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JUS PRO BELLO: THE IMPACT OF INTERNATIONAL PROSECUTIONS ON WAR CONTINUATION

Marco Bocchese[†]

Abstract: This Article investigates the political and military conditions under which national governments decide to invite judicial scrutiny from the International Criminal Court (“ICC”). The cross-case analysis of seven countries either examined or officially investigated by the ICC Prosecutor’s Office (“OTP”) lends support to the conclusion that governments solicit external judicial scrutiny due to two main independent variables: namely, a military’s inability to defeat a rebellion and a short-term preference for continuing war over negotiating its conclusion. This Article contends that the values placed on these variables combine to persuade national governments in conflict-ridden countries that, against predictions to the contrary, inviting ICC scrutiny is in fact in their best interest. This Article also makes a threefold contribution to the lasting debate on peace versus justice. First, it emphasizes state agency in the processes of norm exploitation and subversion. Second, it sheds new light on the tactical use of international laws in the pursuit of broader state strategies. Third, it identifies political and military conditions for the optimal tactical use of international laws. In all, this Article highlights the instrumentality of international laws in prolonging, rather than bringing to an end, internal conflict. In so doing, it urges scholars and practitioners to rethink the relationship between the concepts of “justice” and “peace,” for the former can be used to undercut the latter.

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I. INTRODUCTION

States use international norms and laws in the pursuit of extralegal ends. Far from a provocation, the foregoing statement is regarded today as true by diplomats, foreign policy pundits, and academics alike.¹ Political scientists, for instance, have explored how, and to what ends, both state and non-state actors manipulate norms and legal provisions.² In brief, as international

[†] Ph.D. candidate, Northwestern University (June 2018); LL.M. Northwestern University (2010); J.D. University of Verona, Italy (2007). For helpful comments on previous drafts, I would like to thank William Reno and Jahara “Franky” Matisek. Financial assistance from Northwestern University’s Program of African Studies, the Buffett Institute for Global Studies and the Dispute Resolution Research Center at the Kellogg School of Management is gratefully acknowledged. For excellent editorial assistance, I thank Alexandra Wilson.

¹ Political scientists generally accept “the definition of a norm as a standard of appropriate behavior for actors with a given identity.” Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 887, 891 (1998).

² On the strategic use of norms and laws, see generally Ian Hurd, *The Strategic Use of Liberal Internationalism: Libya and the UN Sanctions, 1992–2003*, 59 INT’L ORG. 495 (2005); Kenneth A. Rodman & Petie Booth, *Manipulated Commitments: The International Criminal Court in Uganda*, 35 HUM. RTS. Q. 271 (2013); Marco Bocchese, *Odd Friends: Rethinking the Relationship Between the ICC and State Sovereignty*, 49 N.Y.U. J. INT’L L. & POL. 339 (2017).

politics become increasingly entangled in treaties and other legal instruments, both state and non-state actors have regarded international law (“IL”) as instrumental in the pursuit of foreign policy goals, and thus integral to the logic behind conducting international affairs.³ Similarly, legal experts and scholars have acknowledged the systematic use of international law for extralegal ends. A new term—“lawfare”—was coined to conceptualize the new logic at play.⁴ This term has proven useful in that it defines instances whereby state and non-state actors resort to IL provisions and institutions for their military or political byproducts, rather than their intended legal effects. The International Criminal Court (“ICC”) has played an increasingly central role within this ongoing global trend, referred to as the “legalization” of international politics.⁵ The ICC’s prominence in “waging lawfare” is a function of its potentially unlimited temporal and territorial jurisdiction, as well as the shift from state to individual criminal accountability that its establishment enabled.⁶

This Article explores the political and military conditions under which national governments invite judicial scrutiny from the ICC. The academic payoff of undertaking such a study, as well as its intended contribution to the field of international law and politics, is threefold. First, it sheds new light on the systematic exploitation and subversion of the ICC—hereby conceived of as both a legal regime and international organization—for extralegal purposes. More specifically, this Article reveals that government decisions to “outsource” criminal jurisdiction to independent third parties do not happen randomly. Rather, national governments conceive of this possibility as an alternative course of action to conflict-resolution efforts. Second, a better understanding of why governments invite external judicial scrutiny must start

³ See, e.g., Ian Hurd, *The International Rule of Law: Law and the Limit of Politics*, 28 ETHICS & INT’L AFF. 39 (2014). The strategic exploitation of legal provisions speaks to the broader state use of multilateral institutions and organizations, commonly referred to as soft or institutional balancing. See Robert A. Pape, *Soft Balancing Against the United States*, 30 INT’L SECURITY 7 (2005); T.V. Paul, *Soft Balancing in the Age of US Primacy*, 30 INT’L SECURITY 46 (2005).

⁴ In Charles Dunlap’s authoritative definition, lawfare is “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.” Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 146 (2008).

⁵ See Ryder McKeown, *International Law and Its Discontents: Exploring the Dark Sides of International Law in International Relations*, 43 REV. INT’L STUD. 430, 436 (2017). See generally LEGALIZATION AND WORLD POLITICS (Judith L. Goldstein et al. eds., 2001).

⁶ See, e.g., Alana Tiemessen, *The International Criminal Court and the Lawfare of Judicial Intervention*, 30 INT’L REL. 409 (2016); Kirsten J. Fisher & Cristina G. Stefan, *The Ethics of International Criminal ‘Lawfare,’* 16 INT’L CRIM. L. REV. 237, 244–49 (2016); Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT’L J. TRANSITIONAL JUST. 434, 437, 441 (2013).

with the identification of the political and military conditions in which said decisions occur. Third, a cross-case analysis of seven countries shows there is more to these decisions than state leaders' self-interest. Establishing whether or not to invite external judicial scrutiny is a complex decision for state leaders, but adopting an individual level of analysis unduly narrows our understanding of the underlying decision-making processes. Hence, shifting the level of analysis from individual to state offers a more fine-grained picture of what is at stake when governments ask for ICC involvement in internal affairs. To be clear, this is not tantamount to underestimating—let alone ignoring—the salience of state leaders' self-interest and preferences. On this point, there is a wealth of evidence supporting the claim that sitting heads of state, from Ugandan President Museveni to Congolese President Kabila, thought they would personally benefit from involving the ICC in domestic affairs.⁷ Yet, as this Article demonstrates, a state leader's interest in retaining power is but one of several factors contributing to the decision to invite ICC scrutiny.

In all, the logic of inviting external judicial scrutiny must be analyzed, and its efficacy assessed, in light of the broader military and political strategies states adopt. These strategies reflect state preferences when coping with internal threats within an ever-tightening normative and institutional global governance structure. Given this legalistic structure, the invitation of external judicial scrutiny amounts to a wartime tactic to which governments resort in the pursuit of their strategic goals. Furthermore, the context wherein incumbent governments decide which strategy to pursue matters tremendously.

On this point, some preliminary observations on the universe of cases highlight commonalities in seemingly heterogeneous situations. First, governments invited external judicial scrutiny in situations where armed rebel groups contested their authority or posed a threat to their survival. In many of such cases, governments had no control over large portions of national territory at the time they formally requested external judicial scrutiny. Second, the same governments proved unable to achieve military victory against the internal threats they confronted. A military's inability to quash a

⁷ See generally Paola Gaeta, *Is the Practice of Self-Referrals a Sound Start for the ICC?*, 2 J. INT'L CRIM. JUST. 949 (2004). On Uganda, see Sarah M. H. Nouwen & Wouter G. Werner, *Doing Justice to the Political: The International Criminal Court in Uganda and Sudan*, 21 EUR. J. INT'L L. 941, 949 (2010). On the Democratic Republic of Congo ("DRC"), see William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557 (2005).

rebellion and win a war is one of the two independent variables that determine the likelihood of governments asking for external judicial scrutiny. Lastly, external actors' preferences must be taken into account as well, for they affect—albeit indirectly—the decision of governments to invite external judicial scrutiny or call for the establishment of new international courts (“ICs”). As security scholars correctly point out, state-initiated brute force is seldom a viable, let alone uncontested, option in an increasingly legalized international system.⁸

In fact, the international community has generally proven unwilling to pour sizable military, political, and economic resources into conflict management or resolution in peripheral countries, showing even less eagerness to intervene in Africa.⁹ Accordingly, major global players hold a marked preference for short-term solutions—solutions whose long-term validity is being increasingly questioned. Calls for the immediate cessation of hostilities usually precede the deployment of peacekeepers and the brokering of inclusive power-sharing agreements aimed at giving rebel groups (and the people they allegedly represent) a stake in state affairs.¹⁰ Scholars noticed this “standardized” path to conflict resolution can have adverse consequences; in particular, it can incentivize non-state armed groups to use the escalation of violence as a method of obtaining a seat at the negotiating table.¹¹ As this three-party peacemaking process unfolds, it becomes increasingly clear that the likely loser is the state, whose sovereignty and authority global players readily sacrifice to appease the rebels. Unsurprisingly, national governments, as legitimate state representatives and acting sovereigns, resist externally sponsored power-sharing agreements that demean their standing and legitimize internal enemies as trustworthy partners in peace.¹² Against this backdrop, national governments begin to rethink the invitation of external judicial scrutiny as a means to criminalize internal

⁸ ROBERT MANDEL, COERCING COMPLIANCE: STATE-INITIATED BRUTE FORCE IN TODAY'S WORLD 1 (2015).

⁹ See Nouwen & Werner, *supra* note 7, at 948; Mohammed Ayoob, *Third World Perspectives on Humanitarian Intervention and International Administration*, 10 GLOBAL GOVERNANCE 99, 105–110 (2004); Denis M. Tull & Andreas Mehler, *The Hidden Costs of Power-Sharing: Reproducing Insurgent Violence in Africa*, 104 AFR. AFF. 375, 386 (2005).

¹⁰ See Pierre Englebert & Denis M. Tull, *Postconflict Reconstruction in Africa: Flawed Ideas About Failed States*, 32 INT'L SECURITY 106 (2008); Roy Licklider, *Ethical Advice: Conflict Management vs. Human Rights in Ending Civil Wars*, 7 J. HUM. RTS. 376, 377 (2008).

¹¹ On this problem, see Stephen John Stedman, *Spoiler Problems in Peace Processes*, 22 INT'L SECURITY 5, 5 (1997); WILLIAM RENO, WARFARE IN INDEPENDENT AFRICA 164 (2011).

¹² See Bocchese, *supra* note 2, at 358–61; Englebert & Tull, *supra* note 10, at 126.

enemies. They do so in hopes of forestalling power-sharing agreements or undermining their implementation.¹³

The remainder of this Article is organized as follows. Part II surveys the literature on the strategic use of international laws and institutions. The same section also engages with scholarly work on power-sharing in conflict-ridden countries and suggests that state referrals (also referred to as “self-referrals”) to the ICC are better conceived of as governmental responses to undesired external political or military interference in internal affairs. Part III lays out the theoretical argument and outlines the research design and case selection. Part IV compares seven countries’ situations pending before the ICC, demonstrating that the theory detailed in Part III translates easily across continents. The Article concludes by highlighting the causal nexus between state-led processes of norm exploitation, norm subversion, and war continuation and, in so doing, contributes to the development of mid-level theories on state use of IL in the pursuit of extralegal objectives.

II. LITERATURE REVIEW

To fully appreciate the tactical power of inviting external judicial scrutiny, this section offers a brief survey of the scholarship on issues relevant to the theoretical argument laid out below. The first topic to be addressed is state agency in the processes of norm exploitation and subversion. In other words, are state leaders cognizant of what the invitation of external judicial scrutiny entails, and what extralegal objectives can be achieved through its invitation? On this point, Cambridge University lecturer on international law Sarah Nouwen argues that “the [Ugandan government] expected, and obtained, dividends from the intervention.”¹⁴ On state co-optation of international laws and institutions, reader at the University of London School of Oriental and African Studies Phil Clark highlights the issue of (perceived) selectivity arising from the ICC Office of the Prosecutor’s (“OTP”) choice to investigate only crimes allegedly committed by the Lord’s Resistance Army

¹³ See Bocchese, *supra* note 2, at 356; see also Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 828 (2006); Adam Branch, *Uganda’s Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT’L AFF. 179, 183 (2007).

¹⁴ SARAH M. H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* 114 (2013). On the DRC situation, see Burke-White, *supra* note 7, at 559; Thomas O. Hansen, *Africa and the International Criminal Court*, in *HANDBOOK OF AFRICA’S INTERNATIONAL RELATIONS* 171 (Tim Murithi ed., 2014).

(“LRA”), but not from state armed forces.¹⁵ For others, state invitation of ICC scrutiny was instrumental in criminalizing the LRA, undermining peace talks, and marginalizing domestic and international actors pushing for political solutions.¹⁶ These arguments do not apply exclusively to Uganda, for prominent legal scholars have noticed “striking similarities” with both Democratic Republic of Congo (“DRC”) and Central African Republic (“CAR”) self-referrals and, more recently, the declaration under Article 12(3) of the Rome Statute lodged by the government of Côte d’Ivoire in April of 2003.¹⁷

The second topic of interest is the link between power-sharing agreements and state invitation of external judicial scrutiny. Colby College professor of government Kenneth Rodman and his former student Petie Booth, whose work lies at the crossroads between international law and conflict studies, note that “negotiated resolutions of civil wars are most likely when there is a ‘mutually hurting stalemate’ in which all of the parties recognize that they cannot win and will be worse off the longer the war continues.”¹⁸ Stalemates have become the rule rather than the exception as definitive victories in both interstate and civil wars have declined in number.¹⁹ That so many wars end in draws today is likely due not only to the military weakness of national armies, but also to other factors such as the technologies of rebellion or geography.²⁰ Lastly, this author argues that incumbent governments invite ICC scrutiny to either forestall or undermine externally imposed power-sharing accords.²¹

¹⁵ Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 37, 42 (Nicholas Waddell & Phil Clark eds., 2008); see also Asad G. Kiyani, *Third World Approaches to International Criminal Law*, 109 AM. J. INT’L L. UNBOUND 255, 255 (2015). On the DRC situation, see Felix Mukwiza Ndahinda, *The Bemba-Banyamulenge Case Before the ICC: From Individual to Collective Criminal Responsibility*, 7 INT’L J. TRANSITIONAL JUST. 476, 491 (2013).

¹⁶ See generally Payam Akhavan, *The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT’L L. 403 (2005); Nouwen & Werner, *supra* note 7; Hans Peter Schmitz, *Rebels Without a Cause? Transnational Diffusion and the Lord’s Resistance Army (LRA), 1986–2011*, in *TRANSNATIONAL DYNAMICS OF CIVIL WAR* 120–48 (Jeffrey T. Checkel, ed., 2013).

¹⁷ See Rodman & Booth, *supra* note 2, at 296; Bocchese, *supra* note 2, at 360.

¹⁸ Rodman & Booth, *supra* note 2, at 293; see also Tull & Mehler, *supra* note 9, at 386.

¹⁹ See Tanisha M. Fazal, *The Demise of Peace Treaties in Interstate War*, 67 INT’L ORG. 695, 706 (2013).

²⁰ See Maria Eriksson Baaz & Judith Verweijen, *The Volatility of a Half-Cooked Bouillabaisse: Rebel-Military Integration and Conflict Dynamics in the Eastern DRC*, 112 AFR. AFF. 563, 578–79 (2013).

²¹ Bocchese, *supra* note 2, at 358–61.

On foreign interference in internal conflicts, Jack Snyder and Robert Jervis, two prominent international relations scholars at Columbia University, conclude that “powerful outsiders” acting like guarantors are almost necessary for reaching a political solution to end civil wars.²² Foreign preference for—if not obsession with—conflict management explains why “[p]olitical power-sharing agreements have become an almost standard ingredient of negotiated settlements to civil wars in Africa, as elsewhere.”²³ On the one hand, this attitude is the backbone of short-term initiatives aimed at stopping violence.²⁴ On the other hand, it reveals both a preference for low-cost political options and a lack of commitment to creating conditions for lasting peace.²⁵ The limits intrinsic to this approach of conflict management are known to the proponents of power-sharing agreements, for they regard political solutions engineered to reduce the security dilemma as second-best solutions.²⁶

Finally, a brief mention of the politics of conflict management is due. A long-known criticism of power-sharing is that it “reifies the contending groups”²⁷ because “external mediators . . . conceive all the parties [to a civil conflict] as subsisting on a more or less equal footing.”²⁸ Rebel groups are well aware that peace negotiations greatly enhance their international standing²⁹ and, accordingly, are becoming increasingly proficient in the art of diplomacy—formerly the exclusive domain of state actors.³⁰ Bearing in mind the enmity between negotiating parties and the external pressures exerted on them, it might not be surprising that “most negotiated peace agreements fail during the implementation phase.”³¹ Government and non-state armed groups have different reasons for defecting, but a thorough analysis of such reasons is beyond the scope of this Article. However, one overlooked and understudied way in which incumbent governments undertake to sabotage

²² Jack Snyder & Robert Jervis, *Civil War and the Security Dilemma*, in CIVIL WARS, INSECURITY, AND INTERVENTION 15, 19 (Barbara F. Walter & Jack Snyder eds., 1999); see also Séverine Autesserre, *Hobbes and the Congo: Frames, Local Violence, and International Intervention*, 63 INT’L ORG. 249, 250 (2009).

²³ Eriksson Baaz & Verweijen, *supra* note 20, at 564. For a list of African peace agreements since 1999, see Andreas Mehler, *Peace and Power Sharing in Africa: A Not So Obvious Relationship*, 108 AFR. AFF. 453, 457–61 (2009).

²⁴ See Licklider, *supra* note 10, at 377.

²⁵ See Tull & Mehler, *supra* note 9, at 395; Mehler, *supra* note 23, at 455.

²⁶ See Snyder & Jervis, *supra* note 22, at 19.

²⁷ *Id.*

²⁸ Christopher Clapham, *Degrees of Statehood*, 24 REV. INT’L STUD. 143, 153 (1998).

²⁹ *Id.* at 153; see also Bridget L. Coggins, *Rebel Diplomacy: Theorizing Violent Non-State Actors’ Strategic Use of Talk*, in REBEL GOVERNANCE IN CIVIL WAR 98–99 (Ana Arjona et al. eds., 2016).

³⁰ See Coggins, *supra* note 29, at 98–99.

³¹ Autesserre, *supra* note 22, at 250.

peace talks is to co-opt international criminal tribunals (“ICTs”) in the criminalization of their enemies so as to strip them of their newly bestowed legitimacy.

III. THEORETICAL ARGUMENT

International criminal law (“ICL”) and ICTs have changed the landscape of modern warfare in ways policymakers and treaty drafters never could have foreseen. The aim of this Article is not to assess whether the aforementioned change represents a major or minor development in twenty-first century military affairs; rather, it purports to illustrate how the introduction of these IL institutions has affected state decision-making by ushering in wartime tactics which were previously unavailable. To be clear, lawfare is not an option to which states should resort if maximizing the impact of external judicial scrutiny is their intent. Moreover, it is worth recalling that not all state leaders who decide to invite ICC scrutiny fully understand the implications of doing so beforehand. That said, identical political and military conditions have underpinned five instances of self-referrals (Uganda in 2003, the DRC in 2004, the CAR in 2004 and 2014, and Mali in 2012), as well as five instances of declarations of ad hoc acceptance of ICC jurisdiction under Article 12(3) of the Rome Statute (Côte d’Ivoire in 2003, Palestine in 2009 and 2015, and Ukraine in 2014 and 2015). Put differently, seven countries from three different continents presented the same conditions at the time their governments invited ICC scrutiny. Extracting general rules by way of induction always calls for caution, yet the fact that identical conditions were at play across a very diverse pool of countries suggests incumbent and future governments can learn from past episodes of invitation of external judicial scrutiny.

Table 1: The Logic of Inviting External Judicial Scrutiny

	Preference for Peace	Preference for War
Ability to Win the War	Political Settlement or State Acquiescence	War Continuation
Inability to Win the War	Government Survival	Invitation of External Judicial Scrutiny

Table 1 illustrates both the novelty introduced by state invitation of external judicial scrutiny and the alternatives to the latter if and when the underlying conditions vary. All the aforementioned situations were in the lower-right quadrant at the time their governments formally invited ICC scrutiny. A few remarks on how to correctly read Table 1: first, it offers an overview—not a taxonomy—of the alternative tactics national governments can employ under different conditions. In other words, governments are not limited by the tactical options listed in Table 1, which nevertheless maps their adoption in accordance with how the two independent variables—i.e. military ability and state preferences—combine. Second, Table 1 allows for movement from one quadrant to another as change in either government preferences or military ability occurs. For instance, the Ugandan government held constant its preference for war over time, yet it changed tactics depending on whether or not the LRA was within or beyond reach due to geography. Lastly, this study’s focus on the conditions underpinning state invitation of external judicial scrutiny allows the bracketing of endogeneity problems. Indeed, it is fair to argue that a military’s ability to win a conflict may affect state preference for war, while state preference for peace may avert—or stop—military build-up (Table 1’s upper-right and lower-left quadrants). Still, this study is exclusively interested in explaining one particular—and to some extent counterintuitive—combination of the two independent variables. As far as the outcome of interest (i.e. state invitation of external judicial scrutiny) is concerned, endogeneity problems are successfully bracketed by the fact that national governments held a preference for continuing war over negotiating its conclusion *despite* their inability to win by military means.

It is now time to ask why the systematic state invitation of external judicial scrutiny is a noteworthy novelty and, relatedly, what it adds to the mainstream understanding of international law and politics. First, ICs—and ICTs in particular—provide national governments with an institutional

avenue in which to overcome—to a certain extent, at least—military realities, and fend off external pressures to cease hostilities and enter peace negotiations.³² Put another way, before ICs were co-opted into state strategies of resistance, Table 1's lower-right quadrant was blank and national governments, willing but unable to prolong hostilities, could only resort to diplomatic initiatives. Second, state invitation of external judicial scrutiny affords a readily available and surprisingly effective credible commitment mechanism: a lesson Ugandan president Museveni learned the hard way when he considered rewarding the LRA's demobilization with amnesty for its leaders. In response to this suggestion, former ICC Chief Prosecutor Moreno-Ocampo clarified he "could not use his discretion to suspend the arrest warrants, which were non-negotiable."³³ ICC scholars have thus far neglected this aspect of self-referrals, overlooking the application of the credible commitment mechanism to war continuation and not just to war termination. Third, state invitation of external judicial scrutiny adds another tool to the state's arsenal of non-violent wartime tactics.³⁴ As with many other wartime tactics, moreover, the underlying political and military conditions prompt its adoption and predict its efficacy in the pursuit of broader strategic objectives.

Not all governments who are willing but unable to continue fighting necessarily invite external judicial scrutiny, yet all governments that eventually decided to do so were willing but unable to sustain their military efforts at the time they formally requested it. But what are the alternatives to this Article's outcome of interest, i.e. Table 1's lower right quadrant? The remainder of this section offers a brief overview of the potential change-determined outcomes in one or both independent variables. First, governments who have both the will and means to sustain military efforts may resist pressures to negotiate a political solution to the conflict and continue fighting (upper-right quadrant), as the case of Sri Lanka aptly illustrates.³⁵ To defeat the Liberation Tigers of Tamil Eelam ("LTTE") rebellion and end twenty-five years of civil war, the Sri Lankan government allegedly employed military tactics that quite blatantly violated international humanitarian law

³² On the conceptualization of lawfare as the weapon of the (militarily) weak, see Fisher & Stefan, *supra* note 6, at 240, 243.

³³ Kenneth A. Rodman, *Justice as a Dialogue Between Law and Politics: Embedding the International Criminal Court Within Conflict Management and Peacebuilding*, 12 J. INT'L CRIM. JUST. 437, 459 (2014).

³⁴ See Fisher & Stefan, *supra* note 6, at 240.

³⁵ For a detailed account of the Sri Lankan Civil War dynamics, see ZACHARIAH C. MAMPILLY, *REBEL RULERS: INSURGENT GOVERNANCE AND CIVILIAN LIFE DURING WAR 93–128* (2011); see generally Sumit Ganguly, *Ending the Sri Lankan Civil War*, 147 DÆDALUS 78 (2018).

(“IHL” or “laws of war”) provisions.³⁶ On May 18, 2009, upon defeating the remaining LTTE resistance and killing top-ranked rebel officials, the Sri Lankan armed forces declared total victory and government control over the entire island.³⁷

Second, the incumbent’s short-term outlook can be so negative that its survival requires co-opting the rebellion(s) into national unified power-sharing governments (lower-left quadrant). There is no shortage of recent examples for this outcome, including Bosnia and Herzegovina (1995), Sierra Leone (1999), Burundi (2000), Côte d’Ivoire (2002), the DRC (2002–2003), and Kenya (2008).³⁸ It is also worth noting that power-sharing agreements are often sponsored (when not de facto imposed) by political patrons or international organizations—an interference that curtails state agency in the critical decision-making process on war termination.³⁹

Finally, incumbents may prefer non-military solutions to the conflict despite having the military capability to defeat the enemy in combat (upper-right quadrant). Cases belonging to this quadrant include situations wherein the incumbent seeks either short-term (e.g., ceasefire) or long-term (e.g., peace treaty) political solutions to an ongoing conflict. At present, Colombia exemplifies a country whose armed forces enjoy overwhelming military superiority over active left-wing rebellions (namely the Revolutionary Armed Forces of Colombia—known by their Spanish acronym, FARC—and the National Liberation Army—known by their Spanish acronym, ELN), but whose national government favors peace negotiations over war continuation.⁴⁰ Colombia is also a fitting example in that political, ethical, and legal considerations shaped government preferences on conflict resolution. On this point, Colombian military and procurement officers, when

³⁶ See Rodman & Booth, *supra* note 2, at 274 n.15; see also Wasana Punyasena, *The Facade of Accountability: Disappearances in Sri Lanka*, 23 BOS. C. THIRD WORLD L. J. 115, 132–33 (2003).

³⁷ See *Timeline: Sri Lanka’s 25-Year Civil War*, REUTERS, May 18, 2009, <http://www.reuters.com/article/us-srilanka-war-timeline-sb-idUSTRE54F16620090518>.

³⁸ On all of the African examples listed above, see Tull & Mehler, *supra* note 9, at 375–96. On Burundi and the DRC, see René Lemarchand, *Consociationalism and Power Sharing in Africa: Rwanda, Burundi, and the Democratic Republic of the Congo*, 106 AFR. AFF. 1, 7–14 (2006). On Bosnia specifically, see Ulrich Schneckener, *Making Power-Sharing Work: Lessons from Successes and Failures in Ethnic Conflict Regulation*, 39 J. PEACE RES. 203, 209–10 (2002).

³⁹ On the increased popularity of internationally-sponsored power-sharing agreements in Africa, see Tull & Mehler, *supra* note 9, at 386; Matthew I. Mitchell, *Power-sharing and Peace in Côte d’Ivoire: Past Examples and Future Prospects*, 12 CONFLICT, SECURITY & DEV. 171, 178–79 (2012).

⁴⁰ Breanne Hataway, *The FARC’s Drug Trafficking as Political Crime: Determining the Success of Colombia’s Peace Talks*, 41 N.C. J. INT’L L. 163, 169, 170 (2015).

interviewed in fall 2016, affirmed that, from a purely military viewpoint, the armed forces could achieve total victory over the aforementioned rebel groups.⁴¹ However, military victory becomes impossible to attain once political, ethical, and legal considerations are brought back into the picture. A war-winning strategy would likely entail not just the escalation of violence in a low-intensity conflict, but also employing tactics that would likely lead to gross violations of IHL norms. But the case of Colombia may well be the exception rather than the rule.⁴²

When national governments want to pause, but not to settle, an ongoing conflict, buying time can be a useful tactic. For instance, a ceasefire agreement can provide both the opportunity to test the enemy's credibility as a potential partner in peace, as well as time to engage foreign actors and possibly win their support in hopes of altering the balance of power among warring parties.⁴³ Ceasefire agreements can, at times, lead to lasting peace,⁴⁴ yet this Article is interested in the short-term suspension of hostilities, after which war can either resume or not. Recent examples of ceasefire agreements include those brokered in South Sudan (January, August, and November 2015), Ukraine (February 2015), Mali (June 2015), Myanmar (October 2015), and Libya (December 2015).⁴⁵

Another country deserving membership in this category is Nigeria, despite the fact that its domestic situation is quite different from Colombia's. With 80,000 active military soldiers and 82,000 paramilitary, "Nigeria retains

⁴¹ Interview with a member of the armed forces, in Bogotá, Colombia (Nov. 9, 2017); Interview with a member of an administrative executive agency, in Bogotá, Colombia (Nov. 18, 2016).

⁴² Interview with a senior member of the armed forces, in Bogotá, Colombia (Nov. 15, 2017).

⁴³ On this point Mateja Peter notices that "[p]eacekeepers are now often protecting states," thus surrendering their nominal impartiality. Mateja Peter, *Between Doctrine and Practice: The UN Peacekeeping Dilemma*, 21 GLOBAL GOVERNANCE 351, 357 (2015). Rebels have also used ceasefire agreements to reorganize and rearm. See Coggins, *supra* note 29, at 106. On ceasefire agreements and the prospect of durable peace, see generally VIRGINIA P. FORTNA, PEACE TIME: CEASE-FIRE AGREEMENTS AND THE DURABILITY OF PEACE (2004).

⁴⁴ See, e.g., Anna Jarstad et al., *Peace Agreements in the 1990s – What Are the Outcomes 20 Years Later?*, UMEÅ WORKING PAPERS IN PEACE & CONFLICT STUD., Dec. 2015, at 2, <https://pdfs.semanticscholar.org/0973/8bb3086c0db9a8708dff13a9768f51c776f9.pdf> (mentioning Namibia and Guatemala as success stories).

⁴⁵ See *Peace Agreements Database Search*, UNITED NATIONS PEACEMAKER, http://peacemaker.un.org/document-search?keys=cease-fire&field_padate_value%5Bvalue%5D%5Bdate%5D=2015&field_pacountry_tid=

the best-funded and -equipped forces in West Africa.”⁴⁶ Nigeria at once faces distinct security challenges and contributes around 5000 troops to nine peacekeeping missions throughout the African continent.⁴⁷ Yet countries like Nigeria may have a (temporary) interest in diverting human and financial resources away from one internal threat to deal with another—a tactic referred to as “state acquiescence” in Table 1.⁴⁸ When the Nigerian government, in partnership with regional allies, launched major offensives against Boko Haram, as it did during 2015, “the number of Boko Haram attacks in the region . . . declined significantly.”⁴⁹ In all, the example of Nigeria illustrates how variations in short-term preferences (e.g., peace versus war) explain the back-and-forth movement from one quadrant to another on Table 1.

A. *Research Design and Case Selection: Military (In)ability to Win a War*

Military (in)ability to win a war is determined by the capability of state armed forces and paramilitaries to achieve key wartime objectives in a specific operating environment.⁵⁰ Military victory, in turn, is achieved either by quashing the enemy or capturing the territory under its control. For most selected cases, the main threat to government survival was internal rather than external. Incumbent governments have an ontological desire to stamp out sovereign competition and reassert control over areas that have fallen under rebel rule. Borrowing from Oxford professor Stathis N. Kalyvas’ conceptualization of civil wars as processes of competition over sovereignty,⁵¹ this Article moves from the theoretical premise that national governments hold a long-term preference for uncontested sovereignty over their entire national territory.

⁴⁶ *Sub-Saharan Africa*, 113 MILITARY BALANCE 477, 524 (2013) [hereinafter IISS 2013]. Figures from subsequent volumes of *The Military Balance* show a steady increase from 2013 to 2017. See, e.g., *Sub-Saharan Africa*, 117 MILITARY BALANCE 479, 528 (2017) [hereinafter IISS 2017] (listing 118,000 total active military soldiers).

⁴⁷ *Id.* at 524–25.

⁴⁸ As further discussed in the next section, the term “peace” is defined in the negative, that is, merely as the absence of war. See, e.g., FORTNA, *supra* note 42, at 9. For a critique of said approach, see Paul F. Diehl, *Exploring Peace: Looking Beyond War and Negative Peace*, 60 INT’L STUD. Q. 1 (2016).

⁴⁹ IISS 2017, *supra* note 46, at 481.

⁵⁰ The Joint Chiefs of Staff defines capability as “[t]he ability to complete a task or execute a course of action under specified conditions and level of performance.” JOINT CHIEFS OF STAFF, CJCSI 5123.01G, CHAIRMAN OF THE JOINT CHIEFS OF STAFF INSTRUCTION glossary, at GL-7 (2015). Prominent security scholar Stephen Biddle offers a different definition of military capability. In his words, (offensive) military capability is “the capacity to destroy the largest defensive force over the largest possible territory for the smallest attacker casualties in the least time.” STEPHEN BIDDLE, *MILITARY POWER: EXPLAINING VICTORY AND DEFEAT IN MODERN BATTLE* 6 (2004).

⁵¹ See STATHIS N. KALYVAS, *THE LOGIC OF VIOLENCE IN CIVIL WAR* 88–89 (2006).

But military inability is itself the synthesis of several distinct contributing factors, as Table 2 elucidates below. Aside from the balance of power among warring parties, other exogenous factors can and do affect state armed forces' likelihood of winning a war. This Article therefore also examines the technology of rebellion, political geography, and foreign military assistance to active rebellions.

The first—and most intuitive—factor at play is the balance of power among belligerents. Simply put, state armies and pro-government militias may not be strong enough to defeat the enemy; it can be a matter of numbers (i.e. soldiers ready for deployment), military professionalism, the technology or availability of weapons, or any combination of these circumstances.

The second factor determining military (in)ability is the technology of rebellion. Some civil wars are fought conventionally,⁵² like the one kicked off in Côte d'Ivoire by the failed coup d'état of September 19, 2002; others are fought as irregular wars (or insurgencies).⁵³ For example, the “hit-and-run” tactic has historically informed LRA operations directed at both military and civilian targets.⁵⁴ Commonly employed when weaker forces attack stronger opponents, this tactic puts rapidity of movement before territorial conquest and control, causing damage to the opponent and then quickly withdrawing before the latter can retaliate.

The third factor accounting for military (in)ability to win a war is political geography. The notion that the size and shape of nations—alongside population distribution within national borders—pose both hurdles and opportunities for governments has long been integral to the study of comparative politics.⁵⁵ The working definition of political geography herein

⁵² According to Stathis N. Kalyvas and Laia Balcells, “[i]n conventional wars, military confrontation is direct, either across well-defined front lines or between armed columns; clashes often take the form of set battles, trench warfare, and town sieges.” Stathis N. Kalyvas & Laia Balcells, *International System and Technologies of Rebellion: How the End of the Cold War Shaped Internal Conflict*, 104 AM. POL. SCI. REV. 415, 419 (2010).

⁵³ *Id.* at 418 (“[i]rregular or guerrilla warfare is a technology of rebellion whereby the rebels privilege small, lightly armed bands operating in rural areas.”) (citing James D. Fearon & David D. Laitin, *Ethnicity, Insurgency, and Civil War*, 97 AM. POL. SCI. REV. 75, 75 (2003)).

⁵⁴ See Jude Kagoro, *Competitive Authoritarianism in Uganda: The Not So Hidden Hand of the Military*, in DEMOCRATIZATION AND COMPETITIVE AUTHORITARIANISM IN AFRICA 160 (Matthijs Bogaards & Sebastian Elischer eds., 2016). On the inherent illegality of tactics employed in guerrilla warfare, see Coggins, *supra* note 29, at 104.

⁵⁵ See, e.g., JEFFREY HERBST, STATES AND POWER IN AFRICA: COMPARATIVE LESSONS IN AUTHORITY AND CONTROL 145 (2000).

employed is broader than usual in that it includes “artificial” hurdles to government power broadcasting, like the buffer zone established through the deployment of peacekeepers in post-genocide Rwanda and post-coup Côte d’Ivoire.⁵⁶ This addition is relevant in that the mainstream notion of political geography, while concerned with the state’s ability to broadcast power over a defined territory, neither considers nor is meant to apply to countries experiencing an internal conflict.

The last factor is foreign military intervention or assistance. In theory, foreign military intervention on the side of—or assistance to—the rebellion can alter meaningfully the balance of power between warring parties. In practice, none of the domestic situations referred to ICTs were immune from some type of foreign military intervention or assistance to the rebellion.⁵⁷ In other words, none of the situations listed in Table 2 were purely national matters, as civil conflicts were consistently internationalized, albeit to different degrees.

Table 2: Military Inability and Factors at Play in ICC Country Situations

	Balance of Power	Technology of Rebellion	Political Geography	Foreign Assistance
Uganda		✓		✓
DRC		✓	✓	✓
CAR	✓		✓	✓
Mali	✓		✓	✓
Côte d’Ivoire	✓		✓	
Ukraine	✓			✓
Palestine	✓	N/A	✓	

⁵⁶ On the Rwanda case, see Adekeye Adebajo, *The Revolt Against the West: Intervention and Sovereignty*, 37 THIRD WORLD Q. 1187, 1193 (2016).

⁵⁷ On Russian intervention on the side of Eastern Ukrainian separatists, see Ivan Katchanovski, *The Separatist War in Donbas: A Violent Break-Up of Ukraine?*, 17 EUR. POL. & SOC’Y 473, 475 (2016). In CAR, for instance, both state forces and the rebellion sought and eventually received foreign military assistance. Marielle Debos, *Fluid Loyalties in a Regional Crisis: Chadian ‘Ex-Liberators’ in the Central African Republic*, 107 AFR. AFF. 225, 227, 229 (2008).

B. State Tactical Preferences (Peace versus War)

Military inability alone does not explain why incumbent governments turn to ICL norms and institutions to exacerbate, rather than settle, armed conflicts active within their national borders. As noted earlier, adverse military realities should push state decision-makers in the opposite direction, making conflict resolution more likely to follow, not less. Only by bringing in the second independent variable—namely state preference for prolonging hostilities—is it possible to account for the rationality and strategic purview of government decision-making. From a methodological standpoint, inferring preferences is an inevitably risky endeavor when advancing causal claims. To minimize the risk of doing so, this subsection sets forth a working definition of “state preferences,” narrows its application, and operationalizes the variable into empirically observable factors.

It is worth recalling that the focus of this study is to explore and explain the seemingly odd and counterintuitive combination of political and military conditions underpinning state invitation of external judicial scrutiny, as illustrated in Table 1. Consequently, this Article looks specifically at the short-term tactical preferences of states at the moment national authorities formally invite ICC scrutiny. State preferences are inferred by and operationalized through public speeches, press releases, meeting minutes, government-issued documents, and state behavior. To corroborate otherwise insufficient evidence, state preferences are best accounted for by a combination of statements and actions—as it happened for the Uganda referral—or a pattern of consistent action over time, like in the case of the Article 12(3) declaration submitted by the Ivorian government in April 2003.

C. Case Selection

The theoretical argument above draws primarily, albeit not exclusively, on past situations referred by national governments to the ICC through either a self-referral or a declaration of accepting the jurisdiction envisaged by Article 12(3) of the Rome Statute. It is worth noting that not all self-referrals or Article 12(3) declarations are considered in this study, but only those that occurred in conflict or post-conflict countries. Thus, the self-referrals submitted by the Union of the Comoros (2013) and Gabon (2016) are excluded on the ground that no armed conflict of any kind, whether intra- or interstate, high- or low-intensity, was ongoing in these countries at the time their governments invited ICC scrutiny. Conversely, country situations like

Rwanda (1994) and Sierra Leone (2000–2002) fit into the theoretical framework, for they occurred at a historic juncture when ICTs had already become a reality, although established on an ad hoc, rather than permanent, basis. These two situations are particularly salient for the argument laid out in the previous section because they show national governments realizing ICTs' potential for norm subversion and exploitation before any such tribunal was established to adjudicate international crimes committed in their territory. In microeconomics terms, the demand for norm exploitation and subversion predated the supply of such norms.

On what counts as an armed conflict—and in line with the ICC's temporal and subject-matter jurisdiction—this Article looks at interstate, intrastate, and internationalized intrastate conflicts that were ongoing or broke out after July 1, 2002, when the Rome Statute entered into force. To make sure all armed conflicts falling within this time period are duly considered for case-selection purposes, this Article relies on the Uppsala Conflict Data Program at the department of Peace and Conflict Research, Uppsala University and the Center for the Study of Civil War at the Peace Research Institute Oslo (UCDP/PRIO) Armed Conflict Dataset (Version 4-2016—the latest available online at the time of submission).⁵⁸ It is beyond the scope of this publication to map all conflicts listed in the abovementioned dataset; rather, this Article aims to demonstrate that all episodes of state-invited external judicial scrutiny occurred under the same conditions (see the bottom-right quadrant of Table 1).

IV. EMPIRICAL EVIDENCE

A. *Côte d'Ivoire*

The Ivorian Civil War officially broke out on September 19, 2002, when a loose coalition of non-state armed groups unsuccessfully attempted to overthrow President Laurent Gbagbo.⁵⁹ While rebel forces failed to take over Abidjan and seize power, they nevertheless succeeded in taking control of the northern half of Côte d'Ivoire.⁶⁰ The unpreparedness of the Ivorian armed

⁵⁸ The original version of this dataset, widely used by researchers and policy makers alike, is described in Nils P. Gleditsch et al., *Armed Conflict 1946–2001: A New Dataset*, 39 J. PEACE RES. 615 (2002).

⁵⁹ Marco Wyss, *The Gendarme Stays in Africa: France's Military Role in Côte d'Ivoire*, 3 AFR. CONFLICT & PEACEBUILDING REV. 81, 91 (2013).

⁶⁰ LAIA BALCELLS, RIVALRY AND REVENGE: THE POLITICS OF VIOLENCE DURING CIVIL WAR 154 (2017).

forces in responding to the rebel sortie in Abidjan, let alone to the broader offensive carried out in the northern regions, speaks directly to their military inability. In fall of 2002, Ivorian armed forces still remained loyal to Gbagbo's predecessor, military ruler General Robert Guéi. Gbagbo's mistrust of state armed forces led him to rely on the presidential guard, the gendarmerie, and militiamen loyal to him because of clientelistic linkages.⁶¹ It is also worth noting that, at that time, the Ivorian army was relatively small in comparison to other African standing armies addressed below, due to the Ivorian government's lasting reliance on France for protection from external threats.⁶² Two more considerations are important to note. First, the main rebellion's estimated strength matched that of the Ivorian armed forces—a rare instance of balanced distribution of power between two sides.⁶³ Second, the sudden deployment of peacekeepers from France and the Economic Community of West African States ("ECOWAS") created a buffer zone and crystallized the initial balance of power, affording few opportunities for military confrontation between state and rebel forces.⁶⁴

Coerced by the French government into signing the Linas-Marcoussis agreement in late January 2003, Gbagbo actively undertook to sabotage the agreement's implementation by any means available.⁶⁵ From his perspective,

⁶¹ For the estimated strength of each service branch, see *The Military Balance*, 104 INT'L INST. FOR STRATEGIC STUD. 1, 231 (2004) [hereinafter IISS 2004]. For the purpose of this Article, clientelistic linkages consist in iterative dyadic relationships between patron and client whereby the former rewards the latter's political loyalty with access to public goods and services in a situation characterized by resource scarcity. For a conceptualization of clientelism, see Allen Hicken, *Clientelism*, 14 ANN. REV. POL. SCI. 289, 290 (2011). For its application to—and effects on—military recruitment and discipline, see Philip Roessler, *The Enemy Within: Personal Rule, Coups, and Civil War in Africa*, 63 WORLD POL. 300, 304, 309–10 (2011).

⁶² For a comparison between Côte d'Ivoire, the DRC, and Uganda, see IISS 204, *supra* note 61, at 231, 248. On Côte d'Ivoire's reliance on France for protection, see Maja Bovcon, *France's Conflict Resolution Strategy in Côte d'Ivoire and Its Ethical Implications*, 11 AFR. STUD. Q. 1, 13 (2009); Daniel Chirot, *The Debacle in Côte d'Ivoire*, 17 J. DEMOCRACY 63, 70 (2006), PAUL COLLIER, WARS, GUNS AND VOTES: DEMOCRACY IN DANGEROUS PLACES 163–64 (2010).

⁶³ See IISS 2004, *supra* note 6611, at 231, 374.

⁶⁴ See Alex J. Bellamy & Paul D. Williams, *The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect*, 87 INT'L AFF. 825, 829 (2011); COLLIER, *supra* note 62, at 163–64. Moreover, it was arguably "the exceptionally quick intervention by West African and French troops that prematurely froze the 2002 civil war." Mike McGovern, *The Ivorian Endgame: Can Ouattara Rebuild a Shattered Country?*, FOREIGN AFF. (Apr. 14, 2011), <http://www.foreignaffairs.com/articles/67728/mike-mcgovern/the-ivorian-endgame>.

⁶⁵ On the Linas-Marcoussis agreement and its discontents, see Mike McGovern, *Proleptic Justice: The Threat of Investigation as a Deterrent to Human Rights Abuses in Côte d'Ivoire*, in MIRRORS OF JUSTICE: LAW AND POWER IN THE POST-COLD WAR ERA 67, 83 (Kamari M. Clarke & Mark Goodale eds., 2009); Abu Bakarr Bah, *Democracy and Civil War: Citizenship and Peacemaking in Côte d'Ivoire*, 109 AFR. AFF. 597, 605–06 (2010); Glulia Piccolino, *David Against Goliath in Côte d'Ivoire? Laurent Gbagbo's War Against*

inviting ICC scrutiny was but another method of pursuing this endeavor.⁶⁶ The short timeline of three months—from January 23, 2003, when the abovementioned agreement was signed, to April 18, 2003, when the Ivorian government accepted ICC jurisdiction—strongly supports the claim that Gbagbo took all available measures not to share power with the rebellion by preventing already-appointed “rebel” ministers from claiming their seats in the cabinet.⁶⁷ Gbagbo’s heuristic approach did not stop with the declaration of acceptance of ICC jurisdiction hastily faxed to the OTP. Indeed, his government persisted in undermining the implementation of the power-sharing agreement and eventually succeeded in September 2003, when the rebel leadership announced they had resigned and quit the unity government.⁶⁸

B. Uganda

Uganda is the ideal case for this study because state leaders consistently preferred militaristic over political approaches to the LRA problem and behaved accordingly long before and after inviting ICC scrutiny. The Ugandan government referred the situation concerning the LRA to the ICC prosecutor on December 16, 2003.⁶⁹ There is a wealth of historical evidence on the Ugandan executive branch’s constant preference for a military approach to the LRA problem.⁷⁰ Facing opposition at home,⁷¹ Museveni skillfully interpreted the changing geopolitical landscape and seized new opportunities provided by the “War on Terror.”⁷² His government reached an agreement with its Sudanese counterpart under American auspices and, as a result thereof, was granted permission to carry out military operations against LRA bases on a limited portion of Sudanese soil.⁷³ This vast cross-border offensive, known as operation “Iron Fist,” ended in November 2003 with

Global Governance, 111 AFR. AFF. 1, 8, 15 (2012); Matthew I. Mitchell, *Power-Sharing and Peace in Côte d’Ivoire: Past Examples and Future Prospects*, 12 CONFLICT SECURITY & DEV. 171, 178–79 (2012).

⁶⁶ See Bocchese, *supra* note 2, at 377–79.

⁶⁷ On Gbagbo’s intentions to undermine the power-sharing agreement and hold on to power at all costs, see Englebert & Tull, *supra* note 10, at 126; COLLIER, *supra* note 62, at 162. For a detailed timeline, see *Timeline Ivory Coast*, TIMELINES HIST., <http://timelines.ws/countries/IVORYCOAST.HTML>.

⁶⁸ Bocchese, *supra* note 2, at 381.

⁶⁹ Akhavan, *supra* note 16, at 403; Rodman & Booth, *supra* note 2, at 271–72.

⁷⁰ See Rodman & Booth, *supra* note 2, at 281, 284, 290–91.

⁷¹ In late 1999 the Ugandan Parliament passed a bill offering amnesty to all LRA members who decided to renounce the rebellion and surrender. The Amnesty Act was enacted on January 21, 2000, in spite of Museveni’s opposition. *Id.* at 282.

⁷² See *id.* at 283; DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 96–97 (2014).

⁷³ Rodman & Booth, *supra* note 2, at 283; BOSCO, *supra* note 72, at 96–97.

mixed results.⁷⁴ Contrary to Museveni's expectations, indeed, the LRA "appeared to make progress in late 2003 and the beginning of 2004."⁷⁵ Lastly, events that occurred after the self-referral, like operations "Iron Fist II" (2004) and "Lighting Thunder" (2008),⁷⁶ lend further support to the claim that Museveni treated peace talks merely as opportunities for the rebellion to surrender unconditionally.⁷⁷

On military inability, the balance of power was overwhelmingly in favor of the Ugandan People's Defense Force ("UPDF") in 2003. With 40–45,000 active members, 1800 paramilitaries, and around 3000 local militiamen, the UPDF confronted around 1500 LRA members, the majority of whom were based across the border in Sudan.⁷⁸ Furthermore, those numbers do not reflect considerations like military discipline, training, and equipment: all factors further stacking the deck in favor of the UPDF. Rather than a favorable balance of power, the two major factors impeding a decisive victory were the technology of rebellion and the Sudanese logistical and military assistance. The latter impediment was overcome with the signing of a bilateral agreement between Kampala and Khartoum in March 2002, whereby the latter permitted the UPDF to cross into southern Sudan in order to attack LRA bases.⁷⁹ As a result, the LRA could no longer enjoy safe haven across the border.⁸⁰ Still, the technology of the rebellion is sufficient to explain why a well-trained and well-equipped state army has thus far been unable to decisively quash a rebel group composed mostly of child soldiers.⁸¹

⁷⁴ See, e.g., Akhavan, *supra* note 16, at 417; Kasaija P. Apuuli, *The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda*, 4 J. INT'L CRIM. JUST. 179, 182 (2006); Frank Van Acker, *Uganda and the Lord's Resistance Army: The New Order No One Ordered*, 103 AFR. AFF. 335, 336 (2004).

⁷⁵ IISS 2004, *supra* note 61, at 223.

⁷⁶ On these military operations, see Valerie Freeland, *Rebranding the State: Uganda's Strategic Use of the International Criminal Court*, 46 DEV. & CHANGE 293, 308 (2015).

⁷⁷ This is similar to Museveni's actions in 1994 when, right before peace talks started, he "issued a deadline for the LRA's unconditional surrender. In response, Kony relaunched the rebellion." Christopher R. Day, *The Fates of Rebels: Insurgencies in Uganda*, 43 COMP. POL. 439, 449 (2011); see also Rodman & Booth, *supra* note 2, at 281.

⁷⁸ See IISS 2004, *supra* note 61, at 248.

⁷⁹ On Sudanese cooperation with Uganda's operation "Iron First," see Cecily G. Brewer, *Peril by Proxy: Negotiating Conflicts in East Africa*, 16 INT'L NEGOTIATION 137, 149 (2011).

⁸⁰ See James Bevan, *The Myth of Madness: Cold Rationality and 'Resource' Plunder by the Lord's Resistance Army*, 9 CIV. WARS 343, 345 (2007).

⁸¹ See *id.* at 343, 350, 354. On LRA's guerrilla tactics, see Anthony Vinci, *The Strategic Use of Fear by the Lord's Resistance Army*, 16 SMALL WARS & INSURGENCIES 360, 369 (2005). On LRA's history of mass abduction and re-socialization of child soldiers, see Van Acker, *supra* note 74, at 338, 343.

C. *The Democratic Republic of Congo*

The DRC's political and military landscape in 2003–2004 was beyond chaotic. On paper, the DRC armed forces (known by their French acronym “FARDC”) included some 60,000 soldiers and 3000 air force members. They often worked in cooperation with the United Nations Mission in the DRC (“MONUC”), which deployed over 17,000 active troops and observers.⁸² What these figures do not reveal, however, is that FARDC troops were in a dreadful state, as they “suffer[ed] from insufficient funding for food, salaries and equipment.”⁸³ In addition, the FARDC confronted two major rebellions—namely the Movement for the Liberation of the Congo (“MLC”)⁸⁴ in the north and the Congolese Rally for Democracy (“RCD”)⁸⁵ in the east—whose common intents were to overthrow the government sitting in Kinshasa alongside several non-state thousand-unit-strong groups active at the local or regional level.⁸⁶ While the MONUC contingent began to disarm warring factions in Ituri on February 18, 2004, this effort did not—and could not—significantly affect the manpower factor by the time the government of Kinshasa invited ICC scrutiny over the entire national territory on March 3, 2004. But the balance of power between state and rebel forces was neither the only nor the most important obstacle impeding military victory for the FARDC. All of the above-listed factors were present and carried explanatory weight: rebels employed guerrilla tactics; foreign nations internationalized the conflict by assisting, when not directly creating, non-state armed groups; and the DRC's immense territory made it virtually impossible for the government to project power onto remote regions.⁸⁷

⁸² *The Military Balance*, 105 INT'L INST. FOR STRATEGIC STUD. 1, 375–76 (2005) [hereinafter IISS 2005].

⁸³ *Id.* at 362.

⁸⁴ Estimated strength was 18,000 units. IISS 2004, *supra* note 61, at 375. On the MLC, see Ndahinda, *supra* note 15.

⁸⁵ This was split into two main factions: the Congolese Rally for Democracy—Liberation Movement (“RCD-ML”), whose estimated strength ranged between 2000 and 3000 units; and the Congolese Rally for Democracy—Goma (“RCD-Goma”), whose strength was estimated around 20,000 units. IISS 2004, *supra* note 61, at 375; *see also* MAMPILLY, *supra* note 35, at 167–208.

⁸⁶ Some of these armed groups were active in the northeastern province of Ituri, often engaging in combat against one another, rather than fighting the FARDC. *See* IISS 2004, *supra* note 61, at 374–75; CHRIS ALDEN, MONIKA THAKUR & MATTHEW ARNOLD, MILITIAS AND THE CHALLENGES OF POST-CONFLICT PEACE: SILENCING THE GUNS 113–19 (2011).

⁸⁷ On foreign assistance to Congolese rebel groups, *see* MAMPILLY, *supra* note 35, at 167–208. On the challenges posed by geography, *see* HERBST, *supra* note 55, at 146–47. For more recent developments in the situation of eastern DRC, *see* John Karlsrud, *The UN at War: Examining the Consequences of Peace-Enforcement Mandates for the UN Peacekeeping Operations in the CAR, the DRC and Mali*, 36 THIRD WORLD Q. 40, 44–45 (2015).

Given the grim political landscape and military reality his government confronted in early 2004, President Kabila had good reasons to play along with international efforts aimed at sharing power among key domestic players. Such players included his two main political rivals and former military opponents, RCD leader Azarias Ruberwa and MLC leader Jean-Pierre Bemba Gombo. Indeed, it would have been prudent for him to focus on consolidating power in Kinshasa and nearby provinces before—a concern that materialized on March 28, 2004, when government troops eventually warded off attacks against military installations and television headquarters in what was reportedly a coup attempt against him.⁸⁸ Yet, as discussed elsewhere in greater detail, Kabila saw the ICC as a way to criminalize his former enemies and, in so doing, undermine the implementation of the foreign-sponsored power-sharing agreement.⁸⁹ The plan of co-opting and subverting ICL norms and institutions exceeded expectations, for the MONUC contingent successfully pursued and apprehended several warlords beyond state reach.⁹⁰

D. *The Central African Republic*

The government of Bangui referred the situation of its territory to the ICC on December 18, 2004. General François Bozizé seized power in March 2003 following five months of intense hostilities against the regime of Ange-Félix Patassé and his allies, who included MLC rebels from the DRC as well as Chadian and Libyan mercenaries.⁹¹ This was Bozizé's second known attempt to overthrow Patassé, having failed first in October 2002.⁹² At least initially, Bozizé claimed he was not seeking office,⁹³ but merely helping the domestic transition toward free and fair presidential elections occurring in March 2005.⁹⁴ Following a constitutional referendum held on December 5, 2004, and approved by the vast majority of voters, the CAR system of government changed from presidential to semi-presidential and introduced the

⁸⁸ A detailed timeline is available online at *Timeline: Congo DRC, Democratic Republic of the Congo*, TIMELINES HIST., <http://www.timelines.ws/countries/CONGO.HTML>.

⁸⁹ See Bocchese, *supra* note 2, at 365–73.

⁹⁰ *Id.* at 373.

⁹¹ See Owen Fiss, *Within Reach of the State: Prosecuting Atrocities in Africa*, 31 HUM. RTS. Q. 59, 61 (2009); Ndahinda, *supra* note 15, at 488–89.

⁹² Bozizé was also accused of involvement in a coup attempt against Patassé in October 2001, when he was serving as the army chief of staff for the latter. Following these allegations, Bozizé quickly fled the country and sought refuge in Chad. See Patrick Vinck & Phuong N. Pham, *Outreach Evaluation: The International Criminal Court in the Central African Republic*, 4 INT'L J. TRANSITIONAL JUST. 421, 426 (2010).

⁹³ Debos, *supra* note 57, at 229 n.13.

⁹⁴ See Andreas Mehler, *Rebels and Parties: The Impact of Armed Insurgency on Representation in the Central African Republic*, 49 J. MOD. AFR. STUD. 115, 126 (2011).

two-term limit for the presidency.⁹⁵ The new constitution entered into force on December 27, 2004.⁹⁶ On December 16, 2004—just two days before the self-referral—the highest functioning court in the country certified the CAR judiciary’s inability to investigate and prosecute former President Patassé and Congolese Vice-President Bemba Gombo as they were both in exile at that time.⁹⁷ Because of this inability, the court “recommended referring the matter to the ICC.”⁹⁸

To nobody’s surprise, on January 4, 2005, Bozizé excluded his predecessor’s candidacy “on the grounds that [he was] being prosecuted for ‘blood crimes and economic crimes.’”⁹⁹ Patassé’s legal problems stretched beyond the CAR, for he “was a likely suspect in the ICC investigation in the CAR.”¹⁰⁰ His death in 2011 may explain why a formal indictment never materialized, yet there is no doubt the troops under his command, along with their foreign allies, committed egregious human rights violations between 2002 and 2003.¹⁰¹ Thus, the state invitation of ICC scrutiny causally follows the impossibility to apprehend Patassé, who had been in exile since March 2003.¹⁰² In all, Bozizé was at a critical turning point of his journey to power at the time his government invited ICC scrutiny. On the one hand, he sought the legitimacy of an electoral win to consolidate his authority;¹⁰³ on the other hand, his main enemies escaped his reach and continued to pose a constant threat to his survival.¹⁰⁴

There is no doubt that Bozizé’s government was too weak to pursue any military option to enhance power consolidation in December 2004. First, he

⁹⁵ PETER BOUCKAERT & OLIVIER BERCAULT, STATE OF ANARCHY: REBELLION AND ABUSES AGAINST CIVILIANS, HUMAN RIGHTS WATCH 37–38 (2007), <https://www.hrw.org/reports/2007/car0907/car0907web.pdf>.

⁹⁶ *Id.* at 37.

⁹⁷ Andreas Th. Müller & Ignaz Stegmüller, *Self-Referrals on Trial: From Panacea to Patient*, 8 J. INT’L CRIM. JUST. 1267, 1268 n.4 (2010).

⁹⁸ *Id.*

⁹⁹ BOUCKAERT & BERCAULT, *supra* note 95, at 38; see also Marlies Glasius, *A Problem: Not a Solution: Complementarity in the Central African Republic and the Democratic Republic of Congo*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 1204, 1208 (Carsten Stahn & Mohamed El-Zeid eds., 2011).

¹⁰⁰ Glasius, *supra* note 99, at 1206.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1209–10.

¹⁰³ See Wasana Punyasena, *Conflict Prevention and the International Criminal Court: Deterrence in a Changing World*, 14 MICH. ST. J. INT’L L. 39, 64 (2006); BOUCKAERT & BERCAULT, *supra* note 95, at 37.

¹⁰⁴ See Steven D. Roper & Lilian A. Barria, *State Co-Operation and International Criminal Court Bargaining Influence in the Arrest and the Surrender of Suspects*, 21 LEIDEN J. INT’L L. 457, 467–68 (2008).

“came to power . . . thanks to Chadian mercenaries, and his rule . . . hardly extend[ed] beyond the capital Bangui.”¹⁰⁵ Second, his tenure in power was at best precarious, for his stay in power hinged on the protection provided by said Chadian mercenaries,¹⁰⁶ foreign patronage, and ethnic politics.¹⁰⁷ Third, his government was in control of neither the entire national territory—northeast CAR had become the theater of clashes between Chadian state and rebel forces¹⁰⁸—nor part of the abovementioned mercenaries, who, in April 2004, “engaged in a skirmish with government forces in Bangui.”¹⁰⁹ Finally, the London-based International Institute for Strategic Studies (IISS) estimated the CAR armed forces’ strength at 2550 men on active duty.¹¹⁰

The CAR did not enjoy greater security under Bozizé, whose rule ended in late March 2013 when the rebel coalition Séléka captured the capital. At that time the rebel coalition, whose estimated size reached 10,300 well-armed troops, enjoyed a favorable balance of power, counting on “more than double the total number of the Central African Armed Forces.”¹¹¹ Rather than bringing much-needed stability to the country, the rebel takeover plunged it into more violence and chaos.¹¹² Widespread looting and rape by Séléka militants—predominantly Muslim northerners¹¹³—ignited resentment in the predominantly Christian population and led to the emergence of self-defense militias known as anti-Balaka. Against this backdrop, on January 23, 2014 the National Transitional Council (“CNT”) appointed non-partisan Bangui mayor Catherine Samba-Panza to the presidency.¹¹⁴ Violence continued unabated under her rule, and on May 30, 2014, she signed the CAR’s second referral to the ICC.¹¹⁵ In the referral letter, she asked the ICC to investigate crimes committed in the country since August 2012 when the rebel coalition Séléka first emerged and began to organize.¹¹⁶

¹⁰⁵ Jennifer Giroux et al., *The Tormented Triangle: The Regionalisation of Conflict in Sudan, Chad, and the Central African Republic* 9 (Crisis States Research Ctr., Working Paper No. 47, 2009).

¹⁰⁶ See Debos, *supra* note 57, at 227.

¹⁰⁷ See Giroux et al., *supra* note 105, at 9.

¹⁰⁸ Debos, *supra* note 57, at 228.

¹⁰⁹ *Id.* at 230.

¹¹⁰ IISS 2005, *supra* note 82, at 371.

¹¹¹ Gino Vlavonou, *Understanding the ‘Failure’ of the Séléka Rebellion*, 23 AFR. SECURITY REV. 318, 321 (2014).

¹¹² *Id.* at 322.

¹¹³ *Id.* at 321.

¹¹⁴ Martin Welz, *Briefing: Crisis in the Central African Republic and the International Response*, 113 AFR. AFF. 601, 603 (2014).

¹¹⁵ Government of the Central African Republic, Letter of Referral to the ICC (May 30, 2014) available at <https://www.icc-cpi.int/iccdocs/otp/2014-05-30-CAR-referral.pdf>.

¹¹⁶ *Id.*

In the months leading up to the referral, the security situation disintegrated into mayhem as sectarian tensions soured and former victims became perpetrators. This latest wave of mass violence did not spare the capital Bangui.¹¹⁷ International military assistance notwithstanding,¹¹⁸ the sitting government proved unable to contain, let alone stop, ongoing bloodshed. Massacres had sadly become a constant feature of life in the CAR well before Catherine Samba-Panza took office, and the month of May 2014 was no exception. On May 1, for example, fifteen people were killed near the border with Chad.¹¹⁹ On May 5, unidentified gunmen attacked French peacekeepers.¹²⁰ On May 9, the United Nations (“U.N.”) Security Council imposed sanctions on high-profile CAR nationals, including Séléka and anti-Balaka leaders and former president Bozizé.¹²¹ Sanctions apparently failed to exert any constraining or deterring effects, for on May 10, armed men rounded up and burned thirteen people alive.¹²² Fearing spillover effects into their country, the Chadian government shut down its border with the CAR on May 12. On May 22, French peacekeepers confronted hundreds of Muslims who refused to disarm in Bambari. French forces again engaged in combat with Séléka militants two days later. On May 28, gunmen attacked a church in Bangui, killing at least seventeen people and abducting twenty-seven. Christian militiamen retaliated the following day by plundering a mosque in Bangui.¹²³ On May 30—the day the referral letter was signed—Catherine Samba-Panza publicly stated that the armed groups’ aim was to destabilize her government. The same day, Burundian peacekeepers clashed with protesters in the capital, killing two.¹²⁴ Finally, on May 31, hundreds of Muslims took to the streets in Bangui to demand a safe exit from the capital.¹²⁵ In conclusion, the CAR is perhaps the easiest case to test the theoretical argument put forth herein, as state authority had collapsed and the acting government was unable to broadcast power over the capital city, let alone over the entire national territory.

¹¹⁷ Vlavonou, *supra* note 111, at 323.

¹¹⁸ *Id.*

¹¹⁹ A detailed timeline is available online at *Timeline Central African Republic*, TIMELINES HIST., <http://timelines.ws/countries/CENAFREP.HTML>.

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

E. Mali

The Mali self-referral aptly illustrates the logic underlying state invitation of external judicial scrutiny. On March 22, 2012, the military removed two-term President Amadou Toumani Touré from power.¹²⁶ This coup d'état took place five weeks before presidential elections were scheduled to take place.¹²⁷ To justify its action, the military junta lamented Touré's weak and half-hearted response against the new Tuareg rebellion (the National Movement for the Liberation of Azawad—"MNLA") that had emerged in mid-January and had controlled the northern regions since that time.¹²⁸ The situation further deteriorated on April 6, when the rebellion declared the independence of Azawad from Mali.¹²⁹

The military junta's strategy was three-pronged. First, by ousting the recalcitrant Touré, coup leaders sought to change state preferences in coping with the MNLA problem and adopt a more decisive military approach thereto. On this point, upon taking office on April 12, the new interim leader and former speaker of the parliament, Dioncounda Traoré, promised "total war" against the MNLA and newly formed Islamist groups claiming control of northern Mali.¹³⁰

Second, by inviting ICC scrutiny, Malian state authorities aimed to focus international attention on an otherwise peripheral conflict and criminalize the rebellion along with the Islamist groups.¹³¹ To this end, the

¹²⁶ Dan E. Stigall, *The French Military Intervention in Mali, Counter-Terrorism, and the Law of Armed Conflict*, 223 MIL. L. REV. 1, 10 (2015).

¹²⁷ See Simeon H.O. Alozieuwa, *The March 22, 2012 Coup in Mali: Lessons and Implications for Democracy in the West Africa Subregion in the Wave of Transnational Terrorism*, 9 DEMOCRACY & SECURITY 383, 388 (2013); Isaline Bergamaschi, *French Military Intervention in Mali: Inevitable, Consensual yet Insufficient*, 2 STABILITY 1, 4 (2013). See also Adam Nossiter, *Soldiers Overthrow Mali Government in Setback for Democracy in Africa*, N.Y. TIMES (Mar. 22, 2012), <https://www.nytimes.com/2012/03/23/world/africa/mali-coup-france-calls-for-elections.html>.

¹²⁸ See Kwesi Aning & Fiifi Edu-Afful, *African Agency in R2P: Interventions by African Union and ECOWAS in Mali, Côte d'Ivoire, and Libya*, 18 INT'L STUD. REV. 120, 128 (2016); Stigall, *supra* note 126, at 10; IISS 2013, *supra* note 46, at 477, 480, 519.

¹²⁹ A detailed timeline is available online at *Timeline Mali*, TIMELINES HIST., <http://timelines.ws/countries/MALI.HTML> (last visited Apr. 12, 2018). On the Tuaregs' long-lasting struggle for the establishment of a "Free Azawad" in northern Mali, see Douglas Livermore, *The Case for Azawad*, 22 AFR. SECURITY REV. 282, 284 (2013). On the African Union and ECOWAS's crisis management strategy, see Aning & Edu-Afful, *supra* note 128, at 128.

¹³⁰ A detailed timeline is available online at *Timeline Mali*, TIMELINES HIST., <http://timelines.ws/countries/MALI.HTML>.

¹³¹ Stigall, *supra* note 126, at 3–4.

Malian government referred its own domestic situation dating back to January 2012, thereby ensuring that ICC jurisdiction would cover war crimes and crimes against humanity allegedly committed—mostly by non-state actors—in the six months immediately prior to the self-referral.

Third, state efforts to criminalize internal enemies were crucial to forestall the African Union (“AU”) and ECOWAS’s attempts at finding a political solution to the crisis and convincing the military junta to relinquish power.¹³² By calling instead for the deployment of 3300 ECOWAS troops in November 2012 and also for French military intervention in December 2012, the Malian state invited an intervention that significantly altered the balance of power among the warring parties.¹³³

There was wide consensus among interim authorities on the need for French military intervention, due to the Malian state’s inability to quash the Tuareg rebellion at the time the interim government referred its situation to the ICC.¹³⁴ The first factor contributing to its inability was an unfavorable balance of power. Historically small and underfunded,¹³⁵ the Malian army had an estimated strength of 7350 personnel, alongside 4800 paramilitaries and 3000 militiamen.¹³⁶ When the MNL emerged in January 2012, “Mali’s armed forces suffer[ed] from low morale, politicization and outdated equipment.”¹³⁷ The air force—a key element of state military advantage over the rebellion—was small in size and only “intermittently capable of delivering limited strike capabilities.”¹³⁸ The army was not faring any better, for it was reportedly forced to withdraw during clashes with the rebels due to ammunition shortages.¹³⁹ Conversely, Tuareg tribesmen “had returned from fighting in Libya in possession of relatively sophisticated arms.”¹⁴⁰

The deployment of ECOWAS troops and French military intervention eventually redressed the balance of power but could not overcome the other

¹³² See Djallil Lounnas, *The Regional Fallouts of the French Intervention in Mali*, 18 MEDITERRANEAN POL. 325, 325–28 (2013); Bergamaschi, *supra* note 127, 5–6.

¹³³ See Bergamaschi, *supra* note 127, at 6; IISS 2013, *supra* note 46, at 477, 482.

¹³⁴ See Bergamaschi, *supra* note 127, at 5–6.

¹³⁵ See STEVEN LEVITSKY & LUCAN A. WAY, *COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR* 297 (2010).

¹³⁶ IISS 2013, *supra* note 46, at 519.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at 481.

¹⁴⁰ *Id.* at 477.

major factor currently at play in Mali: political geography. Because of its shape, infrastructure, and population distribution, the Malian state has been unable to broadcast power onto the northern half of the country for decades.¹⁴¹ Military officers are painfully aware of the adverse effects of political geography on a state's ability to exert control over desert regions. According to a high-ranking officer, "it is impossible, for States, like Mali and Mauritania, to insure an effective security of the region without the appropriate aerial surveillance equipment. For the quasi-delinquent Malian state, the situation is [even] worse."¹⁴² In all, political geography, alongside the balance of power, explains why Mali has long been "characterized by vast state-less areas, particularly in the northern Tuareg-dominated regions."¹⁴³

F. Ukraine

The Government of Ukraine lodged its first declaration under Article 12(3) on April 17, 2014, and a second one on September 8, 2015. The latter was instrumental in extending the ICC's temporal jurisdiction beyond the narrow time frame specified in the first declaration and to reaffirm Ukraine's commitment to the ICC after democratically elected President Petro Poroshenko replaced acting President Oleksandr Turchynov.¹⁴⁴

At that time, the government, led by Prime Minister Arseniy Yatsenyuk, faced a dire domestic situation. First, President Yanukovich—the main suspect for ordering the police to break up protests in Independence Square (Maidan) on February 18, 2014 and the subject of an arrest warrant issued by the acting government on February 24—had fled the country and found refuge in Russia.¹⁴⁵ Second, the March 16 referendum added the trappings of democratic legitimacy to Russia's annexation of Crimea.¹⁴⁶

¹⁴¹ See HERBST, *supra* note 55, at 152–54.

¹⁴² Lounnas, *supra* note 132, at 326.

¹⁴³ LEVITSKY & WAY, *supra* note 135, at 297.

¹⁴⁴ President Turchynov assumed the position between Viktor Yanukovich's removal in late February and the presidential elections to be held in late May. Furthermore, it bears noting that the military and political conditions of interest have not changed since April 2014. A detailed timeline is available online at *Timeline Ukraine*, TIMELINES HIST., <http://timelines.ws/countries/UKRAINE.HTML>.

¹⁴⁵ *Ukraine arrest warrant for fugitive Viktor Yanukovich*, BBC NEWS (Feb. 24, 2014), <http://www.bbc.com/news/world-europe-26320004>. On Yanukovich's flight, see also Brad R. Roth, *The Neglected Virtues of Bright Lines: International Law in the 2014 Ukraine Crises*, 21 ILSA J. INT'L & COMP. L. 317, 318 (2014); Ivan Katchanovski, *The Separatist War in Donbas: A Violent Break-Up of Ukraine?*, 17 EUR. POL. & SOC'Y 473, 475–76 (2016).

¹⁴⁶ See Robin Geiß, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91 INT'L L. STUD. 425, 427, 429 (2015).

Third, in early April, government forces were struggling to reassert control over eastern provinces after pro-Russian separatists seized provincial administration buildings in eastern Ukraine's major cities and proclaimed independence from Kiev.¹⁴⁷

Against this backdrop, Ukraine's military response was timid at best. Prime Minister Yatsenyuk reiterated the government's official position on March 5, 2014, claiming that the embattled Crimean peninsula must remain part of Ukraine.¹⁴⁸ Public announcements notwithstanding, skirmishes between Ukrainian and Russian forces took place repeatedly during the first half of March as the latter consolidated its hold on Crimea.¹⁴⁹ On March 20 and 22, pro-Russian crowds stormed Ukrainian military bases in Crimea, seizing two warships and capturing the commander of an air force base.¹⁵⁰ On March 24, the government of Kiev de facto acknowledged defeat as it ordered the evacuation of its troops from the occupied peninsula.¹⁵¹ The situation in eastern Ukraine was dire, but the government "demonstrated resolve to restore its territorial integrity through the use of military force."¹⁵² Russia's stated intention not to invade eastern Ukraine and only unofficial support of the secessionists may partially explain this uneven resolve.¹⁵³

Unable to confront Russia militarily, Ukraine's strategy has been an ode to institutional balancing by "counter[ing] pressures or threats through initiating, utilizing, and dominating multilateral institutions."¹⁵⁴ Put otherwise, the government of Kiev switched the battlefield with diplomatic fora and international courts in hopes of raising the political costs of Russian

¹⁴⁷ See Roth, *supra* note 145, at 321–22.

¹⁴⁸ See Bob Fredericks & Geoff Earle, *Ukrainian PM: We Won't Give Up Crimea*, N.Y. POST (Mar. 5, 2014), <https://nypost.com/2014/03/05/ukrainian-pm-we-wont-give-up-crimea/>.

¹⁴⁹ See, e.g., Steve Gutterman & Pavel Polityuk, *Putin Signs Crimea Treaty as Ukraine Serviceman Dies in Attack*, REUTERS (Mar. 17, 2014), <https://www.reuters.com/article/us-ukraine-crisis/putin-signs-crimea-treaty-as-ukraine-serviceman-dies-in-attack-idUSBREA1Q1E820140318>.

¹⁵⁰ *Russian Troops Storm Ukrainian Bases in Crimea*, BBC NEWS (Mar. 22, 2014), <http://www.bbc.com/news/world-europe-26698754>; *Top Ukrainian air force commander "abducted"*, CBS NEWS (Mar. 23, 2014), <https://www.cbsnews.com/news/top-ukrainian-air-force-commander-abducted/>.

¹⁵¹ Similarly, Robin Geiß notes that, while Crimea's incorporation into the Russian Federation is inconceivable from an international law viewpoint, in realpolitik terms, Ukraine somehow had to accept it. Geiß, *supra* note 146, at 426.

¹⁵² Roth, *supra* note 145, at 321–22.

¹⁵³ See Katya Golubkova & Gabriela Baczynska, *Russia Sees No Need for Ukraine Incursion, Tatars Seek Autonomy*, REUTERS (Mar. 29, 2014), <https://www.reuters.com/article/us-ukraine-crisis/russia-sees-no-need-for-ukraine-incursion-tatars-seek-autonomy-idUSBREA2S0K020140329>.

¹⁵⁴ Kai He, *Institutional Balancing and International Relations Theory: Economic Interdependence and Balance of Power Strategies in Southeast Asia*, 14 EUR. J. INT'L REL. 489, 492 (2008).

aggression. On March 15, 2014, Russia vetoed a U.N. Security Council resolution declaring Crimea's secession illegal. While Russia fended off this attempt, China's abstention signaled Moscow's diplomatic isolation on the issue.¹⁵⁵ On March 27, the U.N. General Assembly passed a non-binding resolution invalidating Crimea's referendum and reaffirming Ukraine's territorial integrity.¹⁵⁶ Lacking the veto power to block this resolution, Russia nevertheless persuaded or threatened several countries not to back the resolution.¹⁵⁷ As a result, the General Assembly's half-hearted support for Ukraine's territorial integrity could not be interpreted as a diplomatic success and called for further action.¹⁵⁸ On April 17, the Government of Ukraine lodged an Article 12(3) declaration accepting ICC jurisdiction.¹⁵⁹ The OTP quickly followed up and, on April 25, opened a preliminary examination of the situation in Ukraine.¹⁶⁰

On the eastern front, events took a positive turn after the election of Poroshenko to the presidency. In late May, the Ukrainian army stepped up its military efforts against the separatists in the eastern provinces.¹⁶¹ Lack of popular support, poor coordination within the insurgency, eccentric leadership, and inadequate military training all contributed to the defeat of the rebellion by the Ukrainian military on May 26.¹⁶² Despite Russian assistance, the military balance of power unequivocally favored the Ukrainian military over the insurgency. In response to the defeat, the Russian government allegedly provided the insurgents with advanced equipment, including anti-aircraft weapons, and replaced the rebel leadership.¹⁶³

¹⁵⁵ See *UN Security Council Action on Crimea Referendum Blocked*, UN NEWS (Mar. 15, 2014), <https://news.un.org/en/story/2014/03/464002-un-security-council-action-crimea-referendum-blocked>.

¹⁵⁶ See Louis Charbonneau & Mirjam Donath, *U.N. General Assembly Declares Crimea Secession Vote Invalid*, REUTERS (Mar. 27, 2014), <https://www.reuters.com/article/us-ukraine-crisis-un/u-n-general-assembly-declares-crimea-secession-vote-invalid-idUSBREA2Q1GA20140327>.

¹⁵⁷ See *id.*

¹⁵⁸ Interview with an Eastern European diplomat, in New York, N.Y. (June 17, 2016).

¹⁵⁹ See Ilaria Zavoli, *Peacekeeping in Eastern Ukraine: The Legitimacy of a Request and the Competence of the United Nations General Assembly*, 22 J. CONFLICT & SECURITY L. 147, 160 (2017).

¹⁶⁰ Press Release, Int'l Criminal Court Office of the Prosecutor, The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination in Ukraine (Apr. 25, 2014), <https://www.icc-cpi.int/Pages/item.aspx?name=pr999>.

¹⁶¹ Lawrence Freedman, *Ukraine and the Art of Limited War*, SURVIVAL, Dec. 2014–Jan. 2015, at 7, 15.

¹⁶² *Id.* at 16.

¹⁶³ *Id.* As of early June, Moscow still officially denied providing any assistance to eastern separatists. The Kremlin admitted Russian mercenaries were active in Ukraine only in early summer. See Roy Allison, *Russian 'Deniable' Intervention in Ukraine: How and Why Russia Broke the Rules*, 90 INT'L AFF. 1255, 1257, 1257 n.3 (2014).

Ukraine's lawfare strategy began to pay dividends in November 2016 when the OTP issued its yearly report on preliminary examination activities accusing Russian forces of having committed war crimes during and after the annexation of Crimea.¹⁶⁴ In rejecting these allegations, Russian authorities symbolically unsigned the Rome Statute, alleging in turn that the Court is politically biased.¹⁶⁵ Lastly, on January 16, 2017, Ukraine sued the Russian Federation before the International Court of Justice, accusing the latter of financing terrorism and discriminating against ethnic and religious minorities in Crimea.¹⁶⁶ In conclusion, the imbalance of power between Ukrainian and Russian forces was such that the government of Kiev limited military violence to the bare necessities and instead explored alternative ways and means to contrast enemy action. Having failed to garner enough political support at the U.N. level, lawfare became a tactic of last resort.

G. Palestine

The government of Palestine lodged two declarations accepting ICC jurisdiction under Article 12(3). The first, submitted on January 22, 2009, granted the Court jurisdiction over acts committed on the territory of Palestine since July 1, 2002.¹⁶⁷ The second, filed on January 1, 2015—one day before Palestine acceded to the Rome Statute—modeled the Court's temporal jurisdiction and included crimes allegedly committed since June 13, 2014.¹⁶⁸ Both episodes squarely fit the theoretical argument herein set forth in that they bring to the fore the extralegal considerations underlying a government's decision to invite external judicial scrutiny.

January of 2009 saw intense hostilities in the Gaza Strip. Israel's military offensive, aimed at stopping rocket assaults against Israeli cities by

¹⁶⁴ Int'l Criminal Court Office of the Prosecutor [hereinafter ICC-OTP], *Report on Preliminary Examination Activities 2016*, ¶¶ 172–76, ICC-CPI-20161114-PR1252 (Nov. 14, 2016), https://www.icc-cpi.int/ic-docs/otp/161114-otp-rep-PE_ENG.pdf.

¹⁶⁵ Ivan Nechepurenko & Nick Cumming-Bruce, *Russia Cuts Ties with International Criminal Court, Calling It 'One-Sided,'* N.Y. TIMES (Nov. 16, 2016), <https://www.nytimes.com/2016/11/17/world/europe/russia-withdraws-from-international-criminal-court-calling-it-one-sided.html>.

¹⁶⁶ *In U.N. Lawsuit, Ukraine Demands Russia End Support for Separatists*, REUTERS (Jan. 17, 2017), <https://www.reuters.com/article/us-ukraine-crisis-russia-court/in-u-n-lawsuit-ukraine-demands-russia-end-support-for-separatists-idUSKBN1511EU>.

¹⁶⁷ See Malcolm N. Shaw, *The Article 12(3) Declaration of the Palestinian Authority, the International Criminal Court and International Law*, 9 J. INT'L CRIM. JUST. 301, 301–02 (2011). See also John Cerone, *The ICC and Palestinian Consent*, AM. SOC'Y INT'L L.: INSIGHTS (Mar. 20, 2015), <https://www.asil.org/insights/volume/19/issue/6/icc-and-palestinian-consent>.

¹⁶⁸ See Cerone, *supra* note 167.

Hamas militants, reached its peak in early January after the Israeli Defense Forces (“IDF”) successfully carried out ground, air, and drone operations against Hamas leaders and targets, including weapon storages and smuggling tunnels.¹⁶⁹ Israeli troops advanced into the Gaza Strip; Hamas militants retreated into urban centers.¹⁷⁰ As war entered Palestinian cities, the civilian population became increasingly caught up in combat operations. On January 17, Israel agreed to a weeklong ceasefire, and Hamas militants followed suit the next day.¹⁷¹ The IDF concluded the three-week offensive on January 21 when troops pulled out from the Gaza Strip.¹⁷²

The end of hostilities did not bring about lasting peace; rather, it moved the Israeli-Palestinian conflict toward non-military avenues, including the ICC.¹⁷³ It is worth noting the parties’ reaction to the end of combat operations, for both sides were concerned about the perceived external legitimacy of the military offensive that had just concluded. On January 21, the Israeli foreign minister embarked on a diplomatic mission to Europe “in a bid to rally international support to end arms smuggling into the Hamas-ruled territory.”¹⁷⁴ The Palestinians responded by lodging the abovementioned declaration under Article 12(3).¹⁷⁵ By doing so, they purported to criminalize the same action the Israelis aimed to legitimize. Furthermore, the choice of using international laws and institutions resonated with the intended audience, for European powers favor non-coercive alternatives to conflict resolution and staunchly support the ICC.¹⁷⁶ That said, this first attempt at inviting ICC

¹⁶⁹ Nidal al-Mughrabi, *Gaza Death Toll Tops 900*, REUTERS (Jan. 11, 2009), <https://www.reuters.com/article/us-palestinians-israel/gaza-death-toll-tops-900-idUSTRE5053R720090112>.

¹⁷⁰ *Israeli Forces Storm Gaza City Neighborhood*, NBC NEWS (Jan. 14, 2009), <http://www.nbcnews.com/id/28633969>.

¹⁷¹ *Hamas Agrees to Cease-Fire, Gives Israel One Week to Remove Troops*, FOX NEWS (Jan. 18, 2009), <http://www.foxnews.com/story/2009/01/18/hamas-agrees-to-cease-fire-gives-israel-one-week-to-remove-troops.html>.

¹⁷² *As Obama Takes Office, Israel Withdraws Last Troops from Gaza, Makes Bid to End Arms Smuggling*, N.Y. DAILY NEWS (Jan. 21, 2009), <http://www.nydailynews.com/news/world/obama-takes-office-israel-withdraws-troops-gaza-bid-arms-smuggling-article-1.422372>.

¹⁷³ See David Bosco, *Palestine in The Hague: Justice, Geopolitics, and the International Criminal Court*, 22 GLOBAL GOVERNANCE 155, 157 (2016).

¹⁷⁴ A detailed timeline is available online at *Timeline Palestine (C) 2004–2010*, TIMELINES HIST., http://timelines.ws/countries/PALES_C.HTML (last visited Apr. 12, 2018).

¹⁷⁵ See Andreas Zimmermann, *Palestine and the International Criminal Court Quo Vadis? Reach and Limits of Declarations Under Article 12(3)*, 11 J. INT’L CRIM. JUST. 303, 304 (2013).

¹⁷⁶ On Europe’s diplomacy in conflict resolution, see Patrick Mueller, *Europe’s Foreign Policy and the Middle East Peace Process: The Construction of EU Actorness in Conflict Resolution*, 14 PERSP. ON EUR. POL. & SOC’Y 20, 29 (2013). On Europe’s political and diplomatic support for the ICC, see Antonis Antoniadis & Olympia Bekou, *The European Union and the International Criminal Court: An Awkward Symbiosis in Interesting Times*, 7 INT’L CRIM. L. REV. 621, 622, 646–50 (2007).

scrutiny fell short of the Palestinians' expectations as the crucial legal question revolved around the status of Palestine under international law.¹⁷⁷ After temporizing for more than three years, in April 2012, the ICC chief prosecutor Luis Moreno Ocampo declined Palestine's referral to avoid taking a position on the thorny question of Palestinian statehood—a question he deemed appropriate for a political, rather than legal, organ to address and resolve.¹⁷⁸

On January 1, 2015, the government of Palestine lodged a second Article 12(3) declaration, accepting ICC jurisdiction retrospectively to June 13, 2014.¹⁷⁹ In the summer of 2014, the Gaza Strip became the unwilling stage of yet another episode of the Israeli-Palestinian conflict after the IDF launched Operation Protective Edge in response to sustained rocket fire from Gaza into Israel.¹⁸⁰ This operation resulted in 51 days of intense hostilities and severely weakened Hamas.¹⁸¹ Still, the Israeli victory claimed a high civilian death toll: 2251 Palestinian casualties, of which 1462 were civilians.¹⁸² The acceptance of an unconditional ceasefire by both sides officially ended the conflict on August 26, 2014, yet clashes continued in the following months due to, among other factors, the Israeli government's approval of new settlements in East Jerusalem.¹⁸³ On December 20, 2014, the IDF carried out the first air strike against a Hamas site in response to a rocket fired from Gaza into Israeli territory the day before.¹⁸⁴ Another similar attack followed on December 24.¹⁸⁵ Clashes between Israeli policemen and Palestinian individuals continued on December 26 and 29, resulting in two

¹⁷⁷ See Zimmerman, *supra* note 175, at 305.

¹⁷⁸ See BOSCO, *supra* note 72, at 173; Fisher & Stefan, *supra* note 6, at 247.

¹⁷⁹ ICC-OTP, *supra* note 164, at ¶ 111.

¹⁸⁰ See *id.*, at ¶ 123; see also Matthew S. Cohen & Charles D. Freilich, *The Delegitimization of Israel: Diplomatic Warfare, Sanctions, and Lawfare*, 9 *ISR. J. FOREIGN AFF.* 29, 40 (2015).

¹⁸¹ *Gaza crisis: Toll of operations in Gaza*, BBC WORLD NEWS (Sep. 1, 2014), <http://www.bbc.com/news/world-middle-east-28439404>.

¹⁸² U.N. Human Rights Council, Rep. of the Detailed Findings of the Indep. Comm'n of Inquiry Established Pursuant to Human Rights Council Resolution S-21/1, ¶ 574, U.N. Doc. A/HRC/29/CRP.4 (June 24, 2015); see also Bosco, *supra* note 173, at 160.

¹⁸³ Jeffrey Heller, *Israel Claims West Bank Land for Possible Settlement Use, Draws U.S. Rebuke*, REUTERS (Aug. 31, 2014), <https://www.reuters.com/article/us-palestinians-israel-settlement/israel-claims-west-bank-land-for-possible-settlement-use-draws-u-s-rebuke-idUSKBN0GV0D020140831>.

¹⁸⁴ *Israel Launches Gaza Air Strike on ' Hamas Target,'* BBC NEWS (Dec. 20, 2014), <http://www.bbc.com/news/world-middle-east-30558922>.

¹⁸⁵ *Palestinian Killed in Clash with Israeli Troops near Gaza Border*, REUTERS (Dec. 24, 2014), <https://www.reuters.com/article/us-mideast-gaza-violence-idUSKBN0K20M520141224>.

Israelis wounded and one Palestinian killed.¹⁸⁶ On December 30, a draft resolution calling for the end of the Israeli occupation of the West Bank and East Jerusalem and the establishment of a Palestinian state by 2017 was tabled before the U.N. Security Council but fell one vote short of the required majority.¹⁸⁷ U.S. Permanent Representative to the U.N. Samantha Power criticized the draft resolution as an unproductive step toward a negotiated settlement, adding that the draft “sets the stage for more division, not for compromise.”¹⁸⁸ President Mahmoud Abbas signed onto the Rome Statute of the ICC on December 31, and the following day his government lodged the abovementioned declaration under Article 12(3).¹⁸⁹ It was immediately clear to all that Palestine’s accession to the Rome Statute was instrumental in exposing IDF leaders to prosecution for alleged war crimes and to heighten tension with the government led by Benjamin Netanyahu.¹⁹⁰

In all, this case study demonstrates that the logic of enemy criminalization applies to interstate and intrastate wars alike. Cognizant of its military weakness vis-à-vis one of the most efficient armies in the world, the Palestinian leadership has long understood that the battlefield is not the optimal venue in which to redress its grievances against a militarily superior neighbor. From this perspective, the ICC is simply the last in chronological order of a long list of external actors invited to intervene in—or interfere with—the Israeli-Palestinian conflict. As Samantha Power rightly pointed out, however, what distinguishes the ICC from other third parties is the expectation that its intervention will make externally sponsored conflict resolution efforts less likely to succeed.

¹⁸⁶ *Israel: Palestinian Stabs 2 Border Police*, AP NEWS (Dec. 26, 2014), <https://www.ap-news.com/fbc9b706562a44c7a9c98ee4689dea5a>; *Israeli Military Shoots and Kills Palestinian Stone Thrower*, AL ARABIYA (Dec. 29, 2014), <http://english.alarabiya.net/en/News/middle-east/2014/12/29/Israeli-military-shoots-and-kills-Palestinian-stone-thrower.html>.

¹⁸⁷ Michael R. Gordon & Somini Sengupta, *Resolution for Palestinian State Fails in United Nations Security Council*, N.Y. TIMES (Dec. 30, 2014), <https://www.nytimes.com/2014/12/31/world/middleeast/resolution-for-palestinian-state-fails-in-security-council.html>.

¹⁸⁸ *Id.*

¹⁸⁹ Government of Palestine, *Declaration Accepting the Jurisdiction of the International Criminal Court* (Dec. 31, 2014), https://www.icc-cpi.int/iccdocs/PIDS/press/Palestine_A_12-3.pdf. See also Fisher & Stefan, *supra* note 6, at 248.

¹⁹⁰ See Cohen & Freilich, *supra* note 180, at 33; Bosco, *supra* note 173, at 155–56.

V. CONCLUSIONS AND POLICY IMPLICATIONS

The concept of lawfare is moving away from the battlefield, where it once belonged, and toward more political avenues. State leaders have realized the political potential of delegitimizing military enemies and political rivals by making them the targets of ICTs' investigations and rulings.¹⁹¹ To earn the payoffs of inviting external judicial scrutiny, state leaders need not wait for a conviction beyond a reasonable doubt; formal indictments, arrest warrants, and reports submitted by U.N.-mandate commissions of inquiry and OTP statements tamper reputations when names are named. As state leaders master the inner workings of the international criminalization processes, they successfully export lawfare outside the battlefield.

The self-referrals submitted to the OTP by the Union of the Comoros (2013) and Gabon (2016) were excluded from the previous analysis on the grounds that their governments faced neither a conflict nor a post-conflict domestic scenario at the time they formally invited ICC scrutiny. However, they deserve mention now, for they aptly illustrate the future directions of norm exploitation and subversion applied to ICL.

These two self-referrals pertain to distinct levels of politics. The one by the Comorian government relates to the country's foreign policy, and it is thus far the only invitation of ICC scrutiny by a state party against non-party nationals.¹⁹² The lack of information on the domestic decision-making process makes it only possible to speculate as to why the Union of the Comoros referred the *Mavi Marmara* incident to the ICC despite not having suffered tangible or intangible losses from said incident (merely on the ground that the attacked vessel flew a Comorian flag).¹⁹³ That said, the incentive structure may help explain why the Union of the Comoros proved so eager to play a supporting role in the Israeli-Palestinian conflict. On the one hand, historians and political scientists have long discussed the economic

¹⁹¹ See, e.g., Bosco, *supra* note 173, at 155.

¹⁹² Eugene Kontorovich, *Israel/Palestine—The ICC's Uncharted Territory*, 11 J. INT'L CRIM. JUST. 979, 989 n.44 (2013).

¹⁹³ In this incident, IDF commandos, upon boarding several ships found in violation of Israel's blockade of Hamas in Gaza, were met with resistance by pro-Palestinian activists and eventually killed ten of them. This incident led to an international outcry as Turkey and other countries openly accused Israel of war crimes. For an in-depth analysis of said incident and its legal consequences, see Russell Buchan, *The Mavi Marmara Incident and the International Criminal Court*, 25 CRIM. L.F. 465 (2014).

(un)viability of micro-states.¹⁹⁴ On the other hand, a long history exists of Arab countries rewarding other states' action against Israel.¹⁹⁵

The referral by the Gabonese government is purely a matter of domestic politics, for it concerns post-electoral violence allegedly incited by the losing presidential candidate. Since presidential-election results were announced on September 3, 2016, indeed, re-elected Gabonese President Ali Bongo Ondimba has faced increasing internal and external opposition to his regime.¹⁹⁶ On this point, the Gabonese diaspora has been remarkably active in shaming him before key foreign audiences, staging protests in Paris and New York, and even attracting the attention of the European Parliament.¹⁹⁷ Both the timing and the intended target of Gabon's self-referral strongly suggest that President Bongo used the legal institute as a means to retaliate against his main rival and former Minister of Foreign Affairs, Jean Ping, who contested the electoral results and led public protests before the Constitutional Court.¹⁹⁸

But how can legal scholars and experts account for the aforementioned shift in the means, ways, and avenues of norm exploitation and subversion? This evolution in lawfare is, to a significant extent, a byproduct of the ongoing reclassification of conduct formerly allowed under IHL as crimes against humanity.¹⁹⁹ Relatedly, the fact that these crimes no longer require the so-called "war nexus" opens a window of opportunity for state leaders to exploit in the co-optation of ICTs in criminalizing political rivals, and not just military enemies. Civilian victimization is still—unfortunately—a recurring feature of the domestic politics of the countries falling under ICC scrutiny. Furthermore, civilian victimization is a strategy to which seemingly all actors resort, from incumbent governments (e.g., Côte d'Ivoire, Sudan-Darfur, Venezuela, Guinea, Kenya, and Burundi) to opposition parties (e.g., Kenya,

¹⁹⁴ See, e.g., ROBERT STOCK, *AFRICA SOUTH OF THE SAHARA: A GEOGRAPHICAL INTERPRETATION* 15 (1995); MARK MAZOWER, *GOVERNING THE WORLD: THE HISTORY OF AN IDEA*, 268–70 (2012).

¹⁹⁵ See, e.g., CHRISTOPHER CLAPHAM, *AFRICA AND THE INTERNATIONAL SYSTEM: THE POLITICS OF STATE SURVIVAL* 113, 129 (1996).

¹⁹⁶ See Brett L. Carter, *Autocrats Versus Activists in Africa*, 29 *J. DEMOCRACY* 54, 54 (2018).

¹⁹⁷ *Id.* at 58–59.

¹⁹⁸ See République Gabonaise [Gabonese Republic], *Requête aux Fins de Renvoi D'une Situation par un Etat Partie Aupres du Procureur de la Cour Penale Internationale* [Request for Referral of a Situation by a State Party to the Prosecutor of the International Criminal Court], in letter dated Sept. 20, 2016 from the Justice Minister of Gabon addressed to the Chief Prosecutor of the Int'l Criminal Court, ¶ 1 (Sept. 21, 2016), <https://www.icc-cpi.int/iccdocs/otp/Referral-Gabon.pdf>.

¹⁹⁹ See, e.g., Payam Akhavan, *Reconciling Crimes Against Humanity with the Laws of War: Human Rights, Armed Conflict, and the Limits of Progressive Jurisprudence*, 6 *J. INT'L CRIM. JUST.* 21, 36 (2008).

the CAR, and allegedly Gabon) and non-state actors uninterested in competing for political power by peaceful means (e.g., Nigeria and Mali).²⁰⁰ Since civilian victimization defies the *raison d'être* of the laws of war—sparing unnecessary human suffering and protecting civilians—the link between political violence and external judicial scrutiny is easy to grasp. Put differently, deliberately targeting civilians in the pursuit of broader strategic goals almost inevitably amounts to a crime against humanity.

After shedding light on state strategies of institutional co-optation and norm exploitation, the last remaining task is to lay out policy recommendations to contain, if not to reverse, this trend. State use of international laws and courts in the furtherance of extralegal objectives undercuts the ICC's work in a two-fold manner. First, it negatively affects perceptions of justice and fairness, insinuating that the Court submits to state will and interests.²⁰¹ Second, it impacts OTP decisions on resource allocation, for more preliminary examinations or official investigations do not necessarily carry along more financial contributions from state parties. Thus, the OTP should receive state referrals with healthy skepticism, promises of cooperation notwithstanding. In particular, the OTP must carefully gauge the pros and cons of self-referrals as opposed to those of *proprio motu* investigations. The former assures friendlier state attitudes toward the Court and the prospect of greater cooperation but jeopardize perceptions of impartiality; the latter shield the Court from such negative perceptions but increase the risk of state confrontation and noncompliance. In light of recent events, the OTP should resist the temptation of ignoring political considerations and dismissing the positive externalities stemming from self-referrals. Yet a policy favoring state cooperation over perceived impartiality will pay dividends in the short to medium run, while tampering the Court's long-run reputation. Thus, adopting such a policy would signal a dramatic shift in the OTP's time horizon—from long- to short-term—for casting aside reputational concerns makes sense only if and when the outlook on the Court's survival is negative.

²⁰⁰ On civilian victimization being committed by all sorts of armed actors see, e.g., Ndahinda, *supra* note 15, at 484; JOHN HAGAN & WENONA RYMOND-RICHMOND, *DARFUR AND THE CRIME OF GENOCIDE* 153–58 (Cambridge Univ. Press 2009); Emily Lenning & Sara Brightman, *Oil, Rape and State Crime in Nigeria*, 17 *CRITICAL CRIMINOLOGY* 35, 40–41, 46 (2009); Ana Arjona, *Wartime Institutions: A Research Agenda*, 58 *J. CONFLICT RES.* 1360, 1365 (2014); Daniel Kremaric, *Varieties of Civil War and Mass Killing: Reassessing the Relationship Between Guerrilla Warfare and Civilian Victimization*, 55 *J. PEACE RES.* 18, 18 (2018).

²⁰¹ Fisher & Stefan, *supra* note 6, at 245, 250.

