Power, Principle, and Pragmatism:

The ICC and the Politics of Prosecutorial Strategy

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Paper prepared for presentation at the Western Political Science Association Meeting, March 24-26, 2016, San Diego, CA

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“Geopolitical implications of the location of a situation […] are not relevant criteria for the selection of situations under the Statute.”

 --ICC Office of the Prosecutor[[1]](#footnote-1)

**I. Introduction**

It was an unprecedented event in the relatively short history of the ICC. On September 5, 2013, members of the Kenyan parliament approved a motion to withdraw from membership in the International Criminal Court. At issue were the charges of crimes against humanity issued by the ICC against current President Uhuru Kenyatta and Deputy President William Ruto. The charges stem from mass violence in the 2007 election that brought the two men into power. During the widespread violence over 1,000 people were killed and more than one half million people were forced from their homes. Both Kenyatta and Ruto have repeatedly demanded that the charges against them be dropped, and have characterized the ICC action as a politically motivated assault on Kenyan sovereignty by foreign interests.

Though the Kenyan move was uniquely provocative, the sentiments expressed during the meeting reflected a broader skepticism of the ICC evident across Africa. Critics point out that among the 19 situations currently under review by the Court, formal investigations and subsequent legal proceedings have been established in only 8—all in African countries. This has generated considerable skepticism in the region. For example, Rwandan president Paul Kagame suggested that the ICC “was made for Africans and poor countries.” Similarly, Jean Ping, president of the AU Commission, declared that “the ICC seems to exist solely for judging Africans.”[[2]](#footnote-2)

This emerging narrative of an institutional bias against African nations has found a receptive ear, both in African civil society as well as in wider academic and policy circles.[[3]](#footnote-3) Choices made by the ICC’s Office of the Prosecutor (OTP) fuel the fire of this rhetoric, as observers point out significant inconsistencies in the application of justice at the ICC. Why did the OTP utilize its *proprio motu* power authorized under Article 15 of the Statute to seek permission to open a formal investigation into the election violence in Kenya in 2007, yet decline to move forward with investigations into situations characterized by a significantly larger number of civilian casualties, including Afghanistan and Iraq? One critic remarked, “When the Prosecutor quickly decides to open an investigation—as in the Kenya situation—without making a decision about long-term preliminary examinations—in places like Colombia and Afghanistan—it can taint perceptions of the Prosecutor’s impartiality and give rise to the impression that the Prosecutor has been influenced by non-legal factors.”[[4]](#footnote-4) These case-specific criticisms beg the broader question regarding the determinants of situation selection. In other words, why does the court pursue some cases but not others? Moreover, why does it seem to move more aggressively in some cases and cautiously on others?

It is often presumed that prosecutorial choices are made solely in accordance with accepted norms of jurisprudence. Not surprisingly, this is the position consistently forwarded by the OTP and in all Court statements and documents. However, as pointed out above, a strictly legal perspective has difficulty in accounting for some of the inconsistencies evident on the Court’s docket. In response, some have argued that prosecutorial strategy is the product of politics—of institutional capture by external influence or bias.[[5]](#footnote-5) Such arguments appear quite extreme and face a formidable burden to prove their claims. In addition to providing concrete evidence of external efforts to influence the decisions of the OTP, scholars would need to provide evidence that the Prosecutor’s decisions were predicated in response to coercion and/or bias. The OTP is unlikely to concede any such admission, and has vigorously denied such accusations. The Court’s first Chief Prosecutor, Luis Moreno-Ocampo, maintained that, “[…]the Statute provides that the Office of the Prosecutor shall act independently on instructions from any external source. Independence goes beyond not seeking or acting on instructions; it means that the Office decisions shall not be altered by the presumed or known wishes of any party or by the cooperation seeking process.”[[6]](#footnote-6) Ocampo’s successor, Fatou Bensouda, has also emphatically defended the autonomy of the OTP: "We are a new tool, a judicial tool, not a tool in the hands of politicians who think they can decide when to plug or unplug us."[[7]](#footnote-7) This article offers a theoretical explanation of prosecutorial strategy at the ICC that explores the intersection of these two extremes—one based solely on legal idealism, the other based primarily on political influence. I do so by developing a theory of prosecutorial strategy that explains why egoistic institutional interests may internalize the preferences of external actors. In particular, I provide a rationale for why the strategic interests of three of the most powerful *non-member states* may be internalized by the OTP. These non-states party to the Rome Statute include the United States, Russia, and China. Using this theoretical framework, I argue that prosecutorial strategy emerges from the intersection of principle, power, and pragmatism. While international legal principles press the OTP to place greater emphasis on situations deemed to be the most grave, institutional pragmatism prompts the Court to move much more cautiously in cases involving the strategic interests of these three non-member states.

**II. Developing a Theory of Prosecutorial Strategy**

Given that the ICC is such a new institution on the international landscape, it’s not surprising that little theoretical research has been done to explain the behavior of the Court.[[8]](#footnote-8) It is only now that enough time has passed that we have a large enough sample to begin identify possible patterns of ICC behavior. Because there isn’t a developed theoretical literature focused on the behavior of the ICC, it may be useful to seek inspiration and guidance from research aimed at explaining the behavior of other international courts with longer track records, such as the International Court of Justice (ICJ), the European Court of Justice (ECJ), and the European Court of Human Rights (ECHR).

A number of scholars have turned to Principal-Agent (PA) theory to address questions regarding the behavior of international courts and other international institutions and organizations.[[9]](#footnote-9) PA theorists examine the relationship between principals and agents and the mechanisms through which principals attempt to get agents to pursue their preferred course of action. Unfortunately, the models don’t provide a clear picture of whether international courts are autonomous or not. Some posit that being a principal provides specific tools of leverage that can shape outcomes, since control over the terms of delegation contract confers a hierarchical control of the principal over the agent.[[10]](#footnote-10) Applying this framework to the study of international courts, Geoffrey Garrett and Barry Weingast suggest that the ECJ has little autonomy and generally selects outcomes that the court’s most powerful principals prefer.[[11]](#footnote-11) Additional studies also provide support for the notion that IC behavior is influenced by politics. Garrett, Kelemen and Schulz suggest that, while legal precedent is taken into account in court rulings at the ECJ, judges do take into account the likely reactions of member state governments.[[12]](#footnote-12) This would seem to suggest that political factors may have a significant influence on outcomes and challenge those who argue that the ECJ is largely independent of such considerations. Similarly, in their study of the ICJ, Posner and Figueiredo found that that judges tend to favor the states that appoint them and those whose wealth level is commensurate with their home country.[[13]](#footnote-13)  Other scholars counter that international courts are more independent than PA models would generally anticipate. For example, in his analysis of rulings at the ECHR, Erik Voeten found that judges displayed a high degree of independence from political influence.[[14]](#footnote-14) A similar argument is made by Karen Alter, whose work on the European Court of Justice supports the notion that rulings have become increasingly independent of the interests of member governments, suggesting again that international courts have the capacity to remain independent of political pressure.[[15]](#footnote-15) Subsequent research by Mark Pollack and Jonas Tallberg offers similar findings of judicial autonomy.[[16]](#footnote-16)

 Though extant scholarship remains ambiguous regarding the issue of the autonomy of international courts, the PA framework is useful in that it prompts us to think carefully about the relationship between the ICC and the states that established it. Of particular utility is the consideration of the egoistic interests of the parties who make up the ICC and the delegation contract (Rome Statute) that define the terms of the arrangement. However, though these factors are not sufficient to capture the process leading toward the creation of a prosecutorial strategy, they do serve as a good starting point in the process of additional theory-building.

 I begin by considering the interests of the states that created the ICC—the States Party to the Rome Statute. Though states may have had different reasons for wanting to create and then join the Court, the largest was represented by the Like-Minded Group (LMG), a coalition of some 60 countries whose primary stated interests centered on notions of the Court as an instrument of principled justice.[[17]](#footnote-17) We can consider the LMG as representative of the principal in this case, since the group’s interests were for the most part reflected in the final design of the Rome Statute and its membership constituted most of those whose prompt ratification brought the Statute into force on July 1, 2002.[[18]](#footnote-18) Among the most prominent of these principles of justice was the notion of equality under the law. From the standpoint of the principals that created the court, the mandate of the ICC was clear—to pursue justice independent of considerations of the political power and interests of the actors involved. This is reflected in the process of design during the Rome Conference, where the idealist LMG sought to secure the institutional independence of the Court by freeing it from Security Council control. Thus, the OTP is charged with facilitating this pursuit of justice under this premise. For the principals, among the most significant achievements possible would be for the Court to finally hold the leadership of a powerful country accountable for their actions.

 At first glance, the interests of the principals would seem to be perfectly congruent with the institutional interests of the Court itself and could explain extremely high degree of delegation afforded to the Court. As with other international courts, high levels of delegation are intended to promote judicial independence and insulate the courts from political influence.[[19]](#footnote-19) Moreover, this delegation was accompanied by an unusually high level of discretion afforded to the OTP. As pointed out by Luis Moreno-Ocampo, “States established two key provisions in order to enhance the impartiality and independence of the new Court: they made it a permanent body, and they decided that the selection of situations would be a judicial decision.”[[20]](#footnote-20) Presumably, this means that decisions regarding the selection of situations would be soundly rooted in definitive legal thresholds to be met, including jurisdictional limitations as articulated in the Statute and whether or not the principle of complementarity applies in a given instance. Yet, the ICC Statue provides tremendous discretion to the OTP with regards to the selection of cases, a point not lost on the Court’s first Chief Prosecutor: “Few commentators on the Statute have noted that the most distinctive feature of the Court, as compared to the other international tribunals, is the power given to the Court to independently select the situations to investigate.”[[21]](#footnote-21) Presumably, such discretion would simply provide the Court the independence it needs to remain insulated from political factors that might influence these crucial decisions. Applied to the question of prosecutorial strategy, this autonomy manifest in the Rome Statute would lead us to predict that the OTP would pursue a strategy based solely on issues of jurisprudence and international legal principles.

Ironically, the discretion afforded to the OTP that was intended to increase the independence and legitimacy of the Court may also open the door to political considerations and strategic behavior on the part of the Prosecutor.[[22]](#footnote-22) It consolidates the power of the Prosecutor to define both the institutional interests of the Court and plot the course to achieve these objectives. But wouldn’t these interests remain congruent with the principled goals laid out in the Rome Statute by its member states? Over the long-term—absolutely. The ICC’s most ardent and principled supporters have long envisioned a Court that would serve two functions: 1) to provide justice for victims of war crimes, crimes against humanity, and genocide necessary to facilitate post-conflict peace and reconciliation; and 2) to serve as a deterrent against the commission of future atrocities by holding those most responsible to account for their crimes. If successful on both counts, the ICC stands to make a significant and lasting impact on global peace. In the short-term, however, stand formidable obstacles. Two elements figure prominently for the OTP: 1) the fact that the ICC is a new institution that must overcome considerable inertia on the road to becoming a well-functioning and powerful force in international society; and 2) the fact that it is a weak institution that depends on cooperation of states. Achieving success in the long-term depends on successfully navigating these challenges. As will be outlined below, these challenges create an institutional dependence on the UN Security Council that influences the manner in which the OTP pursues its mission to promote international justice.

In order to gain support and build legitimacy, new (and thus, relatively weak) institutions face considerable pressure to produce positive results quickly and achieve some measurable evidence of progress in the short-run. For the ICC, this meant that becoming a functioning Court involved more than gaining the requisite number of states to ratify the Rome Statute—it meant having defendants to prosecute. Thus, the choices regarding initial investigations and prosecutions would likely sacrifice some degree of principle in the name of pragmatism. This pressure toward pragmatism was evident in the ad hoc criminal tribunals that preceded the ICC. Even though the ICTY was based on a principle of decollectivization of guilt that pressed for prosecution of those most accountable for atrocities (i.e. leadership), it began by prosecuting the case of Dusko Tadic, a low-level official at the Omarska prison camp.[[23]](#footnote-23) This choice was clearly influenced by the fact that apprehending political or military leadership was simply not feasible, given that hostilities were still ongoing at the time the court began operation. The ICC faced similar choices at the time it became operational. Given that prosecution is limited by the Court’s *jurisdiction ratione temporis*, the OTP had face the fact that defendants would likely come from ongoing situations where stability and order have not yet been achieved.[[24]](#footnote-24) In such situations, the OTP will likely only be able to try rebels apprehended by government forces (most likely, not the top leadership), or would need states to provide the necessary military intervention necessary to stabilize the situation, apprehend political and military leadership, and turn these defendants over to the Hague for trial. For the latter, the Court depends on the support of the UN Security Council.

Since the Rome Statute itself does not confer authority on the Court to take coercive action, the OTP is dependent particularly on the UN Security Council. The Security Council has the authority to legitimize coercive action to stabilize a situation through its Chapter VII powers under the UN Charter. One example of the need for coercive action sanctioned by the UNSC to forward war crimes trials was the application of NATO airstrikes in the Bosnian conflict. Operation Deliberate Force played a decisive role in equalizing the balance of power among warring parties, brought the political leadership to the negotiating table, and ultimately paved the way to the stability needed for the ICTY to conduct investigations, apprehend accused war criminals, and forward the process of adjudication. The situation in Libya is another prime example. The ICC was granted jurisdiction over the situation in Libya on February 26, 2011, to investigate crimes committed by the Muammar Gaddafi against civilian protesters during the ongoing civil war. It is unlikely that the ICC’s arrest warrant for president Gaddafi would bring him into the Court’s custody absent international military support of the rebel forces. On March 17, 2011, the UN Security Council issued Resolution 1973 that provided the legal basis for international military intervention. The Council’s action was instrumental to the fall of the Libyan regime and to the apprehension of Gaddafi. Unfortunately for the ICC, Gaddafi was executed by the mob that discovered him before he could be brought into custody to stand trial. The situation in Sudan serves as another example, though in the reverse. Though the OTP issued an arrest warrant for Sudanese president Omar al-Bashir, lack of international military intervention enabled the regime to maintain its hold on power. As such, al-Bashir remains a free man.

As major world powers, the Security Council’s five permanent members (P5) can also help to gain cooperation that the court needs from states involved through the use of political pressure and suasion. For example, the United States used the threat of withholding a $50 million aid package to Serbia if they did not cooperate with the ICTY by arresting Slobodan Milosevic and turning him over to the Hague for prosecution.[[25]](#footnote-25) Similarly, the EU linked Serbia’s bid for accession to cooperation in securing the arrest of indicted war criminal Ratko Mladic. Following the apprehension and surrender of Mladic, French president Nicholas Sarkozy declared that the arrest represented “one more step towards Serbia’s integration one day in the European Union.”[[26]](#footnote-26) Although the permanent members of the Security Council are not the only powerful states that can be called upon 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. For example, U.S. opposition to the Court under the George W. Bush administration produced a number of measures aimed at weakening the ICC. These included threatening to veto UN peacekeeping missions unless the Security Council provided a resolution granting immunity for military personnel from non-ICC member countries, including the United States.[[27]](#footnote-27) It also included a massive diplomatic campaign to secure bilateral non-surrender agreements from nations around the globe.[[28]](#footnote-28) While the former Chief Prosecutor maintains that the Court “managed” to operate in the face of this opposition, such obstacles clearly did not make the OTP’s job easier nor facilitate the pursuit of justice.[[29]](#footnote-29) In another example, both Russia and China vetoed a UN Security Council resolution to refer the situation in Syria to the ICC, denying the Court jurisdiction to act where human rights organizations have documented massive human rights violations and atrocities.[[30]](#footnote-30)

Cooperation from the Security Council is also essential for the Court to expand its jurisdictional reach. The Rome Statute limits the court’s jurisdiction to the territory and nationals of member states. Yet, jurisdictional limitations do little to quell the calls for justice for situations arising in states that are not party to the Statute. Sudan (Darfur) and Libya are two significant examples. To answer the calls for justice required referral by the UNSC under the authority afforded to it under the Rome Statute. The capacity for expanding its reach through UNSC referrals must be considered essential to addressing human rights violations even when they fall outside the courts statutory jurisdiction. Though the former Chief Prosecutor maintains that the OTP has never lobbied the Council for referrals, having a Council willing to refer situations to the ICC is essential to its global mission to end impunity.[[31]](#footnote-31) Had it not secured a Security Council referral in the case of Sudan, the ICC would have remained a witness to a situation characterized by many as genocide.

In short, it is clear that the ability of the ICC to achieve its mandate for justice is greatly facilitated when it enjoys the support of the Security Council and can be greatly hampered if these states actively oppose the Court. Indeed, Luis 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.[[32]](#footnote-32) The ICC already has the support of two of the five permanent members of the Security Council—Britain and France. Indeed, their high level of support for the Court was on display when they served as key players in securing a Security Council referral for the situation in Sudan.[[33]](#footnote-33) Thus, it is rational for the OTP to pursue an institutional course aimed partially at forging better relations with the three remaining permanent members of the Security Council that are *not members* of the Court: the United States, Russia, and China (hereafter referred to as the P3).[[34]](#footnote-34) This is not to suggest that the OTP would be optimistic about all three joining the Court. However, U.S. opposition to the Court has softened under the Obama administration, suggesting that future membership is not beyond the realm of the possible. It is difficult to envision Russian or Chinese membership in the Court in the foreseeable future; however, should the U.S. join the ICC, it would place some pressure on them to follow suit. At this point, it is highly unlikely that the OTP would seriously consider such an outcome. That does not mean that the OTP does not have a strong interest in bettering relations with these states, even if their eventual membership in the Court is extremely unlikely. As outlined above, the P3’s role on the Security Council can either facilitate the Court’s mission or create formidable obstructions in its path. Indeed, from its standpoint, the OTP doesn’t necessarily need support—simply actions that don’t obstruct the ability of the Court to investigate and prosecute alleged crimes. In the case of UNSC Resolution 1593, the ICC was able to gain jurisdiction over the situation in Sudan by virtue of the Chinese and American decisions to abstain during the vote rather than exercise their individual veto power. It stands to reason that, realistically, the OTP would seek to facilitate eventual U.S. membership in the Court and to assuage Russian and Chinese opposition to the point that they don’t actively obstruct its mission.[[35]](#footnote-35) Put differently, it is in the *egoistic* institutional interests of the ICC to carefully consider the interests and potential reaction of the P3 in charting a course of action for the Court. Thus, it is rational to expect that these interests may be internalized in the process of defining the institutional interests of the ICC.

From this perspective, we now have reason to believe that there is a divergence of interests between the principals (States Party) and the Court—at least in the short- to medium-time frame as the institution establishes itself, broadens its support base, and cultivates its legitimacy in international society.[[36]](#footnote-36) This theory of internalization suggests that the egoistic interests of the Court take into account the preferences of powerful non-member states whose cooperation it seeks to secure. In this sense, it goes beyond the scope of PA theory that suggests political dynamics are largely endogenous to the P-A dyad. This internalization theory *does not* propose that the prosecutorial strategy of the OTP is driven primarily by strategic interests and deference to the preferences of the P3. Instead, such internalized interests may serve as a significant *intervening variable* in the process of adjudication. Given this, we would expect prosecutorial strategy to be first and foremost driven by an interest to respond to the situations characterized by the gravest violations of international law. However, we would also expect the Court to act much more cautiously when situations involve the strategic interests of the P3. Specifically, this means that the OTP would be less likely to move forward in cases involving high strategic value to any members of the P3. Moreover, we would also expect the process of investigation to move more slowly where P3 interests are vested. These hypotheses are tested using both qualitative and quantitative methods of analysis, and this research develops and draws on an original dataset that includes both legal and political variables.

**III. Research Design**

Creating an appropriate research design to test these hypotheses is challenging. The first involves deciding on the unit of analysis. The unit of analysis used herein is the situation—generally defined in terms of the geographic location where events took place, but also including a temporal context as well. Although the ICC prosecutes individuals rather than states and charges are specific to particular instances of atrocities committed, the OTP has made it clear that initial decisions to act are done in consideration of situations, not specific events within them. As such, decisions are also not predicated on the actions of individuals who could eventually face prosecution by the Court. A second challenge involves deciding which aspect of the process of adjudication to focus on. Adjudicating possible crimes committed in a given situation involves numerous steps. Key among these is the decision to launch a formal investigation after completing a preliminary investigation of a situation. From the standpoint of responding to calls for justice, there is little political capital lost by the OTP upon the decision to open a preliminary investigation. Information obtained during this process remains confidential, and unless a formal investigation is launched, no arrest warrants will be issued. More importantly, there is little discretion exercised by the OTP with regards to preliminary investigations. As a matter of policy and practice, the OTP will open “a preliminary investigation of all situations that are not manifestly outside the jurisdiction of the court.”[[37]](#footnote-37) In contrast, the decision to open a formal investigation involves much more discretion on the part of the OTP. Moreover, the decision to launch a formal investigation performs two significant signaling functions: 1) It suggests that sufficient evidence exists to warrant further action by the court, and 2) It establishes a firm commitment by the OTP to move the process of adjudication further. Though doing so does not bind the OTP into seeking arrest warrants, closing down the adjudication process at this point would signal that the OTP misread the initial findings and that the expense incurred through the formal investigation were squandered. In short, it would have a significantly negative effect on the legitimacy of the Court. As such, the dependent variable used herein is the decision by the OTP to establish (or the failure to establish) a formal investigation. The universe of cases is comprised of all situations where the Court has opened a preliminary investigation, the necessary precursor to the establishment of a formal investigation. It is during the process of a preliminary investigation that the OTP determines if the Court has jurisdiction over a given situation.

 While the choice to focus on the decision to open a formal investigation makes much more sense than focusing on preliminary investigations, it presents formidable challenges in terms of research design. Among the most vexing is the size of the universe of cases—in this case 19 situations under review by the Court. Researchers who seek to explain general patterns of ICC behavior face a Goldilock’s problem—the universe of cases appears too small to rely solely on multivariate regression analysis, too large for an intensive qualitative analysis encompassing all cases. Moreover, qualitative analysis likely would rely largely on the statements of key individuals involved in the decision-making process. It is extremely unlikely that anyone in the OTP would acknowledge political considerations influencing their decisions. I attempt to bridge this gap by carefully employing elements of both. Two key independent variables figure prominently: gravity and P3 strategic interests. Because neither is concrete, I employ substantial qualitative analysis to operationalize each. To address the question of what factors shape the decision to begin a formal investigation (or not), I begin with a qualitative analysis of the relationship between gravity and outcomes regarding formal investigation, as well as the relationship between strategic interests and outcomes. Basic probability analysis is highly suggestive, but doesn’t allow for possible interaction with other potentially significant variables. Thus, I supplement the qualitative data with probit regression analysis. To address the second question—what factors shape the speed that the Court moves from preliminary to formal investigation—I use a similar mixed-methods approach. Survival analysis is supplemented with a qualitative examination of outcomes when different modes of referral are employed. For the quantitative analysis, I utilize an original dataset that includes both constant and time-varying variables with situation-month observations. Observations begin for the month in which a preliminary investigation is established, and run until the month that either a formal investigation is begun or June, 2013. The following sections describe the legal and political variables employed in the analysis.

*A. Legal Factors*

One common theme in the literature suggests that support for international criminal courts is a function of a state’s commitment to liberal principles of human rights and democracy. From this we might expect that democracies would be more inclined to prosecute crimes covered by the Rome Statute within the domestic court system. The level of democracy can thus serve as a proxy for complementarity—the principle that the ICC should not be the primary venue for prosecution, but rather, a court of last resort.[[38]](#footnote-38) Thus, one might expect that the OTP would be less likely to move aggressively in more democratic countries. I operationalize “democracy” using the Freedom House index.[[39]](#footnote-39)

Another likely legal factor involves a judgment as to whether events that occurred in a given situation are severe enough to warrant ICC involvement. Indeed, the Rome Statute charges the ICC to prosecute the *most serious* international crimes. Of course, determining a suitable measure for such a variable is challenging. Given that many of the crimes the ICC is charged with adjudicating involve atrocities committed against non-combatants, using civilian deaths as a proxy for conflict intensity is initially appealing. However, this variable is problematic for several reasons. First, many of the contemporary conflicts marked by atrocities and followed by calls for international justice have been intrastate rather than interstate—either civil wars or ethnic conflicts.[[40]](#footnote-40) Are rebels and their supporters to be defined as “military” or “civilian”? Second, estimates of civilian casualties are often biased to support political agendas, or what Seybolt et al. refer to as “efforts to produce official ignorance.”[[41]](#footnote-41) They add, counting civilian casualties “is an area where politics is often involved in the most pernicious way.”[[42]](#footnote-42) Researchers are left with a combination of cases that lack data on civilian casualties and cases characterized by substantial differences in estimates. Though not an ideal measure, I instead employ aggregated battle-related deaths as an alternative measure to gauge the severity of a conflict, drawing primarily on the Uppsala Conflict Data Program dataset. This measure captures both military and civilian casualties recorded in a given situation.

 Some may object to using the scale of violence alone as a measure of the significance of a given situation. The criteria put forward by the OTP suggest that the gravity of a situation goes beyond consideration of scale, and includes consideration of more subjective factors as well, including the “nature, manner, and impact of the alleged crimes committed in the situation.”[[43]](#footnote-43) Yet, the Statute provides little precise guidance regarding how the “gravity threshold” is to be applied. Margaret de Guzman points out that, “In light of the serious repercussions of labeling an international crime ‘grave,’ one might expect the concept of gravity to have reasonably well-defined and accepted content in international law. In fact, the opposite is true. Individuals who craft, apply, and write about international criminal law invariably reference the seriousness of the crimes at issue but rarely specify what they mean.”[[44]](#footnote-44) This had led to some glaring inconsistencies. For example, the OTP argued that he was hesitant to open a formal investigation into possible crimes committed in Iraq because they involved a small number of victims, yet he was willing to open a preliminary investigation into the situation in Korea that involved a similarly low-volume of casualties.[[45]](#footnote-45) In rationalizing his decision on Iraq, the Chief Prosecutor writes, “The alleged crimes committed by those nationals of States Party in Iraq appeared isolated and did not meet the required gravity threshold.”[[46]](#footnote-46) Because the Statute does not offer a precise means of determining the level of gravity, finding an appropriate measure to be used in this analysis is problematic. Consideration of factors such as the nature, manner, and impact of crimes is inherently subjective. Utilizing the stated assessments of the Chief Prosecutor is inappropriate because, as a variable, such remarks would suffer from endogeneity.

 One solution was offered by Allison Danner, who argued that gravity could be reflected in terms of a hierarchy of crimes. Noting that a “hierarchy of crimes seems to emerge from the case-law of the ICTY,” she suggests that genocide is the most grave, and points out that the ICTR frequently referred to it as the “crime of crimes.”[[47]](#footnote-47) Citing similar references in the case-law drawn from the ad hoc tribunals, she further suggests that war crimes can be considered “lesser crimes” (i.e. less grave) than crimes against humanity. Thus, gravity could be measured on a 1-3 scale. The problem with this operationalization is that this scheme was largely conceptualized with respect to gravity as applied to individual acts, not necessarily to situations as a whole. Most of the situations brought to the attention of the Court show evidence of crimes across the hierarchy of crimes, thus we are left with little to differentiate level of gravity between situations. Thus, garnering a subjective assessment measure from the OTP suffers from endogeniety, while utilizing a categorical hierarchy loses precision at the level of the situation. I have sought to address these limitations by using original survey data drawn from sources with backgrounds and experience commensurate with those of the Chief Prosecutor. Twenty of the world’s most noted international legal scholars/practitioners drawn from five continents were surveyed, selected because of their extensive expertise in the area of international criminal justice. Survey participants were asked to gauge the gravity of situations under investigation by the Court on a scale of 1-10 (10 being the most grave) using only the ICC’s published criteria as guidance in their determination.[[48]](#footnote-48) The mean score for each situation as reflected in the surveys received were used in the analysis.

*B. Political Factors*

The high degree of discretion given to the OTP under the Statute raise questions regarding whether or not external political factors influence the judgment and action of the prosecutor. The broader literature on the Court prompts us to consider several likely factors.

One possible political factor could involve public pressure. This argument is in line with those who cite the influence of global civil society on the creation of the court in the first place.[[49]](#footnote-49) From this perspective, one might predict that increased levels of public attention on a given situation will increase the probability that the court will establish a formal investigation. I utilize original data compiled from content analysis of news stories on situations considered by the Court that were published in major world publications from July 2002 through June 2013. Stories on situations under review by the ICC were analyzed to confirm that they involved aspects germane to the Court (i.e. war, casualties, deaths, etc) as opposed to other news from the country (for example, the economy). In all, 190,462 news stories published in major world publications were included in the dataset and observations were made on a country-month basis.

Non-governmental organizations may also serve to create political pressure to act. Numerous scholars have documented the role that NGOs played in the process leading up to the signing of the Rome Statute, and the number of such organizations has grown substantially over time.[[50]](#footnote-50) Many NGOs acknowledge the fact that they actively press for ICC action by providing information to the OTP via communiques. Moreover, the OTP has made clear that it pays close attention to the reports groups such as Amnesty International and Human Rights Watch generate. In describing the preliminary investigation on the situation in Iraq, the Chief Prosecutor noted that, “[W]e conducted an exhaustive search of all readily-available open source information, including media, governmental, and non-governmental reports. Significant additional material collected from open sources includes, among others, the findings of Amnesty International, Human Rights Watch, Iraq Body Count, and Spanish Brigades against the War in Iraq.”[[51]](#footnote-51) To reflect the level of pressure human rights NGOs direct towards the OTP, I measure the number of published press releases and reports produced regarding a specific situation. I draw on the archive of such materials established by the Coalition for the International Criminal Court (CICC), an NGO that serves to bring together a wide array of human rights organizations that support an active role for the ICC in dealing with human rights issues. For the period 2002-2013, I reviewed 2,399 press releases and reports that appear in the CICC archive and recorded the number that applied to each situation where a preliminary investigation was opened by the OTP.

 Lastly, the internalization theory posed here generates the final political variable tested in this analysis: the strategic interests of the P3 vested in a given situation. What constitutes “strategic interests” in the sense used here? Defining strategic interests is an inherently subjective enterprise and is challenging to operationalize because no single measure can capture it adequately. As such, I employ qualitative analysis of bilateral relationships between individual members of the P3 and countries where primary investigations have been established by the ICC.[[52]](#footnote-52) I attempt to utilize the most parsimonious measure possible in operationalizing strategic interests. I define strategic interests in this setting as the combination of three primary components: 1) level of involvement in a situation, 2) strategic military value, and 3) the significance of economic ties. “Level of involvement” reflects the degree to which a member of the P3’s actions contributed to the commission of atrocities—either directly or indirectly. An example of direct involvement would be Russia’s actions in Georgia.[[53]](#footnote-53) Indirect actions might be financial or military support for those who perpetrated atrocities in a given situation. Thus, where level of involvement is high, there is the risk of potential prosecution by the OTP should the ICC proceed to a formal investigation. Although cases involving indirect involvement are a much lower risk in terms of vulnerability to prosecution, information made public during the investigation and possible trials could pose a substantial threat to a P3 member’s soft power. Among the three components of strategic interests employed herein, level of involvement is likely the most sensitive. As such, it is weighted double relative to the other two measures included composite “strategic interests” variable. Strategic military value similarly considers multiple factors, including alliance relationships, as well as the regional military importance of the relationship. In addition to whether an alliance relationship exists for a given dyad, I also consider the qualitative nature of the relationship when determining the overall value. China has what could be considered a “special relationship” with North Korea.[[54]](#footnote-54) Similarly, the United States—Israel relationship is frequently described as “special” by leadership on both sides.[[55]](#footnote-55) The regional importance of a bilateral relationship is essential to consider as well. For example, since 2001, Russia has sought to increase its influence in the Western hemisphere by strengthening its ties with Venezuela. Venezuela has been one of the largest importers of Russian-made weapons, the two countries have carried out joint military exercises, and Russian military forces have utilized Venezuelan bases. The significance of the relationship is increased because of Russia’s relative lack of political influence in the hemisphere. Another example is the developing relationship between China and Nigeria. China’s interest in close relations with Nigeria is a function of its oil resources as well as an important step in the PRC’s grand strategy to increase economic and political influence on the continent.[[56]](#footnote-56) “Significance of economic ties” reflects the relative importance of the relationship and considers the country’s position among the bilateral trading relationships of P3 countries. Level of exports from the P3 member country is prioritized over level of imports, except in cases involving strategic resources, especially oil. Along each facet, situation-countries are coded on a 1-3 scale. The total strategic value of a relationship is determined by a sum of these scores, which are then converted back to a 1-3 scale to correspond with low, medium, and high strategic value.[[57]](#footnote-57)

**IV. Findings**

The empirical evidence provides strong support that the gravity of a situation and the level of P3 strategic interests vested in a given situation have a strong influence on the choices made by the OTP, both the choice to pursue a formal investigation and the swiftness with which they do so. A simple summary of Court actions when considering these two variables provides initial support for the hypotheses offered herein. As shown in Table 1, formal investigations have been

**Table 1: Investigation Type for Situations Deemed the Most Grave**

|  |  |  |
| --- | --- | --- |
| **Situation** | **Gravity** | **Formal Investigation** |
| Democratic Republic of Congo | 8.5 | Yes |
| Sudan | 8.5 | Yes |
| Uganda | 7.3 | Yes |
| Nigeria | 5.8 | No |
| Central African Republic | 5.5 | Yes |
| Afghanistan | 5.3 | No |
| Cote d’Ivoire | 5.3 | Yes |
| Libya | 5.3 | Yes |

established in 75% of the cases deemed to reflect the gravest violations of crimes covered under the Rome Statute. Consistent with the hypotheses, both of the situations where formal investigations have not been established involve cases with high or medium levels of strategic importance to a member of the P3. Conversely, Table 2 shows that none of the situations involving high levels of strategic interests to a P3 member have had a formal investigation opened. Moreover, only 1 of the three situations involving mid-level strategic interests has had a

**Table 2: Formal Investigation Status for Situations with High Strategic Interests**

|  |  |
| --- | --- |
| **Situation** (Relevant State) | **Formal Investigation** |
| Afghanistan | No |
| Comoros (Israel) | No |
| Georgia | No |
| Iraq | No |
| Korea (North Korea) | No |
| Palestine | No |
| Venezuela | No |

formal investigation opened, and that case (Sudan) was referred by the Security Council. Though striking, this cursory analysis is a rather blunt instrument on which to make substantive judgments regarding causal inference. Thus, I utilize additional quantitative tools of analysis to provide additional support and clarity.

A series of probit regressions were performed to check their effect on whether the Court established a formal investigation across cases.[[58]](#footnote-58) Probit regression tests the probability that an observation with certain characteristics (i.e. defined by the covariates included) will fall into either of the two outcome categories. The results of the probit regression can then be transformed to establish their marginal effect on outcomes. Marginal effects show the effect that a one unit change in the covariate will have on the probability that a formal investigation won’t be established for a given situation. Regressions were run with only two covariates at a time because of the small number of observations available for analysis.[[59]](#footnote-59) The probit results provide further evidence that the decision regarding whether or not to open a formal investigation is strongly influenced by the level of gravity witnessed in a given situation (p=.015). Moreover, the evidence suggests that strategic interests also play an important role in outcomes. Strategic interest is statistically significant (p=.016), while most other variables have little statistical significance on outcomes. The results of the probit regression become more meaningful when converted into their marginal effects, shown in Table 3. In the case of gravity, a one unit change in the level of gravity increases the probability that a formal investigation will be established by roughly 30% (dy/dx=0.317). Conversely, for each unit increase in the strategic value of a given situation, the probability that a formal investigation will be established *decreases* by over 50% (dy/dx=0.509). As reflected in Figures 1 and 2, the more grave the situation, the more likely a formal investigation will be established, while the more strategic importance P3 countries place on a given situation, the less likely a formal investigation will be established.

**Table 3: Marginal Effects after Probit (Paired Covariates)**

|  |  |
| --- | --- |
|  | (1) |
|  | FORMAL |
| FORMAL |  |
| STRATEGIC2 | -0.510\*\* |
|  | (0.172) |
|  |  |
| NGO | -0.00484 |
|  | (0.0170) |
|  |  |
| GRAVITY | 0.317 |
|  | (0.266) |
|  |  |
| BDEATH | -0.0000701 |
|  | (0.0000473) |
|  |  |
| MEDIA1 | 0.000212 |
|  | (0.000171) |
|  |  |
| HRREPUTATION | 0.0782 |
|  | (0.0713) |

Marginal effects; Standard errors in parentheses

 (d) for discrete change of dummy variable from 0 to 1

\* *p* < 0.05, \*\* *p* < 0.01, \*\*\* *p* < 0.001

**Figure 1: Effect of Increases in Gravity on Probability of Formal Investigation**



**Figure 2: Effect of Increases in Strategic Interests on Probability of Formal Investigation**



 The probit analysis provides further support for the qualitative empirics that P3 strategic interests shape institutional choices regarding the selection of situations to investigate. It does not suggest that the Court is beholden to the P3 nor captured by them. Rather, it suggests that the Court is more likely to establish formal investigations for those situations deemed most grave, but also takes into account the perceived interests of powerful states whose support it would like to gain. This would be consistent with a principled, yet pragmatic prosecutorial strategy. However, a closer look at the data gives reason for caution with regards to the application of the gravity threshold. Figure 3 shows patterns drawn from the results of the survey conducted regarding situational gravity. The graph plots the range of gravity levels assigned to a situation across the universe of survey respondents as well as the mean score used in the quantitative analyses. While the gravity variable was statistically significant in the probit model, Figure 3 shows the degree of variation in respondents’ assessment of the gravity of a given situation. For many of the situations there was a significant degree of disagreement among

**Figure 3: Gravity of Situations under Investigation by the ICC**

respondents regarding the level of gravity. In particular, variation was particularly high for the cases of the Central African Republic, Colombia, Iraq, Kenya, and Nigeria, each having a range of at least 5 scale points between the low and high values. Note, however, that the mean in many cases clearly deviates from the median, suggesting that the size of the range across situations is a function of outliers in the survey pool. On the one hand that should give some confidence that the correlation between assessments of gravity and the choices made by the OTP with regards to investigations is indeed robust. However, the presence of such significant outliers, combined with the institutional discretion afforded to the OTP also suggest that there is the potential for significant deviation regarding the assignment of situational gravity depending on the perspective of a given individual holding the office of Chief Prosecutor.

 Do these factors also affect the speed of the adjudication process? To answer this question, I utilize survival analysis to examine likely legal and political variables that may affect outcomes. I begin with a simple test of how strategic interests affect the process of adjudication. Figure 4 presents the Kaplan-Meier “survival function” for situations involving low, medium, and high levels of strategic interest to one or more of the P3.[[60]](#footnote-60) Each line represents the

**Figure 4: Effect of Increases in Strategic Interest on**

**Probability that the ICC Doesn’t Open a Formal Investigation**



probability that an inquiry open for a given number of months “survives” to the next month (i.e. that the ICC does not open a formal investigation at that time). The graph reinforces the qualitative results regarding the decision by the OTP to open a formal investigation: situations that have high (level 3) strategic value to the P3 have a 100% probability that a formal investigation *will not* be established. Of course, this could change since most still have open primary investigations underway. However, even if the OTP eventually decides to open formal investigations for some of these situations, the difference in duration between those with high strategic value and those with lower strategic value is striking. Figure 4 illustrates the declining rate of survival as the strategic value of a situation decreases. Put simply, as the strategic value of a situation declines, the probability that the OTP will open an investigation rises sharply and the time between the preliminary investigation and start of a formal investigation is reduced. To test whether the differences in survival rate reflected in the K-M curve is statistically significant, a non-parametric log-rank test was run.[[61]](#footnote-61) The results of the log-rank test reveal that the results shown in Figure 1 are statistically significant (p=0.019).[[62]](#footnote-62)

To gauge the significance of the strategic interest variable when other covariates are included in the analysis, I utilize the Cox proportional hazard regression model. The Cox proportional hazard model is a type of event history analysis that in this case tests the extent to which the covariates influence the rate that a formal investigation won’t be established. The Cox regression produces a hazard ratio, which is the relative probability of failure due to a one unit increase in the value of the independent variable. To gauge how sensitive the effect of strategic interest is to the other covariates, a series of bivariate Cox regressions were run, pairing strategic interest with each of the other covariates.[[63]](#footnote-63) The p-values from these regressions ranged from 0.04 to roughly 0.09, providing a measure of confidence that that the effect of strategic interest is not sensitive to model specification.[[64]](#footnote-64) Next, a full model Cox P-H estimate was run that included NGO activity, gravity of the situation, number of battle deaths, amount of media coverage, and human rights reputation. The results listed in Table 4 show that the only statistically significant variable is strategic interest (p=.05). The fact that gravity was not a

**Table 4: Cox Proportional Hazard Model Results (Full Model)**

|  |  |
| --- | --- |
|  | (1) |
|  | \_t |
| STRATEGIC2 | 0.0251\* |
|  | (0.0471) |
|  |  |
| NGO | 1.034 |
|  | (0.0596) |
|  |  |
| GRAVITY | 1.950 |
|  | (0.796) |
|  |  |
| BDEATH | 1.000 |
|  | (0.000126) |
|  |  |
| MEDIA1 | 1.002 |
|  | (0.000929) |
|  |  |
| HRREPUTATION | 1.904 |
|  | (0.864) |
| N | 19 |

Exponentiated coefficients; Standard errors in parentheses

\* *p* < 0.05, \*\* *p* < 0.01, \*\*\* *p* < 0.001

statistically significant predictor stands in stark contrast with the results drawn from the probit regressions. This suggests that while gravity may be strongly correlated with the probability that a formal investigation will be established, it may not be highly correlated with the duration of preliminary investigations. However, given the small-n available for the full-model analysis, these results should be considered more suggestive than definitive. As such, additional empirical evidence is necessary to supplement these findings.

Another indicator that strategic interest exerts influence over the process of adjudication can be seen when we consider the role of power in the reverse utilizing a qualitative approach. In other words, how does the court behave when it receives support by great powers, particularly members of the Security Council? Most of the current situations under review by the ICC were initiated either by member state referrals or by the OTP (*proprio motu*) with authorization by a pre-trial chamber. However, two situations, Sudan and Libya, were referred by the UNSC. The

**Figure 5: Average Weeks between Preliminary and Formal Investigation**

first situation referred by the Security Council was Sudan, which granted jurisdiction to the ICC after passage of Resolution 1593 on March 31, 2005. Passage of the resolution was unanimous, although four Security Council members abstained, including two members of the P3—China and the United States. In this case, a willingness not to block the referral was sufficient support for the ICC to gain jurisdiction over the situation. The OTP opened a formal investigation only 9 weeks later on June 6. The situation in Libya was referred to the ICC by the UNSC through Resolution 1970 on February 26, 2011. Resolution 1970 enjoyed stronger support of the P3, passing unanimously with no abstentions. The OTP opened a formal investigation just five days later on March 3. When comparing the assertiveness of the OTP’s response to situations across the different sources of referrals, there are clear patterns of behavior. Figure 5 shows the average time between the start of a preliminary investigation and the start of a formal investigation for the three sources of referrals. The average time between preliminary and formal investigations is roughly 45 weeks for situations referred by States Parties to the ICC, whereas those referred by the Security Council average only five weeks.

While there are many factors that may affect the speed of an investigation,the evidence suggests that the OTP may feel more confident in moving the process forward and making a stronger institutional commitment for situations where the UNSC has offered its support. This is also consistent with the strategic interest hypothesis, but in the reverse. Where investigations may clash with P3 strategic interests, the OTP has an interest to proceed cautiously. Where the Court has the backing of the Security Council, the OTP is more inclined to pursue the case more aggressively.

**V. Conclusion**

Many are loathe sacrificing principal at the altar of pragmatism, or worse, *realpolitik*: “In order for the International Criminal Court to build legitimacy over time, it must both act and be seen to act in a neutral way that transcends political pressures.”[[65]](#footnote-65) Similarly, Cherif Bassiouni argues, “The legitimacy of the ICC will not be sustained on the basis of occasional referrals based on political expediency but will depend on the consistency of its work.”[[66]](#footnote-66) This would certainly include political pressures that might underlie any sort of regional or racial bias. Some critics of the Court have argued that its prosecutorial strategy is an extension of great power bias against weak African countries.[[67]](#footnote-67) Similarly, others have suggested that powerful states have sought coerce the Court to comply with their interests, using direct influence through regular dialogue to pressure the OTP.[[68]](#footnote-68) If the legitimacy of the Court is tarnished by questions regarding the OTP’s choices regarding which situations it investigates, not only will this potentially hamper its efforts to expand the number of States Party, but risks losing the hard-won support it already has.

Though highly provocative arguments, the “regional bias” and “institutional capture” explanations of ICC behavior are extreme and do not take into account the many non-African situations under preliminary investigation by the OTP nor the fact that the current Chief Prosecutor is Gambian. Moreover, they face a formidable burden of proof unlikely to be met by the available evidence. The evidence presented herein strongly suggests that great power interests shape the behavior of the Court, but there is no direct evidence that the OTP is beholden to the interests of powerful Western states as some critics have claimed. Rather, a more nuanced explanation of Court behavior is gained by examining how the *egoistic* institutional interests of the OTP are influenced—not determined—by the strategic interests of some important external actors. This is *not* a case of institutional capture, but rather, the *internalization of external preferences*. It is a reflection of the challenges facing a new, relatively weak institution that depends considerably on receiving cooperation from states, particularly powerful ones. The theoretical framework forwarded here reveals how the interests of powerful *non-member states* (and thus, not principles under the more limited PA framework) can be taken into account by the OTP in defining institutional interests and consequently, shaping prosecutorial strategy.

 The underlying theory and resultant findings are significant to our understanding of the ICC, and may also be of interest to those studying other international courts or international institutions more generally. First, they provide a theoretical explanation for the behavior of the ICC and the decisions made by the OTP regarding situation selection in accordance with its prosecutorial strategy. The theory of prosecutorial strategy forwarded here is strongly supported by the available empirical evidence—both quantitative and qualitative. Though there was no attempt to account for initial actions into a situation (i.e. opening a primary investigation), the internalization hypothesis does illuminate a powerful intervening variable in the process of investigation and adjudication by the court. While the law may be clear on a principle, how this is pursued in practice by the Court offers considerable latitude to the OTP that can strongly shape the legal process. The evidence presented here illuminates factors that may press the OTP to proceed more cautiously in some cases (those where P3 interests are involved) and more aggressively in others (where referral came from the authority of the UNSC). More broadly, the theoretical framework and the evidence drawn from the ICC reveal how behavior can be affected by institutional dependence on external actors, and how the preferences of these actors may be internalized into the decision calculus even legal institutions where procedure is clearly articulated in law. As such, they may be of interest to those interested in the functioning of international legal institutions more broadly, not just on the ICC.

 These findings should also be of interest to those seeking to understanding international institutions more broadly. It unpacks the ways that new and/or weak institutions may be more vulnerable to the influence of great power *realpolitik*. This influence need not be the product of direct suasion by these powerful states, but rather, as a function of the dependence such institutions have on them and their institutional interests to garner their support. Such insights would seem applicable to institution-building across issue areas, including international trade, finance, and environmental protection. Moreover, understanding these processes may facilitate the creation of more successful international institutions charged with addressing crucial global challenges.

 Lastly, there are normative implications that can be drawn as well. Idealists critical of the Court’s apparent consideration of great power interest—*particularly among those who are not even members of the Court*—consider such actions as anathema to the pursuit of justice. Others argue for a more pragmatic course: “The Prosecutor should therefore establish and adhere to a long-term policy which is widely perceived as acceptable, while carefully balances the need for political support with the need to be perceived as independent and credible.”[[69]](#footnote-69) The evidence presented herein suggests that the OTP has done just that, and has navigated a very difficult course between principle and pragmatism. The significance of gravity in the series of analyses performed here suggests that the OTP has indeed remained true to the Court’s mission to prosecute the most serious international crimes. As such, it would seem that the OTP acts in accordance with the wishes of the State parties.[[70]](#footnote-70) On the other hand, the consistently high significance of strategic importance reflects institutional awareness of the very practical dependence the Court has on powerful states to successfully prosecute cases and bring the architects of mass atrocities to justice. Moreover, the ability of the Court to expand its jurisdictional reach and global influence is dependent on gaining the support of three of its most powerful non-member states—the United States, Russia, and China. The road to achieving its institutional mandate for international justice requires that the OTP be pragmatic as well as idealistic.

**References**

Alter, Karen. 2008. Agents or Trustees? International Courts in their Political Context. *European Journal of International Relations* 14 (1):33-63.

Alter, Karen. 2006. Delegation to International Courts and the Limits of Re-Contracting Political Power. In *Delegation and Agency in International Organizations*, ed. by D. Hawkins, D. Lake, D. Nielson, and M. Tierney. Cambridge: Cambridge University Press.

Alter, Karen. 1998. “Who are the Masters of the Treaty”? European Governments and the European Court of Justice. *International Organization* 52 (1):121-148.

Ambos, Kai and Ignaz Stegmiller. 2013. Prosecuting International Crimes at the International Criminal Court: Is There a Coherent and Comprehensive Prosecution Strategy? *Crime, Law and Social Change* 59 (4):415-437.

AMICC. 2005. The Principle of Complementarity. Typescript. (Sept. 26) URL: <http://www.amicc.org/docs/Complementarity.pdf> (accessed 9 February 2015).

Arieff, Alexis, Rhoda Margesson, Marjorie Ann Browne, and Matthew C. Weed. 2011. International Criminal Court Cases in Africa: Status and Policy Issues. Washington, DC: Congressional Research Service (July 22).

Bajoria, Jayshree and Beina Xu. 2013. The China-North Korea Relationship. *Backgrounder*

(21 February). URL: <http://www.cfr.org/china/china-north-korea-relationship/p11097> (accessed 22 Aug 2013).

Barnett, Michael and Martha Finnemore. 1999. The Politics, Power, and Pathologies of

International Organizations. *International Organization* 53 (4):699-732.

Bass, Gary Jonathan. 2000. *Stay the Hand of Vengeance*. Princeton, NJ: Princeton University Press.

Bassiouni, M. Cherif. 2006. The ICC—Quo Vadis? *Journal of International Criminal Justice* 4 (X):421-427.

Bosco, David. 2014. *Rough Justice: The International Criminal Court in a World of Power Politics.* Oxford: Oxford University Press.

Box-Steffensmeier, Janet M. and Bradford S. Jones. 2004. *Event History Modeling*. Cambridge: Cambridge University Press.

Brautigam, Deborah. 2009. *The Dragon’s Gift: The Real Story of China in Africa.* Oxford:

Oxford University Press.

Castle, Stephen. 2011. Mladic Arrest Opens Door to Serbia’s Long-Sought European Union Membership. The New York Times (26 May). URL: <http://www.nytimes.com/2011/05/27/world/europe/27union.html?_r=0> (accessed 28 Jan. 2015).

Clark, Phil. 2008. Law, Politics, and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda. In *Courting Conflict? Justice, Peace, and the ICC in Africa*, ed. by Nicholas Waddell and Phil Clark. London: Royal African Society, SOAS.

Cryer, Robert. 2005. *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime.* Cambridge: Cambridge University Press.

Danner, Allison Marston. 2001. Constructing a Hierarchy of Crimes in International Criminal Law Sentencing. *Virginia Law Review* 87 (3):416-501.

de Guzman, Margaret M. 2012a. How Serious are International Crimes? The Gravity Problem in International Criminal Law. *Columbia Journal of Transnational Law* 51 (1):18-68.

de Guzman, Margaret M. 2012b. Choosing to Prosecute: Expressive Selection at the International Criminal Court. *Michigan Journal of International Law* 33 (winter):265-320.

Dong, Jingbo. 2009. Prosecutorial Discretion at the International Criminal Court: A Comparative Study. *Journal of Politics and Law* 2 (2):109-114.

Erlanger, Steven. 2001. U.S. Makes Arrest of Milosevic a Condition of Aid to Belgrade. *The New York Times* (10 March). URL: <http://www.nytimes.com/2001/03/10/world/us-makes-arrest-of-milosevic-a-condition-of-aid-to-belgrade.html> (accessed 27 Jan. 2015).

Garrett, Geoffrey R. and Barry Weingast. 1993. Ideas, Interests, and Institutions: Constructing the EC’s Internal Market. In *Ideas and Foreign Policy*, ed. by J. Goldstein and R. Keohane. Ithaca, NY: Cornell University Press.

Garrett, Geoffrey, R. Daniel Kelemen, and Heiner Schulz. 1998. The European Court of Justice, National Governments, and Legal Integration in the European Union. *International Organization* 51 (1):149-176.

Goldsmith, Jack. 2003. The Self-Defeating International Criminal Court. *The University of Chicago Law Review* 70 (1):89-104.

Grandison, Claire. 2012. Maximizing the Impact of ICC Preliminary Investigations. *Human Rights Brief* (10 February). URL: <http://hrbrief.org/2012/02/maximizing-the-impact-of-icc-preliminary-examinations/> (accessed 14 March 2014).

Greenhill, Kelly M. 2010. Counting the Cost: The Politics of Numbers in Armed Conflicts, in

*Sex, Drugs, and Body Counts: The Politics of Numbers in Global Crime and Conflict*, ed. by Peter Andreas and Kelly Greenhill. Ithaca, NY: Cornell University Press.

Hawkins, Darren G., David A. Lake, Daniel L. Nielson, and Michael J. Tierney. 2006. Delegation Under Anarchy: States, International Organizations, and Principal-Agent Theory. In *Delegation and Agency in International Organizations*, ed. by D. Hawkins, D. Lake, D. Nielson, and M. Tierney. Cambridge: Cambridge University Press.

Hoile, David. 2014. *Justice Denied: The Reality of the International Criminal Court*. London: Africa Research Centre.

Human Rights Watch. 2009. *Up in Flames: Humanitarian Law Violations and Civilian Victims in the Conflict Over South Ossetia.* New York: Human Rights Watch (January).

Kelley, Judith. 2007. Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements. *American Political Science Review* 101 (3):573-589.

Kim, Pauline T. 2011. Beyond Principal-Agent Theories: Law and the Judicial Hierarchy. *Northwestern University Law Review* 105 (2):535-575.

Lepard, Brian D. 2010. How Should the ICC Prosecutor Exercise His or Her Discretion? The Role of Fundamental Ethical Principles. *The John Marshall Law Review* 43 (3):553-567.

Little, Douglas. 1993. The Making of a Special Relationship: The United States and Israel.

1957-68. *International Journal of Middle East Studies* 25 (4):563-585.

Luckscheiter, Jochen and Kirsten Maas-Albert, eds. 2012. *A Fractious Relationship: Africa and the International Criminal Court.* Capetown: Heinrich Böll Stiftung.

Ocampo, Luis Moreno. 2009. The International Criminal Court in Motion. In *The Emerging Practice of the International Criminal Court*, ed. by C. Stahl and Göran Sluiter. Leiden: Martinus Nijhoff Publishers.

Office of the Prosecutor. 2010. Draft Policy Paper on Preliminary Investigations. The Hague: ICC. URL: <http://www.icc-cpi.int/NR/rdonlyres/9FF1EAA1-41C4-4A30-A202-174B18DA923C/282515/OTP_Draftpolicypaperonpreliminaryexaminations04101.pdf> (accessed 13 March 2014).

Pollack, Mark. 2003*. The Engines of Integration: Delegation, Agency, and Agency Setting in the European Union.* Oxford: Oxford University Press.

Posner, Eric A. and Miguel F. P. de Figueiredo. 2005. Is the International Court of Justice Biased? *Journal of Legal Studies* 34 (2):599-630.

SáCouto, Susana and Katherine A. Cleary. 2008. The Gravity Threshold of the International Criminal Court. *American Journal of International Law* 23 (5):807-854.

Schabas, William. 2008. Prosecutorial Discretion vs. Judicial Activism. *Journal of International Criminal Justice* 6 (4):731-761.

Schabas, William. 2004. *An Introduction to the International Criminal Court*. 2nd ed. Cambridge: Cambridge University Press.

Scheffer, David M. 2012. *All the Missing Souls: A Personal History of the War Crimes Tribunals.* Princeton, NJ: Princeton University Press.

Seybolt, Taylor B., Jay D. Aaronson and Baruch Fischhoff, eds. 2013. *Counting Civilian*

*Casualties*. Oxford: Oxford University Press.

Sharp, Jeremy M. 2013. U.S. Foreign Aid to Israel. *CRS Report 7-5700*. Washington, DC:

Congressional Research Service.

Smith, Charles Anthony. 2012. *The Rise and Fall of War Crimes Trials*. Cambridge: Cambridge University Press.

Smith, David. 2012. New Chief Prosecutor Defends the Internaitonal Criminal Court. *The Guardian* (May 23). <http://www.theguardian.com/law/2012/may/23/chief-prosecutor-international-criminal-court> (accessed 21 January 2015).

Stahn, Carsten. 2009. Judicial Review of Prosecutorial Discretion: Five Years On. In *The Emerging Practice of the International Criminal Court*, ed. by C. Stahl and Göran Sluiter. Leiden: Martinus Nijhoff Publishers.

Stigen, Jo. 2008. *The Relationship between the International Criminal Court and National Jurisdictions.* Leiden: Martinus Nijhoff Publishers.

Struett, Michael J. 2012. Why the International Criminal Court must *Pretend* to Ignore Politics. *Ethics & International Affairs* 26 (1):83-92.

Tallberg, Jonas. 2002. Delegation to Supranational Institutions: Why, How, and with What Consequence? *West European Politics* 25 (1):23-46.

Taylor, Ian. 2006. China’s Oil Diplomacy in Africa. *International Affairs* 82 (5):937-959.

U.S. State Department. 2012. U.S. Relations with Israel Fact Sheet (28 November). URL: <http://www.state.gov/r/pa/ei/bgn/3581.htm> (accessed 8 August 2013).

Van de Looy, Judith. 2006. Africa and China: A Strategic Partnership. *ASC Working Paper 67.*

Leiden, NL: African Studies Centre.

Vaubel, Roland. 2006. Principal-Agent Problems in International Organizations. *Review of*

*International Organizations* 1 (2):125-138.

Voeten, Erik. 2008. The Impartiality of International Judges: Evidence from the European

Court of Human Rights. *American Political Science Review* 102 (4):417-432.

Walter, Barbara F. and Jack Snyder, eds. 1999. *Civil Wars*. New York: Columbia University

Press.

Wimmer, Andreas, ed. 2004. *Facing Ethnic Conflicts: Toward a New Realism*. Lanham, MD:

Rowman & Littlefield.

1. Office of the Prosecutor 2010, 7. [↑](#footnote-ref-1)
2. Qtd. in Arieff et al. 2011, 27. [↑](#footnote-ref-2)
3. Cf. Arieff et al. 2011, Luckscheiter and Maas 2012. [↑](#footnote-ref-3)
4. Grandison 2012. [↑](#footnote-ref-4)
5. On “institutional capture,” see Bosco 2014. Cf. Smith 2012. [↑](#footnote-ref-5)
6. Office of the Prosecutor 2010, 6. [↑](#footnote-ref-6)
7. Qtd. in D. Smith 2012. [↑](#footnote-ref-7)
8. There are numerous works directed at explaining ICC actions, however they do not develop or test a theory of prosecutorial strategy more generally. *Cf.* Cryer 2005, Clark 2008, Schabas 2008, Dong 2009, Lepard 2010, de Guzman 2012, Scheffer 2012, Ambos and Stegmiller 2013. [↑](#footnote-ref-8)
9. Cf. Alter 2006, Alter 2008, Vaubel 2006, Hawkins et al. 2006, Kim 2011, Pollack 2003, Stone-Sweet 1999, Voeten 2008, [↑](#footnote-ref-9)
10. Hawkins et al. 2006. [↑](#footnote-ref-10)
11. Garrett and Weingast 1993. [↑](#footnote-ref-11)
12. Garrett, Kelemen and Schultz 1998. [↑](#footnote-ref-12)
13. Posner and Figueiredo 2005. [↑](#footnote-ref-13)
14. Voeten 2008. [↑](#footnote-ref-14)
15. Alter 1998. [↑](#footnote-ref-15)
16. Cf. Pollack 2003, Tallberg 2002. [↑](#footnote-ref-16)
17. Schabas 2004, 15-16. [↑](#footnote-ref-17)
18. According Article 126, the Statute would enter into force when it was ratified by 60 nations (roughly the exact size of the LMG). [↑](#footnote-ref-18)
19. Alter 2008, 312. [↑](#footnote-ref-19)
20. Ocampo 2009, 14. [↑](#footnote-ref-20)
21. Ocampo 2009, 13. [↑](#footnote-ref-21)
22. Stahn 2009. [↑](#footnote-ref-22)
23. Bass 2000, 206-207. [↑](#footnote-ref-23)
24. The ICC’s jurisdiction is limited to situations occurring after the Court became operational in July 2002. [↑](#footnote-ref-24)
25. Erlanger 2001. [↑](#footnote-ref-25)
26. Qtd. in Castle 2011. [↑](#footnote-ref-26)
27. UN Security Council Resolution 1422. [↑](#footnote-ref-27)
28. These are also referred to as Bilateral Immunity Agreements (BIAs) or Rule 98 Agreements. *See* Kelley 2007. [↑](#footnote-ref-28)
29. Author interview with Luis Moreno-Ocampo (6 February 2015). [↑](#footnote-ref-29)
30. “Russia and China Veto UN Move to Refer Syria to the ICC,” *BBC News Middle East* (22 May 2014). URL: <http://www.bbc.com/news/world-middle-east-27514256> (accessed 28 Jan. 2015). [↑](#footnote-ref-30)
31. Author interview with Luis Moreno-Ocampo (6 February 2015). [↑](#footnote-ref-31)
32. Author interview with Luis Moreno-Ocampo (6 February 2015). [↑](#footnote-ref-32)
33. Bosco 2014, 138. [↑](#footnote-ref-33)
34. Jack Goldsmith (2003, 89) emphasizes that this dependence is particularly applicable with respect to the United States. He writes, “An ICC without U.S. support […] will not only fail to live up to its expectations. It may well do actual harm by discouraging the United States from engaging in various human-rights protecting activities.” [↑](#footnote-ref-34)
35. It is worth noting that the Chinese have rarely used their veto unilaterally. Thus, it stands to reason if other members of the P5 would not veto a UNSC resolution calling for a referral to the ICC, the probability that China would do so alone is not likely. [↑](#footnote-ref-35)
36. This is consistent with notion of egoistic organizational interests put forward by Barnett and Finnemore (1999). [↑](#footnote-ref-36)
37. Office of the Prosecutor, Policy Paper on Preliminary Investigations (November 2013), 2. [↑](#footnote-ref-37)
38. On complementarity, see AMICC 2005. [↑](#footnote-ref-38)
39. Values range from 1 (free) to 7 (not free). [↑](#footnote-ref-39)
40. Cf. Lake and Rothchild 1998; Walter and Snyder 1999; Wimmer 2004. [↑](#footnote-ref-40)
41. Seybolt et al. 2013, 44; *see also* Greenhill 2013 [↑](#footnote-ref-41)
42. Seybolt et al. 2013, 45. [↑](#footnote-ref-42)
43. Office of the Prosecutor 2010, 2. [↑](#footnote-ref-43)
44. de Guzman 2012a, 21. [↑](#footnote-ref-44)
45. de Guzman 2012b, 285. [↑](#footnote-ref-45)
46. Ocampo 2009, 15. [↑](#footnote-ref-46)
47. Danner 2001, 469-70. [↑](#footnote-ref-47)
48. *See* SaCouto and Cleary 2008. [↑](#footnote-ref-48)
49. Cf. Schiff 2008, Struett 2008, Glasius 2006, Deitelhoff 2009, Sikkink 2011. [↑](#footnote-ref-49)
50. Struett 2008; Sikkink 2011. [↑](#footnote-ref-50)
51. Letter from Luis Moreno Ocampo, Chief Prosecutor of the ICC, to the Hague (9 February 2006) at page 2. URL: <http://www.cara1933.org/userfiles/File/ICC%20Report%20%209February%202006.pdf> (accessed 23 March 2014). [↑](#footnote-ref-51)
52. Appendix A [↑](#footnote-ref-52)
53. Human Rights Watch 2009. [↑](#footnote-ref-53)
54. Bajoria and Xu 2013. [↑](#footnote-ref-54)
55. See U.S. State Department 2012, Little 1993, Sharp 2003. [↑](#footnote-ref-55)
56. Brautigam 2009, Van de Looy 2006, Taylor 2006. [↑](#footnote-ref-56)
57. Scores totaling more than 8 were coded as “high” (3), those totaling 6-8 were coded “medium” (2), and those less than 6 were coded “low” (1). [↑](#footnote-ref-57)
58. Logit regression is another technique that can be employed. In practice, the results tend to be similar for both logit and probit analysis, and preferences for one over the other tend to vary by discipline. [↑](#footnote-ref-58)
59. Appendix B. [↑](#footnote-ref-59)
60. The KM estimator is non-parametric and is one of the most widely used methods for estimating survivor functions. [↑](#footnote-ref-60)
61. This is a basic test of the equivalence of the survival functions across the scores of a covariate, similar to the chi-square test,  and is very well equipped to deal with the right-censoring reflected in the dataset.  [↑](#footnote-ref-61)
62. See Appendix C. [↑](#footnote-ref-62)
63. A test of the proportional hazard assumption was also run to justify the use of the Cox model. None of the covariates violated the P-H assumption. The number of independent covariates included in each regression was kept minimal because of the small number of cases to examine. [↑](#footnote-ref-63)
64. Appendix D. [↑](#footnote-ref-64)
65. Struett 2012, 83. [↑](#footnote-ref-65)
66. Bassiouni 2006, 426. [↑](#footnote-ref-66)
67. Hoile 2014. [↑](#footnote-ref-67)
68. Bosco 2014, 20. [↑](#footnote-ref-68)
69. Stigen 2008, 376-377. [↑](#footnote-ref-69)
70. Schabas 2008, 731. [↑](#footnote-ref-70)