist the Court's focus on Africa as running counter to its original mandate to deliver impartial justice. Hence, my framework is able to incorporate Bosco's strategies but further disaggregates the specific behaviors within each strategy.

The most similar to the framework I present is the analysis by Hillebrecht and Straus. They identified four categories of a cooperation continuum based on the frequency with which states execute court requests.⁴⁷ Rather than clear-cut categories, they range along a spectrum from full cooperation to non-cooperation. A state engages in full cooperation when it “fulfills the vast majority of the ICC's requests, whether they be procedural, jurisdictional, or practical.”⁴⁸ Second, qualified cooperation occurs when “the state cooperates up until a certain point but has a set of non-negotiable issues on which it will not yield. Often these are of a practical or jurisdictional nature.” A third option is pro forma cooperation, which occurs when the state “does the minimum to approximate cooperation and poses technical challenges to cooperation.”⁴⁹ States do this by couching their behavior within the ICC's language and processes while “often using legal technicalities to limit their cooperation.” Hence, when engaging in pro forma cooperation, states “typically cooperate on procedural matters but seek to block the Court from exercising full jurisdictional authority.” At the other end of the spectrum is non-cooperation, which occurs when “the state opts against cooperation and outwardly contests the ICC's work.”⁵⁰

⁴⁷ Hillebrecht and Straus 2017.

⁴⁸ *Ibid.*, 174.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

This framework clearly overlaps with my framework, especially in its consideration of legal means of cooperation. Hence, their categories would be situated along my horizontal compliance continuum. Moreover, both accounts share an attention to the various facets of cooperation. Hillebrecht and Straus distinguish between different types of court requests because “states rarely cooperate or comply with each and every one of the Court’s demands.”⁵¹ However, in an important departure, my framework incorporates the multitude of actions states take toward the ICC by also including non-legal means of engagement, i.e. my vertical axis. This adds an important dimension to how we think about what constitutes ‘good’ cooperation with the Court. If we call Kenya a pro-forma cooperator purely based on compliance with court requests we skew its cooperation record by not taking into account the extensive efforts to delegitimize the Court domestically and regionally.

Transitional Justice and Compliance with International Law

The dissertation draws from and contributes to two sets of literatures in International Relations (IR): 1. transitional justice and accountability norms, 2. compliance with IL. The former builds on a range of scholarship since the 1990s that has been labeled ‘constructivist’ because the authors share an interest in identity, international norms, their emergence, and diffusion. While I focus on norms scholarship in general, I also discuss transitional justice and accountability norms as the substantive norms I am most interested in. In turn, compliance research on human rights emerged in the 2000s when IR and IL scholars started to investigate

⁵¹ Ibid.

why states would commit to human rights treaties and why they would comply with treaties that prescribed their conduct toward their own citizens.⁵²

While I present these literatures as distinct here for analytical purposes and they are often separately discussed, they share a common concern about international norms as standards of appropriate behavior. These standards can be codified into international agreements, such as human rights treaties or the Rome Statute to codify the accountability norm. But norms do not have to be codified. So while compliance is usually looked at as honoring legal obligations, a state can also comply with unwritten rules and standards of appropriate behavior so that an alternative definition of compliance can be “any action conforming to a norm.”⁵³ Hence, the two literatures are not completely distinct and indeed speak to one another.

Transitional Justice: ICC as the Culmination of the Accountability Norm

As an international criminal court, the ICC functions as an instrument of transitional justice. Transitional justice mechanisms aim at “confronting and dealing with the legacies of past violations of human rights and humanitarian law.”⁵⁴ While transitional justice mechanisms include a range of tools—amnesty laws, truth commissions, reconciliation, as well as prosecutions—I focus on trials as a form of retributive justice. In the 1990s, when the ICTY, ICTR, and the ICC were created, many observers were optimistic about the capacity of law to confront mass atrocity crimes. Sikkink has famously argued that increasing efforts for accountability and justice in international, foreign, and domestic courts amount to a ‘justice cascade’ in which “there has been a shift in the *legitimacy of the norm* of individual criminal

⁵² Of course cooperation and compliance have been concerns of IR for decades, for instance, in the regime and cooperation literature.

⁵³ Cardenas 2007: 7.

⁵⁴ Roht-Arriaza 2009: vii.

accountability for human rights violations and an increase in criminal prosecutions on behalf of the norm.”⁵⁵ The ICC is widely seen as the culmination of this trend, encapsulating the ideal that perpetrators of the worst human rights abuses should be held accountable by independent judges, regardless of their position within a state. The 1990s were a ‘honeymoon phase’—marked by authors with “an abiding faith in the capacity of law to confront the horrors of crimes as extreme and unthinkable as genocide.”⁵⁶ This has contributed to the inclusion of transitional justice mechanisms in many peace agreements so much so that “[t]his institutionalisation of transitional justice has strongly encouraged states to accept transitional justice as a norm or standard practice after conflict.”⁵⁷

Despite this normative change, scholars and practitioners have become more skeptical since then about the positive effects of prosecutions. They raise doubts about the proper timing of prosecutions, whether accountability should be sidelined until peace has been secured during a conflict.⁵⁸ Moreover, some question the effects of prosecutions, whether they will actually deter criminals or even create a ‘sense of justice’ for the victims, especially when the trials are held far away from the conflict location.⁵⁹

Hence, transitional justice mechanisms have ‘diffused’ as norms over the past decades and scholars have been analyzing their spread and effects. As much as the content-specific literature on prosecutions was optimistic in the 1990s, the same holds true for the norms literature. Norms, defined as “collective expectations for the proper behavior of actors with a given identity,”⁶⁰ help to distinguish communities and shape the members’ behavior by

⁵⁵ Sikkink 2011: 5.

⁵⁶ Akhavan 2003: 721; see also Akhavan 2013.

⁵⁷ Subotic 2015: 363.

⁵⁸ To name a few: Kersten 2016; Clark 2011; Oette 2010; Gegout 2013; Snyder and Vinjamuri 2003/04; Vinjamuri 2010.

⁵⁹ To name a few: Hillebrecht 2016; Appel 2016; Jo and Simmons 2016.

⁶⁰ Katzenstein 1996: 5.

demarcating appropriate from inappropriate behavior.⁶¹ Early scholarship on norms was concerned with the extent to which norms mattered in international relations and several works investigated norms seen as ‘progressive’ or ‘positive’ such as human rights norms.⁶² This scholarship thus unintentionally created the impression among some that norms tend to be unidirectional, i.e. more and more countries would ultimately adopt them. In a current ‘second wave’ of norm diffusion literature, scholars have unearthed the non-linear and sometimes curvy or reversed ways in which international norms gain traction in specific locales.⁶³ State or non-state actors can actively fight norms and resist them domestically or locally.

This norms research has also examined transitional justice norms. While scholars and practitioners agree that transitional justice mechanisms have increasingly become a staple of peace negotiations and post-conflict settings, some evidence shows that they are not being directly translated locally and that they can be undermined in local contexts. While important analytical distinctions exist between the concepts, the process of clashing and adopting international and local norms has variably been referred to as norm subsidiarity,⁶⁴ hybridization,⁶⁵ resistance,⁶⁶ divergence,⁶⁷ and norm collision.⁶⁸ Norm subsidiarity refers to “the process whereby local actors develop new rules, offer new understandings of global rules or reaffirm global rules in the regional context” so that local actors are not merely passive norm takers but can be active norm rejecters and/or norm makers.⁶⁹ This indicates an important shift from the concept of ‘norm entrepreneurs’ as key actors in propelling norm development so much

⁶¹ Gillies 2010: 107.

⁶² To name a few: Finnemore and Sikkink 1998; Risse-Kappen, Ropp, and Sikkink 1999; Katzenstein 1996.

⁶³ Bloomfield and Scott 2017: 4; Subotic 2015: 361.

⁶⁴ Acharya 2011; see also Acharya (2004) on localization.

⁶⁵ Moore 2012.

⁶⁶ Freyburg and Richter 2010.

⁶⁷ Subotic 2015.

⁶⁸ Cloward 2016.

⁶⁹ Acharya 2011: 96-98; see also Harman and Brown 2013.

so that Bloomfield and Scott's edited volume recently suggested conceptualizing norm resisters as distinct actors, so-called norm 'antipreneurs.'⁷⁰

For Subotic, for example, normative divergence is a form of norm localization that refers to "the implementation of international norms and institutions in the manner inconsistent with the original international normative intent."⁷¹ She argues that an international norm, here for transitional justice mechanisms of justice, truth, and reconciliation, "splits into a variety of locally meaningful, but mutually contradictory directions. In norm divergence, domestic political actors interpret the same international norm in mutually inconsistent, but politically useful ways."⁷² When norms mean different things to different domestic elites and groups, no clear domestic pro-norm constituency emerged to advocate for them. This is an important caveat to research on the compliance-promoting role of domestic groups: Even when domestic groups are present and interested in promoting compliance, competing views about the norm and its expectations can hamper domestic groups in their efforts.

But how do we know that norms emerge or change? One way is to look for concrete state actions, such as signing agreements, implementing new laws, or creating new domestic institutions (this is institutionalization as an important part in the norm life cycle). In addition to these behaviors, scholars also highlight speech and discourse as an indicator: "[n]orm emergence is a largely discursive affair: if a norm emerges within a given community, its constituent actors will in their communications recognize its desirability and employ it to justify their actions."⁷³ As states adapt and/or resist international norms and socialization efforts, they do not just refuse to implement, they also use statements and language to explain their actions: "Beyond simply

⁷⁰ Bloomfield and Scott 2017.

⁷¹ Subotic 2015: 367.

⁷² Ibid., 365.

⁷³ Gillies 2010: 104.

complying with or violating a norm; states contest, resist, and respond to international norms in a range of ways.”⁷⁴ Rhetorical adaptation is a “central form of resistance to international norms,” because it “draws on a norm’s content to resist pressures for compliance or minimize perceptions of violation.”⁷⁵ Similarly, Peskin argued that counter-shaming, through statements and speech, is a key feature through which states resist the efforts of international courts. It delegitimizes the international court “by magnifying its shortcomings and mistakes.”⁷⁶

This extensive research on norms suggests that we can understand resistance to the ICC in Africa through the lens of norms research. Norms and the institutions, which embody these norms, can be locally resisted and incompletely adopted. The normative intent of the Rome Statute is that accountability is achieved regardless of official capacity. However, this intent is undermined and diverged from as some states, such as South Africa and Kenya, failed to uphold their legal obligations. They diverge not only from their legal obligation to the ICC but also from the accountability norm. They have expressed their discontent with the ICC and head of state accountability in various forums, most importantly the AU and the UN, through concrete actions as well as statements. I argue that we can understand these efforts as ‘norm interpretation.’ Norm interpretation happens when “one or more aspects of a norm’s definition are tweaked or contested. It is an attempt to narrow or limit the interpretation of a norm or the conditions under which a norm applies, in order to exclude an action that might otherwise be seen as a violation of that norm.”⁷⁷ These states acknowledge the general accountability norm but they claim that a sub-norm, accountability for heads of state, is unacceptable. For them, heads of state are immune and that is the norm from which they should not stray.

⁷⁴ Dixon 2017: 83.

⁷⁵ Ibid.

⁷⁶ Peskin 2008: 11.

⁷⁷ Dixon 2017: 86.

Compliance with International Law

The study of compliance with IL and human rights treaties has gained increasing attention in IR since the early 2000s. Ever since Hathaway argued that compliance with human rights treaties is not widespread and that treaties may lead to worse human rights practices,⁷⁸ myriad studies have been published on when and why states comply with treaties.⁷⁹ Much research affirms that “compliance is not an all-or-nothing affair and that the effects of human rights regimes, when and where they exist, are conditional on other institutions and actors.”⁸⁰

When studying compliance—a state of conformity between a state’s actual practice or written domestic law to treaty stipulations⁸¹—international lawyers and IR scholars tend to focus on different things. Lawyers often see compliance in binary terms (compliance or non-compliance) based on whether a state adheres to the terms of the treaty. In contrast, IR scholars have mostly examined the *effects* of treaties as an indicator for a state’s substantive compliance with a treaty, measuring *inter alia* the development of human rights practices post-ratification.⁸² For instance, in his critique of Simmons’ work, Posner argues that her measure of compliance—decline in human rights abuses—does not measure compliance but rather causal effects.⁸³ However, some IR scholars are also studying indicators of procedural compliance, such as states’ compliance with a treaty’s reporting mechanism. According to Hathaway, compliance has several dimensions: compliance with procedural obligations, compliance with substantive obligations outlined in the treaty, and compliance with the spirit of the treaty.⁸⁴ Thus, compliance is not binary but rather a continuum “based on the degree to which behavior deviates from the

⁷⁸ Hathaway 2002.

⁷⁹ Some scholars find that treaties have little to no influence on human rights practices, especially in hard cases of autocratic regimes, see e.g., Smith-Cannoy 2012; others suggest some positive influence, e.g., Landman 2005.

⁸⁰ Hafner-Burton 2012: 275.

⁸¹ Raustiala and Slaughter 2002.

⁸² E.g. Simmons 2009; Hathaway 2002.

⁸³ Posner 2011.

⁸⁴ Hathaway 2002: 1964.

legal requirements of the treaties.”⁸⁵ I take this insight seriously and consider instances when a state may engage in compliance and non-compliance simultaneously.

Studies vary widely in how they operationalize commitment and compliance. While commitment is captured by signature and ratification of treaties, compliance research often looks at treaty effects as compliance with the spirit of a treaty or compliance with specific treaty stipulations such as reporting requirements. Much compliance research looks at treaty effects, an understandable focus considering that the ultimate goal of human rights treaties is to improve human rights on the ground. Many studies have focused on the UN’s International Covenant for Civil and Political Rights and the Convention Against Torture with the independent variable being ratification and the dependent variable being human rights practices, measured through data from the Political Terror Scale or the CIRI index.⁸⁶

Apart from treaty effects, some studies analyze compliance with reporting mechanisms. For instance, Creamer and Simmons look at how seriously governments take their reporting obligation to the Commission Against Torture by analyzing the regularity and quality of reports.⁸⁷ They find that report submission is heavily dependent on what neighboring countries are doing and on a government’s human rights commitment and institutional capacity as measured by the presence of national Human Rights Institutions. In addition, the quality of reports increases when countries have democratic institutions and have recently transitioned to democracy.

Both IL and IR scholars have studied the contributing factors of compliance and non-compliance, focusing on different levels of analysis and underlying decision-making logics (logic of consequences and logic of appropriateness). While these theories’ main concepts are

⁸⁵ Ibid., 1965.

⁸⁶ Goodliffe and Hawkins 2006; Vreeland 2008; Simmons 2010.

⁸⁷ Creamer and Simmons 2015.

presented as distinct factors below, I expect these factors to interact and to work simultaneously.⁸⁸ While this complicates the assessment of which causal factor is driving the outcome, detailed case studies help to assess the explanatory power of each factor.

I focus here particularly on compliance research, but I occasionally include relevant arguments from research on commitment to treaties. On the one hand, commitment and compliance are related as we can expect that some reasons for commitment and compliance overlap. For instance, a country that genuinely wants to improve human rights based on a normative belief that human rights shall be protected is propelled to commit to and comply with a treaty for this very reason. Similarly, a country may want to signal to peers that it values human rights, thus seeing treaty commitment as a low-cost means to achieve this goal. Since human rights treaties have little enforcement mechanisms, this commitment rationale translates into compliance rationales as governments who committed but never intended to comply with the treaty face little consequences for non-compliance. On the other hand, compliance warrants distinct attention as it refers to *post*-commitment and involves a broader range of actions by the state. The treaty might call on the state to establish a domestic mechanism to address a specific human rights violation, to submit regular reports to treaty bodies that monitor state actions, or pass domestic laws in line with the treaty.

Most scholarship assumes that the absence of compliance factors leads to non-compliance, so that for instance, the absence of domestic pro-compliance groups makes a country less likely to comply with treaty obligations. Recently Berlin convincingly argued that compliance and non-compliance should be considered separately since the causal pathways to

⁸⁸ Other scholars who find the approaches to interact are: Börzel, Hofmann, Panke, and Sprungk 2010; Tallberg 2002.

each may differ, and non-compliance has its own causes.⁸⁹ He finds that while corruption and non-compliance groups help explain non-compliance with arrest warrants issued by the ICTR, liberal norms and aid dependency explain compliance with them. My research confirms that distinct factors might explain compliance and non-compliance, arguing that non-compliance pressure by the AU created loyalty conflicts in individual African ICC member states that chose compliance with AU decisions over compliance with ICC arrest warrants. In Table 7, I group common explanatory factors according to their outcome—compliance and non-compliance—and level of analysis.

Table 7: Overview of Existing Compliance Explanations

	Compliance	Non-compliance
International level	International pressures and dependence networks Enforcement Legitimacy of rule and institution	(lack of compliance factors)
Domestic level	Compliance constituencies Democratic values and institutions Eliminating domestic opponents Reputation concerns	(lack of compliance factors) Non-compliance constituencies Lack of state capacity

Explaining Compliance and Non-Compliance

Three sets of compliance theories reside on the international level. One prominent explanation is material pressure, whereby states respond to outside pressure by powerful states or ‘dependence networks.’⁹⁰ A rationalist argument at heart, it holds that external pressure induces states into compliance as they deem the benefits of compliance to be higher than the benefits of

⁸⁹ Berlin 2016: 28.

⁹⁰ Hafner-Burton 2005; Meernik 2008; Goodliffe, Hawkins, Horne, and Nielson 2012; Goodliffe and Hawkins 2009.

non-compliance. For instance, powerful states can use their foreign aid strategically and demand compliance of aid recipients under the threat of withholding further financial support. This conditionality, in the form of carrots and sticks, can be used through tying aid, sanctions, or membership to compliance. For instance, Serbia's and Croatia's compliance with the ICTY relied on threats of withholding aid and EU membership.⁹¹ Serbian leaders were publicly and privately encouraged to cooperate with the ICTY to ensure access to Western institutions and aid.⁹² Similarly, pressure by the EU and the US influenced new Eastern European states' commitment to various UN human rights treaties in the early 1990s. Rather than being driven by a normative belief in human rights, elites accepted UN oversight "to offset global human rights pressures without paying the electoral costs associated with true democratic reform."⁹³

Furthermore, scholarship has often traced compliance with international treaties to effective sanctioning and monitoring mechanisms. This enforcement school relies on the assumption that states calculate costs and benefits. Consequently, a state chooses non-compliance when it confers higher benefits on the state than compliance. In turn, increasing the costs of non-compliance, such as strong enforcement measures, states can be induced into obeying⁹⁴: "Establishing institutionalized monitoring and sanctioning mechanisms can alter the cost-benefit calculations of states as the likelihood of being detected and punished increases the anticipated costs of noncompliance."⁹⁵ For instance, when the detection of ICTY suspects' whereabouts increased, their arrest became more likely.⁹⁶

⁹¹ Peskin 2008; Grodsky 2011; Subotic 2009.

⁹² Grodsky 2011.

⁹³ Smith-Cannoy 2012: 66.

⁹⁴ Downs, Roocke, and Barsoom 1996; Hathaway 2002; Hafner-Burton 2005.

⁹⁵ Börzel, Hofmann, Panke, and Sprungk 2010: 1367.

⁹⁶ Meernik 2008.

While the enforcement school is institution-centric by focusing on treaty stipulations and the likelihood of non-compliance detection, the premise has implications for a state's propensity to comply. Powerful states can more easily resist external pressure "because they have more alternatives to cooperation with a particular partner and can more easily pay for reputational or material damages."⁹⁷ While both material pressure and enforcement theories rely on rationalist logic of action, the referent from which the compliance pressure comes is different. With material pressure theories, states will respond to direct inducements by other states or international organizations. In the enforcement school, the compliance pressure is exerted by the international legal norm itself, i.e. the treaty stipulations for non-compliance. The Rome Statute stipulates for instance that states found to be non-compliant will be referred to the ASP and UNSC. It is possible that this potential punishment alone prompts a state to comply with a court request. However, past experience with the lack of follow-up on non-compliance through the ASP and the UNSC makes it unlikely that enforcement pressures through the Rome Statute are powerful enough to induce compliance.

In addition to dependence networks and enforcement, scholars suggest that states comply with treaty obligations when these are perceived to have been created and are applied in a legitimate fashion.⁹⁸ Franck argued that compliance hinges on the perceived legitimacy and fairness of a rule, the rule-making process, and the rule's application. Once perceived as legitimate, a rule or institution exerts a pull toward compliance. When a social system is seen as legitimate or valid, "nonbelievers cannot simply ignore the rules and institutions that they do not view as legitimate. That enough others do believe in their legitimacy means that nonbelievers

⁹⁷ Börzel, Hofmann, Panke, and Sprungk 2010.

⁹⁸ Franck 1995.

must consider them when estimating the likely effects of different courses of action.”⁹⁹ Hurd defines legitimacy as “an actor’s normative belief that a rule or institution ought to be obeyed”;¹⁰⁰ for Christian Reus-Smit it is about “social recognition” that an actor’s “identity, interests, practices, norms, or procedures are rightful.”¹⁰¹

On the one hand, legitimacy has a normative dimension; it is about a perception of rightfulness, that something ought to be done a certain way. This normative dimension of legitimacy refers to “whether a claim of authority is well founded-whether it is justified in some objective sense. An institution [...] is normatively legitimate if there are good reasons in support of its claims to authority, and illegitimate if not.”¹⁰² On the other hand, legitimacy is not created unilaterally; it is inter-subjective and defined by others’ perceptions. This is often referred to as the sociological dimension of legitimacy: “Authority has popular legitimacy if the subjects to whom it is addressed accept it as justified. The more positive the public’s attitudes about an institution’s right to govern, the greater its popular legitimacy.”¹⁰³ Struett argues that the court’s legitimacy “depends ultimately on its capacity to persuade observers that the exercise of its powers to investigate, prosecute, and punish violations of international criminal law (ICL) is consistent with the application of rules that are universal in nature.”¹⁰⁴ Thus, one can argue that ICC has normative legitimacy because its existence and authority in questions of international criminal law are not questioned but rather its exercise of that mandate and so its popular legitimacy has suffered from the counter-movement.

⁹⁹ Hurd 2007: 46.

¹⁰⁰ Ibid., 7.

¹⁰¹ Ibid., 159.

¹⁰² Bodansky 1999: 601.

¹⁰³ Ibid., 601.

¹⁰⁴ Struett 2009: 107.

Four additional sets of explanations for compliance reside on the domestic level of analysis. Scholars increasingly highlight the important role of domestic politics for compliance.¹⁰⁵ Simmons argued that international treaties impact domestic agendas, litigation, and mobilization. These venues then enable domestic actors, so-called compliance constituencies, to capitalize on treaty ratification by bringing suits demanding the government's compliance or mobilizing support for compliance among the population. International courts can thus impact domestic politics by "giving symbolic, legal, and political resources to compliance constituencies, ever-changing groups of actors that for a variety of reasons may prefer policies that cohere with international law."¹⁰⁶ Civil society groups, be they present international NGOs or smaller domestic groups, play the key role in enforcement here. Consequently, countries with strong civil societies will pressure their government to comply over time. For instance, NGOs can, "under certain circumstances, enhance levels of compliance with the decisions of UN treaty bodies by using individual cases at the UN as focal points for domestic rights claims and revealing incidences of noncompliance" as well as socializing and training the larger public.¹⁰⁷ Hence, even when governments make initially insincere commitments to IL, domestic NGOs can over time use this to render the country compliant.

Another set of explanations focus on regime type where scholarship has consistently highlighted the importance of liberal norms or a democratic form of government for compliance.¹⁰⁸ One line of research suggests that democracies are more likely to comply with international treaties due to 'value congruence,' which means that they hold values dear—such as the rule of law and civil rights—that make them more inclined to obey IL even in the absence

¹⁰⁵ Simmons 2009; Alter 2014; Hillebrecht 2014.

¹⁰⁶ Alter 2014: 19.

¹⁰⁷ Smith-Cannoy 2012: 29.

¹⁰⁸ Bass 2000; Neumayer 2005; Kelley 2007; Wallace 2012.

of strong enforcement.¹⁰⁹ Institutionally, democracies also feature strong respect for domestic courts,¹¹⁰ the rule of law,¹¹¹ and *pacta sunt servanda* (agreements must be kept), hence making them more likely to obey the orders of similar international courts. Some states refused to sign Bilateral Immunity Agreements (BIA) with the United States because they valued the ICC, the accountability norm for which it stands, and the principle of treaty commitment.¹¹² The logic behind the democracy argument lies in the public expectation that treaty commitment creates. As concerns for upcoming election results influence the calculation of leaders, they are expected to follow through on treaty commitments to avoid public discontent and ‘audience costs.’¹¹³ Even established democracies that may lack a desire to signal their commitment to human rights comply with the rulings of human rights tribunals begrudgingly, “arguing that their hands are tied by the government’s long-standing commitments to international law, human rights, and democracy.”¹¹⁴

A third relevant domestic explanation for compliance concerns the domestic leaders’ cost-benefit analysis. The prosecutorial record of the ICC shows that a majority of arrest warrants have been for rebel leaders and the domestic opponents of the sitting government. Hence, scholars investigating the ICC’s effects increasingly highlight the domestic calculus of leaders: “[R]uling elites in states that refer their situations to the Court can ensure their impunity as long as their crimes are no graver than the crimes of their opponents.”¹¹⁵ In these cases, state cooperation with the Court is less costly because the Court and the ruling government share a common adversary, and cooperation with the Court means the arrest and transfer of a domestic

¹⁰⁹ Slaughter 1995; Checkel 1999; Sandholtz 2014; Kelley 2007; Berlin 2016.

¹¹⁰ Powell and Staton 2009.

¹¹¹ Meernik 2015.

¹¹² Kelley 2007.

¹¹³ Roper and Barria 2008.

¹¹⁴ Hillebrecht 2014: 32.

¹¹⁵ Tiemessen 2014: 451.

rival: the interests of the ICC and the sitting government are aligned. Hillebrecht and Straus have dubbed this argument ‘legal lasso’ in which “states’ cooperation with the ICC is contingent on the ability of incumbents to use cooperation for their domestic political gain.”¹¹⁶ Likewise, with other treaty commitments, leaders in Central and Eastern Europe committed to individual petition mechanisms to “off set global human rights pressures without paying the electoral costs associated with true democratic reform” which can be seen as a “cheap signal used by governments to delay true reforms.”¹¹⁷

Another explanation for compliance is reputation, i.e. what a state is known for. In the rationalist school of reputation, often focused on a reputation for resolve,¹¹⁸ reputation matters for future cooperation and agreements because it impacts other actors’ expectations about a state’s willingness to comply or show resolve.¹¹⁹ Thus, when a state fails to comply it may become known for this behavior and thus other states are less likely to enter into agreements with that state because they expect future non-compliance. While earlier scholars addressed reputation,¹²⁰ Guzman has provided a reputational theory of compliance with IL.¹²¹ For Guzman, reputation is one of the three ‘Rs’ of compliance, and it is uniquely powerful to explain compliance with human rights treaties because reciprocity and retaliation are less likely.¹²² But reputation has also been found to motivate compliance in other issue areas. With regard to lending decisions between private investors and foreign governments, Tomz argued that

¹¹⁶ Hillebrecht and Straus 2017: 163.

¹¹⁷ Smith-Cannoy 2012: 23.

¹¹⁸ To name a few: Mercer 1996; Mercer 1997; Wiegand 2011; Clare and Danilovic 2010.

¹¹⁹ Simmons 2000; Von Stein 2005.

¹²⁰ Keohane 1984: 105; Simmons 2000.

¹²¹ Guzman 2008.

¹²² Reciprocity works well in bilateral agreements, such as those relating to trade, because the threat of one actor to withdraw compliance is often enough to induce compliance by the other actor. This does not work well for human rights treaties where the compliance of one state with an agreement has little consequence for another state. Likewise, retaliation involves costly punishments for the derogating state but it only happens when there are benefits for the retaliating state. Compliance happens when the violator wants to avoid future retaliatory sanctions.

“governments uphold their international commitments to avoid being classified as unreliable types and excluded from potentially beneficial agreements.”¹²³

Most importantly, I draw on Tomz’s theory’s emphasis on the importance of prior history of a government to build a reputation. This implies that when governments make decisions about cooperating with a state, they draw on information about prior compliance of a state. Once a reputation is built, this reputation can be destroyed because expectations for compliance have been shattered. However, prior low reputations for compliance can also be improved by refusing expectations of non-compliance: “A government alters those beliefs (its reputation) by defying expectations: acting contrary to its perceived type, given the circumstances. Likewise, a government preserves its reputation by behaving as anticipated, thereby validating beliefs observers hold about the government’s characteristics.”¹²⁴ Guzman used the example of South Africa’s desire to change its image from global pariah to good world citizen so that the country committed to the Nuclear Non-Proliferation Treaty in 1991 to improve its reputation: “doing so allowed it to more fully rejoin the community of nations and reap the benefits of cooperation with other states.”¹²⁵ Gillies applied reputation theory to norm emergence, arguing that reputational concerns by Western governments, international institutions, and corporations incentivized them to adopt best practices on oil sector transparency.¹²⁶

In addition to this rationalist perspective on reputation, constructivist scholars have attributed importance to reputation. Rather than being purely incentive-driven, i.e. seeking reputation for the sake of future benefits, behavior here is affected by the social status and identity that a certain commitment signals to others. Finnemore and Sikkink argued that states

¹²³ Tomz 2007: 33.

¹²⁴ Ibid., 20.

¹²⁵ Guzman 2008: 81.

¹²⁶ Gillies 2010.

embrace norms if they are “insecure about their international status or reputation,” suggesting that states will join agreements when it makes them ‘look good.’¹²⁷ Similarly, states adopt legal sex quotas also “to improve their standing” in the international system because it signals that they are a ‘modern’ rather than a ‘traditional’ state.¹²⁸ Hence, this strand of literature situates compliance and norm adoption within states’ desire to project a certain identity or signal its commitment to a social group.

In addition to the mere absence of the compliance factors presented above, non-compliance may be caused by additional factors. Lack of capacity features as a powerful domestic-level explanation for non-compliance. Chayes and Chayes argued that non-compliance stems from capacity constraints and unclear rules, and their approach has since been known as the ‘management school’ of compliance.¹²⁹ Some research on compliance with environmental agreements suggests limited capacity and resources limits adoption.¹³⁰ While many human rights provisions do not involve capacity concerns as governments are often asked to merely refrain from certain actions, capacity constraints come into play with the Rome Statute because court requests ask ICC states parties to provide records or arrest suspects. These concrete domestic actions require some level of technical expertise or law enforcement capacity,¹³¹ and thus, state fragility can impede human rights development in a state.¹³² For instance, limited state capacity in the form of over-stretched and thinly-staffed justice systems has slowed the implementation of the Rome Statute in Botswana, Ghana, Kenya, Tanzania, and Uganda.¹³³ Capacity could also diminish compliance when record keeping or interviewing witnesses is hindered due to limited

¹²⁷ Finnemore and Sikkink 1998: 906.

¹²⁸ Towns 2012: 183.

¹²⁹ Chayes and Chayes 1993.

¹³⁰ Brown Weiss and Jacobson 1998.

¹³¹ Cole 2015.

¹³² Risse, Ropp, and Sikkink 2013.

¹³³ du Plessis and Ford 2008.

staff and state resources. This speaks to the importance of bureaucratic capacity and quality, meaning the state's ability to "collect and manage information," as one indicator for state capacity.¹³⁴ Risse's edited volume on limited statehood critically examined the assumption often made in global governance analyses of perfect statehood. Rather, outside of the developed countries of the West, we can find many areas, which "lack the capacity to implement and enforce central decisions and a monopoly on the use of force."¹³⁵ Thus, areas of limited statehood face additional hurdles in compliance with IL.

One last non-compliance domestic factor I wish to highlight are domestic actors that wish to prevent compliance, so-called pro-violation constituencies or non-compliance constituencies. In his study of compliance with the ICTR, Berlin found that the Catholic Church played a pivotal role preventing Italy's compliance when the tribunal sought to arrest a Rwandan Catholic priest for his alleged involvement in the Rwandan genocide.¹³⁶ Similarly, pro-violation constituencies can advocate for non-compliance with IL in times of emergencies and national security crises.¹³⁷

Interest Alignment and Reputation Concerns

This previous section on compliance factors is useful for examining state cooperation with the ICC. This research suggests paying attention to the international partners with which these countries had important economic, political, and military ties. In addition, human rights scholars increasingly point to domestic politics as an explanation for compliance. This can involve the cost-benefit calculations of domestic leaders, their assessments of whether

¹³⁴ According to Hendrix (2010), studies on state capacity and its relationship to civil war use three types of indicators for state capacity: military capacity, bureaucratic/administrative capacity, and quality and coherence of political institutions.

¹³⁵ Risse 2011: 2.

¹³⁶ Berlin 2016.

¹³⁷ Cardenas 2007.

compliance will help or hurt their reputation with desired partners and peer groups, and the extent to which domestic civil society and democratic institutions hold elites accountable to their treaty obligations. Table 8 presents the compliance explanations I advance in the case studies.

Table 8: Compliance Explanations in the Case Studies

	Compliance	Non-Compliance	Alternative Explanations
South Africa	Global reputation concerns	Interest misalignment Regional reputation concerns and foreign policy priorities	Lack of state capacity Domestic civil society Enforcement Legitimacy
Kenya	Reputation concerns Dependence networks Domestic support for ICC	Interest misalignment Absence of international accountability pressure Domestic mandate against ICC	Lack of state capacity Domestic civil society Enforcement Legitimacy

In line with existing research I argue that interest misalignment helps explain non-compliance with the Rome Statute. When the interests of the government making cooperation decisions and the ICC differ, cooperation is not forthcoming. In both the South Africa and Kenya case studies, the governments had different interests than the Court. This contrasts with earlier years when both countries cooperated with the Court. In addition to interest misalignment, reputation concerns matter in both case studies. Reputation can both foster compliance and non-compliance. When South Africa decided to not arrest al-Bashir its decision was impacted by the AU's non-cooperation policy and choosing that alternative legal commitment allowed the country to bolster or at least not damage its reputation in Africa. The argument seems to run counter to what happened in Kenya. Here, it is puzzling that the government showed some compliance with the ICC. I argue that the Kenyan government engaged in pro forma cooperation

because it was elected on promises of cooperation with the Court and because outright non-compliance could have tarnished its reputation for compliance with IL.

Alternative Explanations

Three theoretical explanations are less powerful in the case studies. I do not wish to suggest that they are *never* useful in analyzing compliance with the Rome Statute or IL. But in the cases I examine, they do not explain convincingly why non-compliance happened so I treat them as alternative explanations. While I describe their limited utility in each chapter in more detail, I briefly address them here to distinguish my own argument more clearly.

With regard to capacity, one could argue that South Africa and Kenya, two countries in Sub-Saharan Africa, qualify as low-capacity countries, maybe even areas of limited statehood. However, I argue that compliance with the Rome Statute in these two countries is not affected by limited capacity or statehood. While South Africa and Kenya may be subject to some governance problems—be they territorial or in specific policy sectors—their compliance with the Rome Statute was in the hands of the executive and in both cases deserved a lot of diplomatic attention and resources. In addition, we see swift action by domestic courts and the use of domestic legal systems to challenge the ICC.

A second argument that is less convincing is enforcement. As Hathaway remarked, human rights is a unique issue area: It “stands out as an area of international law in which countries have little incentive to police noncompliance with treaties or norms.”¹³⁸ Likewise, Guzman argued that reciprocity and retaliation as ways to enforce IL usually do not work in human rights issues because states do not retaliate when another state fails to comply with a human rights treaty. Likewise, the ICC has no way to enforce its warrants, and no actor has tied

¹³⁸ Hathaway 2002: 1941.

arrest of an ICC suspect to development aid or future membership in an organization— something that was powerful compliance inducement with the ICTY. These external actors can act as ‘surrogate enforcers’ of cooperation obligations in that they can “significantly limit or expand the political space in which a targeted state acts to undermine a tribunal.”¹³⁹ The UNSC and the ASP play this role on paper with the ICC as they can act on state’s non-compliance but this has never happened so far.

Third, one could argue that African states do not cooperate with the Court because the Court is illegitimate. At face value this seems to be a promising explanation given that many African countries question the Court’s work because it has focused primarily on prosecuting Africans. However, I do not consider this explanation very powerful. First, African countries were deeply involved in creating the Court with all its provisions, including lack of immunity for heads of state. Moreover, several African states have themselves invited ICC action in their countries rather than ICC action being imposed on them. Third, as Chapter 3 shows, questioning the ICC’s legitimacy has only become fashionable since it went after sitting heads of state. I do not wish to deny that the ICC’s prosecution focus on Africa has not damaged it but more often than not, legitimacy is used as a strategic argument to depict the Court as anti-African.

Contributions to the Literature

Transitional Justice Literature

By shedding light on the role of the AU as an intermediary compliance actor and as a forum for regional resistance to the ICC, my research highlights the constraints under which prosecutions against alleged war criminals occur. The two cases under analysis here are arguably the two most negative ones when it comes to state cooperation since they involve sitting heads of

¹³⁹ Peskin 2008: 12.

states or senior state officials. In these cases, the AU acted as a formidable norm antipreneur, directly counteracting the ICC. When regional pressures work against international courts like this, transitional justice can be hard to realize, with victims being left without any redress. This research then joins skeptical studies¹⁴⁰ that provide a more pessimistic hue to the ‘justice cascade’: The resistance and backlash to the ICC’s accountability for heads of state norm from some African states challenges the unidirectional approach described by Sikkink toward more human rights prosecutions and accountability. While we might see trials and prosecutions at the ICC, Sikkink’s account fails to consider how they can be undermined once they are started and when the suspects are in positions of power.

Thus, this research should lead us to pause and rethink the high expectations we have of transitional justice mechanisms, particularly of retributive justice through the ICC. Scholarship has established that international norms and institutions rely on robust bottom-up support from states to function properly. My research squarely shares this skeptical outlook: This dissertation chronicles in detail the various ways in which some African states, especially Kenya, have led the movement against the Court, have engaged in counter-shaming and delegitimizing the Court, and have used the AU as a receptive forum for a neocolonial narrative. In its wake, former model cooperators, such as South Africa, have become more critical of the Court and have refused to honor their legal obligations to arrest an ICC suspect. This countermovement and lack of compliance has contributed to cases being hibernated and dropped at the Court, thus severely curtailing the effective functioning of the Court in the pursuit of accountability.

¹⁴⁰ Snyder and Vinjamuri 2003/04.

Compliance Literature

In this dissertation I propose a framework to analyze how states engage with the ICC. The framework draws from both the norms and compliance literatures and thus incorporates a broad range of engagement tactics. The framework allows scholars to disaggregate states' cooperation behavior toward the ICC into legally prescribed forms of cooperation, such as compliance with court requests, as well as non-legal means of engagement such as diplomacy and statements in support of the Court. The framework also takes seriously that compliance and support for the Court are not static but change over time. What characterizes a country's stance toward the Court today may be different in several months or years as new leaders come to power. Moreover, the framework recognizes that states may engage in cooperation and non-cooperation simultaneously. For instance, while the Kenyan government was openly complying with the Rome Statute by attending hearings in The Hague and handing over some records for evidence, it was simultaneously shoring up anti-Court rhetoric and action at the AU.

The framework can thus be used for theory testing in future research on state cooperation with the ICC. While the framework was created based on the dissertation's two case studies, I would argue that it could be applied to other international organizations. While the non-legal means of engagement are fairly neutral and similarly at stake with other organizations, the legal means of engagement would vary with each organization and the obligations in its founding treaty. Rather than compliance with court requests, legal cooperation would then mean submitting regular reports to a UN oversight committee or creating a domestic human rights institution. Based on a country's compliance with these obligations and its voluntary cooperation, it could be placed in one of the quadrants and the country's change in cooperation behavior could be traced chronologically.

With regard to concrete compliance factors, the case studies contribute to an increasing domestic politics focus, or second image theory. First, some explanations that have so far been associated with compliance, such as democracy, reputation-seeking behavior, and international pressure, can also contribute to *non-compliance* with IL. For instance, in case of al-Bashir's non-arrest in South Africa, ICC compliance was directly opposed by compliance with an AU decision. Strengthening its regional reputation by not arresting al-Bashir and acting in line with AU policy, allowed South Africa to forego the negative consequences and reputation costs of acting contrary to the regional organization. Likewise, in Kenya, Uhuru Kenyatta and William Ruto both campaigned on an anti-ICC platform in their joint election campaign for President and Deputy President of Kenya in 2013. While promising to continue to cooperate with the Court, they also fostered a neocolonial narrative about the ICC. After being elected on that platform, despite the charges against them at an international court, their electoral strategy against the ICC legitimized their selective cooperation behavior. In this case, the leaders' democratic mandate did not incentivize them to comply with IL. Thus, the same factors that we associate with compliance may actually work against compliance.

Second, the South Africa and Kenya chapters also lend support to the reputation literatures. Both rationalist and constructivist perspectives of reputation are hard to distinguish in empirical cases because they produce similar behaviors.¹⁴¹ In this dissertation, I argue that Kenya and South Africa have at different points in time complied and not complied with the Rome Statute out of reputation concerns. This supports the claim that rather than one single reputation, states can have different reputations in different global and regional arenas. The case studies suggest that, against the background of increasing tension between the AU and the ICC, both countries attached more significance to their reputation within their regional peer group

¹⁴¹ Lebovic and Voeten 2006.

(represented by the AU) than the global community. Compliance with the rules of each organization was tied to loyalty to an associated community: the Rome Statute with the West and the AU Constitutive Act and AU Assembly decisions with the African continent. The AU provided an alternative forum for reputation-building so that non-compliance with the Rome Statute is unlikely to negatively affect South Africa's reputation in Africa, likely bolstering it. This contrasts with reputation studies that assume one 'single reputation' across partners and issue areas.¹⁴² Only with this 'single reputation' assumption in place can a theory predict that a state would update its expectations about another state's future reliability. So even if states reassess their estimates about another state's reputation for compliance after a defection or several defections, it is likely that they do so only for a subset of agreements that "(1) are affected by the same or similar sources of fluctuating compliance costs (or benefits) and (2) are valued the same or less by the defecting state."¹⁴³

The central role of the AU in understanding the state-ICC cooperation nexus and its role as a forum for resistance against the Court and the norm of head of state accountability contributes to studies of the 'actorness' of regional organizations. While actorness has long been seen as the sole attribute of the European Union, understood as a *sui generis* international organization that is "incomparable to other political entities," actorness has more recently been claimed for cross-comparisons of regional organizations.¹⁴⁴ My research does not claim that the AU is a powerful actor in itself and across all issue areas. After all, the AU Assembly decisions on which the AU's behavior toward the ICC is based, are consensus-driven and shaped by the motions of African states rather than AU bureaucrats. However, the AU has provided a forum where ICC-critical African states have successfully fostered a neocolonial narrative and have

¹⁴² Downs and Jones 2002.

¹⁴³ Ibid., 98.

¹⁴⁴ Hulse 2014: 549; Wunderlich 2012.

passed decisions that directly counteract the ICC or seek to limit its effectiveness.¹⁴⁵ In this way, *with regard to its ICC posture*, the AU can be said to possess actorness since it was successful in using its capabilities to challenge another international organization. It has a common identity based on sovereignty and liberation from colonialism and it leveraged that identity in contrast to the ICC to resist the charges against sitting heads of state.¹⁴⁶ This actorness also speaks to African agency in the international system: “Like most governments in the global South, they are dictated to by external actors in certain circumstances and on some issues but in certain situations they influence these external governments and institutions.”¹⁴⁷ This account contrasts with some norm diffusion scholarship that presents norm-takers as passive recipients and contributes scholarship on the regional organization’s role in global governance:¹⁴⁸ “The mediating role of regional institutions deserves closer inspection in studies of norm diffusion, even in cases like this where the regional grouping is weak in relation to its individual member-states.”¹⁴⁹

The case studies in this dissertation trace cooperation behavior over time. This process tracing at the country-level contrasts with many large-N compliance studies. I do not mean to suggest that we do not learn valuable lessons about compliance from these studies. What these case studies contribute, however, is an understanding of the micro-processes involving the struggle over cooperation, the ‘virtual trial,’ that remain hidden in statistical analyses. Thus, the dissertation contributes to cross-national comparisons of compliance. What creates compliance or non-compliance years after commitment has unique theoretical value and points us to

¹⁴⁵ This is similar to Capie’s study on ASEAN’s role in resisting the diffusion of the small arms in Asia (2008).

¹⁴⁶ Tieku 2013; Edozie and Gottschalk 2014; Nzungola-Ntalaja 2014.

¹⁴⁷ Tieku 2013: 514.

¹⁴⁸ Welz (2013a) argues that continental disagreement based on different national preferences hinder the AU’s impact on global governance, for instance in seeking deferral for the al-Bashir case. My account challenges this interpretation.

¹⁴⁹ Capie 2008: 654.

potentially new ways of explaining compliance. A focus on concrete compliance behavior down the road adds not only data points to our understandings but also sheds light on whether other considerations by the current government might impact compliance. Studying compliance actions, in the case of South Africa *16 years* after ratification of the Rome Statute, casts doubts on assuming that what explained ratification then also explains compliance actions today. Thus, studying compliance incidents after ratification might illuminate further causes for compliance and non-compliance. Other governments might calculate costs and benefits differently, might be differently influenced by international peers or regional organizations, and might be differently subject to civil society groups and litigation.¹⁵⁰

¹⁵⁰ For instance, Grugel and Perruzotti's research on compliance with the UN Children's Rights Convention suggests that it can take a long time to see actual compliance happen and that a country's history might influence compliance more than initially thought (2012).

Chapter 3: Expressing Support and Critique for the ICC

The International Criminal Court (ICC, or the Court) appears to be in deep trouble given that three African countries announced their intents to withdraw from the ICC in 2016. While two (South Africa and Gambia) have since then withdrawn from the withdrawal, the announced exits sent shockwaves through the international justice community about the impending collapse of the Court. This chapter shows that not all is doomed: Support for the Court, as expressed through public statements of loyalty, remains high and does so across regions. While states do raise critiques of the Court at the UN, when examined more closely, these critiques more often than not relate to state-to-state criticism over the lack of cooperation as well as the UN Security Council's (UNSC) influence over the ICC's docket, budget, and lack of follow-up. Moreover, states encourage universal ratification of the Rome Statute and stress the positive effects of the Court. While Africa constitutes the most critical region, many African states continue to support the Court and more references expressing loyalty were issued in 2016 than in 2007. This suggests that the Court is seen as a robust young institution and that states recognize the institutional constraints under which it operates, particularly the Court's ties to the UNSC.

The analysis of country statements at the UN is contrasted with decisions issued by the African Union (AU) Assembly, the AU's main decision-making body that is comprised of African heads of state. Overall, AU decisions are much more critical of the Court, its judges and the Chief Prosecutor. Some contrasts stand out: First, the AU praised instances of non-cooperation with the Court, i.e. instances when AU member states have not arrested ICC suspect at large, Sudanese President Omar al-Bashir during visits to their country. At the UN, these non-arrests drew strong criticism from other states as undermining the accountability mechanisms set up through the ICC. Second, in the debate of justice versus peace, AU decisions highlighted the

prioritization of peace. On several occasions, the African countries chastised the Court for the negative effects indictments and judicial decisions have on peace negotiations on the ground. Third, immunity of heads of state loomed large as a critical issue at the AU, which is not surprising given that some of the individuals charged by the Court are government officials and thus have a seat at the table at the AU, most importantly al-Bashir but also current Kenyan President Uhuru Kenyatta and his Deputy President William Ruto. The AU repeatedly called on the ICC and the UNSC to consider their constitutional duties as heads of state as somewhat mitigating circumstances for their trials.

The chapter's findings deserve attention as they illustrate the climate surrounding the Court, or what court officials like to call the ICC's 'enabling environment.'¹⁵¹ The Court as a judicial institution rests on the enforcement pillar but it does not control that pillar. That pillar is dependent on the states and especially the Court's states parties. The analyses below point to important challenges faced by the Court, including its ties to the UNSC, the lack of state cooperation, and its troubled relationship with many African states.

The next section describes in more detail the methodology for this content analysis. I then present first empirical results, charting expressions of voice, exit, and loyalty rhetoric. I then delve more deeply into common points of support and critique, and each section includes a regional overview to better chart geographical variation. The chapter's second main part presents the main criticisms raised by the AU Assembly over time.

¹⁵¹ Interviews 004, 006.

Methodology

These statements represent the ‘discourse’ about the court—the way state leaders and officials talk about the Court—and they tell us about the expectations that states have of the Court and the reasons for continued support for or critique of the Court. I argue that this is part of states’ voluntary, non-legal cooperation with the ICC that contributes to institution and norm strengthening.

To analyze what states like and dislike about the Court, I created a dataset of more than 600 ICC-related statements made at the UN General Assembly (UNGA) from 2002, the entry into force of the Rome Statute and beginning of the Court’s operation, until 2016. A total of 605 statements by 106 countries were coded. In addition, regional blocs presented collective statements, such as the European Union (EU: 15 statements), the Caribbean Community (CARICOM: 13 statements), and the AU (7 statements). However, individual states from within these regional groupings are free to and frequently made use of individual statements to express their support for or concerns with the Court. For representative statements, I chose statements in the UNGA surrounding the annual introduction of the ICC report by its Chief Prosecutor. This report updates UN member states on the Court’s activities of the past year and states are invited to comment. The debates are accessible online. The debates surrounding this report allow for a better comparison across time than debates at the UNSC surrounding the use of force and potential referrals to the ICC, which are very context-specific.

The statements were coded and analyzed with the qualitative data software NVivo according to country, regional grouping, and topics. The unit of analysis is references that either express support, critiques, or threaten exit. Hence, a statement by Japan can contain several references, some critical and some supportive of the Court. These references vary in length from

sentences to entire paragraphs if they are devoted to a specific theme. Coding longer phrases allows for more nuanced analysis that may become obscured when doing automated word searches. For instance, an expression of support for the Court is the calling on other states to join the Rome Statute, which was coded under the loyalty sub-category of “universality.” An example by CARICOM reads: “She urged States that had not yet done so to ratify or accede to the Statute, to adopt the necessary implementing legislation and to ratify and implement the Agreement on the Privileges and Immunities of the International Criminal Court, which would ensure that the latter was in a position to conduct its work properly.”¹⁵²

For each country I added their region as an attribute to analyze regional variation, using the ICC’s regional groupings: Africa, Asia Pacific, Western European and Other (including Western European states as well as Canada and Australia), Eastern European, and Latin American and Caribbean States. These regional counts include *all* countries in that region, regardless of whether they are states parties or not. This was done to achieve the broadest possible views about the Court. The drawback of this coding choice is of course that the counts do not just represent the views of states parties. To mitigate this concern, I point out the different views of vocal non-member states when appropriate, particularly in the voice section.

It is important to point out that some regions were more vocal than others, i.e. the times they issued statements on the ICC is higher. Thus, their number of references is higher simply because they spoke up more often. Table 9 compares the total number of statements made per region and the number of ICC states parties in that region. While the percentages are similar for Asia Pacific and Latin America, they differ more for Western Europe and Other, Africa, and Eastern Europe, suggesting that Western states are slightly overrepresented in the statements while Africa and Eastern Europe are slightly underrepresented.

¹⁵² UN General Assembly, UN Doc A/C.6/59/SR.6: 9.

Table 9: Number of Country Statements per Region (% of 605)

	Asia Pacific	Africa	Western Europe and Other	Eastern Europe	Latin America
# of Country statements	85 (14%)	147 (24.3%)	170 (28.1%)	60 (9.9%)	143 (23.6%)
# of ICC States Parties	19 (15.3%)	34 (27.4%)	25 (20.2%)	18 (14.5%)	28 (22.6%)

With regard to subject matter, I coded expressions of support as loyalty, concerns or critiques as voice and threats to exit as exit. Loyalty is defined as expressions of support for the Court, i.e. positive statements about the Rome Statute system. Concerns or critiques related to the ICC were coded as voice. Within loyalty and voice many subcategories emerged depending on what was the object of loyalty or voice, i.e. what exactly was being referred to in a positive or negative way. In contrast, voice related to many different themes, such as resources and funding, the work of the UNSC, the work of the ICC Chief Prosecutor, or state-to-state critiques for the refusal to execute ICC arrest warrants.

It is important to point out that *within* the categories of voice and loyalty coding was not mutually exclusive. That means that a statement critical of the UNSC and its refusal to provide financial assistance to the Court was coded at the voice subcategories of UNSC and finances, such as the following example by Costa Rica: “[I]t is necessary to recall that any referral from the Council to the Court, significant as it may be, also implies unforeseen obligations. It would be fair, therefore, if the resulting costs were to be compensated by the United Nations — something that has not occurred to date. We trust that reasonable arrangements will be arrived at in this area as well.”¹⁵³ However, double coding of *one reference* as both loyalty and voice was deemed theoretically impossible.

¹⁵³ UN General Assembly, UN Doc A/66/PV.47: 7.

In addition to the UN discourse, based on a textual analysis of AU Assembly decisions, I created a timeline of ICC-related decisions passed by the AU Assembly to chart when and why the regional organization became critical of the ICC. To allow for a better comparison between the statements countries made at the UN and AU Assembly decisions I coded the same themes, i.e. voice and loyalty. 16 AU decisions between 2009 and 2017 directly addressed the ICC and its cases.

It is important to note the differences between speeches at the UN and AU decisions. The AU is a pan-African organization that represents the common views of the African continent. The AU Assembly is the summit meeting of AU heads of state that meets twice per year. They pass non-binding decisions but these decisions are meant to direct the policy of member states and express the common values and goals of the organization and its constituent members. These decisions are consensus decisions and usually no reservations are entered into to signal that one or more member states disagree openly with a decision. The AU decisions were chosen because they are all readily available online whereas speeches and meeting minutes from the summit meetings are not. This means that these decisions are likely to express the smallest common denominator of the continent. To mitigate these concerns about taking the decisions as representations of the ‘African’ view on the ICC, I triangulated the decisions with news articles about the summits to learn more about potential disagreements behind the scenes.

Talking about the ICC at the UN

The following sub-sections present the main themes that emerged from the content analysis. I first discuss the main three categories of exit, voice, and loyalty and compare them across regions. Then, I present findings from *within* the loyalty and voice categories. After

discussing more general findings, each section contains representative quotes from country statements to illustrate rhetoric at the UN and regional variation for the important categories.

Exit, Voice, and Loyalty

All three categories of exit, voice, and loyalty account for 1,742 references, i.e. 1,742 times did countries use rhetoric to signal their intentions to exit, critique, or support the ICC. Expressions of loyalty received the most mentions with 1,112 references, amounting to 63.8% (see Figure 4). Countries referred critically to the Court or the Rome Statute system 626 times, which accounts for 35.9% of all references. Thus, the fact that loyalty accounts for almost twice as many references as voice suggests high support for the Court. Four references were made with regard to exit in 2015 and 2016, together accounting for only 0.002% of references.

Figure 4: Exit, Voice, and Loyalty Rhetoric

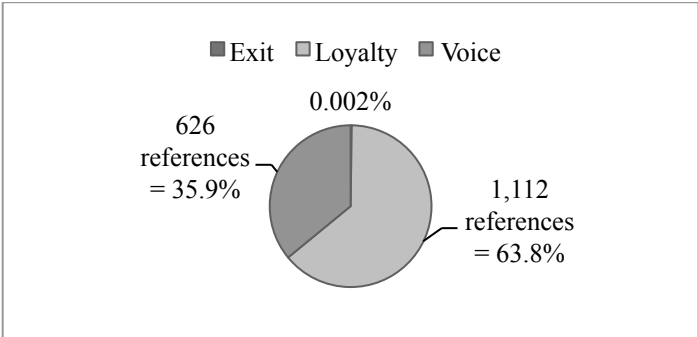
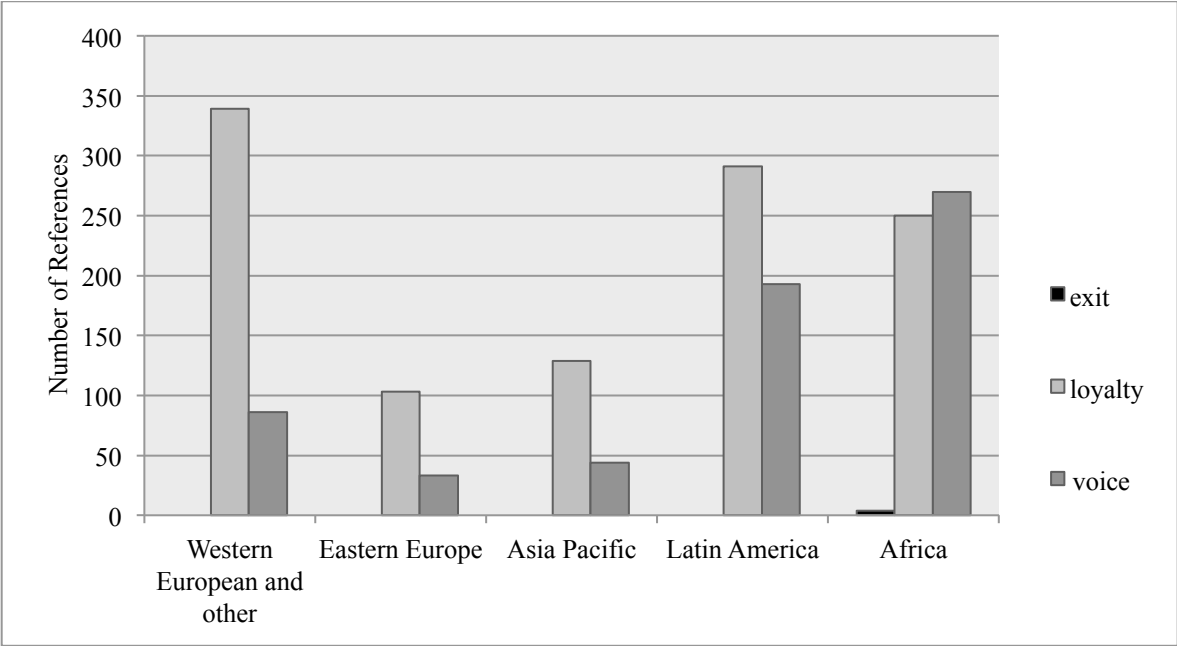


Figure 5 shows the extent to which different regions expressed exit, voice, and loyalty. Based on the total number of statements, Western Europe and Other is the region with the most positive mentions of the Court, totaling 339 loyalty statements and only 86 voice statements. So of a total 425 statements, almost 80% of these were positive and only 20% were voice. A majority of statements by countries in Latin America, Asia Pacific, and Eastern Europe were also

expressions of loyalty even though their total number of statements is much smaller than Western Europe. Of the 136 statements made by Eastern European states, 103 were coded as loyalty (76%) and 33 as voice (24%). In Asia-Pacific, of a total of 173 statements, 129 were loyalty (74.5%) and 44 were voice (25.4%). So in these three regions, together accounting for 62 states (50%) of 124 ICC states parties, the shares of loyalty for the Court ranged between 74% and 80%.

Figure 5: Exit, Voice, and Loyalty per Region



The share of loyalty of all statements is smaller in other world regions. Latin American countries expressed loyalty 291 times and voice 193 times, accounting for 60% and almost 40% respectively of the combined 484 statements. Africa is the most critical region and in fact the only region where voice surpasses expressions of loyalty. With 524 statements, the region has been the most vocal region of all. 270 statements were coded as voice (51.5%) and 250 as loyalty (47.7%) to the Court or the norms for which it stands. It was also the only region with four exit

statements, accounting for 0.7% of mentions. Figure 6 illustrates the regions’ respective shares of exit, voice, and loyalty statements as percentages of their total statements.

Figure 6: Percentages of Exit, Voice, and Loyalty per Region

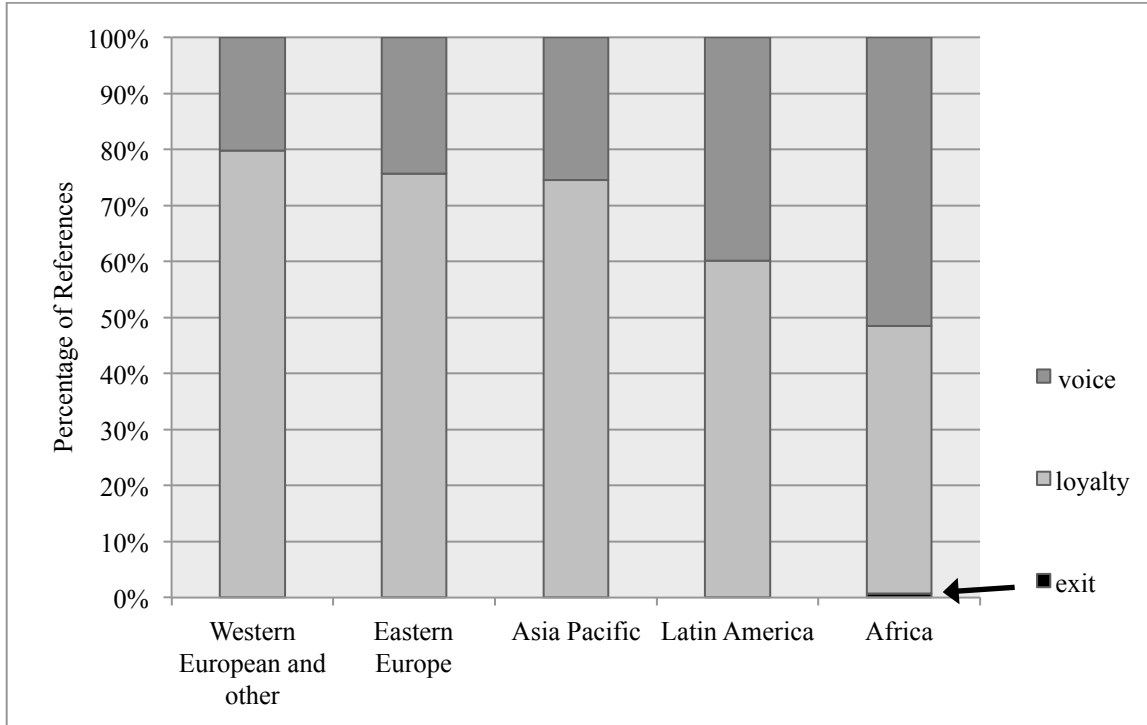
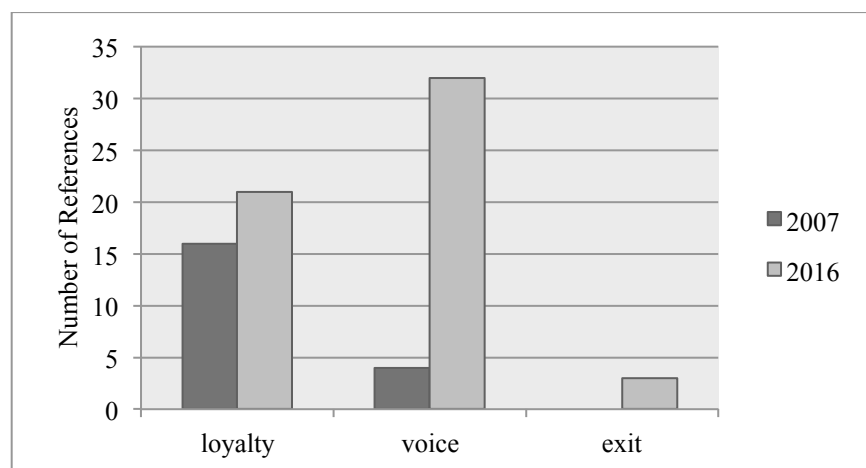


Figure 7 displays the African region’s changes over time. I chose 2007 and 2016 as ‘most different’ points in time considering that 2007 is before the post-election violence in Kenya in which the Court then became involved and it is before Sudanese President Omar al-Bashir is officially charged by the ICC. 2007 also precedes the most critical statements by the AU against the Court which started in 2009. 2016 was chosen as the contrast year given that a main Court supporter, South Africa, failed to arrest al-Bashir in 2015. The comparison highlights the stark increase in voice between the two years and the addition of exit rhetoric. While African states also voiced slightly more loyalty toward the Court (from 16 references in 2007 to 21 references in 2016), statements coded as voice increased from 4 in 2007 to 32 in 2016.

Figure 7: Change in Exit, Voice, and Loyalty in Africa



Loyalty: Support for the Court

I coded 1,112 expressions of loyalty, positive statements about what the Court does or can do in an ideal world. Table 10 contains the eight most often coded themes under loyalty, which account for 798 references (71.7%) of the 1,112 statements.

Table 10: Main Categories of Loyalty

Category	Number of References	Percentage of All Voice (1,112)
More Resources	50	4.50
Peace and Justice	51	4.59
Effects of ICC	73	6.56
Complementarity	74	6.65
Kampala Review	79	7.10
UN Relationship	123	11.06
Cooperation Call	171	15.38
Universality	177	15.92
Total	798	71.7

The most frequently coded loyalty theme was universality, which means that states called on more states to join the ICC in order to expand the Court’s territorial jurisdiction and move

closer to a truly global Court that can charge individuals regardless of country. For instance, Japan was determined to expand the Rome Statute's reach in Asia stating that it "renews its commitment to continuing to encourage our Asia Pacific friends that have not yet done so to ratify or to accede to the Statute."¹⁵⁴ New Zealand stated that "the Court should have the greatest possible geographical reach" to be fully effective.¹⁵⁵ Ecuador stated it this way: "We therefore believe that in order to guarantee the Court's future and its effective operation, it is essential that we achieve universal adherence to and full application of the Rome Statute."¹⁵⁶ Universality was deemed important because the Rome Statute's global reach would mean that all perpetrators ultimately got punished, hence contributing to the ICC's goal of ending impunity through true universal jurisdiction. Moreover, states linked universality to increased legitimacy of the court.

The second most frequently coded loyalty theme was states calling on other states to cooperate with the Court. The vast majority of references were non-specific and simply intended to remind others of their obligations. For instance, Costa Rica's stated in 2005 that "[s]tate cooperation is also necessary both to implement arrest warrants and to facilitate the Court's functioning at The Hague. Therefore, I should like to conclude my statement by calling upon all States to reaffirm their commitment to the International Criminal Court."¹⁵⁷ Finland called "on all States parties to the Rome Statute to uphold their international legal obligations under the Statute."¹⁵⁸ However, sometimes countries explicitly called out peers and reminded them of their duties, such as Argentina: "The authorities of the Sudan, Uganda and the Democratic Republic of

¹⁵⁴ UN General Assembly, UN Doc A/68/PV.42: 19.

¹⁵⁵ UN General Assembly, UN Doc A/C6/59/SR.6: 11.

¹⁵⁶ UN General Assembly, UN Doc A/60/PV.46: 16.

¹⁵⁷ *Ibid.*, 17.

¹⁵⁸ UN General Assembly, UN Doc A/65/PV.14: 17.

the Congo must fully cooperate to arrest persons against whom arrest warrants have been issued.”¹⁵⁹

The category ‘UN relationship’ refers to states stressing the importance of inter-organization cooperation and complementary values of both organizations. In 2004, both organizations signed a Relationship Agreement, which formulates the working relationship between the UN and ICC and forms the legal foundation for cooperation between them. In many ways the UN’s global presence and infrastructure make it an important partner for the ICC in terms of its personnel across global field operations, who may act as experts or witnesses.¹⁶⁰ States see this relationship as highly positive, with Norway remarking in 2007: “The relationship between the ICC and the United Nations is of great importance. Ending climates of impunity requires determined cooperation by interlocutors who have international peace, justice and security as their common goals and their common ambition. The ICC is independent, but it has strong legal, historical and operational ties with the United Nations.”¹⁶¹ Estonia stated in 2015 that recent decisions to authorize UN peacekeepers to arrest ICC suspects were praiseworthy: “The Security Council has authorized the missions in the Democratic Republic of the Congo and Mali to cooperate with and support the Court. We encourage the Security Council to mandate peacekeeping missions to arrest ICC fugitives and to equip them in such a manner that the missions are able to fulfill their mandate.”¹⁶² So while many states were very critical of the UNSC’s role, they also recognized the enormous potential of the UN to help fulfill the ICC’s mandate.

¹⁵⁹ UN General Assembly, UN Doc A/61/PV.27: 9.

¹⁶⁰ Coalition for the International Criminal Court 2004.

¹⁶¹ UN General Assembly, UN Doc A/62/PV.43: 9.

¹⁶² UN General Assembly, UN Doc A/70/PV.48: 25.

The Kampala review was also seen as very positive. Before the review conference in 2010 in Kampala, states made recommendations and expressed their hopes for the conference. After 2010, they remarked on the conference's success, especially with regard to adding the crime of aggression to the Court's jurisdiction. Lesotho stated that the Kampala review conference "was undoubtedly a success" and Sierra Leone remarked that the "historic achievements made in Uganda [...] form a major milestone in the development of international criminal justice."¹⁶³ In 2016, states praised the activation of the Kampala amendments by reaching the threshold of 30 ratifications. Brazil stated that the adding of the crime of aggression represents "a major contribution to completing the international criminal justice system. It will give additional meaning to the prohibition of the use of force, thus fostering a more stable, just and democratic world order."¹⁶⁴

Other positive aspects that received states' attention were complementarity, and states often highlighted the positive effects of the Court as a reason why it should be supported. Coded as 'complementarity' were statements that supported the principle according to which the Court only steps in when domestic authorities are found to be either unwilling or unable to prosecute the alleged crimes. For example, Liechtenstein said in 2011 that the "ICC is one of the most important tools in the fight against impunity, but it is not the only one. It is States themselves that play the greatest role in that respect. Fighting impunity is, in most cases, best undertaken at the national level, in particular since the ICC and other international mechanisms can only deal with a limited number of cases"¹⁶⁵

The effects that states see in the ICC are grand and are so far not borne out by empirical research, which remains divided over the potential effects of the court on deterrence and

¹⁶³ UN General Assembly, UN Doc A/65/PV.41: 16; *Ibid.*, 24.

¹⁶⁴ UN General Assembly, UN Doc A/71/PV.38: 3.

¹⁶⁵ UN General Assembly, UN Doc A/66/PV.44: 16.

strengthening the rule of law, and has at best found conditional court effects.¹⁶⁶ But at the UN, states largely assert these effects. Peru said: “The Court not only prosecutes those allegedly responsible for the most horrendous crimes and serves as a means of prevention and deterrence, but also cooperates with other institutions with similar objectives. Thus, it promotes an international system in which respect for the rule of law prevails.”¹⁶⁷ Echoing these hopes was Poland in 2014: “The International Criminal Court is central to the achievement of justice and accountability in the battle against those responsible for the most serious crimes, along with the States that harbour or otherwise endorse such actions.”¹⁶⁸

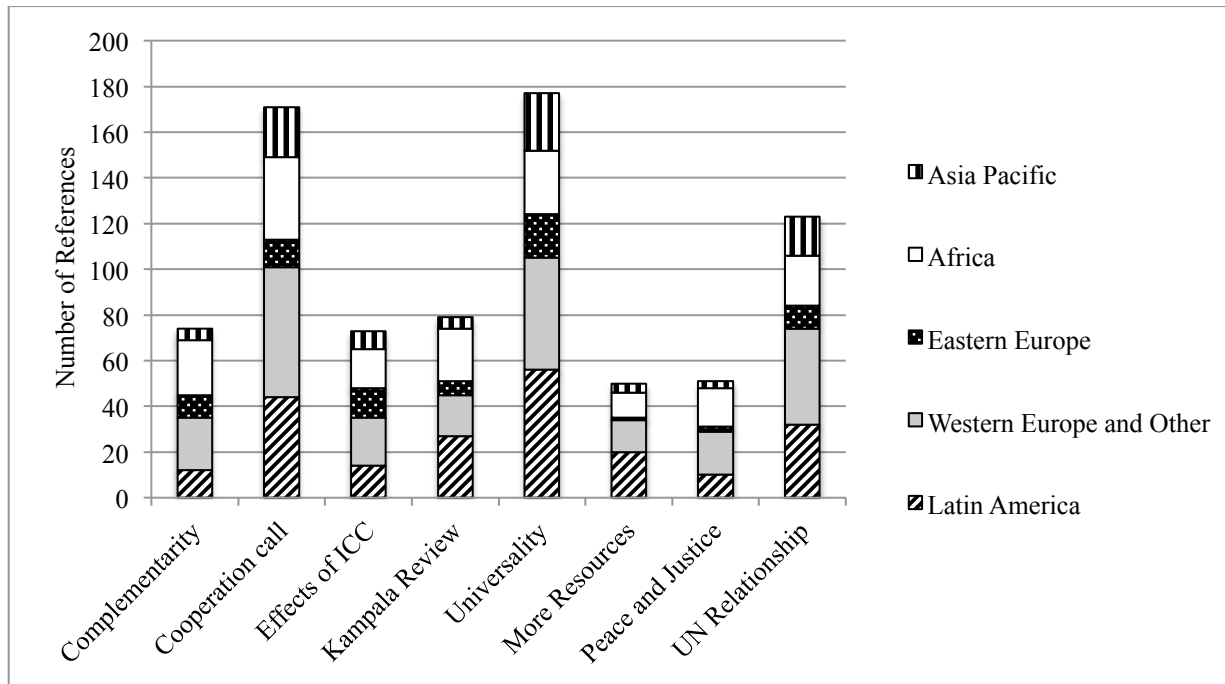
Figure 8 charts the eight most frequently coded loyalty subcategories across regions. The need for state cooperation was stressed across regions. This was particularly the case in Western European and Other states where calls for other states to comply with their Rome Statute obligations were made 57 times, followed by Latin America with 44 references and Africa with 36 references. Universality was mentioned most frequently by Latin American states (56 mentions) whose other priorities were calling on better state cooperation and highlighting the importance of a good UN-ICC relationship.

¹⁶⁶ While important variations exist, scholars agree that the Court’s impact on deterrence and violence prevention is at best conditional. For instance, Jo and Simmons (2016) argued that the ICC can deter some governments and rebel groups that seek legitimacy from engaging in intentional killing of civilians; see also Broache 2016; Cronin-Furman 2013.

¹⁶⁷ UN General Assembly, UN Doc A/61/PV.27: 16-17.

¹⁶⁸ UN General Assembly, UN Doc A/69/PV.35: 11.

Figure 8: Most Frequently Coded Loyalty Categories per Region



African states placed special emphasis on stressing the need for state cooperation (36 references), universality (28 references), complementarity (24 references), the Kampala review (23 references), and the relationship to UN (22 references). Other priorities were adequate funding for the Court given its increasing workload as well as the mutually reinforcing relationship of justice and peace. When coded as loyalty, ‘peace and justice’ statements emphasized that both objectives should be pursued alongside one another and that one cannot be accomplished without the other. This contrasts with decisions by African states at the AU Assembly. The sections below demonstrate how AU decisions often called for delays in ICC court cases or the dropping of charges because peace should be prioritized. At the UN, states stressed the mutually reinforcing relationship between justice and peace.

Twenty-six references were coded under loyalty as states expressed regret over recently announced intent or decisions to withdraw from the Court by South Africa, Burundi, and Gambia in 2016. The EU expressed its regret over these decisions and hoped for a change of heart: “What

was right in 1998 is still right. The world needs the ICC, and the ICC needs the support of every country. We would like to continue our engagement with these countries and with all our other partners in determining how we can all continue to act constructively in furthering the important work of the International Criminal Court.”¹⁶⁹ Similarly, Australia noted: “While we recognize that membership in an international treaty is a sovereign decision, we take the opportunity to encourage those States parties that have indicated that they intend to withdraw from the Rome Statute to reconsider their decision.”¹⁷⁰

Senegal and Tanzania were the only African countries to openly call on their African peers to reconsider their exit decisions. Tanzania expressed its general concern that “African countries have come to be critical of the Court, to the point that a policy of non-compliance and non-cooperation with the Court is a real possibility.”¹⁷¹ Senegal emphasized the need to strengthen the relationship between the ICC and Africa especially in light of these exit decisions: “Senegal, while respectful of the sovereignty of all States, nevertheless hopes that a dynamic consensus will be found so that Africa may continue to play a major role in the fight against impunity within the Assembly of States Parties.”¹⁷²

This section on loyalty has revealed what states value about the Court. Most importantly, states emphasized the need to garner more ICC states parties to ensure a truly global Court that can charge suspects in all corners of the world regardless of UNSC decisions. Looking at the subcategories of loyalty together it became apparent that states are much more expressive of their hopes and support for what the Court *can become* rather than what the Court has been doing. States are eager to point out that the institution is very young and is hampered in its work by its

¹⁶⁹ UN General Assembly, UN Doc A/71/PV.37: 6.

¹⁷⁰ *Ibid.*, 10.

¹⁷¹ UN General Assembly, UN Doc A/71/PV.38: 9.

¹⁷² *Ibid.*, 2.

ties to the UNSC and the Statute that states agreed to. Hence, states were very supportive of the further development of the Court through the Kampala review conference, the effort to achieve universality, and the potential effects of the Court such as deterrence of future perpetrators.

Voice: Critiques of the UNSC and other States

When looking more closely at ‘voice,’ we can better assess the relative importance of criticisms. Table 11 presents the twelve most frequently coded voice subcategories that account together for 86.9% of all critical comments (544 references of 626). I included all categories that garnered more than 20 references between 2002 and 2016.

Most notably, the two most frequently voiced critiques were not of the Court itself but of other actors: states and the UNSC. With 106 references, critique of the UNSC’s conduct accounts for almost 17% of all references, i.e. almost every fifth voice reference was a criticism of the UNSC. As the sections below demonstrate, states were very critical of the UNSC’s lack of funding contribution to the Court in the situations which it referred to the Court, i.e. Sudan and Libya, as well its inaction with regard to atrocities occurring in Syria. Moreover, states chastised the Council for its lack of follow-up with the referred situations and that the Council bears some political responsibility to use its leverage to help the ICC secure states’ cooperation. African states also criticized the UNSC for ignoring the AU’s deferral requests for the Sudan and Kenya cases. In 2010, the Zambian representative read a statement on behalf of the African ICC states parties, saying that African officials are concerned that “the Security Council has shown disrespect for the African Union by failing to respond either positively or negatively to its

deferral request” and that “[r]esolution of this issue is the only way to facilitate cooperation between the African Union and the ICC.”¹⁷³

Table 11: Main Categories of Voice

Category	Number of References	Percentage of All Voice (626)
Prosecutor	21	3.35
Immunity	22	3.51
Internal Procedures	27	4.31
Cooperation with AU	28	4.47
Aggression	29	4.63
Darfur	31	4.95
UNSC deferrals	43	6.87
Africa focus	44	7.03
Finances	47	7.51
Politicization	67	10.7
Lack of State cooperation	79	12.62
UNSC conduct	106	16.93
TOTAL	544	86.9

The third and fourth most frequently mentioned references refer to politicization and finances. Importantly, 17 references of 106 UNSC references (16%) are linked to politicization and non-member states, such as Cuba and Sudan, especially emphasize these connections. States are concerned that the power of the UNSC to refer situations to the Court skews the situations that the Court is investigating. Over the years, many states for instance voice critique of the UNSC’s failure to refer the situation in Syria to the Court despite overwhelming support for the referral among most UN member states. Chile’s representative stated that “the linkage existing between the Security Council and the International Criminal Court, and specifically the powers of the Council to refer situations or suspend investigations in accordance with articles 13 and 16 of the Rome Statute, must be based on consistent criteria that demonstrate that the decisions are

¹⁷³ UN General Assembly, UN Doc A/65/PV.39: 15.

not arbitrary.”¹⁷⁴ Similarly, Ecuador voiced concerns that it is “indispensable that we ensure the independence and autonomy of the Court, gradually eliminating any political interference that may stem from any of the organs of the United Nations.”¹⁷⁵ The frustration over the use of the veto by the P5 in cases of mass atrocities led the Accountability, Coherence and Transparency Group (ACT), a “cross-regional group of 27 small and mid-sized countries”¹⁷⁶ focused on improving the UNSC’s working methods, to “[a]dvocate for the voluntary suspension of the use of the veto in cases of atrocity crimes (that is, when the Council’s actions aim at preventing or ending genocide, war crimes or crimes against humanity).”¹⁷⁷ Especially since 2012, the theme was reiterated by states at the UN with Peru stating in 2015 that it “supports the French initiative and the initiative of the Accountability, Coherence and Transparency group regarding a code of conduct on Security Council resolutions to prevent mass atrocities.”¹⁷⁸

An even greater share of UNSC references were also linked to finances so that states were complaining about the UNSC’s lack of funding for the situations that it refers to the Court. Since UNSC referrals to the Court are made in accordance with Articles 24 and 39 of the UN Charter on behalf of *all* UN member states, many countries called on the UNSC to heed this obligation. 28 references of the total 106 UNSC references were linked to finances, accounting for 26.4%. Hence, almost every fourth ‘complaint’ about the UNSC was critical of its lack of funding for the Court. South Africa stated in 2011 that these UNSC referrals place a “financial strain” on the Court and that is it “only fair that the financial burden of that task be borne by all

¹⁷⁴ UN General Assembly, UN Doc A/68/PV.42: 13.

¹⁷⁵ UN General Assembly, UN Doc A/66/PV.47: 7.

¹⁷⁶ Austria, Chile, Costa Rica, Denmark, Estonia, Finland, Gabon, Ghana, Hungary, Ireland, Jordan, Liechtenstein, Luxembourg, Maldives, New Zealand, Norway, Papua New Guinea, Peru, Portugal, Rwanda, Saint Vincent and the Grenadines, Saudi Arabia, Slovenia, Sweden, Switzerland, Tanzania and Uruguay.

¹⁷⁷ Center for UN Reform 2015.

¹⁷⁸ UN General Assembly, UN Doc A/70/PV.48: 23.

Members of the United Nations, not only States parties to the Statute.”¹⁷⁹ Likewise Jordan complained in 2012 that the UNSC has referred situations to the ICC “without putting the financial burden on the United Nations membership, as it rightfully should have, both in accordance with the Rome Statute and the Relationship Agreement between the Court and the United Nations,” and that ICC states parties “should not have to continue bearing the costs of the decisions arising from Security Council decisions.”¹⁸⁰ Similarly, Slovenia reiterated in 2013 that the “financing of the costs arising from the Court’s activities triggered by Security Council referrals continues to be a matter of concern for us.”¹⁸¹

A third point of voice is the UNSC’s lack of follow up on states’ non-compliance in UNSC-referred cases. This is a critical issue for ICC investigations because it was the lack of UNSC support for the Sudan cases and the associated lack of compliance with ICC arrest warrants that Bensouda cited as justification for ‘hibernating’ the Sudan cases to shift resources elsewhere in late 2014. Argentina remarked that “the Council cannot merely take note of the reports of the Prosecutor or the Court without following up on compliance with the obligation to cooperate with the Court or on situations on the ground” and that the country “is convinced that establishing some kind of follow-up mechanism for situations referred to the Court would substantially contribute to the Council’s responsible collaboration with it.”¹⁸² Mexico cited cases in which the ICC informed the Council of lacking state cooperation and found “an urgent need for the Security Council to immediately follow up on situations referred to the Court so as to promote cooperation between States and the Court.”¹⁸³

¹⁷⁹ UN General Assembly, UN Doc A/66/PV.44: 24.

¹⁸⁰ UN General Assembly, UN Doc A/67/PV.31: 14.

¹⁸¹ UN General Assembly, UN Doc A/67/PV.95: 4.

¹⁸² UN General Assembly, UN Doc A/67/PV.31: 20.

¹⁸³ UN General Assembly, UN Doc A/68/PV.42: 6.

In addition to critiques related to the UNSC, 79 references were made criticizing other states for failing to cooperate with the Court, i.e. not executing ICC arrest warrants. Rather than shaming peers by calling them out in public, states often used their statements to highlight the consequences of non-cooperation. While this node may seem like the flip-side to the loyalty category of *encouraging state cooperation*, it represents a different kind of reference. References were coded as loyalty when the reference expressed overall support for the Rome Statute or the Court and derived a necessity to cooperate from that legal obligation and commitment. In contrast, expressions of voice against other states' lack of cooperation were references that also referred to the negative consequences of cooperation failure or unwillingness. As such, given that both types of statement were not coded simultaneously is testament to the overwhelming concern states have with state cooperation. For instance, Peru's representative stated in 2006 that the country "regrets" that "none of the members of the Lord's Resistance Army — who are accused of crimes against humanity or war crimes — has yet been arrested or surrendered to the Court."¹⁸⁴ In 2007, Mexico warned that "the absence of cooperation in this respect may affect the preventive role of the Court."¹⁸⁵ An EU representative remarked in 2012 that the outstanding arrest warrants "stifle[s] the ICC's capacity to deliver justice."¹⁸⁶

Figure 9 displays the twelve most frequently mentioned Voice subcategories across regions. The graph illustrates the weight the different regions pay to certain critiques and it displays stark differences. It becomes evident that Latin American countries emphasized especially the role of the UNSC (53 references) and the negative effects of state non-cooperation (36 references), followed by the lack of finances (28 references) and lack of UNSC willingness to defer some cases. This confirms that Latin American states are among the biggest supporters

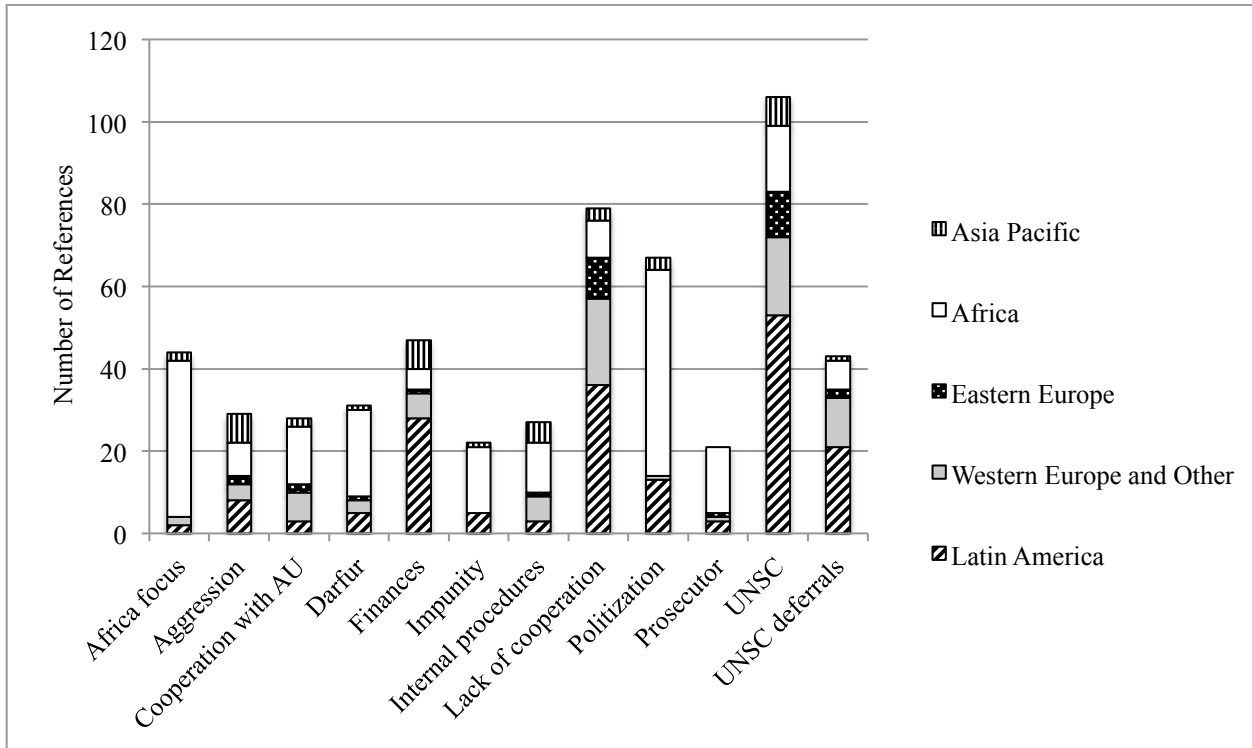
¹⁸⁴ UN General Assembly, UN Doc A/61/PV.27: 16.

¹⁸⁵ UN General Assembly, UN Doc A/62/PV.43: 17.

¹⁸⁶ UN General Assembly, UN Doc A/67/PV.31: 10.

of the Court given that their main points of voice refer to actors other than the ICC: other states and the role of the UNSC.

Figure 9: Most Frequently Coded Voice Categories per Region

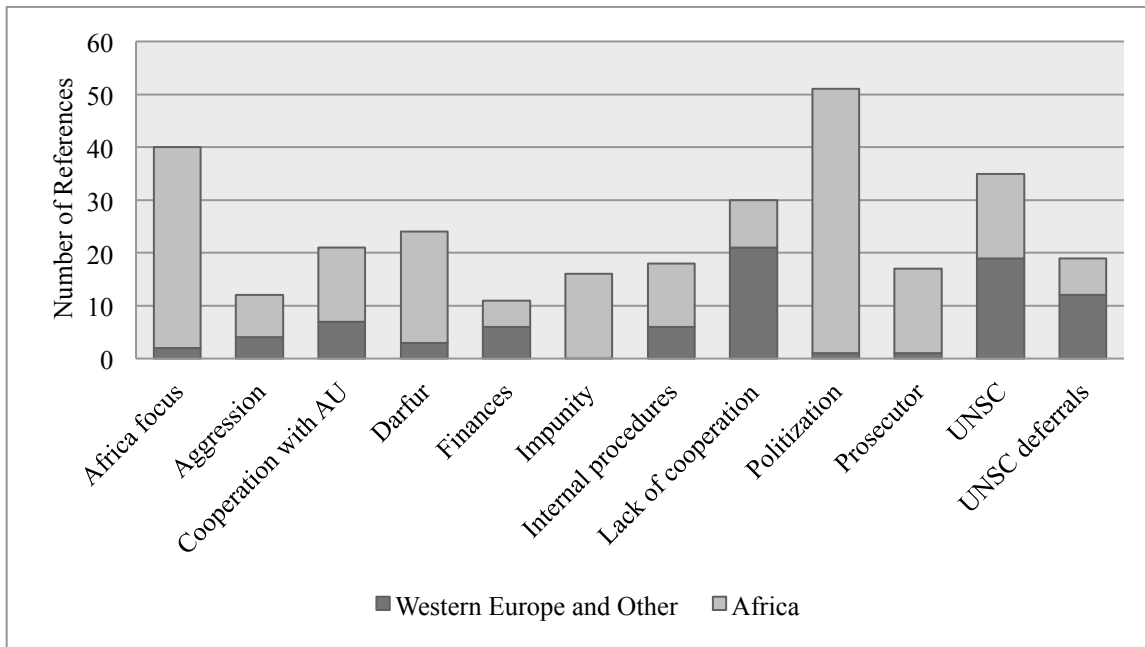


The proportion of statements by Eastern European states roughly corresponded with those of Western states considering their overall lower number of statements. They similarly criticized primarily the UNSC (11 references) and the lack of state cooperation (10 references) with other points of critique far behind with only 1 or 2 references. Asia Pacific states criticized the lack of the crime of aggression as part of the ICC’s jurisdiction (7 references), finances (7 references), and the UNSC (7 references).

Comparing Voice across African and Western States

With 212 references total within these twelve subcategories African countries made the most critical references (38.9%), followed by Latin American states with 180 references (33%). Figure 10 visualizes the references across the African and Western regions. This comparison is instructive considering that Africa constitutes the most critical region and the only one, which has publicly discussed the possibility of exit. Several African states continue to criticize the role that Western states play at the Court, arguing that states that fund the Court have an unfair impact on its conduct. Important differences exist with regard to critiques of the Prosecutor, the Court’s Africa focus, and politicization.

Figure 10: Percentages of Voice Categories in Africa and Western States

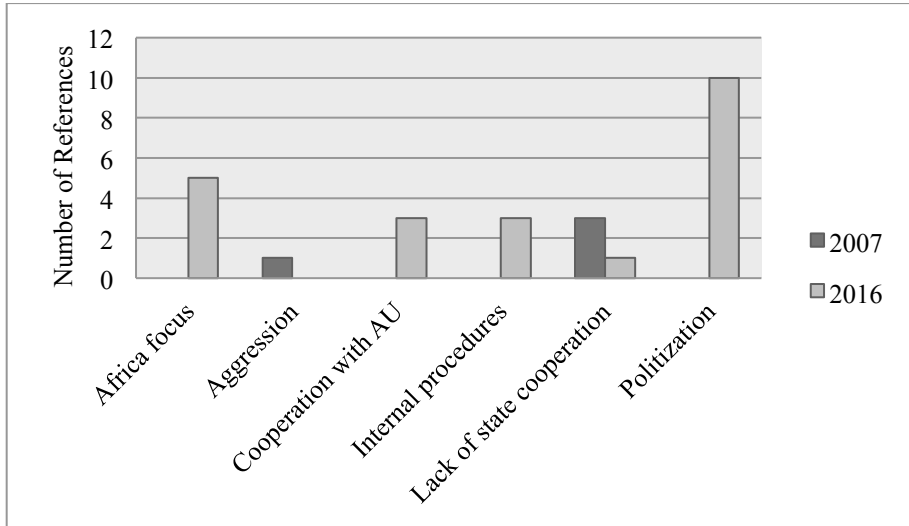


With 21 references to lack of state cooperation and 19 references to the UNSC, the states of Western Europe and other are much less critical than the other regions. Together, their 82

references to the twelve subcategories account for only 15% of the total 544 voice references. The region only remarked critically on the prosecutor and politicization once and the Court's Africa focus twice. This contrasts starkly with the views of the African region. The African region especially focused its critique on the Court's focus on Africa (38 references) and politicization (50 references). This is much more Court-centered than the critiques of the other regions, which often focused on the UNSC's role. In contrast to Latin American and Western states, African states criticized the lack of state cooperation less frequently (9 references). This is not surprising given that critiques for absent state cooperation were indirectly directed at African states that failed to arrest ICC suspects when they visited their respective countries. The African region thus stands out for its overall more critical attitude in issuing more critical statements than other regions but also in that what they criticize relates to the ICC proper rather than other actors.

Figure 11 displays the changes in this voice rhetoric between 2007 and 2016. References critical of politicization increased from 0 to 10 as did mentions critical of the Court's Africa focus from 0 to 5. References critical of states' lack of cooperation with the Court decreased from 3 to 1. Other new concerns in 2016 related to the Court's internal procedures and its lack of engagement with the AU. While these absolute numbers are not very impressive, they indicate a shift in focus and attention between 2007 and 2016. African countries have become more critical of the Court and point out especially politicization and the Court's African focus.

Figure 11: Change in Voice Categories in Africa 2007-2016



Voice: Critiques of the Court

In addition to gender and regional balance among ICC staff, the Court’s budget management came under critique by states, albeit less so than the UN’s unwillingness to contribute its fair share to the budget. For instance, Canada’s representative stressed the “need for fiscal discipline” in 2013,¹⁸⁷ and Nigeria suggested in 2005 that the Court “adopt a strategy that is based on resources rather than on demand.”¹⁸⁸ Mexico was especially focused on sound financial management. In 2007, the country noted that “the Court has an enormous responsibility towards States parties to the Statute for the good management of its financial resources under the principle of ‘one Court.’”¹⁸⁹

Other important categories that deserve attention due to the most pressing concerns about the Court’s ongoing cases are politicization and Africa focus. While politicization was

¹⁸⁷ UN General Assembly, UN Doc A/68/PV.42: 26-27.

¹⁸⁸ UN General Assembly, UN Doc A/60/PV.46: 6.

¹⁸⁹ UN General Assembly, UN Doc A/62/PV.43: 17.

mentioned 67 times, 35 times were by vocal non-member states (Cuba, Sudan, Egypt, Eritrea, Ethiopia, Rwanda) and Kenya. Table 12 contrasts these various voice subcategories.

Table 12: Main Voice Categories

	All references	By vocal non-member states
Politicization	67	35
Africa focus	44	21
Prosecutor, internal procedures, long trials	56	23

For instance, Eritrea exclaimed: “The unacceptable treatment of African States and their leaders by the ICC is aggravating the current situation rather than addressing the root cause of the problem”¹⁹⁰ and likewise Rwanda said that the ICC

has been selective in its methods of investigating and prosecuting perpetrators of serious international crimes in that it has so far failed to accept the glaring truth that similar crimes have been committed with impunity in different parts of the world. It is evident that political bias and control and a flawed methodology are being deployed in the name of international justice.¹⁹¹

In 2009, Sudan heavily criticized Chief Prosecutor Luis Moreno-Ocampo “who has always lacked professionalism and has been characterized by an eager pursuit of publicity, fame and the limelight. Indeed, the Prosecutor has abandoned his status as a jurist and turned into a political activist who visits capitals and advocates against Governments, undeterred by conscience or sense of professionalism.”¹⁹² Likewise, Kenya chastised the Court for being driven by the interests of its funders, i.e. a “proprietorship that [...] is driven by those who think that because they fund a disproportionately larger amount of the budget for the operations and, I might add, digressions of the ICC, that therefore they have an inherent right to lay claim to a

¹⁹⁰ UN General Assembly, UN Doc A/68/PV.42: 4.

¹⁹¹ Ibid., 17.

¹⁹² UN General Assembly, UN Doc A/64/PV.29: 15.

special relationship with the ICC, including its staff, prosecutor and judges. But what we say is that money, like might, does not necessarily make right.”¹⁹³

Apart from Kenya, Sudan, and non-member states, most statements related to politicization were references of ideal situations rather than pointing out existing politicization. For instance, the Netherlands’ representative stressed “the importance of its independent judicial role” and the need to “keep it free from political considerations.”¹⁹⁴

With regard to the Court’s focus on Africa, 21 of 44 references were made by these vocal non-member states with Sudan stating in 2009: “We will say it out loud: stop politicizing justice. We say no to selectivity and double standards. We say no to breaches of and encroachments on the sovereignty of States and their sovereign choices and to targeting their leaders. We say no. Africa said that.”¹⁹⁵ In fact, no common statement by African member states contained language that criticized the Court for its focus on Africa.¹⁹⁶ Instead, these common AU statements emphasized the close relationship between the ICC and the region, stressing the continent’s contribution to creating the Court and constituting its largest regional block:

All of this illustrates the high regard that the region has for the protection and promotion of the rule of law. African States avail themselves of the judicial assistance provided by the Court in cases that, due to their complexity and/or political sensitivity, lend themselves to be better dealt with by the Court. It is not true that Africa is against the Court and its rationale. It is true, nevertheless, that there is a lingering perception that relations between the ICC and African countries could be better.¹⁹⁷

¹⁹³ UN General Assembly, UN Doc A/69/PV.34: 27.

¹⁹⁴ UN General Assembly, UN Doc A/68/PV.42: 3.

¹⁹⁵ UN General Assembly, UN Doc A/64/PV.29: 16.

¹⁹⁶ It is noteworthy that after 2014 no more common AU statements were made at the UN but individual statements by African countries whereas other regions continue with collective and additional individual statements.

¹⁹⁷ UN General Assembly, UN Doc A/66/PV.44: 5.

However, recognizing the strain that the continuous disagreements between the ICC, the UNSC, and several vocal African countries has had on the Court's perception and work, many countries used their UN speeches to urge more cooperation. Tanzania remarked in a common African statement in 2011, that the next ICC prosecutor should "prioritize the improvement of relations between the Court and the African Union" and that the "future success of the Court will depend on improved relations with its supporters across Africa."¹⁹⁸ Nigeria reiterated that call in 2014, calling on the Court to "show more respect to African leaders and to engage with the African Union and African States on a mutual and respectful basis, as we all share the same values of promoting the rule of law and fighting impunity for the most serious crimes."¹⁹⁹ But also non-African states expressed the need for more engagement, such as Argentina: "The issues raised by the African Union are central to the current debate concerning the International Criminal Court. Argentina believes that we must continue a frank dialogue among all actors regarding such issues and concerns, with care not to impinge on the judicial independence of the Court."²⁰⁰

Three of the more Court-centered voice subcategories are related to critiques of the prosecutor, internal procedures, and long trials. Of the 56 references to these three categories, 23 of them were made by the vocal non-member states and Kenya. For instance, Kenya stated that when the Court was created, member states were "convinced that we were setting up a court with higher standards of practices and procedures than those found in our national jurisdictions. However, today we find ourselves saddled with a Court that has lower thresholds and standards than those found in our national courts."²⁰¹ But other member states also criticized the Court

¹⁹⁸ Ibid.

¹⁹⁹ UN General Assembly, UN Doc A/69/PV.34: 25.

²⁰⁰ UN General Assembly, UN Doc A/68/PV.42: 2.

²⁰¹ UN General Assembly, UN Doc A/71/PV.38: 16.

specifically, reminding it of its need to be seen as independent and legitimate. Venezuela stressed the need for the Court to “act scrupulously and with great caution in order to safeguard the reputation of the International Criminal Court”²⁰² and Mexico called “on the Court’s bodies and officials to think about its real needs and to propose their own measures of internal austerity, with consequent savings. That would encourage States parties to respond to requests on budgetary matters.”²⁰³ The Court’s efficiency was also important for Japan: “The fact that its judicial independence is sacrosanct does not render the Court immune to investigation of its management. We must address this issue with a view to striking a good balance between the need for strict financial discipline and the provision for procedural legitimacy that a criminal institution requires.”²⁰⁴

This section on voice has revealed several aspects of how states see the Court. Most importantly, several subcategories were not critiques of the Court proper but rather a frustration over the UNSC, that body’s political nature, and its relationship to the Court. States criticized the UNSC for its lack of financial contribution, thus flouting its own obligations under the Rome Statute and the Relationship Agreement between the two institutions, as well as its lack of follow-up to instances of state non-cooperation with the Court. States also criticized other states for their lack of cooperation with the Court. In addition, roughly 50% of mentions with regard to politicization, the Court’s Africa focus, and Court-internal dynamics were made by several vocal non-member states Egypt, Sudan, Eritrea, Ethiopia, Cuba, Rwanda, and state party Kenya. The regional breakdown revealed that the African region centered its critique more on the ICC proper and that its frustrations increased over time.

²⁰² UN General Assembly, UN Doc A/60/PV.46: 27.

²⁰³ UN General Assembly, UN Doc A/64/PV.29: 24.

²⁰⁴ UN General Assembly, UN Doc A/67/PV.31: 21.

Exit: State Withdrawals

From 2002 until 2014, no references were coded as ‘exit.’ This is surprising considering that threats of exit have been made in the AU as the next section demonstrates. Started by Kenyan calls for withdrawal from the ICC, the AU tried but failed to pass a motion for a mass exit by African states in 2013. The most vocal proponents for exit have been countries in which the ICC had started investigations: Kenya, Sudan, and increasingly Uganda. In the early years of the Court, Uganda had been a staunch ICC supporter and referred its own country to the Court. However, President Yoweri Museveni has shifted toward more critical tones since then.

Exit rhetoric entered the UN in 2014 when Kenya stated that it would be “our historical duty to put the ICC to rest, thus save it from further self-inflicted misery and the international community tens of millions of dollars, while sparing the long-suffering victims the pangs of false hope and empty promises” but that the country was held back by “the noble objectives of international rule of law and the historical imperative of our time to fight impunity were such a pressing, urgent and necessary requirement for international peace and security.”²⁰⁵ So this statement by Kenya in 2014 was the first time in the surveyed period that a country considered exit in a speech at the UN. The issue came front and center in 2016 after South Africa, Burundi, and Gambia had announced their intent or decisions to withdraw from the Rome Statute. Burundi’s representative gave a speech to this effect, actively discouraging other nations from joining the Court. He justified the country’s sovereign decision to exit with a summary of many voice subcategories:

We believe that African countries should reconsider their accessions to the Rome Statute because the International Criminal Court has recently become a biased instrument at the service of a category of countries, a tool with which to exercise political pressure and, in some cases, to effect regime change in developing countries, in general, and African countries, in particular.

²⁰⁵ UN General Assembly, UN Doc A/69/PV.34: 25.

Furthermore, my delegation recalls that the selectivity, the lack of objectivity and the tendency towards politicization which the Court has shown in its targeting of only African States and Heads of State, led to the convening of an extraordinary session of the Assembly of the African Union on 12 October 2013. It is clear that the ICC is focusing all of its attention on Africa, while unacceptable situations in other parts of the world go unacknowledged. The substance of my comments, which are by no means exhaustive, has recently compelled Burundi to withdraw from the list of States parties to the Rome Statute of the International Criminal Court at the explicit request of the people of Burundi through a joint session of the two Houses of their Parliament. [...] Similarly, withdrawal from a treaty to which a State is party is a sovereign decision and should not elicit the amount of commentary from other Member States that it has.²⁰⁶

This section has shown that exit did not play a role at the UN until 2014. Rather, other states and even two African states used their statements at the UN to encourage the exiters to reconsider their decisions. The exiters, in response, stressed the sovereign nature of making withdrawal decisions and justified their decision with the Court's politicization and its case focus on Africa.

Talking about the ICC at the African Union

The second, more critical, venue where states express their views about the ICC is the AU. This section shows important differences with the UN. Since the AU comprises many of the most vocal critical ICC non-member states as well as critical ICC states parties Kenya and Uganda, the majority of statements constitute 'voice.' Some common voice themes emerge, particularly politicization, the Court's Africa focus, and critique of the Chief Prosecutor. Moreover, the AU repeatedly expressed its frustration with the UN system, especially the UNSC and its unwillingness to take up AU requests for deferrals. There are three main differences that stand out in contrast to the UN: immunity of heads of state ranks high among the concerns, in the

²⁰⁶ UN General Assembly, UN Doc A/71/PV.38: 19.

peace versus justice debate, AU decisions prioritize peace over justice, and exit finds its expression earlier in official documents. Over time and with increasing ICC focus on leading political officials, the decisions become more critical. Hence, the AU served as a primary forum in which African states expressed their frustrations with the Court and through which they seek to impact the Court via the UN. The next sections will present expressions of loyalty to the Court's underlying norms of accountability and complementarity and then shift toward critiques of the Court.

Expressions of Loyalty to Accountability Norm and Complementarity

Rather than express loyalty to the court, AU decisions express loyalty to the accountability norm undergirding the Court. Several AU decisions reaffirm the organization's "unflinching commitment to combating impunity."²⁰⁷ The AU publicly condemned violence and atrocities in the western Sudanese region of Darfur and demanded that perpetrators be brought to justice. The Assembly also supported the decision by the AU's Peace and Security Council to set up an expert panel to examine the situation. This commitment to the accountability norm in general and in concrete African conflicts remained a staple part of the Assembly decisions over time.²⁰⁸

While support for the accountability norm can be seen as support for the ICC, there are other avenues to justice and these find more support by the AU. The second most frequently mentioned ICC norm is complementarity. As a key principle of the court, complementarity means that the ICC only becomes involved in situations where countries have been found to be

²⁰⁷ Assembly of the African Union, Assembly/AU/Dec.221(XII): para. 6.

²⁰⁸ For instance: Assembly of the African Union, Assembly/AU/Dec.296(XV): para. 2; Assembly of the African Union, Assembly/AU/Dec.482(XXI): para. 2; Assembly of the African Union, Assembly/AU/Dec.547(XXIV): para. 2.

unwilling or unable to pursue justice themselves. Hence, while the norm is an integral part of the Rome Statute, it gives national courts the primary right to try international crimes. In July 2009, the AU Assembly encouraged its member states to start domestic cooperation and capacity building programs to get model legislation passed and initiate police and judiciary reforms to strengthen their capabilities to complete trials themselves, hence bypassing potential future ICC action.²⁰⁹ This means that the AU does not express direct loyalty to the Court in its decisions but rather to the broader accountability norm and the complementarity principle, which allows national jurisdictions to address crimes first.

Voice: ICC Critiques and UN Conduct

The AU's concern over the conduct of the Court was expressed for the first time in 2009 after al-Bashir had been charged for war crimes and crimes against humanity in Darfur.²¹⁰ The most momentous AU decision was the 'non-cooperation decision' in July 2009 when the AU called on its member states to not cooperate in the arrest and surrender of al-Bashir due to the UNSC's refusal to defer the Bashir case for one year.²¹¹ This directly counteracts some African states' other obligations under the Rome Statute. This AU decision has formed the cornerstone and legal justification on which states relied that subsequently refused to arrest al-Bashir during visits to their countries. As legal questions arise to what extent AU member states are legally bound by the AU decision and how that obligation relates to their obligation when the state is also an ICC state party, the AU passed a decision in 2010, requesting "[m]ember [s]tates to balance, where applicable, their obligations to the AU with their obligations to the ICC."²¹²

²⁰⁹ Assembly of the African Union, Assembly/AU/Dec.245(XIII)Rev.1: para. 6.

²¹⁰ A second arrest warrant for him was issued in 2010 for genocide against the Fur, Masalit, and Zaghawa groups.

²¹¹ Assembly of the African Union, Assembly/AU/Dec.245(XIII)Rev.1: para 10.

²¹² Assembly of the African Union, Assembly/AU/Dec.296(XV): para. 6.

Voice: ICC Decisions, Conduct, and Personnel

A main criticism related to the conduct of the ICC, especially the Office of the Prosecutor (OTP), for its decisions to start proceedings against sitting heads of state. The first critical statement occurred in February 2009 when the AU “*expresse[d] its deep concern*” over the Bashir charges and their impact on peace processes in Darfur, and called for a meeting of African ICC member states so they can “*exchange views on the work of the ICC in relation to Africa, in particular in the light of the processes initiated against African personalities.*”²¹³ “*Concern*” for the conduct of the ICC Prosecutor became a recurring theme, especially toward Moreno-Ocampo. In July 2010, the AU decision stated that he had been “*making egregiously unacceptable, rude and condescending statements on the case of President Omar Hassan El-Bashir of The Sudan and other situations in Africa.*”²¹⁴ In 2011, the concern related to Libya and how the Prosecutor was handling the situation there.²¹⁵ In other instances, statements expressed regret over ICC judges’ decisions in particular court cases, such as the one rejecting Kenya’s admissibility challenge.²¹⁶

A very common theme was critiques of ICC judges’ proceedings and findings of non-compliance against African states that failed to arrest al-Bashir. In turn, this occurred alongside support for the African countries that hosted him and praising them for implementing the AU non-cooperation policy of 2009. The first mention of this is in January 2011, when the AU expressed its regret over the ICC decision on al-Bashir visiting Chad. The AU decided that “*by receiving President Bashir, the Republic of Chad and the Republic of Kenya were implementing various AU Assembly Decisions on the warrant of arrest issued by ICC against President Bashir*

²¹³ Assembly of the African Union, Assembly/AU/Dec.221(XII): para. 5.

²¹⁴ Assembly of the African Union, Assembly/AU/Dec.296(XV): para. 9.

²¹⁵ Assembly of the African Union, Assembly/AU/Dec.366(XVII): para. 6.

²¹⁶ Assembly of the African Union, Assembly/AU/Dec.482(XXI): para. 6.

as well as acting in pursuit of peace and stability in their respective regions.”²¹⁷ A similar decision is issued in July 2011 reaffirming support for Kenya and Djibouti hosting al-Bashir as acting according to “their obligations under Article 23 of the Constitutive Act of the African Union and Article 98 of the Rome Statute.”²¹⁸ In 2012, the same support was given to Malawi²¹⁹ and to South Africa. In January 2016, several months after South Africa hosted al-Bashir and experienced domestic judicial challenges against its non-arrest, the AU “commend[ed]” the country for complying with the AU non-cooperation decision and decided that “by receiving President Bashir, the Republic of South Africa was implementing various AU Assembly Decisions on the warrants of arrest issued by the ICC against President Bashir and that South Africa was consistent with its obligations under international law.”²²⁰

This support for non-arrests contrasted sharply with the UN where states expressed only critique of non-cooperation in arrests and surrender. At the AU, voice is directed at the Court while states are applauded for their non-cooperation because they acted in loyalty to the AU rather than the ICC. When African states faced loyalty conflicts between the ICC and AU, their prioritization of the regional commitment resulted in praise from the AU and critique from states at the UN.

The AU Assembly was also critical of the ICC’s trial conduct, especially the poor state of evidence, long trials, and the judges’ disregard to decisions by the Assembly of States Parties (ASP). In January 2015, the AU welcomed the withdrawal of charges against Kenyan president Kenyatta despite “regretting the period it took the OTP to arrive at the decision and the continued

²¹⁷ Assembly of the African Union, Assembly/AU/Dec.334(XVI): para. 5.

²¹⁸ Assembly of the African Union, Assembly/AU/Dec.366(XVII): para. 5.

²¹⁹ Assembly of the African Union, Assembly/AU/Dec.397(XVIII): para. 7.

²²⁰ Assembly of the African Union, Assembly/AU/Dec.590(XXVI): para. 3.

prosecution through disclosure of alleged evidence available to the ICC against him.”²²¹ Similar concerns were raised with regard to Kenyan Deputy President Ruto in 2016: The AU reiterated its call for the OTP to drop the case against him since “any continued prosecution is without foundation given the unambiguous absence of any incriminatory evidence capable of belief.”²²²

Several AU countries tried to address the features of the Court they deemed negative through the ASP where states can make amendments to the Rome Statute and the rules of the Court. At the 12th session of the ASP in 2013, the body decided to amend the Rules of Procedure and Evidence to include new subparagraphs to rule 134, which would allow accused persons on a ‘case-by-case’ basis to be present at trial from a remote location through the use of video technology.²²³ Moreover, the ASP also amended Rule 68 at the request of Kenya, “to allow for the admission of ‘prior recorded witness testimony’ in the Court’s proceedings” which was subsequently used in 2015 by the OTP to introduce the pre-recorded witness testimony in the trial against Ruto and Sang.²²⁴ In response to these decisions, the AU expressed concern over the ICC Trial Chamber V(b)’s decision to summon Kenyatta “which did not take cognizance whatsoever of the amendments of the Rules of Procedure and Evidence of the ICC adopted by the 12th Ordinary Session of the Assembly of States Parties to the Rome Statute held in the Hague, the Netherlands in November 2013.”²²⁵ The AU also commended Kenyatta for his leadership in making Ruto Acting President while he complied with the ICC’s summons to go to The Hague.²²⁶

²²¹ Assembly of the African Union, Assembly/AU/Dec.547(XXIV): para. 8.

²²² Assembly of the African Union, Assembly/AU/Dec.590(XXVI): para. 9.

²²³ At the ASP, Botswana, Kenya, Nigeria, Namibia, Uganda, South Africa, Zambia, Tanzania, Senegal, Tunisia and Sierra Leone delivered statements supporting the amendments: Coalition for the International Criminal Court 2013: 21.

²²⁴ Coalition for the International Criminal Court 2015a.

²²⁵ Assembly of the African Union, Assembly/AU/Dec.547(XXIV): para. 4.

²²⁶ Ibid.

Another disregard to ASP decisions caused critique from the AU Assembly in early 2016, when the body criticized the “obstinacy” of the ICC Prosecutor, Registrar and President of the ICC for continuing to “privilege the views of civil society over clearly held positions of African Member States parties to the Rome Statute” and the Prosecutor for her “disturbing public dismissive disregard of the decisions of the 14th ASP [...] in relation to the pending Rule 68 Appeal against Kenya’s Deputy President.”²²⁷ Rule 68 allows for the use of prior-recorded testimony as evidence and came front and center in the ICC case against Ruto and Sang as 16 Prosecution witnesses later changed their statements or refused to cooperate. The OTP has argued that witnesses were subjected to a climate of fear and intimidation in Kenya. At the 14th ASP, the body inserted “Kenya’s requested language on the non-retroactive use of amended Rule 68 on using pre-recorded witnesses testimony” but the language’s inclusion in the ASP’s final report “holds no obligations for states or the ICC.” At the time of the ASP in 2015, the “retroactive use of rule 68 [was] before the ICC Appeals Chamber after the prosecutor used this new rule to introduce pre-recorded witness testimony in the ongoing trial of Kenyan Deputy President William Ruto and broadcaster Joshua Sang.”²²⁸

The section revealed the attention paid by the AU Assembly to matters at the ASP and using that venue to seek changes to the Court’s rules and procedures. But the AU then expressed frustrations when the Court and its judges disregarded ASP decisions and amendments. This reveals the preferences of the various actors, with African leaders and their delegations being able to influence the outcomes of the ASP but being unable to influence the legal reasoning and decisions of the ICC judges.

²²⁷ Assembly of the African Union, Assembly/AU/Dec.590(XXVI): para. 9.

²²⁸ Coalition for the International Criminal Court, 2015b.

While the AU started criticizing the ICC for its focus on Africa in 2013, these critiques had already emerged indirectly in earlier AU decisions on universal jurisdiction. For instance, in July 2009, the AU expressed frustration over the abuse of universal jurisdiction by some European countries against African persons and called for the “immediate termination of all pending indictments”²²⁹ given that the immunity of state officials needs to be respected. This critique of universal jurisdiction was reiterated in February 2010²³⁰ and 2011²³¹ when the Assembly restated that European states have to respect IL and head of state immunity. This critique became more centered on the ICC in later years. For instance, in May 2013, the AU reaffirmed its concerns about the “misuse of indictments against African leaders”²³² and in 2015 questioned the “wisdom of the continued prosecution against African Leaders.”²³³

Other internal critiques related to peace over justice and personnel decisions. One common argument made at the AU is that peace should be pursued first or ranks higher than accountability and justice. This contrasts with the UN loyalty subcategory above where member states repeatedly stressed the mutually reinforcing relationship between justice and peace. In July 2009, the AU stated that the decision to charge Bashir has “unfortunate consequences” on the Sudanese peace process.²³⁴ The same argument was advanced with regard to Libya in July 2011 when the AU called on its member states not to cooperate in the arrest and surrender of Gaddafi because it complicates peace negotiations on the ground.²³⁵ In May 2013, the AU reaffirmed these earlier decisions.²³⁶

²²⁹ Assembly of the African Union, Assembly/AU/Dec.243(XIII): para. 4.

²³⁰ Assembly of the African Union, Assembly/AU/Dec.271(XIV): para. 3.

²³¹ Assembly of the African Union, Assembly/AU/Dec.335(XVI): para. 4-8.

²³² Assembly of the African Union, Assembly/AU/Dec.482(XXI): para. 4.

²³³ Assembly of the African Union, Assembly/AU/Dec.547(XXIV): para. 4.

²³⁴ Assembly of the African Union, Assembly/AU/Dec.245(XIII)Rev.1: para. 3.

²³⁵ Assembly of the African Union, Assembly/AU/Dec.366(XVII): para. 6.

²³⁶ Assembly of the African Union, Assembly/AU/Dec.482(XXI): para. 4.

Regional balance in personnel decisions also found their way into AU decisions. Fuelled by frustration over Moreno-Ocampo and the lower share of Africans holding positions at the Court, the AU Assembly stated in January 2011 that African member states “should ensure that the position of the ICC Prosecutor goes to an African.”²³⁷ In 2012, the AU further expressed regret over the unsuccessful African proposals for judgeships²³⁸ and urged its member states to push for more African representation on the bench.²³⁹

ICC Voice: Rome Statute and Immunity of Heads of State

The main critique of the Court originated with the provisions in the Rome Statute about head of state immunity. While states signed the Rome Statute knowing that official capacity does not excuse a person from being investigated by the Court, the debate emerged in 2010 around the immunity of state officials who are third parties, i.e. Sudan and the al-Bashir arrest warrant.²⁴⁰ In the following years, the AU took several steps to express concerns about the removal of immunity for al-Bashir, which the organization regards as a violation of customary IL. In January 2012, the AU Assembly reaffirmed its understanding that “Article 98(1) was included in the Rome Statute [...] out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and by referring the situation in Darfur to the ICC, the UN Security Council intended that the Rome Statute would be applicable, including Article 98.”²⁴¹ The Assembly also supported a decision by African Justice Ministers and Attorneys General to approach the International Court of Justice (ICJ) through the UNGA, “for seeking an advisory opinion on the question of

²³⁷ Assembly of the African Union, Assembly/AU/Dec.334(XVI): para. 9.

²³⁸ Assembly of the African Union, Assembly/AU/Dec.397(XVIII): para. 9.

²³⁹ Assembly of the African Union, Assembly/AU/Dec.419(XIX): para. 8.

²⁴⁰ Assembly of the African Union, Assembly/AU/Dec.270(XIV): para. 9.

²⁴¹ Assembly of the African Union, Assembly/AU/Dec.397(XVIII): para. 6.

immunities, under international law, of Heads of State and senior state officials from States that are not Parties to the Rome Statute of ICC.”²⁴² Moreover, the Assembly encouraged individual states to conclude bilateral agreements on the immunities of their senior state officials. This of course is a similar suggestion to the BIAs concluded by the USA in the early 2000s, which was then seen very critically by African states even though many concluded the BIAs for fear of losing essential US financial support.

At the extraordinary AU summit on the ICC in October 2013, the Assembly went further in its statements and decided that “no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.”²⁴³ With regard to the ongoing trials against Kenyan officials, the Assembly stated that the trials against Kenyatta and Ruto “should be suspended until they complete their terms of office,” and in a confrontational approach that for the first time made Kenya’s compliance conditional on the ICC honoring the AU’s demands, the decision stressed that Kenyatta would not appear before the Court until AU concerns were addressed.²⁴⁴ This conditional approach was reiterated in 2015 when the AU Assembly requested the ICC to terminate or suspend the proceedings against Ruto “until the African concerns and proposals for amendments of the Rome Statute of the ICC are considered.”²⁴⁵

²⁴² Assembly of the African Union, Assembly/AU/Dec.419(XIX): para. 3.

²⁴³ Extraordinary Session of the Assembly of the African Union, Ext/Assembly/AU/Dec.1(Oct.2013): para. 10.

²⁴⁴ Ibid.

²⁴⁵ Assembly of the African Union, Assembly/AU/Dec.547(XXIV): para. 17.

Non-ICC Voice: Inaction and Lack of Respect by the United Nations

Apart from critiques about the Court and its immediate decisions and conduct, the AU also expressed frustration with the UN and its repeated failure to act according to the AU's desires. Several decisions urged the UNSC to defer various cases for a year, given their adverse effects on the ground, leading the AU to send high-level delegations to the UNSC.²⁴⁶ These statements usually went hand in hand with calls for unity among AU member states: the Assembly "underscores the need for African States Parties to speak with one voice to ensure that the interests of Africa are safeguarded."²⁴⁷ The early frustration with UN inaction is used as justification for the 2009 non-cooperation decision for al-Bashir's arrest.²⁴⁸ The UNSC's inaction upset the AU so much that South Africa proposed an amendment to Art. 16 at the ASP, which the AU supported.²⁴⁹ This amendment would allow the UN General Assembly to defer ICC cases for a year if the UNSC fails to make a decision on the matter for six months. However, the ASP failed to adopt an amendment to that effect.²⁵⁰

In 2014, the AU urged the UNSC again to respond to AU statements and wishes "so as to avoid the sense of lack of consideration of a whole continent."²⁵¹ The frustration culminated in early 2016 when the AU Assembly, after years of including identical language regretting the UN's inaction, expressed "its deep grievance at the failure of the UNSC to respond to the requests of the AU for deferral of The Sudan and Kenyan cases for the past five (5) years."²⁵²

²⁴⁶ For instance: Assembly of the African Union, Assembly/AU/Dec.221(XII); Assembly of the African Union, Assembly/AU/Dec.296(XV); Assembly of the African Union, Assembly/AU/Dec.334(XVI); Assembly of the African Union, Assembly/AU/Dec.366(XVII); Assembly of the African Union, Assembly/AU/Dec.482(XXI).

²⁴⁷ For instance: Assembly of the African Union, Assembly/AU/Dec.270(XIV): para. 6.

²⁴⁸ Assembly of the African Union, Assembly/AU/Dec.245(XIII)Rev.1: para. 10.

²⁴⁹ Assembly of the African Union, Assembly/AU/Dec.270(XIV): para. 5.

²⁵⁰ For an extensive treatment of Article 16 and the AU's attempts to change it, see Akande, du Plessis and Jalloh 2010.

²⁵¹ Assembly of the African Union, Assembly/AU/Dec.493.(XXII): para. 8.

²⁵² Assembly of the African Union, Assembly/AU/Dec.590(XXVI): para. 8.

Exit: A Push for Withdrawal But Without Consensus

The AU has openly discussed the possibility of collective withdrawal since 2013. In May 2013, Kenyatta attended the AU summit for the first time as Kenyan President, bringing direct attention to the perceived contrast between popular sovereignty (as expressed by popular election of him as President) and the demands of international criminal justice (as expressed through his case at the ICC). In subsequent months, the AU sent letters to the ICC requesting the Court to allow the Kenyan officials to choose which sessions of their trials they want to attend given their constitutional duties in Kenya and that the ICC should refer the cases back to Kenya. The ICC judges' reaction that these requests cannot be accommodated prompted the AU to hold an unprecedented extraordinary summit on the ICC in 2013 at the request of Kenya and the East African group.

In her speech to the summit, AU Commission Chairperson Nkosazana Dlamini-Zuma emphasized the importance of African solutions to African problems, praised Kenyatta and Ruto for their cooperation with the Court despite having immunity under IL, and she called on member states to strengthen the proposed African Court of Justice and Human Rights so that the ICC became the court of last resort. However, despite previous concerns by commentators, a mass withdrawal of African states from the Court did not happen in 2013.²⁵³

Over the years, as the AU has consistently discussed and provided advice for countries on how to withdraw, whether individually or collectively, it has become clear that there is no consensus on the ICC in Africa. Some countries continue to support the Court and have prevented continent-wide exit strategies from being adopted. Generally, many countries in Western Africa continue to support the Court, most importantly Nigeria, Ghana, and Senegal. In contrast, several East African countries have led the 'anti-ICC' movement, especially countries

²⁵³ Dersso 2013a.

whose leaders have been subject to investigations such as Sudan and Kenya. This difference of opinion on the Court has prevented a consensus view in Africa and casts doubt on common media tropes and the AU's own depiction of representing the views of Africa on ICC matters.

In January 2014, several months after the extraordinary summit, the Assembly decided that the AU and its member states “reserve the right to take any further decisions or measures that may be necessary in order to preserve and safeguard peace, security and stability, as well as the dignity, sovereignty and integrity of the continent,”²⁵⁴ which can be read as a threat of exit as a potential necessary measure to safeguard the continent's dignity. The urgency for withdrawal increased over time as the AU recognized the need to design a comprehensive strategy given the legal and political hurdles and as a major former supporter of the Court, South Africa, joined the critical chorus of states after al-Bashir's visit and escape from the country in June 2015. In January 2016, the AU requested the creation of a Ministerial Committee charged with “the urgent development of a comprehensive strategy including collective withdrawal from the ICC to inform the next action of AU Member States that are also parties to the Rome Statute.”²⁵⁵

At the AU summit in January 2017, exit was on the agenda again but no continental consensus was achieved. The final AU decision welcomed the announced withdrawals by three African states, adopted a withdrawal strategy, and called on member states to consider implementing the strategy's recommendations.²⁵⁶ However, several countries entered formal reservations: Nigeria, Senegal, and Cape Verde entered reservations to the decision, Malawi, Tanzania, Tunisia, and Zambia requested more time to study the strategy, and Liberia entered a reservation to the paragraph that adopts the strategy.²⁵⁷ Compared with prior ICC-critical

²⁵⁴ Assembly of the African Union, Assembly/AU/Dec.493.(XXII): para. 9.

²⁵⁵ Assembly of the African Union, Assembly/AU/Dec.590(XXVI): para. 10iv.

²⁵⁶ Kepler 2017.

²⁵⁷ Assembly of the African Union, Assembly/AU/Draft/Dec.1(XXVIII)Rev.2.

decisions adopted by the AU Assembly, never had this many states entered formal reservations. Thus, the fact that this exit statement prompted an unprecedented number of reservations emphasizes the disunity among African states on the ICC. Ultimately, even the withdrawal strategy is “not all it is cracked up to be.”²⁵⁸ The strategy does not call for mass withdrawal but notes that “[f]urther research on the idea of collective withdrawal, a concept that has not yet been recognized by international law, is required.” Nigerian foreign minister Geoffrey Onyeama expressed his support for the Court, arguing that it had “an important role to play in holding leaders accountable,” and that several African countries are “agitating against” exit.²⁵⁹ Other countries that have expressed loyalty to the Court back home in their own capitals, New York, and The Hague, include Senegal, Burkina Faso, Côte d’Ivoire, Mali, Malawi, Zambia, Tanzania, Ghana, Democratic Republic of Congo, Lesotho, Sierra Leone, and Botswana.²⁶⁰

Solution: A Criminal Court for Africa

The decision to create a court that could handle cases of human rights violations was taken before the ICC controversy started. In July 2004, the AU Assembly decided to integrate the African Court on Human and People’s Rights with the Court of Justice of the African Union.²⁶¹ One year later, it decided that a draft legal instrument for the merged court should be completed for consideration and that “all necessary measures for the functioning of the Human Rights Court be taken.”²⁶² In January 2007, the AU expressed satisfaction with the progress on the courts’ merger and that the AU Commission should establish contact with the host state of

²⁵⁸ Kersten 2017.

²⁵⁹ Momoh 2017.

²⁶⁰ Keppler 2017.

²⁶¹ Assembly of the African Union, Assembly/AU/Dec.45(III): para. 4.

²⁶² Assembly of the African Union, Assembly/AU/Dec.83(V): para. 3.

Tanzania to secure the “swift installation” of the court in Arusha.²⁶³ The draft protocol of the Statute of the African Court of Justice and Human Rights was adopted in July 2008 with the AU calling on its member states to sign and ratify the statute “as expeditiously as possible” to enable its entry into force and “ensure speedy operationalization” of the court.²⁶⁴

But the push for the merged court with jurisdiction over international crimes intensified after 2010 and after the ICC’s charges against al-Bashir and Kenyatta: “More importantly, the events galvanised AU’s resolve to establish an African regional criminal court to basically serve as a substitute and operate parallel to the ICC.”²⁶⁵ In June 2014, the AU adopted the Malabo Protocol, which extends the jurisdiction of the proposed merged African Court of Justice and Human Rights to international crimes such as those covered by the Rome Statute.²⁶⁶ However, the Protocol’s Article 46*Abis* raised eyebrows as it grants immunity from prosecution to sitting heads of state and other senior officials. As of November 2016, only five African states (Benin, Congo Brazzaville, Guinea-Bissau, Kenya and Mauritania) had ratified the Malabo Protocol, leaving the African Court on Human and People’s Rights as the only functioning AU court.²⁶⁷ In January 2014, the AU urged that the process for the African Court to hear international crimes should be sped up and reiterated this call in 2015²⁶⁸ and 2016.²⁶⁹

²⁶³ Assembly of the African Union, Assembly/AU/Dec.144(VIII): para. 5.

²⁶⁴ Assembly of the African Union, Assembly/AU/Dec.196(XI): para. 3.

²⁶⁵ Amnesty International 2016: 9.

²⁶⁶ For more information on the emerging court, please see Murungu 2011; Africa Centre for Open Governance 2016.

²⁶⁷ Goitom 2016.

²⁶⁸ Assembly of the African Union, Assembly/AU/Dec.493.(XXII); Assembly of the African Union, Assembly/AU/Dec.547(XXIV).

²⁶⁹ Assembly of the African Union, Assembly/AU/Dec.616(XXVII): para. 2.

Conclusion

The findings from the content analysis show a varied picture of state rhetoric about the ICC. Three findings from the UN analysis deserve special attention because they relate to the object of voice. Most criticisms relating to finance, for instance, were not of the Court itself but rather of an outside organization, the UNSC. Given the UNSC's legal responsibility to share in the expenses of the ICC situations it refers, this criticism does not come as a surprise. In addition, the UNSC drew heavy critique for its lack of follow-up on state non-cooperation. A second surprising finding concerning the object of voice relates to states themselves. Rather than faulting the Court for lack of progress in cases, states constantly reminded each other and faulted other states for their lack of cooperation and failure to execute arrest warrants.

These findings underscore that the object of loyalty (i.e. the Court or the underlying norm of individual criminal accountability) may be different from the ones a state blames for a perceived decline in quality, here the UNSC and states themselves. Considering this peer-to-peer voice as shaming might be a worthy subject of further exploration. The fact that peer-to-peer critique accounted for a large share of voice highlights the extent to which states are not only aware of the crucial importance of state assistance to the Court but also how lack of cooperation might hinder the Court's work. This shaming of other state parties points to an important undertheorized aspect of ICC-state relations.²⁷⁰

The AU stands out as a more critical venue than the UN where loyalty rhetoric accounts for a majority of references. The AU rather expressed more loyalty to the accountability norm in general rather than the ICC proper. In contrast, AU criticisms are more Court-centered and expressed frustrations over judicial decisions and the Court's chief prosecutor. The contrast

²⁷⁰ For instance, Lebovic and Voeten (2006) and Terman and Voeten (2017) address state-to-state shaming in other international organizations.

showed that the AU is seen as the primary venue where grievances by African states were aired and concrete action was sought. At the UN, other African states expressed support for the ICC but their views found less expression in these AU decisions where states are more reluctant to enter reservations to decisions. At the AU, countries support non-cooperation and non-arrests while at the UN exits are regretted and non-cooperation criticized. Both the UN and AU analyses confirm that Africa is the Court's most critical region: it is the only region with a slight majority of voice references at the UN, and at the AU, the pursuit of peace is foregrounded rather than the mutual attainment of peace and justice as it is at the UN.

Two caveats are in order. The nature of the AU decisions differs from the UN speeches so it comes as no surprise that AU decisions do not express direct praise for the Court. These decisions are outcome documents so they can be seen as the smallest common denominator that negotiators were able to find consensus on. However, the fact that the only time several African countries entered reservations to an AU decision on the ICC was the 2017 decision to adopt a withdrawal strategy, highlights the lack of unity among African states on ICC exit. Second, as a UN body, the UNGA could be seen as an 'easy' case for ICC support. Hence, expressions of loyalty might be overrepresented in this chapter. UNSC criticism might also be overrepresented given that many UNGA members have been calling for reform of the UNSC given the power wielded by the P5. As such then, UNGA criticism of the UNSC may also be a result of inner-UN dynamics or relations between veto powers and less powerful states.

Chapter 4: South Africa and the Non-Arrest of Omar al-Bashir

This chapter analyzes the government of South Africa's (GSA)²⁷¹ non-arrest of Sudanese President Omar al-Bashir during his visit to the country in June 2015 to attend the African Union (AU) summit. From 7-15 June 2015, South Africa hosted the summit in the posh Johannesburg neighborhood of Sandton. This summit drew its significance from the fact that it was the closest a country and a state party of the International Criminal Court (ICC, or the Court) has come to arrest al-Bashir. The episode of his presence in Sandton, lasting less than 48 hours, featured all ingredients of a Hollywood thriller: a branded fugitive, contradictory reports about his whereabouts, a last-minute court hearing, and an alleged government conspiracy to let the fugitive escape. In the aftermath, some deemed al-Bashir's 'escape' to be the beginning of the end of South Africa's constitutional democracy, given that the executive ignored a domestic court order and its international obligation to arrest an ICC suspect.²⁷² From the perspective of the ICC, this episode was yet another example where a state party to the Court failed to execute the arrest warrant for al-Bashir.

The chapter has three objectives. First, this chapter traces chronologically the GSA's engagement with the Court over time. The analysis of various legal and non-legal means of engagement shows that South Africa was a strong early supporter of the Court but that its position shifted after 2009 as the GSA supported several ICC-critical decisions by the AU Assembly. When al-Bashir visited South Africa in 2015, the GSA was confronted with a

²⁷¹ While I refer her to the government of South Africa (GSA) as the main decision-making body, it does not suggest that all government branches agreed with this course of action. As the chapter shows, the judiciary agreed with the ICC that non-arrest constituted non-compliance with the arrest warrants for al-Bashir. However, for ease of reading, I refer to the GSA as the main government body deciding to not arrest al-Bashir.

²⁷² Tisdall 2015; Hoffman 2015; Greeff 2015.

significant test of its commitment to the Court: comply with the ICC's arrest warrant and arrest a fellow African leader or not arrest al-Bashir and justify the non-arrest with existing AU policy.

Second, I explain the shift in position and the non-arrest with the changing calculations by the GSA and their regional reputation concerns. Since 1994, South African foreign policy has oscillated between strengthening its global reputation as a human rights-promoting country and its regional reputation as a good African neighbor. These identities have sometimes conflicted because of normative attachments to human rights and accountability on the one hand and to regional solidarity and quiet diplomacy that refrains from open criticism of fellow African leaders on the other hand. When faced with the loyalty conflict between its ICC commitment and its AU commitment, the GSA ultimately failed to arrest al-Bashir to cement its regional reputation. I argue that this reputation includes both material and social dimensions. First, aligning its stance with the AU signaled the GSA's willingness to honor regional commitments, which can help with future support by fellow African countries for South African positions and initiatives. Second, complying with the AU non-cooperation policy helped the GSA to signal its prioritization of its African identity and associated norms, at a time when it was also facing criticism from the continent for its handling of xenophobic attacks in the country. Hence, there was a fundamental interest misalignment between the GSA and the ICC when al-Bashir visited South Africa in June 2015.

This argument about shifting foreign policy ideas and regional reputation challenges several common compliance theories. In contrast to recent literature convincingly highlighting the role of domestic compliance explanations, these domestic factors were all present in South Africa, including a strong pro-compliance judiciary that decided on litigation pushed by a domestic pro-compliance group. However, this was not enough to compel the GSA to arrest al-

Bashir. Based on the trajectory of South Africa's post-apartheid foreign policy and public officials' statements from June 2015, I argue that we have to consider South Africa's regional and international reputations to comprehend its actions. South Africa failed to arrest al-Bashir trying to cement its leading position in the AU—long critical of the ICC—and for this, was willing to flout its obligations to the ICC.

Third, investigating the GSA's non-arrest as well as the non-arrests of other African countries that have hosted al-Bashir since 2009 reveals the important role of the AU. By passing its non-cooperation policy in July 2009—calling on its member states to not cooperate with the ICC in the arrest of al-Bashir—the AU furnished African states with an alternative legal obligation to the ICC arrest warrants. Regardless of the IL status held by an AU Assembly decision, the non-cooperation policy has proved instrumental in hampering compliance with the arrest warrants. All African ICC states parties that failed to arrest al-Bashir have relied on the policy to explain their non-arrests. This suggests that the explanations I furnish here for the South African non-arrest have the power to travel to other African countries. The AU decision created a legal 'out' for the visited countries that chose regional loyalty over their international legal obligation to the ICC.

To further these arguments, the chapter consists of three main empirical sections. The next section traces the GSA's behavior toward the Court over time to identify mandatory and voluntary cooperation behavior. Afterwards, I explain the non-arrest by first illustrating the limited explanatory value of several common explanations to then focus on regional reputation concerns. I trace the GSA's foreign policy since 1994 to highlight shifting priorities. The goal of the section is to provide a background for the explanation that the GSA has invested increasing attention to solidifying its regional status as a good African citizen. Capitalizing on three

regional arguments drawn from the existing ICC-critical discourse placed South Africa more squarely within the African ‘consensus’ on the Court’s role in Africa. Third, to gain a broader understanding of the al-Bashir case and the non-cooperation it sparked, I analyze the justifications put forth by other African countries that failed to arrest him. The final section lays out what we can learn from the episode about compliance more generally and the non-arrest of al-Bashir in particular.

South Africa’s Engagement with the ICC

To investigate why South Africa failed to comply with the al-Bashir arrest warrant in 2015, the next sections will chronologically trace South Africa’s cooperation behavior toward the Court in years leading up to the non-arrest. Table 13 presents the various legal and non-legal means of engagement.

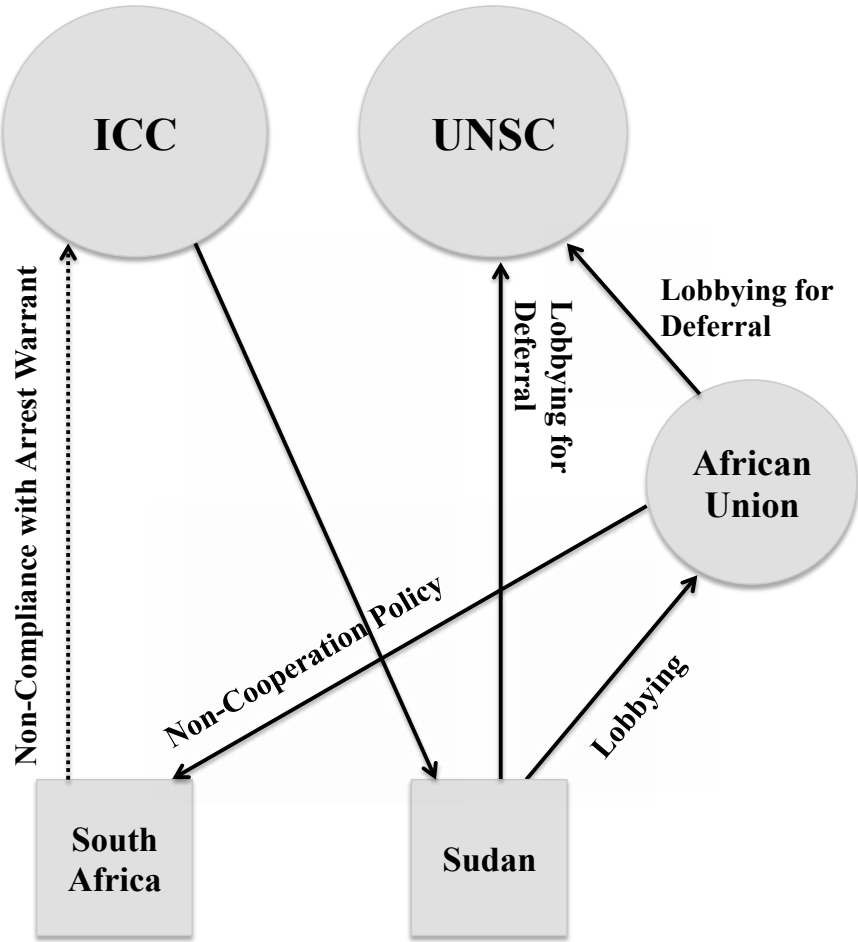
Table 13: Overview of South Africa's Engagement with the ICC

Government actions	Institution and Norm Strengthening	Institution and Norm Weakening
Legal actions	Ratification and implementation of the Rome Statute	Non-arrest of al-Bashir ASP amendment proposals (UNSC deferrals)
Non-legal actions	Encouraging other states to ratify and implement the Rome Statute Refusal to sign BIA with USA Pro-ICC actions and rhetoric at UN Opposing African mass withdrawal from ICC	Tacit support for AU Assembly decisions ANC critique of the Court

Figure 12 visualizes the cooperation context in which the GSA made its non-arrest decision. The figure shows the important mediating role of the AU. After al-Bashir was charged

by the ICC, Sudan and other ICC-critical African states started lobbying the AU to pass ICC-critical decisions. The most important decision is the non-cooperation policy, passed in July 2009, which calls on AU member states to not cooperate in the arrest of al-Bashir. This created non-cooperation pressure in the African countries which al-Bashir visited, confronting them with loyalty conflicts in which they had to choose between their commitment to the AU and their commitment to the ICC. South Africa chose its commitment to the AU, thus failing to comply with the ICC arrest warrant but complying with the AU's non-cooperation policy instead.

Figure 12: Cooperation Context for South Africa



Legal and Non-Legal Means: Early Support for the Court

The years before the ICC's creation were characterized by strong support for the idea of an independent court, both in South Africa, within the Southern African Development Community (SADC), and from most African countries. Since 1993, South Africa had been active in the International Law Commission, charged with drafting a treaty for an international criminal court. South Africa also participated in the UN Preparatory Committee for the Court's founding treaty, and from 1995 to 1997 was active in SADC consultative meetings, hosting, for instance, conferences to adopt negotiating principles for the Rome Conference where the treaty was finalized.²⁷³ SADC countries formed a negotiating bloc together to pool resources and attain a better negotiating position rather than speaking for their respective countries only.²⁷⁴ For instance, in September 1997, legal experts from SADC countries convened in Pretoria and adopted principles that would later form the basis of the negotiating 'manual' for SADC countries at the Rome Conference. One principle affirmed the need for an independent Prosecutor, "who should be able to initiate investigations and institute prosecutions on his or her own initiative and without influence from states or the Security Council, subject only to appropriate judicial scrutiny."²⁷⁵ At the Rome Conference, SADC countries sat in different organs so as to ensure their positions were heard in all settings.²⁷⁶

After signing the Rome Statute in July 1998, South Africa took proactive steps to implement the treaty domestically and to sway other African countries to do so as well. For instance, the GSA hosted a conference in June 1999 whose end product was a model implementation kit to be used by SADC member states to domestically implement the treaty. In

²⁷³ Maqungo 2000a.

²⁷⁴ Ibid.

²⁷⁵ Maqungo 2000b.

²⁷⁶ Cf. for instance Friman 1999.

2002, South Africa became the first African ICC state party to pass domestic implementation legislation, and it established the Priority Crimes Litigation Unit to ensure the legislation's effectiveness.²⁷⁷ Since its passage, the law has been widely used by domestic groups to bring suits in South African courts, and South African courts have emphasized the country's legal obligations under IL.²⁷⁸

Other strong signs of support for the Court were evident at the UN. When the UN Security Council (UNSC) passed resolution 1422 in 2002, which gave peacekeepers from non-ICC member states immunity from ICC prosecution for one year,²⁷⁹ South Africa voiced opposition. It argued that US fears of the ICC investigating US peacekeepers are unfounded and that the ICC needs to be supported for it embodies an emerging norm: "We hope the Security Council will actively promote this emerging norm in international law. We urge the Security Council to stand firm and protect the peace mission in the Balkans, while reinforcing — certainly not jeopardizing — the International Criminal Court and the norms of international law it has established."²⁸⁰ Two days later, South Africa joined together with Canada, New Zealand, and Brazil and criticized the resolution again. The letter, signed by South Africa's Ambassador and Permanent UN Representative Dumisani Shadrack Kumalo, posited that the UNSC's "action is damaging international efforts to combat impunity, the system of international justice and our collective ability to use these systems in the pursuit of international peace and security."²⁸¹ In June 2003, when the controversial resolution was renewed with Resolution 1487, Dumisani Kumalo again criticized it.²⁸²

²⁷⁷ Stone 2011: 308.

²⁷⁸ du Plessis and Maunganidze 2014.

²⁷⁹ UN Security Council, Resolution 1422 (2002).

²⁸⁰ UN Security Council, S/PV.4568: 7.

²⁸¹ UN Security Council, S/2002/754: 1.

²⁸² UN Security Council, Resolution 1487 (2003).

Another strong sign of support for the Court was South Africa's refusal to sign a Bilateral Immunity Agreement (BIA) with the United States. In the years after the Court's establishment, the USA pressured states to sign BIAs to give US nationals immunity from ICC prosecution against the threat that US military aid to these countries would be cut.²⁸³ This decision created a net loss of \$8.1 million over the 2004 and 2005 fiscal years for South Africa, amounting to "the most significant loss in military aid funding among African 'refusers.'"²⁸⁴ A Cabinet statement justified the government's firm position against the BIA in July 2003 with the country's "commitment to the humanitarian objectives of the ICC and the country's international obligation."²⁸⁵

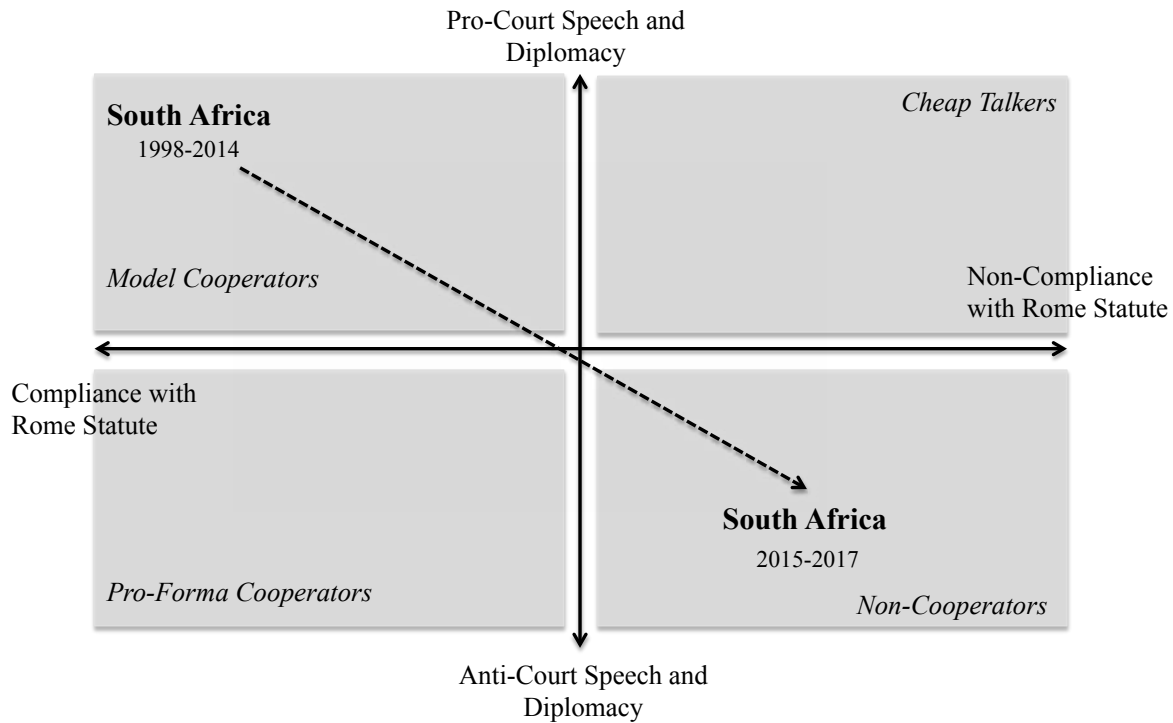
These events illustrate the high support for the Court in its early years. The GSA engaged in legal actions at home by ratifying and implementing the Rome Statute but it went further by engaging in pro-Court diplomacy and trying to persuade other African states to follow suit. Not signing a BIA with the USA resulted in concrete monetary losses for the country and thus signifies a significant non-legal sign of support for the Court. In these early years of the Court's existence, South Africa can be called a model cooperator. However, this changed over time as the AU became more critical of the ICC's charges against sitting heads of state and the ANC grew more critical. Figure 13 visualizes the GSA's shift in cooperation behavior over time that I expand on in the following sections.

²⁸³ Among the African states, this includes Benin, Botswana, Burkina Faso, Burundi, CAR, Chad, DRC, Congo-Brazzaville, Djibouti, Gabon, Gambia, Ghana, Guinea, Lesotho, Liberia, Malawi, Nigeria, Senegal, Sierra Leone, Uganda, and Zambia. See Coalition for the International Criminal Court 2006.

²⁸⁴ Grant and Hamilton 2016: 172.

²⁸⁵ du Plessis 2005: 122.

Figure 13: Shift in South Africa's Engagement with the ICC



2009-2015: Support for AU Non-cooperation Decisions but Promises to Arrest al-Bashir

South Africa’s relationship with the ICC has become more ambivalent since 2009 when the ICC issued its first arrest warrant for al-Bashir. From 2009 on, South Africa at least tacitly approved AU Assembly decisions that called on the UNSC to delay the case and consider heads of state immune from prosecution. In July 2009, the AU issued its non-cooperation decision, stipulating that “AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar Al-Bashir of The Sudan.”²⁸⁶ After civil society organizations (CSOs) criticized the GSA

²⁸⁶ Assembly of the African Union, Assembly/AU/Dec.245(XIII)Rev.1: para. 10.

for its support for the AU decision, the Department of International Relations and Cooperation felt obliged to publicly reconfirm the government's commitment to the rule of law.²⁸⁷

Despite the AU's consensus decision making in the Assembly, they often mask disagreements between African states behind the scenes. On the one hand, South Africa's continuous support for the AU's ICC-critical positions suggests that the country has long been critical of the Court. However, the AU's attention has focused exclusively on the ICC cases against sitting heads of state. In no decision does the AU admonish the Court for indicting the people it indicted. Rather it is only the cases against al-Bashir, Kenyatta and Ruto that draw the ire of the AU and result in critique of the Court. Moreover, and in line with official statements at UN meetings, African states' criticism of the Court's prosecution focus also draws from the actions of the UNSC and its failure to defer these African cases while failing to refer other critical situations to the Court. Thus, the often-lamented hostility of African states toward the Court mainly stems from 3 of its current docket of 24 cases in ten situations and the ICC's relationship to the UNSC as a political actor.

While supporting the AU Assembly decision on non-cooperation, the GSA fell short of inviting al-Bashir to its territory and continued to support the Court. On the occasion of President Jacob Zuma's inauguration in 2009, al-Bashir was not invited, and South Africa clarified that he risked arrest should he enter the country.²⁸⁸ In 2010, al-Bashir was invited to the opening ceremony of the soccer World Cup in South Africa along with other African leaders, but he declined the invitation.²⁸⁹ It would later become important, that when al-Bashir left South Africa in June 2015, the GSA argued that these earlier instances were *South African* events and thus al-

²⁸⁷ Stone 2011: 326.

²⁸⁸ Sudan Tribune 2009.

²⁸⁹ Sudan Tribune 2010.

Bashir was not invited, while the 2015 visit was an *AU summit* for heads of state, which gave him immunity.²⁹⁰

In another instance of Court support, the GSA helped Nigeria and others to thwart Kenya's motion to have African countries withdraw en masse from the ICC at the AU summit meeting in October 2013.²⁹¹ This support came despite the African National Congress's (ANC) position against the Court. South Africa's main post-Apartheid political party had strongly advised the GSA to side with Kenya *against* the Court, arguing that "the ICC is representing inequality before the world justice where the weak is always wrong and the strong is always right."²⁹² The ANC issued a first critical statement about the Court's 'selective prosecution' during its 53rd National Conference in December 2012, urging the Court "to also pursue cases of impunity elsewhere, while engaging in serious dialogue with the AU and African countries in order to review their relationship" as well as calling on the UNSC to recognize African institutions' work in conflict management.²⁹³

The years between 2009 and 2015 were thus marked by an increasingly tense relationship between the AU and the ICC. South Africa joined AU Assembly decisions that called on AU member states not to cooperate in al-Bashir's arrest and decisions for case deferrals for the al-Bashir and Kenyatta cases. South Africa also introduced an amendment at the Assembly of States Parties (ASP) to amend the Rome Statute's Article 16 regarding referrals to the Court by the UNSC. The proposed amendment would make it possible for the UN General Assembly to defer ICC cases for a year if the UNSC does not act. This, of course, has to be understood in light of the AU's continued efforts to have the cases against al-Bashir and Kenyatta deferred,

²⁹⁰ John Jeffrey, ISS Seminar, July 16, 2015, Pretoria.

²⁹¹ Akande 2013.

²⁹² Mantashe 2013.

²⁹³ African National Congress 2012: 44-45.

without the UNSC acting accordingly. The UNGA, without the veto power of permanent members and potentially a majority of states echoing the AU's calls, would have been a much more receptive arena for deferrals. The proposed change indicates a growing frustration in the GSA about the failure of the UNSC to act on behalf of the AU. However, it cannot be clearly interpreted as a sign of discontent with the ICC.

Considering South Africa's longstanding support for the Court but its support of AU decisions paints the picture of an ambivalent supporter, a country torn between its proclaimed support for human rights and accountability on the one hand and its obligation and solidarity with fellow African countries on the other hand. Scholars have noted the country's oscillation—difficult at times—between its guiding principles of human rights on the one hand and its critical role in the African renaissance and the norms of non-interference.²⁹⁴

On the one hand, the examples of South African support for the ICC can be seen as signs of commitment to the norm of individual criminal accountability, which the Court encapsulates. In this view, the non-cooperation in June 2015 comes as a surprise and signals a policy shift. On the other hand, these examples can be seen as costless expressions of support. It can be argued that South Africa claimed support for the ICC when it was costless, but when confronted with costly action—the arrest of another African President—the country revealed its true preferences. In this view, the country's non-cooperation does not signal a departure from prior policy but merely puts the country in the 'cheap talkers' category. While this cannot be convincingly settled, two examples represent prior costly action: South Africa's regional efforts in negotiating for a strong ICC and implementing the Rome Statute, and the country's refusal to sign a BIA with the US which only six other African countries did at the expense of losing US aid.²⁹⁵

²⁹⁴ Neethling 2012.

²⁹⁵ Kenya, Lesotho, Mali, Namibia, Niger, and Tanzania also refused to sign BIAs. Cf. Cotton and Odongo 2007.

The ICC also reminded the GSA of its obligation to execute the al-Bashir arrest warrant days before the AU summit in June 2015. In a series of legal steps and diplomatic meetings between ICC officials and the South African embassy in the Netherlands, the Court clarified that South Africa was under an obligation to arrest, even if an AU decision mandated otherwise.²⁹⁶

Legal Means: Non-Compliance with ICC Arrest Warrants for al-Bashir

This preceding section suggests that the South African executive was still supportive of the ICC in 2015 despite the ANC's critique of the Court and pressure to echo the AU's position. The issue became front and center when African leaders met in Johannesburg in June 2015 to discuss pressing continental concerns. On Saturday, 13 June, rumors emerged that al-Bashir was seen at Sandton's International Convention Center (ironically, the abbreviation is ICC), and reports of his presence were later confirmed. Amidst speculation about his presence, the CSO Southern Africa Litigation Center (SALC) filed an urgent application with the North Gauteng High Court to have the GSA arrest al-Bashir in compliance with South Africa's international obligations under the Rome Statute.²⁹⁷ On Sunday, Gauteng High Court Judge Fabricius issued an interim order instructing the government to inform all South African ports of entry/exit that al-Bashir is to be prevented from leaving the country until another court hearing would determine whether he should be detained.²⁹⁸

According to the GSA's affidavit this court order was partially complied with as the Director of Home Affairs confirmed that he informed all ports of exit and received their

²⁹⁶ Pre-Trial Chamber II, ICC-02/05-01/09-242.

²⁹⁷ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development and Others*, Case no. 27740/2015, Notice of Motion (14 June 2015).

²⁹⁸ *Ibid.*, Draft Order.

confirmation.²⁹⁹ However, after the GSA filed its response on Monday morning (15 June) before the second court hearing took place, al-Bashir's plane had already left South Africa, with pictures of his plane leaving Waterkloof air force base appearing on social media. Hours later, the court ultimately ruled in favor of SALC and decided that Bashir should have been arrested. On behalf of the High Court, Judge Mlambo ruled that the government's failure to arrest al-Bashir had defied the country's Constitution.³⁰⁰

The episode had repercussions in the following weeks and months. Some deemed the non-arrest the beginning of the end of South Africa's constitutional democracy, given that the executive ignored a domestic Court order and its international obligation to arrest an ICC suspect. Some news reports suggested that the GSA had held secret meetings with key ministers to arrange for al-Bashir's successful 'escape' from the country,³⁰¹ which the government denied.³⁰² In its affidavit, the GSA explained that the Sudanese presidential plane was moved Sunday night from a commercial airport to Waterkloof air force base without the usual paperwork involved in moving a foreign nation's plane to a military base, and that al-Bashir's passport was not among the passports presented to immigration officials before departure.³⁰³

When the judges considered the issue again on 24 June 2015, they invited the head of the National Prosecuting Agency to consider pressing criminal charges for government officials given the disregard of the Constitution. According to Judge President Dunstan Mlambo, "[a] court is the guardian of justice, the corner-stone of a democratic system based on the rule of law. If the State, an organ of State or a state official does not abide by court orders, the democratic

²⁹⁹ Ibid., Respondents' Explanatory Affidavit (25 June 2015).

³⁰⁰ Ibid., Judgment (15 June 2015): para. 2.

³⁰¹ Hunter, Mataboge, and de Wet 2015.

³⁰² eNCA 2015.

³⁰³ *Southern Africa Litigation Centre v Minister of Justice And Constitutional Development and Others* (27740/2015), Respondents' Explanatory Affidavit (25 June 2015).

edifice will crumble stone-by-stone until it collapses and chaos ensues.”³⁰⁴ On 15 March 2016, the Supreme Court of Appeal affirmed the High Court’s decision.³⁰⁵ After assessing both sides’ arguments on head-of-state immunity under customary IL, the Rome Statute, the host agreement between South Africa and the AU, as well as South Africa’s domestic legislation, Judge Malcolm Wallis concluded that:

when South Africa decided to implement its obligations under the Rome Statute by passing the Implementation Act it did so on the basis that all forms of immunity, including head of state immunity, would not constitute a bar to the prosecution of international crimes in this country or to South Africa cooperating with the ICC by way of the arrest and surrender of persons charged with such crimes before the ICC, where an arrest warrant had been issued and a request for cooperation made.³⁰⁶

While some ANC members openly talked about withdrawing from the Court, the executive walked a more careful path but indicated its wish to reform the Court. Deputy Minister Obed Bapela said that it is ANC policy “that we remain a member of the ICC [but], given the recent events, we must review our position whether [our] membership is yielding its goals, or has the ICC been sidetracked and hijacked by forces that are anti-progress.”³⁰⁷

The relationship between the ICC and South Africa as well reactions in South Africa to the non-arrest highlight the various domestic actors involved in compliance. Rather than *one* ‘state interest,’ several interests can be identified: The South African judiciary and human rights groups sided with the ICC’s position that South Africa was primarily bound by its Rome Statute obligation to arrest al-Bashir, regardless of the AU’s non-cooperation policy. In contrast, the executive aligned itself with the AU and ANC position against the Court. The ANC subsequently

³⁰⁴ Mabona and de Lange 2015.

³⁰⁵ For more information on the legal aspects of the judgments by the High Court and the Supreme Court of Appeal, see, e.g., de Wet 2015; Akande 2016a.

³⁰⁶ *Southern Africa Litigation Centre v. Minister of Justice and Constitutional Development & Others*, Case no. 867/15 [2016] ZASCA 17, Judgment (15 March 2016): para. 103.

³⁰⁷ Hunter, Mataboge, and de Wet 2015.

became more critical of the Court. In a discussion document published after the al-Bashir visit, the ANC deplored that since 2012 “the ICC has continued to attack African countries” and “arrogantly insists on African countries to execute ICC warrants of arrests which are not recognised by the African Union. South Africa was not spared by this arrogance when President Al-Bashir visited our country for the June 2015 Summit of the African Union to the point that the ANC decided on reviewing South Africa’s membership of this organisation.”³⁰⁸ Noting the Court’s divergence from its original mandate, the ANC highlighted the different obligations the country has vis-à-vis the AU and individual African states such as Sudan. In its most critical statement so far, the ANC noted:

There is no national interest value for South Africa to continue being a member of the ICC. The manner that we were treated around the al-Bashir incident is consistent with the cheeky arrogance that Africa has experienced in its interaction with the ICC. Continuing to be in the ICC especially when the big powers who are calling the shots are themselves not members, gives it the legitimacy it does not deserve. The West dominates the ICC through the influence they command within its structures and the huge financial contributions they make to its budget. In return, they use the ICC as their tool for regime change in Africa.³⁰⁹

These domestic repercussions are intimately tied to South Africa’s announcement in October 2016 that it intended to withdraw from the ICC. The GSA’s withdrawal notice emphasized the legal controversy surrounding head-of-state immunity and its adverse effects on peace efforts: South Africa’s “obligations with respect to the peaceful resolution of conflicts at times are *incompatible* with the interpretation given by the International Criminal Court of obligations contained in the Rome Statute.”³¹⁰ Minister of Justice and Correctional Services Michael Masutha explained that the South African ICC Act and the Rome Statute “compel South

³⁰⁸ African National Congress 2015: 174.

³⁰⁹ Ibid., 175.

³¹⁰ Nkoana-Mashabane 2016, emphasis added.

Africa to arrest persons who may enjoy diplomatic immunity under customary international law but who are wanted by the court.”³¹¹ By withdrawing from the Court and leading the African exodus from the ICC, the GSA was also able to bolster its reputation and image as a continental leader: “Taking the lead in the call to withdraw from the ICC offers South Africa the rare opportunity to deepen its growing influence on the continent ahead of regional competitors such as Nigeria who are against the idea. In the end, it comes down to South Africa making a choice between building on its international soft power mileage by staying in the ICC or developing its soft power leverage in Africa.”³¹²

Since the withdrawal announcement, legal experts had questioned whether withdrawal by executive action is even constitutional given that the public and parliament were neither notified nor consulted.³¹³ Proponents of the ICC and the international criminal justice project have criticized South Africa,³¹⁴ fearing that the decision and similar announcements by Burundi and Gambia set the stage for a domino effect of African exits from the ICC.³¹⁵ On 22 February 2017, the North Gauteng High Court decided that the withdrawal notice was indeed unconstitutional and thus invalid because the parliament had not been consulted. The ruling criticized the “unexplained haste” with which the withdrawal notice was deposited with the UN as “procedural irrationality” and that the executive’s decision to withdraw without prior parliamentary consent amounted to a breach of the separation of powers.³¹⁶ The executive was instructed to revoke the withdrawal. On 7 March 2017, the executive officially withdrew from the withdrawal by notifying the UN to “revoke the Instrument of Withdrawal from the Rome Statute of the

³¹¹ Daily South Africa 2016.

³¹² Isike and Ogunnubi 2017: 176.

³¹³ For a legal analysis of the withdrawal notice and its implications for international and South African law, see, Woolaver 2016; Akande 2016b.

³¹⁴ African Center for Justice and Peace Studies 2016.

³¹⁵ Allison 2016; BBC News 2016.

³¹⁶ Kennedy 2017.

International Criminal Court with immediate effect” in order to “adhere to the said judgement.”³¹⁷ This withdrawal from the exit leaves it unclear at this point whether the GSA is merely seeking exit through proper channels involving parliament or whether the entire exit plan has been abandoned.

When asked to explain the non-arrest at the ICC in April 2017, the GSA gave a “spirited defense”³¹⁸ of its behavior in 2015. The GSA’s legal team argued that “[t]here is no duty under international law and the Rome Statute to arrest a serving head of state of a non-state-party such as Omar al-Bashir.”³¹⁹ In contrast to the ICC’s standing argument that the UNSC resolution, which referred the Darfur case to the ICC, had removed al-Bashir’s immunity, Dladi argued that the UNSC resolution only obliged Sudan to arrest him, adding that “pushing those obligations on other countries was a ‘recipe for anarchy.’”³²⁰ The Court’s judges will make a decision on whether to issue a ruling of non-compliance against South Africa before the summer recess 2017.³²¹

The previous sections have chronologically traced the GSA’s engagement with the Court. Since the 1990s, South Africa has been a strong supporter of the Court, engaging in Court-supportive diplomacy in the southern African region and refusing to sign a BIA with the US. However, the support became more subdued after the ICC’s 2009 arrest warrant for al-Bashir after which the GSA supported ICC-critical AU decisions, and engaged in efforts to change UNSC deferral procedures through the ASP. When al-Bashir visited South Africa in 2015, the GSA was for the first time confronted with a direct conflict of obligations.

³¹⁷ United Nations 2017.

³¹⁸ Ramjathan-Keogh 2017.

³¹⁹ Bundi 2017.

³²⁰ Ramjathan-Keogh 2017.

³²¹ Ibid.

Why Did South Africa Fail to Comply with the ICC Arrest Warrants?

I argue that when al-Bashir visited South Africa, the country faced a loyalty conflict. It was an instance where a commitment to a global institution was directly opposed to commitment to a regional organization. On the one hand, South Africa was subject to non-cooperation pressure from the AU to not arrest al-Bashir, in line with the 2009 AU decision. Acting in line with that policy allowed South Africa to avoid the regional reputation costs of arrest, potentially declining relationships with fellow African countries or future lack of continental support for South African positions and projects.

On the other hand, this rationalist reputation explanation only gets us part of the way. South Africa also could have supported the ICC, arrested al-Bashir and would have been celebrated for that choice by the ICC, domestic groups, human rights activists, and likely thousands of victims in Darfur. It would have further strengthened the Western image of South Africa as a strong supporter of a human rights-based foreign policy that Nelson Mandela proclaimed in the early 1990s. Thus, these potential benefits of compliance with the ICC cannot tell us why South Africa would value its regional commitment over its global commitment to accountability and human rights.

I argue that South Africa valued its regional reputation more than its global reputation as a human rights promoting country. The African continent is South Africa's primary peer group. South Africa placed more emphasis on its good standing among African countries and in African institutions. This argument is the social dimension of reputation, where the benefits of adhering to an agreement, here the AU non-cooperation decision, go beyond the material benefits outlined in the previous paragraph. In addition to the material future benefits from the AU, South Africa's compliance with AU policy also sent important signals to the continent about its commitment to

being a good African neighbor. Aside from reputation, choosing AU commitment over ICC commitment also aligns with South Africa’s foreign policy ideas, developed over the past 20 years, which have increasingly focused on continental integration and progress. Table 14 presents these explanations.

Table 14: Overview of Compliance Explanations in South Africa

	Compliance	Non-compliance
International level	International pressures Enforcement Legitimacy of rule and institution	(lack of compliance factors)
Domestic level	Compliance constituencies Democratic values and institutions	(lack of compliance factors) Non-compliance constituencies Lack of state capacity Regional reputation concerns

Alternative Explanations

Several compliance approaches discussed in Chapter 2—capacity, domestic pro-compliance groups, legitimacy—merit much attention but fail to explain South Africa’s non-arrest convincingly. In many ways, South Africa was a poster child for compliance, making its non-arrest both surprising and troubling to many.³²² South Africa invested heavily in the Court in the years following its establishment and, even after the AU and several African countries became more vocal in their criticism, the GSA still took actions supportive of the Court. It featured most of the assets we associate with compliance, including a strong, independent judiciary, democratic institutions, domestic capacity, strong pro-compliance civil society, domestic implementation legislation, and a strong pro-ICC public stance by the government.

³²² See for instance, New York Times, Editorial Board 2015; Economist 2015; Tisdall 2015; Hoffman 2015; Greeff 2015.

Considering the domestic-level factors described above, South Africa represents a ‘likely’ case for compliance as it features the institutions and actors commonly associated therewith. South Africa has one of the world’s most progressive constitutions, with an extensive Bill of Rights and independent offices to check governmental conduct, such as the public protector. According to the Polity IV index, South Africa’s democracy score is 9 out of 10, indicating a consolidated democracy.³²³ Moreover, South Africa ranks among the top 10 performing countries in overall governance in Africa.³²⁴ However, many social and governance problems remain as the country continues to struggle with high inequality and corruption. For instance, the Constitutional Court decided in 2016 that President Zuma had failed to defend the Constitution when he disregarded orders to repay federal funds he had used for upgrades to his private estate.³²⁵

Despite corruption, the country’s judiciary has remained staunchly independent and continues to defend itself from political interference. In 2015, for instance, Chief Justice Mogoeng Mogoeng initiated a meeting between senior judges, Zuma and cabinet ministers to discuss the relationship between the executive and the judiciary after ANC and Communist Party leaders accused the judiciary of overreach.³²⁶ South Africa also has a robust nonprofit sector, another indicator of a strong democracy. In 2014/2015, South Africa had 136,453 registered nonprofit organizations, an increase of 86 percent since 2009/2010.³²⁷

The country also has significant domestic capacity. South Africa was the first African country to pass domestic legislation to implement the Rome Statute, while other African states’ limited capacity has hindered them from doing so. South Africa’s bureaucratic efficiency ranks

³²³ Polity IV 2016.

³²⁴ Mo Ibrahim Foundation 2016.

³²⁵ Elgot 2016.

³²⁶ Marrian 2015

³²⁷ Department of Social Development 2015: 12.

in the top quartile alongside the US, Canada and Australia.³²⁸ During al-Bashir's visit in June 2015, these pro-compliance factors worked together when the SALC sought to hold the government accountable to its Rome Statute treaty obligation.

The next section provides background on South Africa's foreign policy trajectory since 1994. The objective of the section is to highlight the recurring tension between the country's efforts to strengthen its global reputations as a human rights supporting country and an increasing emphasis on an Africa-centered foreign policy, a continental identity that emphasizes its links to the continent while being more assertive against the West.

South Africa's Foreign Policy post-1994: Solidifying the Country's Regional Reputation

The regional and international influence of post-apartheid South Africa has been complicated by its apartheid legacy as well as its economic weight and middle power status. Under apartheid, the country pursued destabilization policies in other African states, formed institutions to cement its own disproportionate economic power, and supported 'albinocracies' in the region under the Pax Pretoriana.³²⁹ In other words, South Africa saw itself and was seen by other African states as a European outpost on the continent, which has "left profound scars on its neighbours and a distrust even of a black-led government that will take decades to overcome."³³⁰ During apartheid, the AU's predecessor, the Organisation of African Unity, represented a counterweight to South Africa with "African leaders agree[ing] that South Africa and the explicit racism of its apartheid policy signified a threat to Africa's overall peace and prosperity."³³¹ This apartheid legacy continues to shape the country's historical and contemporary role on the

³²⁸ Cole 2015.

³²⁹ Adebajo 2007.

³³⁰ Ibid., 29.

³³¹ Klotz 1995: 75.

continent and is one reason why South Africa “has generally been unable to overcome the continental constraint of African unity, even if it wished to.”³³² Consequently, the South African government has been wary of being seen as assertive and dominant by other African states.

On the one hand, the country boasts all ingredients of a middle power. It is an economic giant in southern Africa, boasting a 9:1 trade balance with its neighbors and accounting for 80% of the regional economy, as well as providing high foreign direct investment into other African countries. Acting like an emerging regional hegemon and middle power that uses institution-building to cement its preferred policy beliefs,³³³ post-apartheid South Africa has stirred continental debates about the proper role of Africa in international organizations, via the African Renaissance, the formulation of the New Partnership for African Development, the creation of the AU, and efforts to expand the trade and security portfolio of the SADC. These actions “all speak to South Africa’s ambitions to realise a hegemonic presence on the continent.”³³⁴

However, all these initiatives have not created a strong following among other African states.³³⁵ The first years of post-apartheid South Africa were marked by what some call ‘inconsistent’ foreign policy, characterized by ad hoc and unpredictable reaction to crises and a high degree of personalization under Mandela; all of this met with critique from African states. One early foreign policy crisis that tarnished the newly democratic country’s image in Africa was Mandela’s unsuccessful attempt to rally African support against the Abacha regime in Nigeria.³³⁶ After Ogoni campaigners had been hanged in Nigeria in November 1995, Mandela called for the imposition of oil sanctions, collective action by SADC against Nigeria, and argued for Nigeria’s expulsion from the Commonwealth. However, not a single southern African state

³³² Borer and Mills 2011: 90-91.

³³³ Cf. Hamill and Lee 2001; Cooper, Higgott, and Nossal 1993.

³³⁴ Alden and Le Pere 2009: 149.

³³⁵ Cf. Bischoff 2003.

³³⁶ Cf. Black 2003.

supported South Africa's endeavor. Instead, South Africa "was accused by many African leaders of sowing seeds of division in Africa and undermining African solidarity."³³⁷ This episode impacted Mbeki's later policy of 'quiet diplomacy' toward Zimbabwe because "Africa's depiction of South Africa as a western stooge over Nigeria was a traumatic experience that the country's leaders were determined never to repeat."³³⁸

Moreover, South Africa's first peacekeeping mission (or intervention) in Lesotho in September 1998 stirred opposition from neighboring and other African states. Lesotho's Prime Minister Pakalitha Mosisili had asked the leaders of Botswana, Mozambique, South Africa, and Zimbabwe to send troops into Lesotho to restore peace after a contested election had resulted in widespread rioting and mutiny in the Lesotho Defence Force. Together with Botswana, South Africa sent 700 soldiers. While SADC depicted the mission as a peacekeeping mission, its legality remains controversial, as does the 'humanitarian' motive behind South Africa's action.³³⁹ Likoti argued that intervention was more in line with realist imperative—South Africa seeking to secure water access in Lesotho, including a joint dam—as well as lacking authorization from the UNSC. The intervention lasted until May 1999, resulting in the destruction of the capital city Maseru. Its legitimacy remains "widely questioned"³⁴⁰ and revived fears of South African domination in the region.³⁴¹ These examples highlight the potential reputation costs of a South African foreign policy that diverges from common regional positions.

Of regional importance is also South Africa's role in the AU, which former South African President Thabo Mbeki helped to create and in which South Africa sought leadership during the past decade. Mbeki espoused the concept of African Renaissance, signaling a deeper

³³⁷ Adebajo 2007: 37.

³³⁸ Ibid.

³³⁹ Likoti 2007.

³⁴⁰ Adebajo 2007: 38.

³⁴¹ Hamill and Lee 2011: 38.

commitment to Africa after Mandela—widely loved by the West—had been perceived by some as less committed to Africa.³⁴² Mbeki thus introduced “a more Africanist hue to South African politics” which has “helped facilitate South Africa’s integration in Africa after a period in which, fairly or unfairly, it was perceived by important sectors of continental opinion as essentially a Western state in its political and economic outlook and a proxy for Western interests.”³⁴³ When the OAU was transformed into the AU in the early 2000s Mbeki played a key role “spearheading the continental integration process on various levels.”³⁴⁴ Mbeki became the AU’s first Chairperson, the leading advocate for the African Peer Review Mechanism, he pushed for the Pan-African Parliament to be located in South Africa and the NEPAD Secretariat can be found in Midrand, South Africa.³⁴⁵ This push for the AU and integration initiatives was, according to Welz, “watched like a hawk by fellow African leaders: he was perceived as a bully, a head of state who stubbornly wanted to push his conceptions through.”³⁴⁶

Under Zuma, while the country remains committed to the AU, it does so with less vigor than under Mbeki. Since 2009, the Zuma administration has continued to focus on Africa, but has shown an increasing affinity for BRICS diplomacy and anti-global North rhetoric.³⁴⁷ Zuma’s vote to abolish the SADC Tribunal³⁴⁸ and his support for ousted Ivorian president Laurent Gbagbo suggest a limited interest in the promotion of good governance when that goal interferes with regional alliances. Zuma has also pursued a more assertive role on the continent. His efforts to install Dlamini-Zuma as AU Commission chairperson went against the unspoken rule that the

³⁴² Cf. Okolo 2010. The concept of African Renaissance stems from the idea that, while not a homogenous whole, African nations share a common history of marginalization due to the slave trade, colonialization, and imperialism.

³⁴³ Hamill 2006: 118.

³⁴⁴ Welz 2013b: 129.

³⁴⁵ Ibid., 130.

³⁴⁶ Ibid.

³⁴⁷ Landsberg 2012.

³⁴⁸ Nathan 2013.

position should not be assumed by a big power. Moreover, he has readily deployed more troops in Africa, for instance, in a failed mission in the Central African Republic (CAR) in 2013 and in support of the SADC's mission in the DRC.³⁴⁹

In addition to these regional interests, South Africa has also sought to assume a leading role as an African representative in global institutions. Its effort to gain a permanent seat on the UNSC was seen critically in Africa, as a break from the Ezulwini Consensus, that showed South Africa's ambitions as a nation, rather than unity for the continent.³⁵⁰ In 2010, South Africa was invited to join the BRICS of emerging economies despite its relative lack of economic prowess compared to Brazil, Russia, India, and China. It is also the only African country to be a member of the G20. In the UN, the country held a seat as non-permanent member on the UNSC twice. During its UNSC tenures in 2007-2008 and 2011-2012, South Africa worked to expand the cooperation between the UN and the AU in the regional organization's efforts to deal with regional threats to peace and security.³⁵¹ While it voted mostly in conformity with the Council, South Africa often worked to water down resolutions that insisted on human rights or toward resolving critical issues in forums other than the UNSC, including the often-lamented opposition to resolutions condemning neighboring Zimbabwe and Myanmar.³⁵² These positions surprised many Westerners who associated the country with its 1994 promise of a human rights based foreign policy. However, it is important to note that "Pretoria's dominant geopolitical and ideological reference group resides in the non-West amongst emerging powers and the global South, including AU member states."³⁵³

³⁴⁹ Fabricius 2013.

³⁵⁰ Murithi 2012.

³⁵¹ Alden 2015.

³⁵² Jordaan 2012.

³⁵³ Kornegay 2012: 11.

While South Africa's position has been described as that of a 'regional hegemon' in southern Africa, the lack of a continental hegemon in Africa means that even wealthy states, such as Nigeria and South Africa, "encounter great difficulties much of the time in turning their size and wealth into effective diplomatic influence."³⁵⁴ One legacy of colonialism and the Cold War has been a deep resentment against powerful states. Consequently, wealthy African states often struggle to get support for their positions and African states often mobilize against potential hegemony seekers.³⁵⁵

al-Bashir's 2015 visit occurred at a time when South Africa was facing criticism from other African states. Four years earlier (March 2011), South Africa had supported UNSC Resolution 1973 authorizing 'all necessary measures' to protect civilians in Libya, widely interpreted in other African capitals as South Africa voting with the West to support regime change on the continent.³⁵⁶ Then, just months before the al-Bashir visit, widespread attacks occurred against African migrants in South Africa, drawing the ire of African nations whose citizens were attacked.³⁵⁷ Nigeria withdrew its envoys from South Africa, and Economic Community of West African States chairman John Mahama remarked that "it was so unfortunate that the very people, whose nations sacrificed to help South Africans fight, repel and defeat apartheid, were now today considered aliens and hacked to death."³⁵⁸ Thus, South Africa was in a difficult regional position in June 2015 when al-Bashir decided to attend the AU summit.

The paragraphs above show that South Africa has taken on prominent tasks in Africa as a middle power. However, these actions have not always resulted in praise by fellow African states.

³⁵⁴ Tieku 2014: 13.

³⁵⁵ Ibid.

³⁵⁶ Ibid.

³⁵⁷ For an analysis of xenophobic violence in South Africa and government responses, see Klotz 2013 and 2016; Tella 2016; Misago 2016.

³⁵⁸ News Agency of Nigeria 2015.

The GSA's foreign policy has been characterized by a delicate balance between its powerful status on the African continent and a deep suspicion from that same region. While Mandela (mostly) undertook a principled foreign policy, often against the consensus of fellow African countries, foreign policy under Mbeki and Zuma has become more pragmatic and in line with continental positions. This can be seen in the declining value placed on democracy promotion in Africa since the Mbeki presidency, as evidenced by support for undemocratic regimes in Angola, Swaziland and Zimbabwe.³⁵⁹ This historical overview highlights several foreign policy priorities that the GSA has been increasingly committed to: continental peacemaking and stability, a non-confrontational diplomacy toward autocrats and those considered pariahs by the West, and an anti-imperialist world order in which the global South is given equal treatment.³⁶⁰ These priorities, in line with the ANC's foreign policy doctrine, provide the lens through which to understand South Africa's non-arrest of al-Bashir in 2015.

By highlighting their role, I do not suggest that it is *only* regional considerations that drove the GSA's behavior. Domestically, two factors help explain the origin of these foreign policy priorities. Most important among the domestic constraints on foreign policy making are the historical alliances between the ANC and other liberation movements in Africa, which makes open criticism of their regimes politically controversial for South Africa. The ANC is constantly balancing its anti-imperialist roots based on a liberation ethos with its democratic and human rights ethos.³⁶¹ Both identities can conflict and sometimes the former can trump the latter in foreign policy decision-making.³⁶² Moreover, South Africa continues to suffer from the legacy of apartheid in the form of economic inequality, prompting its leaders to emphasize the benefits of

³⁵⁹ Khadiagala and Nganje 2015.

³⁶⁰ Nathan 2010.

³⁶¹ Khadiagala and Nganje 2015.

³⁶² Neethling 2012.

African economic development to address domestic needs. This continental development goal can also stymie a purely human rights-focused foreign policy.

Interest Misalignment and Regional Reputation Concerns

I argue that we can explain the non-arrest through the lens of South Africa's foreign policy and its interest in a good reputation among fellow African countries. During al-Bashir's visit, South Africa was forced to choose between loyalty to two norms and international organizations, each associated with different audiences. The accountability norm, associated with the ICC and Western states, is institutionalized through South Africa's ICC membership and domestic implementation of the Rome Statute. The arrest of al-Bashir would have resulted in praise from these actors, ending a seven-year period in which al-Bashir has evaded accountability. The non-cooperation norm in the arrest of al-Bashir³⁶³ is associated with the AU and institutionalized in AU Assembly decisions that South Africa supported. Arresting an African president in line with the 'anti-African' ICC directive would likely have tarnished South Africa's reputation and resulted in harsh opprobrium from the AU, African states and fellow emerging countries, many of them not ICC states parties.

This reputation argument has a material and a social dimension. In terms of material reputation concerns, arresting a fellow African leader would likely have severely impacted the GSA's reputation in Africa. These countries would likely have withheld support for South African positions and initiatives in bilateral relations and in the AU. South Africa is also tied economically to the states in southern Africa, especially fellow SADC members. These

³⁶³ I am not suggesting here that there is a general noncooperation norm in Africa with the ICC. In fact, judicial cooperation with the ICC by most African states has been very positive. I merely refer to the noncooperation *in the arrest of al-Bashir*.

economic ties have contributed to the GSA's support for autocratic regimes in the region.³⁶⁴

Thus, material reputation concerns about the economic repercussions from an arrest also impacted the South African executive's non-arrest decision.³⁶⁵

In terms of social reputation, South Africa solidified its reputation as a trustworthy African 'citizen' by complying with the AU non-cooperation policy. Since 1994, the country has tried to solidify leadership in the AU as well as bolster its position as 'Africa's leading nation' in global institutions. In 2012, the GSA succeeded in having its own candidate Dlamini-Zuma become the AU Commission's chairperson, making it less likely that South Africa will take positions different from those of the AU.³⁶⁶

Thus, there was a fundamental interest misalignment between the GSA and the ICC in terms of signaling commitment to relevant peer groups and securing future benefits. Arresting an African leader in support of an international organization was not in line with South Africa's interests. Not arresting al-Bashir due to reputation concerns also helps explain the country's withdrawal from the ICC: Just as non-arrest signaled the country's commitment to Africa over its global reputation, withdrawal let its African neighbors know "where its commitment lies. Knowing that it commands greater influence within the continent, Pretoria is able to use this opportunity to mend broken fences and address accusations and counter-accusations of harbouring interests that transcend those of the continent."³⁶⁷

³⁶⁴ Khadiagala and Nganje 2015.

³⁶⁵ For more information on the importance of economic ties, see Goodliffe, Hawkins, Horne, and Nielson 2012; Hentz 2005; Lee 2003.

³⁶⁶ Khadiagala and Nganje 2015.

³⁶⁷ Isike and Ogunnubi 2017: 176.

The South African Executive's Political Arguments for Non-Arrest

While the government's main public reasons for letting al-Bashir escape were of a legal nature—immunity for al-Bashir as sitting head of state of a non-ICC member state, his visit to an AU summit rather than a South African event, and competing legal obligations between the AU decisions advocating for al-Bashir's non-arrest compliance and the Rome Statute—the South African executive also advanced several political arguments, all of which involve regional politics. Statements by government officials surrounding the al-Bashir visit suggest that three regional considerations influenced the GSA's decision: 1. An arrest would have negative implications for the GSA's relationship with other African countries, 2. An arrest would have a negative impact on regional peace efforts in Sudan, and 3. An arrest would lend support to a Court that lacks regional legitimacy due to selective prosecution. Various African countries and the AU have advanced these arguments before. Thus, the South Africa executive capitalized on an existing discourse that questioned the Court's operation and utility for Africa.

Deputy Minister Obed Bapela, the head of the ANC's international relations sub-committee, is quoted as saying that had al-Bashir been arrested in South Africa, “[w]e would have been seen as lackeys of the West. We had to choose between the unity of Africa and the ICC and we chose Africa. We said we can deal with the ICC later.”³⁶⁸ Moreover, he is paraphrased as saying that “unity of the continent was hanging in the balance when the Southern Africa Litigation Centre asked the Court to force the government to arrest al-Bashir.” John Jeffery, Deputy Minister for Justice and Constitutional Development, echoed these statements: Had al-Bashir been arrested during the summit, there would have been “extreme consequences in the region.”³⁶⁹ Drawing an analogy to George W Bush's visit to South Africa and the potential

³⁶⁸ Hunter, Mataboge, and de Wet 2015.

³⁶⁹ Jeffery 2015 (paraphrased).

move to not let him leave the country under the UN Convention Against Torture and the South African Prevention of Torture Act, Jeffery asked “do we think the US would have just stood idly by and waited?”

A related argument against the ICC emphasizes Africa’s development over the pursuit of justice. In this peace versus justice debate, the proponents of the peace argument, here brought forth by Bapela, argue that peace agreements should take precedent over seeking accountability. South Africa has long been involved in peace-making efforts in Sudan, using its tenures on the UNSC to pull the conflict away from the UNSC and toward the AU. Jordaan argued that this behavior “was also intended as a challenge to the West and an effort to keep them at bay.”³⁷⁰ In line with this previous assessment, Bapela stressed that since al-Bashir is a critical figure in settling the Darfur conflict, “[t]he ANC believes that our country should continue to support the African Union’s honest and sustained efforts at finding a peaceful solution to Sudan’s conflicts and efforts towards its democratisation. . . . The Sudanese people therefore need him in Khartoum and not The Hague!”³⁷¹ Africa, as a continent experiencing much conflict, cannot afford to foreground justice when it needs peace first to develop. This seems to be the argument when he said: “The debate we ought to have in this parliament and every corner of our country is whether the ICC has not become a stumbling block for the achievement of peace and what the continent must do given the imperative for peace and stability which is the basis upon which the continent’s renewal is to be built.” In addition to being used as a tool by Western powers to keep Africa marginalized, the ICC’s pursuit of justice comes at the expense of peace, needed for the development of states and societies in Africa.

³⁷⁰ Jordaan 2012: 291.

³⁷¹ Bapela 2015.

Several statements by government officials reveal that the South African executive shared in the AU's critique of the Court's lack of legitimacy. John Jeffery remarked that, while South Africa still believes in the Court's underlying value of prosecuting perpetrators, its current institutional manifestation "is not the Court we signed up for."³⁷² Over the years, the ICC has "diverted from its mandate" and has come to be "influenced by powerful non-member states." Echoing this critique is also Bapela who laments: "the ICC has also fallen victim of the geopolitical calculus of the powerful, who demand that it tries some cases while rejecting its involvement in others."³⁷³

Borrowing from existing arguments about the Court's bias against Africans and its instrumental value for regime weakening in Africa through its European funders, the South African executive took advantage of this existing legitimacy problem. While the argument is not new, what is important in terms of legitimation is that the claim promises to portray the country as norm-abiding. This is so because the country reaffirmed its commitment to the underlying norm of the Court—individual criminal accountability—but what harms the Court's legitimacy as the ultimate actor for this norm is its unfair application. By doing this, the GSA legitimized its own actions through pointing out the illegitimacy of the ICC.

The episode highlighted the important role of institutional legitimacy and the need to legitimize politically controversial decisions to various audiences. For the regional audience, the South African executive highlighted competing legal obligations between the ICC and the AU—loyalty to which organization—and utilizing the Court-critical discourse that has become mainstream within the AU and some African countries.³⁷⁴ Using the AU's arguments of the

³⁷² Jeffery 2015, paraphrased.

³⁷³ Bapela 2015.

³⁷⁴ Akande 2013. He reports that the Kenyan delegation had claimed that the ultimate goal of the ICC case was "to effect regime change in Kenya, pure and simple."

Court’s racial bias against Africans and its instrumental value for regime weakening in Africa through its European funders, the South African executive took advantage of existing ICC-critical discourse and sided with what is widely perceived as the common African position on the Court. While it is incorrect to assert that all African states oppose the ICC, it is a useful rhetorical trope for the AU to depict it this way, suggesting its representation of a common African position. South Africa expressed its solidarity with a position depicted as the continental consensus.

South Africa: One Case among Many Non-Arrests

South Africa is not the only African country facing a loyalty conflict. While the arrest warrants are intended to try the suspect at the ICC and the enforcement burden lies on ICC member states, al-Bashir has traveled widely since 2009.³⁷⁵ The AU’s non-cooperation policy has created an environment in which al-Bashir’s non-arrest has become permissible. Between 2009, when the first ICC arrest warrant was issued for him, and 2016, the Sudanese president visited eight ICC states parties without arrest: Chad, Kenya, Djibouti, Malawi, Nigeria, Democratic Republic of the Congo (DRC), South Africa and Uganda. Table 15 presents an overview of al-Bashir’s travels.

Table 15: Overview of al-Bashir Visits to African Countries

Category	Countries
African ICC states parties who threatened arrest or where trips were canceled	Botswana (2009), Uganda (2009), Central African Republic (2010), South Africa (2009, 2010), Zambia (2010), Malawi (2012)
African ICC states parties he visited without arrest	Chad (2010, 2011, 2013, 2014), Kenya (2010), Djibouti (2011), Malawi (2011), Nigeria (2013), DRC (2014), South Africa (2015), Uganda (2016)

³⁷⁵ Unless otherwise indicated, information on Bashir’s canceled trips and travel dates and reasons is taken from *Bashir-Watch*, a website that presents his travel map as well as a timeline for the Darfur conflict.

In many respects South Africa is not unique among African ICC countries that have hosted al-Bashir. First, they have used the same arguments as South Africa used in 2015. Nigeria, Chad, the DRC, and Malawi submitted observations to the Court following their hosting of al-Bashir.³⁷⁶ These countries explained their actions mostly with al-Bashir's head of state immunity (Malawi, DRC, Chad) and that the AU's non-cooperation policy prevented them from arresting him (DRC, Chad). Moreover, in striking resemblance to South Africa, they explained their non-arrest with the fact that he attended an AU event rather than a national event (Nigeria). Nigeria and the DRC also bring forth time constraints as reasons, arguing that his visit was too short to allow the relevant national authorities to become active and act on the arrest warrant.

Second, like in the South Africa case, statements by government officials suggest other political reasons behind the non-arrest. In public statements surrounding al-Bashir's 2011 visit to Malawi, Mutharika's government indicated that Malawi does not "have any business to do with the arrest of President Omar."³⁷⁷ Other statements by the former President indicate a general opposition to the Court: "Why on earth should your leaders be dragged to the Hague when your judges are right here" and that ICC intervention means that African judges and judicial systems "would be seen to be admitting failure if they continue to allow its own leaders to appear before an international judiciary for offenses committed on the African continent."³⁷⁸ While Kenya's official replies to the Court remain either absent or classified, official statements by the Kenyan government suggest opposition to the Court based on political reasons. Assistant Foreign Minister Richard Onyonka said: "Sudan's stability is vitally linked to Kenya's continued peace and well being."³⁷⁹ Arresting al-Bashir would have had detrimental effects on regional peace

³⁷⁶ Kenya, and Djibouti either did not file observations or these are not publicly accessible.

³⁷⁷ BBC News 2011.

³⁷⁸ Sudan Tribune 2011.

³⁷⁹ Guardian 2010.

efforts. Moreover, Kenya's transport minister Amos Kimunya clarified that "Kenyan interests must come first, regional interests come second and international interests come third."³⁸⁰ In terms of legal reasons for the non-arrest, Onyonka is paraphrased as saying that the cooperation obligation to the ICC is "superseded by an African Union decision to not arrest and extradite Bashir." While the country never explained its actions to the Court, officials' statements point to regional political reasons as well as the AU's non-cooperation policy.

Third, all these visits prompted the same responses from the ICC. The Court's pre-trial chamber(s) were alerted by the Registry or the OTP that a visit to a state party is imminent or that it happened recently, prompting the chambers to remind the countries of their cooperation obligation and then inviting them to submit official explanations about why the arrest warrants were not executed. Once a country submitted these, the Chamber has mostly found them in non-compliance and referred them to the ASP, the ICC's legislative body, or the UNSC. After Chad failed to file observations with the Court and did not consult prior to the visits, the Court's Pre-Trial Chamber II used starker language to reprimand the country for its "consistent pattern of deliberately disregarding not only the Court's decisions and orders related to its obligation to cooperate in the arrest and surrender of Omar Al-Bashir" as well as Security Council Resolution 1593(2005).³⁸¹

Apart from these similarities in judicial and political justifications, the South Africa visit is unique in the repercussions that followed. The extent to which this visit caused a public outcry and criticism from abroad and domestically makes South Africa stand out. Influential newspapers called the actions "disgraceful"³⁸² and signaling the end of Mandela's legacy.³⁸³

³⁸⁰ *Guardian* 2010.

³⁸¹ Pre-Trial Chamber II, ICC-02/05-01/09-151: 9, para. 21.

³⁸² *New York Times*, Editorial Board 2015.

³⁸³ *Economist* 2015.

Critique also came from neighboring Botswana which found South Africa's actions "disappointing" and stated that the "African Union should lead by example in this regard."³⁸⁴ However, there are no reports about other AU countries openly criticizing South Africa. The US expressed deep concern about the events, and the EU expressed its expectation that South Africa would "act in accordance with UN Security Council 1593, in executing the arrest warrant against any ICC indictee present in the country."³⁸⁵ Possible reasons for this increased attention on the South Africa visit are that South Africa was more widely perceived as an ICC supporter, making its actions more surprising and newsworthy. More generally, the visit and the inaction of the government seem to go against widespread international perception of South Africa as a human rights-and treaty-respecting country.

Conclusion

The chapter has advanced three claims. First, the chronological tracing of how the GSA has engaged with the Court has shown a shift in strong support for the Court to more modest support where the government supported ICC-critical AU decisions after 2009. The analysis showed how cooperation varies over time as the GSA's calculations about associated reputation costs and benefits changes as well as the social environment in which the state operated (here the AU becoming more critical). Second, South Africa had all the domestic ingredients for compliance, yet its regional ambitions played a role in not arresting a fellow African leader. In justifying the non-arrest, the GSA's arguments paralleled ICC-critical discourse that has been advanced by several African countries ever since the Court started issuing arrest warrants for sitting heads of state, including its adverse effects on peace processes and its skewed prosecution

³⁸⁴ Mogopodi 2015.

³⁸⁵ European Union 2015.

record. Third, the AU's non-cooperation policy has been instrumental in obstructing cooperation with the ICC and thus progress and accountability in the al-Bashir case. Several African countries that hosted al-Bashir and flouted their legal obligation under the Rome Statute to arrest him justified their decisions with similar arguments raised by the GSA in 2015.

From a practical perspective, this analysis casts doubts on whether al-Bashir will ever be arrested as long as he is in office. While his travels over the past years have been severely curtailed by the arrest warrants and civil society pressure and suits in many countries have led him to cancel trips, his visits to African ICC member states have come with no legal consequence when he attended summits of regional organizations. However, the events in South Africa suggest that he will be very careful to travel there again even for international summits given the speed and efficiency of the legal system to demand arrest.

Chapter 5: Kenya's Selective Cooperation with the International Criminal Court

This chapter analyzes the cooperation of the government of Kenya (GOK) in the case against current Kenyan president Uhuru Kenyatta (*Kenyatta* case). The *Kenyatta* case shares several features with the ICC case against al-Bashir. First, both cases involve leading state officials and they reveal the high degree to which these cases are fraught with politicization. In terms of domestic discourse, these cases are depicted as affronts to the country itself, an assault on the sovereignty of a nation, whereas the Court's legitimacy is challenged as a tool of Western imperialism. Second, in both cases, the AU became a venue through which leaders sought to rally support for their cause against the Court by having cases delayed and dropped. As with Sudanese president al-Bashir, the *Kenyatta* case thus represents a 'hard case' of cooperation because it involved a leading political official of a country who is charged by the Court for international crimes. We can expect that an accused wielding the power of the state has more tools of resistance at its disposal and more power and reputation to lose when charged and potentially deemed guilty by an international court. These two factors make it likely that cooperation with the Court is *not forthcoming*.

Despite this expectation, the GOK's engagement with the Court can best be described as *selective* cooperation or pro forma cooperation. With Kenya being a state party to the ICC, the GOK engaged in *selective compliance* rather than outright non-compliance as done in Sudan. The analysis below shows that the GOK adopted a dual strategy with the ICC by employing a wide array of legal and non-legal means of engagement with the Court, some supportive, others flagrantly obstructive. Given the extent of and resources spent on opposition to the Court, the GOK was unwilling to comply timely and fully, contrary to their claims about capacity constraints as the reason for non-compliance. Selective cooperation allowed the GOK to claim

that it is honoring the country's treaty obligations while subverting them politically. I explain the GOK's cooperation behavior and various strategies meant to delay and undermine cases or weakening the ICC with the government's desire to not be prosecuted by an international court. Thus, there was a fundamental interest misalignment between the GOK and the ICC. This is a rational choice argument where the costs of compliance—furthering the trial of a Kenyan by cooperating with the court—outweigh the potential benefits of doing so. In addition to avoiding prosecution, non-cooperation is best explained by domestic resistance against the ICC, which the Jubilee Alliance successfully rallied during the 2013 election, as well as the absence of accountability pressure by Western countries. However, rather than refusing to cooperate with the Court altogether, the GOK cooperated with the ICC due to reputation concerns, its desire to uphold existent trade relationships with ICC-supporting countries, as well as its campaign promises to continue cooperation.

This chapter contributes to the literature on state cooperation and Kenya's engagement with the Court in four ways. First, the analysis disentangles the GOK's two-pronged cooperation approach of legal and non-legal strategies to cooperate with the ICC while not cooperating with it in other ways and at other times. This contrasts with recent work by Hillebrecht and Straus who have argued that the GOK has stayed within the confines of the Rome Statute in its engagement with the Court (apart from witness intimidation).³⁸⁶ Rather, I argue, the GOK has employed several non-legal strategies beyond the Rome Statute framework that have contributed to the ICC's institutional weakening in Africa. This suggests that research on cooperation with international organizations and courts can benefit from a disaggregation of 'means of cooperation' to better chart how states can subvert institutions while simultaneously claiming to be cooperating with them.

³⁸⁶ Hillebrecht and Straus 2017.

Second, the analysis over time reveals that cooperation varies chronologically. We can discern two stages in the cooperation by the GOK. Once Kenyatta and Ruto were charged by the Court, the Kibaki government led a diplomatic initiative to delay the cases. After Kenyatta became President of Kenya in 2013, cooperation declined further, thus corroborating the expectation that once the accused are in a position of power, cooperation is less forthcoming. This shows that ratification of a treaty and formal domestic implementation are not the end of the compliance story. Rather, charting compliance behavior over time helps us better understand the changing calculations by governments and normative contexts in which states make compliance decisions.

Third, mirroring the events of the al-Bashir case, the analysis shows the important role of the African Union (AU). The regional organization needs to be considered as an intervening actor in the Africa-ICC compliance context. The GOK lobbied extensively at the AU and African governments over the years to garner support for its stance against the ICC and with the support of other ICC-critical states was able to position the AU as a main forum of resistance. The AU's involvement helped present several African countries' misgivings about the ICC as the African continental position—despite significant variation among African states—and lend additional institutional weight to the criticisms of the Court.

Fourth, some widespread compliance explanations hold less explanatory power in the Kenya analysis. Simmons' argument about the presence of domestic compliance groups fostering compliance does not explain the GOK's actions, as these groups' presence did not contribute to improved compliance. Moreover, lack of capacity was found to be irrelevant for non-compliance in Kenya. The extent to which state resources were used to bypass ICC actions instead suggests that weak states may effectively leverage their resources for non-compliance. I provide a soft

rational choice explanation for the selective cooperation of the Kenyatta administration: Seeking to avoid prosecution had to be balanced with the potential reputation costs of renegeing on the Rome Statute outright and the derogation's potential future effects on cooperation.

The chapter proceeds with two main empirical sections. The first section charts Kenya's engagement with the Court over time, presenting the GOK's behavior in the mandatory and voluntary realms. The second section investigates the reasons behind the GOK's selective cooperation behavior and the last section summarizes the findings and reflects on their implications for the Court and international justice.

Kenya's Cooperation and Engagement with the International Criminal Court

Analyzing the GOK's behavior toward the ICC over time complicates an understanding of compliance as simply binary. The GOK used legal and non-legal means to simultaneously undermine the Court while also presenting the image of a compliant state by engaging in selective cooperation. Table 16 presents the various legal and non-legal means of engagement as found in the *Kenyatta* case. The next sections show how the GOK engaged in skillful legal maneuvering to appear cooperative at a superficial level without providing much substantive cooperation so much so that Obel Hansen called the GOK "masters of manipulation."³⁸⁷

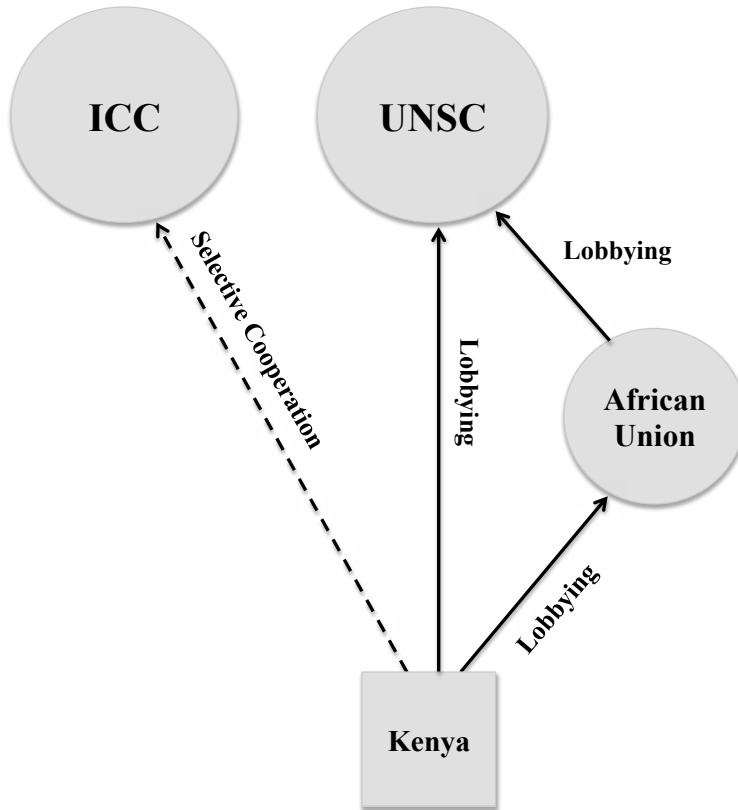
³⁸⁷ Hansen 2012a.

Table 16: Overview of Kenya's Engagement with the ICC

Government actions	Institution and Norm Strengthening	Institution and Norm Weakening
Legal actions	GOK signs, ratifies and implements Rome Statute Accused appear at ICC GOK signs memorandum of understanding with ICC GOK allows ICC to open office and conduct investigations in Kenya Complies with parts of records request	UN deferral attempts Admissibility challenge Non-arrest Bashir Non-compliance with records requests Seeking absence from trial Obstruction of police investigation
Non-legal actions	GOK refuses to sign BIA with USA Tacit support for ICC intervention (“Don’t be vague, let’s go to The Hague”)	Shuttle diplomacy at UN and AU Invitation and non-arrest of al-Bashir ASP Rule 134 change Intimidation of witnesses, bribery Anti-ICC election campaign Leading AU withdrawal movement

Figure 14 visualizes the cooperation context in which the GOK is making compliance decisions, most notably the AU and UN. Rather than analyzing cooperation merely between the GOK and the ICC, we have to disaggregate the international environment.

Figure 14: Cooperation Environment for Kenya



The *Kenyatta* case shows how states may leverage other actors in their engagement with the ICC and how the international environment may foster or hamper cooperation with the Court. The GOK’s expansive lobbying campaign against the ICC and the anti-ICC rhetoric the GOK helped promote, have garnered support among other African states. After the ICC announced charges against Kenyatta and other leading Kenyan officials and nationals, the GOK under Kibaki started campaigning at the AU and UN for the cases’ deferral. The AU acted as a venue where the GOK (as well as other ICC-critical leaders) was able to air its grievances against the Court and seek amplification of their demands. Gaining regional support lent further support to the GOK’s ICC-critical position because anti-ICC arguments could then be depicted as ‘the continental position.’ Regionalizing the trial against two Kenyans by reframing them as a “pan-

African problem by presenting them as the latest salvo in a long line of affronts to the sovereignty of all African nations” not only increased pressure on the ICC but it also “deflected concerns about impunity by diverting focus from the defendants to a wider political context.”³⁸⁸

Hillebrecht and Straus characterized Kenya’s cooperation with the ICC as ‘pro forma cooperation,’ meaning that the country has generally stayed within the confines of the Rome Statute and played along with the Court’s proceedings while also taking every opportunity to exculpate the indicted.³⁸⁹ According to the authors, Kenya’s strategy involved “cooperation on a shallow level to [court requests]; second, challenging the Court’s decisions on admissibility and the location of the trials within the channels set up by the ICC; and third, using extra-judicial means to intimidate witnesses.”³⁹⁰ This chapter confirms the presence of these three strategies, but it highlights additional means, such as diplomacy at the UN and AU to bypass ICC action, consistent anti-Court rhetoric to delegitimize the Court cases against Kenyan officials, as well as leading a movement for withdrawal from the ICC by African states. This chapter thus outlines the full spectrum of the GOK’s actions, drawing attention to the wide array of strategies countries may use to undermine international judicial interventions. Taking seriously this range of strategies highlights how the GOK has effectively engaged in institution weakening by fostering anti-Court rhetoric in Kenya and at the AU and leading a continental exit movement. This contrasts with Hillebrecht and Strauss’ contention that the GOK stayed within the confines of the Rome Statute to counter the court.

A second text that analyzes the GOK’s engagement with the ICC is by Helfer and Showalter.³⁹¹ Both my and their account distinguish between strategies operating within the

³⁸⁸ Ibid., 45.

³⁸⁹ Hillebrecht and Straus 2017: 24.

³⁹⁰ Ibid., 25.

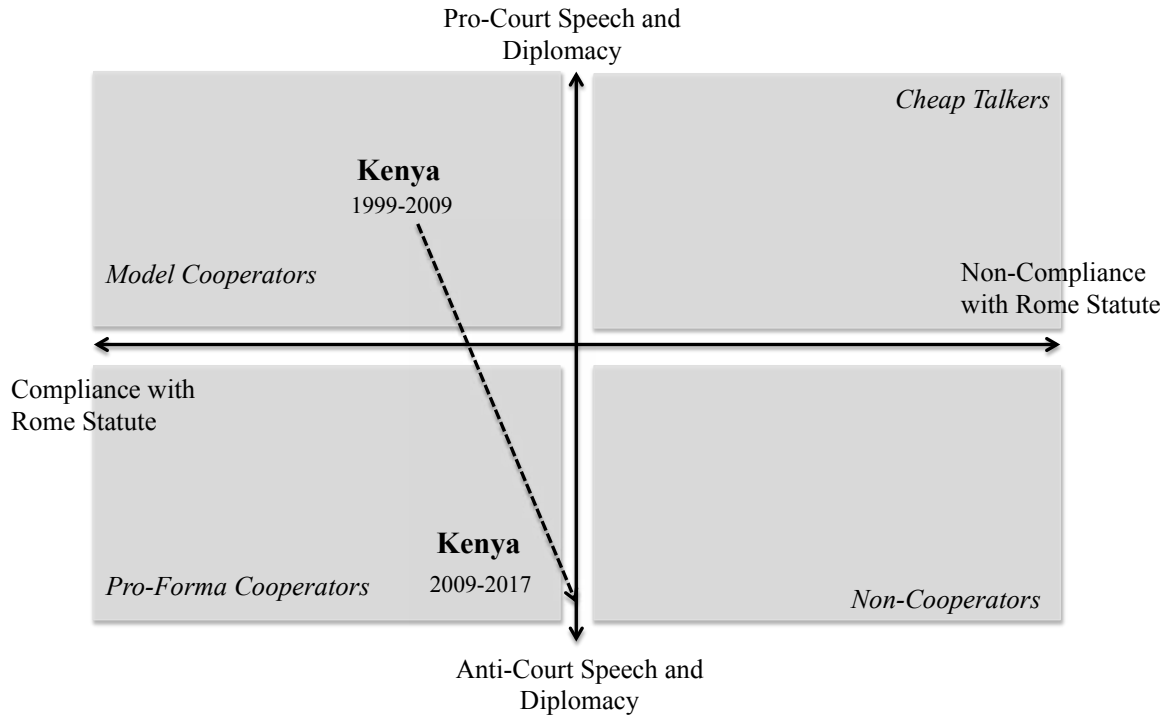
³⁹¹ Helfer and Showalter 2017.

confines of the Rome Statute and others outside of the treaty. However, my distinction is clearer than theirs in that they consider refusal to comply with court requests as a strategy outside of the Rome Statute along with “threatening national and regional withdrawal from the Rome Statute” and “using rhetoric to politicize the trials.”³⁹² While I agree that the latter two—promoting exit from the treaty and using anti-Court rhetoric—constitute non-legal strategies, non-compliance with court requests can only be placed within the confines of the Rome Statute considering that the Statute’s Chapter 9 explicitly creates a legal obligation on states parties to cooperate fully with the Court.

Figure 15 presents the GOK’s shift in cooperation behavior over time. Tracing the cooperation process over time revealed the changing interests among the GOK as the charges against leading Kenyan officials represent an ‘exogenous shock’ that led the Kibaki administration to engage in extensive diplomacy. Rhetoric and anti-Court actions increase after Kenyatta and Ruto ascent to the Presidency in 2013. Over time, the interest misalignment between the GOK and the ICC increased and cooperation declined.

³⁹² Ibid., 11.

Figure 15: Shift in Cooperation Behavior by Kenya



Early Legal and Non-Legal Support for the Court

Kenya’s early engagement with the young Court was largely positive as the GOK took legal steps to comply with the Rome Statute and refused to sign agreements that countered the Statute’s purpose. Kenya signed the Rome Statute in August 1999 under President Daniel arap Moi. Mueller argues that the GOK signed the treaty “largely due to pressure from local human rights groups”³⁹³ but an alternative explanation is Moi’s wish to deflect mounting Western criticism for his repressive political tactics.³⁹⁴ In March 2005, the GOK ratified the treaty under President Mwai Kibaki with little controversy. Debates in parliament and between activists largely focused on “delays in ratification and on reconciling the parts of the Kenyan

³⁹³ Mueller 2014: 29.

³⁹⁴ For instance, in 1991, international donors suspended \$250 million in aid to Kenya. Within one month of the measure, Moi reinstated multiparty politics. See Barkan 2004.

constitution that gave immunity to the president, something the Rome Statute prohibited,” thus presenting an image of a country little concerned that it would become the target of an ICC investigation.³⁹⁵ Ratification of the Rome Statute also occurred despite “constant pressure by the United States not to ratify the treaty and its subsequent domestication into law.”³⁹⁶ To implement the Rome Statute, Kenya drafted the International Crimes Bill in 2005 but the law only passed in 2008, a delay that resulted from the government’s focus on other priorities and the lack of domestic pressure groups.³⁹⁷ Many domestic human rights groups did not regard implementation as a priority, seeing it as a “foreign driven” priority without any direct relationship to domestic human rights issues such as poverty, development, and terrorism.³⁹⁸ Kenya ultimately enacted the International Crimes Act of 2008 in December 2008 and it entered into force in January 2009.

In another sign of compliance with the Rome Statute and its spirit, Kenya refused to sign a Bilateral Immunity Agreement (BIA) with the United States.³⁹⁹ Kenya opposed the BIA on legal and political grounds, with GOK representatives arguing that signing a BIA would amount to double standards given the country’s commitment to the ICC, and that non-signing was a sign of opposing the United States’ “intimidation and diplomatic arm-twisting” on BIAs.⁴⁰⁰ Consequently, the US suspended some forms of military assistance to Kenya but only for a short time.⁴⁰¹ In 2005, US authorities had secretly expressed frustration at Kenya’s resistance to

³⁹⁵ Mueller 2014: 29.

³⁹⁶ Ngure 2011: 6.

³⁹⁷ Ford 2008: 57.

³⁹⁸ *Ibid.*, 69.

³⁹⁹ BIAs were part of the George W. Bush administration’s approach to the Court in the early years of the ICC’s operation. Worried about US citizens being charged at the Court, the US encouraged/incentivized other countries to sign BIAs, pledging that they would not hand over US citizens to the ICC. While the concluded BIAs remain in force, sanctions on the countries that declined to sign have since been repealed.

⁴⁰⁰ Cotton and Odongo 2007: 28.

⁴⁰¹ Ford 2008: 76.

“intensive Embassy lobbying” and “all types of inducements, arm-twisting and threats to sign the so-called Article 98 agreement.”⁴⁰²

Despite these signs of early support for the Court, Kenya declined to arrest ICC suspect al-Bashir during his visit in 2010. A statement by the Kenyan Ministry of Foreign Affairs justified the non-arrest with Kenya’s “legitimate and strategic interest in ensuring peace and stability in the sub-region and promoting peace, justice and reconciliation in the Sudan” as well as the UN’s inaction to defer the case as wanted by Kenya and the AU. President Kibaki remarked that he wished “that the international community would appreciate the delicate situation of Sudan and act proactively. We should not isolate the people of Sudan. Let us encourage them to play their rightful role in the community of nations.”⁴⁰³

These brief examples suggest that Kenya was largely supportive toward the ICC until it became the subject of an investigation itself. Political action on the Rome Statute occurred with little controversy over its details, albeit not being a national priority. However, al-Bashir’s visit and his non-arrest suggest that Kenya did not value compliance with the ICC above solidarity with fellow African leaders and acting in unison with AU policy. At the time when al-Bashir visited the country, Kenya was already on the ICC’s radar. This suggests that the GOK’s actions were linked to reputation concerns about its social standing in Africa, thus acting in line with the AU non-cooperation policy on al-Bashir allowed it to cement its reputation among African states. Just months later, in the fall of 2010, the GOK would start to lobby the AU and African government to support its own campaign against the ICC and for the deferral of cases against Kenyans.

⁴⁰² Gaitho 2011.

⁴⁰³ Menya 2010.

Tacit Support for the Court after PEV and Entrance of the Court

This section provides a brief background to the post-election violence of 2007/2008 (PEV) during which the events occurred that led the ICC to initiate cases against leading Kenyan officials. In December 2007, Kenyans were called to vote in the presidential election, and incumbent President Kibaki was declared the winner over Raila Odinga. Odinga had commanded a strong lead in the polls before the election, prompting Odinga's supporters to claim election fraud when Kibaki was announced as the winner. The PEV that ensued was mainly directed against Kikuyus, the same ethnic group as Kibaki. Over the next two months, over 1,100 people were killed and 350,000 displaced. In February 2008, the parties of the two contenders entered into a settlement establishing a coalition government (National Accords) through mediation by the AU and Kofi Annan.

The National Accords included the appointment of a Commission of Inquiry into the violence, later dubbed Waki Commission after its chair, Kenyan Justice Philip Waki. The Commission's goal was to further investigate the PEV's causes and suggest mechanisms for accountability. In its October 2008 report, the Commission suggested the establishment of a truth commission and a hybrid Special Tribunal to prosecute PEV perpetrators. The Commission also handed a sealed envelope with the names of the main alleged perpetrators and boxes of evidence to Annan. Moreover, the report included a self-enforcing mechanism: If the GOK failed to establish the recommended special tribunal by 30 January 2009, "Annan was requested to forward the envelope and evidence to the ICC."⁴⁰⁴

The Kenyan parliament failed to pass a motion to establish the tribunal several times in February and July 2009.⁴⁰⁵ Chants of 'Don't be vague, let's go to The Hague' expressed the fears

⁴⁰⁴ Sriram and Brown 2012: 224.

⁴⁰⁵ Kariuki 2009.

of lawmakers that the GOK pushed for the local tribunal to shield its own officials from prosecutions.⁴⁰⁶ Legislators opposed the measures for several reasons, including that it allowed for presidential pardons while others feared to be prosecuted themselves. In contrast to a special tribunal, which could indict more people more quickly, some preferred ICC action given the Court's past record of long investigations and a tendency to prosecute only the 'biggest fish.'⁴⁰⁷ In late July 2009, the self-enforcing provision took hold and Annan handed the envelop to the ICC's Office of the Prosecutor (OTP). The support for the Waki Commission and the subsequent failure to establish a special tribunal can be seen as tacit support for an ICC intervention given that no domestic consensus was found for a special tribunal: "While there was no formal, direct referral of the Kenyan situation to the ICC by the state in question, there was certainly a deliberate assent to the Court's involvement by the coalition government."⁴⁰⁸

In March 2010, the ICC's Pre-Trial Chamber (PTC) II authorized Chief Prosecutor Moreno Ocampo to start an investigation into the PEV. According to interviews with local NGOs, the ICC's intervention in Kenya started out with "lots of optimism" and "huge support" by a population who had little trust in their own judicial system.⁴⁰⁹ In December, the PTC II released the names of six individuals who would later become known as the 'Ocampo Six': Uhuru Kenyatta (at the time, Deputy Prime Minister and Minister for Finance), William Ruto, Francis Muthaura (Head of Public Service and Cabinet Secretary), Henry Kosgey (Minister for Industrialisation), Joshua arap Sang (radio presenter), and Muhammed Hussein Ali (commissioner of the Kenyan police during the PEV).

⁴⁰⁶ Daily Nation 2011a.

⁴⁰⁷ Sriram and Brown 2012: 224.

⁴⁰⁸ Okwara 2011: 7.

⁴⁰⁹ Interview 012. The sentiment was also expressed in Interview 013.

Legal and Non-Legal Means: Efforts to Block the ICC Cases through the UN and AU

The support for the ICC intervention started to wane after the summons to appear for these six individuals were issued. A “deliberate effort” was made to undermine the investigation.⁴¹⁰ From the announcement of the six suspects, we see government efforts to block the trials at the domestic and regional level, thus lending support for the argument that a desire to shield elites from prosecution helps explain the non-cooperation. Regionally, the GOK tried to rally support to have the cases deferred at the UN.⁴¹¹ To that end, former Vice President Kalonzo Musyoka was tasked to engage in shuttle diplomacy across Africa and in various Western capitals to shore up support for the deferral. In late 2010, he visited more than 10 African countries in two months to gather support from heads of state for a joint AU resolution supporting Kenya’s deferral request.⁴¹² In addition, then Trade Minister Chirau Mwakwere visited Botswana, Swaziland, and Zimbabwe with the same intention.⁴¹³ One interviewee described the Kenyan government’s approach to lobbying the AU as “bulldozing” to the point where some governments grew tired of the continuous focus on Kenya and that Kenya “seized” the AU and the ICC’s Assembly of States Parties (ASP) by pushing its agenda aggressively.⁴¹⁴

In March 2011, Musyoka also headed a Kenyan delegation to New York where he met with UNSC president Li Baodong of China. Asked about the GOK’s position on the ICC, he said: “All we want is [for] the UN Security Council to consider positively the Africa Union

⁴¹⁰ Interview 012.

⁴¹¹ Per the Rome Statute’s Article 16, cases can be deferred for one year: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” However, a deferral has never happened before. Chapter VII of the UN Charter allows the UNSC to take measures to “maintain or restore international peace and security” if it determines “the existence of any threat to the peace, breach of peace or act of aggression.” This has proven a high threshold to achieve.

⁴¹² Among them Uganda, Tanzania, Ethiopia, Gabon, Nigeria, South Africa, Malawi, Libya, Egypt, and Zambia.

⁴¹³ Standard on Sunday Team 2013.

⁴¹⁴ Interview 013.

resolution endorsing Kenya’s request for a 12 month deferral to allow us to complete reforms and embark on local trials.”⁴¹⁵ Agriculture minister Sally Kosgei briefed Nigeria, Gabon and South Africa—then African UNSC members—about ongoing domestic reforms, including elements of the new Kenyan Constitution that would enable the country to try PEV perpetrators domestically. Musyoka’s press secretary, Kaplich Barsito, explained that the diplomatic offensive was aimed at supporting local judicial processes but also “that the ICC process has the potential to affect Kenya’s fragile stability and could spill to the region.”⁴¹⁶ The lobbying efforts continued as Trade Minister Mwakwere visited Bosnia and Lebanon, and Kosgei and Sambili visited Brazil⁴¹⁷ and Kalonzo held meetings with then AU chairman Obiang Nguema to ensure local justice mechanisms.⁴¹⁸

In January 2011, African leaders supported Kenya’s deferral efforts at the AU to “allow for a National Mechanism to investigate and prosecute the cases under a reformed Judiciary provided for in the new constitutional dispensation, in line with the principle of complementarity” and to “support of the ongoing peace building and national reconciliation processes, in order to prevent the resumption of conflict and violence.”⁴¹⁹ In fact, the AU Assembly continued to call for the cases’ deferrals at the UN and expressed its regret over the ICC’s failure to accept Kenya’s admissibility challenge over the following years.⁴²⁰ Despite these diplomatic efforts, Kenya’s deferral motion failed to garner enough support at the UNSC because it was deemed

⁴¹⁵ Daily Nation 2011b.

⁴¹⁶ Barasa 2011.

⁴¹⁷ Standard on Sunday Team 2013.

⁴¹⁸ Menya 2011.

⁴¹⁹ Assembly of the African Union, Assembly/AU/Dec.334(XVI): para. 6.

⁴²⁰ Assembly of the African Union, Assembly/AU/Dec.366(XVII); Assembly of the African Union, Assembly/AU/Dec.397(XVIII); Assembly of the African Union, Assembly/AU/Dec.419(XIX); Assembly of the African Union, Assembly/AU/Dec.482(XXI); Assembly of the African Union, Assembly/AU/Dec.547(XXIV).

that the situation in Kenya did not constitute a threat to international peace and security.⁴²¹

Another UN deferral bid failed in November 2013.⁴²² The GOK initiated another deferral attempt in 2015 to achieve delay in the ICC case against Ruto and Sang.

The failure of these deferral attempts lent support to the narrative of marginalization the GOK was fostering. It can be argued that the GOK knew very well that the deferral attempts were fruitless because deferrals can only be made when the UNSC deems a situation a threat to international peace and security. It would be hard to argue that this was the case in 2011, 2013, and 2015. One argument for why the deferrals were pursued nonetheless is that they bolstered the GOK's claim that African positions, as represented by the AU Assembly deferral decision, were marginalized in UN institutions: "The government used each rejection to strengthen the narrative that the defendants' prosecutions were evidence of a deeper problem:

Africa's marginalization by the West. That narrative politicized the ICC, undermining its legitimacy."⁴²³ The failure of the deferral attempts gave additional credence to the ICC's Kenyan cases being pan-African problems rather than purely domestic matters. Onyango-Obbo has characterized Kenya's AU lobbying campaign case for deferral as "the most pan-African posture any Nairobi government has ever had to take."⁴²⁴

Legal Means: Challenging the Admissibility of Cases at the ICC

Apart from domestic and regional political efforts to bypass ICC intervention, Kenya also took steps in the legal realm. In March 2011, Justice Minister Mutula Kilonzo said "Kenya will

⁴²¹ Jillo 2011.

⁴²² United Nations 2013.

⁴²³ Helfer and Showalter 2017: 12.

⁴²⁴ Quoted in Rosen 2014.

challenge the right of the ICC to try the cases”⁴²⁵ and Kibaki said that “Kenya will fast track laws to implement its new constitution, set up a supreme court and reform its judiciary to strengthen accountability of the courts to handle the trials of suspects.”⁴²⁶ Seeking to trigger the Court’s complementarity rule whereas the ICC does not intervene when genuine domestic proceedings are ongoing, Kenya launched an admissibility challenge in March 2011.⁴²⁷ The GOK argued that in light of ongoing constitutional and judicial reforms,⁴²⁸ including new democratic checks and balances,⁴²⁹ it was now better equipped to investigate and prosecute cases arising from the PEV. Setting out a timeline for the following months, the GOK promised to submit regular reports about the reforms’ implementation progress.

On 30 May 2011, the ICC Chamber rejected the GOK’s admissibility challenge. First, the Chamber expressed doubts that Kenya would actually start proceedings against the same persons currently under ICC investigations for the same conduct and not just at the same level of hierarchy.⁴³⁰ Second, the Chamber dismissed the GOK’s reform timeline as lacking concrete evidence of ongoing investigations: “It is apparent that the Government of Kenya in its challenge relied mainly on judicial reform actions and promises for future investigative activities.”⁴³¹ This failure to have the cases tried locally provided additional support for a narrative of marginalization by the Court—again the ICC had decided against the Kenyan government. Employing legal means had once again, mirroring the experience with deferral attempts, left the GOK at the losing end of the ICC-GOK ‘virtual trial.’

⁴²⁵ Reuters 2012.

⁴²⁶ Ibid.

⁴²⁷ Pre-Trial Chamber II, ICC-01/09-01/11 and ICC-01/09-02/11.

⁴²⁸ Ibid., 3, para. 2.

⁴²⁹ Ibid., 19, para. 47-48.

⁴³⁰ Pre-Trial Chamber II, ICC-01/09-02/11-96: para. 54.

⁴³¹ Ibid., 25, para. 64.

Legal Means: Selective Cooperation with Court Requests

In addition to seeking deferrals and bypassing ICC action based on national proceedings, the GOK delayed responding to and executing court requests. While some court requests were complied with, a majority of requests—those deemed most important by the OTP to prove Kenyatta’s guilt beyond a reasonable doubt—remained unexecuted.

The GOK complied with some court requests. For instance, the accused did appear at the ICC in The Hague when they were supposed to. Early on in the investigations, in December 2010, Moreno-Ocampo met with President Kibaki and Prime Minister Odinga to seek assurances that “should he issue summonses, he would face no roadblocks from the GOK. Both leaders agreed to cooperate.”⁴³² Subsequently, the Ocampo Six appeared at the ICC in April 2011, in compliance with the summonses to appear, and in September, they also appeared for their respective confirmation of charges hearings. Moreover, the GOK allowed the Court to conduct in-country investigations and set up an office.⁴³³ In 2010, the government also signed a memorandum of understanding with the Court. The GOK complied with parts of a records request whereby it provided some of Kenyatta’s bank records, however, only relating to a period spanning three to four months and not the three years on which the OTP had sought records. The GOK also claimed it had not found any intelligence records on Kenyatta from the period between 1 June 2007 and 15 December 2010, hence they complied with the request.⁴³⁴

Legal Means: Non-Compliance with Records Request

However, much litigation attests to the difficult legal battles over the GOK’s compliance with court requests. The continued legal battle went so far as to the OTP demanding Kenya to be

⁴³² Okwara 2011: 10.

⁴³³ Mueller 2014.

⁴³⁴ Kenyans for Peace with Truth and Justice 2014: 10.

deemed as non-compliant twice. Litigation in the *Kenyatta* case has revealed the extent to which the GOK has stalled for time and has pursued a selective cooperation strategy. The ICC's Trial Chamber V used harsh language in May 2013 to describe the systematic effort to undermine the ICC:

However, since the beginning of the OTP's investigations in April 2010, the GoK has constructed an outward appearance of cooperation, while failing to execute fully the OTP's most important requests. Indeed, while the GoK has provided some cooperation and has complied with a number of OTP requests, the most critical documents and records sought by the OTP remain outstanding, despite the OTP's exhaustive efforts to urge the GoK to furnish these items. The outstanding documents and records that the OTP has requested from the GoK have been pending for periods that range from one to three years. The individual and cumulative effect of the GoK's actions has been to undermine the investigation in these cases and limit the body of evidence available to the Chamber at trial.⁴³⁵

Kenyatta's role in the PEV is supposed to have turned mainly around the financing of activities and behind the scenes orchestrating. The OTP alleged that Kenyatta "provided large quantities of money to intermediaries, which was funneled down and delivered as cash to the perpetrators of the post-election violence in Nakuru and Naivasha, enabling them to carry out acts of rape and murder, and resulting in the forced displacement of thousands."⁴³⁶

To produce relevant records to substantiate these allegations, the Court sent a request for assistance to the GOK on 24 April 2012. The government did not react substantively to this request for 19 months. In June 2012, the GOK "asked for more detailed information or a schedule of items requested." During a meeting in July 2012, members of the OTP and the Kenyan Attorney General (AG) agreed that no additional information was required from the

⁴³⁵ Trial Chamber V, ICC-01/09-02/11-733-Red: para. 4.

⁴³⁶ Kenyans for Peace with Truth and Justice 2014: 4.

OTP to ensure compliance with the Records Request.⁴³⁷ Despite these assurances, nothing happened for 19 months. With only two months left before the start of the trial, the OTP sought the help of the ICC’s Trial Chamber, citing the GOK’s “intransigence” and “obfuscation.”⁴³⁸ Dismissing the GOK’s assertion that it required more time to collect information from various sources and consent from relevant individuals, the OTP stressed that “financial records relevant to the alleged commission of crimes can be obtained by any national law enforcement agency acting in good faith without undue difficulty.”⁴³⁹

The Prosecutor and leading Kenyan officials discussed the records request and stressed its importance during several meetings in July and October 2012 in which the GOK ensured its continued willingness to execute the request. However, the GOK did not meet the set deadlines of 30 November 2012 and 9 January 2013. In its responses to the OTP, the GOK merely addressed the freezing of assets part of the request but not the other requested records. In response to the non-execution of the records request, the OTP applied for a finding of non-compliance, arguing that:

[t]he information of the type sought in the Records Request is standard in criminal investigations with a financial dimension. It is routinely obtained without undue burden on state resources. A law enforcement authority acting in good faith could normally be expected to be in possession of such records in a matter of days or weeks. The GoK’s failure to do so 19 months after the Records Request was sent is unjustifiable, especially in the absence of proper explanation.⁴⁴⁰

Three months later, in February 2014, the Chamber held a status conference in which the GOK argued that it was unable to comply with a request from the OTP and that instead a court

⁴³⁷ Trial Chamber V(B), ICC-01/09-02/11-866-Red: para. 8. Pursuant to Trial Chamber V(b)’s order ICC-01/09-02/11-900, dated 12th February 2014, this document is reclassified as Public.

⁴³⁸ Ibid., para. 2.

⁴³⁹ Ibid., para. 3.

⁴⁴⁰ Ibid., para. 27.

order must be issued to produce the requested records.⁴⁴¹ Seeking to draw a distinction between the ICC’s judicial chambers as the proper ‘court’ and the OTP, the Kenyan AG argued that requests must emanate from the court and not the OTP. In response to this exchange, the Chamber asked the OTP on 31 March 2014 to send a revised records request to the GOK which should meet the requirements of specificity, relevance, and necessity, and that it wished to receive regular updates about the progress of executing the revised records request.⁴⁴² The revised request involved eight distinct areas including bank accounts, telephone numbers, motor vehicle records, and income tax returns.⁴⁴³

At another status conference in July 2014, the Kenyan AG described the revised request as “a fishing expedition or something that is akin to setting up the Government of Kenya so that it fails and carries the can.”⁴⁴⁴ He also asserted that during the ongoing restructuring of the ministry “1.3 million files to have been misfiled, misplaced or lost.”⁴⁴⁵ Moreover, Muigai claimed that there were no records that Kenyatta owned any land, a statement that “raised eyebrows in Kenya, since it is common knowledge that the Kenyatta family is one of the biggest landowners in the country” and that just weeks before the status conference, the central lands registry in Nairobi had been shut down for 10 days during which the National Land Commission was denied access to the registry.⁴⁴⁶

In the periodic updates on the record request’s execution, the OTP noted in September that the GOK had provided some bank records, however, only relating to a period spanning three to four months and not the three years on which the OTP had sought records. No information had

⁴⁴¹ International Criminal Court, ICC-01/09-02/11-T-28-ENG ET WT 13-02-2014.

⁴⁴² Kenyans for Peace with Truth and Justice 2014: 5.

⁴⁴³ Ibid., 6.

⁴⁴⁴ International Criminal Court, ICC-01/09-02/11-T-30-ENG ET WT 09-07-2014: 17, lines 5-7.

⁴⁴⁵ Ibid., 11-12, lines 25-4.

⁴⁴⁶ Kenyans for Peace with Truth and Justice 2014: 6.

been provided with regards to other records. The GOK's explanations were based on the inability to find the information or said information being private. For instance, with regard to information about the companies in which Kenyatta had an ownership interest, the GOK's submission argued that "the legal and administrative regime employed at the Companies registry . . . makes it impossible to do a search by using an individual's [sic] or any other search item other than [the name of the company or the registration number of the company]." ⁴⁴⁷ From an overview provided by the NGO Kenyans for Peace with Truth and Justice, the only requests that were complied with relate to bank records (albeit only for 3-4 months period in 2008/09) and foreign exchange records. ⁴⁴⁸ On land records, the Kenyan Ministry of Land, Housing and Urban Development stated that it was impossible to execute the request because the OTP would need to provide more concrete information, including the relevant Land Reference number, a copy of the identification document of the person/company seeking the search, and a copy of the registration map or deed plan of the property. ⁴⁴⁹ The Chamber later deemed this behavior by the Kenyan government "unhelpful." ⁴⁵⁰

A first sign that there was serious trouble for the OTP's case against Kenyatta came in September 2014, when the OTP informed the Trial Chamber that it was unable to commence trial the next month, given that there was not sufficient evidence to prove Kenyatta's guilt beyond reasonable doubt. ⁴⁵¹ In the five months since the revised records request was issued, the GOK "has produced a total of 73 pages of documentation" with the "large majority of the

⁴⁴⁷ Ibid., 8.

⁴⁴⁸ Ibid., 8-9.

⁴⁴⁹ Trial Chamber V(B), ICC-01/09-02/11-982: para. 29.

⁴⁵⁰ Ibid., para. 56.

⁴⁵¹ Trial Chamber V(B), ICC-01/09-02/11-944: para. 2.

material sought in the Revised Request remains outstanding.”⁴⁵² Hence, the OTP requested a further adjournment of the case until the GOK executed the records request fully.

On 3 December 2014, the Trial Chamber decided *not* to refer Kenya to the ASP for non-compliance despite finding that “the approach of the Kenyan Government, as outlined above, falls short of the standard of good faith cooperation required under Article 93 of the Statute. The Chamber considers that this failure has reached the threshold of non-compliance.”⁴⁵³ The GOK had argued that it had “cooperated fully” and that in turn the OTP had “not demonstrated a ‘cooperative approach’ in relation to the Revised Request by not providing responses to requests from the Kenyan Government for further information” which hindered execution of the request.⁴⁵⁴ While criticizing the GOK’s inconsistent execution of the records request, the Chamber also chastised the OTP for its lack of follow-up on the original records request and for subpar investigations.⁴⁵⁵ Due to the OTP’s deficient investigation, the Chamber saw itself unable to regard the GOK’s assertions as rebutted. The Chamber ultimately rejected the OTP’s motion for a non-compliance finding because even if the records were presented their usefulness remained speculative, and a referral to the ASP could cause more uncertainty and delay in the proceedings.⁴⁵⁶

Not satisfied with the Trial Chamber’s decision, the OTP sought appeal, which was granted in March 2015.⁴⁵⁷ In August 2015, the Appeals Chamber reversed the Trial Chamber’s decision and required the Chamber to make a new determination: “The Appeals Chamber finds that the Trial Chamber erred in the exercise of its discretion by conflating the non-compliance

⁴⁵² Ibid., para. 5.

⁴⁵³ Trial Chamber V(B), ICC-01/09-02/11-982: para. 78.

⁴⁵⁴ Ibid., para. 23.

⁴⁵⁵ Ibid., para. 88.

⁴⁵⁶ Ibid., para. 82.

⁴⁵⁷ Trial Chamber V(B), ICC-01/09-02/11-1004.

proceedings against Kenya with the criminal proceedings against Mr Kenyatta, by failing to address whether judicial measures had been exhausted and by assessing the sufficiency of evidence and the conduct of the Prosecutor in an inconsistent manner.”⁴⁵⁸

It took the Trial Chamber more than a year to deliver its final decision.⁴⁵⁹ In September 2016, the Chamber decided that the GOK “has failed to comply with a cooperation request that has prevented the Court from exercising its functions and power under the Statute” and referred the matter to the ASP.⁴⁶⁰

Legal Means: Non-Compliance with Freezing of Assets Court Request

Apart from the records request, the GOK also delayed response to the request for freezing of assets. On 5 April 2011, the Court’s Pre-Trial Chamber ordered the Registrar to prepare and transmit a cooperation request to Kenya to identify, trace and freeze or seize Kenyatta’s property and assets, and to provide regular updates on the progress in executing this request.⁴⁶¹ The request was sent one year later in April 2012. It was not until February 2014 when a Registry Report brought the lack of compliance with the request to the judges’ attention. For three years, the court order had not been complied with or even been communicated about, nor had the GOK complied with the stipulation of regular progress reports. In its delayed response, the GOK challenged the request’s legality because it assumed that 1. the accused persons had already been found guilty of the crimes and that 2. the accused were actually in possession of the demanded documents.⁴⁶² The OTP responded that “an interpretation of the Statute requiring the Pre-Trial

⁴⁵⁸ Appeals Chamber, ICC-01/09-02/11-1032: para. 90.

⁴⁵⁹ Trial Chamber V(B), ICC-01/09-02/11-1037.

⁴⁶⁰ Ibid., para. 27.

⁴⁶¹ Pre-Trial Chamber I, ICC-01/09-02/11-42-Conf.: 5. This is the citation for the confidential order given in the 8 July 2014 decision on the matter in ICC-01/09-02/11-931-Conf 09-07-2014, “Decision on the implementation of the request to freeze assets.”

⁴⁶² Registry Report, ICC-01/09-02/11-905-Conf.: para. 3.

Chamber to wait until *after a conviction* ‘defies logic’” and that “the position held by the Kenyan Government is merely pretext and an attempt to obstruct the proceedings.”⁴⁶³

In its decision, the Chamber found that “there has been a substantial unexplained delay on the part of the Kenyan Government in either giving effect to the Pre-Trial Chamber’s Order or raising any concerns which may have prevented execution of the request.”⁴⁶⁴ However, the Chamber’s majority suspended the order until further notice because the Prosecution had stated it did not have enough evidence for a conviction at that point.

Legal Means: Absence from Trials

Once Kenyatta and Ruto became President and Vice President in Kenya in March 2013, their defense teams also took legal and political steps to have the defendants be allowed to be absent from trial or participate via video to take care of their official state functions. In February 2013, both Kenyatta and Ruto’s defense teams filed motions to have them participate via video link, and later in April Ruto’s team filed a similar motion requesting excusal from trial.⁴⁶⁵ In June 2013, Trial Chamber V(A) granted Ruto conditional excusal from trial,⁴⁶⁶ and in early September Kenyatta’s defense team made a similar request for what they described as a ‘Ruto Relief’ to excuse Kenyatta from continuous presence at trial.⁴⁶⁷ Relying on the Ruto Relief, Trial Chamber V(B) granted Kenyatta’s excusal “in order to permit him to discharge his functions of state as the executive President of Kenya; while his trial proceeds, as it must do, in this Court.”⁴⁶⁸ Kenyatta would have to attend the most important sessions of the trial, including opening and

⁴⁶³ Trial Chamber V(B), ICC-01/09-02/11-931-Conf 09-07-2014: 5 para. 7 (emphasis added).

⁴⁶⁴ *Ibid.*, 14, para. 26.

⁴⁶⁵ Trial Chamber V, ICC-01/09-02/11-667; Trial Chamber V, ICC-01/09-01/11-685.

⁴⁶⁶ Trial Chamber V(A), ICC-01/09-01/11-777.

⁴⁶⁷ International Criminal Court, ICC-01/09-02/11-T-26-ENG.

⁴⁶⁸ *Ibid.*, para. 4.

closing statements and the delivery of the judgment.⁴⁶⁹ His absence from trial was excused only “for purposes of accommodating the discharge of his duties as the President of Kenya.”⁴⁷⁰

However, one week after granting Kenyatta’s conditional excusal, the Appeals Chamber reversed the decision. The Appeals judges decided that the Trial Chamber had “interpreted the scope of its discretion too broadly and thereby exceeded the limits of its discretionary power.”⁴⁷¹ By granting a broad excusal policy, the Trial Chamber had provided Ruto “with what amounts to a blanket excusal before the trial had even commenced, effectively making his absence the general rule and his presence an exception.”⁴⁷² The ruling meant that Ruto would have to remain in The Hague for the remainder of his trial but he could apply for excusal on a case-by-case basis. Subsequently, Kenyatta’s request for excusal was rejected in November 2013. The judges held that Kenyatta would “as a general rule, have to be present for his trial” except in exceptional circumstances.⁴⁷³

After this judicial repudiation—which added insult to injury after the failed UN deferral attempts and admissibility challenge—the GOK shifted the issue into a non-legal venue. At the annual meeting of the ASP in 2013, the ICC states parties amended Rule 134 of the ICC’s Rules of Procedure and Evidence to make recuse allowable. This rule change occurred “following intense lobbying” and “pressure from the African Union (AU) and the Kenyan government, which have arguably left no stone unturned in their efforts to shield Kenyatta from trial.”⁴⁷⁴ However, Schwarz argues that the rule change was initiated by other states to stymie momentum behind African withdrawal from the Court in light of the UNSC’s repeated failures to defer the

⁴⁶⁹ Ibid., para. 5a.

⁴⁷⁰ Ibid., para. 5b.

⁴⁷¹ Appeals Chamber, ICC-01/09-01/11-1066: para. 63.

⁴⁷² Ibid.

⁴⁷³ Trial Chamber V(B), ICC-01/09-02/11-863: para. 16.

⁴⁷⁴ Momanyi and Jennings 2013.

cases and the AU's decision that sitting heads of state should be immune.⁴⁷⁵ The new Rule 134 *quarter* allows an accused, subject to a summons to appear, to “submit a written request to the Trial Chamber to be excused and to be represented by counsel only” to “fulfill extraordinary public duties at the highest national level.”⁴⁷⁶

Non-Legal Means: Witness Interference

Witness problems also plagued the trial against Kenyatta and his alleged co-conspirator Muthaura. Witness four, whose evidence was critical in initially confirming the charges against the two, admitted to lying and taking bribes, leading to his evidence being dropped. Witness four had said he was present at meetings in the State House and the Nairobi Club where Kenyatta and Muthaura allegedly planned violence. Later, it was revealed that the witness “had been offered and accepted money from individuals holding themselves out as representatives of the accused to withdraw his testimony and provided e-mails and records that confirmed the bribery scheme.”⁴⁷⁷

By January 2014, the OTP had withdrawn 14 witnesses from the *Kenyatta* case. The Prosecution has described the negative impact of a “climate of fear” in Kenya that led them to withdraw various witnesses from the witness list: “While the Prosecution does not have evidence suggesting that these witnesses were subject to direct intimidation, their reluctance to testify appears to have been motivated, at least in part, by the anti-ICC climate in certain parts of Kenyan society.”⁴⁷⁸ Witnesses were concerned that testifying against Kenyatta would expose them and their families to retaliation by his supporters. It has also exerted a chilling effect on potential witnesses as some individuals refused to be included on the witness list because

⁴⁷⁵ Schwarz 2016: 101.

⁴⁷⁶ International Criminal Court, Rules of Procedure and Evidence, Rule 134 *quarter*.

⁴⁷⁷ Gekara 2013.

⁴⁷⁸ Trial Chamber V(B), ICC-01/09-02/11-892-AnxA-Red: 2.

inclusion at trial would reveal their identities to the accused. In addition to stymieing witness participation, there is evidence of bribery as “individuals attempted to persuade Witnesses 4, 11 and 12 to recant their testimony and/or to withdraw their cooperation with the Prosecution. On some occasions, money was offered to them.”⁴⁷⁹

Kenyan AG Muigai has declined the allegations of witness interference. According to a statement, the GOK “has no knowledge of who the witnesses are and it has no desire to deal with the witnesses whatsoever. All the Kenyan Government has done as regards witnesses is to facilitate cooperation between the ICC Victims and Witnesses Unit and the Kenyan Witness Protection Agency.”⁴⁸⁰

Non-Legal Means: Delegitimizing the ICC as Campaign Strategy and Winning the Election

The ICC became a key theme during the 2013 general election in Kenya. While this election is a purely domestic issue, it deserves attention here because it helped to fuel anti-ICC sentiment in Kenya, thus increasing Kenyatta and Ruto’s claim against the ICC in case of their election success. Kenyatta and Ruto used the ICC charges to depict their cases as affronts to Kenyan sovereignty and to the people of Kenya. The election campaign thus represented a crucial moment in time where an ICC state party engaged in explicit opposition to an international treaty and delegitimization of the Court. Moreover, winning the election can be seen as an additional strategy in order to be in a superior political position to defy the Court and its cases. In fact, Mueller argued that winning the election was the “mega strategy” against the

⁴⁷⁹ Ibid., 3.

⁴⁸⁰ Daily Nation 2013a.

Court so that “demonizing the ICC became a way of solidifying ethnic polarization, thereby turning the 2013 election into another zero sum ethnic contest.”⁴⁸¹

Kenyatta announced that he would form a joint ticket with former minister Ruto, called the Jubilee Alliance. He explained the coalition with Ruto as an attempt to avoid a repeat of the PEV that had plagued the country five years ago. At a campaign rally in January 2013, he said: “Our Union with Ruto is informed by the need to preserve peace in the country and ensure that we do not walk the dark path we did after the presidential elections in 2007.”⁴⁸² With regard to the ongoing ICC cases against them, Kenyatta warned competitors to steer clear of using the cases to rouse opposition against them and that they believed in their innocence which the Court would ultimately have come to unearh: “We are not scared of the ICC process for we will defend ourselves and emerge victorious. Even God knows that we played no role in fanning the violence.”⁴⁸³ Many credit this alliance between Kenyatta and Ruto, each seen as the leader of their respective ethnic groups of the Kikuyu and Kalenjin, the main perpetrators of the 2007 violence, with the peaceful conduct of the 2013 elections.⁴⁸⁴

The Jubilee Alliance succeeded in creating a “siege mentality by persuading the majority of Kikuyus and a large number of non-Kikuyus that the ICC was a threat to the country’s sovereignty, peace, and stability. The coalition presented Kenyatta and Ruto as best placed to promote and defend people’s individual and collective interests.”⁴⁸⁵ By using the ICC as a tool in the election, Ruto and Kenyatta “became heroes of their respective ethnic groups” which unified

⁴⁸¹ Mueller 2014: 35.

⁴⁸² Wanga 2013.

⁴⁸³ Ibid.

⁴⁸⁴ Cf. Cheeseman, Lynch, and Willis (2014) argue that the elections were peaceful due to 1. The political realignment between former opponents, 2. A pervasive peace narrative, 3. partial democratic reforms, 4. A new constitution and shifting of some power to regional and local bodies so that voters that lost nationally won some battles regionally/locally.

⁴⁸⁵ Lynch 2015: 184.

their communities during the election season.⁴⁸⁶ They successfully convinced voters of their innocence, the ICC's ineptitude and bias, and their power, once in office, to restore stability and peace in Kenya.

To promote their message Ruto attended regular prayer meetings in 2011, in which also many parliamentarians participated. Reelection for these MPs depended on a strong anti-ICC stance.⁴⁸⁷ During the campaign, UhuRuto successfully reframed the ICC as an instance of neocolonialism and a threat to national sovereignty and stability.⁴⁸⁸ First, UhuRuto argued that the ICC was conducting flawed investigations in which they failed to charge those most responsible for the PEV and lacked detailed understanding of what actually happened. They questioned that no charges were levied against Odinga and Kibaki but explained that outcome away with the support they had received at the hands of Western states.⁴⁸⁹ The missing charges against Odinga were presented as another piece of evidence that the ICC was directed by its funding states in Europe.⁴⁹⁰ This argument served to undermine the Court's legitimacy in the eyes of the Kenyan population. Second, to renounce the Court and its biased nature, support for Jubilee Alliance "was promoted as a way of standing up to neocolonialism and of forging closer relations with African neighbors and new allies in the East; the election was cast as a competition between patriotic Kenyans and a patronizing West."⁴⁹¹ A vote cast for UhuRuto was depicted as a vote against foreign intervention in Kenyan affairs and a vote for closer ties with regional partners, equally critical of the ICC's prosecution focus on Africa. This neocolonial

⁴⁸⁶ Maupeu 2014: 29.

⁴⁸⁷ Ibid., 30.

⁴⁸⁸ Lynch 2014: 184.

⁴⁸⁹ Opiyo 2013.

⁴⁹⁰ Lynch 2014: 186.

⁴⁹¹ Ibid., 187.

narrative helped to counter-shame the ICC and to draw support for the GOK's anti-ICC cause among African nations and the AU.⁴⁹²

The potential of winning the election meant that holding political power could be used to deflect the ICC or avoiding presence at trials due to state business.⁴⁹³ This potential avenue for avoiding international criminal charges led Mueller to argue that the Kenya cases are unique because “it was the first time any ICC defendants had run for president and deputy president as part of a strategy to avoid trial.”⁴⁹⁴ More importantly perhaps, winning the election despite being charged by the ICC meant that UhuRuto could claim that a majority of Kenyans also oppose ICC action, thus lending them a mandate to counter the Court. Before the election, Kenyatta linked the election to their cases at the ICC: “I am not saying that international justice doesn't have a purpose... but if Kenyans do vote for us, it will mean that Kenyans themselves have questioned the process that has landed us at the International Criminal Court. But that does not mean that we will cease to cooperate because as I have said most importantly we understand and recognise the rule of law.”⁴⁹⁵

For Western nations, the running for office by an ICC suspect proved controversial. When former US ambassador to Kenya, Johnnie Carson, remarked during the election campaign that “actions have consequences,” alleged Western involvement/maneuvering with the Court came front and center.⁴⁹⁶ The statement, implying that Kenyans should not vote for UhuRuto, contradicted earlier statements by US President Barack Obama that the US would not favor any candidate in the election, and created “huge fallout.” Carson's statement proved “very influential” in fueling the anti-Western sentiment. Since then, Western diplomats have been reluctant to

⁴⁹² Lugano 2017.

⁴⁹³ Mueller 2014: 26-27.

⁴⁹⁴ Ibid., 27.

⁴⁹⁵ Opiyo 2013.

⁴⁹⁶ Interview 015.

make any statement with regard to the Court and the GOK's relationship with it. Interviews suggest that the issue has "strained" bilateral relations with Kenya so much that there was some relief after the ICC cases were over.⁴⁹⁷

Non-Legal Means: Diplomacy against the Court - Calling for Exit from the ICC

In its most severe anti-ICC action, the GOK led the continent-wide movement for withdrawal from the ICC justified by claims that the ICC is unfairly targeting Africans and imposing neocolonial justice. This diplomacy against the Court contributed to weakening the Court's standing in Africa. 2013 was a key moment for this exit movement, and it started with a domestic vote in Kenya to leave the Court on 5 September 2013.⁴⁹⁸ During the debate on the exit motion, Kenyan parliamentarians were very critical of the Waki Commission and the process that led to Kenyans being charged by the Court. Majority leader Aden Duale described these events as a "constitutional coup."⁴⁹⁹ The parliamentary vote highlighted the polarization surrounding the ICC in Kenyan politics with the Jubilee Alliance following a nationalistic narrative of the ICC violating Kenyan sovereignty against the will of the people. While before their election, Kenyatta and Ruto were individual subjects, they now served as symbols of the country's unity and sovereignty. In contrast, main opposition party Coalition for Reforms and Democracy (CORD) supported the ICC. The vote was likely influenced by the continued failures to relocate, defer, and terminate the trials. One Kenyan parliamentarian stated that the "reason for the Motion [to withdraw from the Rome Statute] is that despite cooperation, the ICC has not reciprocated with respect and even appeals are denied."⁵⁰⁰

⁴⁹⁷ Ibid.

⁴⁹⁸ Kagwanja 2013.

⁴⁹⁹ Ibid.

⁵⁰⁰ Hoehn 2013.

However, despite the support for Kenya's exit from the ICC in parliament, the executive did not sign the bill. One argument for why the GOK, despite its extensive regional efforts for exit, failed to seal Kenya's exit, is the desire to keep up 'cooperation appearance' or what Helfer and Showalter call the 'veneer of cooperation.' These motions to exit provided the leaders with domestic leverage for the exit movement, "public demonstrations of the desire of many Kenya legislators to withdraw from the Rome Statute," thus helping to bolster the larger continental push for withdrawal.⁵⁰¹ Kenyatta and Ruto thus appeared to be compliant, keeping with 2013 campaign promises to further cooperate with the ICC, which "prevented the government from appearing indefensibly uncooperative."⁵⁰²

After the election of Kenyatta to the Presidency in March 2013, the perception problem existed that Kenyatta as the president was seen to be on trial while technically the individual Uhuru Kenyatta was on trial. But from now on, the trial against him came to be seen as a trial against the will of a majority of Kenyans who elected him into highest office. After the election, Kenyatta warned the ICC: "I speak not as an accused person, but as the President of the sovereign Republic of Kenya. [. . .] If you want us to continue to cooperate let me make it clear that when Ruto is in the Hague I will be here, and when I am in the Hague, Ruto will be here."⁵⁰³ This narrative deliberately merged Kenyatta's responsibilities as President as a symbol of national unity with his trial, making the charges against him appear to be charges against the entire country.

In October 2013, the AU convened an extraordinary summit on the ICC issue at Kenya's request—a request supported by a two-thirds majority of AU member states.⁵⁰⁴ Kenya lobbied its

⁵⁰¹ Helfer and Showalter 2017: 18.

⁵⁰² Ibid., 20.

⁵⁰³ Ibid., 33.

⁵⁰⁴ Dersso 2013a.

fellow AU countries extensively before the summit.⁵⁰⁵ In his speech, Kenyatta launched several critiques at the ICC that together justify exit. While he never explicitly called on fellow countries to withdraw, his emphasis on new forms of colonialism and marginalization and disregard of African positions at the Court and the UN suggest exit as the only logical solution. He also thanked the AU for its continued support for Kenya: “As Kenya’s President, it gives me a feeling of deep and lasting pride to know that I can count on the African Union to listen and help in trying times. Africa has always stood by our side.”⁵⁰⁶ In contrast to the continued loyalty between the AU and Kenya, the ICC has proven disrespectful by ignoring the GOK’s various non-legal and legal attempts to delay and derail the cases: “The AU is the bastion of African sovereignty, and the vanguard of our unity. Yet the ICC deems it altogether unworthy of the minutest consideration. Presidents Kikwete, Museveni, Jonathan and Zuma have pronounced themselves on the court’s insensitivity, arrogance and disrespect.”

Describing Kenya as one of the “the good-faith subscribers” to the Court and the hopes they had invested in an independent criminal court, these supporters have now “fallen prey to their high-mindedness and idealism” given the Court’s and its main funders’ support for regime change in Africa and suggestions for how to handle domestic government affairs. For instance, Kenyatta reminded the West of statements before the Kenyan presidential election, especially those by Carson, which constituted “a fetid insult to Kenya and Africa. African sovereignty means nothing to the ICC and its patrons.”⁵⁰⁷

Kenyatta also stressed his cooperation while deploring the ICC for its lack of good faith cooperation and criticized the Court for its instrumentalization by Western powers: “The ICC has been reduced into a painfully farcical pantomime, a travesty that adds insult to the injury of

⁵⁰⁵ Dersso 2013b; Ludger Schadomsky 2013.

⁵⁰⁶ Daily Nation 2013b.

⁵⁰⁷ Ibid.

victims. It stopped being the home of justice the day it became the toy of declining imperial powers. This is the circumstance which today compels us to agree with the reasons US, China, Israel, India and other non-signatory States hold for abstaining from the Rome Treaty.”⁵⁰⁸

While African states failed to agree on an en masse withdrawal from the Court at the October 2013 summit, the AU Assembly passed a decision announcing that “no charges shall be commenced or continued before any International Court or Tribunal against any serving AU Head of State or Government or anybody acting or entitled to act in such capacity during their term of office.”⁵⁰⁹ This statement directly counters the Rome Statute’s provision that official capacity shall not exempt a person from ICC prosecution. Moreover, the AU argued that the ICC proceedings against Ruto and Uhuru “are beginning to adversely affect the ability of the Kenyan leaders in discharging their constitutional responsibilities,”⁵¹⁰ hence the summit decided that the trials “should be suspended until they complete their terms of office.”⁵¹¹ At the next AU summit in early 2016, Kenya proposed language for withdrawal from the Court.⁵¹²

The withdrawal movement that Kenya sparked continues to thrive but is struggling to overcome continental disagreements over the Court’s utility and legal strategies. In 2016, South Africa, Gambia, and Burundi announced their intent to withdraw from the Rome Statute. During its January 2017 summit, the AU encouraged member states to withdraw from the Court although many African states continue to support it.⁵¹³ In a rebuke to Kenya’s withdrawal

⁵⁰⁸ Ibid.

⁵⁰⁹ Extraordinary Session of the Assembly of the African Union, Ext/Assembly/AU/Dec.1(Oct.2013): para. 10.

⁵¹⁰ Dersso 2013a.

⁵¹¹ Extraordinary Session of the Assembly of the African Union, Ext/Assembly/AU/Dec.1(Oct.2013).

⁵¹² AFP 2016.

⁵¹³ States that have issued supportive statements include Nigeria, Senegal, Burkina Faso, Côte d’Ivoire, Mali, Malawi, Zambia, Tanzania, Ghana, Democratic Republic of Congo, Lesotho, Sierra Leone, and Botswana. Cf. Lansky 2016.

movement, Kenyan foreign minister Amina Mohamed lost the election for AU Commission Chair to Chad's Foreign Minister Moussa Faki Mahamat, who has supported the ICC.⁵¹⁴

Collapse of the Kenyatta Case

After vacating the October 2014 trial date and receiving another adjournment request from the OTP, the Trial Chamber decided in December 2014 that “the Prosecution does not have any concrete prospect of obtaining evidence sufficient to meet the standard required for trial and to sustain the current charges. In the Chamber's view, such circumstances should now weigh compellingly in favour of not further prolonging these proceedings.”⁵¹⁵ Given the Chamber's ultimatum of a one-week notice, the OTP dropped the charges against Kenyatta two days later: “The evidence has not improved to such an extent that Mr Kenyatta's alleged criminal responsibility can be proven beyond reasonable doubt. For this reason, and in light of the Trial Chamber's rejection of the Prosecution's request for an adjournment until the Government of Kenya complies with its co-operation obligations under the Rome Statute, the Prosecution withdraws its charges.”⁵¹⁶ The proceedings against Kenyatta were officially terminated in March 2015.⁵¹⁷

Explaining Selective Cooperation in the *Kenyatta* Case

The myriad legal and non-legal ways in which the GOK tried to stymie progress on the *Kenyatta* case suggest an unwillingness to cooperate with the Court. However, rather than outright refusing to cooperate with the Court (as Sudan has done), Kenyan officials pursued a

⁵¹⁴ York 2017.

⁵¹⁵ Trial Chamber V(B), ICC-01/09-02/11-981: para. 49.

⁵¹⁶ Trial Chamber V(B), ICC-01/09-02/11-983: para. 2.

⁵¹⁷ Trial Chamber V(B), ICC-01/09-02/11-1005.

more complex strategy. As shown above, the government complied with some court requests but not with others. The country operated within the legal confines of the Rome Statute, which allows countries to challenge the admissibility of cases and to seek delay at the UN. However, the GOK also operated outside of the legal realm by trying to derail the cases politically through engaging in diplomacy against the Court and led a continent-wide exit movement from the ICC. This placed the GOK between the non-cooperators and the pro forma cooperators.

This section draws on compliance scholarship introduced in Chapter 2 to reflect on possible reasons for non-cooperation and cooperation. On the one hand, the GOK's *non-cooperation* behavior is best explained by three factors: the elite's wish to avoid prosecution (misalignment of interest between GOK and ICC), the absence of international accountability pressure, and a domestic mandate against the Court. On the other hand, the government's *cooperation* behavior can be explained by the GOK's concerns for good trade relations, domestic support for compliance, and by reputation concerns. Table 17 presents these explanations in bold.

Table 17: Overview of Compliance Explanations in the Kenya Case

	Compliance	Non-compliance
International level	International pressures and dependence networks Enforcement Legitimacy of rule and institution	Lack of international pressure Dependence networks
Domestic level	Compliance constituencies Democratic values and institutions Eliminating domestic opponents Reputation concerns	(lack of compliance factors) Non-compliance constituencies Lack of state capacity Avoiding prosecution/interest misalignment

State capacity and civil society pressure are two compliance theories that hold less explanatory power for cooperation in the *Kenyatta* case. Lack of capacity features as a powerful domestic-level explanation for non-compliance⁵¹⁸ and it does help explain the delayed implementation of the Rome Statute. Implementation of the Rome Statute had not been a GOK priority. Instead, the GOK focused on other policy areas that were deemed more immediately important, especially the constitutional review process and the referendum.⁵¹⁹ Implementation action then stalled after the PEV in 2007/08.

Thus, while lack of state capacity obstructed Kenya's implementation, the vast amount of resources spent on continental lobbying against the ICC and the long unexplained delays in responding to court requests suggest that capacity constraints did not impact the GOK's non-compliance with court requests. Considering the long time periods in which the GOK did not reply to the records request and failed to consult with the OTP on potential challenges in executing them, it is hard to argue that the GOK was engaging in good faith compliance rather than just stalling for time.⁵²⁰ For instance, while the GOK had initially claimed that physically searching around 2 million companies records would be theoretically possible, it never followed up on the option and later declared that this was "impossible" due to the "legal and administrative regime"⁵²¹ and failed to pursue options other than the Companies Registry or to make inquiries with the Ministry of Land.⁵²² Given this, the Chamber was not convinced that "the failure to execute this category of the Revised Request is simply an issue of capacity, of practical or administrative barriers or a result of insufficient information having been provided

⁵¹⁸ Chayes and Chayes 1993; Cole 2015.

⁵¹⁹ Ford 2008: 68.

⁵²⁰ See "In this regard, the Chamber reiterates its view that cooperation is a continuing process and that both the requesting entity and the requested State should make genuine efforts to resolve any difficulties in order to facilitate the execution of a request." Trial Chamber V(B), ICC-01/09-02/11-982: para. 40.

⁵²¹ Ibid., para. 51.

⁵²² Ibid., para. 53.

by the Prosecution.”⁵²³ Thus, the *Kenyatta* case suggests that some countries, whose capacity we might expect to be detrimental to compliance, such as Global South countries, might actually be non-compliant for other reasons. Capacity might be limited in some sectors or territories of the state, but here, senior government officials had access to sufficient resources to delay and rally other governments against compliance with an international treaty. One ICC interviewee pointed out that the GOK had very good lawyers who would “answer a request with ten pages of counter questions on the request, asking to clarify.”⁵²⁴ So while this delayed the judicial process, it does not suggest a lack of capacity.

Another alternative explanation relates to civil society. Recent studies on compliance have highlighted the importance of domestic civil society groups that may either push for or against compliance.⁵²⁵ While Kenyan civil society is vibrant and has “historically been known for their capacity to enable political and institutional reform,”⁵²⁶ it has not succeeded in pushing the GOK toward full cooperation with the ICC. Several Kenyan CSOs initially preferred ICC intervention even if they could have pushed for domestic justice reforms and accountability during Kenya’s status as a preliminary investigation at the ICC from 2008 to 2010. Demoralized by the failed attempts to establish a special tribunal and by a lack of trust in Kenyan institutions and leadership to prosecute perpetrators, several CSOs had few interactions with the government. Many feared that pushing for domestic reforms might deter or delay “the ICC from opening up a formal investigation in Kenya.”⁵²⁷ The current CSO sector in Kenya is highly fractured and often short for money as foreign assistance is being increasingly funneled through the GOK rather than

⁵²³ Ibid., para. 54.

⁵²⁴ Interview 007.

⁵²⁵ Simmons 2009; Hillebrecht 2014.

⁵²⁶ Bjork and Goebertus 2011: 210.

⁵²⁷ Ibid., 219.

directly to groups.⁵²⁸ The NGO sector also lacked a policy entrepreneur early on that was pushing for implementation prior to the ICC's intervention. During the early 2000s, when countries were slowly implementing the Rome Statute in their domestic legal systems, there was not really a "particular official, local campaign or political grouping either advocating for or opposing implementation" which led to the relatively late domestication of the Rome Statute in Kenya.⁵²⁹ This suggests that while Kenya features a strong civil society sector, it had little impact on the GOK's compliance record. This counters the expectations suggested by compliance constituencies' theories.

Why Did the GOK Fail to Cooperate with the ICC?

The evidence presented in this chapter suggested that the GOK, at first through President Kibaki and then through the Kenyatta administration, was driven mainly by the impulse to avoid prosecution of high-ranking Kenyan officials. There was a misalignment of interests between the GOK and the ICC. The sequencing of events as described above suggested that the Kenyan elite was supportive of ICC intervention at first when the country failed to set up a special tribunal. Choosing The Hague was deemed a better solution to calls for accountability given the ICC's slow trial history and its focus on only a few perpetrators. This initial support for the ICC's intervention disappeared after the Court revealed the names of the accused, including several high-ranking government officials. The Kibaki government then started to lobby African governments and UNSC members to support case deferral at the UN—to no avail. Kenyatta and Ruto later won the presidential elections in 2013 *because* they were able to effectively depict

⁵²⁸ Lind and Howell 2010: 349.

⁵²⁹ Ford 2008: 58.

themselves as victims of an outside, Western-oriented court that was violating Kenyan sovereignty and the will of the Kenyan people.

This argument about avoiding prosecution mirrors several scholars' accounts. Hillebrecht and Straus argued that leaders make rational cost-benefit calculations when charged by the ICC: "Because the indictment is against the state incumbents, Kenyatta and Ruto prefer not to cooperate."⁵³⁰ Incentives among the GOK changed from initial ICC support to refusal to cooperate when the elites saw themselves prosecuted at the Court. Mueller advanced a similar argument related to political risk, positing that changes in political risk explain the switch from support for the Court to selective cooperation. After signing and ratifying the Rome Statute, "Kenya's changing politics and the weakness of the rule of law explain why Kenya initially was in favor of the ICC and signed on to the Rome Statute before political circumstances changed. Kenya then turned against the court and began to undermine it while minimally complying with its directives."⁵³¹ According to Helfer and Showalter, the GOK pursued a selective cooperation strategy of condemnation and cooperation because it yielded most benefits:

First, they enhanced the defendants' popularity in Kenya, ultimately helping to turn public opinion against the ICC. Second, the supposed willingness to cooperate likely made the government's backlash more palatable to other AU member states, generating regional support that enabled Kenya to place more political pressure on the ICC than it could have generated on its own.⁵³²

I agree with these claims but highlight additional factors. Rather than just wishing to avoid prosecution, the GOK was also free to not comply because Western donors refrained from pushing for compliance and because winning the election gave them a popular mandate for their

⁵³⁰ Hillebrecht and Straus 2017: 26.

⁵³¹ Mueller 2014: 28.

⁵³² Helfer and Showalter 2017: 48.

actions. These additional factors have to be considered to fully explain the GOK's non-cooperation with the ICC.

Thus, an additional reason for non-compliance was the combination of little outside donor pressure with Kenya's relative independence from outside aid. Contrary to the expectations of the dependence network theory,⁵³³ according to which key donors to Kenya that are also ICC supporters could have exerted pressure on the GOK to achieve more accountability, this donor pressure was absent. Western donors failed to put pressure on Kenya to provide accountability. While donors supported the creation of a special tribunal and indicated this in private meetings with the GOK immediately after the PEV, "they did not publicly threaten the government with sanctions or indicate that it would not be 'business as usual' if it did not establish the tribunal."⁵³⁴ Donors had dropped the focus on accountability by 2010 and were reluctant to exert pressure as long as Kenyatta and Ruto promised cooperation with the ICC. After the Westgate Mall attack in Nairobi in 2013, donors' attention shifted to security concerns and mitigating diplomatic tensions: "Aside from issuing cryptic warnings about the implications of non-compliance, donors did not apply any real political pressure on Kenya to increase its level of cooperation with the ICC. Donors recognized that their comments prior to the elections painted them into a corner."⁵³⁵ Despite this absent pressure it is doubtful if more pressure would have led to more cooperation because Kenya is not aid-dependent as only around 15% of the "country's public expenditures are foreign-financed [...]."⁵³⁶ This lack of aid dependence might help explain why even if donors had tied *full and speedy* ICC cooperation to continued aid, the GOK would have felt less constrained by these demands.

⁵³³ Hafner-Burton 2005; Meernik 2008; Goodliffe, Hawkins, Horne, and Nielson 2012; Berlin 2016. See theory chapter for a more detailed discussion.

⁵³⁴ Brown and Raddatz 2014: 48.

⁵³⁵ Ibid., 53.

⁵³⁶ Fengler 2011.

A third reason for non-cooperation is that Kenyatta and Ruto had a popular mandate after winning the 2013 elections. The majority of Kenyans who voted for them made their choice despite the charges at the ICC. Kenyatta and Ruto could afford to upset the Court through non-cooperation because they were elected despite the charges and with lots of support from their own ethnic groups. When disaggregating survey data along ethnic lines, it becomes evident that Kenyans who belong to the Kikuyu and Kalenjin ethnic groups, the groups that Kenyatta and Ruto belong to, hold “majority negative perceptions of the court, while groups associated with opposition politicians are highly supportive of its involvement.”⁵³⁷

This argument about a democratic mandate fueling non-compliance turns the ‘democracy theory’ of compliance on its head. Scholarship has consistently highlighted the importance of liberal norms or a democratic form of government for compliance due to belief in the rule of law, human rights, and the audience costs associated with renegeing on commitments.⁵³⁸ In contrast, in the ICC’s Kenyan cases, we see the accused being emboldened by their popular mandate to deny compliance with an international treaty. While democratic structures usually serve as an incentive for compliance with treaties based on the assumption that renegeing increases audience costs, in the *Kenyatta* case the election of ICC suspects emboldened them in their opposition to the Court.

This section argued that three factors combined together help explain the GOK’s non-cooperation with the ICC. Primary among them is the wish to avoid prosecution. However, I also highlight additional factors, which previous studies have neglected: absent pro-accountability pressure by the West and a popular mandate against the Court, which lend popular support for the GOK to resist the ICC. Kenyatta and Ruto won on an anti-ICC platform that depicted the

⁵³⁷ Lekalake and Buchanan-Clarke 2015: 2.

⁵³⁸ Bass 2000; Neumayer 2005; Kelley 2007; Wallace 2012. See Chapter 2 for a more detailed account.

court cases as affronts to Kenyan sovereignty. Resistance against the Court thus became legitimated through their ascent to the presidency.

Why did the GOK Cooperate?

In contrast to the Sudan where the government refused to cooperate altogether, the GOK engaged in selective cooperation. Two factors help explain the GOK's cooperation with the Court: global reputation concerns and a popular mandate. First, as mentioned in Chapter 2, states send various signals to other states by complying with an agreement or not. Non-compliance can lead other states to regard that state as non-trustworthy and prevent them from entering into future agreements or it may signal that the state regards that agreement and the associated states as less valuable. Hence, the GOK cooperated to not undermine regional and global trade relationships with ICC-supporting states, thus bolstering the country's reputation for adherence to IL. In 2013, the top five exporting countries from Kenya were Uganda, the United Kingdom, Tanzania, the Netherlands, and the US. The top five countries to which Kenya exported were India, China, United Arab Emirates, Japan, and South Africa.⁵³⁹ Regionally, a majority of Kenya's exports go to the East African Community and the Common Market for East and Southern Africa (COMESA) of which Kenya is a member.⁵⁴⁰ The European Union (EU) is the second most important export destination for Kenya's products, including flowers and fresh produce. In terms of who supports the ICC, this suggests a mixed picture. All EU members are also member states of the ICC as well as Uganda, Tanzania, and Burundi. However, several African trading partners, despite being ICC members have been increasingly critical of the Court in recent years such as Uganda and Burundi. Several COMESA states are openly hostile toward

⁵³⁹ World Integrated Trade Solution.

⁵⁴⁰ Embassy of the Republic of Kenya,

the Court and never became member states such as Sudan, Rwanda, Egypt, Ethiopia, and Zimbabwe. The GOK engaged in some cooperation with the Court due to its concern about its “long-term standing in the international system, as well as the future of its foreign policy and economy” which led the government to cooperate at least partly with “a Court that poses a clear threat to the survival of its leadership.”⁵⁴¹

Paradoxically, the same popular mandate argument that fueled non-compliance due to rising anti-ICC sentiment also helps explain cooperation in the *Kenyatta* case. While this might seem counterintuitive, Kenyatta and Ruto may have also felt a need to cooperate with Court superficially because a majority of Kenyans supported the cases. Survey data from 2015 indicates that “61% of Kenyans believe that the cases are an important tool for fighting impunity in the country.”⁵⁴² Moreover, a majority of respondents (55%) believed that the ICC is an impartial institution and that withdrawing from the ICC is a negative thing. 86% also supported Kenyatta’s attendance of Court hearings in The Hague.⁵⁴³ These data suggest that the public’s support for their leaders’ cooperation with the Court may have had an influence on Kenyatta and Ruto. While the opposition to the Court from their own ethnic groups suggests that their anti-ICC campaign platform from 2013 was effective in stirring or increasing anti-ICC sentiments, the appearance of doing what is widely expected and accepted might also have been weighed.

These reflections on the presence of international pressure suggest that there was little pro-accountability pressure from the West after 2010 and even less after 2013 when the two accused became President and Deputy President of Kenya. Rather than pro-compliance pressure, the GOK was emboldened by rising anti-ICC sentiment in Africa and especially in the East Africa region, which it also helped to fuel. Outright non-compliance was discarded as an option

⁵⁴¹ Hillebrecht and Straus 2017: 26-27.

⁵⁴² Lekalake and Buchanan-Clarke 2015: 2.

⁵⁴³ Ibid.

because it would have been too obviously political and could have tarnished the country's reputation as an IL compliant state. Instead, the GOK engaged in *just enough* compliance to credibly say that Kenya was honoring its treaty commitment to the ICC, thus allowing the GOK to be seen as a law-abiding state that honors international treaty obligations.

Conclusion

The analysis of the GOK's cooperation behavior in the *Kenyatta* case revealed the multiple ways in which states can cooperate with the ICC. Compliance and non-compliance can have both non-legal and legal facets, and states may at the same time comply and not comply. This selective cooperation only becomes evident when we analyze cooperation over time. The analysis above revealed the extent to which the GOK managed to cooperate superficially while at the same time declining to substantively engage with a majority of Court requests. It illustrates the enormous potential for ICC investigations against sitting heads of state to become undermined when alleged perpetrators wield authority over the state apparatus and thus can more easily obstruct investigations. While some means of engagement—shuttle diplomacy, UN deferral efforts, AU support seeking—mirror the engagement of Sudan with the Court, Kenya's status as a state party necessitated a more subtle approach that falls short of outright non-cooperation. Rather than outright refusing to cooperate with the Court, Kenyatta attended hearings and complied with some court requests while not complying with others and fueling anti-ICC sentiments at home and in Africa.

Domestic political calculations and lack of international accountability pressure help explain the non-cooperation side of this selective cooperation. Shielding oneself from prosecution provides a strong explanation given the wide array of legal and non-legal means as well as resources invested in fueling domestic and continental opposition to the Court. Kenya's

relative independence from donor contributions and the increasing focus of donors on Kenya's strategic importance as a bulwark against terrorism further help explain why the GOK might have been emboldened to defy the Court that many donors support. However, since many ICC supporters are Kenya's trade partners and the GOK seeks to be seen as compliant to benefit from future agreements, the GOK chose to cooperate to some extent as well as the fact that superficial compliance allowed the country to portray itself as honoring international treaty obligations. In addition, Kenya's non-compliance with the Rome Statute allowed the country to signal to its African peers that it would stay true to what the AU decided and its critical stance toward the Court in cases against leading state officials. Depicting the two groups as distinct—Western pressures for retributive justice and accountability on the one hand, and African pressures for local justice and head of state immunity on the other hand—made it possible for the GOK to depict its non-compliance as loyalty to African principles and resistance to Western impositions.

Chapter 6: Conclusion

Summary of Findings

Chapter 2 introduced the cooperation framework and situated the project within the transitional justice and norms scholarship as well as the scholarship on compliance with International Law (IL). I argued that we can distinguish between legal and non-legal means of engagement or cooperation behavior. The former originate in the Rome Statute and include mandatory obligations states have once they sign onto the Rome Statute, including ratification, domestic implementation, and compliance with court requests such as requests for arrest and surrender. Non-legal means go beyond the Rome Statute and include voluntary actions that can strengthen or undermine the Court, such as diplomacy and statements. Based on these legal and non-legal means of engagement, we can differentiate between four types of cooperators: model cooperators, pro-forma cooperators, cheap talkers, and non-cooperators.

Chapter 3 investigated the ways in which states express their support through statements about the Court, contrasting the UN and the AU. At the UN, I found consistent cross-regional support for the Court. While states voice critiques of the Court, they are often related to the UNSC's role in influencing the ICC cases. Moreover, we often see state-to-state criticism for failing to arrest ICC suspects. While Africa constitutes the most critical region, many African states continue to support the Court and more references expressing loyalty were issued in 2017 than in 2007. In contrast, AU decisions explicitly applauded African member states for their non-arrests because they were in line with AU policy. Moreover, AU decisions pushed for and created exceptions to accountability for leading state officials, thus directly counteracting the Rome Statute.

In Chapters 4 and 5, I analyzed the cooperation behaviors of South Africa and Kenya longitudinally with the Court. Using the cooperation framework introduced in Chapter 2, I argued that South Africa shifted from being a model cooperator to a non-cooperator when it decided to not arrest Sudanese President al-Bashir during his visit in June 2015. I explained the shift with the increasing development of an Africa-centered foreign policy and increasing concerns for its regional reputation. Thus, the interests of the government were not aligned with the interests of the ICC in June 2015. In addition, the African National Congress has become more ICC-critical over time and has advised the government to not break ranks with Africa on the ICC issue. The chapter also briefly analyzed the actions and justifications by other African states that hosted al-Bashir. Their actions suggest that the AU's non-cooperation policy provided a welcome legal 'out' for states preferring to let al-Bashir visit without a diplomatic fallout.

Chapter 5 shifted the attention to Kenya and the ICC case against current Kenyan President Kenyatta. I argued that we can also see a shift in Kenya's cooperation behavior toward the ICC over time, from a model cooperator, albeit less openly supportive than South Africa, to a non-cooperator. In contrast to South Africa, however, Kenya became a more outspoken and active non-cooperator and did so earlier, with the start of the ICC investigations against leading Kenyan officials in 2010. I explained the shift with the desire to avoid prosecution, hence the interests of the governments differed from the interests of the ICC. This interest misalignment drove the GOK's lobbying initiatives at the AU for mass exit from the Court. This intensive form of institution weakening was accompanied by a domestic election platform that delegitimized the ICC as a neocolonial imposter undermining Kenyan sovereignty.

Broader Theoretical and Methodological Implications of the Findings

The chapters introduced the various ways in which states may engage with the ICC. Together, they suggest that state cooperation varies over time and that future analyses on compliance can benefit from tracing cooperation behavior longitudinally to identify and explain shifts. What explained South Africa's cooperation and support for the Court in the early 2000s should not be assumed to hold true 15 years later. Rather than focusing only on ratification and implementation of international treaties as indicators and forms of compliance, I suggest to enlarge the 'cooperation field' by including diplomacy and statements that can contribute to or undermine an organization's legitimacy and effectiveness. The general framework introduced here also has the potential to be applied to other international organizations where the specific legal obligations differ. While states can still support the organization through statements and diplomacy, they can also comply with its respective treaty obligations, such as submitting regular reports or establishing domestic monitoring systems.

The AU stands out as an important intervening actor throughout the chapters. ICC-critical African states have used the AU for their own interests, making the AU a forum where important ICC-critical decisions have been passed. The AU then provided an alternative legal avenue whose own decisions counteract ICC arrest warrants and, despite criticism and legal debate as to their legally binding nature, have been used as legal justification for non-arrests by several African countries, including South Africa. In addition, the AU represents an alternative peer group, or even a primary peer group, to the 'West,' where African states seek to bolster their reputation for compliance. While reputation analyses often assume that non-compliance will harm a state's reputation, this may hold true only for similar agreements with the same peer group. Not arresting al-Bashir allowed South Africa to bolster its regional reputation regardless

of what the ‘West’ may think of South Africa’s reputation for compliance or human rights. Thus, with regards to the ICC, the AU possesses an actorness that makes it effective in influencing its member states’ external relations with other states and organizations.

In the broader theoretical debates about these inter-organizational relationships, the AU and the ICC represent opposing actors in the case studies I examined. However, one should not generalize from these findings to all African states and the accountability norm writ large. As stated above, the case studies emanate from the two ICC situations in which sitting heads of state are charged, and as such they differ from the majority of court cases. Contrasting the findings to state and AU behavior in cases where rebels have been charged should make us pause to posit a fundamental norm resistance from Africa against the accountability norm. Rather, *some* African countries have used the AU for their interests against the ICC *in the cases where ICC involvement has the potential to harm a fellow African leader*. Neither the AU nor individual countries have admonished the Court for its decisions when rebels were charged. For instance, despite Ugandan President Museveni’s commonplace attacks on the ICC, Uganda agreed to have former LRA commander Dominic Ongwen tried at the ICC after he was arrested in the DRC in January 2015. In addition, many ICC states parties in Africa continue to support the Court as can be seen in the lack of consensus in coordinating a continent-wide withdrawal from the Court.

Compliance in these cases can be explained by domestic-level factors. In the cases I investigate here, the interests are not aligned between state leaders and the ICC when it came to compliance with concrete court requests. When the Court charges state officials, cooperation becomes less likely as states may refuse to cooperate or engage in selective cooperation. These findings further support existing scholarship on the importance of domestic politics for compliance and the strategic nature of compliance. However, these domestic concerns are

channeled through the AU as an intermediary actor when Kenya leveraged the AU for its own agenda and South Africa was able to justify its non-arrest of al-Bashir with an AU decision.

In that sense, the dissertation speaks both to second-image theories of IR as well as the second-image reversed tradition. On the one hand, the cases suggest that domestic considerations about the potential costs of compliance and concerns for regional and global reputations can hamper cooperation. Thus, state cooperation with an international organization such as the ICC can be furthered or obstructed through domestic politics. On the other hand, the ICC (and the AU) can also impact domestic politics. In South Africa, the charges against al-Bashir and increasing AU action against the ICC prompted a shift in the ANC's and subsequently the South African executive's position vis-à-vis the Court. In Kenya, the charges against Kenyatta and other senior government officials prompted a regional lobbying offensive as well as the alliance between Kenyatta and Ruto during the 2013 presidential elections. Forged by convenience, the Uhuruto alliance under the Jubilee Alliance banner will continue to impact domestic politics, as both are running mates in the August 2017 presidential election.

Broader Policy Implications for Accountability through the ICC

For the ICC, the cases against sitting leaders have shown the immense hurdles when cases go against the interests and policy of the AU. This dissertation has revealed the focus of the AU on cases against sitting heads of state. Considering these odds, it seems likely that the Court will be reluctant to initiate more cases against sitting heads of state and rather shift its attention to rebel leaders and smaller fish to get some 'wins' for the Court. As the section below illustrates, cooperation has been more forthcoming in court cases where the interests of the sitting governments and the ICC are more aligned. However, in terms of the ICC's legitimacy, this strategy of focusing on rebel leaders carries enormous risks. It risks that the Court is accused of

one-sided justice when it charges rebel leaders but not officials during conflicts where both sides committed serious crimes. This has been the case in the Court's Uganda and Côte d'Ivoire situations.⁵⁴⁴

If the Court were to charge another sitting head of state, the record of the Kenyatta administration's cooperation behavior provides a 'blueprint' for recalcitrant governments that are legally obligated to cooperate but wish to not incriminate themselves by cooperating 'too much.' Hence, potential future suspects that are subject to a summons to appear now have a blueprint of to how to engage in selective cooperation, allowing the government to uphold a veneer of cooperation while at the same time undermining the Court in other forums.

The rather negative cooperation record in the case studies under analysis here also casts a more pessimistic light on the ICC's potential effects if state cooperation is not forthcoming. While this analysis concentrates on state (non-)cooperation as an external constraint on its work and effectiveness, the findings suggest several things in light of academic studies about the Court's potential for deterrence⁵⁴⁵ and its effects on peace processes on the ground.⁵⁴⁶ The South Africa case study has shown that the AU's non-cooperation policy has helped to make al-Bashir's non-arrest acceptable in African countries. Rather than a deterrent effect, the arrest warrant against al-Bashir emboldened the Sudanese government in its dismissal and non-cooperation with the Court. The charges against leading Kenyan officials led to heightened diplomacy at the AU and UN in support for delaying the cases as well as dropping them later, and even leading efforts for mass withdrawal from the Court. This suggests that cases against

⁵⁴⁴ In Uganda, while the investigation's focus was on the Lord's Resistance Army's and the national authorities after 2002 in northern Uganda, only arrest warrants for five LRA commanders have been issued. In Côte d'Ivoire, three individuals associated with the former regime are charged but not members of the current president's circle.

⁵⁴⁵ While scholars disagree about the extent to which deterrence is possible, most scholars agree that certain conditions need to be met: Cronin-Furman 2013; Hillebrecht 2016; Appel 2016; Jo and Simmons 2017.

⁵⁴⁶ Kersten 2016; Clark 2011; Oette 2010; Gegout 2013.

sitting governments have little accountability-furthering effects but risk increasing resistance to the Court and its work. For instance, Engbo Gissel argued that the extent to which the Court can impact peace negotiations depends on the level of ICC involvement.⁵⁴⁷ This means that the impact is larger when the ICC is more involved, i.e. as a court case proceeds through an investigation and into a trial phase. This *deeper involvement* by the Court and the starting of a trial substantially depends on whether the ICC receives state cooperation in the particular case. In the absence of state cooperation and the deepening of ICC involvement, the Court cannot affect peace processes positively or negatively.

Interest Alignment and AU Non-Involvement in ICC Cases against Rebel Leaders

The two detailed case studies in this dissertation are based on the similar case design where the outcomes differ. Since both countries involve cases against sitting heads of state, cooperation is less likely under these conditions because incentives to shield one's own are higher and state leaders have greater resources at their disposal to make cases 'go away': lawyers, planes and diplomats to lobby other governments and international organizations, voters to mobilize against the Court. Thus in cases where the interests of the ICC are diametrically opposed to those of the state—charging and arresting versus shielding—state cooperation is unlikely.

This argument, however, can only be upheld in broader comparisons with other court cases in which the interests of the government and the ICC *are aligned*. Preliminary evidence suggests that these situations, often stemming from self-referrals to the Court, have received greater cooperation from the sitting governments. This supports the interest alignment claim to some extent: Sitting governments were willing to refer their country to the Court, hence 'risk'

⁵⁴⁷ Gissel 2015.

that the Court would intervene judicially in the affairs of their country, presumably because they were confident that the Court would charge their political opponents. This is the ‘legal lasso’ argument advanced by Hillebrecht and Straus: Involving the ICC and having the Court charge domestic political opponents allows a sitting government to ‘get rid’ of a domestic rival.⁵⁴⁸

Indeed, the ICC has been charging rebels in most cases and has refrained from charging state officials of the governments that referred. Until the Kenya cases, the OTP had not charged individuals on both sides of a conflict. Table 18 presents an overview of the charges brought against individuals in each of the Court’s ongoing situations and the extent to which compliance has occurred. The situations in which the interests between the government and the ICC were aligned and cooperation occurred are shaded gray.

Table 18: Overview of ICC Situations and Cooperation Types

Situation Country	Number of AW and SA	Political Opponents Charged?	Cooperation Types
Georgia	0	N/A	N/A
Mali	1	yes	Model Cooperator
Côte d’Ivoire	3	yes	Model Cooperator
Kenya	9	some	Pro forma and Non-Cooperator
Libya	4	yes	Pro forma Cooperator
Darfur/Sudan	7	no	Non-Cooperator
DRC	6	yes	Model Cooperator
CAR (I and II)	5	yes	Model Cooperator
Uganda	5	yes	Pro forma cooperators

The ICC’s focus on rebel leaders has created criticism of the Court, which promised to bring charges against those deemed ‘most responsible’ regardless of which political side a person is on. The ICC maintains that it does investigate the actions of all sides and that when it fails to

⁵⁴⁸ Hillebrecht and Straus 2017.

bring charges it is often due to missing evidence or that the crimes do not pass the gravity threshold.⁵⁴⁹ Critics, however, assert that the Court fails to bring charges against government members even if evidence points to crimes, because the Court relies on the government's cooperation and goodwill toward the Court.⁵⁵⁰ The cases in this dissertation attest to this fact.

Outside of the Sudan and Kenya situations, cooperation has been 'forthcoming' as ICC officials stress: "[G]enerally we have very good cooperation on the routine types of assistance, such as access to territories, interviewing people, provision of records, including from the large number of African states where we have high volumes of requests, even non state parties."⁵⁵¹ While many are reluctant to categorize cooperation because that would represent a political statement and not "a judicial finding, an accurate statement,"⁵⁵² several highlight the successful cooperation by the DRC and CAR but also France, the Netherlands, and Belgium had very successful cooperation.⁵⁵³ In addition, "the authorities of Ivory Coast are very good in complying with their duty to cooperate. So that is something that you will hear less in the media because it works. What you will hear is when it doesn't work."⁵⁵⁴ It suggests that African states differ in their posture when at the AU from bilateral relations with the ICC. At AU summits ICC-supporting states may be less expressive of that support as they need to balance "how do they relate to their fellow African states and how they relate to the court."⁵⁵⁵

Five states referred their country to the Court: the DRC, Uganda, CAR twice (CAR I and II), and Mali. We can also add Côte d'Ivoire to the list because while the Prosecutor technically initiated the situation, the country signaled its willingness to cooperate and self-refer as it

⁵⁴⁹ Interviews 002, 004, and 006.

⁵⁵⁰ Bosco 2014.

⁵⁵¹ Interview 006.

⁵⁵² Interview 004.

⁵⁵³ Interview 001, 007.

⁵⁵⁴ Interview 002.

⁵⁵⁵ Interview 001.

accepted the Court's jurisdiction.⁵⁵⁶ In these cases states have been cooperating well with the Court and the Court has completed several trials arising out of those cases with CAR and DRC leading the field of cooperators.

Uganda was the first situation at the Court and it arose out of the government's self-referral to the Court, seeking the ICC's help in dealing with the Lord's Resistance Army (LRA). Hillebrecht and Straus categorized Uganda as engaging in qualified cooperation. At first, Uganda was interested in "removing and undermining a persistent armed opposition group," the LRA.⁵⁵⁷ In addition to removing domestic political rivals, the Ugandan government "reaped international reputational benefits for endorsing a then-fledgling international human rights body" while the ICC gained its first cases in its early years. However, after the Court issued arrest warrants for several LRA leaders, including Joseph Kony, Museveni grew more critical over time, charging the Court with negatively impacting peace processes on the ground.⁵⁵⁸ Moreover, the ICC investigation proved costly for Museveni, as critics depicted the ICC cases as proof of his inability to deal with the LRA himself.⁵⁵⁹ After years of ICC critique, Uganda nevertheless surrendered Ongwen to the ICC in 2015.

Mali also stands out in terms of cooperation albeit only one arrest warrant has been issued so far. The Mali situation was referred to the Court by the Mali government in July 2012 with the ICC opening an official investigation in January 2013. The arrest warrant for Ahmad Al Mahdi Al Faqi was issued in September 2015 "for war crimes of intentionally directing attacks against historic monuments and buildings dedicated to religion, including nine mausoleums and

⁵⁵⁶ Hansen 2012b: 194.

⁵⁵⁷ Hillebrecht and Straus 2017: 177.

⁵⁵⁸ For more information about the ICC's intervention in Uganda, please see Allen 2006; Clark 2011; Branch 2007; Nouwen and Werner 2010.

⁵⁵⁹ Hillebrecht and Straus 2017: 178.

one mosque in Timbuktu, Mali.”⁵⁶⁰ Just six days later, Al Mahdi Al Faqi was surrendered to the Court by the authorities of Niger. Al Mahdi Al Faqi was a member of the Islamist militia group Ansar Dine.

In December 2004, the government of CAR referred the situation to the Court and the ICC opened an official investigation in May 2007 with a focus on alleged crimes against humanity and war crimes committed since 1 July 2002 in an armed conflict between the Central African governmental authorities and allied forces and the organized armed group of General Bozizé’s rebels.⁵⁶¹ Jean-Pierre Bemba Gombo, a Congolese citizen, served as the leader of the Movement for the Liberation of the Congo (MLC) and the Commander-in-Chief of the Armée de Libération du Congo (ALC).⁵⁶² Bemba deployed three MLC battalions to CAR in 2002 “at the request and in support of former CAR President Ange-Félix Patassé to counter forces loyal to” General François Bozizé.⁵⁶³ However, in 2004, Bozizé was President of CAR and thus referred the conflict to the ICC. He has then likely welcomed the charges against his former rival Bemba who was arrested near Brussels in May 2008: “A weak domestic political landscape with few mechanisms for accountability reduced concerns that Bozizé himself would ultimately be turned over to the ICC, while cooperation provided a modicum of legitimacy for Bozizé’s government.”⁵⁶⁴

In the DRC, President Kabila referred the situation in his country to the Court in April 2004 and the ICC opened an official investigation only two months later with a focus on crimes committed in the Eastern DRC, in the Ituri region and the North and South Kivu Provinces after 2002. The Kabila government cooperated with the arrests warrants for Thomas Lubanga Dyilo

⁵⁶⁰ International Criminal Court, ICC-PIDS-CIS-MAL-01-08/16_Eng.

⁵⁶¹ International Criminal Court, ICC-PIDS-CIS-CAR-01-016/16_Eng.

⁵⁶² Ibid.

⁵⁶³ Ibid.

⁵⁶⁴ Hillebrecht and Straus 2017: 176-177.

and Germain Katanga who had been arrested in March 2005 for other incidents. Bosco Ntaganda voluntarily handed himself over at the U.S. Embassy in Rwanda asking to be transferred to ICC in March 2013. Lubanga was President of the Union des Patriotes Congolais (UPC), a rebel group that took power in Ituri in September 2002 with the help of its military wing.⁵⁶⁵ Katanga was the leader of the armed rebel group Patriotic Resistance Force in Ituri, and Ntaganda was chief of military operations of UPC's military wing and later a general in the national army but he defected. All three men thus were opponents of the Kabila government at some point: "Presiding over a very fragile peace and the persistent threat of conflict, particularly in the eastern part of the country, Kabila and his interim government wanted to keep potential spoilers and major opposition parties from the country."⁵⁶⁶

Côte d'Ivoire's situation before the Court originates in the post-election violence in 2010/2011 after a contested election between then-President Laurent Gbagbo and his challenger and current President Alassane Ouattara. The clashes that followed the contested election cost at least 3,000 civilians their lives and forces linked to both Gbagbo and Ouattara reportedly committed attacks.⁵⁶⁷ The situation was brought at the ICC after Côte d'Ivoire signaled to the Court that it welcomed ICC intervention. In October 2011, ICC judges authorized the OTP to open an investigation into crimes committed during the PEV. The OTP has brought cases against Laurent Gbagbo, his wife Simone Gbagbo, and Charles Blé Goudé, the leader of a pro-Gbagbo militia group. Blé Goudé was surrendered to the ICC in March 2014, after he had been extradited by Ghana to Côte d'Ivoire in January 2013. The charges against him were confirmed in 2014. Hillebrecht and Straus label the country's cooperation behavior as 'qualified' given that the government cooperated fully at first and transferred Blé Goudé and Laurent Gbagbo to the ICC

⁵⁶⁵ International Criminal Court, ICC-PIDS-CIS-DRC-01-015/16_Eng.

⁵⁶⁶ Hillebrecht and Straus 2017: 177.

⁵⁶⁷ Human Rights Watch 2015: 1.

but later challenged the Court's jurisdiction in an admissibility challenge for Simone Gbagbo. The cooperation in the cases against Blé Goudé and Laurent Gbagbo as the two main political leaders sits well with the interest alignment: "The state thus used the international legal lasso, removed and potentially discredited the main opposition, and earned some international accolade for such action."⁵⁶⁸

In October 2013, Côte d'Ivoire challenged the admissibility of the Simone Gbagbo case by arguing that she was already being prosecuted in national courts. Pre-Trial Chamber I rejected this challenge in December 2014 because "Côte d'Ivoire's domestic authorities were not taking tangible, concrete and progressive steps aimed at ascertaining whether Simone Gbagbo is criminally responsible for the same conduct that is alleged in the case before the Court." The judges also reminded Ivorian authorities of their obligation to surrender Simone Gbagbo to the ICC.⁵⁶⁹ In March 2017, she was found not guilty of war crimes and crimes against humanity in Côte d'Ivoire.⁵⁷⁰ However, her trial has been criticized for "fair trial concerns and a critical lack of evidence."⁵⁷¹ In Côte d'Ivoire, the ICC has only charged members of Gbagbo's camp even though evidence suggests widespread human rights abuses by Ouattara's forces: "None of Ouattara's out-of-control followers, including members of the official armed forces under his control, have been charged or even credibly investigated," opening up the ICC to charges of 'victor's justice.'⁵⁷²

It is notable that with the exception of the Libya cases, which have also been referred to the Court via the UNSC in 2011, no AU decision even mentions any of these ongoing court cases against rebel leaders. During its July 2011 summit, the AU Assembly expressed its "deep

⁵⁶⁸ Hillebrecht and Straus 2017: 179.

⁵⁶⁹ International Criminal Court, ICC-PIDS-CIS-CI-02-004/15_Eng.

⁵⁷⁰ Aljazeera 2017.

⁵⁷¹ Human Rights Watch 2017.

⁵⁷² Corey-Boulet 2012.

concerns at the manner in which the [ICC] Prosecutor is handling the situation in Libya” and called on its member states to “not cooperate in arrest and surrender of Gaddafi because it complicates peace negotiations on the ground” and thus the case should be deferred.⁵⁷³ In the Libya situation, the Libyan government successfully challenged the admissibility of the case against Abdullah Senussi and has refused to surrender Gaddafi’s son Saif.⁵⁷⁴

This brief overview cannot do justice to the details of each case. However, the preliminary evidence gathered from interviews and this overview suggests that cooperation with the Court has been more forthcoming in cases against rebel leaders. In these cases interests were often aligned between the ICC and the sitting governments as both shared an interest in the same outcome: arresting the suspects and bringing them to justice. While the motivations of the ICC and the government might differ, the outcome of forthcoming cooperation remains the same.

This overview then suggests that the cases I investigate in this dissertation do indeed underlie different cooperation dynamics and thus merit distinct scholarly attention. In addition, we see very limited involvement by the AU in cases against rebel leaders. This suggests that in these cases, the AU Assembly, as the heads of states, stand to gain from these ICC cases and hence their motivation to involve the AU for their cause wanes. The AU’s involvement thus appears to be limited to cases in which ICC directly go against heads of state (Sudan, Kenya) as well in cases where the UNSC was involved in referring the case to the Court.

Future Research Avenues

Several possible research expansions flow from the restrictive focus on two case studies. Expanding the N to examine additional cases would add leverage to the explanations I provided.

⁵⁷³ Assembly of the African Union, Assembly/AU/Dec.366(XVII): para. 6.

⁵⁷⁴ Hillebrecht and Straus 2017: 175.

Since both the South Africa and Kenya case studies involved court cases against sitting heads of state, examining the cooperation record of countries in which the Court has charged rebels provides a fruitful way to test and refine my arguments. Hence, in-depth case studies of the model cooperators from Table 18 would help round out the analyses. In these cases, one would also expect less variation over time unless the ICC had signaled to also initiate cases against government forces or the inner elite circle. Hence, potential cases would include those that remained model cooperators despite arrest warrants for nationals of those countries, such as in DRC and CAR. Hence, extending the N to include more cases from other countries where a main compliance factor (interest alignment) and/or the outcomes vary promises to substantiate or refine the arguments presented here.

A second avenue to future research includes a closer consideration of the ICC as an actor in the ‘virtual trial’ between the court, state, and international community. Since the focus of this dissertation was more on the states and their cooperation with the ICC, the actions of the Court provided what states responded to. However, to fully understand the engagement between the two it should be considered that what the Court does could also be reactive to how states engage. Thus, analyzing the timing of ICC judicial decisions and arrest warrants and statements by the ICC Chief Prosecutor could yield important insights into state cooperation.

Beyond the ICC, future research can further test and refine the cooperation framework I propose. One viable path to comparison would be to restrict the analysis to international courts. This could entail the international criminal tribunals (as a narrow focus on international criminal law) and/or human rights courts, such as the European Court of Human Rights and the Inter-American Court of Human Rights (as a broader focus on human rights). Outside of the topical focus, other courts could include the International Court of Justice, the Andean Tribunal of

Justice, or the European Court of Justice. In these cases we would expect that the legal obligations differ that states take on depending on the treaty in question. For instance, compliance does not occur with arrest warrants but rather implementing court decisions domestically, such as paying reparations. In contrast, non-legal means of engagement remain similar but can vary depending on the court's international profile or its standing. If a court enjoys a good standing among states in a region and membership in it is widespread, we would not expect to see extensive pro-Court diplomacy for more membership but maybe for increased compliance with the decisions.

More difficult tests of the framework would include applications to IOs more generally, likewise in the field of human rights or across issue areas. For instance, diplomacy and statements attesting to the important work of the UN Human Rights Council (UNHRC) can help strengthen the Council's legitimacy. But the Council's work can also be undermined through negative statements and anti-Council diplomacy. Legal cooperation with the UNHRC would involve that a state submits a national report for the Universal Periodic Review and whether a state implements the recommendations arising from the review.

These are some of the possible ways to substantiate and further test the dissertation's findings. While some involve more case studies and comparisons across ICC cases to test compliance explanations, others involve leaving the ICC as an actor and using the framework established here and applying it to other courts and/or IOs.

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EDUCATION

Syracuse University, USA

PhD Political Science (expected June 2017)

MA Political Science (2012)

Concentrations: International Relations, American Politics

University of Leipzig, Germany

MA American Studies, with Distinction (2010)

Martin Luther University Halle-Wittenberg, Germany

BA Intercultural European and American Studies (2008)

DISSERTATION

Title: “Enabling Justice: State Cooperation with the International Criminal Court”

I investigate when and why states cooperate with the International Criminal Court (ICC). I argue that African countries’ cooperation is shaped by domestic considerations and the African Union’s non-cooperation pressure. The project highlights regional political dynamics as a new explanation for non-compliance.

Committee: Audie Klotz (Chair), Hans Peter Schmitz, Thomas M. Keck, Lamis Abdelaaty

RESEARCH AND TEACHING INTERESTS

International Organizations/International Law, Human Rights, Global Governance, Transitional Justice, African politics, European politics, Qualitative Methods, Model UN

TEACHING EXPERIENCE

As independent instructor:

PSC 300 Human Rights through Film (Summer 2016)

PSC 354 Human Rights and Global Affairs (Summer 2014)

As section instructor in a team-taught class: MAX 132 Global Communities (Fall 2014, Spring 2015)

As discussion section instructor:

PAI 710 International Actors and Issues (Fall 2015)

PSC 121 Introduction to American Government (Spring 2012, Fall 2012, Spring 2014)

PSC 124 Introduction to International Relations (Spring 2017)

GRANTS AND AWARDS

Doctoral Dissertation Research Improvement Grant, National Science Foundation (2016: \$13,268)

Research Grant, Horowitz Foundation for Social Policy (2016: \$7,500)

Outstanding Teaching Assistant Award, Syracuse University (2016)

Cohn Award, Political Science Department, Syracuse University (2016: \$7,200)

Travel Grants, Graduate Student Organization, Syracuse University (2013, 2014, 2016: \$1,350)
Research Grants, Roscoe Martin Fund for Research, Maxwell School of Citizenship and Public Affairs, Syracuse University (2013, 2014, 2015: \$2,500)
Travel Grants, International Studies Association (2014, 2015: \$600)
Summer Research Grant, Maxwell African Scholars Union, Syracuse University (2015: \$2,500)
Meiklejohn Award, Political Science Department, Syracuse University (2013: \$4,400)
Graduate Student Assistantship, Political Science Department, Syracuse University (2011-2017)

PUBLICATIONS AND WORKS IN PROGRESS

“‘We Chose Africa’: South Africa and the Regional Politics of Cooperation with the International Criminal Court,” *International Journal of Transitional Justice* (2016), doi: 10.1093/ijtj/ijw024
“Cultural Diversity and the Politics of Recognition in International Organizations” (with Lindsay Burt, Patricia Goff, Audie Klotz), *working paper*
“Exit, Voice, and Loyalty Rhetoric: The International Criminal Court and its State Parties,” *working paper*

ADDITIONAL TRAINING

Research Assistant, Audie Klotz (2014-2016)
Venice Academy of Human Rights, “Judicial Legitimacy and the Rule of Law,” Venice, Italy (2014)
Institute for Qualitative and Multi-Method Research (IQMR), Syracuse University (2014)
Research Assistant, Hans Peter Schmitz (2012)

SERVICE TO THE DEPARTMENT AND UNIVERSITY

Third reader, undergraduate distinction thesis, Seth Gilgus (Spring 2016)
Teaching mentor, Syracuse University TA Orientation (2015, 2016)
Co-Organizer Weekly Political Science Research Workshop (2013-2015)
Political Science Graduate Student Association, Syracuse University
President (2014-2015)
Pre-comps Representative (2012-2013)
Sherman Social Chair (2012-2013)
Graduate student member, American Politics Job Search Committee (2013-2014)

SELECTED PROFESSIONAL CONFERENCE PRESENTATIONS

“Enabling Justice? State Cooperation with the International Criminal Court” – iposter presentation, American Political Science Association, Philadelphia (September 2016)
“South Africa and the ‘Great Escape’: Regional Politics and Compliance with the Rome Statute” – International Studies Association – Human Rights Section, New York City (June 2016)
“Globalizing Cultural Diversity Claims: International Governmental Organization and the Governance of Difference” (with Burt, Goff, Klotz) – International Studies Association, Annual Convention, Atlanta (March 2016)
“Charting Cooperation Variance Between the International Criminal Court and its African

State Parties” – International Studies Association, Annual Convention, Atlanta (March 2016)

“International Organizations and Cultural Diversity Claims: Evidence from Internal and External Dynamics at the International Criminal Court and the World Health Organization” (with Burt, Goff, Klotz) – North East International Studies Association, Providence (November 2015)

“Exit, Voice, and Loyalty: The ICC and its State Parties” – International Studies Association, Annual Convention, New Orleans (February 2015)

“Looking Beyond Economic Explanations? Peace and Democracy as Underlying Values for Supporting the European Union” – Midwest Political Science Association, Annual Meeting, Chicago (April 2014)

“Partisan Attitudes on Human Rights Treaty Ratification in the United States” – Midwest Political Science Association, Annual Meeting, Chicago (April 2013)

“Litigating Human Rights in US Courts: A Look at Opposing Arguments in Two Alien Tort Statute Cases” – New York State Political Science Association, Annual Meeting, Syracuse (April 2013)

ADDITIONAL SKILLS

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