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Growing Up Rough: The Changing Politics of Justice at the International Criminal Court

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Summary

The International Criminal Court (ICC) was established at The Hague in 2002 with a mandate to prosecute genocide, crimes against humanity, war crimes and aggression. The ICC operates as a court of “last resort” that becomes active only when national governments are unwilling or unable to prosecute relevant crimes. Its jurisdiction is subject to various conditions, and can be triggered by the referral of a “situation” to the Court by the UN Security Council, by a state party referral, or through a *proprio motu* investigation initiated by the ICC Prosecutor. Since taking up its work in 2002, the ICC has investigated nine situations, held six trials of individuals and handed down two convictions. In addition, it has conducted 12 preliminary examinations that have not resulted in the opening of official investigations. All investigations and trials to date have focused on African countries.

From its inception, the ICC has been a highly contested institution-building project. Already the negotiations about its statute were marked by heated controversies among participating states. Following the statute’s entry into force, political debates have continued to surround the Court’s relationship with member and non-member states as well as its investigations, arrest warrants and trials have continued to be the subject of political debates. This PRIF report summarizes these debates and tracks the evolution of the “politics of international criminal justice” at the ICC since 2002. The report argues that there have been three distinct phases in the work of the Court, and that key political problems relating to ICC activities have undergone considerable change in the second and third phases.

In the first phase (2002-2005), the Court began investigations in four African states in quick succession. Three of these investigations were triggered by “self-referrals” of ICC member states, the fourth by a UN Security Council resolution referring the situation in Darfur to the ICC. The Darfur referral marked a turning point that ushered in a new phase of ICC activity. In this second phase (2005-2009), the ICC did not take on any new cases but instead focused on advancing its ongoing investigations and consolidating its institutional framework. It also conducted a number of preliminary examinations of non-African situations, which did not, however, lead to the opening of official investigations. In the third phase (2010 to the present), the ICC refocused on Africa and initiated five new investigations on the continent. Other than the first wave of ICC cases, these recent investigations have included two *proprio motu* investigations by the ICC Prosecutor.

These different phases in the ICC’s work, this report will show, have not only been characterized by different patterns of ICC activity, but also reflect shifts in the political dynamics underlying the Court’s work. Specifically, these changes refer to four political issues that have been widely debated ever since the establishment of the ICC.

The first of these issues concerns the *politics of state support* for the nascent court. In the first years of its existence, the ICC struggled to expand its still-limited membership and with the opposition of great powers, most notably the United States. The latter factor led to a blockade on ICC-related matters in the UN Security Council that prevented the latter body from playing the supportive role vis-à-vis the Court envisioned in the ICC Statute. At the same time, ICC investigations were invited and supported by African governments which had a political interest in delegitimizing domestic political opponents through ICC

investigations. The Darfur referral reversed this initial pattern by breaking the blockade in the Security Council, and enabling the ICC to become active *against* the interests of a government of the affected territory. In the second and third phase of the ICC's work, the politics of state support have continued to evolve in the direction foreshadowed by the Darfur referral. A gradual rapprochement between the ICC and the Security Council has been accompanied by growing scepticism towards the Court in Africa. The Court's embrace by the Council and its targeting of sitting heads of state in Darfur and Kenya have given rise to criticisms that it functions as a "neo-colonial" instrument of great power domination.

The second dimension of the politics of justice that underwent some – albeit much less dramatic – change in the second and third phases of the ICC's work relates to the *politics of the ICC Prosecutor*. In the ICC's early years, the Office of the Prosecutor (OTP) encouraged consensual self-referrals. This cooperative approach avoided jeopardizing still-fragile state support, and it promised quick successes with investigations and trials, which allowed the young Court to demonstrate its effectiveness. Faced with criticisms of political bias and "complicity" with questionable African governments, the OTP has partly adjusted its strategy since 2005. Most importantly, the Prosecutor has sought to demonstrate greater independence from the governments of "situation countries" by initiating the Court's first *proprio motu* investigations, by charging higher-ranking individuals, including the Sudanese and Kenyan Presidents, and by indicting individuals from different sides of the respective conflicts. He has also reversed his earlier strategy of speeding up investigations and trials by bringing very narrowly defined criminal charges against indictees. And yet, the Prosecutor has also perpetuated certain contested practices established in the ICC's early years. Self-referrals have continued after 2005, and upon closer inspection, even the *proprio motu* cases have followed signals of encouragement from the governments concerned. Furthermore, the OTP has remained unwilling, until very recently, to go against the interests of major powers, particularly Western ones, in selecting situations for investigation. The decision to close a preliminary examination of British conduct in Iraq in 2006 was a case in point. The fact that the new ICC Prosecutor recently reopened this preliminary inquiry and named the US military as a suspect in war crimes in Afghanistan sends a tentative signal that the Court may yet begin to emancipate itself in this respect.

The third political problem analysed in the report concerns the ICC's *impact on peace processes in situation countries*. When the Court was created, optimists hoped that its prosecutions would deter atrocities, even in the course of ongoing conflicts, whereas pessimists warned that they could further escalate ongoing violence. These hopes and fears became more acute when the Court opened its first investigations, all of which intervened in ongoing conflicts. From today's perspective, the track record of these early cases suggests that both extremely pessimistic and extremely optimistic predictions were exaggerated. The Court has been credited with positive as well as negative effects on peace processes, specifically in Uganda and Darfur, but was not the single most important factor in either case. The ICC's second wave of cases is still too fresh to draw definite conclusions. However, it is already evident that since 2005 states themselves have become increasingly disillusioned with regard to the ICC's short-term deterrent value.

The growing doubts about “legal deterrence” among analysts and policy makers relate to a fourth political issue which distinguishes the different phases in the ICC’s work: the Court’s relationship with, and impact on, collective crisis management by military means. Warnings that states could hide behind the ICC to avoid politically costly military crisis interventions appeared to be confirmed in the early work of the ICC, particularly by the Darfur referral. And yet, this precedent has not been repeated since 2005. On the contrary, new investigations in the third phase of ICC activity have been closely associated with coercive military measures. This development is explained by the confluence of two political dynamics. The governments of intervening countries have sought to use ICC investigations to build support for military action, while the Court itself has exhibited a growing interest in close cooperation with peacekeeping missions.

Based on this analysis of the changing politics of international criminal justice, the report concludes with a series of policy recommendations. The Court itself should take bolder steps towards independence not only from its (thus far exclusively African) situation countries but also vis-à-vis major (Western) powers. ICC member states, in turn, should abandon the idea that the Court can be used as an effective tool for short-term crisis management, and should refrain from abusing it as a “bargaining chip” in diplomatic crisis mediation efforts. At the same time, however, they should also resist the opposite political reflex of using ICC investigations as a justification for controversial military interventions.

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1. Introduction: The ICC and the politics of international criminal justice

The International Criminal Court (ICC), established at The Hague in 2002 to prosecute severe atrocity crimes, has been one of the most embattled multilateral institution-building projects of the post-Cold War era. From the outset, negotiations about the Court's statute were marked by fierce controversies among participating states (e.g. Weschler 2000). The statute that was eventually adopted at the 1998 Rome Conference ("Rome Statute") gives the Court jurisdiction over genocide, war crimes, crimes against humanity and aggression (Art. 5), although this last crime was only defined at the 2008 ICC Review Conference (Krefß/Von Holtendorff 2010). The ICC's jurisdiction is subject to a range of conditions. As a "court of last resort" (Kirsch 2007: 543), it operates according to the principle of complementarity: it can only become active when national governments are either unwilling or unable to prosecute relevant crimes (Art. 17). Alleged crimes may come under the scrutiny of the Court in three ways (Art. 13): through the referral of a "situation" by an ICC member state, through the ICC Prosecutor's own initiative (*proprio motu*) and through a referral resolution of the United Nations (UN) Security Council. In the first two scenarios, the ICC can only investigate crimes committed on the territory of or by the nationals of member states (Art. 12). This precondition does not apply to referrals made by the Security Council – which also has the power to *defer* ICC investigations for a (renewable) one-year period (Art. 16). In all three "trigger" scenarios, the decision to open an official investigation is preceded by a "preliminary examination" of the case's admissibility, and is subject to the approval of the ICC's Pre-Trial Chamber.

At the Rome Conference, agreement on these basic institutional features was only achieved after lengthy and often acrimonious discussions. Fifteen years later, political controversies about the Court have not yet subsided – as illustrated by recent setbacks in the ICC's two most high-profile investigations. On 5 December 2014, the Court's only trial to date against a sitting head of state, Kenya's President Uhuru Kenyatta, collapsed. On this day, ICC Prosecutor Fatou Bensouda announced the withdrawal of charges against Kenyatta, which had related to his role in instigating post-election violence in 2007 (Bowcott 2014). The decision had been preceded by controversy over the legal admissibility of the case and the wisdom of the Prosecutor's strategy, by accusations that the trial reflected a political bias of the Court against Africa, and by reports about the Kenyan government's obstruction of investigations and intimidation of witnesses. Following the Prosecutor's announcement, observers warned that the collapse of the Kenyatta case not only undermines the credibility of the ICC but also risks reigniting ethnic tensions in the country, given that Kenyatta's deputy and erstwhile political opponent in the 2007 episode, William Ruto, is still facing trial in The Hague (Ulrich/Zick 2014). Only a week after the Kenyatta decision, the ICC Prosecutor made another startling announcement relating to a second major investigation. In her briefing report to the UN Security Council on 12 December, she stated that the Court would shelve its investigations of crimes committed in the conflict in the Sudanese region of Darfur. Pointing to the Security Council's lack of support in enforcing arrest warrants issued in the case, including the one against Sudan's President Omar Al-Bashir, she argued that she was "left with no choice but to hibernate

investigative activities in Darfur” and “shift resources to other urgent cases” (UN News Centre 2014).¹ As in the Kenyatta case, the decision marks the culmination of long-standing controversies about the Sudanese government’s obstruction of investigations, other African states’ lack of cooperation with the Court and the ICC’s alleged anti-African bias, a noncommittal Security Council, and negative implications that investigations and arrest warrants might have for peace negotiations in Darfur.

The Kenyatta and Darfur fiascos illustrate typical problems that the ICC has encountered time and again in its work: political interference of governments with investigations, lack of support in the wider international community, the ICC Prosecutor’s heavy dependence on state cooperation, and controversies over potential negative effects of ICC investigations on peace processes. Taken together, these issues suggest that the Court must be understood not only as a *legal* institution that is operating according to the logic and procedures of international law, but also as a fundamentally *political* institution that is influenced by a wide range of political forces and, in turn, has a political impact reaching far beyond the courtroom. It is, in other words, both subject and object of a “politics of international criminal justice” (Mégret 2002: 1261).

This PRIF report tracks and analyses the evolution of the political dynamics that have shaped the ICC’s work to date, asking whether the major political problems that emerged in its early years have since lessened – or in fact worsened. Specifically, it highlights four central issues that plagued the Court in its infancy and were subject to heated academic and political controversies at the time (see section 2). Whereas the first two issues refer to different political factors that have *influenced ICC investigations*, the last two issues concern two different dimensions of *political impact* that the ICC itself has had on political developments and decisions.

- (1) Politics of state support: Although the ICC Statute has been signed and ratified by 122 states, the Court is far from reaching universal membership. Key players, including the United States, Russia and China, have remained detached, as have large parts of Asia and the Middle East. In the ICC’s early years, these divisions made it hard for the Court to obtain much-needed state support for its investigations, arrest warrants and trials, particularly from the UN Security Council. At the same time, some governments actively invited the Court to investigate crimes committed on their own territories, giving rise to suspicions that they were abusing the ICC as a legal weapon against domestic opponents.
- (2) Prosecutorial politics: Not only states but also the ICC itself, and particularly its Prosecutor, were widely criticized for basing decisions about investigations on political considerations, particularly for demonstrating the Court’s relevance and broadening its support among states.
- (3) Political impact in the situation countries: Even before the ICC was officially set up, commentators debated whether its future prosecutions could help to reduce and

¹ Other than in the Kenyatta case, all arrest warrants and charges remain in place in the Darfur investigation.

resolve political tensions and end violent conflicts in the countries concerned (the “situation countries”), or rather would exacerbate these problems. The Court’s early cases added fuel to such controversies, as they all interfered in ongoing violent conflicts.

- (4) Political impact on military crisis management: Another discussion that accompanied the ICC from its inception concerned the wider political impact it would have on the international community’s practice of collective crisis management, specifically on military intervention in violent conflicts. While some warned that states could use the Court as an excuse to avoid politically costly interventions, others predicted that military measures would be legitimized and facilitated by ICC prosecutions.

The following report uses the four themes highlighted above as an analytical lens to track continuity and change in ICC politics in different phases that are discernible in the Court’s work. It argues that while all four issues emerged in the first three years of the ICC’s operation, each of them has undergone significant change in two subsequent phases of ICC activity.

In 2003-2005, the ICC launched four investigations of “situations” that all concerned alleged crimes committed in African countries (the Democratic Republic of the Congo/DRC, Uganda, the Central African Republic/CAR and Sudan). The last of these investigations (Sudan) was triggered by a UN Security Council referral, the other three by “self-referrals” of ICC member states.² The Darfur referral marked a critical turning point that was followed by a second phase of ICC activity. In this second phase, the Court did not take on any new cases, but focused on advancing its old investigations as well as on a range of preliminary examinations of situations outside Africa, none of which led to the opening of an official investigation. Starting in 2010, a third phase of ICC operations then saw the Court return to Africa with a new wave of investigations: Kenya (2010), Libya and Côte d’Ivoire (2011), Mali (2012) and – again – the Central African Republic (CAR II, 2014). In addition to two self-referrals (Mali, CAR II) and a Security Council referral (Libya), the new cases have included, for the first time, *proprio motu* investigations by the ICC Prosecutor in Kenya and Côte d’Ivoire.

The following analysis will show that these different phases in the Court’s work were not only marked by distinct patterns of ICC activity, but also by important changes in underlying political dynamics and discussions. With regard to the politics of state support, the second and third phase have brought a gradual rapprochement of the Court with the great powers, enabling a more cooperative relationship with the UN Security Council, but also a parallel estrangement from Africa, the region on which all of the Court’s practical work has focused to date. The politics of the ICC Prosecutor, meanwhile, have been marked by a struggle for greater independence from state cooperation in phases two and three – with partial success. With respect to the ICC’s political impact in situation countries,

² For an overview of ICC investigations and preliminary examinations to date, see tables 1 and 2 in the annex.

experiences with the Court's first cases have led both commentators and state representatives to tone down earlier hopes it could be used as an effective tool for short-term crisis management. However, extreme pessimistic predictions that ICC investigations could exacerbate and prolong violence have not been substantiated either. Lastly, the Court's indirect political impact on collective crisis management through military interventions intervention has become much clearer in its third phase of activity. Whereas the Darfur referral was still widely seen as a symbolic substitute for robust military measures, all recent ICC investigations have been closely linked to coercive military interventions. This development can be attributed to the Court's own interest in cooperating with UN peacekeeping missions, but also to states' attempts to justify military interventions with reference to ICC investigations.

The remainder of the report is structured as follows: Section 2 briefly summarizes the political and academic discussions about the four central political problems outlined above that emerged in the ICC's early work, up until the 2005 Darfur referral. In greater detail, section 3 deals with the – thus far less widely analysed – second and third phases of ICC activity. It begins with a short overview of key empirical developments after 2005 and then compares the political dynamics underlying them to those driving the Court's early work, again focusing on political influences on and political impacts of ICC activities highlighted by the four central themes. Section 4 summarizes key lessons and policy implications emerging from the analysis.

2. The politics of international criminal justice in the ICC's early work (2002-2005)

2.1 Politics of state support: Power struggles and self-referrals

At the 1998 Rome Conference, 120 states voted for the adoption of the ICC Statute. This numerical success, however, was somewhat spoilt by the fact that several major powers, including the United States, China, Russia and India, voted against the negotiated compromise – and have since remained non-members of the Court. After the Rome Statute reached the required 60 ratifications and entered into force in 2002, state support remained a paramount problem for the ICC. Specifically, it had to grapple with three interrelated issues: a still limited membership, a blockade of the UN Security Council reflecting US hostility toward the Court, and the contested practice of self-referrals.

Limited state membership – Given the various preconditions written into the ICC Statute, the young Court urgently needed to win more state ratifications to extend its jurisdictional reach. While ICC membership grew steadily in the Court's early years and was already strong in conflict-prone regions such as Africa, several critical players continued to stand aside, and the ratification record remained patchy in other key regions. Drawing on statistical analysis, scholars advanced a range of explanations for the apparent differences in states' willingness to join and support the ICC. Court supporters, they argued, were motivated partly by a principled commitment to human rights and humanitarian

foreign policy goals, and partly by a belief that they were unlikely to become the targets of ICC prosecutions (Kelley 2007; Neumayer 2009; Struett/Weldon 2006). In addition, the attitudes of weaker states were often affected by structural dependency on major ICC proponents and opponents (Goodliffe et al. 2012; Kelley 2007).

A blocked UN Security Council – The challenge of broadening the ICC’s membership was thus connected to a second major problem: the fact that the new Court soon became the object of open power struggles between proponents and opponents, particularly between the United States (US) and its traditional Western European allies. After taking office, the George W. Bush administration withdrew his predecessor’s belated signature of the ICC Statute and embarked on an active campaign against the Court. At a bilateral level, it sought to negotiate “non-surrender agreements” with as many states as possible to shield US nationals from ICC prosecutions, and threatened countries unwilling to sign with aid and diplomatic sanctions (Johansen 2006: 311-9). The European Union (EU) lobbied against such agreements and instructed EU candidates to turn down related US requests (Thomas 2009). In the UN Security Council, the US pushed through resolution 1422, which exempted all UN peacekeepers from ICC prosecutions for the period of one year, in 2002.³ European members of the Council reluctantly backed the resolution because the US threatened to block the renewal of the peacekeeping mission in Bosnia and Herzegovina. Resolution 1422 was renewed for another year in 2003, but in 2004 – following the Abu Ghraib scandal – the US dropped its request for a further renewal, fearing that it would be outvoted this time (Johansen 2006: 309-10). The US also secured similar exemption clauses in Council resolutions mandating peacekeeping missions in Liberia and Burundi, and managed to delete positive references to a potential role for the ICC in resolutions reacting to the bombing of the Baghdad UN headquarters and the Gatumba massacre in Burundi. As a result of these policies, the Security Council was blocked from playing the supportive role toward the Court envisaged both in the ICC Statute and in the draft Relationship Agreement Between the ICC and the United Nations.⁴

The invention of self-referrals – Given this state of affairs, the only pathways through which the ICC could theoretically become active were *proprio motu* investigations on the Prosecutor’s own initiative or state referrals. In practice, what emerged in the ICC’s early years was a second-and-a-halfth pathway: the *self-referral* of ICC member states, which invited the ICC Prosecutor to investigate crimes committed during civil wars on their own territories. This was not the kind of state referral envisioned envisaged by the drafters of the Rome Statute, but a creative re-interpretation of a clause originally intended to allow ICC member states to initiate investigations of crimes in *other*, recalcitrant member states (Arsanjani/Reisman 2005: 386-7). The fact that consensual self-referrals nevertheless became the dominant practice not only reflected the Prosecutor’s fear that a more

3 The US claimed that this move was covered by the Council’s authority to defer ICC cases under Article 16 of the ICC Statute, but this interpretation was heavily criticized by legal experts (e.g. El Zeidy 2002: 152-42).

4 The draft Relationship Agreement was adopted by the ICC’s Assembly of State Parties (ASP) in 2002 and entered into force in 2004, following further negotiations between the ICC and the UN Secretariat.

confrontational approach could endanger still-fragile state support (see section 2.2) but also the interests of the self-referring African governments. As analysts noted critically, the latter sought to use the ICC as a strategy for delegitimizing civil war opponents by branding them as “enemies of mankind” (Nouwen/Werner 2010: 946). In this way, the states sought to justify military measures against their opponents – measures that in some cases *also* involved outright atrocities (ibid: 950-1; see also Arsanjani/Reisman 2005: 392-5).

The turning point of the Darfur referral – Up until 2005, the politics of state support for the Court were thus characterized by a pattern of growing but regionally varied ratifications, hostility exhibited toward the Court by major powers, and consensual self-referrals by African states. All these elements began to shift with the decision of the UN Security Council on 31 March 2005 to refer the situation in Darfur to the ICC. Resolution 1593, widely hailed as a breakthrough, was made possible by the US decision to drop its earlier opposition to the European-led initiative and abstain on the vote (Johansen 2006: 320-3).⁵ This turnaround was neither easy nor inevitable, but resulted from the coincidence of several extraordinary conditions: the strong pressure of the domestic “Save Darfur” coalition in the US to respond to ongoing violence in the civil war in Darfur, the recommendation of a UN inquiry to refer the case to the ICC, and the shrewdness of the French UN delegation, which tabled a Sudan resolution tying the Darfur referral to the establishment of a peacekeeping force for Southern Sudan (Fehl 2012: 108). Forced to either veto progress on either of those conflicts or allow the ICC to play a role, the US backed down.⁶ Involuntary as it was, the US stance on Darfur set a precedent that subsequently made it difficult for it to revert to a policy of overt opposition to the ICC. At the same time, resolution 1593 also gave rise to new political controversies. To make the draft acceptable to the US a clause exempting the nationals of ICC non-members from ICC jurisdiction, in the context of UN-mandated operations in Darfur, had been included in the resolution (§6). From the perspective of many states and analysts, the fact that the Council combined its referral of an ICC non-member with a blanket exemption for *other* non-members amounted to a “double standard” of justice and threatened to undermine state support for the Court (Johansen 2006: 324). Thus, the Darfur referral set the stage for a new phase in the Court’s work – and for new controversies over the politics of international criminal justice.

2.2 Prosecutorial politics: Treading softly

The ICC’s early investigations were shaped not only by the politics of ICC member and non-member states, but also by the Court’s own political interests and tactics, particularly by the *consensus-based strategy* of its Prosecutor.

Maximizing formal independence – The first ICC prosecutor, Argentinean Judge Luis Moreno Ocampo, was already heavily involved in structuring the Office of the Prosecutor

5 The US had originally proposed an ad hoc tribunal for Darfur.

6 In addition, earlier key veto players within the US administration were no longer in a position to influence the decision-making process (Thimm 2009: 270).

(OTP) when the Court set up its headquarters in The Hague. By shifting responsibilities among subunits and preventing the publication of formal OTP rules of operation, he was careful to maximize his office's freedom of manoeuvre in selecting situations and cases (Schiff 2008:113-5). However, the way in which he subsequently used this political leeway surprised many observers.

Consensus-based practice – Rather than opting for independent *proprio motu* investigations, Moreno Ocampo actively encouraged self-referrals, a practice based on a reinterpretation of the ICC Statute which was not invented by the self-referring states themselves but rather by the OTP (Schabas 2008: 752).⁷ From the Prosecutor's perspective, self-referrals had clear strategic advantages. Firstly, they avoided any open challenge to national sovereignty, thus allaying concerns about an overly assertive Court that had been articulated most notably (but not only) by the United States during the Rome negotiations. The self-referral strategy thus promised to both soften US opposition and encourage further ratifications of the Rome Statute. Secondly, the choice of cases in which states could be expected to cooperate with ICC investigations promised quick success in terms of arrest warrants and trials, helping the Court to demonstrate its relevance and legitimacy (Gaeta 2004: 950-1). Outside a consensual scenario, similar success was unlikely, particularly given that the Security Council as a potential enforcer of state cooperation was blocked on ICC-related matters.

From the perspective of critics, the Prosecutor's strategy raised difficult questions. Most importantly, the acceptance of self-referrals that were quite obviously directed against specific militant opposition groups created a strong appearance of "complicity" with governments that had themselves employed criminal tactics (Schabas 2008: 751; see also Arsanjani/Reisman 2005: 390-2). While the Prosecutor was careful to stress that his office would investigate both sides of each conflict, he appeared to jeopardize his impartiality with moves such as a joint press conference with the Ugandan President.

In summary, prosecutorial politics during the ICC's first phase of operations were marked by a strongly consensus-oriented attitude toward both member and non-member states of the Court. This strategy reflected the Prosecutor's concern for broadening the ICC's membership and improving its relationship with the great powers as much as his interest in speedy and successful investigations.

2.3 Political impact in the situation countries: Deterrence or "peace versus justice"?

One reason why the self-referral strategy met with much scepticism from the beginning was that it touched on a long-standing debate about the *effects of international criminal prosecutions on ongoing conflicts*. The fact that all of the ICC's first investigations focused on crimes committed in ongoing civil wars between government and opposition forces raised

⁷ In the case of the DRC, the self-referral only occurred after the Prosecutor announced his intention to seek authorization for a *proprio motu* investigation from the ICC Pre-Trial Chamber.

hopes that the Court could help to resolve the respective crises – but also widespread fears that it could involuntarily exacerbate them.

General and specific deterrence – From the Nuremberg trials to the ad hoc tribunals of the 1990s⁸ to the ICC negotiations, proponents of international criminal justice had pointed to the “deterrent” effect prosecutions would have on potential future perpetrators (Vinjamuri 2010: 192). Only recently, this argument was complemented with the idea of “specific deterrence”, the suggestion that prosecutions in *ongoing* conflicts can deter conflict parties who have already committed atrocities from continuing their actions, and contribute to the delegitimization and downfall of perpetrators in power positions (Akhavan 2001: 7-8; Vinjamuri 2010: 194-7).

Peace versus justice – This line of argument was criticized by sceptics who warned that prosecutions could escalate, rather than pacify, ongoing conflicts, as they would provide an incentive for perpetrators to tighten their grip on power – a problem often referred to as a “peace versus justice” dilemma (Rodman 2011; see also Snyder/Vinjamuri 2003). It was in part on the grounds of a potential clash between peace and justice that the UN Security Council was given the power to defer ICC investigations under Article 16 of the ICC Statute (Arsanjani 1999: 26-7).

Peace processes and ICC investigations – When the ICC commenced work on its first cases, the peace versus justice issue was an obvious focus of debate, as all four investigations concerned ongoing violent conflicts between government and opposition forces. With regard to the three self-referrals, pundits and practitioners discussed whether the prospect of ICC prosecutions could help to bring militant rebels to the negotiating table – or rather drive them away from it (e.g. Volqvartz 2005). The UN Security Council referral of the Darfur situation was lauded by proponents as a “means of removing serious obstacles to national reconciliation and the restoration of peaceful relations in Darfur” (Condorelli/Ciampi 2005: 592), whereas sceptics warned that the Court’s investigations could provoke retaliation against civilians, endanger the work of humanitarian aid organizations and obstruct a negotiated settlement of the conflict (Ulich 2005; Rodman 2008: 556-7). Five years into the ICC’s existence, the jury was still out on the impact of the contested investigations.

2.4 Political impact on military crisis management: The ICC as a fig leaf?

Another early debate revolved around the question of how the ICC’s existence would *affect other collective practices of crisis management* in the international community at large. In particular, observers debated whether the Court’s existence and activities would effectively obstruct, or rather facilitate, military intervention for humanitarian purposes.

8 The International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), established in 1993 and 1994, respectively, are known as “ad hoc tribunals” because they were set up by the UN Security Council as non-permanent institutions with the task of investigating crimes committed only during specific conflicts.

Criminal prosecution as an obstacle to intervention – A danger that loomed large in the minds of ICC sceptics was that states might hide behind the Court’s expected deterrent effect and use it as a cheap substitute for financially and politically costly military interventions in humanitarian crises. According to observers, the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) had already been motivated in part by Western leaders’ initial eagerness to avoid military involvement, while also being seen as “doing something” in response to the suffering (Anderson 2009: 333-337). This experience led some analysts to conclude that a permanent ICC would perpetuate the “moral hazard” problem and “become a virtuous excuse for states to turn a blind eye to atrocities” (Smith 2002: 178). Other court sceptics warned that the ICC would inhibit humanitarian intervention for another reason. Its competence to indict even the nationals of non-member states under certain conditions as well as its jurisdiction over the (yet-to-be-defined) crime of aggression would discourage potential intervening countries from exposing their soldiers to the risk of ICC prosecution (Scheffer 1999: 19).

Criminal prosecution as a catalyst for intervention – Both lines of argument were contradicted by those who drew different inferences from the experience of the Yugoslavian tribunal. According to them, the ICTY served to legitimize and prepare intervention, rather than delay it – after all, even senior US officials had described it as a strategy to “fortify the international political will to employ economic sanctions or use force” (Scharf 1999). The new permanent court, it followed, would “only magnify the dangers of the ad hoc tribunals” and was likely to become a justification and facilitator for military intervention (Chandler 2002: 146-7; see also Anderson 2009: 334).

ICC investigations and the use of military force – The first years of the ICC’s operation did not provide conclusive evidence for the prevalence of one or the other effect. On the one hand, the Ugandan government sought to use the self-referral not only to legitimize its own use of force against the rebel Lord’s Resistance Army (LRA) but also to shore up external military support (Nouwen/Werner 2010: 949).⁹ The Darfur referral, on the other hand, was criticized as exactly the kind of symbolic substitute for military action that ICC sceptics had warned against (Anderson 2009: 335-336; Bosco 2005). While the UN Security Council had earlier endorsed the African Union’s consensus-based peacekeeping mission in Darfur, it remained unwilling to authorize coercive military action against government forces (Rodman 2008: 547-9). At the same time, the inclusion of a special exemption clause for UN or AU personnel in the ICC referral (discussed above) speaks *against* the argument that potential intervening powers were deterred by a fear of ICC prosecution in this case.

9 The LRA, led by Joseph Kony, has fought a guerrilla war against the Ugandan government of Yoweri Museveni since 1987. While it initially operated in Northern Uganda, it was later pushed into the border regions of Southern Sudan, the CAR, and the DRC by Ugandan government forces. The rebel group is widely blamed for large-scale atrocities including wilful killings, mutilations and the abduction of child soldiers. However, government forces have also been accused of crimes against civilians committed in the course of various anti-LRA offensives.

3. A new politics of justice? The ICC's work after the Darfur referral (2005-2014)

As discussed above, the Darfur referral marked the end of the first phase of ICC operations in which the court opened an initial series of investigations. The ICC's work from this turning point until the present day can be subdivided into two phases characterized by distinct patterns of activity. In the five-year period immediately following the Darfur resolution the ICC did not take on any new cases but focused instead on preliminary examinations of various non-African situations, on advancing its old investigations toward the stages of arrest warrants and trials, and on consolidating its institutional framework at the 2008 ICC Review Conference. Following this interim period, a third phase of ICC activity began in 2010 with the onset of a new wave of investigations, again exclusively in African countries. The following section provides an in-depth analysis of the political dynamics shaping the ICC's work in the second and third phase of its activity. Following a brief overview of key developments at and around the court in 2005-2014, both phases are discussed jointly and compared to the pre-2005 phase of ICC operations with regard to the four political issues highlighted in the report's introduction. As in section 2, the analysis focuses on two key factors *influencing* the ICC's investigations – state support and prosecutorial politics – and on two dimensions of the political *impact* of ICC investigations – on violent conflicts in the situation countries and on collective practices of crisis management in the international community at large.

Preliminary examinations – Most of the preliminary examinations undertaken by the ICC since 2005 have focused on situations outside the African continent, yet none of them has, thus far, led to the opening of an official investigation, and some cases have been closed by judgments of inadmissibility. Perhaps the most controversial decision concerned complaints about the conduct of British troops in Iraq following the 2003 Anglo-American military intervention. In 2006, the ICC Prosecutor announced that he would not initiate an investigation of the situation because the alleged crimes fell below the “gravity” threshold beyond which the court could become active (Moreno Ocampo 2006). That same year, Moreno Ocampo decided against an official investigation of complaints about crimes committed in Venezuela, and in 2012, he declined to investigate complaints about crimes committed on the territory of Palestine. Since taking office, Moreno Ocampo's successor has closed one further preliminary examination (relating to military incidents between North and South Korea) while also reviving others. In May 2014, ICC Prosecutor Bensouda reopened the preliminary Iraq inquiry following the submission of new evidence by human rights organizations. In 2013, her office had already encouraged Palestine to make an official bid for ICC membership, following the country's recognition as a “non-member observer state” by the UN General Assembly in November 2012. In December 2014, the Palestinian Authority followed this advice by ratifying the Rome Statute, a step that may yet

result in a new preliminary examination of crimes allegedly committed on the territory of Palestine.¹⁰

Progress in old cases – Meanwhile, the ICC’s “old” cases advanced at different speeds toward the stages of arrest warrants and trials. The first arrest warrants were issued in the DRC case in 2006, further indictments followed in 2007 and 2010. All indicted Congolese individuals were former rebel leaders. Two of them, Thomas Lubanga Dyilo and Germain Katanga, have since been convicted by the ICC, two were acquitted, one has yet to stand trial and one remains a fugitive. In the Ugandan case, five leaders of the oppositional LRA were indicted in July 2005, but none has yet been apprehended by the court. In the CAR case, former rebel leader Jean-Pierre Bemba was arrested in 2008; his trial closed in November 2014 with decisions pending. In the Darfur case, the OTP initially issued arrest warrants against two mid-level government figures and three rebel leaders in 2007. In 2009, Sudanese President Omar Al-Bashir was charged with war crimes and crimes against humanity.¹¹ None of the indicted government officials have been arrested to date. The rebel leaders initially appeared voluntarily at the court; one of them was subsequently acquitted, one disappeared when charges against him were confirmed, and the third died before a trial could be opened.¹² The lack of progress in the Darfur investigation has prompted increasingly critical statements by the ICC Prosecutor to the UN Security Council, culminating in her recent threat to “hibernate” investigations until stronger support was forthcoming (see section 1).

Institutional consolidation – At the 2008 ICC Review Conference in Kampala, the most important institutional innovation concerned the previously undefined crime of aggression. At Kampala, ICC member states adopted a series of related statute amendments that defined the crime (Art. 8^{bis}) and specified the preconditions for the court’s exercise of jurisdiction over it, differentiating between the two scenarios of a state referral or *proprio motu* investigation (15^{bis}) and a Security Council referral (15^{ter}).

A new wave of investigations – In 2010, the interim period in which the ICC was preoccupied with old cases, new preliminary examinations and institutional consolidation ended with a big bang: the OTP announced its first *proprio motu* investigation, which focused on the post-election violence that had erupted in Kenya after the country’s 2007

10 Moreno Ocampo’s refusal to investigate had been based on his assessment that it was unclear whether Palestine fulfilled the requirement of recognized statehood, a determination his office did not see itself as competent to make (ICC 2012). The OTP’s 2013 Report on Preliminary Examination Activities did not reverse either of these assessments, but suggested that a Palestinian membership application for the court might have improved chances of success following the 2012 UN General Assembly Resolution (ICC 2013a: 53-4). This judgment was confirmed by the ICC’s ASP, which accepted Palestine as a non-member observer state in December 2014. Following this step, Palestinian President Mahmoud Abbas signed the Rome Statute on 31 December 2014, thus setting Palestine on course to become an official ICC member on 1 April 2015.

11 The genocide charge also requested by the OTP was rejected by the ICC Pre-Trial Chamber but later re-confirmed by the Appeals Chamber, leading to a second arrest warrant against Al-Bashir in 2010.

12 Appearance in court was voluntary in these cases because the OTP used a “summons” procedure, rather than arrest warrants.

Presidential election. A year later, the Prosecutor took the bold step of charging six leaders involved in the violence on both sides of the conflict, including Deputy Prime Minister Uhuru Kenyatta who was subsequently elected President in 2013. All six have since appeared voluntarily (under summons) in the court. Four cases, including the arguably most important one of President Kenyatta, have ended with the dismissal or withdrawal of charges, while the trial of Kenyatta's deputy and former opponent, William Ruto, as well as that of Ruto's long-standing ally Joshua arap Sang, are still ongoing.

Following the start of the Kenyan inquiry, the ICC initiated investigations into four additional new cases in quick succession. On 26 February 2011, the UN Security Council unanimously voted to refer the situation in Libya to the court in resolution 1970. The second investigation triggered by a Council referral resulted in quick ICC arrest warrants against Libyan President Muammar Al-Gaddafi, his son Saif Al-Islam and intelligence chief Abdullah Al-Senussi. Yet none of the accused has since been tried by the ICC. Whereas Muammar Al-Gaddafi was killed during the civil war, the new Libyan authorities have claimed the right to try the other two accused in national courts. The ICC ceded to the Libyan request with regard to Al-Senussi in October 2013, yet continues to insist that Libya is unable to effectively prosecute Saif Al-Islam, who is still in the custody of non-governmental militias.

Shortly after the Libya referral, in May 2011 the ICC Prosecutor announced his second *proprio motu* investigation, that into the situation in Côte d'Ivoire. In the same year, the court issued arrest warrants against former Ivoirian President Laurent Gbagbo and one of his ministers. A warrant against Gbagbo's wife Simone was added in 2012. While she remains under arrest in Côte d'Ivoire, both men are awaiting their trials in ICC custody.

The two most recent ICC cases have not yet resulted in the public announcement of arrest warrants. The situation in Mali was referred to the ICC by the government of Mali in January 2013, and in May 2014 the government of the Central African Republic referred a second situation, related to violence that erupted after 2012, to the court.

3.1 Politics of state support: Winning great power backing, losing Africa

The ICC's mixed track record of apprehending suspects and concluding trials reflects the fact that state support for the court still varies greatly within the international community – more than a decade after its establishment. And yet, beneath this image of stagnation it is possible to discern two major shifts in state attitudes that have taken place since 2005: a rapprochement with the UN Security Council, which reflects an improved relationship with the United States, and a simultaneous estrangement from (parts of) Africa.

Council-court cooperation – The rapprochement of the UN Security Council with the ICC that began with the Darfur referral has since continued accelerating as the ICC began its second wave of investigations. In the interim period of 2005-2010, the Council had already dropped its earlier routine of including express exemptions for UN peacekeepers in resolutions extending the mandate of UN peacekeeping missions (Fehl 2012: 90). In recent years, it has gone even further by making *positive* references to the ICC in numerous presidential statements and resolutions by calling on states to cooperate with specific ICC

investigations – including those *not* triggered by Council resolutions – and by urging UN-mandated peacekeeping missions to support ICC investigations (Kaye et al. 2013: 7-8). In October 2012, the Security Council held its first public debate on its relationship with the ICC; all participants, including ICC non-members, expressed a positive view of the court (Kaye et al. 2013: 1). These developments indicate a dramatic reversal of the blockade that had prevented the highest UN body from supporting the court prior to 2005. In line with this trend, the Council also referred a second situation – the case of Libya – to the ICC, this time in a unanimous resolution that reflected the growing agreement among Council members about the court. It is also noteworthy that, following the non-renewal of the blanket exemption for all UN peacekeepers in 2004, the Council refrained from using its *deferral* power under Article 16 of the ICC Statute. At the same time, the Council now seems to have institutionalized the precedent set by the Darfur referral in exempting the nationals of ICC non-members (and thus three of its permanent members) from ICC prosecutions in the wording of its resolutions – a fact still widely criticized by both state representatives and scholars (Kaye et al. 2013: 22; Kersten 2014a). Critics have also noted the Council’s careful avoidance of creating any *legal* obligation, in its referral resolutions for states *other* than the respective situation country to cooperate with the court, as well as its lack of concrete support for the enforcement of arrest warrants in cases such as that of Sudan’s President (Kaye et al. 2013: 6-7; Nichols 2014). Furthermore, all ICC referral resolutions placed full financial responsibility for the cost of investigations and trials on the court – in contradiction to the Rome Statute, which envisions a use of UN funds (Mistry/Ruiz Verduzco 2012: 7). The most recent setback for the ICC was the failure of the Western-led initiative to refer the situation in Syria to the ICC due to Chinese and Russian opposition (Black 2014). In summary, the Council’s support for the ICC has been growing, but within clear limits.

Mending fences with the United States – At the heart of this development was, above all, a change in the US position that did not bring the US itself closer to ICC membership but largely dissolved the 2002-2005 blockade of the Council.¹³ Both the precedent set with Darfur (despite all US assurances that this was an exceptional case) and the election of a Democratic President with a strong interest in promoting an agenda of “atrocities prevention” played their part in bringing about this more cooperative US attitude (Junk 2014: 542-4, 553-4; Kaye 2013; Thimm 2009: 262-3). Equally important was experience with the actual work of the court (Simons 2013). The Prosecutor’s reliance on consensual self-referrals and his 2006 decision not to investigate British conduct in Iraq seemed to disprove earlier fears of “frivolous” prosecutions of Western soldiers.¹⁴ The US ability to obtain exemptions for ICC non-parties in Security Council resolutions provided an additional safeguard – as did the compromise definition of the crime of aggression adopted in 2008. Although the US had been unsuccessful in its attempt to insert an express exemption for

13 The US voted for the referral of the Libyan situation to the ICC in 2011 and even sponsored the resolution on a referral of the situation in Syria.

14 This also suggests, however, that the Prosecutor’s recent decisions to reopen the Iraq inquiry and to name the US military as a potential culprit for war crimes in Afghanistan (see section 3.2) may put new strain on the US-ICC relationship.

humanitarian interventions into the definition (Barriga 2010: 645), the formula agreed on in Kampala limits the crime to acts that constitute “manifest violations” of the UN charter in terms of their “character, gravity and scale” (Art. 8^{bis}) and restricts ICC jurisdiction over aggression to ICC states parties (Art. 15^{bis}), unless the UN Security Council refers a case. Taken together, these provisions ensure that no US national could ever be prosecuted unless the US joined the court. If it did, it could still opt out of jurisdiction over aggression (*ibid.*), and it could be optimistic that interventions with humanitarian aims would be judged as falling outside the “manifest violation” criterion due to their “character”. In summary, the fact that UN Security Council support for enforcing ICC decisions has still been lukewarm can be explained less by fears that the court could pay “undue” attention to the US or other Council members, than by concerns about the potential political fallout of investigations and arrests in situation countries. In Sudan, for instance, the Council appears to have prioritized ensuring Al-Bashir’s consent to the peacekeeping mission of the African Union/United Nations Hybrid Operation in Darfur (UNAMID) and his cooperation in the South Sudan peace process over enforcing accountability in Darfur (Kersten 2013a).¹⁵

Africa between cooperation and resistance – The second major development in state attitudes was, in a sense, the flipside of growing great power support: a deepening estrangement between the ICC and Africa, the region on which all of the court’s practical work to date has focused. This is not to say that all cooperation between the court and African governments suddenly ceased. The recent track record shows that African governments still resort to self-referrals when such a move fits their political calculations. The government of Mali, for instance, was suspected of having used the ICC referral to draw international attention to its internal conflict with Islamist rebels and to shore up support for an external intervention. As one analyst put it: “[T]he government’s real problem seems to be **defeating** the rebels, not **prosecuting** them” (Heller 2012, emphasis in original; see also Kersten 2012). A closer look reveals that government interests were also a driving force behind the ICC’s investigation in Côte d’Ivoire. The latter was a *proprio motu* case on paper, but in reality it had been explicitly invited by the Ivoirian government, which could not refer a case to the ICC as long as it remained a non-party (Currie 2011).

And yet, African discontent with the work of the ICC has been increasing in the course of the past decade, both within ICC situation countries and beyond. In Uganda, for instance, the government that had itself invited the ICC in 2004 to investigate crimes committed by the LRA later criticized the court for endangering peace negotiations with the rebel group through ill-timed arrest warrants. Non-governmental groups and other African states concurred, arguing that the ICC was marginalizing local, alternative pathways of transitional justice (Apuuli 2011: 122-5).

What angered many African states even more were the ICC’s indictment of a sitting African head of state in the Darfur inquiry and the court’s subsequent decision to press charges against the Kenyan President. In both cases, the African Union (AU) asked the UN Security Council to defer ICC investigations according to the provisions of Article 16 of the

¹⁵ See also *infra* note 22.

Rome Statute, but without success. Noting the lack of response from the Council, the AU affirmed in a series of decisions that it would not cooperate in securing the arrest of President Al-Bashir.¹⁶ African critics claimed that the Sudanese President enjoyed immunity from ICC prosecutions due to Sudan's not being a party to the ICC – a claim rejected by the ICC's Pre-Trial Chamber (Trendafilova 2014: 10-8). In the case of President Kenyatta, the AU took the even more far-reaching view that *all* sitting heads of state should enjoy immunity for their term of office, regardless of the ICC membership status of their country. Such a general exception was also proposed by Kenya as an amendment to the ICC Statute at the ICC's 12th Assembly of States Parties (ASP) in 2013, but was not discussed for formal reasons (Trendafilova 2014: 18-22). Additional reform proposals that were made at AU summits and at various ASP meetings include a deferral competence for the UN General Assembly in addition to that of the UN Security Council, and the adoption of guidelines that would oblige the ICC Prosecutor to take into account negative impacts on peace in selecting cases and issuing arrest warrants (Goldston 2010: 385).¹⁷ Beyond these demands for institutional reform, African leaders have also repeatedly questioned the wisdom of African membership in the Court. In addition, they have made amendments to the Statute of the proposed African Court of Justice and Human Rights (ACJHR) that appear aimed at making it a potential regional "substitute" for the ICC (Du Plessis/Fritz 2014; Du Plessis et al. 2013: 8-11).¹⁸

The recent African disenchantment with the ICC is partly a consequence of the court's investigations in Africa producing their first tangible results. Prior to the Al-Bashir arrest warrant most African states were simply not confronted by the necessity of backing up their rhetorical support for the court with real and potentially costly political action (Du Plessis et al. 2013: 4). And yet, reducing African opposition to this factor would mean oversimplifying things. The fact that African concerns have not been met with prompt responses either in the ASP or in the UN Security Council, combined with the observation of an increasingly active Council willing to shield the interests of its permanent members, has revived earlier

16 Kenya also – unsuccessfully – challenged the admissibility of the case before the ICC Pre-Trial Chamber on the grounds of having undertaken reforms in its justice sector that would enable a domestic prosecution. A debate about a potential withdrawal of Kenya from ICC jurisdiction was still ongoing in the country at the time of writing. For an overview of African opposition to ICC investigations, see Du Plessis et al. (2013).

17 The most recent ASP that met in December 2014 deferred discussions of these African amendment proposals to later ASPs and inter-sessional meetings. The only change adopted in response to African concerns was a 2012 amendment of the ICC's Rules of Procedure and Evidence, which allows government officials to remain absent from trials due to their public duties – a rule that benefitted President Kenyatta and his deputy.

18 The ACJHR will merge the existing African Court on Human and Peoples' Rights and the African Court of Justice. Through a Statute amendment adopted in 2014, the jurisdiction of the future African Court was extended to cover the same international crimes as the ICC Statute, while heads of state and other (unspecified) senior officials were at the same time exempted from ACJHR jurisdiction (Du Plessis/Fritz 2014). Once the Statute of the new Court enters into force, these provisions could be used to attempt to shield African leaders from ICC investigations. However, the ICC is unlikely to defer to decisions of the African Court, as the Rome Statute does not include any complementarity provision with regard to regional courts.

apprehension that the ICC could serve as an instrument of great power domination. Thus, African leaders have chastised the ICC as existing “solely for judging Africans” (Jean Ping, President of the AU Commission, cited in Arieff et al. 2010: 26), as a form of “imperialism” seeking to “undermine people from poor and African countries” (Paul Kagame, Rwandan President, *ibid.*), and as a “biased instrument of post-colonial hegemony” (Museveni, cited in Wassawa 2014). However insincere some of this rhetoric emanating from leaders with poor human rights records may be, its underlying concern is shared by renowned scholars (Mamdani 2008), and it is evident that neither the court nor the Security Council have worked enough to disprove it. With regard to Darfur, African Union members have complained about the fact that the Security Council considered its reiterated deferral proposals only once and only in the context of a broader discussion about the renewal of the UNAMID peacekeeping force (Akande et al. 2010: 10-11). The Council’s discussion of the request for a deferral of trials against Kenyan officials also failed to reassure African states that the body was taking their concerns seriously. Rather than limiting their comments to the substantive merits of the African proposal, Western Council members argued that discussions about a Kenya deferral were “unnecessary” or that the Council was not the “proper venue” for them (UN Security Council 2013). African opposition to the ICC was further hardened by Moreno Ocampo’s failure to take part in AU discussions (Du Plessis et al. 2013: 2) – and by a general feeling that African voices are regularly marginalized in global decision-making processes. In the case of Libya, for instance, the AU’s frustration with Western domination of the UN-mandated intervention there contributed to its refusal, in July 2012, to cooperate with the ICC in the arrest of Muammar Al-Gaddafi (Dembinski/Mumford 2012: 6). Still, it is important to note that African criticism of the court is far from unanimous. At the December 2014 Assembly of States Parties, for instance, numerous African leaders offered strong statements of support for the court (Coalition for the ICC 2014).

3.2 Prosecutorial politics: Timid steps toward independence

In the ICC’s early work, the Court and its Prosecutor gave priority to a policy of self-referrals and close cooperation with situation countries over a more confrontational approach that would have risked undermining state support and slowing down the pace of investigations. While the Darfur referral was an important milestone for the ICC that signalled growing state trust in the new institution, prosecutorial strategy since this turning point has exhibited greater independence from states in some respects only. On the whole, the OTP’s selection of situations to investigate, as well as its choice of cases against specific individuals within situation countries, have continued to reflect a strong concern for demonstrating the ICC’s relevance and ability to act quickly, and for securing state support. Only recently have there been tentative indications that this strategy might undergo some change under Fatou Bensouda, the Gambian lawyer who succeeded Moreno Ocampo as ICC Prosecutor in 2012.

Getting out of Africa? – The first issue that remained the subject of acrimonious discussions after 2005 concerned the court’s *selection of situations* in which to investigate. The rising number of preliminary examinations of (non-African) situations that did not

result in the opening of investigations, and particularly the OTP's 2006 decision to close the Iraq case, increased the pressure on the court to justify why it was devoting most of its energy to three self-selected situations in Africa. In response, the Prosecutor argued that "[a]t present, the gravest admissible situations within the jurisdiction of the court have been in [...] Africa" (ICC 2006). Yet, the manner in which he used the "gravity" argument – a criterion that had hardly been mentioned during the ICC negotiations or before late 2005 – was perceived as inconsistent and unsatisfying by commentators (Schabas 2008: 736-48). For instance, the OTP argued that the African situations involved thousands of deaths, whereas British forces in Iraq were only alleged to have killed 10 to 20 people – but the more obvious comparison between the overall level of killings in African situation countries and in the Iraq war was not made. Neither did the court take into account potentially aggravating *qualities* of the alleged British crimes (such as their commission in the context of an aggressive war, see Schabas 2008: 747-8), whereas it relied on such qualitative criteria in defending its choice of specific *cases* within African situation countries (see below). As a result, the ICC's justification strategy ultimately failed to quell doubts about the court's independence from the interests of major (Western) powers. Against this background, two recent decisions by Bensouda appear to indicate a greater willingness to confront major power interests. In May 2014, the Prosecutor announced the reopening of the preliminary examination of British conduct in Iraq, and on 2 December 2014, her office, for the first time, named the US military as a potential perpetrator of war crimes in Afghanistan (related to the treatment of prisoners) in its annual report on preliminary examinations. Particularly the latter move, while still far from an official investigation or indictment, has the potential to stir up the ICC's recent "truce" with the global hegemon (Bosco 2014).

Increasing formal independence, continued practical cooperation – Another early criticism regarding the ICC's selection of situations had focused on its perceived complicity with self-referring governments. In this regard, the decision to open two *proprio motu* investigations appears to signal an effort of the Court to move toward selecting situations more independently from government interests. And yet, closer examination reveals that both of these investigations were opened in response to signals of encouragement from situation countries. In the Kenyan case, a Kenyan commission of inquiry, which had been established as part of the mediation process between the conflict parties, asked the ICC to investigate, and the ICC had elicited informal assurances of cooperation from the government (Akhavan 2010: 107). Côte d'Ivoire, on the other hand, was really a veiled self-referral (see above). Thus, the use of a *proprio motu* procedure, in and of itself, is not a reliable indicator of prosecutorial independence. In comparison, the OTP played a more proactive role in the recently opened second investigation in the CAR, where the government opted for a self-referral only three months after ICC Prosecutor Bensouda had announced a preliminary examination of the situation. In the case of Mali, Bensouda had warned Mali rebel groups several days before the government referral that they could be prosecuted by the ICC for their large-scale destruction of cultural property (Brown 2012). When the Prosecutor moved to open a formal investigation in the case six months later, commentators speculated that this decision not only reflected Mali's own interest in the prosecution, but also an external factor that promised to facilitate investigations and arrests:

a French military intervention in the conflict had been launched only five days before Bensouda's announcement (Vinjamuri 2013).

Improving cases and charges selection – Concerns about a lack of impartiality and about an exaggerated concern for demonstrating the ICC's efficiency have also marked debates about the Prosecutor's selection of *cases* – that is, of indicted individuals – and of specific criminal charges *within* situation countries. Early criticisms that the court was siding too openly with the government in Uganda's civil war appeared to be confirmed in July 2005 when the OTP issued arrest warrants exclusively against rebel LRA leaders (Clark 2008: 42). Again, the Prosecutor defended his decision with the criterion of "gravity", pointing to the higher number of killings on the LRA side of the conflict (Schabas 2008: 747). Yet he also appeared to react to the criticism by charging individuals from different conflict factions in his investigations in Darfur, Kenya and – to some extent – in the DRC (Clark 2008: 40). In Darfur, the OTP also responded to initial criticism of its "exceedingly prudent" focus on mid-level government figures (Cassese 2006: 438) by taking the confrontational step of indicting President Al-Bashir. Still, it is hardly possible to speak of a full reversal in policy, because two of the ICC's recent investigations (Libya and Côte d'Ivoire) have again resulted in arrest warrants for individuals on only one side of the conflict, while two others (Mali and CAR II) have not yet reached the indictment stage.

Another criticism with respect to the ICC's selection of individuals to be indicted and charges against them has focused on the OTP's choice of "easy" cases that promised quick successes for the court. In particular, the Congolese warlord Thomas Lubanga was apparently singled out for an ICC prosecution because he was already in the custody of Congolese authorities. Also, he was only charged with recruiting child soldiers despite being accused of more severe crimes in the DRC because a more narrowly focused prosecution was considered easier (Goldston 2010: 12-3). Once more, the court (in this case the Pre-Trial Chamber) defended both the focus on the accused and the selected charges with a "gravity" argument, adding qualitative criteria such as the global "social alarm" caused by the practice of child soldiering and the seniority of the accused in the chain of command (Schabas 2008: 742). Yet again, the court did not seem completely immune to criticism, as more comprehensive charges packages were advanced in later cases, both in the DRC and elsewhere.

Strategic retreat – While controversies about the OTP's selection of situations, cases and charges have long accompanied the work of the court, the Prosecutor's recent moves to end the Kenyatta trial and pause the Darfur investigation highlight yet a new dimension of prosecutorial politics. In spite of the air of resignation that marked Bensouda's public explanations of both these decisions, there should be little doubt that her retreat is rather strategic. The underlying calculation seems to be that a highly publicized admission of defeat by the court will shock the international community, and particularly the UN Security Council, into more robust action. It remains to be seen whether this strategy will work, but it is clear that the Prosecutor is trying out a new confrontational strategy to expose and pressure states whose practical support for the court has been high in rhetoric but half-hearted in practice. As one commentator put it: "Bensouda is getting tired of being Charlie Brown to the Security Council's Lucy" (Heller 2014).

In summary, the Prosecutor as well as the ICC's Chambers have not only rhetorically defended the court against accusations of political bias and self-serving case selection, but also genuinely attempted to adapt and improve ICC policy. In addition to the changes discussed above, both the choice of an African Prosecutor and court decisions such as the ruling of non-admissibility in the Al-Senussi case (Libya, see above) can be seen as signals to counter allegations of an anti-African bias. And yet, it is equally clear that concerns regarding state support and expediting investigations continue to play a major role in the court's recent decisions. Thus far, the ICC has taken only small – if increasingly brave – steps toward greater independence.

3.3 Political impact in the situation countries: Doubting deterrence

When the ICC initiated its first investigations, commentators made vastly divergent predictions about the impact the court's activities would have on the ongoing conflicts in situation countries. While optimists hoped that prosecutions would have a deterrent effect and contribute to the prevention of crimes, even on a short-term basis, pessimists warned that they risked exacerbating and escalating the violence. More than a decade into the court's work, an assessment of the – still preliminary – evidence gathered by scholars suggests that *both of these claims* may have been exaggerated.¹⁹

Mixed evidence from the first wave of cases – In the case of Uganda, the ICC has been credited with both positive and negative effects on the peace process between the Ugandan government and the LRA. According to analysts, the ICC arrest warrants were an important factor in bringing rebel leader Joseph Kony and other major LRA figures to the negotiating table in 2006. However, the ICC involvement *also* impeded the successful conclusion of the peace talks, as LRA leaders demanded the withdrawal of arrest warrants before they could sign the final deal (Grono/O'Brian 2008:14-7; Greenawalt 2009: 114-21). Eventually, the peace process collapsed and fighting resumed in 2008. Both African neighbours and the US have since provided military support to the Ugandan government's anti-LRA campaign, which has effectively pushed the LRA out of Northern Uganda and into neighbouring countries (Cooper 2014). The ICC's overall impact on the peace process thus seems to have been neutral, and analysts caution that both the start and the breakdown of the peace talks were influenced by a whole range of other factors. Furthermore, some of the ICC's positive impact was rather indirect. For instance, the court is said to have raised the awareness of the international community and thus shored up external support for the peace negotiations, and it is credited with encouraging the decision of the Sudanese government to end its active support for the LRA (Grono/O'Brian 2008: 16).

Similar conclusions about both optimistic and pessimistic forecasts of ICC impact can be drawn from the second highly contested case, the ICC investigation in Darfur. On the upside, neither did the peace process in South Sudan collapse as a consequence of ICC investigations, nor did the arrest warrant for Al-Bashir put an end to the intermittent

19 On the general methodological difficulties inherent in impact assessments of transitional justice processes, see Thoms et al. (2010).

rounds of (unsuccessful) peace talks between the Sudanese government and Darfur's rebel movement, as some had feared (Natsios 2009).²⁰ On the downside, hopes that the ICC intervention would have a deterrent effect on perpetrators on either side of the conflict have proved equally misplaced. In fact, the fighting has continued amidst growing accusations of failure against the UNAMID peacekeeping force (Lynch 2014). While it is ultimately impossible to know whether Al-Bashir's stance in the conflict was hardened by the arrest warrant against him, the strong backing he has received from African neighbours as well as his provocative plan to travel to the 2013 UN General Assembly meeting in New York do not suggest that he has recently felt very much on the defensive – even before Bensouda's announcement that she would put investigations on hold (Kersten 2013a). Arguably, positive or negative effects might be more pronounced if there was a real chance that any of the arrest warrants against Sudanese government members might actually be enforced. Yet, this remains a matter of mere speculation as long as the African Union does not reconsider its opposition to the ICC investigation and Security Council members remain loath to mandate a more powerful and robust peacekeeping force – or take other effective measures to enforce accountability.

Among the other countries investigated in the ICC's first wave of cases, the Central African Republic stands out as an obvious instance in which deterrence failed to work. At the very same time as Jean-Pierre Bemba was standing trial for his alleged responsibility for war crimes and crimes against humanity, the same crimes were being committed again in a new escalation of violence, giving rise to a second ICC investigation (Kersten 2013b).

Limited impact in the new cases – The second round of ICC investigations that started in 2010 still appears too fresh for drawing final conclusions about positive or negative impacts on peace. Specifically in the cases of Kenya and Libya, both (African) state representatives and commentators again warned that the court's interventions could endanger ongoing peace processes or exacerbate ongoing violence (Du Plessis et al. 2013: 5; Kersten 2014b; Tisdall 2011), whereas the court itself and other trial advocates again placed high hopes in ICC involvement (see below). In both cases, most existing analyses indicate a positive but also extremely limited impact. In Kenya, the ICC appears to have contributed to avoiding, rather than provoking, renewed violence in the 2013 presidential elections and to have fostered national debates about accountability – but without moving closer to actual national prosecutions or undermining the domestic power base of high-level suspects (Halakhe 2013: 14; Brown/Sriram 2012). In the very different political context of the Libyan civil war, early fears that the ICC could spoil a potential peace/amnesty deal appear unwarranted in retrospect, as neither the government nor the rebel side signalled genuine interest in such an outcome of the war. Some senior level defections from the government camp may have been encouraged by the threat of prosecution, yet the prospect of losing the war was most certainly a more pressing concern for these defectors than a distant prison sentence in The Hague (Kersten 2014b).

20 The most widely cited direct negative consequence of the arrest warrant against Bashir was the Sudanese government's decision to expel international humanitarian aid organizations in 2009.

The view of political actors – In the most recent ICC cases which have not yet produced any arrest warrants, any assessment of effects on the respective conflicts would be even more premature. However, all of the new cases offer an opportunity to assess how *political actors* currently evaluate conflicting claims about the effects of international criminal trials and what lessons, if any, they have drawn from experience with the ICC's early cases. The ICC itself has repeatedly rejected suggestions that implications for peace should form part of its criteria for selecting situations and cases.²¹ Nevertheless, the OTP continues to make strong claims about potential *positive* effects that ICC investigations can have in situation countries. With regard to the Kenya investigation, for instance, Moreno Ocampo claimed that “to prevent new violence in 2012 it is necessary to prosecute those responsible for the crimes committed during the post election violence” (ICC 2009). Similarly, he argued that “[a]rresting those who ordered the commission of crimes will contribute to the protection of civilians in Libya because it will deter ongoing crimes” (ICC 2011). His successor Bensouda employed similar rhetoric when she argued that “[t]here is still turmoil in North Mali” and that “[j]ustice can play its part in supporting the joint efforts of the ECOWAS (Economic Community of West African States, C.F.), the AU and the entire international community to stop the violence and restore peace in the region” (ICC 2013b).

In comparison, government officials (from non-situation countries) have become more cautious in their assessments of the ICC's utility as a deterrence tool. On paper and as a matter of general policy, states attribute an important preventive function to the court – a function that has been affirmed both in UN documents related to the international “Responsibility to Protect” (UN General Assembly 2009) and by individual government policies. In the US, for instance, a 2010 Presidential Study Directive on Mass Atrocities has prompted the creation of an Office of Global Criminal Justice charged with supporting the ICC's work (Junk 2014: 553-4). In concrete crisis situations, however, governments have recently made more modest claims about the expected effect of prosecutions. By way of illustration, France was a strong backer of both the Darfur and Libya referrals by the UN Security Council, but was much less assertive in justifying the latter. After the Darfur referral, the French UN Ambassador commented proudly: “We will deter the criminals in Darfur. We will contribute to reducing the exposure of thousands of prospective victims. We will save lives.” (De la Sablière 2005). In the debate about Syria, by contrast, his successor argued rather defensively: “To argue that the involvement of international justice would undermine the peace process [...] makes no sense, as there is no peace process and, in the short and medium term, there are no prospects for any peace process either” (Permanent Mission of France to the United Nations 2014). Passed between the Darfur and the Syria debates, the Council's referral of Libya to the ICC, at first sight, appears to be a move aimed at deterring atrocities in Libya – so the accompanying rhetoric suggested. And yet, Council members were unwilling to rely on criminal sanctions alone, as the referral was quickly followed by a military intervention. Furthermore, Western intervening powers

21 In a 2007 Policy Paper, the OTP even drew an explicit (if contested) distinction between the “interest of justice” formulated as a criterion of admissibility in the ICC Statute and the “interest of peace” (Schabas 2008: 749).

played a double game by supporting the ICC referral while also working on a possible exile option for Al-Gaddafi as part of a prospective peace deal. The ICC was thus used as a bargaining chip, rather than an instrument of deterrence (Kersten 2014b).

In summary, evidence from past and ongoing ICC cases suggests that neither deterrence effects nor negative effects on peace processes have been as marked as many commentators had initially warned. Policy-makers already appear to be learning this lesson, as is evident from their increasing reluctance to rely on the ICC as a tool of conflict management.

3.4 Political impact on military crisis management: From fig leaf to slippery slope

The question of how governments other than those of situation countries view and use the ICC is closely related to the last of the four political issues highlighted in this report. More than a decade after the court took up its work, it is worth revisiting conflicting predictions made at the time about its likely impact on other collective practices of crisis management: Has the ICC been used as a “fig leaf” for governments unwilling to intervene militarily in humanitarian emergencies? Has it deterred potential intervening powers? Or has it rather legitimized and facilitated the use of force for (allegedly) humanitarian purposes? The evidence to date appears to lend most support to the last of these predictions.

No deterrence of intervening countries – Looking back from today, the argument that can be most clearly refuted is the idea that the court’s jurisdiction over war crimes or the crime of aggression could prevent countries from intervening in humanitarian crises with military force. Aggression as an obstacle to humanitarian intervention was effectively removed with the adoption of a consensus definition with high thresholds and various safeguards for both member and non-member states. In addition, the UN Security Council has further extended protection for non-state parties beyond the crime of aggression in its referral practice, and the ICC Prosecutor has (thus far!) been reluctant to investigate alleged crimes committed in Western-led interventions. All this seems to have allayed earlier US fears to a sufficient degree to allow the country to support ICC investigations, even in cases such as Libya in which the US itself was involved in a parallel military intervention.

The ICC as a fig leaf? – But what about the prediction that the ICC would obstruct humanitarian intervention because governments would use it as a symbolic substitute for more costly military measures? The 2005 Darfur referral of the ICC was interpreted as being driven in part by such opportunistic motives (see above). From today’s viewpoint, however, this case appears as the exception rather than the rule. All other situations investigated in the ICC’s early work were triggered by self-referrals. In addition, they did not attract a level of interest remotely comparable to that generated by the violence in Darfur – so outside governments did not have any incentive to support ICC investigations as a strategy for deflecting intervention pressure. Neither does the “fig leaf” argument hold for later phases of ICC activity. In the court’s second wave of cases, investigations were in fact initiated in parallel or in close temporal proximity to military interventions (see below) or, in the case of Kenya, in the wake of a successful mediation that obviated the need for military measures.

The ICC as a facilitator of intervention – Among the conflicting predictions made about the ICC’s political impact beyond the situation countries, then, the argument that ICC investigations could be used to legitimize military intervention appears to receive the strongest empirical support. A noticeable difference between the ICC’s first and second wave of cases is that all recent investigations (except Kenya) have been much more closely associated with coercive military interventions. The court’s early work concerned mainly situation countries which, at the time investigations were started, had either no direct external military involvement (Uganda, CAR) or were the targets of consensus-based peacekeeping missions mandated to use violence only for purposes of self-defence (DRC, Sudan/Darfur).²² In the years following the start of ICC investigations, however, this began to change with the Security Council’s authorization of a more robust mandate for the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) in 2004 and with unilateral French and US interventions in the CAR and Uganda in 2007 and 2011. In the investigations commenced by the ICC from 2011 onward, the connection to coercive external interventions was more obvious from the start. The Libya referral was followed in less than three weeks’ time by a full-scale Western-led military campaign against the regime. In Côte d’Ivoire, the crimes investigated by the ICC were committed during an outbreak of violence that also elicited a forceful military response by French and UN troops. In the case of Mali, the ICC’s decision to investigate came five days after the initiation of military measures. In the second CAR case, finally, the ICC’s announcement of a preliminary examination was made just over a week after the UN Security Council authorized the EU’s EUFOR RCA mission to the country on 29 January 2014.

What does this emerging pattern tell us about the evolving relationship between the ICC and the (collective) use of force for humanitarian purposes? In part, the recent cases seem to confirm earlier predictions that ICC investigations could be used to legitimize military intervention – either in preparation or in retrospect. The clearest example of this was Libya. Supporters of the Western intervention argued, firstly, that the *failure* of legal deterrence had demonstrated the need for military intervention as a last resort:

“Yes, international intervention to protect civilians was the right choice in Libya. [...] The international community had tried stepped up diplomacy, unified condemnation, targeted sanctions [...], and clear warnings of accountability through referral to the International Criminal Court. [...] Indeed, from the series of graduated measures down to the last resort and UN Security Council approval, Libya was a textbook case for the Responsibility to Protect.” (Sullivan 2012)

Secondly, they claimed that the ICC’s arrest warrant against Al-Gaddafi demonstrated the necessity of the intervention:

“[A]ll the evidence that the prosecutor has gathered is a stark reminder of why NATO is conducting operations in Libya – to protect civilians against what the prosecutor described as crimes against humanity perpetrated by the Qadhafi regime. It’s further proof the international isolation of the regime is growing every day – and that its reign of terror must end immediately. It’s hard to imagine that a genuine transition in Libya can take place while those responsible for

22 In the DRC, non-consensual force had been used in the EU-led Artemis mission in 2003, which was, however, extremely limited in geographical and temporal scope.

widespread and systematic attacks against the civilian population remain in power.” (NATO 2011)

Indirectly, this statement also justified the contested – if never formally acknowledged – alliance interpretation of its mandate as requiring regime change in Libya. Apparently reflecting such experiences, Russia attacked the proposed referral resolution on *Syria* as “an attempt to use the ICC to [...] lay the groundwork for eventual outside military intervention” (RT.com 2014). While this accusation may be unjustified in the context of *Syria*, it still illustrates that ICC referrals by the UN Security Council tend to be seen more and more as a “slippery slope” toward the use of force, rather than as a tool for deflecting intervention pressure (Sands 2013; see also Kaye et al. 2013: 5; Kersten 2014b).

In the ICC’s self-referral and *proprio motu* cases, the positive link between military and judicial intervention has been of a more indirect nature. While it cannot be ruled out that outside intervening powers encouraged the governments of Mali, Côte d’Ivoire or Ivory Coast behind the scenes to call for ICC investigations, in each of these cases it was the national governments themselves that most clearly profited from potential ICC-induced military intervention. In addition, commentators speculated that the ICC *itself* was encouraged to become active by the prospect of conducting investigations in close cooperation with international intervention forces. In two of its first investigations, the DRC and Sudan/Darfur, the ICC has already relied on cooperation with UN peacekeeping troops for protecting its personnel (Clark 2008: 40) and assisting its investigations. The cooperation has been closest, and most institutionalized, with the DRC-based MONUC mission.²³ In fact, the OTP relied so heavily on evidence gathered through MONUC “intermediaries” that the Lubanga trial was at some point on the brink of collapse (Melillo 2013: 775-8). In Sudan, cooperation has been much more difficult – but also much more needed, given the overt hostility of the Sudanese government to the Court.²⁴ In all likelihood, the ICC’s demand for support from peacekeeping operations will increase further as the Prosecutor seeks to counter allegations of complicity with situation countries and move toward a more independent stance. In Mali, for instance, observers expect a “cash-strapped” ICC to rely heavily on both French troops and local intermediaries in conducting its investigations (IRIN 2013).

4. Conclusion and policy recommendations

A comparison of the political dynamics that shaped the ICC’s work in its first phase of activity up until the 2005 Darfur referral with the politics of justice that characterized the second and third phase of ICC operations reveals instances of change as well as continuity.

23 In 2010, the mission was renamed United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO).

24 The UNAMID mission has been accused of failing to report or even actively covering up human rights abuses in Darfur for fear of jeopardizing the government’s support for its mission (Lynch 2014).

- (1) With respect to the *politics of state support*, we can observe, on the one hand, a gradual rapprochement between the ICC and the great powers, most notably the United States, which is reflected in increasingly close cooperation between the Court and the UN Security Council, and on the other hand, growing estrangement between the Court and Africa. Aside from these major shifts, attempts by the governments of situation countries to use the ICC for their political purposes have been a feature of both phases of ICC activity.
- (2) *The Court itself and its Prosecutor* have reacted to early criticisms of “complicity” with situation countries by seeking to demonstrate the ICC’s independence through a more even-handed case selection strategy and by initiating *proprio motu* investigations. The OTP has also sought to counter criticism of exaggerated concern with quick success by constructing more complex and ambitious charges packages, and has recently sought to pressure states into more robust support for the Court by dropping or interrupting ongoing trials and investigations. Upon closer examination, however, some of these changes – such as increased resort to the *proprio motu* procedure – appear cosmetic rather than substantive. On the whole, the Court still relies heavily on cooperation with situation countries and, until very recently, has remained unwilling to infringe on major power interests.
- (3) The ICC’s *political impact in the situation countries* was another strongly debated topic when the Court took up its operations. In this regard, an assessment of the Court’s first cases from today’s point of view suggests that hopes for a strong short-term deterrent effect of ICC prosecutions and warnings of investigations escalating and exacerbating ongoing conflicts have both been exaggerated. The ICC is credited with both positive and negative effects on peace processes, but in no case was it the single most important factor determining the course of a conflict. With regard to the second wave of cases, definite conclusions would be premature, but it already seems safe to say that any impact the Court might have on these ongoing conflicts pales in comparison to that of military interventions conducted in parallel.
- (4) This points to a last issue that was discussed among scholars and commentators when the ICC took shape, the question of how the Court would *influence collective practices of military crisis management*. Early fears that the ICC’s competence to prosecute crimes committed by intervening powers would deter military intervention for humanitarian purposes have not been confirmed. Furthermore, while the Security Council’s referral of the Darfur situation to the Court was criticized as an attempt to deflect pressure for military intervention, there is little evidence that a similar strategy was used in other cases. On the contrary, ICC investigations have increasingly been closely associated with military intervention in ongoing conflicts, a development that is explained by attempts of intervention proponents to legitimize the use of force with reference to the ICC and by the ICC’s own growing interest in cooperating with UN peacekeeping missions. Today, it appears that far from constituting a “fig leaf” for countries unwilling to intervene, ICC investigations are feared by opponents of intervention as a “slippery slope” towards the use of force.

What can and should decision-makers, both within the Court's organs and in national governments, learn from all this? From the perspective of the ICC, the preceding analysis highlights several inescapable dilemmas faced by the Court in its work: it can cooperate closely with situation countries, giving rise to charges of political bias and complicity, or it can rely on enforcement through the UN Security Council and its powerful members, provoking accusations of neo-colonialism. Alternatively, it can seek greater independence from both, at the risk of conducting lengthy and perhaps unsuccessful investigations and, as a consequence, appearing inefficient and irrelevant. Another dilemma concerns perceived conflicts between justice and peace: in the face of accusations that its investigations endanger peace negotiations, the ICC can insist on *not* bearing the primary responsibility for peace, as it has done in the past, or try to incorporate the peace criterion more explicitly in its selection of situations and cases, as demanded by some scholars (e.g. Rodman 2009) and by the African Union (see section 3.1). The latter course of action, however, would be certain to provoke new criticism of "political bias".

Thus, the real question the Prosecutor has to face is not how she can be less "political" (see also Goldston 2010), but what political line she should take in the future. Regarding the "peace versus justice" dilemma, the rather weak existing evidence for such conflicts supports the OTP's established position. It also remains unclear exactly *how* the Court could incorporate the peace criterion in practice if negative effects of prosecutions are so hard to ascertain even after the fact.²⁵ Furthermore, even in a hypothetical case where strong negative implications for peace were obvious, it would serve the Court's reputation of impartiality far better if it were to leave the task of blocking such an investigation to the Security Council under Article 16 of the ICC Statute, rather than engaging in self-censorship. Thus far, the fear that such an open clash between Court and Council would undermine the ICC seems to have prevailed (Mistry/Ruiz Verduzco 2012: 16). However, given widespread perception of political bias, it is perhaps time to see what the Court could *gain* from such a scenario – provided the Council's invocation of Article 16 were based on sound and widely shared substantive arguments, rather than political pressure, or even blackmail, by concerned states – as in the case of US-sponsored Resolution 1422. In any case, the Council, and particularly its Western member states, would be well advised to take deferral requests, such as those made by the African Union on Sudan and Kenya, more seriously, and to carefully assess them on substantive grounds. By failing to formally respond to such proposals or by insisting on their inappropriateness, Council members can only contribute to undermining the legitimacy of the ICC.

This point also relates to the first dilemma highlighted above. In the past, the Court has wavered between accommodating situation countries and accommodating great power interests, with a stronger penchant for the second option in its second wave of cases. What has been neglected is option three: investigate at least a few situations that are unlikely to

25 Importantly, this should not be misread as suggesting that the court should not hold back with arrest warrants and trials until after a conflict has ended if this is likely to produce qualitatively better results. In this regard, the apparent flaws of the "deterrence" argument could relieve the court from some pressure to move quickly in the course of ongoing conflicts.

achieve strong political support from either side, even at the risk that this will anger governments and progress will be very slow. Over the course of the past decade, governments large and small have made enough public commitments to the ICC to suggest that such occasional signals of greater independence would not prompt a wave of defections from the Court. This is not to say that the ICC should completely stop harvesting the low-hanging fruit of self-referrals and investigations backed by intervening powers, but it is high time to be more ambitious than that. Prosecutor Bensouda's recent decisions on Iraq and Afghanistan therefore point in the right direction. However, her recent moves on the Kenyatta trial and the Darfur investigation reflect a somewhat different strategy, which appears to be aimed at eliciting *even stronger cooperation* from states (particularly Security Council members) by publicly embarrassing them. While this tactic *also* reflects the growing willingness of the Prosecutor to confront great power interests, it remains to be seen whether it can work alongside a simultaneous attempt to bring potentially criminal actions by the same great powers under ICC scrutiny.

Beyond such "grand" decisions, it has been suggested that the OTP could reinforce the credibility of the Court by clarifying and publishing the criteria it uses in selecting situations and cases (e.g. Marston Danner 2003).²⁶ Such a step may indeed be useful, but it should not lead to the belief that all political decisions can be defined away (Greenawalt 2009: 237). In addition, it should not distract attention from the more important task: communicating honestly which criteria are applied in a given case, to counter the suspicion that arguments such as "gravity" are merely used as a catch-all cover for all sorts of political considerations.

From the perspective of governments, particularly those represented in the UN Security Council that are often faced with public pressure to resolve humanitarian crises abroad, the analysis holds the important lesson that the ICC *cannot* reliably be used as an instrument of short-term deterrence in ongoing conflicts. Governments already appear to be learning this lesson, yet they should also strive to withstand the opposite reflex: trying to use ICC investigations as a tool for preparing and legitimizing military intervention in a humanitarian crisis. To be sure, effective practical cooperation with the Security Council and with the military missions it mandates can be very important for ICC investigations. And yet, the outcome (or mere existence!) of such criminal investigations should in no way be understood as determining the need for, and rightfulness of, military measures. Therefore, reform proposals that envisage ICC reports to the UN Security Council as an "important source of evidence for justifying military intervention" (Roach 2006: 171) are moving in a completely wrong direction. At this stage of its development, what the ICC needs most from states is more genuine support, where this is deemed appropriate, and less manipulative meddling.

For instance, the UN Security Council could and should help the Court by legally obliging states *other* than the respective situation countries to cooperate with ICC investigations, both in its future referral resolutions and in resolutions concerning ongoing

26 In the case of the "peace" criterion, the African Union has even demanded that the OTP submit its revised guidelines to the ASP to "ensure more accountability" (cited in Goldston 2010: 385).

ICC cases. In addition, it should respond promptly to reports of state non-cooperation by the ICC; it should consider the imposition of targeted sanctions, such as financial or travel restrictions, on individuals accused by the ICC; and it should give the Court access to UN funding, particularly, but not only, for investigations triggered by the Council itself (Kaye et al. 2013: 20-1). Conversely, the Council and its members should refrain from using ICC referrals as bargaining chips that can be negotiated away in diplomatic crisis resolution efforts – Libya was a negative case in point. In (exceptional) cases, where states genuinely worry that the Court’s investigations could seriously endanger diplomatic efforts to end violent conflict, the Council should not shy away from using Article 16 of the Rome Statute to defer investigations for a one-year period. Such a step would doubtless constitute a difficult challenge for the ICC, yet it seems preferable to paying lip service to the Court’s efforts while at the same time obstructing effective enforcement behind the scenes. Now that the ICC is slowly growing out of its adolescent phase, a healthy conflict with its state “parents” might actually do it better service than continued ambivalence.

Annex: ICC Investigations and Preliminary Examinations

Table 1: ICC investigations (Phases 1 and 3)

Situation	Referral	Investigation opened	Indictments	Trials	Verdicts
Uganda	Uganda government, 29/01/2004	29/07/2004	Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, Dominic Ongwen (08/07/2005)	-	-
DRC	DRC government, 19/04/2004	23/06/2004	Thomas Lubanga Diylo (10/02/2006), Bosco Ntaganda (22/08/2006), Germain Katanga (02/07/2007), Mathieu Ngudjolo Chui (06/07/2007), Callixte Mbarushimana (28/09/2010), Sylvestre Mudacumara (13/07/2012)	Lubanga (2009-2011), Katanga (2009-2012), Ngudjolo Chui (2009-2012)	Lubanga (convicted 2012), Katanga (convicted 2014), Ngudjolo Chui (acquitted 2012)
CAR I	CAR government, 07/01/2005	22/05/2007	Jean-Pierre Bemba (23/05/2008)	2010-2014	Pending
Darfur/ Sudan	UN Security Council, 31/03/2005	06/06/2005	Ahmed Haroun, Ali Kushayb (27/04/2007), Omar Al-Bashir (04/03/2009), Bahr Idriss Abu Garda (07/05/2009), Abdallah Banda, Saleh Jerbo (27/08/2009), Abdel Raheem Muhammed Hussein (01/03/2012)	-	-
Kenya	Proprio motu	31/03/2010	William Ruto, Joshua Sang, Henry Kosgey, Francis Muthaura, Uhuru Kenyatta, Mohammed Hussein Ali (08/03/2011), Walter Barasa (02/08/2013)	Kenyatta (2013-2014), Ruto, Sang (2013 to the present)	-
Libya	UN Security Council, 26/02/2011	03/03/2011	Mummar Al-Gaddafi, Saif Al-Islam Gaddafi, Abdullah Senussi (27/06/2011)	-	-
Côte d'Ivoire	Proprio motu	03/10/2011	Laurent Gbagbo (23/11/2011), Charles Blé Goudé (21/12/2011), Simone Gbagbo (29/02/2012)	-	-
Mali	Mali government, 13/07/2012	16/01/2013	-	-	-
CAR II	CAR government, 30/05/2014	24/09/2014	-	-	-

Table 2: ICC preliminary investigations (Phase 2)

Situation	Initiated by	Announced	Closed
Colombia	Prosecutor	2006	2006
Iraq	Prosecutor	2006	2006, reopened 2014
Venezuela	Prosecutor	2006	2006
Afghanistan	Prosecutor	2007	-
Georgia	Prosecutor	2008	-
Palestine	Palestinian Authority	2009	2012
Guinea	Prosecutor	2009	-
Honduras	Prosecutor	2010	-
Nigeria	Prosecutor	2010	-
Republic of Korea	Prosecutor	2010	2014
Comoros	Government of Comoros	2013	2013
Ukraine	Prosecutor	2014	-

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Abbreviations

ACJH(P)R	African Court of Justice and Human (and Peoples’) Rights
ASP	Assembly of States Parties to the Rome Statute of the International Criminal Court
AU	African Union
CAR	Central African Republic
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
EU	European Union
EUFOR RCA	European Forces Republic of Central Africa
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
LRA	Lord’s Resistance Army
MONUC	United Nations Organization Mission in the Democratic Republic of the Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic Republic of the Congo
NATO	North Atlantic Treaty Organization
OTP	Office of the Prosecutor
UN	United Nations
UNAMID	African Union/United Nations Hybrid Operation in Darfur
US	United States