The International Criminal Court in Self-Referral States:

Legitimacy, Reputation, and the Court's Anti-Impunity Mandate

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Abstract

As per its establishing treaty, the Rome Statute, the mandate of the International Criminal Court (ICC) is to end impunity for the crimes falling under its jurisdiction, i.e., genocide, crimes against humanity, war crimes, and crimes of aggression (ICC-level crimes). Concerning investigations initiated by a State Party to the Rome Statute referring a situation within their own territory to the ICC (self-referral states), the ICC has been criticized for only indicting rebel/ non-state actors when there is credible evidence that state elite were complicit in ICC-level crimes in the situations under investigation. This criticism has been detrimental to the ICC's legitimacy with many victims of ICC-level crimes and general proponents of international criminal law. Previous research has convincingly found that the ICC's apparent inability and/or unwillingness to indict state elite in self-referral states emerges from its dependence upon this elite for protection and access during its investigations, but this work posits that these choices also illustrate the ICC favouring its interest in its immediate survival over its interest in genuinely fulling its mandate. Further aggravating this criticism is the previously discovered tendency for the political regimes of these states to co-opt the ICC's investigations to enhance their international legitimacy and other related interests in the face of fierce challenges to their holds on power. Paying particular attention to this problematically political reality, this work articulates an approach to potentially mitigate the legitimacy costs of the ICC's case selection strategy in self-referral states. This approach involves the ICC taking advantage of the interests motivating the political regimes of self-referral states to co-opt the ICC's investigations by leveraging the reputations of these regimes and their political elite to incrementally improve their states' domestic judicial systems so that these systems might get to a point where they are eventually able and willing to prosecute ICC-level crimes genuinely and impartially themselves. At the center of this approach is the goal of creating an incentive structure to motivate this political elite to engage with strategies embodying the long-established concept of positive complementarity.

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List of Abbreviations

APC	Congolese Popular Army (French: Armée Populaire Congolaise)
AU	African Union
CAR	Central African Republic
CPIJ	Canadian Partnership for International Justice
FARC	Revolutionary Armed Forces of Colombia (Spanish: Fuerzas Armadas Revolucionarias de Colombia)
FARDC	Armed Forces of the Democratic Republic of Congo (French: Forces Armées de la République Démocratique du Congo)
FPLC	Patriotic Force for the Liberation of Congo (French: Forces Patriotiques pour la Libération du Congo)
HRW	Human Rights Watch
ICJ	International Court of Justice
ICC	International Criminal Court
ICL	International Criminal Law
ICTY	International Criminal Tribunal for the former Yugoslavia
JEP	Special Jurisdiction for Peace (Spanish: Jurisdicción Especial para la Paz)
JPL	Justice and Peace Law (Spanish: Ley de Justicia y Paz)
LFP	Legal Framework for Peace (Spanish: Marco Jurídico para la Paz)
LRA	Lord's Resistance Army
OTP	Office of the Prosecutor
PNA	Palestinian National Authority
RCD-ML	Congolese Rally for Democracy-Liberation Movement (French: Rassemblement Congolais pour la Démocratie-Mouvement de Liberation)
UPC	Union of Congolese Patriots (French: Union des Patriotes Congolais)
UPDF	Uganda People's Defence Force
UN	United Nations
UNSC	United Nations Security Council

Chapter 1

Introduction

On June 16, 2020, the Canadian Partnership for International Justice (CPIJ) urged the now-former chief prosecutor of the International Criminal Court (ICC or the Court), Fatou Bensouda, to end the ongoing impunity for government officials in the Democratic Republic of Congo (DRC) likely involved in crimes falling under the jurisdiction of the Court. This jurisdiction is established by Articles 5-8 and 8*bis* of the Rome Statute, the ICC's founding and governing document, and includes genocide, crimes against humanity, war crimes, and crimes of aggression (International Criminal Court 2002, 3–8). The CPIJ's insistence, while specifically addressing the ICC's investigation in the DRC, concerns something the institution has been criticized for in several of its formal investigations which has arguably caused considerable damage to its legitimacy: the Court's case selection strategy in self-referral investigations (Keller 2010, 218–20; Kersten 2016, 163–66). There are three mechanisms by which a situation can come before the Court, one of which is a referral by a state that is a member of the Rome Statute.[1] Until the referrals of a situation in Venezuela in 2018 and the Russian invasion of Ukraine in early 2022, the state referral mechanism had only been used by states referring situations within their own territory to the Court (i.e., self-referral).[2] The state in this case is

[1] The state referral trigger mechanism is established by Articles 13(a) and 14 of the Rome Statute (International Criminal Court 2002, 9). The other two trigger mechanisms are referral by the United Nations Security Council (UNSC), as established by Article 13(b) of the Rome Statute, and the opening of a case via the discretion of the Office of the Prosecutor (OTP), i.e., *proprio motu*, as established by Article 13(c) and 15 of the Rome Statute (ibid.). A UNSC referral is the only mechanism that can be used to open investigations in states which are not members of the ICC and has been used twice for a situation in Darfur, Sudan in March 2005, and a situation in Libya in February 2011 (International Criminal Court n.d.l). The OTP's *proprio motu* power has been used to open investigations into situations in Kenya in March 2010 and Côte d'Ivoire in October 2011 (ibid.).

[2] Interestingly, William Schabas argues that this use of the state referral mechanism is an "interpretive deviation" from the original intent of the Rome Statute's drafters (2008b, 760).

called a 'self-referral state.' Since the Court's creation in July 2002, it seems that its case selection strategy has been one of selective impunity in self-referral states.

In its two decades of existence, the Court relied on self-referral investigations to open most of its formal investigations, with this use of the state referral mechanism being used to open six of its eleven formal investigations.[3] In each instance, however, the Court has displayed an apparent inability and/or unwillingness to indict political and military elite[4] even when there is considerable credible evidence that they were involved in ICC-level crimes within the situations being investigated, choosing instead to focus exclusively on the upper echelons of rebel or enemy factions (Schabas 2008b, 752–53; Robinson 2011, 367–70; Tiemessen 2014, 450; Kersten 2016, 163–67; P. Clark 2018, 81–86; Fisher 2019, 741–45). The Court's six self-referral investigations consist of situations referred by Uganda in January 2004, the DRC in April 2004, the Central African Republic (CAR) first in December 2004 and again in May 2014, Mali in July 2012, and the state of Palestine in January 2015.[5] The crimes of the political regimes of the DRC

[3] The OTP was authorised by the Court's Pre-trial Chambers to open investigations *proprio motu* in Georgia in 2016, Burundi in 2017, Bangladesh/Myanmar in 2019, Afghanistan in 2020, and the Republic of the Philippines in 2021, but these investigations are not explicitly listed as being opened by the OTP on the Court's website yet, with their situation pages simply stating that the "ICC Prosecutor [has been] authorised to open [a] *proprio motu* investigation" in these states (or a very similar variation of this statement), whereas the situation pages for Kenya and Côte d'Ivoire explicitly state that the "ICC Prosecutor [has opened] *proprio motu* investigations after authorisation of Pre-trial Chamber" (International Criminal Court n.d.l), and are thus not yet considered as formal investigations in this work.

[4] These two types of elites are collectively referred to as "state elite" in this work, with "political elite" being referred to separately when necessary.

[5] The Ugandan situation concerns "Alleged war crimes and crimes against humanity committed in the context of a conflict between the Lord's Resistance Army (LRA) and the national authorities in [northern] Uganda since 1 July 2002" (International Criminal Court n.d.o). The DRC situation concerns "Alleged war crimes and crimes against humanity committed in the context of armed conflict in the [Ituri region and North and South Kivu provinces of the] DRC since 1 July 2002" (International Criminal Court n.d.f). The first CAR referral concerns "Alleged war crimes and crimes against humanity committed in the context of a conflict in CAR since 1 July 2002" (International Criminal Court n.d.b). The Mali referral concerns "Alleged war crimes committed … since January 2012" in Mali's northern regions of Gao, Kidal and Timbukt and specific incidents in the Southern Malian cities of Bamako and Sévaré (International Criminal Court n.d.h). CAR's second referral concerns "Alleged war crimes and crimes against humanity committed in the context of renewed violence starting in 2012 in CAR" (International Criminal Court n.d.c). Finally, the referral from the state of Palestine concerns **"**Crimes within the

and Uganda will be discussed in Chapters 2 and 3, as this work uses these as case studies. In each of the other three self-referral states, there are also multiple allegations of the political regime being involved in ICC-level crimes within the situations being investigated.[6] For example, in the case of CAR, a 2007 Human Rights Watch (HRW) report provided credible evidence that "Government troops, notably the elite Presidential Guard, … carried out hundreds of unlawful killings and burned thousands of civilian homes since mid-2005 in their counterinsurgency campaign in northern [CAR]" (2007). In Mali, army personnel have been credibly accused of torturing detainees in February and March of 2013 (Human Rights Watch 2013a). The state of Palestine has seen actors from both of its authorities, Hamas in Gaza and the Palestinian National Authority (PNA) in the West Bank (which is run by Fatah), being accused of involvement in war crimes, with Hamas being accused of launching missile strikes against civilians in Israel as recently as mid-2021, among other ICC-level crimes (Human Rights Watch 2021b), and the PNA being accused of torture (Amnesty International 2019).[7]

Each of these crimes was committed post-self-referral by the regimes that self-referred. This is notable because it strongly suggests that the act of self-referral was not motivated by an interest in genuine accountability or the protection of human rights. It also suggests that these

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jurisdiction of the Court that are alleged to have been committed … since 13 June 2014**"** across the state (International Criminal Court n.d.m).

[6] While there are multiple alleged occurrences of the political regimes in all three of these states being involved in ICC-level crimes within the situation being investigated, only one occurrence from each state will be mentioned, as one occurrence is all it takes to be admissible to the Court under Article 17 of the Rome Statute.

[7] The Court has not yet indicted any individuals as a result of its investigation in the state of Palestine, so the indictments *may* not be one-sided like they have been in the other self-referral states. As the Rome Statute was acceded to by and the self-referral was made by the PNA in 2015 (International Criminal Court n.d.m), members of Hamas' elite may be more likely to be indicted by the Court than members of the PNA's elite, especially as Hamas' crimes are more significant than those of the PNA. If high-level members of Hamas are indicted, however, this should not necessarily be equated to the Court breaking its trend of not indicting high-level members of the political regimes of the states that self-refer because Hamas is typically not recognized as a legitimate political power (Alijla 2021), is not the regime which self-referred to the Court (International Criminal Court n.d.m), and is often at odds with the PNA (al-Omari 2021), i.e. the political regime which is recognized as legitimate and in charge of the state of Palestine (United Nations n.d.), so an indictment of Hamas' elite could potentially be seen as the PNA co-opting a self-referral investigation to target its enemies, a phenomenon occurring in self-referral states which will be discussed in Chapter 3.

regimes were aware that it was unlikely their elite would be indicted by the Court. Regardless, these crimes fall within the jurisdiction of the ICC's investigations in these states, so the fact that no ICC indictments have emerged from these crimes is problematic and likely does significant damage to the Court's legitimacy because this apparent selective impunity goes directly against its stated mandate of ending impunity for the crimes within its jurisdiction (International Criminal Court 2002, 1; n.d.a). Considering this, why then does the institution continue this apparent convention? Most obviously, the Court does so because it must depend on the governments and militaries of self-referral states for access and protection during its investigations and the indictment of any state elite would likely result in the respective government ceasing cooperation with the Court and/or states not referring situations in their territory to the Court in the future (Carayannis 2009, 13–14; Akhavan 2010, 117–20; Kersten 2016, 164–72; Fisher 2019, 741–45). The Court has always employed strong legal and, to a lesser extent, political minds,[8] so it is unlikely that the Court, and particularly the Office of the Prosecutor (OTP),[9] was unaware of the potential damage that this apparent selective impunity in self-referral states could do to its legitimacy. On the flip side, it is equally unlikely that the institution was oblivious to the fact that this selective impunity would likely increase cooperation from state actors. Beyond simply being aware of this, it has been widely speculated in the relevant literature that there is likely some type of agreement/understanding between the Court and the governments of self-referring states implicit (and some argue explicit) in the act of self-referral (Schabas 2008a, 19–22; 2008b, 751–53; Müller and Stegmiller 2010, 1284–86; Bosco 2014, 96–98; Clarke, Knottnerus, and de Volder 2016, 14; P. Clark 2018, 53–65).

Phil Clark convincingly argues that the Court not only negotiated with these governments but was the ones to pursue and initiate these negotiations in some cases (2008, 39, 43; 2018, 53–

[8] While "the ICC is a legal, not a political body" (Rodman 2010, 10) and thus primarily employs individuals from legal backgrounds, some staff come from more political backgrounds. For example, the head of the Court's Analysis Section from 2004-2006 and the current head of its Investigation Division since 2006, Michel De Shmedt, comes from a public administration (and law enforcement) background (Office of the Prosecutor n,d.).

[9] The OTP "is an independent organ of the Court … responsible for examining situations under the jurisdiction of the Court where genocide, crimes against humanity, war crimes and aggression appear to have been committed, and carrying out investigations and prosecutions against the individuals who are allegedly most responsible for those crimes" (International Criminal Court n.d.i).

65). In the case of the DRC, this pursuit was rather public, with the Court's first chief prosecutor, Luis Moreno-Ocampo, announcing in July 2003 that his office had selected the situation in the Ituri region of the DRC as the most urgent situation requiring the Court (International Criminal Court 2003b) in the hope that this would encourage the DRC's government to refer the situation (P. Clark 2018, 59). When a self-referral did not come, Moreno-Ocampo "issued a direct invitation to the Congolese authorities in a speech to the [Court's Assembly of State Parties]" in September 2003 (ibid.).[10] This was followed by "extensive discussions … between the OTP and the Congolese government" which would eventually result in the DRC's self-referral in April 2004 (ibid., 59–60).[11] Additionally, the DRC's former minister of justice and human rights, Emmanuel Luzolo, revealed to Clark that members of the OTP's staff reached out directly to members of the DRC's government (P. Clark 2018, 60). Concerning Uganda's self-referral, other than a photo of Moreno-Ocampo and Ugandan president, Yoweri Museveni, shaking hands before the self-referral (Kersten 2019), the OTP's pursuit was significantly less public. However, Clark uses interviews with Ugandan government officials, including Uganda's former solicitor general, Lucian Tibaruha, to show that Moreno-Ocampo approached Museveni and persuaded him to self-refer the situation in northern Uganda (P. Clark 2008, 43; 2018, 56–57).

Summing this up, Clark goes on to state that:

> Having chased these state referrals, the ICC was forced to negotiate the terms of its investigations with those governments. This is a key reason that to date the ICC has not charged any Ugandan or Congolese government officials, despite the well-documented complicity of state actors in atrocities. (ibid., 55)

This suggests that the Court viewed the increased cooperation from a state's political regime gained from selective impunity in self-referral states as meeting its interests in ways which justified the potential legitimacy damage it could cause. The fact that the Court has continued this strategy eighteen years on suggests that it still views these benefits as valuable despite the criticism it receives. Working from this premise, this work postulates that this strategy emerges

[10] This speech was released under the title "Second Assembly of States Parties to the Rome Statute of the International Criminal Court Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo" (International Criminal Court 2003a).

[11] Moreno-Ocampo's statement mentioning these discussions was released under the title, "Statement of the Prosecutor Luis Moreno Ocampo to Diplomatic Corps" (Office of the Prosecutor 2004).

from the reality in which the Court must work and thus any solution to mitigate the damage to the Court's legitimacy caused by this strategy must also work within this reality.

The selective impunity seemingly extended to state elite in self-referral states could potentially be justified on three grounds that could make it more palatable in relation to the Court's anti-impunity mandate. Unfortunately, none of these justifications fit with other aspects of the ICC's rhetoric and its interventions in self-referral states to date, but it is important to quickly survey them as they highlight notable aspects of the Court's reality. The first justification relates to an important theoretical debate raging within ICL since its inception called the peace vs. justice debate (Kersten 2016, 1–8, 19–36; Vilmer 2016, 1335–42; P. Clark 2018, 205–7) and would posit that the Court's strategy in self-referral states is simply favouring peace over justice to better protect human rights. Summarizing the core of this debate in a 2013 New York Times article, Bensouda inquires, "Peace or justice? Shall we strive for peace at all costs, sacrificing justice on the way, or shall we soldier on in the pursuit for justice to end impunity" (Bensouda 2013).[12] If used to justify the Court's apparent impunity in self-referral states, the peace over justice argument would likely claim that only targeting non-state actors can serve to quicken the end of the conflict by forcing these actors to the bargaining table; although, this is contentious, with many arguing that it can have the opposite effect (Kersten 2016, 37–63). If embraced, the ICC could potentially use the peace over justice argument to build a bulwark against criticism around impunity for state elite in self-referral states, but the Court has always dismissed this argument. In response to an ambassador claiming that the ICC's investigation was destroying the chance for peace in Uganda, Moreno-Ocampo argued that:

> the [Rome] Statute says that I have to respect the interests of victims. This may mean that I can delay an investigation, if it is in the interests of victims. We start here to integrate the concepts of peace and justice. It is the judges who may then review my decision. I told the ambassador that he would have to give me evidence that the peace effort will stop the violence and would thus be in the interests of victims. The ambassador explained to me, however, that it was not something where one could provide evidence. … My duty is to investigate and to prosecute. We decided to investigate and to prosecute, but to conduct the investigation in a very low-key way, and try not to interfere with the peace efforts. At the end, the peace efforts collapsed, but not because of our investigation. It

[12] For a thorough exploration of the peace vs. justice debate, refer to the second chapter in Mark Kersten's *Justice in Conflict* titled "Peace and/or/with Justice" (2016, 19–36).

> collapsed because the rebels were not really ready to make peace. So in this way, we allowed them to negotiate peace efforts. (Moreno-Ocampo 2006, 499)

Similarly, Bensouda, answering the question of whether the ICC should favour peace or justice, claimed that:

> Past negotiations have … sacrificed justice for peace. Yet history has taught us that the peace achieved by ignoring justice has mostly been short-lived, and the cycle of violence has continued unabated. As the [ICC] is an independent and judicial institution, it cannot take into consideration the interests of peace, which is the mandate of other institutions, such as the United Nations Security Council. (Bensouda 2013)

As Moreno-Ocampo and Bensouda[13] have been against favouring peace over justice, this argument's ability to be used as a ground from which to justify impunity for state elite in self-referral states is likely significantly weakened.[14]

The second potentially credible justification for this apparent selective impunity is born from the fact that indicting state elite in self-referral states would likely decrease the chances of future self-referrals, as political regimes will be unlikely to consider referring a situation within their territory if they think there is even a slight chance that they or their allies will be indicted (Mégret 2018, 183–84). As a grounds for justifying selective impunity, the argument would likely be that self-referrals have resulted in the prosecutions of the perpetrators of horrendous atrocities who would have potentially never been brought to justice if it was not for the ICC's investigations, so losing these kinds of investigations would be a net negative. While it is likely that this is part of the Court's internal justification for its case selection strategy in self-referral states, even the Court's most significant prosecutions come with drawbacks which significantly weaken their ability to be perceived as a strong justification for the apparent impunity enjoyed by the state elite of self-referral states.

The personal histories of many individuals convicted by the Court mean that their prosecutions cannot be used as a strong justification for this selective impunity. Most notable of these individuals are Dominic Ongwen, a former Brigade Commander of the Lord's Resistance

[13] The third and current chief prosecutor, Karim Khan, has only been in the position for approximately a year, so it is difficult to ascertain whether this will be the case with him.

[14] Bartlomiej Krzan provides an excellent review of the previous literature in conjunction with an analysis of the effect of the ICC's investigations on domestic and regional peace, finding that while peace and justice can clash when a situation is handled improperly, one cannot be fully achieved without the other and any attempts to do so will ultimately lead to consequences for both (2016).

Army (LRA) in Uganda,[15] and Bosco Ntaganda, the former Deputy Chief of Staff and Commander of Operations of the Patriotic Force for the Liberation of Congo (FPLC).[16] For his actions between 2002 and 2005 in northern Uganda, Ongwen was found guilty in 2021 of 29 counts of crimes against humanity and 32 counts of war crimes ranging from forced marriage and sexual slavery to torture and enslavement (International Criminal Court 2021b). Inarguably, these are atrocious crimes, but there is a potential issue concerning Ongwen's conviction because, as explained by the International Justice Monitor, "Based on the nature of the conflict in northern Uganda, characterized by the use of abducted children [like Ongwen] to serve in the ranks of the LRA, there will continue to be conflicting views on whether or not people like Ongwen *should be tried*" (Ogoro 2017; my emphasis). In short, while the necessity to convict individuals like Ongwen will be embraced by some, it will be controversial with others who believe child soldiers deserve special consideration.

Ntaganda, on the other hand, was found guilty in 2019 of five counts of crimes against humanity and thirteen counts of war crimes ranging from murder to sexual slavery to "conscripting and enlisting children under the age of 15 years into an armed group and using them to participate actively in hostilities" in 2002 and 2003 (International Criminal Court 2021a, 1). Despite the gravity of these crimes, it would be difficult to use Ntaganda's conviction to justify the Court's selective impunity in the DRC because the political elite enjoying this impunity initially integrated Ntaganda into the Congolese national army (FARDC) as a colonel in 2009 despite his 2006 arrest warrant from the ICC, with the government justifying this based on the peace over justice argument (P. Clark 2018, 78–79). This leads to the third potential ground to justify impunity for state elite in self-referral states.

Based on past statements by Moreno-Ocampo (2006, 497–500; 2007, 217; 2011, 481–85) and Bensouda (2009, 5; 2012, 507–11; 2014, 541–42), the ground likely considered the most significant by the OTP concerning its case selection strategy in self-referral states is that it is aiding in the strengthening of domestic judicial systems for which it requires much cooperation from the respective state's political elite. This justification is born from the Rome Statute and,

[15] The LRA is a rebel group which has been waging war throughout northern Uganda since 1987 and is responsible for many ICC-level atrocities (Hassellind 2020, 791–93).

[16] The FPLC is the military wing of the Union of Congolese Patriots (UPC) which was responsible for a wide range of ICC-level atrocities in the Ituri and North Kivu provinces of the DRC between 2002 and 2005 (Human Rights Watch 2008a).

particularly, a proactive or positive approach to what is called the principle of complementarity. While mentioned in the preamble and Article 1 of the Rome Statute, complementarity is primarily laid out in Article 17 of the Statute as one of two principles, along with gravity, guiding the admissibility of situations to the Court (International Criminal Court 2002, 1–2, 10–11; Moreno-Ocampo 2006, 498–502). The preamble and Article 1 establish that the ICC "shall be complementary to national criminal jurisdictions," while Article 17(1) states that, if the domestic judiciary with jurisdiction over a case is willing and able to genuinely try it, have already genuinely tried and dismissed it, or is currently genuinely trying it, it is inadmissible to the ICC (International Criminal Court 2002, 1–2, 10–11).[17] A proactive approach to complementarity (typically referred to as 'positive complementarity')[18] then involves the Court "[encouraging] genuine national proceedings where possible" to facilitate the "effective functioning of national systems" (International Criminal Court 2006, 7).

As the act of self-referral displays a *supposed* willingness to prosecute, self-referrals are typically admissible on the grounds of inability. Considering the idea of positive complementarity, it is likely then that part of accepting a self-referral for the ICC is to help strengthen the domestic judicial system of the state to a point where it will be able to prosecute ICC-level crimes independently and impartially. If the political elite of self-referral states were to fully cooperate with the ICC in taking steps to this end while also cooperating with its investigations, the Court could potentially justify its one-sided case selection strategy in these states with the argument that this strengthening will create a situation where domestic authorities can investigate cases involving state elite down the road. This has not been the case, however, as

[17] Article 17(2) establishes that an unwillingness to prosecute is observed when proceedings are solely meant to shield the individual being prosecuted, have been hindered by unjustified delay inconsistent with a genuine intent to prosecute, or are not being conducted independently or impartially (International Criminal Court 2002, 11). Inability is set out by Article 17(3) and asserts that the ICC "shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings" (Ibid.).

[18] Positive complementarity, which will be thoroughly explored in Chapter 4, has been consistently emphasized by the Court as a fundamental part of how it interacts with its member states both with and without formal investigations (International Criminal Court 2009, 9; Office of the Prosecutor 2010, 5; Moreno-Ocampo 2010b, 3; United Nations General Assembly 2011, 13–16; Office of the Prosecutor 2015, 22; International Criminal Court 2019, 29; Office of the Prosecutor 2020, 43; International Criminal Court 2021c, 8).

the effects of positive complementarity during formal investigations have been quite limited due to a lack of an incentive for political elite to facilitate genuine national proceedings and improvements to their states' judicial systems (Mattioli and Woudenberg 2008, 57–60; Soares 2013, 322–26; Tillier 2013, 520–26). Beyond this, the political regimes in self-referral states will intermittently cease cooperation with the Court when/if they view the Court's intervention as not in line with their interests. Arguably, the most notable example of this is the DRC's political regime refusing to hand over ICC-indicted Ntaganda after integrating him into the FARDC.

Considered together, the lack of significant steps taken by political regimes to strengthen their states' judicial systems and the intermittent refusal of these regimes to cooperate with the Court make it so that positive complementarity cannot be used as a justification for the Court's case selection strategy in self-referral states. This does not have to be the case, however, and this work posits that positive complementarity can potentially be used to mitigate the legitimacy damage caused by the Court's case selection strategy in self-referral states *if* an incentive structure can be implemented to motivate political elite to incrementally improve their states' judicial systems since the absence of this is what limits positive complementarity the most during formal investigations, as will be established in Chapter 4.

One of my primary considerations when constructing an approach to mitigate the legitimacy cost of the ICC's case selection strategy in self-referral states was that it fit neatly alongside the likely interests of the Court, how it has appeared to pursue these interests since its creation in 2002, and the international reality within which it operates. Part of this consideration pertains to the limited budget and resources of the institution, but it principally concerns the unavoidably political nature of the Court's investigations and case selection, the concept of state sovereignty, and the fact that the political regimes of self-referral states have tended to co-opt the Court's investigations to meet their interests, as will be explored throughout Chapters 2 and 3. Considering the prosecutorial strategy documents the Court has released in the past (Office of the Prosecutor 2006b; 2010; 2013; 2015; 2019; International Criminal Court 2019), it is clear that changes to the way the Court operates concerning formal investigations are quite gradual, so any approach to mitigating the legitimacy cost of the Court's case selection strategy in self-referral states must work as closely within the way the Court currently operates as possible to increase the chances of the approach being engaged with. The idea of creating an incentive structure to motivate political elite in self-referral states to improve their domestic judicial systems through

engagement with strategies of positive complementarity which I propose in Chapter 4 aims to do just this.

With this end in mind, Chapter 2 illustrates the highly political reality in which the Court must work which then affects its decisions concerning self-referral investigations and how it functions internationally. This is primarily done through an exploration of the Court's two primary interests, the institution's survival and the genuine fulfilment of its mandate, and how the favouring of the former has translated into specific actions taken by the Court. This argument is advanced in three sections. Section 2.2 establishes how the concept of 'legitimacy' is used throughout the work concerning the ICC and the political regimes of self-referral states, highlighting the concept of sociological (or perceived) legitimacy as the most relevant to this topic. The third section analyzes the Court's primary interests and how these are shaped by the international reality into which it was born, while section 2.4 establishes the implications of the Court's apparent decision to seemingly favour its immediate survival over genuinely fulfilling its mandate and how this contributes to the legitimacy cost incurred by the Court's case selection strategy in self-referral states.

Chapter 3 turns to the interests of the political regimes of self-referral states concerning ICL, the ICC, and the act of self-referral. While ICC involvement in states with political regimes engaging in international crimes appears to be against the interests of these regimes, this chapter contends, in line with the relevant literature, that self-referral investigations appear to have positive effects on the legitimacy of these regimes and their political elite internationally, regionally, and domestically. The goal of this chapter is twofold: first, to establish that these political regimes have co-opted the ICC's investigations to benefit their interests and temporarily enhance their legitimacy and reputation around human rights as a means to tangible benefits; and second, to establish how this may make them susceptible to the incentive structure proposed in Chapter 4. Section 3.2 explores why the political regimes of states with recent histories of complicity in significant human rights atrocities, like the DRC and Uganda, would join the Court to set the stage for an exploration of the likely motivations and expectations of some State Parties to the Rome Statute before an investigation is ever initiated. The following section identifies the continued existence of the political regime as the primary motivating factor behind the act of self-referral, with these regimes having a subordinate interest in having a positive reputation around human rights because of the benefits potentially emerging from this, such as boosted

legitimacy and the increased receipt of multilateral aid. Section 3.4 explores the cyclical relationship between sociological legitimacy and reputation, using this to demonstrate how and why reputation is considered important to the political elite in African states, paying particular attention to self-referral states.

The fourth chapter articulates an approach to potentially mitigate the criticism the ICC faces for its apparent selective impunity in self-referral states which involves trying to leverage the reputations of political regimes and their elite to i*ncrementally* strengthen their states' domestic judicial systems to possibly decrease impunity for ICC-level crimes in the long-term, thus better meeting the Court's anti-impunity mandate indirectly. Section 4.2 lays out this approach by establishing a possible incentive structure which could be used to motivate this strengthening of domestic judicial systems that centres around *temporarily* boosting the human rights reputation of the political regime and elite of each respective state. This section also further establishes why the political regimes of self-referral states might be susceptible to this approach while rebutting expected criticism. Section 4.3 then explores positive complementarity as the tool to be used to strengthen domestic judicial systems, as it has long been embraced by the Court but with limited success in formal investigations because of the lack of an incentive to engage with it (which my leveraging approach aims to provide). To explore positive complementarity's potential when a proper incentive structure is in place to motivate engagement with it, part of this section explores its use during the Court's preliminary examination in Colombia. This section closes by identifying three strategies of positive complementarity which could fit well with the leveraging approach being proposed.

In the conclusion, I further emphasize how, by pushing for smaller incremental changes to domestic justice mechanisms, the leveraging approach articulated in Chapter 4 may create something more concrete and proactive than 'gravity'[19] to which the Court can point when being criticized for the apparent impunity enjoyed by state elite in self-referral states. By not directly impacting the short-term interests of the political regimes in these states, this approach is less

[19] The concept of gravity is contained in Article 17(1)(d) of the Rome Statute (2002, 11) and will be explored in greater detail in Chapter 2. For the time being, gravity "as a case selection criterion," while not explicitly *defined* in the Rome Statute, has been explained by the OTP in a policy paper on case selection and prioritisation from 2016 as "the [OTP's] strategic objective to focus its investigations and prosecutions, in principle, on the most serious crimes within a given situation" (12-13).

likely to antagonize political elite out of further cooperation with the Court's investigations and the apprehension of suspects. The conclusion closes by identifying a crucial area for future research as an investigation into how my leveraging approach could be utilized in conjunction with transitional justice mechanisms as a means of further mitigating the legitimacy damage caused by the Court's case selection strategy in self-referral states.

In terms of the methodology used to accomplish what has been laid out above, this is a conceptual work drawing on past literature and the short history of the Court and its interactions with State Parties to the Rome Statute, particularly self-referral states, and non-member states. Using a combination of two qualitative methods, discourse analysis and historical analysis, I analyze case studies regarding states that have had significant interactions with the ICC. Specifically, I consider two primary cases, the DRC and Uganda, and three secondary cases, Sudan, Kenya, and Colombia. I use historical analysis to establish the context for the situations in each state I consider and to scrutinize the interactions between the political regimes in these states and the Court. Similarly, this work employs discourse analysis primarily to explore the past literature around the ICC and its interactions with self-referral states as well as the rhetoric of state elite in these states and Court officials, paying particular attention to discourse around legitimacy, interests, and the international/regional/domestic perception of the Court and the political regimes of self-referral states. Regarding theory, I use Ramesh Thakur's 'a balance of interests' theory (2013) to analyze the interests of and interactions between the Court and the political regimes of self-referral states throughout Chapters 2 and 3, as will be established in section 2.1. Relatedly, I employ Margaret deGuzman's conceptualization of legitimacy (2008, 1436-38) throughout the entirety of this work, as will be established in section 2.2.

Chapter 2
The Contradictory Interests of the ICC

2.1 Introduction

As is the case with any institution, the ICC's operations are driven by what it perceives as its interests. One aspect of how these interests are shaped concerns the environment in which the institution must operate. For the Court, the environment it works within extends across many levels and is multi-faceted. Starting with the macro, the Court navigates a largely anarchic international system which tends to favour state sovereignty over all else (Lechner 2022). Similarly, the Court operates alongside other international institutions and organizations with similar or adjacent purposes, like the International Court of Justice (ICJ), the United Nations (UN), and the Human Rights Watch (HRW). At the same time as the ICC operates within and alongside some sovereign states, it also works within and alongside local communities and domestic judicial systems during its investigations, prosecutions, and beyond. Every actor in each of these environments has interests of their own affecting the ICC's interests, which then dictates how the Court is able to operate and the decisions it makes.

With all these competing interests from different levels affecting the interests of the Court, traditional theories of interests are insufficient to properly parse out the interests of each actor in relation to the interactions between each level. Due to this, it is beneficial to look at how the interests of these different groups manifest and interact through the lens of Thakur's theory of a balance of interests. The strength of Thakur's theory for this purpose is that it does not rigidly differentiate between state and non-state actors in terms of their actions on the international stage and simply considers them as international actors with varying abilities to affect domestic, regional, and international affairs (Thakur 2013, 73–78). As Thakur describes it, a balance of interests is "actor-neutral" and is thus "equally applicable to all international actors" (78). Additionally, a balance of interests assumes that, "faced with competing policy options,

identifiable decision-makers conclude that on balance, in the circumstances and given available knowledge, 'X' was the best course of action" (ibid., 78-79, 71, respectively). A balance of interests is especially useful when examining the interests of more authoritarian/corrupt/despotic political regimes because it acknowledges that the interests of a state's political regime are not necessarily those of the state itself (ibid., 75). Most importantly, Thakur explains how:

> the word 'a' in 'a balance of interests' … has a threefold significance. It indicates that one particular balance is struck from among several possible options; it indicates human agency: individual people make specific decisions in the name of the entity concerned[;] … and it includes the possibility of human fallibility and the prospect of course correction. (Thakur 2013, 78–79)

Through this lens, it is easier to understand the decisions of international actors which may appear to go against what appears to be their most obvious interests. While the most recognizable interests of the ICC appear to be undermined by the OTP's acceptance and handling of self-referral investigations, it is likely that those making decisions are weighing these interests against other less overt ones and are (assumedly) identifying the latter as more important. A very similar argument can be made about the act of self-referral for states which use this trigger mechanism, as will be explored in Chapter 3. This is not to say that the Court and the political regimes of self-referral states are willingly undermining their most important interests but that both have decided that the interests being undermined are subordinate to less obvious ones which they have assumedly deemed as more important. When the actions and interests of the Court are broken down with this in mind, an interesting conclusion regarding its handling of self-referral investigations can be inferred. At the root of the ICC's accepting self-referrals and its subsequent case selection strategy during these investigations are, surprisingly, concerns around its legitimacy and reputational standing in relation to how it functions on the international stage. Arguably, this has backfired for the institution.

This chapter will first explicitly establish how 'legitimacy' will be used throughout this work while underscoring its importance and relevance to the ICC. Section 2.3 explores how the primary interests of the Court were/are shaped by the reality it must work within. The fourth section analyses the likely factors causing the Court to favour one interest over the other while favouring self-referral investigations over those initiated via its other trigger mechanisms.

2.2 The Concept of Legitimacy and the ICC

Legitimacy plays a fundamental role in establishing the reality of the environments in which the Court must work and the interests which emerge in response to this reality. Following the example of deGuzman, legitimacy is used in this work to mean the "justified authority" of an actor/institution/regime (2008, 1436). This conceptualization can then be broken down into two distinct types: "sociological [or perceived] legitimacy-'what people think is legally or morally legitimate'-and normative legitimacy- 'what really is legally or morally legitimate'" in which legal legitimacy "suggest[s] the correct application of laws and legal principles ... [and] moral legitimacy refers to the moral justifiability of a judicial regime or decision" (ibid., 1437-1438). Specifically referencing the idea of an international criminal court, Janine Clark asserts that "normative legitimacy is the strongest, purest form … because it exists above and apart from state interests … [in how] it tells us why a state should obey a court's ruling even if it may run contrary to the state's perceived interests to do so;" however, due to the international reality of realpolitik and state interests, the way the Court's actions are perceived (i.e., its sociological legitimacy) becomes a significant determining factor in its efficacy (2015, 765, 767–73). With this said, the institution's normative and perceived legitimacy are not completely separate, as "the extent to which the law is obeyed and respected is critically linked to the perceived legitimacy of the institutions which uphold, interpret and develop it" (ibid., 764).

For the purpose of my argument, it is suitable to break down who is doing this perceiving into two groups which will be referred to as the Court's 'stakeholders' in this work. In an article linking the recent decline in the ICC's legitimacy to the unmanageable scope of what the ICC is expected to accomplish, Marieke de Hoon identifies the victims of ICC-level crimes as crucial stakeholders, arguing that the Court's legitimacy is undermined when "There is a discrepancy between what victims hope to find in terms of justice and what the Court is able to offer" (2017, 593). This first group of stakeholders can reasonably be expanded to also include general proponents of ICL because of their interest in seeing genuine and impartial justice achieved for all international crimes. The second group of stakeholders consists of the actors the Court interacts with on the international stage, primarily the political regimes of states as well as

international and regional intergovernmental organizations (Niang 2017, 615–20; Kerr 2020, 195–98).[1]

Working off this, the very sources of the Court's legitimacy can be seen as problematic because the hopes of the various actors involved appear to be contradictory when analyzed and the fact that the scope of what the Court can accomplish is often out of its hands (Dutton 2017, 87–97). This is mainly because it exists within a state sovereignty-centric international system where any attempt to breach this sovereignty is deeply scrutinized and only allowed under a very narrow criterion. If the Court does not investigate (and indict) state elite allegedly complicit in ICC-level crimes, it is then failing to live up to the hopes of victims and ICL proponents, thus losing legitimacy with them. On the flip side, when the ICC interprets the law in ways that go against the interests of the political regimes who accept its jurisdiction, it loses legitimacy with these stakeholders, which has been the case when the ICC has attempted to indict sitting heads of state in the past (Kerr 2020, 199–205, 208–11), as will be explored in section 2.3. These competing expectations from the different actors with a stake in ICC investigations create a conflict in which the ICC must favour the perception of one stakeholder over the other.

As will be illustrated in this chapter, the OTP's handling of self-referral investigations suggests it favours the interests of the second stakeholder group over the first in the shorter term, as shown by the apparent impunity enjoyed by state elite in self-referral states, while favouring the interests of the first group in the longer term, as shown by its consistent reiteration of the importance of positive complementarity to strengthen domestic judicial systems in its previous prosecutorial strategy documents (Office of the Prosecutor 2006b, 4–6; 2010, 5; 2013, 13–14; 2015, 22; 2019, 29). As the incentive structure articulated in Chapter 4 aims to work within how the ICC has acted in the past, this thesis gives similar consideration to favouring the perceptions of each stakeholder group.

[1] While Mandiaye Niang does not explicitly identify these groups of actors as unique stakeholders of the Court, the cited pages briefly explore how these groups of actors (and the way they perceive the Court) play a significant role in how the Court is able to operate because of how fundamentally intertwined the Court's operations are with those of states and international/regional intergovernmental organizations (2017, 615-20). Similarly, Christa-Gaye Kerr does not explicitly identify these groups as unique stakeholders but also explores the closely tied relationship between them and the Court (2020 195-98).

2.3 The Overarching Interests of the ICC and the Obstacles to Their Pursuit

As an intergovernmental institution with a set mandate operating on the international stage, the ICC has two primary interests to which every other is subordinate. The first is in its continued existence as an institution of ICL (Müller and Stegmiller 2010, 1269, 1292–94; Kersten 2016, 167–72; Bocchese 2017, 384–87). This is often a complex affair, as the ICC operates within a system that is often hostile and antithetical to its existence both in and of itself (Kaul 2007) and in terms of the institution's legitimacy. As the first permanent institution embodying ICL, the Court is an unprecedented challenge to state sovereignty (Cryer 2005, 983–85) in a world which overwhelmingly privileges state sovereignty over the operations of intergovernmental organizations (Pavel 2014, 1–56).[2] Although ICC member states supposedly cede a degree of their sovereignty to the Court by signing the Rome Statute (Dutton 2012, 14; Bocchese 2017, 341), state sovereignty still plays a large role in how the Court is able to operate on the international stage and during its investigations. This then affects the Court's favouring of self-referrals over its two other trigger mechanisms, particularly those initiated via the discretion of the OTP, i.e., *proprio motu*, and its subsequent case selection strategy in self-referral states. The third trigger mechanism is for the United Nations Security Council (UNSC) to refer a situation to the Court which, unlike the other trigger mechanisms, can be in a state which is not a State Party to the Rome Statute.

Relatedly, the ICC's relationship with the UNSC, the related trigger mechanism, and the implications of this mechanism also help create a hostile and antithetical environment for the Court which affects its sociological legitimacy and pushes it to favour self-referrals over UNSC referrals. The primary factors contributing to this are state sovereignty and the ramifications of great power politics. Affecting both is the fact that three of the five permanent members of the UNSC (P5), China, Russia, and the United States, are not members of the Court and are thus not subject to its jurisdiction. This is problematic for the Court's legitimacy for two reasons. First,

[2] The first two chapters of Carmen Pavel's *Divided Sovereignty: International Institutions and the Limits of State Authority* argue "that the failure to protect people who are subject to mass violence can be traced to a theoretical failure of the state model," i.e., state sovereignty, resulting in the need for "external restraints on states' power … to make sense of the ambiguous and conflicting rules regarding the exercise of sovereign prerogatives in international law [in which] … the problem of deciding which rules apply to state behaviour is an institutional problem" (2014, 26).

these three states are great powers with a large degree of power projected across the globe which they often use to allegedly commit significant human rights atrocities domestically, internationally, or both, while having domestic judiciaries who are not willing and/or able to hold state elite accountable for international crimes. Whether it be the scores of civilians killed abroad by the Obama administration (Human Rights Watch 2013b), the Court identified ICC-level crimes committed by Russia in their invasion of Eastern Ukraine in 2014 (Office of the Prosecutor 2016b, 33–42) and the rest of Ukraine in 2022 (Human Rights Watch 2022), or the genocide currently being committed against the Uyghur ethnic group by the Chinese government (Human Rights Watch 2021a), none of the most responsible individuals have been held accountable by domestic courts. The problematic nature of this is then perpetuated by the fact that the UNSC can, and has in the past, refer situations to the Court (Sudan and Libya).[3] Because of the double standard this creates, it can have negative implications on the ICC's legitimacy for members of both its major stakeholders (Aloisi 2013; Ali 2019; Chigowe 2020).[4]

The second primary interest of the ICC is the fulfilment of its mandate "to end impunity, and through international criminal justice, … to hold those responsible accountable for their crimes and to help prevent these crimes from happening again" (International Criminal Court n.d.a). Highlighting the complementarity aspect of the Court's mandate, former ICC President San-Hyun Song states that the institution's "core mandate … is to act as a court of last resort with the capacity to prosecute individuals for genocide, crimes against humanity, and war crimes when national jurisdictions for any reason are unable or unwilling to do so" (2012). The biggest obstacle to this interest is, again, state sovereignty because political regimes and their elite are often the perpetrators of international crimes but are *traditionally* protected from accountability

[3] The situation in Sudan was referred by the UNSC via Resolution 1593 in 2005, while the situation in Libya was referred via Resolution 1970 in 2011.

[4] Nada Ali argues that "[a] major threat to the legitimacy of the Court is its relationship with the United Nations Security Council (UNSC) … [because] UNSC referrals of conflict situations under Article 13(b) of the Rome Statute remain subject to geo-political considerations… [in which t]he exercise is … arbitrary at best, and may render the ICC an instrument of political coercion at worst" (2019, 1). Rosa Aloisi argues that, "in analyzing the relationship between the UNSC and ICC[,] it is evident that clashing political and judicial interests have done a disservice to the implementation of international justice" (2013, 147). Lastly, Lloyd Chigowe establishes "that the relationship [between the ICC and the UNSC] has not only failed to fulfil its intended objectives but has plunged the [ICC] into a crisis of legitimacy" (2020, 403).

by state immunity, which is typically claimed as part of state sovereignty (Özdan 2019, 1522–26). Although the act of ratifying the Rome Statute is "itself an expression of [state] sovereignty" (Bocchese 2017, 341) in which states transfer part of this sovereignty to the Court "and are thus obliged to act in accordance with" the Statute, state sovereignty is still commonly cited when states contest ICC activity (Müller and Stegmiller 2010, 1291). One of the best examples of this obstacle is the intense reactions from many African states when the ICC has indicted sitting heads of state or other political elite in the past, as explored below. A second obstacle to the ICC fulfilling its mandate concerns the peace versus justice debate in which cooperation with the ICC is contested on the grounds that it impedes peace processes (Kersten 2016, 19–63; Méndez and Kelley 2015). One of the most significant examples of this is when the administration of former DRC president, Joseph Kabila, refused to hand over ICC-indicted Bosco Ntaganda to the official seat of the Court in the Hague, "arguing that his integration into the FARDC made him an agent of peace" (P. Clark 2018, 78–79).

As previously mentioned, both of the Court's primary interests relate directly to the institution's legitimacy, but they do so in very different and often contradictory ways. This contradiction, based on the nature of each interest, typically requires the Court to favour one interest at the direct expense of the other. While both interests have clear links to the Court's normative and sociological legitimacy, the effectiveness of the Court, especially concerning these interests, is largely dependent upon whether the relevant stakeholders perceive an action as legitimate and less upon whether it is truly legitimate in a legal/moral sense (J. Clark 2015, 767–73); thus, sociological legitimacy is favoured in my analysis. The cyclical relationship between legitimacy and reputation will be explored in Chapter 4, but it is important to point out that the Court's sociological legitimacy is very closely tied to its reputation on all levels (internationally, regionally, in local communities, etc.), as a positive reputation will likely only emerge if the Court's actions are perceived as legitimate. The link between each of the Court's primary interests and its sociological legitimacy can be starkly differentiated, however, with state regimes and (most) regional/intergovernmental organizations privileging actions embodying the Court's interest in fostering good relationships with states as a means of immediate survival while victims and ICL proponents are likely to privilege actions embodying the Court's interest in genuinely pursuing its mandate. This is then likely a key factor in which interest the Court favours. To illustrate the inherent conflict between these two interests, each will be analyzed

with particular attention paid to the obstacles and factors that contribute to the favouring of one over the other in the context of state sovereignty and the modern international system.

Looking first at the Court's interest in survival, it must be noted that the Court not privileging its survival does not necessarily equate to its future destruction, but it does likely decrease the institution's chances of long-term survival. As the Court is an intergovernmental institution, its survival depends on the support it receives from its member states. To a large degree, the level of support the Court receives from these states (and, to a certain degree, non-member states)[5] comes directly from the amount of legitimacy it is afforded by these states. As deGuzman argues, "the perception of relevant audiences regarding the legitimacy of an institution's actions can affect the diffuse support it enjoys" (2008, 1441). With the Court being an international institution embodying ICL norms, this dependence by proxy on the perceived legitimacy of states can be an obstacle in the genuine pursuit of its mandate in relation to and as a result of the implications of state sovereignty on a state's capabilities to commit mass atrocity and shield themselves from accountability. Despite the recent shift away from sovereignty being understood as the right for states to do whatever they desire to their citizens (Lafont 2016; Witkin 2017, 71–76),[6] it is still often used by political elite to shield themselves from accountability for the crimes they have committed (An-Na'im 2020, 51, 58–63).

Adding to this issue, the ICC, especially in its early days, has had to indict and apprehend individuals when/where necessary to be perceived as viable but has been unable to do so without the support of states because they are the only international actors shy of the UN capable of apprehending individuals (Danner 2003, 526–28; Kersten 2016, 170–73).[7] If the Court were

[5] For an exploration of the role of the US, a nonmember state, in transferring ICC-indicted Bosco Ntaganda to The Hague in early 2012 after he surrendered himself to the US embassy in the Rwandan capital of Kigali, see Phil Clark's *Distant Justice* (2018, 1–4). Additionally, for a thorough exploration of the closely tied relationship between the ICC and the permanent members of the UNSC, see Gabriel Lentner's *The UN Security Council and the International Criminal Court* (2007), Alexander Galand's "Security Council Referrals to the International Criminal Court as Quasi-Legislative Acts" (2016), and Nada Ali's "Through a Glass Darkly: The ICC, the UNSC and the Quest for Justice in International Law" (2019).

[6] This shift began after World War II (Witkin 2017, 71–72) and arguably peaked in 2005 with the UN's unanimous adoption of the (non-binding) Responsibility to Protect (R2P) norm (Lafont 2016).

[7] While the OTP has argued that the absence of cases on its docket would be the greatest sign of success for the Court (Moreno-Ocampo 2003a, 3; International Criminal Court 2006, 7),

unable to successfully prosecute individuals who would otherwise enjoy impunity, this would undeniably have dire effects on its legitimacy with all stakeholders because it would, at best, deem the institution unnecessary. As a result, state sovereignty's privileged status internationally plays a significant role in dictating the Court's dependence on the support of states (Danner 2003, 526–28; Kersten 2016, 170–73; Bocchese 2017, 385–87).[8] As Mark Kersten puts it:

> It should be expected that international institutions such as … the ICC will not take actions which threaten their ability to function effectively or their long-term viability. … In short, … the OTP is guided by an institutional interest to receive cooperation from states and will avoid making decisions that preclude cooperation—contemporaneously or in the future. (2016, 169–71)

While the ICC must indict and successfully try those who would otherwise enjoy impunity to continue its existence in a world where this kind of impunity endures, this is only possible with the aid of the political regimes of states. Further, to obtain cooperation from states, the Court must be generally perceived as legitimate which inevitably requires political regimes to view the institution as staying within what they view as the boundaries of state sovereignty.

Two important clarifications must be made at this point. First, the fact that the ICC is successfully prosecuting individuals does not necessarily mean that it is genuinely fulfilling its anti-impunity mandate. After all, the Court has only targeted one side in all self-referral states even when ICC-level crimes were allegedly committed by both sides, and this extends beyond just self-referrals to the investigations in Libya (referred by the UNSC) where only members of the state elite were indicted despite likely ICC-level crimes from rebel groups (Tiemessen 2014, 455–56; Kersten 2016, 166, 178–83) and Côte d'Ivoire (opened *proprio motu*) where only the state elite of Laurent Gbagbo's outgoing regime was indicted despite credible evidence of ICC-level crimes committed by the newly elected political regime of Alassane Ouattara (Human Rights Watch 2015, 5–6, 35–43; Bocchese 2017, 873–82). The Court's two past chief prosecutors have justified this one-sided selectivity in most ICC investigations primarily on the

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this is not the case when numerous situations are occurring or have occurred within the jurisdiction of the Court in which impunity for ICC-level crimes is rampant.

[8] Bocchese does not explicitly make this argument but argues that the Court's dependence upon self-referrals is born from considerations around its survival in relation to its viability as an institution of ICL required to depend on the cooperation of member states to properly conduct its investigations and apprehend indicted individuals in an international system where state sovereignty reigns supreme (2017, 385–87).

grounds of gravity (Moreno-Ocampo 2006, 498, 501; Office of the Prosecutor 2016a, 4, 9, 12–15). Gravity works in two ways when it comes to the individuals indicted by the Court. The first way is described by deGuzman:

> The concept of gravity … resides at the epicenter of the legal regime of the [ICC.] … [T]he Rome Statute of the ICC … declares as the Court's purpose to end impunity for "the *most serious* crimes of concern to the international community as a whole." The Statute describes these crimes as "unimaginable atrocities," and "grave crimes" that "deeply shock the conscience of humanity." The Court's jurisdiction is restricted to "the most serious crimes" and the judges are to reject as inadmissible crimes "not of sufficient gravity." Thus, the concept of gravity is central to the ICC's purpose and its application will be an integral part of the Court's work. (deGuzman 2008, 1400; deGuzman's italics)[9]

The second way gravity works for the Court is best exemplified by the words of the ICC's first chief prosecutor. Defending his office from criticism around the partiality of not indicting state actors for the ICC-level crimes allegedly committed by the Ugandan military (UPDF), Moreno-Ocampo argued, "A major criterion is gravity. There is no comparison of gravity between the crimes committed by the Ugandan army and by the LRA-the crimes committed by the LRA are much more grave than those committed by the Ugandan army" (2006, 501). Importantly, the validity of Moreno-Ocampo's claim comparing the gravity of the LRA's crimes to those of the UPDF has been challenged by civil society, ICC experts, experts on the conflict in Uganda, and human rights organizations (Branch 2007, 180–82; Apuuli 2011, 123; Tiemessen 2014, 451–52; Kersten 2016, 66–75; P. Clark 2018, 81–82, 172–74).

The second clarification is that the ICC successfully fulfilling its mandate *is not* a prerequisite for its survival. In fact, the genuine pursuit of its mandate has had negative effects in terms of the Court's interest in its survival in the past. This phenomenon is best exemplified by the fallout with the African Union (AU) and the political regimes of many of its African member states after a series of indictments involving a sitting head of state and two political elite who would become the president and vice president of their country. First in March 2009 and later in July 2010, the OTP arguably tried to better embody the Court's anti-impunity mandate when it indicted then sitting president of Sudan, Omar al-Bashir, as part of an investigation opened via a

[9] The first two exerts used by deGuzman are from the Preamble of the Rome Statute, while the third is taken from Article 17(1)(d) of the Rome Statute (International Criminal Court 2002, 1, 11).

UNSC referral with a focus on the Sudanese region of Darfur in 2005.[10] Not only was this the first time the Court indicted a sitting head of state (Barnes 2010, 1602), but it was also the first time it indicted actors on both sides of the conflict being investigated (Kersten 2016, 165), as al-Bashir's indictment corresponded with the indictments of three other members of Sudan's state elite and two high-level members of rebel groups (Tiemessen 2014, 450–51). This should be seen as the ICC genuinely *trying* to fulfill its mandate because it targeted both sides, including the state's most powerful actor who was also the most likely to enjoy impunity as the sitting head of his state, al-Bashir.[11] Arguably, the most interesting aspect of al-Bashir's indictment regarding the Court's mandate is that it was primarily contested on the grounds that the Court was acting outside of this very mandate even though, by most accounts, it was not.

Besides this indictment being criticized for potentially decreasing the chances of the Sudanese government cooperating with peace agreements via the peace over justice argument,[12] the primary criticism from the AU, many AU member states, and China was that it "[interfered] with Sudan's national sovereignty,"[13] with these actors arguing that "Bashir should be immune under Article 98(1) of the Rome Statute" (Barnes 2010, 1606).[14] Adding to this criticism was the

[10] The investigation in Darfur concerned "Alleged genocide, war crimes and crimes against humanity committed in Darfur, Sudan since 1 July 2002" (International Criminal Court n.d.e).

[11] Notably, Kersten argues that, despite the OTP indicting actors on both sides of the conflict in Sudan, this still reflects a one-sided case selection strategy because rebel actors have only "been targeted for attacks on peacekeepers while only the government has been targeted for widespread war crimes in Darfur" (2016, 166), but this does not take away from the fact that these rebels were indicted.

[12] Criticism that the indictment of al-Bashir potentially decreased the chances of peace agreements should not be considered relevant here because "the mandate of the ICC is justice, not peace. … Moreover, the ICC is a legal, not a political body, and it lacks the mandate and expertise to evaluate the political legitimacy of amnesties or the impact of prosecution on peace. The kinds of consultations necessary to make those determinations would violate the independence of the Prosecutor, who, as stipulated in Article 42(1) [of the Rome Statute], shall not 'seek or act on instructions from any external source'" (Rodman 2010, 10–11).

[13] Specifically addressing this criticism, Moreno-Ocampo claimed: "we [requested] the arrest warrant against President Bashir and we requested Sudan … arrest President Bashir. So we utterly respect national sovereignty. We respect this – the national country to arrest … its own president" (2010a).

[14] Article 98(1) states: "The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property

fact that Sudan had not ratified the Rome Statute, and the Court was only able to exercise its jurisdiction there because the situation was referred by the UNSC, which was a trigger mechanism which had already received much criticism even before its first use (Ali 2019, 2–18).

Concerning the validity of the criticism that al-Bashir's indictment interfered with Sudan's sovereignty, this entirely depends on whether one believes in the traditional conceptualization of national sovereignty which allows governments to do whatever they wish to their citizens. As international convention around national sovereignty has largely shifted to a definition that includes a duty for states to protect the human rights of their citizens (Lafont 2016), this argument that al-Bashir's indictment did not fall within the anti-impunity mandate of the ICC holds little credibility. Beyond this, the ICC was working within the confines of the Rome Statute via Article 13(b) which allows UNSC referrals, so it should not be seen as overstepping its *established* jurisdiction, regardless of whether one agrees with this referral mechanism. Based on the scale of al-Bashir's ICC-level crimes[15] and the fact that he was the actor most likely to avoid *impartial and genuine* justice, his indictment should be viewed as the ICC genuinely attempting to fulfill its anti-impunity mandate, regardless of this arguably being what the UNSC wanted from the referral. Despite this, al-Bashir's indictment received much pushback, with the most notable instance in terms of the ICC's legitimacy and survival being a call from the AU for its members to refuse to cooperate with the ICC in apprehending Bashir and the labelling of the indictment as "an attack by the west against Africa" (Barnes 2010, 1605–8).

A couple of years later in early 2011, Moreno-Ocampo again arguably tried to embody the Court's anti-impunity mandate by indicting actors on both sides of the situation being investigated in Kenya,[16] including Kenya's then deputy prime minister, Uhuru Kenyatta, and

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of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity" (International Criminal Court 2002, 48).

[15] For an in-depth exploration of some of the ICC-level crimes of al-Bashir and his regime, refer to the HRW's reports, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan* (2004b), *Sudan: Massive Crimes against Civilians in Darfur* (2005a), and *"They Shot at Us as We Fled": Government Attacks on Civilians in West Darfur in February 2008* (2008), along with Amnesty International's reports, *Sudan: Deliberate and Indiscriminate Attacks Against Civilians in Darfur* (2004) and *Beyond Any Doubt: Sudan Uses and Supports the Janjawid in Darfur* (2006).

[16] The investigation in Kenya concerned "Alleged crimes against humanity committed in the context of post-election violence in 2007/2008" (International Criminal Court n.d.k). The

minister of higher education, William Ruto, as a result of the *proprio motu* investigation initiated in March 2010 (International Criminal Court n.d.k). Notably, Kenyatta and Ruto would go on to win the highest offices in the country, with Kenyatta becoming Kenya's president and Ruto becoming the state's deputy president in April 2013. While the indictments initially "enjoyed widespread public support in Kenya[,] … that support did not survive the defendants' 2013 presidential campaign" (Helfer and Showalter 2017, 6). Amongst this initial support for their indictment, Kenyatta and Ruto would go on to make cooperation with the Court a centrepiece of their campaign, but this did not stop them from "[villainizing] the ICC as a tool of Western nations seeking to meddle in the Kenyan elections" (ibid.). The response from Kenya's government to these indictments was overtly hostile from the outset, ranging from lobbying the UNSC to use their power under Article 16 of the Rome Statute to defer the indictments[17] to Kenya's Parliament passing a motion for Kenya to withdraw from the Rome Statute in December 2011,[18] even though this would not have nullified the indictments (ibid., 9–18). Similarly, the AU called for the cases to be postponed before Kenyatta and Ruto's election campaigns were even announced (BBC News 2011; Brown and Sriram 2012, 256).

As a result of the tension emerging from these indictments along with the earlier indictment of al-Bashir, an Extraordinary Summit was convened by the Assembly of the AU in October 2013 to discuss the relationship between its members and the Court, with a faction of states led by "Kenya, Sudan, Rwanda, Namibia, Chad, Uganda, and Ethiopia" calling for a mass exodus of African states from the Court (Kerr 2020, 203–4). This Summit did not result in the mass exodus that it called for (ibid.), and the ICC went on to withdraw its charges against Kenyatta due to insufficient evidence in December 2014 (International Criminal Court n.d.g) and terminate Ruto's indictment in April 2016 because the evidence presented by the prosecution was weak (International Criminal Court 2016, 1), but tensions around the indictment of sitting heads of state continued. This tension peaked again in October 2016 when Burundi, the Gambia,

indictments emerging from this investigation included four government actors and five non-state/rebel actors (ibid.).

[17] This lobbying for the UNSC to defer the situation was supported by the AU and many of its members in early 2011 (Goldstone 2011, 611).

[18] This motion was never acted on by Kenya's then-President Mwai Kibaki, and a second motion to withdraw from the Rome Statute in September 2013 was similarly not acted on by newly elected President Kenyatta (Helfer and Showalter 2017, 16–17).

and South Africa (once the Court's most vehement proponent) submitted notices of intent to leave the Court. Burundi was the only state of the three to actually leave while the other two withdrew their notices (Kerr 2020, 204), but these extreme reactions to what was viewed by the AU and its members as too significant a breach of state sovereignty[19] shows the potential dangers of the Court attempting to genuinely fulfill its anti-impunity mandate. While the indictments of sitting heads of state were the primary cause of African hostility towards the Court during this period (which extends to a limited degree to today), it is notable that the response from African political regimes and regional powers to the indictment of Kenyatta and Ruto were generally hostile before the individuals were even elected to Kenya's highest offices. This suggests that impunity is expected for political elite beyond sitting heads of state. It then appears that, even to the states that most vehemently supported the Court's mandate at its outset, the 'sacrifices' required to make this a reality were too much.[20]

As the fallout from these indictments illustrates, the genuine pursuit of the Court's mandate likely harms its sociological legitimacy with one of its key stakeholder groups, political regimes and intergovernmental organizations. For the political regimes of states, this damage to the Court's sociological legitimacy is likely born from the expectation that the Court *should* be respecting national sovereignty and sovereign immunity. Thus, whenever the Court's actions breach the narrow borders of the impunity-based expectations of these political regimes, the institution's sociological legitimacy likely decreases. Concerning intergovernmental

[19] The reason claimed by South Africa's political regime for its attempt to withdraw from the ICC was more nuanced than simply being about the indictment of sitting heads of state, with the regime claiming that "South Africa was supposedly caught in a bind. On the one hand, it had to observe diplomatic immunity for heads of state, as per international customary law backed up by AU pressure. Yet its membership of the ICC pulled it in another (apparently politically less attractive direction) towards demanding of it to arrest and surrender state officials like Sudan's al-Bashir to the ICC. To escape this bind, the South African Government effectively opted out and favoured impunity over accountability" (du Plessis and Mettraux 2017, 365).

[20] Notably, it is possible that the response to these indictments from the political regimes of African states who had previously shown significant support for the Court and its mandate may have been considerably more positive if they had perceived the Court as being more even-handed across the globe, as all its formal investigations at the time concerned African states. This has since changed with a self-referral investigation being opened in the state of Palestine in 2021 and investigations via external state referral being opened in Venezuela in 2021 and Ukraine in 2022 (International Criminal Court n.d.l), so responses to something similar may be different in the future.

organizations, these actors appear to favour solutions which embody peace over justice and are less likely to approve of actions which potentially hurt the possibility of these kinds of solutions, which ICC indictments are often accused of doing (Kersten 2019, 27–33).

On the other hand, however, the Court genuinely fulfilling its anti-impunity mandate is one of the strongest factors positively affecting the hopes of the victims of ICC-level crimes and proponents of ICL (Kerr 2020, 197, 212, 216; Kotecha 2013),[21] so the Court doing so is also fundamentally connected to its legitimacy. As mentioned earlier, the ICC firmly established its primary purpose as ending impunity for the most responsible perpetrators of significant international crimes, so it should come as no surprise that the expectations of victims and ICL proponents are closely tied to full accountability for ICC-level crimes, regardless of which side the perpetrator may be on. Concerning these expectations, de Hoon makes a crucial clarification about the language of the mandate in the Rome Statute and Court rhetoric:

> Credos like 'ending impunity' and 'delivering justice' would never be found credible in a domestic criminal law system, since all criminal law can do is strive after *reducing* impunity and *contributing* to *feelings* that justice is served, in close cooperation with other enforcement and support systems that aid these causes too. With the added complications that the transnational space brings, such strange and utopian promises should have no place in [ICL]. (2017, 598; my italics)

In other words, the ICC and ICL have set themselves a much higher standard to meet than is typically expected of domestic judiciaries which thus raises the expectations of victims and ICL proponents. The ICC's proclamation of putting an 'end' to impunity could thus easily be interpreted as not just the utopian ideal it is and instead potentially set up expectations of a literal cessation of impunity, with anything less being detrimental to perceptions of the ICC as legitimate. Consequently, when the OTP appears to ignore the crimes of state actors in self-referral states in terms of what the public can observe, this will likely harm the Court's sociological legitimacy with this key stakeholder group. Most basically, it seems that the more the Court appears to respect state sovereignty in self-referral states despite it being contradictory

[21] While the effect of the ICC successfully fulfilling its mandate on its legitimacy is not the main topic of Christa-Gaye Kerr's article, she discusses the negative effect on the ICC's legitimacy when it is perceived as being politicized in contrast to its mandate. Similarly, Birju Kotecha ponders how to perceive the ICC's success, landing on its procedural and democratic legitimacy while linking this to the end of impunity for ICC-level crimes.

to its mandate, the more legitimate it is considered by state regimes and the less legitimate it is considered by victims and proponents of ICL (and vice-versa).

This then suggests that, while the OTP's case selection strategy in any given investigation depends largely on how it believes its indictments will be perceived by the relevant stakeholders (especially those actors it likely views as most important to successfully conducting investigations, i.e., states' political regimes and intergovernmental organizations), it can be wholly incorrect in its presumptions. While the Court's indictments in Sudan and Kenya likely display an effort to pursue its interest in fulfilling its mandate, it may not illustrate an intentional *favouring* of this interest over its survival interest and, instead, the OTP likely misjudged how the indictments would be received. Considering this in line with Thakur's theory of a balance of interests, actors can only make decisions based on the knowledge they possess at the moment, and there is never a guarantee that their interpretation of this knowledge will be correct.

Regarding the indictment of Sudan's head of state, even as far as the reputations of autocratic leaders go, al-Bashir's reputation was relatively atrocious in Africa and internationally (Archibong and Lloyd 2021, 1–2). Further, the situation was only referred to the Court by the UNSC following a Commission of Inquiry into the situation claiming that "the ICC was the only credible way to bring perpetrators of atrocities in Darfur to justice" (Duursma and Müller 2019, 894), so it is not unreasonable to believe that Moreno-Ocampo's OTP thought this would be enough to stymy potential criticism from the AU and its members who were less likely to support the investigation because they "saw Darfur as a test case for its peacemaking and peacekeeping capacity" and were thus especially wary of outside interference (ibid.). Additionally, as this was the first time the Court was indicting a sitting head of state, it is possible that the OTP rightly did not foresee such intense backlash to al-Bashir's indictment.[22] In terms of the Kenyatta and Ruto indictments, this can likely be credited to two factors. First, there had been relatively widespread support from humanitarian groups in and around Kenya for an

[22] In a 2010 public discussion held by the Council on Foreign Relations, Moreno-Ocampo alludes to the OTP's belief that the indictment of al-Bashir definitively respected Sudan's sovereignty because his office had been attempting to go through Sudanese authorities and the OTP's belief that the large amount of credible evidence of al-Bashir's ICC-level crimes would be sufficient to justify the indictment in relation to his office's belief that there was "clear jurisprudence on international law saying that there's no immunity for [heads] of state before international courts" (Moreno-Ocampo 2010a).

investigation into state violence during the 2007-2008 election period. Second, Kenyatta and Ruto were not, at the time, the leaders of Kenya and thus could not hide behind sovereign immunity in the same way al-Bashir could. Consequently, a potential explanation for the ICC's seemingly inconsistent actions between the indictments in self-referral investigations and those triggered through the Court's other two mechanisms is that the OTP misjudged the degree of hostility that these indictments would be met with. Thus, the Court was likely not subordinating its survival interest to its mandate interest here but simply did not see the actions as likely to affect its survival interest to the degree it did.

As this section has established, while the ICC grapples with many interconnected interests, these can fit into the categories of ensuring its survival or genuinely fulfilling its mandate. These broad interests come into conflict with each other much more often than they complement each other, and this is something that the Court, and especially the OTP, must consider whenever deciding which states to initiate/accept cases in/from and who to investigate/ indict in those states. As the lack of indictments of state elite in self-referral states goes directly against its anti-impunity mandate (since there is credible evidence of ICC-level crimes committed by these actors), it is clear that the OTP has chosen to favour its survival when it comes to its relationship with self-referral states, regardless of how damaging and/or antithetical it may be (or appear to be) to its legitimacy and purpose. The Court is clearly willing to overstep aspects of state sovereignty when it *believes* doing so will be relatively well-received by those it requires to successfully conduct investigations and apprehend perpetrators, but this has seemingly never been deemed the case in self-referral states. Consequently, an important question concerning the Court's legitimacy emerges from this: why exactly does the Court favour its survival interest over its mandate interest? Beyond this, why does this appear to be especially apparent in self-referral states?

2.4 Why the Court Favours its Survival Interest over its Mandate Interest

Exactly why the Court favours increasing the chances of its immediate survival over fulfilling its anti-impunity mandate may appear obvious on the surface, but the implications of this decision make it a complex riddle. For example, why does an institution's survival matter if it is not living up to the purpose for which it was created? Additionally, if the Court is perceived as jeopardizing its mandate because of political considerations, as is the case in self-referral

states, how can its prosecutions be accepted and considered credible by the victims it is meant to achieve justice for and proponents of ICL? On the flip side, what does the pursuit of the Court's mandate mean if it results in State Parties ceasing or significantly limiting support for and cooperation with the institution, as was the case with the indictments of al-Bashir, Kenyatta, and Ruto? While these questions likely do not have definitive answers, this section explores the international situation the Court was entering at its outset as a means of evaluating how/why the Court seems to favour self-referral investigations (despite considerable criticism) and why it seems to favour its immediate survival over its mandate, especially in self-referral states.

When the ICC was created in 2002, it was a very different court than anything that had come before it in the sense that it was permanent and had a much wider scope in terms of jurisdiction and applicability (Danner 2003, 510–16). Due in large part to this novelty, the Court had no real legitimacy to speak of other than that gained from the consensus evident in the Rome Statute being accepted at the Rome Conference in 1998 and ratified by sixty states.[23] The only way for the Court to build on this initial legitimacy as an institution of ICL and not just as a theoretical idea was for the OTP to start opening cases. As Clark explains:

> [there was a] view within the Court – and particularly within the OTP – that, as a new global institution with substantial financial and diplomatic backing from States Parties, it needed to open investigations and prosecutions quickly to be seen as a legitimate actor on the world stage. As one OTP staff member said in 2006, "What use is a court with no cases?" (2018, 64)

There was/is also the issue of state sovereignty. Even though member states had ceded a portion of their sovereignty to the Court by signing the Rome Statute (Bocchese 2017, 341), the OTP was clearly aware that it needed to be careful and strategic in how it breached the more privileged aspects of this sovereignty, such as sovereign immunity, especially as a nascent institution. Beyond the political considerations limiting the degree to which the ICC was able to utilize the state sovereignty ceded to it is the fact that the Court had/has no concrete method of

[23] This is not to undercut the legitimacy provided by states ratifying the Rome Statute, but this legitimacy was largely theoretical as it was not possible for states to fully know how the Court would act or how it would interpret the Rome Statute. The OTP's novel reading of Article 14 of the Rome Statute to include the act of governments referring situations in their state to the Court (Schabas 2008a, 12–18) is just one example of this idea that signatory states had no way of knowing how the ICC would act after being created.

asserting this ceded sovereign authority when a state disagrees that the Court's actions are within the bounds of its authority.

Further complicating the ICC's ability to choose cases at its outset and, to a lesser extent, today is the fact that the OTP must attempt to stick within the bounds of what would be deemed acceptable by the powerful non-member P5 states of the UNSC (Bosco 2014, 14–15, 20–22, 132, 164–66, 171–76). While China, Russia, and the US were and are still not members of the Court, this has never meant that the ICC could operate in a manner which does not consider the interests and expectations of the political regimes of these states; after all, the will and interests of the great powers typically affect much of what occurs on the international stage. One of the biggest implications of this consideration on the Court's ability to select cases is that it must attempt to avoid targeting allies of the P5 or states where members of the P5 may have significant interests (Tiemessen 2014, 449). Even if the Court were to indict an individual with close ties to a P5 state, this could be rendered pointless because of Article 16 of the Rome Statute which allows the UNSC to defer investigations or prosecutions for 12 months with the ability to renew the deferral (International Criminal Court 2002, 10). The only concrete result from this kind of indictment would then be an unnecessary antagonism against the P5, which is likely to be detrimental to the ICC's ability to operate. On the flip side, a positive relationship can have positive implications on the Court's ability to operate. As Christopher Rudolph argues:

> As major world powers, the … P5 … can also help to gain cooperation that the Court needs from states involved through the use of political pressure and suasion. … Although the permanent members of the UNSC are not the only powerful states that can be called on to apply such political pressure, they are among the most important. Moreover, if P5 members seek to actively block ICC action in a given situation, *it is highly unlikely that the court could successfully promote its mission*. … Indeed, Moreno Ocampo remarked that at the time he took office *he considered obtaining the cooperation of the Security Council to be "crucial" to the success of the court* (Rudolph 2017, 120–21; my italics).

It is important to point out, however, that the opening of a formal investigation via self-referral in the state of Palestine in early 2021 likely indicates a change of trajectory for the Court when it comes to investigations with direct links to the interests of the P5. With this said, the US' response to the Court signalling in 2020 that it would likely be opening formal investigations in Palestine and Afghanistan exemplifies the potential pitfalls of antagonizing non-member P5 states; this response included the unprecedented decision from the US to impose sanctions upon

then-chief prosecutor of the Court, Fatou Bensouda, and the head of the jurisdiction, complementarity and cooperation division of the ICC, Phakiso Mochochoko (Human Rights Watch 2020). While this is a troubling occurrence after the Court's nearly twenty years of existence, it might have been fatal for the ICC if something similar had occurred within its first few years. Additionally, the difficulty the OTP has had in choosing situations, especially the initial situations it would investigate, was further extenuated by the principle of complementarity which requires a lack of ability and/or willingness from domestic courts to try international crimes for the ICC to be able to intervene (Imoedemhe 2016, 19–54). The OTP was further restricted by the Court's temporal jurisdiction which began as the institution was created in 2002 via Article 11(1) of the Rome Statute (International Criminal Court 2002, 8).[24]

While this has been a very brief outline of the difficulties the Court faced in choosing situations at its outset, it illustrates the tense landscape the Court had to traverse as a nascent institution trying to establish its usefulness and legitimacy. Additionally, as a result of this tense landscape, the OTP had to be cautious about which trigger mechanism it used to initiate its first investigation, and this caution still exists to a limited extent (P. Clark 2018, 4–11). The Court's first two formal investigations were opened in the DRC and Uganda via self-referral in June and July of 2004, respectively, while the third in Sudan was opened via a UNSC referral in June 2005 (International Criminal Court n.d.l). This should not come as a surprise, as "The drafters of the [Rome] Statute envisaged state party and Security Council referrals as more authoritative" (Reynolds and Xavier 2016, 970), even if the state referral mechanism was never expected or intended to be used to self-refer situations (Schabas 2008a, 12–18). With this said, the Court using a UNSC referral for its very first investigation could have been problematic for the Court's sociological legitimacy. A primary reason why the Court was made independent of the UNSC to begin with was due to the argument:

[24] Article 11(1) only applies to states which were Parties to the Rome Statute at the time it came into force, while Article 11(2) specifies, "If a State becomes a Party to this Statute after its entry into force, the Court may exercise its jurisdiction only with respect to crimes committed after the entry into force of this Statute for that State, unless that State has made a declaration under article 12, paragraph 3" which can extend this temporal jurisdiction to as early as July 1st, 2002 for states which are not Parties to the Statute or states becoming Parties to the Statute after July 1st, 2002 (International Criminal Court 2002, 8).

> that [further] Security Council involvement be rejected because of the alleged impermissibility of any form of political control over the selection of situations. In this way, it was thought that such a purely judicial institution would constitute a major improvement on the 'victor's justice' stigma that had afflicted international prosecution since Nuremberg. (Schabas 2009, 540)

While it is clear from the inclusion of Article 13(b), which allows for situations to be referred by the UNSC, that a limited degree of UNSC involvement was deemed acceptable, relying on this trigger mechanism for the ICC's first investigation may have been perceived as problematic. Even before the Court became operational, some believed that "[t]he role given to the Security Council implied a preservation of pre-existing power dynamics and amounted to little more than 'a rusty facade' to shield the permanent members from exposure to jurisdiction" (Reynolds and Xavier 2016, 964). In retrospect, these worries were well-founded. After just two uses, it is already commonly believed that "the practice of referral … by the UNSC has been governed by political motives, thus diminishing in the eyes of the international community the legitimacy of the ICC's work" (Aloisi 2013, 151). This kind of criticism began immediately following the UNSC's referral of Sudan in 2005 and has since had significant effects on the ICC's sociological legitimacy (Vilmer 2016b, 1321). As already discussed, al-Bashir was able to protect himself from apprehension in Africa "and mobilized considerable African support by painting the ICC and its Prosecutor as a neo-colonial instrument," with much of this arising from the UNSC's involvement (Forsythe 2012, 861). Considering this, it is not unreasonable to imagine that the legitimacy cost imposed by a UNSC referral would have been even more serious had the Court used this mechanism to open its very first investigation.

Opening the Court's first investigation via the OTP's *proprio motu* powers also presented issues, especially as the drafters of the Rome Statute had considered the *proprio motu* mechanism as the least authoritative of the three (Reynolds and Xavier 2016, 970). Moreno-Ocampo was likely aware of this as he took office and was likely hesitant to open a case *proprio motu* so early in the Court's existence, likely fearing this could escalate confrontation with the states supporting the Court which would then make accumulating legitimacy even more difficult (Bocchese 2017, 366). Interestingly, the OTP first used its *proprio motu* powers to open the investigation in Kenya in 2011 which, as was explored in section 2.3, had this very effect, with the indictments of Kenyatta and Ruto resulting in these individuals "and their allies [depicting] the ICC as a neocolonialist institution biased against Africa and improperly intruding on Kenyan

sovereignty" (Dutton 2017, 109). Exploring the OTP's initial hesitancy to use this trigger mechanism, Payam Akhavan claims:

> Despite the prosecutor's power of initiation, a prudent course of action in the early stages of institution building favored voluntary referrals by states rather than a potentially adversarial relationship between the prosecutor and a state whose cooperation would be required for investigations and the arrest of accused persons. (2005, 405)

For an institution struggling to establish itself on a relatively hostile international stage in which it would have to conduct investigations and apprehend indicted individuals without any kind of enforcement authority, "The advantages of self-referrals [were] obvious[,] … [as] working with governments facilitates the collection of evidence, the provision of security for investigators and witnesses, and the capture and surrender of suspects" (Rodman 2014, 450).

Regarding the Court's choice of the DRC and Uganda as its first investigations, Kersten, working off the research of Adam Branch (2011, 187), asserts that "Uganda's self-referral met two specific requirements for the Court: it was a voluntary referral from the [Government of Uganda] and thus 'feasible on the local level' and it did not conflict with the interests of any major powers." (Kersten 2016, 175). Similarly, Pascal Kambale argues that:

> the DRC investigation offered the ICC a unique set of potential assets for the assertion of the young institution's legitimacy. The Congolese legal community's predisposition and desire to cooperate meant that the ICC had an opportunity to develop and creatively implement a doctrine of complementarity based on a positive division of labour with national courts. (2015, 196)

This did not end up being the case for the ICC's relationship with the DRC government, but, conforming with the human fallibility aspect of Thakur's a balance of interests theory (2013, 78–79), it would have been impossible to know whether the OTP's strategy would be successful from the outset.

This section has illustrated how the Court favoured its interest in its long-term viability/survival over its interest in the genuine fulfilment of its mandate, but this does not mean that its mandate interest has not lingered in the background. Clark articulated this idea well in 2008, arguing that "The ICC is caught between an idealistic vision of a global court designed to prosecute the cases that domestic jurisdictions cannot or will not prosecute, and the pragmatic concerns of a new institution seeking judicial results to secure its legitimacy" (39).

2.5 Conclusion

As this chapter has explored, the ICC has two primary interests which often compete against each other and contribute significantly to how the institution has had to operate since the Rome Statute came into force. The ways the Court has pursued its interest in survival and its interest in fulfilling its anti-impunity mandate, and which of these interests the Court has typically chosen to favour, depends heavily on the reality it has had to work within which tends to be hostile to its very existence for reasons ranging from the privileging of state sovereignty to arguments for favouring peace over justice. This reality has led the OTP to embrace a situation selection strategy which favours self-referral investigations, especially in the institution's nascent years, and a case selection strategy which favours its survival interest over its mandate interest. At the ICC's outset, the OTP was likely pushed into favouring self-referral investigations, thus favouring its interest in its immediate survival, because this presented the clearest path to getting perpetrators on its docket without overly antagonizing the states which it depends on for funding and the means to conduct its investigations (i.e., protection and access).

Despite considerable criticism around its case selection strategy in self-referral states, the OTP has not changed course. Even when the chief prosecutor changed in 2012, Bensouda continued to open self-referral investigations while not indicting state elite in the face of credible evidence of their complicity in ICC-level crimes. The few times the Court *appeared* to favour its anti-impunity mandate, such as indicting state elite and/or sitting heads of state while also indicting rebel actors, this was met by significantly negative reactions from the political regimes of its member states in Africa. As the reality the Court navigates is not likely to change significantly soon, the Court must attempt to mitigate the damage its apparent selective impunity in self-referral states does to its sociological legitimacy because the more its authority is viewed as justified, the greater its chances of success on the international stage and within the states it conducts its investigations. Chapter 4 offers an approach to doing this very thing, but a better understanding must first be obtained of the interests motivating the political regimes of self-referral states in their interactions with the ICC.

Chapter 3

The Opportunistic Self-Interests of the Political Regimes of Self-Referral States

3.1 Introduction

As discussed in Chapter 1, the political regimes of all six self-referral states continued to commit ICC-level crimes within the jurisdiction of the Court's investigations after self-referring, suggesting the act of self-referral was never about genuine accountability and these regimes likely believed that the ICC's investigations would meet other interests. Several crucial questions arise from this. First, why would political regimes with histories of human rights atrocities sign the Rome Statute if they clearly had no intention of ceasing these atrocities? Second, why would they later refer situations within their territory to the Court when they, again, had no genuine intention to cease involvement in human rights atrocities in the referred situations? Does this not go against their interests as states operating within an international system, even one as anarchic and sovereignty dominated as the one we inhabit? While it has been established that a period of negotiation took place between the OTP and the political regimes of Uganda and the DRC before the situations in these states were referred (Müller and Stegmiller 2010, 1285–86; Bosco 2014, 96–98; P. Clark 2018, 53–65), there was no guarantee that the ICC would honour any agreements potentially made during these negotiations.[1] These regimes could indeed cease cooperation with the Court if a member of its elite were indicted, but the potential damage would

[1] It must be emphasized that it is not known exactly what was agreed upon in these negotiations, but it is widely speculated that some kind of agreement was made around not indicting state elite (Schabas 2008a, 19–22; 2008b, 749–53; Müller and Stegmiller 2010, 1284–86; Bosco 2014, 96–98; P. Clark 2018, 53–65). Additionally, while there was a set precedent for the political regimes of CAR, Mali, and the state of Palestine that the ICC would not investigate and indict state elite even if there was credible evidence of their complicity in ICC-level crimes, precedent can only serve as a certain level of assurance. This is especially true in the context of the likely fallout of an ICC indictment, even if these individuals were not apprehended and transferred to The Hague.

already be done. This suggests that the interests behind the act of self-referral were/are perceived to outweigh the potential risks. As this chapter will show, this impression has been correct so far; however, in line with Thakur's a balance of interests theory (2013, 78–79), there was much room for human fallibility around this decision, so these regimes were taking a significant risk.

When considering state interests in this context, it is important to remember the distinction between the interests of a state's people and the interests of the political regime in power in that state. As Thakur states as part of his a balance of interests theory:

> If the national interest is whatever governments proclaim it to be, scholars would have to accept at face value that Slobodan Milosevic's atrocities in Bosnia and Kosovo, … the American and British decision to attack, invade, and occupy Iraq, … Russia's actions in Chechnya and South Ossetia, … the decision of the Taliban government to permit Osama bin Laden to set up camp in Afghanistan … were all in the national interest of the countries concerned because that is what the governments claimed. (2013, 76)

The interests of a political regime must often be separated from the best interests of the majority in the state over which the political regime reigns. This is especially true regarding authoritarian and dictatorial political regimes (Thakur 2013, 75–76), like those of Kabila and Museveni.

This is supported by Marco Bocchese who, referencing an argument from Kenneth Rodman and Petie Booth (2013), claims that "changing the unit of analysis from state to government [proves] crucial … to explain why state authorities decided to refer their domestic situations to the ICC" (2017, 353). When looking at how the political regimes of self-referral states interact with the ICC, one primary interest and one subordinated interest can be identified as likely motivating these interactions. Like the ICC, these regimes have a primary interest in their own survival (Clapham 1996, 3–6), especially when they are faced with fierce challenges to their sovereignty from rebel factions (Bocchese 2017, 354). This interest is illustrated in how these regimes co-opt the ICC's investigations for their benefit and in the specific circumstances in which they choose to contest ICC actions. As a means to achieving this interest in the survival of the political regime, there is a subordinate but mutually reinforcing interest in improving their sociological (or perceived) legitimacy internationally and regionally, particularly concerning their human rights reputations. This interest is motivated by the fact that a negative reputation around human rights has legitimacy costs while a positive human rights reputation correlates to legitimacy boosts and other benefits (Downs and Jones 2002, 107, 109–12; Hathaway 2007;

Lebovic and Voeten 2009; Woo and Murdie 2017), due to an essentially cyclical relationship between legitimacy and reputation within international relations, as will be established in sections 3.3 and 3.4.

As such, this chapter explores how the political regimes of self-referral states have co-opted the Court's investigations largely to increase their sociological legitimacy internationally, regionally, and domestically in ways they perceived as better ensuring the regime's survival. While the act of self-referral will be shown to have numerous positive effects on the sociological legitimacy of these regimes, a major aspect of these effects emerges from a *temporary* boost to their human rights reputations. The benefits of this boost include vindication against enemy factions (Burke-White 2005, 559, 564–67; Rodman and Booth 2013, 296; Bocchese 2017, 352–53, 370–71) and the receipt of multilateral aid (Lebovic and Voeten 2009). Both of these factors can be quite important in terms of regime survival, as delegitimizing rebel factions can directly correlate to the support they receive from external parties (Szentkirályi and Burch 2018).[2] Increased multilateral aid, on the other hand, if not lost to corruption (which then increases the financial capacity of the regime's elite),[3] may be used for developmental purposes which have a positive correlation to domestic, regional, and international legitimacy (Englebert 2000, 71–123).

To establish the necessary context around the act of self-referral, section 3.2 establishes the likely reasoning behind ratifying the Rome Statute for the political regimes of states with recent histories of significant human rights atrocities as the belief that ratification met other interests unrelated to the genuine pursuit of justice. Section 3.3 demonstrates how the political regimes of self-referral states co-opted the Court's investigations in their states to illustrate these regimes' interest in boosting their sociological legitimacy and the benefits accompanying this to better meet their interest in regime survival. The last section establishes the cyclical relationship

[2] While this article primarily explores the correlation between the size of rebel groups and the support they receive from states, its argumentative basis is that there is a correlation between the perceived legitimacy of rebel groups and their size which results in greater support from external actors (Szentkirályi and Burch 2018).

[3] Nicholas Charron found that multilateral aid is less susceptible to corruption than other forms of foreign aid (2011). Multilateral funding is also often earmarked for specific purposes (Bosch, Fabregas, and Fischer 2020).

between the legitimacy and reputation of these regimes as mutually reinforcing. This section also establishes the importance of reputation to the regimes of self-referral states in Africa.

3.2 Why did/do Human Rights Abusing Governments Join the ICC?

A variety of explanations have been offered for why states with recent histories of committing human rights atrocities would ratify the Rome Statute. Each of these fails to sufficiently account for the continued human rights abuses of many of these regimes and/or the potentially dire consequences likely emerging from the ICC indicting members of the state elite in these states. While it is impossible to ascribe a single reason to why the political regimes of these kinds of states ratify the Rome Statute, this work contends that the most likely explanation is that these regimes view Rome Statute ratification as meeting some other important interest, whatever that may be. This section illustrates why the three common theories for Rome Statute ratification hold some truth but are ultimately insufficient to explain why the perpetrators of significant human rights atrocities would choose to make their states a Party to the Rome Statute, paying particular attention to the actions of the political regimes of self-referral states.[4]

The first category of theories is that the ratification of the Rome Statute was viewed by many political regimes as almost purely symbolic in the sense that governments perpetrating significant human rights abuses against their populations could potentially increase their domestic and international sociological legitimacy by seemingly opening the doors for genuine accountability down the road while not believing this would happen (Simmons and Danner 2010, 227, 253; Gegout 2013, 811). In a widely cited article from Beth Simmons and Allison Danner, the authors reject this theory on the grounds that the ICC:

> is an institution with the power to put real people in prison for most of their lives[;] Symbolism alone does not explain this decision, especially when one of the world's major powers, the United States, offers a powerful alternative symbol to justify nonratification: state sovereignty over prosecution. The ICC is not the obvious place to engage in purely symbolic gestures; governments have plenty of opportunities to make

[4] The analysis in this section primarily examines a 2010 article from Beth Simmons and Allison Danner in which they survey and reject some of the popular theories around Rome Statute ratification by states with questionable human rights records while offering their own theory linking Rome Statute ratification to credible commitment theory. This article was used because it thoroughly surveys the existing literature on this topic and the authors' rejections of these theories contrast against the reality observable in the DRC and Uganda investigations.

> symbolic gestures in international law by ratifying the numerous treaties devoid of external enforcement provisions." (Simmons and Danner 2010, 253)

It must be pointed out that, while there is much merit to this rejection of the symbolic theory, especially concerning Rome Statute ratification alone, it fails to sufficiently account for the fact that the ICC's ability to target state actors is severely limited by many political considerations (as was examined in Chapter 2) which is exemplified rather well by the ICC's case selection strategy in self-referral states. This does not necessarily vindicate the symbolic theory in relation to self-referral states, however, as the political regimes of these states have co-opted the ICC in ways well beyond the kind of symbolic value this theory posits, as will be explored in section 3.3.

The second category of theories identifies how Rome Statute ratification illustrated a desire from the political regimes of states to hold others accountable in a way that would potentially benefit their regime (Simmons and Danner 2010, 241). This theory comes in three forms: first, to potentially hold rebel groups accountable; second, to potentially hold future governments accountable; and third, to hold neighbouring states accountable (ibid.). Simmons and Danner reject all these together with the argument that, because the ICC is mandated to investigate situations and not individuals, "states … cannot escape the risk that their agents will come under scrutiny and could be prosecuted" and thus could not have reasonably thought the ICC could be used this way (ibid., 253). While reality illustrates how Simmons and Danner are likely correct in their rejection of states hoping to hold future governments or neighbouring states accountable, the fact that self-referrals have successfully been used by political regimes to exclusively hold rebel actors accountable while never facing justice for their own alleged ICC-level crimes (Bocchese 2017, 343–45, 351–61, 365–73) suggests that this very well could have been a factor. As Marco Bocchese argues, the "National governments in both Abidjan[, Uganda] and Kinshasa, [DRC] … expected the ICC to investigate rebel groups only," with these expectations being "grounded in the government's capacity to manipulate ICC operations at both the local and international level" (Bocchese 2017, 363). While Bocchese is referring specifically to the act of self-referral, the political regimes he is referring to were the same at the time of self-referral as they were when their states ratified the Rome Statute and were already engaged in the situations they would later go on to refer to the Court. It is not unreasonable then to suggest that, in the context of ICL's previous interventions within Africa, these regimes were already considering how to co-opt the ICC to their benefit when ratifying the Rome Statute.

After rejecting these two theories, Simmons and Danner offer a third situated within credible commitment theory which has seen considerable recognition. This theory posits that ratification reflects a genuine desire from states to end impunity by self-binding themselves in a manner that limits their ability to commit ICC-level crimes for fear of being held accountable, thus furthering the possibility of peace (Simmons and Danner 2010, 240–54). While this very well may apply to the motivations of some states, it appears to be contradictory to the actions of self-referral states that continued to commit human rights atrocities after ratifying the Rome Statute. Considering the political regimes of the DRC, Uganda, and the state of Palestine, the three self-referral states which had the same political regimes in power when self-referring as they had when ratifying the Rome Statute, credible commitment theory does not appear to apply, as these regimes allegedly continued to commit human rights atrocities after both ratification and self-referral.

The actions of Kabila's and Museveni's regimes around the time of their ratifying the Rome Statute illustrate this well.[5] Mere months after ratifying the Rome Statute in April 2002, the DRC's government provided significant support and funding to the Congolese Rally for Democracy-Liberation Movement (RCD-ML), whose armed wing, the Congolese Popular Army (APC), and their allied armed groups of Lendu and Ngiti peoples committed several massacres in which ICC-level crimes were committed (Human Rights Watch 2003b, 9, 30–36). While these massacres were not committed by the DRC's army, the support from Kabila's regime likely increased the scale of these massacres. Similarly, months after ratifying the Rome Statute, the UPDF committed a series of ICC-level human rights atrocities ranging from the torturing of enemies and the recruitment of former LRA child soldiers into the UPDF (Human Rights Watch 2003a, 42–45, 56–60) to murdering civilians (Human Rights Watch 2002). This is to say, the actions of the political regimes of the DRC and Uganda make Simmons and Danner's credible commitment theory for Rome Statute ratification seem highly unlikely when it comes to these states. When considering self-referral states, it is instead likely that their political regimes,

[5] The Rome Statute was acceded to by the state of Palestine in January 2015 by the PNA, and the faction in charge of the Fatah political regime at the time allegedly conducted acts of torture in the years following their accession to the Rome Statute (Amnesty International 2019).

clearly having no real intention of halting their complicity in human rights atrocities, viewed ratifying the Rome Statute as meeting some interest not related to the genuine pursuit of justice.

3.3 The Primary Motivating Interest Behind the Act of Self-Referral

Even before the ICC's creation, it was commonly believed that "Africa … manifests a pattern of political elites manoeuvring to ensure that interventions by international institutions ultimately play to their advantage" (Clark and Waddell 2008, 9). If the last eighteen years of interactions between the ICC and self-referral states can serve as an indicator, this also applies to the Court; thus, the efficacy of the Court's self-referral investigations has usually been largely dependent on how much that investigation lines up with the interests of that state's political regime. As Kersten puts it, "when the interests of states point towards cooperation and engagement with the ICC, the Court's work will be supported; when state interests are in conflict with the Court, the ICC's mandate will be undercut" (2016b, 167). Based on the states which have self-referred and how they have interacted with the Court during its investigations, it would be difficult to argue that the political regimes of these states refer out of a genuine desire to end impunity as a means of protecting the human rights of *all their citizens*.[6] More specifically, it has been argued that "African leaders … [use] international law to back their political legitimacy, rather than as a source of human rights values" (Fyfe 2018, 997).[7] Interestingly, this legitimacy boost likely only occurs because this engagement with ICL supposedly shows a commitment to protecting human rights, to begin with.

Instead of a genuine interest in protecting human rights and ending impunity for ICC-level crimes, the regimes of self-referral states appear to value their survival as the state's leadership above all else (Bocchese 2017, 354–55). This should not necessarily come as a surprise because all of these states are either full autocracies or struggling and unstable

[6] This is an important distinction because, while these regimes are often perpetuating human rights atrocities against parts of their citizenry, they are likely aware that the regime's survival depends on the support of some groups who they will then want to protect the human rights of as much as possible.

[7] It must be stated for transparencies sake that Shannon Fyfe's argument focuses on how international law has been used to perpetuate global imperialism, and this sentence goes on to say "… and this dependence on international support gave rise to neocolonialism" (2018, 997).

democracies (Clapham 1996, 3–6).[8] It is not that these regimes give zero concern for the well-being of any of their citizens but that they are typically willing to violate the human rights of many of their state's citizens to retain their hold on power (Moore and Welch 2015, 1–10). As a means to this interest in survival, these regimes have a more immediate interest in co-opting the ICC's investigations to legitimize their authority while simultaneously delegitimizing rebel factions. This is supported by the fact that, "at the moment they invited ICC scrutiny, all of the national governments who referred their domestic situations to the Court were facing either a conflict or post-conflict scenario wherein major threats to government survival were internal" (Bocchese 2017, 354). Nonetheless, as Bocchese put it while reviewing past works on the topic:

> Many situation or case-driven studies share a common feature: national governments successfully manipulated the ICC—the OTP in particular—and used it instrumentally in the pursuit of domestic political ends. Contrary to the claims of ratification scholars, however, their situation-driven peers find that ICC intervention has actually enhanced the position of the governments who invited its judicial scrutiny. (2017, 351)

This positive effect on the survival of the political regimes self-referring situations to the Court contrasts significantly with what was originally thought about ICC investigations. In a paper seminal to this section's argument, Bocchese identifies how it was initially believed that any ICC investigation would have sovereignty costs for the state where the investigation was taking place, but self-referrals appear to instead be sovereignty-enhancing for these political regimes (2017, 340).[9]

[8] Christopher Clapham is not arguing that the five self-referral states are autocracies, specifically, but that regimes with autocratic tendencies are more likely to put their interest in their survival above all else. At the time the Court accepted CAR's first self-referral in 2007, the state was considered "partly free" by Freedom House (Puddington et al. 2007, 163–66) but was downgraded to "not free" shortly before its second referral was accepted in 2014 (Puddington et al. 2014, 148–51). Mali was considered "not free" by Freedom House in 2013 when its self-referral was accepted by the Court (Puddington et al. 2013, 444–47). The State of Palestine is not considered by Freedom House, but the *Economist Intelligence Unit*'s "Democracy Index" for 2021, the year the ICC opened the investigation, lists the state of Palestine as "authoritarian" (15).

[9] A similar phenomenon can be observed in the *proprio motu* investigation in Côte d'Ivoire (Bocchese 2017, 373–82), which is outside the scope of this work, but a brief mention is beneficial here to identify how political regimes can co-opt the ICC's investigations outside of the confines of self-referral investigations.

At this point, an apparent contradiction may be obvious which must be addressed. If the ICC faces legitimacy costs because of its relationship with alleged human rights abusers in the political regimes of self-referral states, how is it that these political regimes simultaneously receive legitimacy boosts from this relationship with the ICC? The answer to this is twofold. First, the legitimacy boost received by these regimes appears to occur during the first few years of a self-referral investigation and tapers off as the regime shows itself as not genuinely committed to the precepts of the Rome Statute. This is partially displayed in how these regimes tend to cease or significantly limit cooperation with the Court after these first few years, as will be discussed later in this section. Second, the legitimacy boost enjoyed by self-referral regimes appears most significant with other states and intergovernmental organizations while the legitimacy costs experienced by the ICC appear most significant with scholars, the victims of ICC-level crimes, and non-governmental organizations like humanitarian groups. This can be observed first in the belief that the act of self-referral often "[invites] not only ICC scrutiny, but also military and economic assistance, peace-keeping operations under the aegis of international or regional organizations, and political patronage by major powers" (ibid., 360), and second, in how almost all of the criticism around the Court's case selection strategy in self-referral states comes from scholars, victims, and non-governmental organizations. With this said, the more obviously and consistently the political regimes of self-referral states show a willingness to continue perpetuating human rights atrocities, the quicker and more significantly the legitimacy boost seems to deteriorate, but this is not necessarily detrimental to these regimes by this point. These regimes need the legitimacy boost the most in the nascent years of the investigation due to the presence of significant internal threats to their regime's survival when self-referring (ibid., 354). After this danger has been handled, the legitimacy boost, while still beneficial, is likely viewed as less related to regime survival.

Regarding self-referral investigations being sovereignty-enhancing, it is important to consider the circumstances during which political regimes go into the act of self-referral. The Kabila regime's situation in the DRC when it self-referred in April 2004 was quite dire. For most of the roughly seven years that Kabila's regime had been in power,[10] the country had been

[10] This regime was first led by Joseph Kabila's father, Laurent, who came into power following the end of the First Congo War in 1997 and who was assassinated in the DRC's capital of Kinshasa in 2001, after which Joseph took his place (Stearns 2011, 267–85, 307–25).

consumed by the horrific Second Congo War (Stearns 2011, 181–325) in which approximately 3.9 million people perished (Coghlan et al. 2007, 1). Additionally, a power-sharing agreement (consisting of the Sun City Agreement and the Pretoria Accord) was signed in December 2002, resulting in Kabila's regime sharing power with seven different parties, many of which the regime had been fighting since 1998, until an election could be held in 2006 (Bocchese 2017, 365–66). This power-sharing agreement was, in itself, only the result of intense international pressure on Kabila to end the conflict (Lipscomb 2006, 210–11). Specifically, the power-sharing agreement had considerable negative effects on Kabila's regime because:

> Politically, President Kabila's government was coerced into ushering former enemies into key governmental positions. Economically, access to state power provided former insurgent leaders lucrative sinecures and the constant opportunity to exploit public resources. Militarily, power-sharing accords required the government of Kinshasa to integrate insurgent armed groups into the brand-new national army. (Bocchese 2017, 366)

In the face of this significant threat to the position and power of his regime, Kabila's options were limited. As Bocchese argues, "national governments resort to the ICC as one of the few options available to forestall power-sharing agreements and the legitimization of rebel leaders as trustworthy partners in peace" (2017, 346). This explanation seems particularly relevant for the DRC, where Kabila was facing the very real chance that his regime would be voted out of power in the upcoming election; thus, "the existence of the ICC … offered a politically expedient solution for the Congolese president to deal with potential electoral rivals" (Burke-White 2005, 559). It has been credibly speculated that part of Kabila's motivation to bring in the ICC was "to criminalize his two main rivals in the 2006 presidential elections, former insurgent leaders, and then vice-presidents of the DRC—Azarias Ruberwa and Jean-Pierre Bemba Gombo" (Bocchese 2017, 370–71). This is not to say that Kabila's regime would have accepted the results of that election if it had turned out against it, but it likely would have done significant damage to the regime's sociological legitimacy and almost certainly would have resulted in the end of the limited peace present at the time. Relatedly, the self-referral "served the dual purpose of enhancing governmental control over remote regions fallen under rebel rule and co-opting international actors in the strengthening of the government's position vis-`a-vis rival factions and hostile armed groups" (ibid., 371).

Similarly, Museveni's regime in Uganda had been dealing with the LRA insurgency in the country's northern region on and off since 1987 which, by 2004 when Uganda self-referred, had resulted in the abduction of more than 20,000 children (Child Soldiers International 2004), the displacement of approximately 1.2 million people (Amnesty International 2011),[11] and the deaths of tens of thousands of people (Médecins Sans Frontières 2004, 3). With eighteen years of brutality in the mirror, international and regional attention on the conflict was rapidly increasing, inevitably putting pressure on Museveni to do something that would decisively end the conflict, with much of this pressure pointing towards the ICC and the domestic implementation of the Rome Statute's provisions (De Vos 2015, 388–89).[12] While a power-sharing agreement with the LRA was not on the table, Museveni likely wanted to undermine any kind of peace agreement with the LRA (Bocchese 2017, 352) which would have likely involved amnesty for its leaders, as this could have potentially had a similar (but less powerful) legitimizing effect for that leadership. Bringing together the work of Adam Branch (2007), Matthew Brubacher (2010), Hans Peter Schmitz (2013), and Valerie Freeland (2015), Bocchese identifies that the ICC's investigation in Uganda was invited "as a means for enhancing the international legitimacy of Museveni's regime, criminalizing the LRA, undermining peace talks, marginalizing those actors calling for a political solution to the conflict, or catering to the neopatrimonial dynamics of Ugandan domestic politics" (2017, 352). Relatedly, Kambale, in conjunction with a similar argument about Kabila's regime, argues:

[11] This number was disputed by some at the time, with some organizations like the Médecins Sans Frontières placing the number of displaced individuals at 1.6 million (2004, 3).

[12] The Parliamentarians for Global Action define implementation as "the adoption of domestic legislation by a State to comply with the" anti-impunity mandate of the Court, generally encompassing at least some of the following points: the crafting of definitions of international crimes in line with the Rome Statute and "the general principles of customary international law applicable to these crimes;" the creation of legislation making crimes against the administration of justice punishable; ensuring "The applicability of universal jurisdiction in line with international law[;] … [creating] Detailed procedures for cooperation with the ICC[;] … [ensuring] Protection of due process and defense rights[;] … [providing] guarantees of victim and witness protection[;] … [providing] Access to reparations for victims[;] … [the articulation of] Penalties … possibly in line with those applied by the ICC[;] … [the] Allocation of adequate budgetary and human resources to police/law enforcement and judicial authorities to carry out effective and independent investigations, prosecutions, trials and reparations proceedings … [and] the enforcement of sentences[; and the] Reinforcement of the principles of separation of powers and the independence of judges and prosecutors" (n.d.).

> that President Museveni used the referral to … confer a moral ground status to the Ugandan government, to attract international support 'for a legitimate government, committed to international justice, fighting a hostis humani' and to 'make the ICC's Prosecutor dependent on the cooperation of the Ugandan government' so that 'he might hesitate to jeopardize such cooperation by charging his cooperative friends with crimes committed in neighbouring DRC'. (2015, 192–96)

However, when the ICC's investigations were perceived by the political regimes in the DRC and Uganda as no longer meeting their interests in accruing legitimacy as a means to staying in power later in the investigations, they began contesting the ICC's work (Rodman and Booth 2013, 294, 297–98; P. Clark 2018, 80). Clark refers to this as the "highly conditional nature of state cooperation" (2018, 80). Kabila's regime was wholly willing to fully cooperate with the Court in apprehending many indicted individuals but refused to apprehend Ntaganda in 2009 until his defection from the FARDC in 2012 because he had been deemed "vital to the national military integration programme" (ibid.). In Uganda, the contestation from Museveni's regime got quite extreme, with Museveni calling for African states in the AU to leave the ICC altogether (ibid.; Kerr 2020, 203–4). Despite this intense contestation in some areas, however, Museveni's regime remained relatively consistent in cooperating with the ICC when it involved targeting the LRA (P. Clark 2018, 80). What is especially telling about this contestation concerning the interests of the Kabila and Museveni regimes is that they were accompanied by attempts to potentially shield any legitimacy gains remaining from the ICC's investigations.[13] This contestation was strategic in how it was articulated in such a way that it could be defended/ justified from positions fitting within traditional ICL debates/norms, in Kabila's case, or popular regional sentiment, in Museveni's case.

In defence of his refusal to hand over Ntaganda to the Court in April 2009, Kabila said:

> There is no other country in Africa that has cooperated with the ICC like Congo. Out of the four people at the ICC, four are Congolese. That shows you how cooperative we've been. But you also have to be pragmatic. And realistic. Justice that will bring out war, turmoil, violence, suffering and all that, I believe we should say: let's wait, let's do away with this for the time being. For me, the priority right now is peace. … Bosco has been so cooperative in bringing about the necessary change that has brought about peace that we

[13] This distinction of the 'remaining' legitimacy boost gained from an ICC investigation targeting their enemies is important because, as established earlier, this legitimacy boost likely diminishes in relation to any human rights atrocities a regime is accused of after its referral is accepted by the Court.

> need to give him the benefits … of the doubt. That's what we're doing. We're watching. We're monitoring him. We haven't forgotten that he's wanted by the justice system. But at the same time, we're telling the justice system that you're not going to be in place in the Congo if and when war breaks out. (Kabila 2009)[14]

Clark astutely summarizes Kabila's statement as him arguing that Ntaganda's integration into the Congolese army made him an "agent of peace" (2018, 78). While Bocchese does not fully consider instances of contestation, he asserts that "governments that asked for ICC involvement master ICL norms and rules to such an extent that they successfully made a strategic use thereof" (2017, 383), and this appears to also be the case for instances of contestation. Kabila's above response (from an interview with Jeffery Gettleman) reveals just how aware he was of the nuances of ICL and the debates around it. He may not have used the exact terminology, but there is little doubt that Kabila was playing off the peace over justice argument to defend Ntaganda's integration into the FARDC. Kabila first leaned on this argument by asserting that "we should say: let's wait, let's do away with this for the time being" when considering "[justice] that will bring out war, turmoil, violence, suffering and all that" (Kabila 2009), suggesting that any justice involving Ntaganda would have likely resulted in more violence and should thus be ignored. Instead, Kabila argued that he chose to prioritize peace (ibid.), presenting the decidedly false assumption that peace and justice are mutually exclusive and are unable to work alongside each other (Ellis 2006; Krzan 2016). Kabila also doubled down on this idea by claiming that the domestic justice system in the DRC would cease to exist if war were to have broken out again (2009).

By tapping into a well-known argument often used to stymie ICC actions in states with formal investigations (Apuuli 2011; Vilmer 2016; Mills and Bloomfield 2018),[15] Kabila was

[14] The question Jeffery Gettleman asked Kabila to instigate this answer was, "What about justice? There have been a lot of complaints about Jean Marie Bosco [Ntaganda] … Do you want to turn Bosco over to the International Criminal Court?" (Kabila 2009).

[15] Kasaija Apuuli's paper looks at the 2005 efforts of the Acholi Religious Leader's Initiative at lobbying the Court against its investigation in Uganda based on the argument that the ICC would hinder peace efforts (2011). Jean Batisse Vilmer reviews how the peace over justice argument was used to contest the actions of the International Criminal Tribunal for the former Yugoslavia (ICTY) in Eastern Europe and the actions of the ICC in Uganda, Darfur, and Libya (2016, 1334–35). Kurt Mills and Alan Bloomfield argue that regional norms are used in conjunction with/to justify "the idea of 'African solutions for African problems … which [privilege] peace over justice" in contesting ICC actions (2018, 106).

arguably attempting to mitigate the legitimacy cost that a refusal to hand over Ntaganda could have. This backfired for Kabila, however, as Ntaganda defected from the FARDC in 2012, forcing Kabila to "finally [order] Ntaganda's arrest … [while] shunning the ICC … [by insisting] that the warlord be tried in the DRC" (Tiemessen 2014, 452). Even Kabila's insistence that Ntaganda be tried in the DRC can be interpreted as an attempt to play within ICL norms, as he was invoking the principle of complementarity which prevents the ICC from trying individuals whom domestic courts are willing and able to try. Beyond leaning on ICL norms, this argument has a basis within the Rome Statute through Articles 17, which establishes the principle of complementarity, and 19, which sets the guidelines for challenging a case (International Criminal Court 2002, 10–12; Malo 2009, 61–63).[16] Kabila never formally challenged the admissibility of Ntaganda's case, but it likely would have been denied based on the DRC's judicial system being unable to prosecute the case genuinely and impartially. This inability is reflected in a report from the International Center for Transitional Justice describing the inadequacy of the DRC's attempted implementation of Rome Statute provisions into domestic law and how only 39 cases involving international crimes had gone through the DRC's courts between January 2009 and December 2015 (Candeias et al. 2015, 1–3). Nonetheless, it was this sentiment of complementarity that Kabila invoked when stating that Ntaganda should be tried in the DRC.

In the case of Museveni's regime, their attempts at contesting the ICC's authority did not lean on ICL norms but instead embodied the idea of group sentiment. As discussed in Chapter 2, Museveni's regime was one of the most vehement voices calling for a mass exodus of African states from the ICC in 2013 following the indictments of Kenyatta and Ruto in 2011 and al-Bashir in 2009. By being one voice of many contesting the actions of the ICC, Museveni's legitimacy was better safeguarded by the united sentiment that the ICC tended to overstep its authority through the lens of a cultural/historical perspective (i.e., colonialism/imperialism and neocolonialism).[17] Notably, Uganda withdrawing from the ICC would not have ended the

[16] While Sebastien Malo's article is specifically referencing the cases of LRA warlords and the applicability of restorative justice mechanisms, the thorough outline of Articles 17 and 19 regarding the withdrawal of a case based on the principle of complementarity is general enough that it equally applies to this discussion.

[17] It is important to acknowledge here that there is no such thing as a monolithic 'African culture,' with there being great differences between the cultures of different states on one level and different ethnic groups on another, but all these states have the shared history of colonialism

ongoing investigation in the state or discharged Museveni's regime from cooperation with the Court under Article 127(2) of the Rome Statute (International Criminal Court 2002, 56),[18] but it would have likely given the regime a more credible ground to contest the ICC from in the eyes of the AU and its members. At the same time, however, this would have likely increased the chances of Ugandan state elite being indicted. Seeing as Museveni had so expertly used the ICC's investigation to its advantage up until this point (Kambale 2015, 193; Schabas 2008a, 18–22) and continued to cooperate with the Court in investigating and apprehending members of the LRA (P. Clark 2018, 80), it is likely that this was just one possibility being weighed to mitigate any sociological legitimacy damage that future instances of contestation could have.

In retrospect, it is undeniable that the regimes of both Kabila and Museveni were able to strategically play within the norms of ICL while co-opting the Court's investigations in their states to strengthen their holds on power and their sociological legitimacy with important stakeholders (Nouwen and Werner 2010, 946–54, 961–55; Bocchese 2017, 351–61, 365–73). Facing difficult situations in terms of their grasp on power and international/regional sociological legitimacy, the political regimes of these states turned to the ICC as a way of mitigating these situations and solidifying their holds on power (Schabas 2009; Kambale 2015). Even when these regimes contested the Court's actions, they appeared to do so in ways that potentially protected the diminishing benefits they had initially received from the ICC's intervention.

As can be observed from the considerable literature on the topic (as cited throughout this piece), many are now aware of how these self-referral states co-opt the Court's investigations while continuing to perpetuate ICC-level atrocities, so this arguably diminishes the sociological legitimacy boost acquired when a situation is first self-referred. Regardless, these investigations display the interest of the political regimes of these self-referral states in further bolstering their

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and have all experienced the general effects of this on their traditional cultures, whatever those may have been independent of each other.

[18] Article 127(2) states, "A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective" (International Criminal Court 2002, 56).

sociological legitimacy as a means of fulfilling other interests. This apparent interest then opens avenues for the ICC to mitigate the legitimacy costs that the reality of self-referral investigations creates by potentially leveraging this interest. How this could be approached is established in the next chapter, while the remainder of this chapter explores the cyclical relationship between sociological legitimacy and reputation. This exploration is necessary because the approach proposed in the next chapter aims to leverage reputation rather than legitimacy. After all, while the two are inherently linked, leveraging reputation is likely less overtly antagonistic than leveraging the legitimacy of the leaders of *sovereign* states yet still has direct and potentially significant effects on that legitimacy.

3.4 The Legitimacy-Reputation Relationship and Why Human Rights Reputations Matter

Legitimacy, as established in Chapter 2, is being used to constitute the "justified authority" of an actor, organization, regime, etc. (deGuzman 2008, 1436). Sociological (or perceived) legitimacy, then, constitutes what others believe to be morally and legally legitimate, considering "the perceptions of relevant audiences that such regime or decision is justified" (ibid., 1441). Using this definition, the previous section established how the interactions of the political regimes of self-referral states with the ICC and ICL display their interest in temporarily increasing their sociological legitimacy internationally and regionally. Much of this increase in sociological legitimacy emerges from the perception that these regimes are displaying a supposed *commitment* to protecting the human rights of their citizens (and related treaties and conventions) by supposedly decreasing impunity for ICC-level crimes in their state. This perceived commitment is where the cyclical relationship between legitimacy and reputation is most clear concerning the Court and self-referral states.

Despite considerable use within the discipline of international relations since the mid-1980s (Downs and Jones 2002, 95), the idea of reputation remains largely undefined within much of the relevant literature. With this said, a common thread can be traced throughout this literature that reputation in international relations is typically considered through the lens of an individual's or regime's level of compliance with previously made commitments (Keohane 1999, 376–79; Simmons 2000, 820–29; Downs and Jones 2002, 96, 98–100, 109–11; Lebovic and Voeten 2009, 80–82, 85–86, 89–90; Crescenzi 2018, 5–6, 19–21, 67–83, 120–53, 158–59, 163–64). Mark Crescenzi sums this up by stating, "reputation serves as a measure of commitment,

and provides an incomplete but informative signal of the willingness to abide by an agreement or contract" (2018, 67). Based on this conceptualization, reputation is used in this work to constitute the degree to which a regime is *believed* to honour its commitments. Therefore, having a positive human rights reputation would mean that the relevant regime is perceived by the international and regional community as honouring commitments to human rights treaties and conventions.

Reputation's cyclical relationship with sociological legitimacy is then constituted by the fact that commitments can only be made/honoured by a political regime or actor if the authority of that regime or actor is viewed by the relevant community as justified (i.e., legitimate) which, in the political sphere, is largely determined by the degree to which that regime or actor is viewed as sovereign (Unsworth et al. 2010, 8, 24, 28–29). Essentially, reputation relates to sociological legitimacy in how an actor's sociological legitimacy establishes their ability to fulfill a commitment in the eyes of actors considering making commitments with them. This cyclical relationship is especially significant concerning human rights considerations because sovereignty has increasingly become intertwined with a state's responsibility to protect the human rights of its citizens (Lafont 2016; Witkin 2017, 71–76) and sovereignty is a fundamental source of political legitimacy (Unsworth et al. 2010, 8, 24, 28–29).

This idea is exemplified by the findings of James Lebovic and Erik Voeten who identify a direct correlation between a regime's *perceived* level of compliance with human rights commitments and the amount of multilateral aid it receives (2009, 81–95). By itself, this does not necessarily support the idea of a cyclical relationship between reputation and sociological legitimacy, but it does when we consider how "Democratization promotion has increasingly become a developmental goal for most Western aid bureaucracies" (Bader and Faust 2014, 587), and *perceived* democratization and political liberalization in autocracies can have a legitimizing effect for these regimes in an international system primarily dominated by Western liberal democracies (ibid., 578-80; Solinger 2001, 31–35).[19] The *belief* that a regime is *supposedly* fulfilling its commitments, especially around human rights (thus facilitating a more positive

[19] It is important to acknowledge Dorothy Solinger's research which found that democratization efforts "instituted to enhance the ruling party's legitimacy eventually paved the way for its loss of power many decades later" (2001, 32).

reputation for that regime that it is supposedly not abusive and honours human rights treaties/conventions), creates an avenue to further legitimize it on the international stage.

While a positive human rights reputation is likely not the most important reputational concern of political regimes in African states and beyond, it remains important in relation to the benefits it can facilitate. As George Downs and Michael Jones observe, all but the newest of states actively maintain numerous international reputations "that operate to limit the reputational consequences of a given incident" (2002, 95–97).[20] While Downs and Jones found that a regime's human rights reputation ranked lower on the list of reputations in terms of importance (ibid., 102–12), they also used the specific example of human rights to find that non-compliance in one area can lead to retaliation in another in the sense that:

> states [will] simply [try] to coerce the guilty state into changing its behaviour in the same way that they might try to coerce a state into altering its behaviour in an area where there was no treaty (for example, sanction against South Africa during the waning years of apartheid). (2002, 107)

Thus, Downs and Jones' findings agree with those of Lebovic and Voeten in the sense that one's human rights reputation will often affect areas deemed as more important to a state's political regime. Notably, in reference to developing states, Downs and Jones argue, "Not only does it appear that a defection against such states tends to have the fewest reputational consequences for the violator, but the reputational penalties that they pay for their own defections will tend to be quite large" (2002, 14). In a similar vein, Robert Keohane found that, while:

> [While the] lack of institutionalization of reputational concerns makes reputation a relatively unreliable source of constraint[,] … reputational accountability has some significance because reputations of states matter for other activities. To be effective, states have to be included in the relevant networks. (Keohane 2005, 52)

Section 3.3 considered the actions of political regimes as they relate to sociological legitimacy, but I will now consider some of these same actions as they relate to reputation specifically to further exemplify the cyclical relationship between sociological legitimacy and reputation. Beginning with the DRC, when Kabila's regime contested the apprehension of Ntaganda from 2009 to 2012, it did so on the grounds that the priority was peace and that prioritizing justice would "bring out war, turmoil, violence, suffering and all that" (Kabila 2009).

[20] The term "incident" in this context refers to incidents of a failure to comply with previously established formal commitments.

Implicit in this response was a supposed desire to protect the human rights of DRC citizens, as Kabila's regime was attempting to claim a genuine desire to protect the human rights of his people and thus comply with the most basic tenets of ICL and related treaties/conventions. Regardless of whether this was genuine, it indicates a clear attempt to display an image of a regime that valued human rights and respected related treaties and conventions. It is irrelevant whether this attempt was successful,[21] as the significance here is that the regime attempted this to begin with. In fact, it would be easy to view Kabila's entire interview with Gettleman, which was not primarily about Ntaganda, as an attempt to project his regime as one that valued and protected human rights. This is especially exemplified by Kabila's final response to Gettleman:

> The Congo deserves more. The Congolese people deserve more, more than just fighting, than just war, than just violation of human rights. I believe this is the time for us to make that particular change and we're going to do it. … We are a huge nation but a very gentle giant, determined to live in peace with all its neighbors. (2009)

Looking to Uganda, the actions of Museveni's regime have been credibly linked to consideration of its international human rights reputation. As Courtney Hillebrecht and Scott Straus argue, "The state … reaped international reputational benefits for endorsing [and committing to] a then-fledgling international human rights body" (2017, 177). This is supported by Sarah Nouwen and Wouter Werner, who found that Museveni's regime:

> decided to refer … to the ICC as part of … [an] international reputation campaign, rather than out of a conviction about law and justice [because] … The failing military operations and corruption scandals, the rapidly deteriorating humanitarian situation, and the classification of northern Uganda by the UN Under-Secretary General for Humanitarian Affairs as the "most forgotten and neglected crisis in the world" were beginning to tarnish the government's reputation [around human rights, especially in the context of its previous commitments]. (2010, 948–49)

Specifically looking at the surrender of Dominic Ongwen to the Court, Kersten identifies the motivation for this as the belief that "Museveni [could] reap the potential reputational benefits of

[21] It would be difficult to argue that this attempt was successful; refer to a May 2009 article from the HRW calling on the UNSC to demand that Kabila's regime hold soldiers responsible for war crimes which the organization had identified in the context of the "role played by known human rights abusers in … military operations supported by UN peacekeepers, including Bosco Ntaganda" (Human Rights Watch 2009b). For a more 'accessible-by-the-general-public' criticism of the Kabila regime's treatment of Ntaganda, refer to a 2010 article from the Guardian entitled "Congo Conflict: 'The Terminator' Lives in Luxury While Peacekeepers Look on" (Smith).

supporting accountability for the LRA[, thus fulfilling its commitment to the ICC,] whilst avoiding the potential political costs of defying the views of the people of northern Uganda" (2016b, 178). While there were likely many factors involved in motivating the actions of Museveni's regime, reputational concerns were clearly a significant aspect.

3.5 Conclusion

In retrospect, it would be difficult to analyze the way self-referral investigations have gone and not conclude that the regimes of these self-referral states benefited from them. This is not problematic in and of itself, as genuine justice is a benefit to all, but it becomes questionable when considering how these regimes are largely autocracies or borderline autocracies which have been credibly accused of being complicit in ICC-level atrocities within the jurisdiction of the ICC's investigations. The benefits these regimes obtain from these investigations may not be permanent, but they still serve to boost their international and domestic sociological legitimacy considerably, which then temporarily boosts the regime's reputation with these audiences as well. This is important because the level to which political regimes are viewed as legitimate on the international stage and domestically is likely to affect their ability to operate politically, especially when considering the economically developing states of the Global South.

In terms of domestic audiences, autocratic regimes still tend to worry about their legitimacy with this audience, especially specific subsets of it (Burnell 2006, 547–50), as a total lack of legitimacy here increases the chances of rebel factions emerging while its presence likely increases citizen loyalty to a certain degree (Gerschewski 2018, 655–58). For international audiences, a regime's legitimacy is arguably even more important, since, "To be effective, states have to be included in the relevant networks," and regimes lacking legitimacy in a manner related to a negative human rights reputation are less likely to be included in these networks (Keohane 2005, 51–52). Beyond this, there is the link to aid from these networks which is also affected by a regime's sociological legitimacy and reputation concerning human rights.

When considering how the ICC can potentially leverage the interests of the political elite of self-referral states, any approach must be careful to not antagonize this elite. To target a regime's legitimacy is inevitably going to be challenged as an attack on state sovereignty, and the previous chapter has already illustrated the potential damage to the ICC's sociological legitimacy this can cause with the crucial stakeholders of member states and regional intergovernmental

organizations. While reputation is inherently linked to sociological legitimacy, its targeting is likely to be less antagonistic than targeting sociological legitimacy directly because legitimacy is a more extensive concept which includes many strong links to state sovereignty in contrast to reputation which does not possess such strong links. As this chapter explored, the political regimes of self-referral states have had no issue using the ICC (and what it symbolizes) to temporarily boost their legitimacy and human rights reputations. This has inevitably had negative effects on the ICC's legitimacy, but this does not mean that the interest behind this co-opting cannot be co-opted itself. Instead of damaging the ICC's legitimacy due to its link to the institution not meeting its anti-impunity mandate, what if this interest can be utilized as an indirect path to this very same mandate?

Chapter 4
Leveraging Reputation to Push Engagement with Strategies of Positive Complementarity

4.1 Introduction

If the ICC wishes to eliminate or curb the legitimacy cost of its case selection strategy in self-referral investigations, it must change how it approaches these investigations. Some scholars have gone as far as to posit that the OTP should stop accepting self-referrals altogether because of the already discussed legitimacy issues created by the need for them to be "sovereignty-friendly" and their being relatively easy to co-opt by political regimes (Bocchese 2017, 385–87; Müller and Stegmiller 2010, 1269, 1293). While this is a valid suggestion deserving consideration, it would not halt the legitimacy damage caused by the self-referral investigations currently open. Even if Karim Khan, who became chief prosecutor in July 2021, stopped taking on investigations via self-referral,[1] Bensouda's decision to open an investigation into the situation in the state of Palestine in March 2021 (International Criminal Court n.d.m) means that the Court will likely be embroiled in self-referral investigations for many years to come.

The most obvious suggestion here may be to start indicting political elite in these states when justified, but this would, as established in Chapter 2, likely have dire consequences for the Court's ability to conduct investigations and apprehend indicted actors in these states and elsewhere (Kersten 2016, 170–71; Danner 2003, 526–28). A potentially better approach, this chapter posits, would be for the ICC to attempt to more effectively incentivize political elite into

[1] Khan opening a formal investigation in Ukraine in March 2022 can be interpreted as a willingness to accept self-referrals. While the situation in Ukraine was referred by 43 member states, Ukraine is not a member state and instead accepted the Court's jurisdiction over alleged crimes under the Rome Statute occurring in its territory, pursuant to article 12(3) of the Statute in 2014 and 2015, thus inviting the ICC to potentially investigate a specific situation in their territory (International Criminal Court n.d.p).

improving their state's domestic judicial system so that it might eventually, over multiple decades of engagement, get to the point where it can genuinely prosecute ICC-level crimes which have already occurred itself.[2] While it is unlikely that this approach will eliminate all criticism around the apparent impunity enjoyed by state elite in self-referral states, it would allow the Court to potentially fend off this criticism more credibly because this approach aims to decrease impunity within the next few decades (i.e., the long-term), thus better honouring the Court's anti-impunity mandate. The notion of the ICC helping member states improve their domestic judicial systems is not a new one, with a concept called positive complementarity being embraced early in the institution's existence both in the scholarly literature (Akhavan 2005, 413)[3] and internal ICC documents (Office of the Prosecutor 2006a, 22–23) which posits the idea of "states assisting one another, and receiving additional support from the Court itself, as well as from civil society, to meet Rome Statute obligations" (Gegout 2013, 813). Positive complementary has been utilized most successfully by the OTP in preliminary examinations up until now, with the most notable examples being in Colombia and Guinea (Human Rights Watch 2018, 1–10, 26–58, 85–115; Rogier 2018). Its effects during the Court's formal investigations, however, have been much more limited (Mattioli and Woudenberg 2008, 57–59; Soares 2013, 322–26; Tillier 2013, 514–26).[4] This limited effect is exemplified well by the fact that the DRC only saw 39 domestic trials for international crimes from January 2009 to December 2015 (Candeias et al. 2015, 3).

The cause of positive complementarities relative success during preliminary examinations is typically credited to the fact that the political regimes of these states are

[2] If the Court can prosecute state elite involved in ICC-level crimes which have already occurred, it will likely be able to prosecute the perpetrators of ICC-level crimes which may occur in the future but only if it remains intact during the situation which results in these crimes, which is far from guaranteed.

[3] Akhavan does not use the phrase 'positive complementarity,' but the approach to complementarity he discusses would later become known as positive complementarity (2005, 413).

[4] Geof Dancy and Florence Montal identify what they call "unintended positive complementarity" in states with formal investigations in terms of an increase in domestic prosecutions and guilty verdicts for ICC-level crimes (Dancy and Montal 2017), but even a quick reference at the amount of credible allegations for ICC-level crimes against state actors across many of these states from institutions like the HRW and Amnesty International (refer to the various reports cited throughout Chapters 2 and 3), this increase is not significant.

incentivized to improve their domestic judicial systems by the fear of the ICC potentially opening a formal investigation (De Vos 2018, 283–87; Human Rights Watch 2018, 1–3, 11; Bocchese 2020, 163, 171).[5] As there is no such threat in self-referral states because a formal investigation has already been opened, the political elite in these states are not incentivized to engage strategies of positive complementarity to improve their states' judicial systems. Working off this premise, this chapter argues that the Court may be able to leverage the reputations of the political elite in self-referral states to create the incentive structure necessary to motivate this elite into this kind of engagement.

The first section of this chapter explores how the Court could potentially approach this leveraging in terms of the incentives that would be required. Since the aim of this leveraging may appear antithetical to the survival interest of the elite being targeted, I will establish why this elite may be susceptible to what is being proposed. Additionally, as this approach involves *temporarily* boosting the human rights reputations of individuals who have allegedly been complicit in human rights atrocities, it will be justified in this context. In the second section, positive complementarity will be explored as an effective route to improving domestic judicial systems, both in terms of its general qualities and, using the example of Colombia, in practice. After establishing positive complementarity's potential, I will identify three strategies of positive complementarity already utilized by the Court to varying degrees that could potentially work well with my leveraging approach. These three strategies are: encouraging and stimulating domestic proceedings for ICC-level crimes, encouraging the implementation of Rome Statute provisions into domestic law, and sending ICC missions into self-referral states with the express purpose of identifying weaknesses in the judicial systems of these states.

4.2 How the ICC can Leverage the Reputations of the Political Elite in Self-Referral States

4.2.1 The Leveraging Approach to Incentivizing Improvements to Domestic Judicial Systems in Self-Referral States

When the political regimes and elite of self-referral states contest ICC activities, this is

[5] Interestingly, Bocchese argues that Colombia's level of cooperation with the Court in relation to the OTP's strategies of complementarity were, in large part, dictated by the level to which the political regime at the time viewed the threat of a formal ICC investigation as credible (2020, 158, 162–66, 171–80).

typically publicized considerably, whether that be through human rights organizations like the HRW (2009; Roth 2014) and Amnesty International (2009) or news agencies like The Globe and Mail (York 2009; MacKinnon 2015) and Al Jazeera (2009; 2014);[6] however, this is much less the case when these regimes act in line with the ICC's anti-impunity mandate. This is where the Court could potentially leverage the reputations of these regimes and elite. For this to even potentially be effective, the Court, and particularly the OTP, will have to make clear to each regime that it is willing to publicize their actions if they take steps to improve their state's judicial system and related actions like facilitating credible domestic proceedings. Importantly, the Court already does this to a limited extent, but the approach articulated here would involve emphasizing these actions to a point where they may potentially be used to incentivize improvements to domestic judicial systems.

This will likely appear problematic on the surface to the Court's key stakeholder group of victims of ICC-level crimes and ICL proponents, but the worries of this group could potentially be assuaged with the claim that a truly impartial and empowered judiciary will potentially be able to achieve much wider accountability for crimes already committed and those that may be committed in the future than the ICC's prosecutions would ever be able to, especially in the context of the Court's limited resources.[7] Through the idea of positive complementarity, this is already something that the Court has tried to do but has always lacked the incentive structure required in formal investigations to achieve the level of improvements needed for it to be something that could potentially mitigate the legitimacy cost of the Court's case selection strategy in self-referral states. These ideas are given further consideration in section 4.2.3.

The ICC cannot control what the media reports on, but it can and should release official statements, press releases, and reports identifying concrete and observable improvements to the

[6] This fact should not be taken as an indicator that these regimes do not worry about the negative publicity here because, as established in the previous chapter, these acts contesting ICC activity are typically accompanied by attempts to limit the reputational damage this contestation could potentially have.

[7] Concerning the limited resources of the Court, the approach articulated in this section will require some resources to be allocated to it which would have to be redirected from other projects, but this would likely be true of any approach to mitigating the legitimacy damage caused by the Court's case selection strategy in self-referral states, and the costs of this approach would be minimal because it has been designed largely to expand upon and put emphasis upon work that the Court is already doing to a limited extent.

domestic judicial systems of self-referral states while explicitly crediting and emphasizing the individuals responsible for the improvements.[8] Whether these documents primarily be press releases or official statements from the OTP has to be evaluated in itself, but the latter would likely be more effective in terms of reputational boosts because of the symbolic power of explicitly linking the claims to the OTP. To increase the likelihood of political elite pursuing improvements to their state's judicial system, these improvements would have to be incremental, so it would be unrealistic to publicize each individual improvement made or action taken, and the Court can instead do so quarterly, bi-annually, or annually depending on the quantity of these improvements. These documents can then be promoted to a wider audience through the ICC's various social media accounts, including Twitter, Facebook, and Instagram. Additionally, the Court can also include an in-depth list of measures taken to improve the domestic judicial system of each self-referral state on, or linked from, the webpage for each investigation on the ICC's website with credit again given to the individuals involved.

An additional method of publicization that would likely be even more effective than releasing these kinds of documents would be for the OTP and the Presidency, the organ primarily in charge of external relations for the Court as a whole (International Criminal Court n.d.n),[9] to emphasize these improvements during addresses, interviews, etc. while giving specific credit to the relevant elite. Beyond this, both Moreno-Ocampo and Bensouda wrote numerous opinion pieces for major news publications (Moreno-Ocampo 2009; 2010c; Bensouda 2013; 2014a) and journal articles (Moreno-Ocampo 2007; 2011; Bensouda 2010; 2012; 2014b) during their tenures as chief prosecutor of the Court, so this could also be used as an avenue for this publicization. Opinion pieces would likely work better for this purpose because they tend to reach a wider

[8] The highly conditional nature of this 'positive press' can then be used to address criticism equating this to the Court further cozying up with self-referral regimes because its main goal is to genuinely achieve the institution's anti-impunity mandate by improving domestic judicial systems. The Court being extremely transparent with the public that this approach is to the ends of creating a truly independent, impartial, and strong judiciary will be vital to address any criticism and concern that may emerge from victim groups and proponents of ICL.

[9] The OTP is made up of three main divisions, with the Jurisdiction, Complementarity and Cooperation Division overseeing external relations for the OTP specifically and the chief prosecutor administering over all divisions, thus having a hand in external relations (International Criminal Court n.d.i). Beyond this, a look at media coverage of the ICC shows that the chief prosecutor is essentially the face of the Court to much of the public.

audience than journal articles, but journal articles would be beneficial in terms of publicization among academics/researchers and would also give the Court an avenue to be transparent about this new leveraging approach I am proposing. Khan is yet to release either an opinion piece or journal article as chief prosecutor, but it is quite early in his tenure, so this should not be taken as an indication that he will not. Again, the Court already does all of this to a limited extent, but this should be expanded upon and significantly emphasized.

The last way the ICC could potentially leverage the reputations of political elite in self-referral states involves taking advantage of and operationalizing photo ops. Photo ops have been consistently used in the past by Court officials but with little functionality outside of encouraging cooperation with the Court's investigations and often to the detriment of the ICC's sociological legitimacy (Labuda 2019).[10] Whether it be the infamous photo of Moreno-Ocampo "laughing it up with Yoweri Museveni prior to Uganda's referral" or Bensouda appearing "with Museveni (despite his rather vicious attacks on the ICC) as well as DRC President Joseph Kabila" (Kersten 2019), these photo ops have been occurring since the institution's early days. Kersten defends these photo ops with two points, the first of these being that it is unlikely that the chief prosecutor can decline a photo op when government delegations request one because of the power dynamic lying with the latter party and the fact that declining during the meeting would likely "be a significant diplomatic gaffe" (Ibid.). The biggest implication of this is that the political regimes of these states are aware of the utility and significance of these photo ops. This is evident both in the fact that these regimes ask for them in the first place and the fact that it would be a significant diplomatic gaffe for the chief prosecutor to turn these opportunities down. This awareness can then be used by the Court if the OTP and the other relevant organs of the ICC were to set a clear policy that the publication and publicization of these photo ops by the Court are conditional upon concrete measures taken to improve domestic judicial systems. This would allow the Court to not antagonize the elite by declining the photo op while limiting the

[10] Discussions around photo ops in relation to the ICC appear to be virtually nonexistent in the academic literature. As a result, this discussion utilizes the non-peer-reviewed writings of two prolific ICL scholars, Patryk Labuda and Mark Kersten, from the latter's ICL blog. Labuda's post was published on Feb. 20, 2019, while Kersten's disagreement response was published the next day, on Feb. 21, 2019.

potential reputational boost which may accompany it when steps have not been taken to improve the state's judicial system.

On this note of the ICC's publication of photo ops, Kersten's second defence of ICC officials participating in photo ops with alleged human rights abusers involves transparency and the dire consequences that would likely accompany the publication of any photo op by anyone other than the Court (ibid.). If the ICC were to have a clear and easily accessible policy around the publication of these photo ops being conditional on concrete steps taken by political elite to improve their states' domestic judicial systems, this would potentially mitigate the legitimacy cost of the Court allowing these photo ops in the first place and the potential consequences of not publishing some of them itself while generally increasing the Court's transparency. This mitigating effect would potentially be multiplied by the fact that the policy will explicitly identify the goal of publicizing these photo ops as the meeting of the Court's anti-impunity mandate in the long-term in a manner that honours the principle of complementarity. Compared to the reputational boost that political regimes and elite receive from the act of self-referral, as established in Chapter 3, the boosts received from this approach will be lesser, but this is not overly likely to be a large issue because the risks emerging from the improvements made to each self-referral state's judicial system will be similarly lesser and incremental.

4.2.2 The Willingness of Political Elite in Self-Referral States to Take on Risk

On the topic of risk, in the very acts of first joining the ICC and later referring a situation within their borders to the ICC, the political regimes and elite of self-referral states display a willingness to take on considerable risk when it comes to ICL if they view interactions with it as progressing their immediate interests. As established in the previous chapter, when it comes to the act of self-referral, an inherent part of the interests at play relates to the benefits of having a positive human rights reputation and its link to the sociological legitimacy of the regime and its elite. While the boost initially received from a seemingly one-sided ICC investigation is immediate and temporary, it has concrete and observable benefits during the period it is present, such as international vindication against rebel and/or competing factions (Burke-White 2005, 559; Kambale 2015, 193; Bocchese 2017, 352, 370–71) and the receipt of multilateral aid (Lebovic and Voeten 2009). While this boost would have been speculation for the DRC and

Uganda, it has now become an observable precedent for any state considering self-referring a situation to the ICC, assuming, of course, that no state elite is ever indicted.

It is within the possibility of this elite being indicted that a significant risk calculation takes place, regardless of any agreements that may be made during any negotiations preceding and facilitating a self-referral. When it comes to the Court's first two self-referral investigations, the risk was considerable and obvious for the political regimes of the DRC and Uganda, as there was no precedent to indicate whether any state elite allegedly involved in ICC-level crimes would be indicted as a result of the self-referral. Even if we assume the most extreme possibility about the negotiations which likely occurred between the regimes of self-referral states and the ICC[11] that the OTP explicitly agreed to not indict state actors in exchange for protection, access, and cooperation during its investigations, there still wouldn't have been any guarantee that the OTP would not renege on this.

In retrospect, we can observe that the ICC appears to believe that the apprehension of a select few rebel actors most responsible for ICC-level crimes during self-referral investigations is worth the apparent impunity seemingly enjoyed by the state elite allegedly complicit in ICC-level crimes within the same situations being investigated despite the damage it does to its legitimacy, but there would have been no way for the regimes in the DRC and Uganda to know this, and it is still not a guarantee for other self-referral states. Additionally, it would have been difficult for these regimes to know definitively that the political regimes of other African states would react as negatively as they did to the indictment of sitting heads of state and political elite in the context of the sovereignty ceded to the Court through Rome Statute ratification. This is to say that, for the DRC and Uganda, self-referring their respective situations to the Court would have been an act of significant risk; although, it would be a mistake to believe that the precedent set by these investigations and subsequent self-referral investigations alleviated all of the risks for later self-referral states, especially when a new chief prosecutor was incoming or when it would be the first self-referral under a new chief prosecutor. The way the Court has handled all

[11] It must be emphasized that the negotiations between the OTP and the governments of the DRC and Uganda have been essentially confirmed by Clark through interviews (P. Clark 2018, 53–59), but the claims that negotiations preceded the self-referrals of the CAR I, Mali, CAR II, and the state of Palestine investigations are still mostly speculation and are yet to be confirmed in a similar manner.

previous self-referrals is inevitably going to serve as a level of reassurance for any regime considering self-referral, but it does not necessarily guarantee that no state elite will be indicted. When we consider the potential consequences of an ICC indictment, the risk was/is still significant for any regime self-referring after the DRC and Uganda. In short, the act of self-referral displays a willingness to take on a certain amount of risk relative to the perceived potential gains regarding the political regime's immediate interests.

One last indication of a willingness to take on risk from the political regimes of self-referral states is the fact that these regimes have all allegedly continued to commit human rights atrocities after a formal investigation is opened, as established in the previous chapters. As these crimes slowly come to light and credible evidence is gathered, verified, and published by various organizations other than the ICC, the reputational boost gained from a self-referral begins to diminish until it is gone altogether. While the interest in a positive reputation around human rights is subordinate to other interests, the fact that these regimes self-refer for the temporary benefits to begin with shows that these benefits are deemed important enough in their temporary state to be worth taking on considerable risk to receive. The remainder of this section will justify and address the implications of the origins of this risk, i.e., the fact that the individuals potentially receiving this boost in exchange for improvements to their states' domestic judicial systems have allegedly been complicit in ICC-level crimes themselves.

4.2.3 A Defence of and Justification for this Leveraging Approach

While temporarily boosting the reputations of self-referral regimes and elite allegedly involved in human rights atrocities is likely to be challenged by some, it can be justified on the grounds that it is attempting to meet the Court's anti-impunity mandate by strengthening domestic judicial systems[12] in the context of the reality the Court must work within. The best defence of this approach is that it has the potential to meet the ICC's anti-impunity mandate in the long term better than the immediate indictment of state elite in self-referral states allegedly involved in human rights atrocities. This is primarily due to the likely consequences of the Court

[12] Even if the domestic judicial systems in self-referral states do not get to the point where they can genuinely try elite allegedly complicit in ICC-level crimes, any improvements to these systems are a net positive and are likely to see *more* genuine proceedings than they would have had these improvements not been made.

indicting state elite as established in the previous two chapters. Indicting the state elite of a self-referral state would very likely result in that elite's regime ending or significantly decreasing its cooperation with the Court (Kersten 2019, 169–72; Akhavan 2010, 117–19). If this were to occur, the chances of the Court apprehending already indicted individuals would decrease significantly (Kersten 2016, 171; Danner 2003, 527–28), potentially creating greater impunity and even less genuine justice.

Further, the indictment of political elite from African self-referral states[13] could potentially antagonize the regimes of many other African member states. This antagonism is almost a guarantee if these indictments were to include the head of state of any self-referral state,[14] as responses to the indictments of al-Bashir, Kenyatta, and Ruto indicate, but there is also reason to believe that the indictment of other political elite could antagonize this audience as well. While criticism around the indictments of Kenyatta and Ruto hit a fever pitch when they were elected as president and vice president of Kenya, respectively, this criticism was still present to a lesser extent alongside calls from the AU for the cases to be postponed when they were still only members of Kenya's political elite (BBC News 2011; Brown and Sriram 2012, 256). As established earlier, the peak of this criticism saw calls for a mass exodus of African states from the Court. Had this occurred, it would have likely resulted in a potentially insurmountable obstacle for the Court's anti-impunity mandate, as African states make up 26.8% of its membership. Alternatively, the approach I posit aims to potentially enhance the ability of domestic judiciaries to increase the chances of state elite allegedly involved in ICC-level crimes being indicted in the future while decreasing the chances of future impunity. As Patricia Hobbs argues, "The strengthening of local accountability and the transformation of the local justice landscape should be considered as the [ICC's] long-term objectives" (Hobbs 2020, 345).

A secondary defence of my approach concerns the continued existence of evidence of ICC-level crimes which will not be erased by temporarily boosting the reputations of this elite. It is likely that the ICC also collects evidence of crimes committed by the governments of self-referral states, as suggested by Moreno-Ocampo's gravity defence for the apparent impunity

[13] Five of the Court's six self-referral investigations are in Africa.

[14] Any ICC-level atrocities committed by the military of any self-referral state would very likely be directly linked to the country's head of state because this position is also the commander-in-chief of the armed forces in every self-referral state.

enjoyed by Uganda's state elite in which he claimed that the gravity of the crimes committed by the Ugandan government and military in the situation under investigation was nowhere close to those committed by the LRA (2006, 498–501). This is a clear indication that credible evidence had been collected concerning these 'less grave' crimes. Beyond the evidence collected by the Court, there is the evidence collected by organizations like the HRW and Amnesty International which has been cited throughout this work. None of this is to say that domestic investigations would not require additional evidence or that this information would not have to be independently verified but that these sources are likely to always be present as a credible starting point, at least in terms of what has already been collected.

Regarding the Court's willingness to use an approach like the one proposed here, it has already shown a willingness to boost the reputations of this elite by accepting self-referrals while not indicting any state elite, and this initial boost is considerably more significant than any which would emerge from my proposed approach. This is by the design of the approach because it was conceived to specifically fit within the existing practices of the Court. Admittedly, this approach has the potential to have the opposite of its desired effect by damaging the ICC's legitimacy since much of the criticism directed at the institution is focused on how the political regimes of self-referral states have co-opted investigations to the ends of similar boosts, but this potential can be lessened if the approach were utilized in conjunction with 100% transparency.[15] If the Court can make clear how this approach is attempting to improve domestic judicial systems, thus potentially meeting the ICC's anti-impunity mandate in the long-term, this may mitigate much of the damage this approach could potentially have on the Court's legitimacy.

Throughout this section, I have discussed my proposed approach in the context of its end being the improvement of the domestic judicial systems in self-referral states. When involving the ICC, the route to these improvements is typically subsumed by the concept of positive complementarity, but this tool's use outside of preliminary examinations has been questionable, at best, because of the lack of an incentive to engage with its strategies (Mattioli and Woudenberg 2008, 57–60; Soares 2013, 322–26; Tillier 2013, 520–26). The approach I have

[15] A lack of transparency from the Court has often been linked to damage to its legitimacy, while genuine transparency has been identified as an avenue to enhanced legitimacy (Danner 2003, 547–49; J. Clark 2015, 773, 781–82; Newton 2015, 139; Human Rights Watch 2018, 14, 18–21).

posited here has some potential to create this incentive structure during self-referral investigations, particularly, due to the already close relationship between the states' regimes and the Court. With my leveraging approach articulated, it is time to look at how positive complementarity can facilitate the strengthening of domestic judicial systems.

4.3 Positive Complementarity as a means of Improving Domestic Judicial Systems

4.3.1 The Concept of Positive Complementarity

An inherent part of complementarity, as explained by Moreno Ocampo, is the idea that it is "the primary responsibility of States themselves to exercise criminal jurisdiction" (2003b, 4). Beyond this, Moreno-Ocampo established on the day he officially became chief prosecutor that "The effectiveness of the [ICC] should not be measured by the number of cases that reach it. On the contrary, complementarity implies that the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success" (2003a, 3).[16] Concerning this, a distinct concept called positive complementarity emerged out of the OTP's approach to complementarity which asserts that the ICC should work with its member states to strengthen their domestic judicial systems so that these systems will eventually be both able and willing to handle the investigation and prosecution of ICC-level crimes which may occur or have occurred within their sovereign territory (Gegout 2013, 813; Marshall 2010, 22–25). Positive complementarity is thus considered "a proactive interpretation of complementarity as a tool to end impunity" (Mattioli and Woudenberg 2008, 57) which "intends to promote, assist

[16] While this statement is from Moreno-Ocampo and does not necessarily reflect the beliefs of Bensouda and Khan, I believe that Bensouda's actions as OTP reflect a similar view as Moreno-Ocampo on this topic because Bensouda only opened three formal investigations (Mali, CAR II, and the State of Palestine) which resulted in five cases (with another seven cases opened by Bensouda in formal investigations originally initiated by Moreno-Ocampo) as opposed to Moreno-Ocampo's opening of seven formal investigations (the DRC, Uganda, Darfur, CAR, Kenya, Libya, and Côte d'Ivoire) which resulted in nineteen cases opened while he was chief prosecutor. It is difficult to tell so early in his tenure whether Khan will follow a similar path, but he has opened two investigations (Venezuela and Ukraine) since taking office which are yet to result in any cases. It must also be stated that the number of cases already open when Bensouda took office likely had an affect on how many investigations and cases she was able to open herself in the context of the limited resources of the ICC. The same likely goes for Khan's ability to open investigations and cases.

and incentivise the reform of national systems so that they are capable of undertaking genuine proceedings, making the ICC a true mechanism of last resort" (Soares 2013, 320).

Pretty well every strategy of positive complementarity requires a state's political elite and judiciary to engage with them to be effective, but an HRW report on the concept's use in preliminary examinations stresses the importance of the OTP engaging national authorities for it to be successful (2018, 1–7). While positive complementarity has been used in every state where the Court is involved (but with very limited success in formal investigations),[17] its use in Colombia is a good example of its potential, as the OTP closed its seventeen-year-long preliminary examination in the state in October 2021 (International Criminal Court n.d.d). Each state and situation the ICC deals with is unique, so specifics must be tailored to each state/situation,[18] but some generalities can be discerned across situations. Over the years that positive complementarity has been embraced by the OTP, the concept has expanded to encompass many strategies involving engagement from/with actors and organizations outside the ICC (Human Rights Watch 2018, 1), but the following discussion will only consider a handful in relation to the Court which would possibly work well with the approach proposed above.

4.3.2 Successful Utilization of Positive Complementarity: The Case of Colombia

The preliminary examination in Colombia began in June 2005 and centred on alleged crimes against humanity committed since November 1, 2002, and eventually grew to include war crimes committed after November 1, 2009,[19] "in the context of the armed conflict between and

[17] Wherever the Court is actively engaging with political regimes and judicial systems, it can be viewed as using positive complementarity, as positive complementarity encompasses "the full range of activities conducted at every stage of the OTP's work to enhance domestic [system's] capacity," but has seemingly found the most success in the preliminary examination stage (Tillier 2013, 509). There are currently three situations in this stage in: Guinea, Nigeria, and Venezuela II; and seven situations which were closed during this stage: in Colombia, in Honduras; in the Republic of Korea; in Gabon; in the Plurinational State of Bolivia; concerning the UK in Iraq; and onboard registered vessels of Comoros, Greece, and Cambodia (International Criminal Court n.d.j).

[18] As Emeriec Rogier, the former head of situation analysis for the OTP, puts it, "when referring to any sort of positive complementarity 'policy' or 'strategy', it is important to bear in mind that the [OTP's] approach in a given situation is essentially dictated by the particular facts on the ground and the disposition of the competent authorities" (2018).

[19] War crimes committed from November 1, 2002, to November 1, 2009, were excluded from the preliminary examination's scope because "Colombia deposited its instrument of

among government forces, paramilitary armed groups and rebel armed groups," placing an emphasis "on the existence and genuineness of national proceedings in relation to these crimes" (International Criminal Court n.d.d). In the seventeen years this examination was ongoing, the various political regimes of Colombia were able to improve the state's judicial system to the point where the OTP "[determined] that the national authorities of Colombia [were] neither inactive, unwilling nor unable to genuinely investigate and prosecute Rome Statute crimes" (Office of the Prosecutor 2021). A notable indication of Colombia's activity/willingness/ability to investigate ICC-level crimes is the "highly significant number of convictions of individuals accused of 'false positive' killings, that is, cases of unlawful killings that military personnel officially reported as lawful killings in combat" (Human Rights Watch 2018, 6).

Importantly, the above sentence quoted from a 2018 HRW report goes on to state that Colombia has seen "very scarce progress in prosecuting high-ranking officials" (ibid.), but this is somewhat deceiving concerning positive complementarity's success in Colombia.[20] High-ranking officials may not have been prosecuted in Colombia, but Yahli Shereshevsky has found that Colombia has still shown the *greatest* willingness to prosecute some senior officials (i.e., "commanders in the Military … [as high up as] colonels") of all the states where the Court is active, giving much of the credit for this to the OTP's use of positive complementarity (2020, 1022). Beyond this, while the OTP's use of positive complementarity in Colombia has not yet gotten the state's judiciary to a point where it can prosecute high-ranking officials, the OTP was explicit that the preliminary examination's end simply indicated the beginning of a new era of

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accession to the Rome Statute on 5 August 2002 together with a declaration pursuant to article 124 excluding war crimes from the jurisdiction of the ICC for a period of seven years" (International Criminal Court n.d.d). Article 124 states: "Notwithstanding article 12, paragraphs 1 and 2, a State, on becoming a party to this Statute, may declare that, for a period of seven years after the entry into force of this Statute for the State concerned, it does not accept the jurisdiction of the Court with respect to … [war crimes] when a crime is alleged to have been committed by its nationals or on its territory. A declaration under this article may be withdrawn at any time" (International Criminal Court 2002, 56).

[20] Directly addressing the HRW's claim about Colombia's "scarce progress in prosecuting high level officials" (2018, 6), Rogier argues that the NGO "does not fully appreciate the less palpable but nonetheless significant impact of the OTP's preliminary examination in Colombia … [in terms of] the fairly innovative transitional justice mechanisms directly negotiated by the parties to the armed conflict – and the constructive role that the [OTP] played and continues to play in that process" (2018).

positive complementarity in the state (Office of the Prosecutor 2021),[21] so this does not necessarily mean that the OTP's use of positive complementarity may not eventually help achieve these prosecutions. This is an example of positive complementarity's long-term nature and how its effects are meant to compound on each other to *eventually* fulfill the Court's anti-impunity mandate for its member states.[22] Considering this all together, the current lack of prosecutions of state elite in Colombia should not be taken as an indication that the effects of positive complementarity are not possibly compounding to the point of eventually allowing for the prosecution of those state elite complicit in ICC-level crimes.

Beyond what the OTP's reasoning for closing its preliminary examination in Colombia indicates concerning the state's improved domestic judicial system regarding prosecutions for ICC-level crimes, two specific instances exemplify positive complementarity's success well. Looking to the beginning of the Court's engagement with Colombia, Burke-White identifies how the Court was partly responsible for the Colombian government modifying a piece of legislation passed in June 2005 called the Justice and Peace Law (JPL) "to remove certain amnesty provisions and to better address various human rights concerns[, thus helping] … preserve the possibility of full accountability in domestic courts" (2008, 89–90). Similarly, an unprecedented interim report released when Bensouda first became chief prosecutor in 2012 followed by two OTP missions and a pair of letters sent to the president of Colombia's Constitutional Court in 2013, while criticized for reasons which will be touched on below, influenced the Constitutional Court's decision around a critical amendment to Colombia's constitution called the Legal Framework for Peace (LFP) in relation to accountability and justice (Urueña 2017, 116–19).[23]

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[21] Stressing that the preliminary examination's end did not indicate the cessation of engagement between itself and Colombia's government, the OTP stated that this simply "[marked] the beginning of a new chapter of support and engagement – an example of positive complementarity in action" (Office of the Prosecutor 2021).

[22] Similarly, Rogier's claims that "encouraging national proceedings require painstaking efforts. While it has become commonplace to criticise the length of preliminary examinations, complementarity is in fact the most-important factor having a bearing on their duration, either because the assessment of national proceedings is rendered complex by the information provided (or lack thereof) or *because the mechanisms in place require time to … deliver*" (2018; my emphasis).

[23] Notably, the LFP was enacted but not implemented, and much of its contents were eventually subsumed by the Colombian government's peace deal with one of the country's longest-standing rebel groups, the Revolutionary Armed Forces of Colombia (known widely as

This influence resulted in Colombia's Constitutional Court declaring the LFP as "constitutional, but [prohibiting] the full suspension of penalties for those 'most responsible' for crimes against humanity, genocide, and war crimes committed in a systematic manner" (Human Rights Watch 2018, 42). The legislation and amendment in these examples are of a much greater scale than the improvements to domestic judicial systems potentially emerging from the leveraging approach I proposed above, but they are clear indicators of what OTP engagement concerning strategies of positive complementarity can achieve when the proper incentive structure is in place.

Along with the current lack of any high-ranking officials being indicted, the OTP's use of positive complementarity in Colombia has two other shortfalls worth examining here for the lessons that can be drawn from them concerning positive complementarity's use in conjunction with the leveraging approach proposed in section 4.2.1. Beginning with the absence of prosecutions of high-ranking officials (Human Rights Watch 2018, 6), the lesson here, as unfortunate as it may be, is that positive complementarity is a long-term tool to address impunity for ICC-level crimes, so more immediate results concerning the prosecution of state elite should not be expected as a result of its use. While it would be unreasonable to claim that a strengthened and fully functioning judiciary would guarantee that state elite will be prosecuted, it increases the chances of this and would potentially have positive implications on other areas of justice and accountability. In other words, even if the Court's use of positive complementarity in self-referral states does not result in their domestic judiciaries indicting state elite allegedly involved in ICC-level crimes, it could potentially be a definitive net positive for justice and accountability. This is especially the case considering how these state elite are unlikely to be successfully prosecuted even if the Court did indict them because of the aforementioned privileging of sovereign immunity by states and regional organizations. In terms of accountability for future ICC-level crimes, there is no guarantee that a previously strengthened judiciary would remain intact during the kinds of situations which typically result in international crimes, but past research has found a correlation between strong judiciaries and a decreased chance of civil conflict because of the former's crucial role in broader institutional quality (Taydas, Peksen, and James 2010, 199–212).

FARC) in 2016 which called for the creation of a tribunal called the Special Jurisdiction for Peace (JEP) which embodied the general approach of the modified LFP and was subsequently deemed acceptable in relation to the Rome Statute by the OTP (Urueña 2017, 120–23).

A second shortfall which has been identified across most preliminary examinations (Human Rights Watch 2018, 10–13, 160), but arguably with the greatest effect in Colombia, is the fact that the incentive to improve domestic judicial systems in line with the Rome Statute (i.e., the fear of the OTP opening a formal investigation *proprio motu*) decreases over time as the threat of a formal investigation becomes less credible (Urueña 2017, 105, 123; Bocchese 2020, 158, 162–66). The lesson here is that the incentive to improve domestic judiciaries needs to remain consistent for positive complementarity to remain effective, which can potentially be the case with the approach articulated above (if the Court were to consistently pursue it).

One last relevant shortfall of the OTP's use of positive complementarity in Colombia is the idea that the Court's interventions, even when ultimately successful, can lead to significant pushback, as was the case with Bensouda's attempts to affect the LFP. As Bocchese summarizes it, "From an institutional viewpoint, the Constitutional Court rebuked the OTP's attempted influence[,] and … the executive branch protested that her office reached out directly to judicial bodies instead of using proper diplomatic channels" (2020, 176). The lesson here is that a failure to go through a state's political regime when interacting with its judiciary can result in unnecessary pushback, potentially dampening its influence in the state. While it is important to consider these shortfalls, they do not take away overly from positive complementarity's potential to strengthen domestic judiciaries because it is such a widely encompassing and versatile idea.

4.3.3 Strategies of Positive Complementarity

Of the many strategies of positive complementarity used over the years, one strategy has always been dominant over the others in terms of Court rhetoric and involves the Court, and particularly the OTP, encouraging and stimulating genuine and impartial domestic proceedings for ICC-level and adjacent crimes to strengthen the capacity of the state's judicial system while shrinking any impunity gap present (Tillier 2013, 551–59).[24] Along with this dominant strategy,

[24] While other strategies of positive complementarity will appear in some ICC reports and documents, the encouraging of genuine domestic proceedings for ICC-level crimes has been emphasized consistently by the Court in many of its reports and official documents (International Criminal Court 2006, 7; Office of the Prosecutor 2006a, 22–23, 32; 2006b, 5; Bensouda 2009, 5; Office of the Prosecutor 2010, 4–5; Moreno-Ocampo 2010b, 3; United Nations General Assembly 2010, 14; Song 2010, 3; United Nations General Assembly 2011, 13–14; Office of the Prosecutor 2011, 5, 8; United Nations General Assembly 2012, 15–16; 2013, 16; International

the rest of this section focuses on two subordinate strategies which would possibly be facilitated well by the incentive structure inherent in my leveraging approach: the Court stimulating the implementation of the Rome Statute into national legislation (De Vos 2015, 385–88; Hobbs 2020, 349–53), and the Court sending missions to states with the express purpose of identifying weaknesses in their domestic judicial systems (Human Rights Watch 2011, 20–21; Tillier 2013, 547–48). [25] The importance of these strategies being explicitly allowed and facilitated by the political regimes of self-referral states must be emphasized because, as the fallout around Bensouda going directly to the Colombian Constitutional Court illustrates, circumventing these regimes can damage relations with both the regimes and domestic courts. Additionally, the incremental nature of any improvements resulting from the strategies discussed below is stressed because of the relatively small size of the reputational boosts potentially incentivizing them.

Considering the dominant strategy of positive complementarity to encourage genuine domestic proceedings for ICC-level crimes, this may be particularly useful in the context of my leveraging approach because it can be handled in a wide variety of ways that require the direct engagement of a state's political regime to be successful. Beyond simply allowing genuine prosecutions to take place, this strategy would involve these regimes and their elite facilitating these prosecutions whether that be through the incremental "implementation of a comprehensive security scheme for the protection of victims, witnesses and justice officials" (Office of the Prosecutor 2020, 43) or through incrementally increasing the resources allocated towards these prosecutions and the relevant investigations. This strategy also involves these regimes facilitating the Court in sharing its expertise and intellectual resources with domestic prosecutors, judges, and other relevant actors (Mattioli and Woudenberg 2008, 60–61; Office of the Prosecutor 2010, 5; 2015, 22). A major aspect of how this part of the strategy can be undertaken involves political regimes assisting the Court in "calling upon officials, experts and lawyers from situation countries to participate in OTP investigative and prosecutorial activities, … [and] inviting them

Criminal Court 2019, 29; Office of the Prosecutor 2020, 43; International Criminal Court 2021c, 8).

[25] Unavoidably, these strategies, just like the means of publicization articulated in section 4.2.1, will require the allocation of resources to varying degrees, but these three specific strategies were chosen partially because they would be relatively inexpensive.

to participate in the [OTP's] network of law enforcement agencies (LEN)" (Office of the Prosecutor 2010, 8). Launched in 2009, the LEN aimed to create

> a network at national prosecutor level to deal with crimes connected with crimes listed in the ICC Statute but not directly submitted to the jurisdiction of the ICC. It is further designed to assist domestic authorities in the investigation of genocide, crimes against humanity and war crimes. (Soares 2013, 336)[26]

As introduced by the OTP, the LEN is meant to "provide a platform for enhanced collaboration among different law enforcement officials investigating serious crimes" (Office of the Prosecutor 2010, 15). Unfortunately, the LEN was not mentioned in the OTP's strategic plan for 2016-2018 or 2019-2021, so the Court would have to recommit to this program for it to be engaged with in conjunction with my leveraging approach.

The first subordinated strategy of positive complementarity which is inherently linked to the encouraging of genuine domestic proceedings is for the Court to stimulate the implementation of the Rome Statute into national legislation (De Vos 2015, 385–88; Hobbs 2020, 349–58). While there is considerable contestation around whether there is an inherent duty (via the Rome Statute) to implement Rome Statute provisions into national legislation (De Vos 2015, 382–85), many member states appear to favour the interpretation that "State parties are not under any obligations to implement the Rome Statute in order to exercise their jurisdiction," as a duty to implement is only mentioned in the Preamble to the Rome Statute and preambles lack "any legally binding authority" (Hobbs 2020, 351). With this in mind, the ICC could potentially use my leveraging approach to possibly incentivize political regimes and elite in self-referral states to incrementally implement Rome Statute provisions into national legislation which could then strengthen accountability measures within the judicial systems of these states.

One last strategy of positive complementarity that would potentially work well with my leveraging approach is for the Court to send missions to self-referral states with the express purpose of identifying weaknesses and areas for improvement within each state's judicial system (Human Rights Watch 2011, 21; Tillier 2013, 548). These missions would inevitably require cooperation from the political regimes of these states to allow access to the relevant systems

[26] For an in-depth exploration of the LEN, refer to Reinhold Gallmetzer's "Prosecuting Persons Doing Business with Armed Groups in Conflict Areas" (2010) and the cited article from Patrícia Soares (2013).

while protecting the missions when/where necessary, and this cooperation could potentially be incentivized by my leveraging approach. Following the conclusion of these missions, the Court could then put together a thorough list of incremental steps that the political elite of these states could take to address the identified weaknesses. My leveraging approach could then also be used to potentially incentivize this elite into addressing the identified weaknesses. Since these potential improvements would be incremental (and thus small-scale), this may increase the chances that the political elite in self-referral states will be willing to engage with them because the risk they present by themselves will be relatively minor. With this said, while these incremental changes would appear minor by themselves, the goal would be that they eventually build into a system strong enough to hold all individuals accountable for ICC-level crimes.

4.4 Conclusion

Even if the OTP takes the advice of the scholars who have recommended that the Court cast aside self-referrals in favour of *proprio motu* investigations as a means of protecting its sociological legitimacy (Bocchese 2017, 385–87; Müller and Stegmiller 2010, 1293–94), it will still have to deal with the legitimacy damage caused by the apparent impunity seemingly enjoyed by state elite in the self-referral investigations currently open. As argued in this chapter, the Court indicting state elite allegedly complicit in ICC-level crimes in self-referral states would likely create many other issues for the institution that could very well exceed the legitimacy cost of its case selection strategy in these states. In the context of this imperfect reality, the leveraging approach I have articulated and justified throughout this chapter may possibly offer a route to mitigating this legitimacy damage without simultaneously damaging the Court's legitimacy in other areas. By offering *temporary* boosts to the human rights reputations of political regimes and elite in self-referral states to potentially incentivize engagement with and the facilitation of strategies of positive complementarity to the ends of improving domestic judicial systems, this approach could maybe help along the creation of a legal environment in which elite allegedly involved in ICC-level crimes could eventually be held accountable, even if this is years after the Court's investigations end. This is all to say that the leveraging approach proposed in this chapter hopes to work within the problematically political reality the Court finds itself embroiled in to better meet the institution's anti-impunity mandate in the long term in line with the principle of complementarity.

As the institution itself has argued, the most significant sign of the Court's success would be a world where it is essentially inactive because domestic judicial systems are able and willing to handle all ICC-level crimes themselves (Moreno-Ocampo 2003a, 3; International Criminal Court 2006, 7; Office of the Prosecutor 2006a, 22–23), and the approach articulated in this chapter is arguably more in line with this idea than the immediate indictment of state elite in self-referral states. After all, there is no guarantee that the indictment of state elite allegedly involved in ICC-level crimes would equate to real accountability, as there is no assurance that the Court would be able to apprehend these individuals in the first place. Beyond this, these indictments could have the opposite effect on genuine accountability because they could potentially result in these political regimes not cooperating with the Court concerning its cases against rebel actors. Instead of creating animosity between the Court and the political regimes that it requires cooperation from to function, the approach articulated in this chapter attempts to further maintain the cooperation required from this elite while simultaneously attempting to decrease the likelihood of future impunity. Undeniably, there are some challenges with the approach articulated above, as identified in section 4.2.3, but this will be the case with any approach to mitigate the legitimacy cost of the ICC's case selection strategy in self-referral states. Beyond this, the primary consideration in its formulation was that it fit into the reality the ICC must navigate while potentially securing a future where the Court's anti-impunity mandate is *better* met.

Chapter 5
Conclusion

When questioned about not indicting any state elite in Uganda, Moreno-Ocampo pointed to the gravity of the crimes committed by the LRA being significantly worse than that of the UPDF (Moreno-Ocampo 2006, 501). Similarly, a policy paper on case selection and prioritization from Bensouda's OTP emphasized the importance of gravity in guiding who it indicted during investigations, stating that the:

> Gravity of crime(s) as a case selection criterion refers to the [OTP's] strategic objective to focus its investigations and prosecutions, in principle, on the most serious crimes within a given situation[.] … [Given] that many cases might potentially be admissible under article 17 [of the Rome Statute], the [OTP] may apply a stricter test when assessing gravity for the purposes of case selection than that which is legally required for the admissibility test under article 17. (Office of the Prosecutor 2016a, 12–13)

This gravity justification, however, has always been deemed insufficient by many, with the Court's one-sided case selection strategy in self-referral states receiving considerable criticism while damaging the institution's sociological legitimacy (Keller 2010, 218–20; Kersten 2016, 163–66). The leveraging approach proposed in Chapter 4 aims to potentially give the Court something more concrete and proactive than gravity to mitigate the legitimacy costs of not indicting state elite in self-referral states even when credible evidence exists that links them to ICC-level crimes. By pointing to gravity to justify this lack of indictments, the OTP is essentially admitting that there are ICC-level crimes that it either cannot or will not pursue despite them being in its jurisdiction. For an institution with the mandate of ending impunity for ICC-level crimes, this one-sided case selection strategy justified primarily on the grounds of gravity is unlikely to ever be sufficient for the victims of ICC-level crimes perpetrated by this state elite.

By attempting to leverage the reputations of political elite to strengthen the capacity of domestic judicial systems in self-referral states, however, the Court can possibly mitigate the

legitimacy cost of this impunity on the grounds that it is attempting to create a domestic judicial environment in each state where these elite are arguably more likely to be held accountable in the future by domestic judicial mechanisms. To immediately indict state elite in self-referral states would likely result in less genuine accountability because the respective state would likely cease cooperation with the Court around investigating and apprehending rebel actors, so this leveraging approach attempts to be less antagonistic to the political elite from which the Court needs support to even operate. As James Stewart, the ICC's deputy prosecutor since March 2013, stated, the Court "[has] to make a choice between action and paralysis and between pragmatism and ideals," and it has chosen action and pragmatism (Stewart 2013, 2:01:20), but this pragmatism does not necessarily have to keep damaging the ICC's sociological legitimacy. My leveraging approach could potentially serve to mitigate the legitimacy cost caused by the Court's need to choose action over paralysis, pragmatism over its ideals, and its survival interest over its mandate interest. Further, even if my leveraging approach does not result in the prosecution of state elite in self-referral states, it has the potential to at least contribute to a greater willingness to prosecute higher-ranking officials in each state, as was the case with the OTP's use of positive complementarity in Colombia (Shereshevsky 2020, 1022), and this would likely be a welcome step in the right direction if it were to occur.

It must be acknowledged, however, that my approach is not necessarily a solution to all the legitimacy issues the Court faces in self-referral states. Beyond this, there is a possibility that political elite would be less likely to engage with the incentive structure my leveraging approach aims to create during more 'normal' times when their grasp on power is not in question. Regardless, given that the Court has operated up until this point in a "sovereignty-friendly" manner (Bocchese 2017, 386) which favours its survival interest over its mandate interest in self-referral states and results in significant damage to its sociological legitimacy, it is crucial that the Court attempt to pursue possibilities that could lead to broadening the type of justice that results from its interventions in these states. While it is undeniably possible that the elite of self-referral regimes may not find the incentives I have articulated in Section 4.2.1 as enticing as I might hope, there is reason to believe that they are willing to take on considerable risk if they perceive doing so as leading to tangible benefits, so it is a possibility worth pursuing. Beyond this, even if the specific incentives I identify are not as enticing as they need to be, their consideration by the Court and scholars could potentially contribute to the eventual creation of a different incentive

structure to motivate engagement with strategies of positive complementarity in formal investigations, especially self-referrals, that partially involves leveraging the reputations of the political elite in each respective state.

Relatedly, future research must be conducted around this approach pertaining to transitional justice. One of the strategies of positive complementarity identified to work with my leveraging approach is the stimulating of national proceedings for ICC-level crimes, and these prosecutions would inevitably be of low- and mid-level perpetrators. The fact that these perpetrators would be prosecuted while high-level perpetrators continue to enjoy impunity would remain as unjust as it has always been when instances of this have occurred in the past, so future research must consider how transitional justice mechanisms emphasizing truth-telling and restoration/reparation can be used in conjunction with my leveraging approach in a manner which conforms with the Rome Statute's standards for justice and accountability and those of other ICL norms, conventions, and treaties. This could then potentially allow for the possibility of genuine justice being administered while mitigating the 'harshness' of the prosecutions of low- and mid-level perpetrators in the context of high-level perpetrators enjoying impunity. Exactly what this could look like would have to be parsed out during this future research, but it could involve alternative sentencing in exchange for extensive truth-telling and the contribution of reparations to victims, similar to the Special Jurisdiction for Peace (JEP) in Colombia (Moffet 2019).[1]

Importantly, in a public statement from Stewart in 2015:

> The OTP … effectively … [signalled] that alternative sentencing was acceptable, as long as the overall approach '[serves] appropriate sentencing goals, such as public condemnation of the criminal conduct, recognition of victims' suffering, and deterrence of further criminal conduct' (Urueña 2017, 120)[2]

[1] As briefly mentioned in Chapter 4 (*supra* note 24), the JEP is a tribunal created as a result of the Colombian government's peace deal with FARC in 2016 and is "the cornerstone of Colombia's transitional justice process[. This] tribunal was tasked with prosecuting the international crimes that took place in the Colombian armed conflict as well as granting benefits like amnesties and pardons to perpetrators of 'common crimes' (i.e. non-international crimes) that are linked to that conflict" (Morales 2021).

[2] This statement was given at a public event in Bogotá, Colombia, and was released under the title, "Transitional Justice in Colombia and the Role of the International Criminal Court" (Stewart 2015, 10).

This is especially notable concerning Emeriec Rogier's claim that the HRW's criticism of the lack of high-level officials being indicted in Columbia failed to "fully appreciate … the fairly innovative transitional justice mechanisms directly negotiated by the parties to the armed conflict – and the constructive role that the [OTP] played and continues to play in that process" (2018). Following the announcement of Colombia's peace deal with FARC which called for the creation of the JEP, the OTP explicitly stated that, in principle, it accepted the justice provisions of the deal (Urueña 2017, 121). The fact that Khan's OTP closed the preliminary examination in Colombia on the grounds "that the national authorities of Colombia [were] neither inactive, unwilling nor unable to genuinely investigate and prosecute Rome Statute crimes" while specifically referencing the JEP (Office of the Prosecutor 2021) shows that the transitional justice mechanisms included within it, including alternative sentencing, were deemed acceptable concerning the Rome Statute.

Consequently, future research could, for example, analyze the aspects of the JEP which could feasibly be utilized in self-referral states in modified forms which could then be worked in as part of the goals potentially being incentivized towards by my leveraging approach. This research must pay particular attention to how these kinds of transitional justice mechanisms are typically received by victims of ICC-level crimes and ICL proponents, especially those in each self-referral state, and whether moves like this would be interpreted negatively by this important stakeholder group; after all, it is these stakeholders that my leveraging approach is attempting to satisfy the hopes of in the long-term. If these transitional justice mechanisms are deemed acceptable by the victims of ICC-level crimes in self-referral states, the embracing of transitional justice mechanisms as part of the general strengthening of domestic judicial systems can potentially serve to further shield the ICC from the legitimacy costs typically incurred by its case selection strategy in self-referral states. This is not a guarantee, of course, so this is where additional research will be crucial.

Until the Court takes steps to mitigate the damage done to its sociological legitimacy by its case selection strategy in self-referral states, it will continue to bleed sociological legitimacy with the stakeholder group of victims and proponents of ICL. The indictment of state elite allegedly involved in ICC-level crimes does not appear to be feasible for the Court in self-referral states, so the approach contextualized and articulated throughout this work may possibly

be what is required to protect the ICC's sociological legitimacy with victims and ICL proponents while not subsequently damaging this legitimacy with the stakeholder group it requires support from to operate, the political regimes of states and intergovernmental organizations. The very existence of the ICC is an achievement in an international reality as hostile to it as the one it navigates, but there is still much work to be done. The perception of the Court's legitimacy plays a fundamental role in the institution's ability to accomplish this work, so every effort should be taken to shield it. After all, this will be crucial if the ICC is to ever come close to fulfilling its idealistic mandate of ending impunity for genocide, crimes against humanity, war crimes, and crimes of aggression.

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