

# THE JUSTICE PIVOT: U.S. INTERNATIONAL CRIMINAL LAW INFLUENCE FROM OUTSIDE THE ROME STATUTE

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## ABSTRACT

*International criminal prosecutions have become more common since 1993, both domestically and at international courts and tribunals. Where the United States government is unable to control how and when international criminal law is enforced, prosecutions may confront realist U.S. self-interest. This Article considers the extent to which post-Cold War international justice case selection has become more independent of U.S. pressure, or more captured by it. By considering both the jurisdictional and functional elements of case selection independence, I consider changes in U.S. capacity to influence international criminal law enforcement. This Article examines case selection independence at the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone and the International Criminal Court. Drawing on the jurisprudence, literature, field interviews and experience working in international justice, I observe increasing capture by state self-interest, entrenchment of U.S. definitional preferences, emergence of unintended precedent, and a pivot in how and the extent to which the United States shapes International Criminal Law enforcement. The research observes a combination of factors affecting U.S. influence, including shifts in power dynamics between and among weak and powerful states, increasing state sophistication in international court engagement, a shift*

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*in jurisdiction triggering actors and forums, and realist state co-option of norm entrepreneurs via endearing explanation of independence-diminishing policies.*<sup>1</sup>

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I. INTRODUCTION

The United States remains the primary source of influence over the evolution of international criminal law (ICL) and ICL enforcement despite its reluctance to join the International Criminal Court (ICC). In this Article, I argue that the U.S. government has successfully locked in critical policy preferences for the evolution of ICL and ICL enforcement despite relinquishing instruments of control enjoyed over ad hoc and hybrid tribunals. It was able to do so for two reasons. First, it was an early adopter, driving the agenda of post-Cold War international justice in response to the 1989 United Nations General Assembly (UNGA) Resolution calling for the International Law Commission (ILC) to address the establishment of an international criminal court. Secondly, the time at which policy positions relating to international criminal justice were locked in occurred during a period of U.S. economic and security predominance. This timing enabled U.S. preferences to be achieved via the United Nations Security Council when weaker permanent members were less able to oppose U.S. preferences (compare Russian and Chinese opposition to ICC referral of the Syrian situation with their acquiescence regarding the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY)). Early U.S. engagement, I argue, established path-dependent preferences and negotiating positions, particularly in relation to the crime of aggression and key elements of *jus ad bellum*. The U.S. experience with the ad hoc tribunals helped the U.S. government identify potential for unintended consequences as well as modes of case selection capture. The U.S. experience illuminated means of capturing prosecution case selection either through inserted jurisdictional constraints or functional vulnerability into court design, or through subsequent cooperative pressure.

Despite the aforementioned U.S. advantage of advanced experience, I also identify a shift in power to shape ICC prosecution case selection away from the Security Council and towards increasingly sophisticated weak states more deeply engaged with the ICC—a “justice pivot.” To illustrate this argument, this Article casts a particularly focused lens on the Uganda situation—the ICC’s first—as demonstrative of both the

justice pivot and continued U.S. policy impact on international crimes case selection despite U.S. absence from the Assembly of States Parties (ASP) to the Rome Statute. This Article also examines how a shifting global economic order is reinforcing the justice pivot by lending increased confidence to weak states in a geopolitical context where the Security Council has become increasingly inactive.

Contextualization is particularly pertinent in assessing where the independence of international crimes prosecution has come to: complementarity reinforces the justice pivot. The ICC jurisdictional element of complementarity instructs, unlike the ad hoc tribunals or hybrid courts, such as the Special Court for Sierra Leone (SCSL), that ICC jurisdiction is dependent on the willingness and ability of states themselves to prosecute crimes committed on their territory or by their nationals. In this Article, I will consider what this principle means for both the interests of the United States and others, and for the advancement of the fight against impunity for core international crimes. I consider the extent to which the complementarity principle of the Rome Statute of the ICC accepts politicized trials, the U.S. position on that issue, and how the U.S. government has shaped state adherence to complementarity through cooperation with other states. Does the complementarity principle, which provides primacy to states unless they are “unwilling or unable,”<sup>2</sup> tolerate politicized domestic processes, and how has U.S. foreign policy shaped other states’ engagement with that question? I identify the source of complementarity being less about principled advancement of the norm of international crimes prosecution and more about realist state self-interest in constraining the independent ICC pursuit of those most responsible for international crimes.

## II. THE UNITED STATES AND POST-WORLD WAR II INTERNATIONAL CRIMINAL LAW

This part briefly considers the historical trajectory of international criminal justice and how U.S. policy has shaped the process leading to the establishment of the ICC. I trace the interests of both strong and weak states throughout their efforts to regulate asymmetric relations through rules entrenching powerful state advantage while providing weaker states certainty. A statist perspective views strong states as seeking weak delegation so as to provide more easily manipulated

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2. Rome Statute of the International Criminal Court art. 17, ¶ 1, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

institutions while weak states prefer delegation to mitigate domestic responsibility for sensitive issues.<sup>3</sup> Considering case selection independence will facilitate the opportunity to consider whether independence increases when weaker states are involved. Abbott and Snidal's theory suggests that greater design participation by weak states facilitates greater independence and a cascade of the norm of international crimes prosecution.<sup>4</sup> I identify key elements that constrain prosecution independence in pursuing those most responsible for crimes identifying a degree of "justice capture," and the role of the United States in shaping this trajectory. I note the dilution of U.S. influence via the forum of the ICC design (the Rome Conference) which enabled weak state participation after weak start marginalization in Security Council-established courts' design by permanent members.

As stated in the introduction, the timing of U.S. engagement in shaping the emergence of post-Cold War international crimes prosecution is important. The theory of increasing returns suggests that personnel enthusiasm provides positive feedback that reinforces institutional confidence in case selection and decreases the likelihood of change.<sup>5</sup> Path dependence therefore challenges existing political science explanations that attribute large outcomes to large causes.<sup>6</sup> The analysis of timing, sequence, and the capacity of rational actors to design and implement optimal solutions emphasize an institution's, or in our case a negotiation's, embryonic stage.<sup>7</sup> Path dependence helps explain variance in case selection independence from one court or situation to another by examining the relationship between historical narratives, state policy toward courts, and the extent to which institutionalization of international crimes case selection "locks in"<sup>8</sup> historical narrative and state policy at the time of court design. Similarly, by considering the preferences, comparative power dynamics and timing of state engagement, path dependence assists the explanation of

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3. Legalization bargaining is a process where powerful states, to the extent they offer weak states sufficiently lucrative terms to procure participation, create efficiency gains such as the shaping of war crimes investigations. Kenneth Abbot & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 449 (2000).

4. *Id.* at 421-456.

5. Paul Pierson, *Increasing Returns, Path Dependence and the Study of Politics*, 94 AM. POL. SCI. REV. 251, 251-67 (2000).

6. *Id.* at 251.

7. *Id.* at 251-67; Paul A. David, *Why are Institutions the 'Carriers of History'? Path Dependence and the Evolution of Conventions, Organizations and Institutions*, 5 STRUCTURAL CHANGE & ECON. DYNAMICS 205, 205-20 (1994).

8. *Id.* at 205-20; Pierson, *supra* note 5.

parties' positions, concessions, and the institutional outcome—the ICC, established by the Rome Statute.

The idea of an international criminal court was first raised at the 1919 post-World War I peace negotiations to provide for a special tribunal to prosecute the German Kaiser, a head of state, for waging war.<sup>9</sup> A confluence of interests between norm entrepreneurs and states temporarily demanded prosecution of illegal war-making. The post-World War II London Conference, establishing the International Military Tribunal (IMT), implemented 1919 and 1943 demands for an international criminal response by prosecuting the defeated party to World War II. The first international court to prosecute individuals for international crimes was the IMT at Nuremberg from 1945 to 1946. The Tribunal was established by the Allied Control Council, which received authority over the territory of Germany under the German Instrument of Surrender. Its members—the United Kingdom, the United States, France and the Soviet Union—experienced disagreement internally and amongst each other as to the form transitional justice would take.<sup>10</sup> The Council empowered the Tribunal to charge senior military and political figures with crimes against peace, war crimes, and/or crimes against humanity.<sup>11</sup> In the Pacific theater, U.S. General Douglas MacArthur, who effectively wielded interim power over occupied Japan, created the IMT for the Far East in 1946. This court was empowered to try war criminals for conspiracy, crimes against peace, war crimes and crimes against humanity.<sup>12</sup> MacArthur appointed the eleven

9. Treaty of Versailles art. 227, Jun. 28, 1919, 225 Consol.T.S. 188.

10. BRADLEY SMITH, REACHING JUDGMENT AT NUREMBERG (1977).

11. Article 6 of the Charter of the International Military Tribunal defines the crimes against peace as: "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"; war crimes as "violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity"; crimes against humanity as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated." See Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 58 Stat. 1544, 82 U.N.T.S. 279.

12. Article 5 of the Charter of the International Military Tribunal for the Far East granted jurisdiction over the same crimes as those set out in the Charter of the International Military Tribunal (Nuremberg). *Id.* at art. 5.

members of the Tribunal and its president. The Tribunal tried senior military officers but exempted Japan's Emperor and his family, as well as and members of the bacteriological research program, from prosecution.<sup>13</sup> These first international courts provided an example of selective application for subsequent international courts and tribunals.

During the Cold War, prosecution of international crimes was trumped by the principle of state sovereignty. At the end of the Cold War, however, a new power dynamic of western predominance at the Security Council, accompanied by human rights advocacy, caused the United Nation's role to shift from merely deterring aggression to a more encompassing commitment to justice, law and order within individual states.<sup>14</sup>

The IMT's establishment to try international crimes committed by the European Axis Powers planted a seed that led to the Rome Statute.<sup>15</sup> In response to the U.N. Charter's call for studies and recommendations on international law development and codification, the UNGA established the ILC in 1947.<sup>16</sup> In 1948, when passing the Genocide Convention, the UNGA also called for ILC consideration of an international tribunal to try individuals for genocide.<sup>17</sup> In its first report in 1949, the ILC determined that, because war was outlawed, judging how war was conducted was no longer relevant.<sup>18</sup> This suggests that weak states holding the UNGA majority constituted the predominant influence over the ILC in advancing criminalization of aggression, rather than any conduct of weak states against a stronger enemy. The ILC, in response to an UNGA request, drafted a 1954 ICC Statute that extinguished head of state immunity and the defense of carrying out a superior's orders, and criminalized offenses against the peace including:

1. Use or threat of force by one state against another;
2. Preparation of another states' armed forces for use against a state;

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13. MacArthur excused from prosecution the members of the unit in exchange for germ warfare data collected from human experimentation.

14. Brian Urquhart, *Security After the Cold War*, in UNITED NATIONS DIVIDED WORLD: THE UN'S ROLES IN INTERNATIONAL RELATIONS 81, 82 (Adam Roberts & Benedict Kingsbury eds., 2000).

15. Charter of the International Military Tribunal, *supra* note 11; Peggy E. Rancilio, *From Nuremberg to Rome: Establishing an International Criminal Court and the Need for US Participation*, 78 U. DET. MERCY L. REV. 299 (2000).

16. G.A. Res. 174 (III) (Nov. 21, 1947).

17. G.A. Res. 260(A-B) (Dec. 9, 1948).

18. Int'l Law Comm'n, Rep. on the Work of Its First Session, U.N. Doc. A/CN.4/13, at 281 (1949).

3. State organization or encouragement of armed groups for incursions into another state, tolerating territorial use for such a purpose;
4. Undertaking or encouraging activities to drive civil unrest or terrorist activities in another state;
5. Annexation of territory of another state, and;
6. Use of coercive economic or political measures to impose its will on another state.<sup>19</sup>

The ILC did not determine the jurisdiction in which the crimes would be tried.<sup>20</sup> As weak states came under pressure to align with a Cold War power and abandon the non-aligned movement, the UNGA's momentum on aggression slowed, requiring a further two decades to define aggression.<sup>21</sup> However, it retained a broad definition, including many of the 1954 elements of waging war by proxy, such as through armed bands, groups, irregulars or other state forces.<sup>22</sup> The norm of prosecuting aggression withstood powerful states' interests in constraining such a norm.

From 1974 to 1989, the liquidity of global capital flows increased, and with it the pressure powerful states could apply to their weak counterparts. At the conclusion of the Cold War, the United States and weak states began setting out their positions. On March 2, 1989, the U.S. House of Representatives passed a resolution calling for "the creation of an [i]nternational [c]riminal [c]ourt with jurisdiction over internationally recognized crimes of terrorism, illicit international narcotics trafficking, genocide, and torture, as those crimes are defined in various international conventions."<sup>23</sup> The resolution excluded crimes against the peace, citing a pliant 1978 American Bar Association proposal urging the Department of State to open negotiations for a convention establishing an international criminal court "with jurisdiction expressly limited to certain specific acts of international terrorism, using crimes established by international conventions as a reference."<sup>24</sup> Legal actors within the Department of State were enthusiastic about building a framework that would enshrine punitive consequence for

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19. Int'l Law Comm'n, Rep. on the Work of Its Sixth Session, U.N. Doc. A/CN.4/88, at 151-52 (1954).

20. *Id.*

21. G.A. Res. 3314 (XXIX) (Dec. 14, 1974).

22. *Id.* at art. III.

23. H.R. Con. Res. 66, 101st Cong. (1989) (enacted).

24. *Id.*



violations of international humanitarian law only.<sup>25</sup> In December 1989, the UNGA asked the ILC to address the establishment of an international criminal court to enforce a “Code of Crimes against the Peace and Security of Mankind.”<sup>26</sup>

In 1991 and 1992, U.S. predominance at the Security Council led to expanded Security Council power, with authorizations of military action in Iraq and peacekeeping in Somalia led by the United States. U.N. peacekeeping became a prominent Security Council response to episodes of instability and large-scale human rights violations in the post-Cold War world order.<sup>27</sup> In 1993, the North Atlantic Treaty Alliance (NATO) and the U.N. intervened in the conflict in the Balkans. The United States envisaged an international tribunal for the conflict with jurisdiction provided to it by the Security Council. Other permanent member states of the Security Council (the P5) were apprehensive about a Security Council-established tribunal, fearing the associated material and sovereignty costs.<sup>28</sup> The U.S. government considered including the crime of aggression in the ICTY statute. However, endowment with the crime of aggression would have posed questions as to whether the various states were able to declare independence and whether Croatia had legally attacked Serbia—jurisprudence considered antithetical to U.S. interests.<sup>29</sup> A former State Department legal advisor notes that the ICTY would consequently have had to rule on whether NATO’s attack of Kosovo constituted a crime against the peace. It would have been difficult for the Chamber to show, the legal advisor suggests, that this was not aggression.<sup>30</sup>

The International Criminal Tribunal for Rwanda (ICTR) also demonstrated the Security Council’s utility for a predominant U.S. government seeking to reinforce a favorable military outcome while indicating human rights advances. In 1994, attempts to secure a peaceful conclusion to the conflict in Rwanda were thwarted when Rwandan President Habyarimana was killed as his plane returned to Rwanda from negotiations in Arusha, Tanzania. The conflict pitted a French-supported Hutu government against the Ugandan- U.K.- and U.S.-supported Tutsi Rwandan Patriotic Front (RPF). The shooting

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25. Interview with a Senior Legal Advisor, U.S. Dep’t of State, in Washington D.C. (Sept. 9, 2014) (on file with author).

26. G.A. Res. 44/39 (Dec. 4, 1989).

27. Urquhart, *supra* note 14, at 82-103.

28. Senior Legal Advisor, *supra* note 25.

29. *Id.*

30. *Id.*

down of the President's plane in April 1994 triggered a genocidal response from the Hutu government, which mobilized large groups of unemployed youth and other extreme Hutu elements, who killed an estimated 800,000 Tutsi and moderate Hutu and Twa over the following three months.<sup>31</sup> The RPF also killed between 25,000 and 45,000 civilians between April and September 1994.<sup>32</sup> The Security Council-established ICTR was created in November 1994, excluding jurisdiction over crimes committed outside 1994 and crimes committed by non-Rwandans in territories surrounding Rwanda.<sup>33</sup> The United States, with U.K. support and French acquiescence, was able to impose a tribunal on its Rwandan ally, the RPF government, which the RPF refused to endorse at the Security Council.<sup>34</sup> The RPF government protested the ICTR's temporal jurisdiction beyond July 1994 (when the genocide concluded and RPF crimes scaled up), the ICTR's location outside Rwanda (diminishing the Rwandan governments' influence over ICTR functions), the absence of Rwandan courts' primacy of jurisdiction and the inclusion of war crimes and crimes against humanity alongside the crime of genocide.<sup>35</sup> Including the crime of aggression was never considered—to the astonishment of one State Department legal advisor who had presumed Uganda's financing of the RPF attack on Rwanda would be perceived as a crime against peace.<sup>36</sup>

The ad hoc tribunals reflected powerful states' policy preferences for an international criminal court, providing Security Council control over when international criminal justice would be applied—preferences that threatened the interests of weak state governments. The establishment of the ad hoc Tribunals under Chapter VII of the

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31. ROMEO DALLAIRE, *SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA* 299 (2004).

32. See GERARD PRUNIER, *AFRICA'S WORLD WAR: CONGO, THE RWANDAN GENOCIDE, AND THE MAKING OF A CONTINENTAL CATASTROPHE* 16 (2008); see generally CARLA DEL PONTE, *MADAME PROSECUTOR: CONFRONTATIONS WITH HUMANITY'S WORST CRIMINALS AND THE CULTURE OF IMPUNITY, A MEMOIR* (2009); Lars Waldorf, *A Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal*, 33 *FORDHAM INT'L L.J.* 1221, 1225 (2010), citing ALLISON DES FORGES, *LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA* 702-26 (1999).

33. Statute of the International Criminal Tribunal for Rwanda art. I-IV, U.N. Doc. S/RES/955 (1994).

34. Telephone Interview with Colin Keating, Former N.Z. Ambassador to the U.N. (Sept. 29, 2011).

35. DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 79-83 (2012); U.N. Security Council, letter dated Oct. 1, 1994 from the Secretary-General addressed to the President of the Security Council, U.N. Doc. S/1994/1125, 19 (Oct. 4, 1994).

36. Senior Legal Advisor, *supra* note 25.

U.N. Charter guaranteed U.N. funding and empowered these Tribunals to compel U.N. member states' cooperation. Both tribunals imposed international criminal jurisdiction upon weak states, infringing upon their state sovereignty. It was only when the Security Council, in 1993, employed its Chapter VII power under the U.N. Charter to design and establish the ICTY, that the UNGA demanded ILC prioritization of a draft international criminal court statute.<sup>37</sup> The Security Council signaled a preferred agenda to the ILC with an ICTY template excluding jurisdiction over aggression and a Security Council role in triggering any international jurisdiction over core international crimes.<sup>38</sup> Weaker UNGA states continued to attempt to accommodate the crime of aggression, including a definition that included intervention and colonialism.<sup>39</sup> After the power to trigger jurisdiction, the other critical case selection independence element was primacy of jurisdiction. Some norm entrepreneur states appeared to be willing to place norm enforcement above sovereignty costs by conceding primacy to an international criminal court; some states only wished to make such a concession for genocide.<sup>40</sup> However, the majority of states, including the United States, favored "opting in" or in some other way retaining primacy.<sup>41</sup> The question of whether the prosecutor, a State Party, the UNGA, the Security Council or any combination thereof would trigger jurisdiction also appeared to be contested in 1994.<sup>42</sup> At a point of heightened post-Cold War power, the United States, at the outset of considerations, sought to assert clear primacy for its courts over an international criminal court.<sup>43</sup>

In its 1994 draft, the ILC only considered the Security Council and State Parties to have the power to trigger an international criminal court prosecution.<sup>44</sup> It appeared that weak and powerful states were considering sharing power to trigger jurisdiction—a departure from

37. G.A. Res. 48/31, ¶ 6 (Dec. 9, 1993).

38. Updated Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 1-4, Sept. 2009, [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_sept09\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf).

39. See U.N. Secretary-General, *Report of the Secretary-General to the Security Council Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 21, 23, U.N. Doc. S/25704 (May 3, 1993); Int'l Law Comm'n, Rep. on the Work of Its Forty-Fourth Session, ¶ 57, U.N. Doc. A/47/10 (1992).

40. Int'l Law Comm'n, Rep. on the Work of Its Forty-Sixth Session, ¶¶ 48, 61, U.N. Doc. A/49/10 (1994).

41. *Id.* ¶ 61.

42. *Id.* ¶¶ 64-66.

43. SCHEFFER, *supra* note 35, at 169.

44. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 120 (2nd ed. 2007).

the Security Council's suggestion for the exclusivity of the ad hoc tribunals. The draft conceded to both weak and powerful states' primacy of jurisdiction and the gravity criteria as a means of challenging jurisdiction.<sup>45</sup> The provision of primacy to weak states appeared to be in exchange for major concession to powerful states—the decriminalization of war by proxy by opting for the Nuremberg definition of aggression rather than the 1974 ILC version.<sup>46</sup> Further, the draft provides that the Security Council grant jurisdiction over aggression.<sup>47</sup> Norm entrepreneurs had managed to prevent the inclusion of “interests of justice” case selection criteria, though such criteria could be considered in commuting or pardoning a sentence.<sup>48</sup> Diplomatic immunities were left open to further debate.<sup>49</sup>

In response to the draft, the UNGA established an Ad Hoc Committee followed by a Preparatory Committee to consider a court's viability and statute. The Preparatory Committee's text for consideration at the Rome Conference was exhaustive, containing articles with a multitude of options, including the emergence of complementarity—the provision of primacy to domestic proceedings.<sup>50</sup> A contest between the norms of international crimes prosecution, the interest of major powers, and the interests of weak states would determine case selection independence embedded in the Rome Statute.

#### A. *Explaining Negotiations at The Rome Conference*

This subpart explains how the United States slowed the process of Rome Statute negotiations, sought veto power over assertion of jurisdiction, and relied on its weak state allies for support in procuring realist compromises. Nonetheless, civil society and government actors promoted some elements of case selection independence while weak state governments promoted weak state government control. Observers of and participants in the Rome Conference often view the Rome Statute as a consequence of “unprecedented” input from global civil society—an expression of the normative power of international crimes prosecu-

45. *Id.* at 86-87.

46. Rep. of the Int'l Law Comm'n, *supra* note 40, at art. 20, ¶¶ 6-7.

47. *Id.* at art. 23, ¶ 2.

48. *Id.* at art. 60, ¶ 3.

49. *Id.* at ¶ 175.

50. Mahnoush Arsanjani, *The Rome Statute of the International Criminal*, 93 AM. J. INT'L L. 22, 22-24 (1999); SCHABAS *supra* note 44, at 15.

tion.<sup>51</sup> One method of identifying a norm's advance is to identify court decisions against the interests of the designing actors.<sup>52</sup> That method can be applied to the Rome Conference negotiations, considering the extent to which states delegated power by conceding case selection independence to norm entrepreneurs. This method requires consideration of the interests of weak states, as well as powerful states, weighed against the interests of providing independence to the prosecution to select cases involving those bearing greatest responsibility for international crimes. At the time, the United States constituted approximately one-third of the global economy and around thirty-five percent of global military expenditure.<sup>53</sup> Participants and commentators commonly view the interests advanced by the United States as reflecting those of other P5 states, up until the United Kingdom's shift to join the group of like-minded states.<sup>54</sup> I show that the United Kingdom's shift may also be explained by a calculated move to provide itself and its U.S. ally influence from within the ICC. Non-state norm entrepreneurs from international civil society commonly supported the group of like-minded states.<sup>55</sup> I also argue that despite the rhetorical appeal of like-mindedness, that group more closely reflected weak states compromising with strong states as described in the preceding part, rather than states seeking to authentically confront impunity. Critical indicators of case selection independence compromise include (1) who would trigger jurisdiction and how, (2) what crimes could be prosecuted and how they were defined, (3) the level of specificity of case selection criteria, (4) the provision of primacy to governments, (5) the extent to which the prosecution would be able to compel state cooperation, (6) the financial independence of the prosecution, and (7) the

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51. MARLIES GLASUIS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* (2006); *World Report 1999: Special Issues and Campaigns: The International Criminal Court*, HUMAN RIGHTS WATCH (1999), <http://www.hrw.org/legacy/worldreport99/special/icc.html>; William Pace & Jennifer Schense, *The Role of Non-Governmental Organizations*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 21, 105 (Antonio Cassese et al. eds., 2002).

52. Robert Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT'L ORG. 457, 470 (2000).

53. *World Bank Development Indicators*, WORLD BANK (July 28, 2015), <http://data.worldbank.org/data-catalog/world-development-indicators>; *SIPRI Military Expenditure Database*, SIPRI (2015), [http://www.sipri.org/research/armaments/milex/milex\\_database](http://www.sipri.org/research/armaments/milex/milex_database).

54. 'Like-minded' states included traditional U.S. allies such as the United Kingdom, Canada, New Zealand, and Australia, and mostly weak states from Latin America and the Caribbean, and Africa as well as Middle Eastern and North African States. Arsanjani, *supra* note 50, at 23 (1999); SCHABAS, *supra* note 44, at 16-17.

55. Arsanjani, *supra* note 50.

method of prosecution personnel appointment.

While the United States and the United Kingdom commonly coordinated their policies in Rome, the vast U.S. delegation presented the primary impediment to case selection independence.<sup>56</sup> The United States was supported by P5 states on key issues such as the Security Council's rights to vet and trigger jurisdiction. The Rome Conference placed U.S. government norm entrepreneurs seeking, through their own agency, to marry U.S. policy to norms, at the center of debate. One example is lead U.S. negotiator David Scheffer. Scheffer concedes his own highly constrained agency—noting enemies he made—and his disappointment with the subsequent U.S. position.<sup>57</sup> The United States also experienced a deficit of trust in Rome. When negotiating on the United Nations Convention on the Law of the Sea (UNCLOS), the United States prolonged negotiations for a decade to allow U.S.-demanded amendments. It then failed to ratify. “How could we possibly trust the United States in these negotiations?” negotiators asked Scheffer.<sup>58</sup> Despite assurances to the contrary, the United States never ratified.<sup>59</sup> The U.S. refusal to accept sovereignty costs supports Keohane et al.’s theory of a process moving against a key designing actor, which indicates a normative advance—an endorsement of the Rome Statute as a cascade.<sup>60</sup> However, it is possible, as with UNCLOS, that the United States never intended ratification—it simply sought to bind other states to a politically useful norm, without subjecting itself to that norm.

As the possibility of ICC assertion of jurisdiction over conduct by nationals of non-State Parties emerged, powerful and weak states’ interests increasingly aligned in seeking domestic primacy of jurisdiction over the ICC. The United States unsuccessfully argued to be provided the right to vet, veto, or provide prior consent to any prosecution of U.S. citizens, even if it was to join the ICC.<sup>61</sup> Behind that demand was the precedent of U.S. willingness, in the face of UNGA condemnation, to reject international law before the International

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56. Telephone interview with Roger Clark, Diplomat at Rome Conference (Oct. 14, 2013); Interview with former Rome Conference delegate and ICC member, in The Hague, The Netherlands (Dec. 4, 2012) (on file with author).

57. SCHEFFER, *supra* note 35, at 165.

58. *Id.* at 166.

59. *Id.*

60. Keohane et al., *supra* note 52, at 473.

61. SCHEFFER, *supra* note 35, at 168.

Court of Justice (ICJ).<sup>62</sup> The U.S. position at Rome became focused on protection of non-parties while arguing for a regime holding parties accountable.<sup>63</sup> The second of these objectives was in effect compromised by the first in that complementarity would advance the first, but not the second.<sup>64</sup> Allowing complementarity constituted an impediment to ICC jurisdiction over U.S. nationals to the extent that the U.S. government could enable domestic proceedings.<sup>65</sup> It did diminish U.S. capacity to compel domestic prosecution of international crimes as a source of pressure on adversaries, in that those governments could establish politicized proceedings and still satisfy complementarity.<sup>66</sup> Complementarity's implication for international criminal law enforcement is more closely considered in Part III of this Article.

The United States successfully employed its close allies at Rome in shaping its future approach towards the ICC. The United States and key weak state allies, particularly in Latin America, sought to conceal sharing of intelligence, terrorism, and drug related undercover operations by excluding those offences from the ICC's jurisdiction.<sup>67</sup> The U.S. alliance on this issue with the Latin American and Caribbean Group of States (GRULAC) also included the United Kingdom and Canada.<sup>68</sup> This alliance would form a group of cooperating states that would critically influence the election of the prosecutor, the hiring of key prosecution personnel and the ICC's early case selection.<sup>69</sup> A key actor in driving U.K., Canadian, U.S. and GRULAC cooperation was Sylvia Fernandez de Gurmendi, an Argentine diplomat.<sup>70</sup> When it became clear that the United States was not going to go forward with the Rome Statute, the Anglosphere became weak and de Gurmendi's role in providing the GRULAC vote became increasingly important.<sup>71</sup> The United Kingdom and Canadian-led GRULAC group procured the support of the Southern African Development Community through the South African delegate Medard Rwelamira.<sup>72</sup> Rwelamira, at the

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62. G.A. Res. 44/43 (Dec. 7, 1989).

63. SCHEFFER, *supra* note 35, at 167.

64. *Id.* at 171.

65. Telephone interview with Roger Clark, *supra* note 56.

66. *See infra* Part III.A.

67. SCHEFFER, *supra* note 35, at 169-70.

68. Interview with former Rome Conference delegate and ICC member (Nov. 28, 2012) (on file with author).

69. *Id.*; Interview with former Rome Conference delegate and ICC member, *supra* note 56.

70. Interview with former Rome Conference delegate and ICC member, *supra* note 68.

71. *Id.*

72. *Id.*

insistence of the United Kingdom and Canada, was made the first head of the Secretariat of the ASP.<sup>73</sup> Similarly, the U.K. and Canadian governments were able to bring on board Prince Zahid of Jordan who delivered the Islamic and Arab group away from the primary source of perceived Anglosphere competition, France and Germany.<sup>74</sup> Prince Zahid, de Gurmendi, and Rwelamira, were induced through their own personal advancement, to orient the positions of their respective supporting states towards the United Kingdom and Canada.<sup>75</sup> The utility of their agency would assist U.K. and Canadian influence within the OTP while satisfying German and French demands for civil law, rather than common law dominance.<sup>76</sup>

The Conference's working group structure allowed individual or small groups of states to slow the process and bring like-minded states in line on compromises of case selection independence—a strategy de Gurmendi was instrumental in facilitating.<sup>77</sup> This process was particularly critical in securing support for the final issues of the Security Council's filtering role, the crimes the ICC would cover, and the scope of jurisdiction over non-State Parties.<sup>78</sup> The inclusion of jurisdiction over nationals of non-States Parties, despite the inclusion of complementarity, limited Security Council discretion to filter cases. The limited and delayed jurisdiction over the crime of aggression can be considered a major achievement for weak states' interests, and peripherally, for norm entrepreneurs. Like-minded (mostly weak) states' co-option or compromise of norm entrepreneurs facilitated state primacy over the ICC. States Parties also retained the threat of referring crimes by powerful states' nationals on a State Party's territory. For norm entrepreneurs seeking, as Sikkink does, an increase in domestic international crimes prosecution, the low level of domestic case selection independence demanded by complementarity would instruct success.<sup>79</sup> That element would also instruct the success of norm entrepreneurs' greatest achievement in advancing case selection independence for international crimes—OTP discretion to trigger, *proprio motu*, an investigation of crimes within the court's jurisdiction. *Proprio motu* power was not envisaged in the ILC's 1994 draft. However, it was included in the

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*; Interview with former Rome Conference delegate and ICC member, *supra* note 56.

77. Interview with former Rome Conference delegate and ICC member, *supra* note 68.

78. *Id.*; SCHABAS, *supra* note 44, at 18-19.

79. See *infra* Part III.A. for a description of the low complementarity threshold.



Statute in confrontation to fierce U.S. opposition on the Conference's final day.<sup>80</sup> This discretion allows norm entrepreneurs to prompt *proprio motu* exercise of jurisdiction by communicating information about crimes.

Despite indications of normative contraction, a number of case selection independence elements signal an advance. First and foremost is the discretion of the Office of the Prosecutor (OTP) to assert jurisdiction over crimes by U.S. nationals and U.S. allies on State Parties' territory—a particular concern for the 100,000s of U.S. troops deployed around the world who are granted local immunity by Status of Forces Agreements (SOFAs).<sup>81</sup> Similarly, the definition of weapons particularly concerned the United States along with NATO and P5 states. That group unsuccessfully sought to exclude specific reference to "indiscriminate use," as well as poison, asphyxiating gases, and expanding bullets in the face of the group of like-minded states.<sup>82</sup> However, powerful states successfully excluded specific reference to bacteriological and chemical weapons, as well as nuclear, chemical, and biological weapons.<sup>83</sup>

#### B. *The Rome Statute's Constraints on Case Selection Independence*

The Rome Statute established a permanent ICC with jurisdiction over core international crimes.<sup>84</sup> All ratifying states subject their nationals, and persons acting on their territory, to the ICC's jurisdiction.<sup>85</sup> By lodging a declaration relating to a crime, non-states Parties may also subject incidents by their nationals and on their territory, to the court's jurisdiction.<sup>86</sup> This part discusses the provision of power to trigger and filter ICC case selection, the conduct that is criminalized and the vulnerability of the subsequent case selection processes to political pressure or accommodation.

The United States, along with the other permanent Security Council member states, secured their discretion to refer a situation to the ICC,

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80. Interview with former Rome Conference delegate and ICC member, *supra* note 56; SCHABAS, *supra* note 44, at 120.

81. SCHABAS, *supra* note 44, at 167, 171; BUREAU OF POLITICAL-MILITARY AFFAIRS, U.S. DEP'T OF STATE, INTERNATIONAL CRIMINAL COURT FACT SHEET (2002).

82. Roger Clark, *Building on Article 8(2)(B)(xx) of the Rome Statute*, 12 NEW CRIM. L. REV. 366 (2009); Telephone interview with Roger Clark, *supra* note 56.

83. Telephone interview with Roger Clark, *supra* note 56.

84. Rome Statute, *supra* note 2, at arts. 4-10.

85. *Id.* at art. 12.

86. *Id.* at art. 12(3).

even one involving a non-State Party.<sup>87</sup> A P5 state can block this action by using its veto power.<sup>88</sup> A number of weak states and norm entrepreneurs opposed this case selection independence compromise because it subjected ICC functions to political bodies, undermining its credibility and independence.<sup>89</sup> Security Council control over ICC jurisdiction is further increased by its power to defer cases for renewable twelve-month periods.<sup>90</sup> Power to trigger and defer, allow the Security Council to block ICC jurisdiction where its interests are confronted and trigger it where they are advanced. France and the United Kingdom are the only P5 states to become State Parties. China has never signed the Treaty, while the United States and Russia have signed the Treaty without ratifying it, allowing these three states to direct the court at other states' nationals without accepting jurisdiction over their own.<sup>91</sup>

The Security Council's discretion to impede independent case selection was further advanced by the 2010 Kampala review conference, which completed the narrowing of the 1974 definition of aggression.<sup>92</sup> Continuation of the IMT for the Far East definition of the crime of aggression, including use of other armed groups or states, would advance the interests of weak states hoping to deter conduct that threatened their hold on power. Instead, the final definition requires the act to be by a state against the territory of another state; requires the act to be of the character, gravity, or scale constituting a manifest violation of the U.N. Charter; and requires that the perpetrator command, control, and be aware of the violation.<sup>93</sup> Most importantly, the Security Council wields sole triggering jurisdiction over a non-State Party or a non-consenting State Party situation.<sup>94</sup> This outcome, providing practical exclusion of aggression jurisdiction accompanied by comparatively broad jurisdiction over international humanitarian law, disarms weak states of unorthodox methods of defending themselves

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87. *Id.* at art. 13(b).

88. U.N. Charter art. 27.

89. Lionel Lee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE—ISSUES, NEGOTIATIONS, RESULTS 143, 147 (Roy S. Lee ed., 1999).

90. Rome Statute, *supra* note 2, at art. 16.

91. In 2000, the United States suspended their signature obligations under the Vienna Convention on the Law of Treaties. *Status of the U.S. Signature of The Rome Statute*, AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT (AMICC) (May 1, 2013), <http://www.amicc.org/icc/ratifications#fn3>.

92. Kai Ambos, *The Crime of Aggression after Kampala*, 53 GER. Y.B. INT'L L. 463, 463-509 (2010).

93. *Id.* at 471.

94. *Id.* at 463-509.

against strong militaries that are undeterred by the weak criminalization of aggression.

No court has been empowered to prosecute the crime of aggression since the IMT for the Far East in 1946. Were the ICC prosecutor to have held *proprio motu* jurisdiction over aggression, it might have been able to construct a *prima facie* case against the United Kingdom and other allied parties to that conflict also party to the Rome Statute, for their March 2003 invasion of Iraq. Similarly, cases may have been constructed against Charles Taylor for waging war against Sierra Leone, or NATO forces in Yugoslavia, were the Special Court or the ICTY respectively to have been so endowed. Under contemporary interpretations, Charles Taylor's alleged initial support of rebels in Sierra Leone would not constitute aggression because of the absence of state action (Taylor was at the time launching war against Liberian President Samuel Doe). However, an argument for the expansion of the definition of aggression, both relating to impugned acts and who can be prosecuted for them, is that it would create accountability for the act of indirect aggression—financial, military or other material support of actors waging war against a sovereign territory.<sup>95</sup> Mark Drumbl argues that criminalizing indirect aggression would better equip courts to protect human rights, promote stability, protect legitimate sovereignty, and foster security from the diversity of threats that confront the contemporary world.<sup>96</sup>

States Parties to the ICC did not seriously consider such bold approaches for adoption.<sup>97</sup> The ASP adopted the definition proposed by the Special Working Group on Aggression, which the ASP had set up. This definition adopted and slightly narrowed the two key elements of state character and command responsibility. It first requires that the act be by a state against the territory of another state and of the character, gravity, or scale that violates the U.N. Charter. Secondly, it requires that the perpetrator was aware of the violating factual circumstances and exercised effective control over the political or military action of the state.<sup>98</sup>

Negotiations over the inclusion of the crime of aggression were dominated by the insistence of some P5 members, that the Security Council control jurisdiction. Former ICC Vice President Hans-Peter

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95. Mark Drumbl, *The Push to Criminalize Aggression: Something Lost Amid the Gains?*, 41 CASE W. RES. J. INT'L L. 291, 291-319 (2009).

96. *Id.*

97. Ambos, *supra* note 92.

98. *Id.* at 471.

Kaul, stated: “It seems quite obvious that certain [s]tates, powerful [s]tates, continue to reserve for them, openly or more discreetly, also as some kind of hidden agenda, the option to go to war for their interests.”<sup>99</sup>

Powerful states sought the exclusion of the crime of aggression completely, by specifically excluding its definition and imposing the qualification of Security Council control.<sup>100</sup> After the signing of the Rome Statute, the United States, for example, announced its intent not to participate in and to actively discourage other states from ratifying the Rome Statute.<sup>101</sup> The provision of Security Council control over ICC jurisdiction relating to aggression was provided at the ICC review conference in 2010. Security Council authorization is the only way the ICC can assert jurisdiction over a non-State Party or a non-consenting State Party.<sup>102</sup> Although the definition of the crime has been adopted, ICC jurisdiction over aggression cannot commence until after January 1, 2017, and after thirty states Parties have ratified the amendment. As a result, P5 members will be enabled to block prosecution of the crime of aggression, once it enters into force.

Present among the P5 are those states with greatest military capacity. Enforcing international humanitarian law reinforces the predominance of those states’ conventional military superiority. Criminalizing weak or failed states’ use of terrorist or other illegal methods of warfare stigmatizes the few, albeit unsavory, strategies available to weak states to counter powerful states’ military superiority. This assists powerful states to assert their dominance and entrench their position in the global order by attacking (directly or indirectly) or threatening to attack weak states. Exercising control over the prosecution of aggression allows powerful states to utilize their strategic military advantage to illegally invade weaker states with impunity, while enjoying the benefits of international humanitarian law that demands weak states employ conventional methods of warfare.

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99. Hans-Peter Kaul, *Is it Possible to Prevent or Punish Future Aggressive War-Making?*, FORUM FOR INTERNATIONAL CRIMINAL AND HUMANITARIAN LAW (2011), [http://www.fichl.org/fileadmin/fichl/documents/FICHL\\_OPS/FICHL\\_OPS\\_1\\_Kaul.pdf](http://www.fichl.org/fileadmin/fichl/documents/FICHL_OPS/FICHL_OPS_1_Kaul.pdf).

100. David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT’L L. 12, 13 (1999).

101. Marcella David, *Grotius Repudiated: The American Objections to the International Criminal Court and the Commitment to International Law*, 20 MICH. J. INT’L L. 337, 337 (1999).

102. Ambos, *supra* note 92.

Weak states' incentive to accept a Security Council role was increased by the consequent exclusion of future Security Council-established courts. A permanent ICC advances weak states' interest in entrenching complementarity and domestic proceedings' primacy and reducing the threat of Security Council-imposed tribunals that assert primacy of jurisdiction.<sup>103</sup> The sovereignty benefits of complementarity for both strong and weak states are enhanced by discretion to exclude their nationals from jurisdiction for seven years after ratification for some crimes.<sup>104</sup> That time, should states trigger it, allows them to test the political control and complementarity compliance of their respective domestic proceedings. The impact of complementarity on U.S. influence and control over international criminal law is discussed in greater depth in Part III.A. of this Article.

One arguable element of advance is case selection procedure's precision and public policy, which diminishes scope for accommodation of political pressure. The OTP receives and analyses referrals and communications, assessing reasonable bases for initiating investigations and prosecutions. The OTP's preliminary examination determines jurisdiction to investigate a situation. The OTP's Draft Policy Paper on Preliminary Examinations outlines the applied factors and procedures.<sup>105</sup> The OTP can initiate a preliminary examination if a State Party or the Security Council refers a situation,<sup>106</sup> or via its *proprio motu* discretion, vetted by the Pre-Trial Chamber (PTC), to investigate crimes on a State Party's territory or by its nationals.<sup>107</sup> The OTP considers jurisdiction, admissibility and the interests of justice in determining a "reasonable basis" to proceed.<sup>108</sup>

Critical to understanding the focus of U.S. and other external cooperative pressure on the ICC is the near total OTP discretion to interpret and apply gravity, exercised through the OTP's Jurisdiction, Complementarity and Cooperation Division (JCCD). The JCCD employs a four-stage "filtering process" to select situations for investiga-

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103. Lee, *supra* note 89.

104. Rome Statute, *supra* note 2, at art. 124.

105. Office of the Prosecutor, *Policy Paper on Preliminary Examinations*, INTERNATIONAL CRIMINAL COURT 1-3 (Oct 4, 2010) (draft), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Policy%20Paper%20Preliminary%20Examinations%20%202013.pdf) [hereinafter *Policy Paper on Preliminary Examinations*].

106. Rome Statute, *supra* note 2, at arts. 13(a)-(b).

107. *Id.* at art. 13(c).

108. *Id.* at arts. 53(1)(a)-(c).

Fn109 tion.<sup>109</sup> The first phase, for non-Security Council referrals, which skip preliminary jurisdictional considerations such as complementarity, assesses all communications on alleged crimes, excluding crimes manifestly outside the court's jurisdiction.<sup>110</sup> The second phase commences formal OTP preliminary examination, considering communications and information from the referring entity to determine jurisdiction, gravity, complementarity and the interests of justice.<sup>111</sup> In this phase the OTP considers jurisdiction over crimes, territory, personal jurisdiction and temporal jurisdiction, beginning for states Parties upon ratification, or after July 1, 2002, for Security Council-referred situations.<sup>112</sup> The ICC's current jurisdiction over crimes includes war crimes, genocide, and crimes against humanity, the elements of which are further defined by the ASP.<sup>113</sup> In phase three, the OTP considers the conduct's gravity and then whether domestic proceedings render the situation inadmissible (complementarity).<sup>114</sup> If the situation is admissible, the OTP enters phase four and makes a "countervailing consideration" as to whether, weighing the crimes' gravity and victims' interests, the "interests of justice" require that the OTP refrain from an investigation.<sup>115</sup> That criterion allows broad OTP interpretation of a number of variables affecting the following components of the "interests of the victims:" the parties' views, victims' safety, physical and psychological wellbeing, dignity, interest in seeing justice done, and victims' and witnesses' privacy.<sup>116</sup> After a preliminary examination, the OTP may decline to investigate, continue assessing national proceedings, con-

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109. *Policy Paper on Preliminary Examinations*, *supra* note 105, at 18.

110. Office of the Prosecutor, *Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications*, INTERNATIONAL CRIMINAL COURT (2003), [http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy\\_annex\\_final\\_210404.pdf](http://www.icc-cpi.int/NR/rdonlyres/278614ED-A8CA-4835-B91D-DB7FA7639E02/143706/policy_annex_final_210404.pdf).

111. Rome Statute, *supra* note 2, at art. 53(1).

112. *Id.* at arts. 12, 22.

113. *Id.* at art. 5; Assembly of States Parties, 1st Sess., U.N. Sales No. E.03.V.2 and Corrigendum, Part II B (Sept. 10, 2002).

114. *See* Prosecutor v. Lubanga & Ntaganda, ICC-01/04-01/07, Annex II, Decision on the Prosecutor's Application for Warrant of Arrest, art. 58, ¶ 29 (Feb. 10, 2006); *Policy Paper on Preliminary Examinations*, *supra* note 105, at 10-11.

115. Office of the Prosecutor, *Report on Activities Performed During the First Three Years (June 2003-June 2006)*, INTERNATIONAL CRIMINAL COURT 3 (Sept. 12, 2006), [http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP\\_3yearreport20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/D76A5D89-FB64-47A9-9821-725747378AB2/143680/OTP_3yearreport20060914_English.pdf); *Policy Paper on Preliminary Examinations*, *supra* note 105, at 2; Rome Statute, *supra* note 2, at art. 53(1)(c).

116. Office of the Prosecutor, *Policy Paper on the Interests of Justice*, INTERNATIONAL CRIMINAL COURT 5 (Sept. 1, 2007).

tinue collecting relevant information, or initiate investigations.<sup>117</sup>

C. *Pivoting to Domestic Enforcement Under a Shadow: Complementarity and U.S. Intimidation*

This part considers the effect of complementarity on U.S. capacity to shape ICL enforcement. Complementarity has shifted a large part of “the game” of shaping who is prosecuted and who is not, from the Security Council to direct U.S. engagement with states at risk of becoming the subject of ICC investigation, particularly where U.S. nationals risk prosecution. Critical to U.S. perceived self-interest in shaping ICC case selection in such circumstances is its capacity to identify how complementarity may be “gamed.” Gaming complementarity requires domestic prosecution of core international crimes that meets the ICC threshold of able and willing while maintaining political control over case selection. To what extent might the United States enable domestic proceedings by friendly governments that meet complementarity and exclude ICC jurisdiction, while pursuing only cases of political expediency in that country? U.S. foreign policy has sought to diminish or enhance the independence of domestic criminal processes where it advances its realist interests.

To this end, the Rome Statute ushered in a “justice pivot” from prosecuting international crimes at international institutions triggered solely by the Security Council to deferring international criminal justice to domestic processes and the threat of *proprio motu* assertion of jurisdiction by the prosecutor. The “justice game” moved, to a large extent, from The Hague to the domestic courtroom—where local political actors retained greater control. For global powers, such as the United States, it became about assisting allies and refraining from assisting adversaries in playing this game.

The cases of Colombia, Libya, Kenya, Uganda and Guinea illustrate how shaping international crimes case selection has changed. These cases exhibit varied levels of U.S. national security interest, assistance supporting domestic processes, and complementarity compliance and ICC engagement. The Colombian case is particularly significant for U.S. interests as the case longest before the ICC, with significant U.S. self-interest in avoiding prosecution for itself and its ally, and the most sophisticated and calculated attempt to satisfy complementarity. I therefore dedicate a specific part to the Colombian case.

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117. *Policy Paper on Preliminary Examinations*, *supra* note 105, at 2.

III. PROCURING ICC PROSECUTION DEFERENCE

While sitting outside the Rome Statue, the United States has maintained significant capacity to shape initial ICC case selection away from objective application of law to fact and towards U.S. interests. To this extent, I argue that the United States was able to codify a preferential (though not ideal) international institution that binds weak members and whose enforcement would only occur where enforcement costs would be tolerated.<sup>118</sup>

The OTP was formed under vociferous U.S. attack accompanied by U.S.-allied insertion of personnel deferential to the interests of the United States and its allies, particularly the United Kingdom and Canada. That human agency within the prosecution then sought to protect its discretion from rigorous Pre-Trial Chamber oversight. These elements of case selection independence compromise an accompanying weak capacity to compel cooperation from states, diminishing the ICC prosecution's ability to act against the perceived U.S. interest. I describe the evolution of U.S. pressure, weak OTP capacity, and consequent diminished case selection independence below.

The ICC's ability to pursue cases depends on state cooperation on access to territory, accused, witnesses, and other forms of evidence.<sup>119</sup> It does not have power to compel cooperation in domestic courts and is instead predominantly dependent on ASP support.<sup>120</sup> The United States applied enormous pressure during the ICC's formative years. The United States threatened not only active obstruction, but also to procure obstruction from other states.<sup>121</sup> The threat to the ICC, accompanied by efforts to obtain functional control effectively granted the OTP a trial period in which to demonstrate its U.S. foreign policy utility—the utility of advancing U.S. interests through case selection. U.S. policy makers' concern that U.S. nationals could be pursued, and that the Security Council was ceding power, would be balanced by the strategic and moral benefits of engaging and directing case selection at adversaries.<sup>122</sup>

The U.S. sought Article 98 Agreements with States Parties obligating those states to render U.S. nationals to the United States rather than

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118. Judith Goldstein, et al., *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385, 385-399 (2000).

119. Rome Statute, *supra* note 2, at part IX.

120. *Id.* at art. 86-89.

121. See the position of the U.S. Government described below.

122. Richard Haas, *Forward* to VIJAY PADMANABHAN, FROM ROME TO KAMPALA: THE U.S. APPROACH TO THE 2010 INTERNATIONAL CRIMINAL COURT REVIEW CONFERENCE vii (2010).



the ICC.<sup>123</sup> The United States cited a number of concerns, mostly protestations at sovereignty costs of case selection independence, including potential exclusion of Security Council filtering of aggression cases, Prosecution and Pre-Trial Chamber discretion to trigger jurisdiction, exclusion of states' right to attach reservations, and prosecution discretion to determine complementarity.<sup>124</sup> The United States emphasized its preference for domestic proceedings and the continuing alternative of Security Council established tribunals.<sup>125</sup> U.S. jurisdictional concerns regarding the ICC Prosecution and Pre-Trial Chamber related to departures from the elevated control the United States enjoyed in negotiating jurisdiction for the ICTY, ICTR, or SCSL.<sup>126</sup> The U.S. government position was accompanied by legislation granting U.S. nationals ICC immunity and allowing any means necessary to free them from ICC custody.<sup>127</sup>

Uganda, which the United States viewed as an ally, a regional source of stability, and a positive African Union (AU) member, would provide the U.S. government an ideal test case for ICC viability.<sup>128</sup> Despite external pressure, norm entrepreneurs within OTP believed that scope remained for OTP functional independence as far forward as 2003.<sup>129</sup> However, they acknowledge that independent space had closed within twelve months of the office becoming functional.<sup>130</sup> The closing of that space diluted the possibility that the prosecution would pursue, for example, the Ugandan government for crimes it committed in Northern Uganda as well as those crimes committed by the Lord Resistance Army. U.S. government officials assessed that the ICC "pragmatically speaking . . . was never going to go down that [UPDF] road and wouldn't in its current state because its credibility is so much

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123. Article 98(2) of the Rome Statute prevents the Court from compelling the surrender of persons a state is under international law obligations not to surrender, without the State's consent. The United States has sought agreements triggering Article 98 with over 100 states. *See* Rome Statute, *supra* note 2, at art. 98(2).

124. U.S. STATE DEPARTMENT BUREAU OF POLITICAL-MILITARY AFFAIRS, *supra* note 81.

125. *Id.*

126. At the ICTY and ICTR, the U.S. needed only to procure consensus among the five permanent members of the Security Council to secure favorable design or redesign to remove a prosecutor. As the primary donor to the voluntary contribution-dependent Special Court, the US enjoyed even greater control over Court design and the prosecutor's tenure.

127. 22 U.S.C. §§ 7421-33 (Westlaw through Pub. L. No. 114-40).

128. Interview with Former Advisor, U.S. Mission to the U.N., in Auckland, N.Z. (Oct. 28, 2012) (on file with author).

129. Interview with former Rome Conference delegate and ICC member, *supra* note 56.

130. *Id.*

in question.<sup>131</sup> External actors were confident realist considerations overwhelmed those of independent case selection within the OTP.

The first indication of functional OTP deference to the U.S. position was the nature of the prosecutor's election. Under the Statute, the ASP elects the ICC prosecutor by majority.<sup>132</sup> This system broadens participation comparative to the Security Council-provided list for the ICTR, or the SCSL's donor-instructed appointment by the U.N. Secretariat. However, like the SCSL, the U.S. and U.K. governments were particularly concerned to avoid a prosecutor like Del Ponte, who could pursue cases confronting U.S. or U.K. interests.<sup>133</sup> Luis Moreno-Ocampo was the United States, United Kingdom, and Canada's favored candidate.<sup>134</sup> The U.S. government had also favored Moreno-Ocampo to be ICTY prosecutor, which was blocked by the Argentine government.<sup>135</sup> Since the United States was not a State Party, the United Kingdom and Canada led Moreno-Ocampo's campaign.<sup>136</sup>

For the U.K., Canadian and U.S. governments, an Argentine candidate satisfied continental European demands for a prosecutor of non-Anglophone, civil law background.<sup>137</sup> The GRULAC states and Sylvia Fernandez de Gurmendi became critical agents in this effort.<sup>138</sup> Moreno-Ocampo's campaign was led by de Gurmendi, Moreno-Ocampo and another Argentine delegate to the Rome Conference, Fabricio Guariglia.<sup>139</sup> Despite absent Argentine support, the trio provided the GRULAC vote.<sup>140</sup> Then, working with key U.K. and Canadian diplomats, they sought European States Parties.<sup>141</sup> The election was delayed from February to March 2003, with the nominations to have

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131. Interview with Member, U.S. Dep't of State, in Washington D.C. (Nov. 6, 2012) (on file with author).

132. Rome Statute, *supra* note 2, at art. 42(4).

133. Interview with former Rome Conference delegate and ICC member, *supra* note 68.

134. Interview with former Rome Conference delegate and ICC member, *supra* note 56; Interview with former Rome Conference delegate and ICC member, *supra* note 68.

135. SCHEFFER, *supra* note 35, at 31.

136. Interview with former Rome Conference delegate and ICC member, *supra* note 56; Interview with former Rome Conference delegate and ICC member, *supra* note 68.

137. Interview with former Rome Conference delegate and ICC member, *supra* note 56.

138. Telephone Interview with Matthew Brubacher, Analyst, Jurisdiction, Complementarity and Cooperation Division, ICC Office of the Prosecutor (July 15, 2013); Interview with former Rome Conference delegate and ICC member, *supra* note 68.

139. Interview with former Rome Conference delegate and ICC member, *supra* note 68.

140. *Id.*

141. *Id.*

been posted on the U.N. website.<sup>142</sup> Weak states held a greater interest in expeditious forming of the OTP to mitigate potential Security Council exploration of an alternative institution. In an act that strengthened powerful states' bargaining power, the ASP President, Prince Zeid Al-Hussein called for an election by consensus, a process that diminished the independence provided to individual states by a secret ballot.<sup>143</sup> Prince Zahid further advanced the Anglosphere's interest by discrediting the continental European candidate in the ASP meeting.<sup>144</sup> Moreno-Ocampo was elected unopposed by all seventy-eight ASP members.<sup>145</sup>

Once elected, Moreno-Ocampo enjoyed significant discretion in allocating resources and hiring personnel. The OTP is purportedly protected from state insertion of personnel via the prohibition of gratis personnel from States Parties or NGOs unless in 'exceptional circumstances.'<sup>146</sup> However, the principle of personnel independence was undermined by Anglo-American securing of a deferential candidate (Moreno-Ocampo), and that candidate's continued citation of Article 42(2) "full authority over the management and administration of the Office to subjectively hire personnel."<sup>147</sup>

Moreno-Ocampo immediately hired de Gurmendi as Special Advisor and Director of the JCCD and Fabricio Guariglia as Appeals Counsel.<sup>148</sup> De Gurmendi hired the two leading actors in Moreno-Ocampo's campaign from the United Kingdom and Canada, as consultants.<sup>149</sup> De Gurmendi then hired into the JCCD Gavin Hood, the U.K. Foreign and Commonwealth Office desk officer for international criminal justice issues who had also worked on Moreno-Ocampo's campaign.<sup>150</sup> Multiple personnel within the OTP, registry, and Ugandan government believed Hood sought to shape OTP operations in the interests of the

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142. Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1633-65 (2003).

143. See Danner, *supra* note 142; Assembly of States Parties, 1st Sess. (Resumed), 9th mtg. at 6, ICC-ASP/1/3/Add.1 (Apr. 21, 2003).

144. Interview with former Rome Conference delegate and ICC member, *supra* note 56.

145. Assembly of States Parties, *supra* note 143.

146. Rome Statute, *supra* note 2, at art. 44(4).

147. Interview with Cecilia Balteanu, Head of Field Strategic Coordination and Planning Unit, Registry, The Hague (Dec. 4, 2012).

148. Interview with former Rome Conference delegate and ICC member, *supra* note 68.

149. *Id.*

150. *Id.*

U.K. government.<sup>151</sup> Hood previously worked in the OTP of the SCSL and ICTY, where he was familiar with “what institutional information dependency translates into in terms of the ability of governments to influence the office, all at a very subtle level.”<sup>152</sup> Hood also had a security background, and had served as the legal advisor to the Coalition Provisional Authority in Iraq in 2003.<sup>153</sup> Subsequent to his time in the OTP, Hood served as Washington liaison between U.K. and U.S. national security and intelligence agencies, and then as chief of staff to the U.S. intelligence company, Palantir.<sup>154</sup> Hood would play a leading role in situation and case selection in Africa’s Great Lakes.<sup>155</sup> De Gurmendi also hired Darryl Robinson, the Canadian Foreign Affairs legal officer who had been engaged in the Rome Conference and in the election of Moreno-Ocampo.<sup>156</sup> The British and Canadian role in achieving the election of Moreno-Ocampo provided a degree of indirect U.S. control via election of a prosecutor its allies favored. The British and Canadian role in advancing the U.S. interest as far as *realpolitik* would advance it at Rome had continued in the early formation of the Office of the Prosecutor.

The impact for U.S. capacity to shape ICC case selection of securing deferential OTP personnel is exaggerated by the OTP’s successful exclusion of significant judicial oversight of case selection. Some OTP personnel felt that U.K. and Canadian interests were not only capturing the office and case selection discretion, but also sought to protect broad (imprecise) case selection discretion from judicial oversight.<sup>157</sup> During a formal investigation, each situation is assigned a PTC, which verifies a case’s charges, warrants of arrest or summons to appear.<sup>158</sup>

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151. *Id.*; Interview with former Rome Conference delegate and ICC member, *supra* note 56; Interview with Cecilia Balteanu, *supra* note 147.

152. Interview with former Rome Conference delegate and ICC member, *supra* note 56; Interview with former Rome Conference delegate and ICC member, *supra* note 68.

153. Interview with former Rome Conference delegate and ICC member, *supra* note 68; Shane Harris, *Palantir Technologies Hires British Security Official*, WASHINGTONIAN, (June 29, 2012), <http://www.washingtonian.com/blogs/capitalcomment/news-gossip/palantir-technologies-hires-british-security-official.php>.

154. Harris, *supra* note 153.

155. Telephone Interview with Gavin Hood, Former Senior Policy Advisor to the Chief Prosecutor, ICC Office of the Prosecutor (May 24, 2013).

156. Interview with former Rome Conference delegate and ICC member, *supra* note 68.

157. Interview with former Rome Conference delegate and ICC member, *supra* note 56; Interview with former Rome Conference delegate and ICC member, *supra* note 68.

158. *The ICC at a Glance: What is the ICC?*, in THE INTERNATIONAL CRIMINAL COURT: CHALLENGES TO ACHIEVING JUSTICE AND ACCOUNTABILITY IN THE 21<sup>ST</sup> CENTURY 29, 32-33 (M.S. Ellis & R.J. Goldstone eds., 2008).

Fn159 However, norm entrepreneurs allowed state delegates “primarily concerned with the implementation of a system that would protect their sovereignty” to exclude serious judicial scrutiny of the OTP’s criteria application.<sup>159</sup> Article 53 enables the OTP to jealously guard against  
 Fn160 judicial review, and defeat serious oversight or specified precision of key case selection criteria—including crimes’ “gravity.”<sup>160</sup> In 2006, the  
 Fn161 OTP forcefully argued before a closed Status Conference for near sole discretion to determine gravity,<sup>161</sup> despite jurisprudence acknowledging PTC discretion to “request the Prosecutor to provide specific or additional information . . . that the PTC considers necessary in order to exercise the functions and responsibilities set forth in Article 53, Paragraph 3 (b).”<sup>162</sup>

Fn162 The Rome Statute’s preamble, and Articles 1 and 5, indicate that any  
 Fn163 crime falling within the court’s jurisdiction is “grave.”<sup>163</sup> The prosecution asserts imprecision, citing application of gravity to situation’s  
 Fn164 admissibility as intended to establish a basic standard that is not overly restrictive.<sup>164</sup> However, a “case” within a situation requires case-specific  
 Fn165 gravity consideration of the crimes and the extent of a perpetrator’s responsibility.<sup>165</sup> The PTC employed a literal, contextual and teleological interpretation to require systematic or large-scale conduct considering the social alarm caused, the seniority of the accused, the accused’s role in the conduct and the scope of the accused’s group’s activities.<sup>166</sup>  
 Fn166 The PTC, seeking to maximize the deterrent effect, demanded application of ICTY and ICTR criteria focusing on the “most senior” lead-

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159. G. Bitti, *Article 53—Ouverture d’une enquête*, in *STATUT DE ROME DE LA COUR PÉNALE INTERNATIONALE, COMMENTAIRE ARTICLE PAR ARTICLE 1173-1228*, 25-26 (Julien Fernandez & Xavier Pacreau eds., 2012).

160. *Id.*

161. Office of the Prosecutor, *Submission Providing Information on Status of the Investigation in Anticipation of the Status Conference to be Held on 13 Jan. 2006*, INTERNATIONAL CRIMINAL COURT 5 (Jan. 11, 2006), <http://www.icc-cpi.int/iccdocs/doc/doc97243.pdf>; Interview with former Rome Conference delegate and ICC member, *supra* note 56.

162. Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Decision to Convene a Status Conference on the Investigation in the Situation in Uganda in Relation to the Application of Article 53, ¶ 14 (Dec. 2, 2005).

163. Rome Statute, *supra* note 2, at arts. 1, 5.

164. *Policy Paper on Preliminary Examinations*, *supra* note 105.

165. Fabricio Guariglia, *The Selection of Cases by the Office of the Prosecutor of the International Criminal Court*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 209-217, 213 (Carsten Stahn & Goran Sluiter eds., 2009).

166. Situation in the Democratic Republic of the Congo, ICC-01/04-169, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for the Warrants of Arrest, Article 58,” ¶¶ 59-60 (July 13, 2006).

ers.<sup>167</sup> The PTC identified de jure or de facto authority to sign or implement ceasefires and peace agreements.<sup>168</sup>

The Appeals Chamber contested the term “social alarm” because of its absence from the Statute ignoring similar absence among OTP-established criteria.<sup>169</sup> In avoiding the “those most responsible” criterion, the OTP avoids enhanced case selection precision and independence by allowing resource allocation towards ending impunity for those middle level, and politically less sensitive actors at the expense of pursuing the most powerful. The increased discretion of the prosecutor enables greater accommodation of political pressure. The Appeals Chamber rejected the PTC gravity interpretation citing imprecise ILC and Preparatory Committee language, and deliberately inserted Statute qualifications as allowing voluntary OTP adoption of key criterion, no requirement to satisfy all criteria, and the absence of statutory requirements to pursue the most serious perpetrators.<sup>170</sup> The Appeals Chamber rejected ICTY/ICTR criteria because the Security Council adopted them during those courts’ concluding operations, whereas the ICC remains in its early stages.<sup>171</sup> In citing the different court life cycle position of the ICC, the Appeals Chamber neglects the fact that the real driver of the ICTY/ICTR criteria—resource and time constraints that demand careful consideration of which situations and cases to allocate scarce resources towards—existed at the ICC from its infancy.

The United States combined the security of deferential personnel within the prosecution with an antagonistic position towards the court. U.S. antagonism included threats to undermine court processes by refusing to cooperate with the court, actively impeding it, or pressuring other states to do the same.<sup>172</sup> For example, the United States originally adopted a policy of non-cooperation and active obstruction towards the ICC.<sup>173</sup> A diversity of views was held within the Bush Administration. The views of then Undersecretary for Arms Control and International Security, John Bolton, were those most closely reflecting the Bush Administration’s original position. In testimony before the Senate

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167. *Id.* ¶ 60.

168. *Id.* ¶ 63.

169. *Id.* ¶¶ 77-81.

170. *Id.* ¶ 81.

171. *Id.* ¶ 80.

172. *Is a U.N. International Criminal Court in the US National Interest?: Hearing Before the Subcomm. on Int’l Operations of the S. Comm. on Foreign Relations*, 105<sup>th</sup> Cong., 31, 36 (1998) (statement of Hon. John Bolton, former Assistant Sec’y of State for Int’l Org. Aff.).

173. *Id.*

Foreign Relations Committee after the signing of the Rome Statute, Bolton lays out his primary concern that *proprio motu* assertion of jurisdiction may allow a prosecution beyond U.S. political control to pursue not only U.S. personnel, but also senior actors in the U.S. government: “Our main concern should be for the President, the cabinet officers on the National Security Council, and other senior leaders responsible for our defense and foreign policy. They are the real potential targets of the ICC’s politically unaccountable prosecutor and that is the real problem of universal jurisdiction.”<sup>174</sup>

Bolton prescribes a policy position that seeks to cause the ICC’s collapse prior to the OTP’s functional establishment:

I call it ‘the Three Noes’: no financial support, directly or indirectly; no collaboration; and no further negotiations with other governments to improve the statute. This approach is likely to maximize the chances that the ICC will wither and collapse, which should be our objective. The ICC is fundamentally a bad idea. It cannot be improved by technical fixes as the years pass, and in fact it is more likely than not to worsen.<sup>175</sup>

As the OTP came into operation in 2002 and 2003, Bolton reiterated his preference for active U.S. obstruction.<sup>176</sup> The Bush Administration operationalized the Bolton position via legislation and bilateral agreements with State Parties to the Rome Statute.<sup>177</sup> The bilateral Article 98 Agreements obligate states to hand over U.S. persons to U.S. custody rather than the ICC.<sup>178</sup> The American Servicemembers’ Protection Act (ASPA) restricts U.S.-ICC or U.S.-State Parties cooperation unless “in the U.S. interest,” demands impunity for U.S. nationals engaged in peacekeeping, and authorizes “any means necessary” to free U.S. citizens and allies from ICC custody.<sup>179</sup>

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174. *Id.*

175. *Id.*

176. John Bolton, Remarks to the Federalist Society: The United States and the International Criminal Court (Nov. 14, 2002), <http://www.iccnw.org/documents/USBoltonFedSociety14Nov02.pdf>; John Bolton, Remarks at the American Enterprise Institute: American Justice and the International Criminal Court (Nov. 3, 2003), <http://www.iccnw.org/documents/USBoltonAEI3Nov03.pdf>.

177. *Status of U.S. Bilateral Immunity Agreements*, COALITION FOR THE INT’L CRIMINAL COURT (Dec. 11, 2006), [http://www.iccnw.org/documents/CICCFs\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCFs_BIAstatus_current.pdf); 22 U.S.C. §§ 7421-33 (Westlaw through Pub. L. No. 114-40).

178. Rome Statute, *supra* note 2, at art. 98.

179. §§ 7421-33.

As the world's hyper-power, the United States wields , the tremendous economic and security leverage over many states, particularly those experiencing international crimes. One may conclude that the ICC prosecutor may be cognizant of U.S. capacity to undermine the court, a cognition that may affect case selection. As other states came to engage the ICC, the United States came to view its interests as best served via selective engagement.

The case of Darfur (Sudan) was critical in shifting U.S. policy towards the ICC. In 2005 the United States expressed its preference for a Special, ad hoc, or otherwise U.N./AU tribunal.<sup>180</sup> After failing to persuade the Security Council to pursue an ad hoc court rather than Security Council referral to the ICC, the U.S. position softened. The softening took the form of policy revision that allowed active cooperation where ICC case selection and U.S. interests are congruent.<sup>181</sup> However, the threat of non-cooperation persists were the ICC to employ case selection not viewed by the United States as "responsible."<sup>182</sup> A prosecutor might favor U.S.-friendly states in interpreting complementarity because of a perceived implicit threat from the United States or states of essential strategic importance to other permanent Security Council members. Complementarity is the concept in which the ICC cedes primacy of jurisdiction to states that are able and willing to prosecute crimes domestically.<sup>183</sup> Wide discretion relating to the interpretation of complementarity would allow the prosecutor the legal space to make such a decision.

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180. Daily Press Briefing, Richard Boucher, U.S Dep't of State (Feb. 1, 2005), <http://2001-2009.state.gov/r/pa/prs/dpb/2005/41453.htm>.

181. See *Office of Global Criminal Justice*, UNITED STATES DEPARTMENT OF STATE, <http://www.state.gov/j/gcj>.

182. In 2006, U.S. Department of State Legal Adviser John Bellinger, while insisting the Bush administration will never allow U.S. citizens to be tried by the court stated, "we do acknowledge that it has a role to play in the overall system of international justice." In a May speech, Mr. Bellinger said "divisiveness over the ICC distracts from our ability to pursue these common goals" of fighting genocide and crimes against humanity. Jess Bravin, *U.S. Warm to Hague Tribunal: New Stance Reflects Desire to Use Court to Prosecute Darfur Crimes*, WALL ST. J., (June 14, 2006), <http://www.globalpolicy.org/intljustice/icc/2006/0614warm.htm>. That same year, Republican Senator, John McCain and former Senator and presidential candidate, Bob Dole, stated in an op-ed: "U.S. and allied intelligence assets, including satellite technology, should be dedicated to record any atrocities that occur in Darfur so that future prosecutions can take place. We should publicly remind Khartoum that the International Criminal Court has jurisdiction to prosecute war crimes in Darfur and that Sudanese leaders will be held personally accountable for attacks on civilians." John McCain & Bob Dole, *Rescue Darfur Now*, WASH. POST, (Sept. 10, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/09/08/AR2006090801664.html>.

183. Rome Statute, *supra* note 2, at art. 17.



One example of unclear prosecutorial discretion over complementarity is Colombia. Criminal proceedings in Colombia allow for offenders to provide insignificant information relating to crimes committed by their unit in order to procure amnesty.<sup>184</sup> The prosecution has also refrained from targeting senior leadership personnel or adopting seniority as criteria for selecting crimes.<sup>185</sup> However, Colombia has long been an ally of the United States. The United States may view an indictment of any high-ranking Colombian official as hostile to its interests given the breach of Colombian sovereignty and diplomatic stigma attached to a U.S. ally under such circumstances. Is an ICC prosecutor immune to any cognizance of the potential political consequences of ICC case selection in circumstances that may solicit obstruction from powerful states? The ICC's continuing policy of non-engagement in Colombia may suggest that, according to Keohane et al.,<sup>186</sup> the ICC is not willing to settle disputes against the interests of powerful states as a key indicator of its "non-transnational" status, or for the purposes of this study, an indicator of its weak case selection independence and vulnerability to U.S. influence.

A. *Complementarity and Political Control of Domestic Case Selection*

To consider political interaction with the complementarity principle, we must consider the extent to which realist jurisdictional and functional constraints of complementarity are affected by normative pressure to independently investigate and prosecute core international crimes. Critical to considering the interest of governments in prosecuting international crimes cases are the degree of primacy complementarity affords domestic proceedings, the independence complementarity demands of domestic proceedings, and how those variables interact with other pressures upon the ICC.

Rome Statute deference to domestic jurisdictions constitutes, along with Security Council controls over jurisdiction, the most compromising element of OTP case selection independence. Complementarity provides sophisticated state actors the amnesty card instrument of manipulated investigations while enjoying the credible commitment

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184. Jennifer S. Easterday, *Deciding the Fate of Complementarity: A Colombian Case Study*, 26 ARIZ. J. INT'L & COMP. LAW 49, 73 (2009).

185. Maria Saffon, *Problematic Selection and Lack of Prioritization: the Colombian Experience*, in CRITERIA FOR PRIORITIZING AND SELECTING CORE INTERNATIONAL CRIMES CASES 145, 145 (Morten Bergsmo ed., 2d ed. 2010).

186. Keohane et al., *supra* note 52.

benefits of Rome Statute participation. To understand the regulatory capture and compromise of independence afforded by complementarity, its technical elements must be considered. Articles 17(1)(a)-(c) of the Statute render a case inadmissible if it has been or is being investigated or prosecuted by a state with jurisdiction over the crimes in question.<sup>187</sup> However, inadmissibility is voided if the investigating or prosecuting state is unwilling or unable genuinely to carry out the investigation or prosecution.<sup>188</sup>

### 1. Colombia: Heightened U.S. Interests, Heightened International Justice “Gaming”

Colombia’s government—with U.S. assistance—has employed a strategy of calculated engagement with the ICC prosecution.<sup>189</sup> Complementarity is not definitively and finally determined at one point in time, even after an ICC investigation is opened.<sup>190</sup> This allowed the Colombian government, in coordination with the ICC OTP and the U.S. government, to design the Colombian Justice and Peace Unit (CJPU), a domestic regime that addressed crimes within ICC jurisdiction while protecting politically powerful actors from prosecution.<sup>191</sup> U.S. government military and non-military support to the Colombian government to fight armed opposition, funded via multi-billion dollar public and black budgets, significantly assist a U.S. ally to maintain power, but also

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187. Rome Statute, *supra* note 2, at art. 17.

188. *Id.*

189. For a closer examination of the technical components of complementarity in the considered situations in this Article, see Chris Mahony, *If You’re Not at the Table, You’re on the Menu: Complementarity, Politicized Domestic Processes, and Armed Forces’ Self Interest in Prosecuting Core International Crimes Cases*, in *MILITARY SELF INTEREST IN ACCOUNTABILITY FOR CORE INTERNATIONAL CRIMES* (Morten Bergsmo ed., 2015).

190. JO STIRGEN, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS* 245 (2008); Prosecutor v. Kony et. al., ICC-02/04-01/0, Decision on the Admissibility of the Case Under Article 19(1) of the Statute, ¶ 25 (Mar. 10, 2009).

191. OTP war crimes jurisdiction begins November 1, 2009, but jurisdiction over crimes against humanity begins many years earlier. The U.S. government has provided millions of dollars of technical support and capacity to Colombia’s CJPU. Office of the Prosecutor, *Report on Preliminary Examination Activities*, INTERNATIONAL CRIMINAL COURT 14 (Dec. 13, 2011), <http://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf>; Saffon, *supra* note 185, at 99; Office of the Prosecutor, *Report on Preliminary Examination Activities*, INTERNATIONAL CRIMINAL COURT 32 (Nov. 2013), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/OTP%20Preliminary%20Examinations/OTP%20-%20Report%20%20Preliminary%20Examination%20Activities%202013.PDF); *U.S-Colombia Relations: Hearing Before the Subcomm. on the Western Hemisphere of the H. Comm. on Foreign Affairs*, 110<sup>th</sup> Cong., 116 (2007).

aid and abet crimes.<sup>192</sup> U.S. soldiers and military contractors have also been accused by a Colombian government-commissioned report of sexually abusing more than fifty-four children in Colombia between 2003 and 2007 with impunity.<sup>193</sup> Formal ICC-OTP investigations in Colombia would likely shift U.S. policy towards active obstruction of the ICC.

A German government-commissioned study examined Colombia's 2005 Justice and Peace Law (JPL) established to address crimes within ICC jurisdiction the OTP found were committed by Colombian armed forces, government-aligned paramilitary groups, and left wing armed groups.<sup>194</sup> The report observes considerable mitigation of sentences for government and government-aligned forces at the discretion of the government while left wing armed groups are excluded from sentence mitigation because of drug trafficking or illicit enrichment.<sup>195</sup> An OTP functioning in an atmosphere of U.S. hostility, remained accommodating of a Colombian complementarity approach, described by one former OTP officer as "very sophisticated."<sup>196</sup> The report concludes that mitigation of sentence and a judiciary without "direct" political interference but qualitatively corrupt meets the complementarity threshold of able (without substantial justice collapse) and willing genuinely (without making value judgments).<sup>197</sup> Colombia's Constitutional Court adopted the report's position, as has the ICC OTP, which has continued to accept Colombia's ongoing calculated approach that pursues

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192. Dana Priest, *Covert Action in Colombia*, WASH. POST, (Dec. 21, 2013), <http://www.washingtonpost.com/sf/investigative/2013/12/21/covert-action-in-colombia/>; *Report on Preliminary Examination Activities* (Nov. 2013), *supra* note 191.

193. *At Least 54 Colombian Girls Sexually Abused by Immune U.S. Military*, INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE (Mar. 22, 2015), <https://www.ictj.org/news/least-54-colombian-girls-sexually-abused-immune-us-military>.

194. Kai Ambos & Huber Florian, *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court: Is There Sufficient Willingness and Ability on the Part of the Colombian Authorities or Should the Prosecutor Open an Investigation Now?*, INTERNATIONAL CRIMINAL COURT, OFFICE OF THE PROSECUTOR NGO ROUNDTABLE 30-1 (Oct. 19-20, 2010), <http://www.icc-cpi.int/NR/rdonlyres/7EDB95A1-BE49-4BA7-A64A-7D9DC8F57E98/282850/civil1.pdf>; Kai Ambos, *The Colombian Peace Process (Law 975 of 2005) and the ICC's Principle of Complementarity*, in *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* 1071, 1072-73 (Carsten Stahn & Mohamed El Zeidy eds., 2011).

195. Ambos, *supra* note 194, at 1072-73; Pablo Kalmanovitz, *A Law of Conditionally Reduced Penalty*, in *LAW AND PEACE NEGOTIATIONS* 7, 15 (Morten Bergsmo & Pablo Kalmanovitz eds., 2009); Ambos & Florian, *supra* note 194, at 4-5.

196. Interview with Member of the ICC Office of the Prosecutor, in The Hague, The Netherlands (Dec. 3, 2012) (on file with author).

197. Ambos, *supra* note 194, at 1087, 1089-93.

low and mid-level combatants rather than political, military and business leaders.<sup>198</sup>

An emboldened Colombian government went further in 2012 passing the Legal Framework for Peace (LFP) enabling suspension of sentences, which the Constitutional Court approved, potentially allowing no incarceration for those convicted.<sup>199</sup> A deferential OTP announced it would treat reduced and suspended sentences on a case-by-case basis considering the intent to pursue justice, while indicating that anything less than “total” suspension of sentence may be acceptable.<sup>200</sup>

Early Colombian government engagement with the ICC contrasts with Kenya’s more confrontational approach that abstained from pursuing complementarity until after an ICC investigation was triggered. The complementarity threshold is raised post-ICC OTP opening of investigations, requiring domestic processes pursue the same “case” or conduct as that investigated by the ICC as well as demonstrate the state is not unable or unwilling to do so.<sup>201</sup> Kenya was required to demonstrate a sufficient degree of investigative “specificity and probative value,” including its investigative and witness protection capacities.<sup>202</sup> Complementarity post-ICC opening of investigation also requires gov-

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198. *Id.*; Office of the Prosecutor, *Situation in Colombia—Interim Report*, INTERNATIONAL CRIMINAL COURT 16-17, 50 (Nov. 2012), <http://www.icc-cpi.int/NR/rdonlyres/3D3055BD-16E2-4C83-B A85-35BCFD2A7922/285102/OTPCOLOMBIAPublicInterimReportNovember2012.pdf>; *Justice and Peace: Progress and Great Challenges*, INTERNATIONAL CENTRE FOR TRANSITIONAL JUSTICE (May 10, 2012), <https://www.ictj.org/news/justice-and-peace-progress-and-challenges>. An example is the use of death squads by former President Alvaro Uribe’s brother alleged by a former police officer that states he was paid to turn a blind eye. *See Retired Colombian Police Officer Accuses Uribe’s Brother of Leading a 1990s Death Squad*, FOX NEWS, May 24, 2010.

199. Helen Murphy, *Colombia’s High Court Rules FARC Peace Talks Law Constitutional*, REUTERS, Aug. 29, 2013.

200. *Situation in Colombia—Interim Report*, *supra* note 198, at 64; Letter from the ICC Office of the Prosecutor, to the Government of Columbia (Oct. 28, 2014) (on file with author); *Una ‘carta bomba,’ SEMANA*, (Aug. 17, 2013), <http://m.semana.com/nacion/articulo/una-carta-bomba/354430-3>; *Report on Preliminary Examination Activities* (Nov. 2013), *supra* note 191.

201. Prosecutor v. Gaddafi, ICC-01/11-01/11, Decision on the Admissibility of the Case Against Abdullah Al-Senussi, (Oct. 11, 2013) [hereinafter *Prosecutor v. Gaddafi*]; Prosecutor v Muthaura, ICC-01/09-02/11, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled “Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute,” ¶¶ 15, 23 (Aug. 30, 2011) [hereinafter *Prosecutor v. Muthaura*].

202. *Prosecutor v. Muthaura*, *supra* note 201, at 32-33; Office of the Prosecutor, *Agreed Minutes of the Meeting Between Prosecutor Moreno-Ocampo and the Delegation of the Kenyan Government*, INTERNATIONAL CRIMINAL COURT (July 3, 2009), <http://www.icc-cpi.int/NR/rdonlyres/1CEB4FAD-DFA7-4DC5-B22D-E828322D9764/280560/20090703AgreedMinutesofMeetingProsecutorKenyanDele>.

ernment capacity to ascertain control of the accused, access witness testimony, protect the accused from torture, and provide adequate witness protection within the context of relevant national systems and procedures.<sup>203</sup> A deeply incapacitated Libyan justice system was able to meet the complementarity threshold despite failings in exercise of control over detention facilities, capacity to protect witnesses, provision and protection of accused's counsel.<sup>204</sup> The distinct approach by the OTP to the Kenyan and Colombian cases demonstrates continued U.S. and allied influence over the ICC OTP. A former ICC OTP member identifies Colombia as: "a situation that should have been engaged [where] the Court did not provide an effective threat" and was not consistent.<sup>205</sup> "The Prosecutor had made it clear he wanted to assist and cooperate in Colombia rather than apply pressure to see results at the national level. The opposite approach was taken in Kenya."<sup>206</sup> For the United States, the Kenyan situation demonstrates how domestic political antipathy towards the ICC may prevent a government from putting in place a process that triggers complementarity, thereby raising the complementarity bar to one that state is politically unable to meet—the investigation of its own political leadership. The U.S. government will be cognizant of the opportunity to assist allies in establishing politically controlled complementarity-compliant processes preventing the scrutiny and stigmatization of OTP investigations and potential indictments of political leaders.

## 2. Complementarity Implications for U.S. Policy

A more pressing question for U.S. influence over international criminal law, particularly the ICC's function, is whether its own investigations (whether civil or military) meet the low threshold of ICC complementarity. U.S. systems of military and civilian justice might easily surpass the complementarity-compliant process employed by Colombia. U.S. ratification of the Rome Statute, therefore, may pose a smaller threat to U.S. impunity for international crimes than that implied by threatening U.S. legislation and policy positions. If Guinea

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pdf; Chris Mahony, *The Justice Sector Afterthought: Witness Protection in Africa*, INSTITUTE FOR SECURITY STUDIES 132 (2010), <https://www.issafrica.org/siteimages/WitnessProt.pdf>.

203. *Prosecutor v. Gaddafi*, ICC-01/11-01/11, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi, ¶¶ 82, 86 (May 31, 2013).

204. *Id.* at 83, 87-88; *Prosecutor v. Gaddafi*, *supra* note 201, at 139.

205. Interview with Paul Seils, Former Head of ICC Office of the Prosecutor Situation Analysis, in New York, N.Y. (Dec. 16, 2011).

206. *Id.*

can design a domestic process sufficient to satisfy complementarity but does not self-incriminate the Guinean regime for 2009 killings by Guinean forces, one might assume the United States can too.<sup>207</sup>

Remaining outside the Rome Statute disarms the United States of key sources of direct pressure upon the ICC prosecution including fiscal constraints and capacity to insert personnel. It retains the capacity to facilitate pressure via allied State Parties and via the threat of state non-cooperation, and establishment of alternative justice institutions. Remaining outside the Rome Statute renders the United States less influential over ICC functions than were it to become a State Party. As a senior U.S. Central Intelligence Agency (CIA) officer attempted to explain to John Bolton in the early years of the George W. Bush administration, “John, we can use [the ICC].”<sup>208</sup>

Instead, U.S. ICC policy continues to prefer domestic venues for dealing with crimes, and where they fail, mixed international/domestic processes like the SCSL (where the United States has greater design and functional control), over the ICC.<sup>209</sup> To that extent, U.S. policy generally reflects a theme the ICC itself increasingly seeks to emphasize—that the ICC is a court of “last resort.”<sup>210</sup> It is for this reason that weak states prefer a court where powerful states cede a degree of functional influence diminishing the enthusiasm of weak states for future ad hoc or hybrid tribunals. One potential opening of functional influence is budgetary pressure, evidenced by 2013 budget reductions causing ICC consideration of Security Council, U.S. government, or voluntary funding for Security Council referred situations.<sup>211</sup>

The impact of the original U.S. policy of non-cooperation and active obstruction on nascent ICC case selection is apparent in situations such as Colombia and Uganda. Leading CIA actors, unlike Bolton, viewed

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207. An investigation by former Special Court for Sierra Leone Prosecutor, David Crane, prior to the Guinean process finding the government was not culpable was found not to be credible and contradicted U.N. findings. *Report on Preliminary Examination Activities* (Nov. 2013), *supra* note 191, at 42-45; *Guinea Conakry: Stadium Killings Inquiry Not Credible*, RADIO NETHERLANDS WORLDWIDE, (Mar. 4, 2010), <http://www.rnw.nl/international-justice/article/guinea-conakry-stadium-killings-inquiry-not-credible>.

208. Interview with Larry Wilkerson, Former Chief of Staff to the U.S. Secretary of State, Washington, D.C. (July 7, 2014).

209. Telephone Interview with Clint Williamson, Former Ambassador for War Crimes Issues, U.S. Dep’t of State (Nov. 20, 2012).

210. Tiina Intelmann. *International Criminal Court—African Union*, NEW BUSINESS ETHIOPIA, Oct. 11, 2013.

211. Telephone Interview with Current Member of the ICC Office of the Prosecutor (2012) (on file with author).

the ICC as a potential instrument of pressure to be applied to adversaries.<sup>212</sup> The threat of active U.S. obstruction lends confidence to U.S. allies such as Uganda, which believed the prosecution was unwilling to engage cases antithetical to the U.S. interest.<sup>213</sup>

IV. U.S. INTERESTS, UNFORESEEN CONSEQUENCES, AND ICJ ENFORCEMENT EVOLUTION

U.S. capacity to shape international criminal law is best exemplified by the 2010 Kampala Conference where it sought to ensure control over prosecution of its nationals for the crime of aggression.<sup>214</sup> The court last empowered to prosecute the crime of aggression was the International Military Tribunal for the Far East in 1946.<sup>215</sup> Were the ICC prosecutor to have held *proprio motu* jurisdiction over aggression, it might have been able to construct a *prima facie* case against the United Kingdom, a party to the Rome Statute, for its March 2003 invasion of Iraq. Similarly, cases may have been constructed against Charles Taylor for waging war against Sierra Leone, or NATO forces in the former Yugoslavia, were the Special Court or the ICTY respectively to have been so endowed.

The United States, in leading the design of the ICTY, preferred to exclude the crime of aggression and focus on the atrocities.<sup>216</sup> Strong states had no interest in prosecuting aggression and the Security Council had no interest in ceding its adjudication of the use of force to a judicial body.<sup>217</sup> Uncertainty over the capacity of the ICTY to pursue the accused at the time of the court's design and a U.S. preference to exclude aggression ensured the ICTY and ICTR were unable to prosecute clear incidents in both conflicts.<sup>218</sup> As raised in Part II.B., Charles Taylor's alleged initial support of rebels in Sierra Leone would not

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212. Interview with Wilkerson, *supra* note 208.

213. Telephone Interview with Former Member, Ugandan National Security Council (2012) (on file with author).

214. Ambos, *supra* note 92, at 463-509.

215. Charter of the International Military Tribunal for the Far East art. 5(a), Apr. 26, 1946, T.I.A.S. No. 1587, 4 Bevans 21.

216. Interview with Former Senior Legal Advisor, U.S. Dep't of State, in Washington, D.C. (Sept. 9, 2014).

217. *Id.*

218. *Id.*

Fn219 constitute aggression because of the absence of state action.<sup>219</sup> However, expansion of the definition of aggression would hold those like Taylor accountable, while criminalizing indirect aggression would better equip courts to protect human rights, promote stability, protect legitimate sovereignty, and foster security from the diversity of threats that confront the contemporary world.<sup>220</sup>

Fn220 States Parties to the ICC did not seriously consider such bold approaches for adoption.<sup>221</sup> In Kampala, in 2010, the ASP adopted the definition proposed by the Special Working Group on Aggression that the ASP had set up.<sup>222</sup> Prince Al-Hussein of Jordan—a long-time U.S. ally in the Middle East—chaired the Special Working Group. This definition adopted and slightly narrowed the two key elements of state character and command responsibility. The definition first requires that the act be by a state against the territory of another state and of character, gravity, or scale that violates the U.N. Charter.<sup>223</sup> Second, it requires that the perpetrator was aware of the violating factual circumstances and exercised effective control over the political or military action of the state.<sup>224</sup>

Fn221 Negotiations over the inclusion of the crime of aggression were dominated by the insistence of some P5 members that it control jurisdiction. ICC vice president, Hans-Peter Kaul, has stated: “It seems quite obvious that certain States, powerful States, continue to reserve for them, openly or more discreetly, also as some kind of hidden agenda, the option to go to war for their interests.”<sup>225</sup> Powerful states sought the exclusion of the crime of aggression completely by specifically excluding its definition and providing Security Council control.<sup>226</sup> The United States, alongside other powerful states, was able to secure a Security Council filter for any ICC assertion of jurisdiction over a non-State Party or a non-consenting State Party.<sup>227</sup> Although the definition of the crime has been adopted, ICC jurisdiction over aggression

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219. *The Military and Political History of the Conflict*, SIERRA LEONE TRUTH AND RECONCILIATION COMMISSION (2004), <http://www.sierraleonetr.com/index.php/view-report-text-vol-3a/item/volume-three-a-chapter-three>.

220. Drumbl, *supra* note 95, at 291-319.

221. Ambos, *supra* note 92, at 463-509.

222. *Id.*

223. *Id.*

224. *Id.* at 471.

225. Kaul, *supra* note 99.

226. David Scheffer, *The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12-22 (1999).

227. Ambos, *supra* note 92.



cannot commence until after January 1, 2017, and after thirty States Parties have ratified the amendment. As a result, permanent Security Council members will be able to block prosecution of their nationals for the crime of aggression once ICC jurisdiction enters into force. This position was formed after dismissal of U.S. suggestions to defer discussion until consensus is reached and after the United Kingdom and France abandoned their positions requiring Security Council pre-determination to enable ICC jurisdiction.<sup>228</sup>

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To understand the realist self-interest of the parties negotiating the inclusion and definition of the crime of aggression, it is important to consider the consequences of enforcement of particular forms of conduct. Present among the permanent members of the Security Council are those states with the greatest military capacity.<sup>229</sup> Enforcing international humanitarian law reinforces the predominance of those states' conventional military superiority. Criminalizing weak or failed states' use of terrorist or other methods of warfare criminalized by international humanitarian law stigmatizes strategies available to weak states to counter powerful states' military superiority. This international criminal law framework assists the United States' assertion and entrenchment of its military predominance in the global order, advancing its short-to-medium term self-interest. Exercising control over the prosecution of aggression allows powerful states to utilize their strategic military advantage to illegally invade weaker states with impunity, while enjoying the military benefits of international humanitarian law enforcement.

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Excluding the crime of aggression from international criminal justice has also enabled a culture that impedes the emergence of domestic prosecution of the crime of aggression. Whether via exercise of universal jurisdiction or prosecution of a state's own nationals, criminalization of aggression under customary international law has been slow to emerge.

If the United States perceives its self-interest as enabling war by proxy under international law for itself and/or its allies, its foreign policy competence in considering the long-term effect of international criminal law design comes into question. Article 7(1) of the ICTY Statute introduced criminal responsibility where an actor "aided and abetted in the planning, preparation or execution of a crime"—modes of responsibility not present in the Statutes of the Nuremburg or Tokyo

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228. Interview with delegate to the Kampala Conference, in Washington D.C. (Apr. 12, 2015).

229. See table on military expenditure below.

tribunals.<sup>230</sup> These modes of responsibility, present at all post-Cold War tribunals, made successful prosecution easier because they do not require the accused to hold command responsibility over those carrying out criminal conduct.<sup>231</sup> The mode of “aiding and abetting” also criminalized de facto the conduct of waging war by proxy (where proxy forces commit crimes).<sup>232</sup> Criminalization of war by proxy via aiding and abetting constitutes a development the United States appears to perceive as a threat to its interests.<sup>233</sup> The contemporary U.S. approach to this issue appears uncertain. The U.S. Special Counsel to the Department of Defense General Counsel, David Simon, noted that the United States provides international humanitarian law training to and vets personnel of armed groups the United States supports in Syria.<sup>234</sup> “You can then only hope the armed group does not commit international criminal law abuses,” Simon notes.<sup>235</sup>

U.S. Ambassador at Large for Global Criminal Justice, responding to a question about aiding and abetting in Syria noted:

In other situations in which individuals may be supporting armed groups intending to win military victories, not intending to kill civilians and taking efforts to prevent that kind of conduct and to train people in IHL [International Humanitarian Law], and to vet the people that they train then you’re into a different situation. But certainly this question of supporting proxy forces in the world is one that one has to exercise a fair amount of due diligence on, no question about it, because of these kinds of prosecutions because one shouldn’t be in there enabling.<sup>236</sup>

The provision of international humanitarian law training and process of personnel vetting does not expunge liability for aiding and

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230. See Rep. of the S.C. Pursuant to Paragraph 2 of Security Council Resolution 808, Annex, art. 7(1), U.N. Doc. S/25704 (1993) (containing the text of the Statute for the Int’l Criminal Tribunal for the Former Yugoslavia). The Statute was later legally adopted by a Security Council resolution. See Int’l Criminal Tribunal for the Former Yugoslavia, S.C. Res. 827 (May 3, 1993).

231. Andrew Clapham, *Extending International Criminal Law Beyond the Individual to Corporations and Armed Opposition Groups*, 6 J. INT’L CRIM. JUST. 5, 899-926 (2008).

232. *Id.*

233. David Simon, Special Counsel to the Gen. Counsel, U.S. Dep’t of Defense, Address to the Georgetown Journal of International Law Symposium: World Cops Without World Courts: The Role of the United States in Shaping Public International Law (Apr. 10, 2015).

234. *Id.*

235. *Id.*

236. *Making the Case Against Assad: A Conversation with Amb. Stephen J. Rapp*, Atlantic Council, YouTube (July 2, 2015), <https://www.youtube.com/watch?v=tLEQkuvT8O0>.

abetting crimes if material assistance is provided to an armed group that the United States knows—or ought to know—has perpetrated crimes in the past without internal disciplinary consequences, or is likely to perpetrate in the future.

Of further significance to the pursuit of prosecuting Ugandan aiding and abetting of crimes in the Democratic Republic of the Congo's Ituri province was the obligation or strength of precedent supporting a critical element of liability—*mens rea*. The ICTY had overturned the requirement that aiding and abetting included only directing material support towards an armed group's general war effort.<sup>237</sup> According to the ICTY, aiding and abetting liability required that the defendant's support be specifically directed towards the crimes in question.<sup>238</sup>

The ICTY precedent was considered and rejected in the SCSL's Taylor case, which found that "aiding and abetting liability under customary international law is not limited to direct intent or—purpose."<sup>239</sup> Taylor had only been found to have individual criminal responsibility and not to hold effective control over the leadership of Sierra Leone's Revolutionary United Front (RUF) or Armed Forces Revolutionary Council (AFRC).<sup>240</sup> The control Taylor actually had reflected that alleged of the Ugandan government.<sup>241</sup>

Some OTP members explain OTP reluctance to pursue powerful regional actors supporting militia in Ituri citing U.S. influence: "There was a huge effort by the OTP to avoid mentioning the outside help from Rwanda and Uganda. So that's the first political approach. You try to say it is only the UPC, the FNI, etc.—local militia."<sup>242</sup> That same member believes senior OTP elements sought to appease threatening states during the ICC's infancy and that the approach was: "Don't touch those who are important for the UK and the USA, which are Museveni and Kagame, that's obvious. That's not a big secret. So that's very important. The second part was what can I do in order to avoid Kabila?"<sup>243</sup>

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237. Prosecutor v. Mile Mrksic et al., IT-95-13/1-T, Trial Chamber Judgment, ¶ 126 (Int'l Crim. Trib. for the Former Yugoslavia Sept. 27, 2007); Prosecutor v. Mile Mrksic et al., IT-95-13/1-A, Appeals Chamber Judgment, ¶ 159 (Int'l Crim. Trib. for the Former Yugoslavia May 5, 2009).

238. Prosecutor v. Momcilo Perisic, IT-04-81-A, Appeals Chamber Judgment, ¶ 72 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2013).

239. Prosecutor v. Charles Taylor, SCSL-03-01-A, Appeals Chamber Judgment, ¶ 207 (Sept. 26, 2013).

240. Prosecutor v. Charles Taylor, SCSL 03-01-T, Trial Chamber Judgment (May 18, 2012).

241. *Ituri: Covered in Blood, Ethnically Targeted Violence in Northeastern DR of Congo*, HUMAN RIGHTS WATCH 6-8 (July 2003), <http://www.hrw.org/sites/default/files/reports/DRC0703.pdf>.

242. Interview with former Rome Conference delegate and ICC member, *supra* note 56.

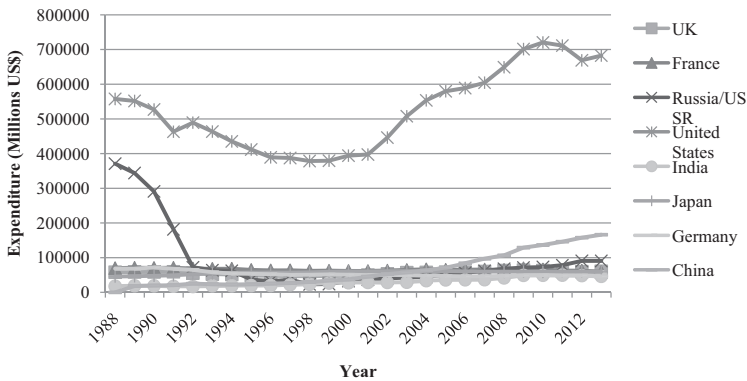
243. *Id.*

The mode of liability of aiding and abetting criminalizes alleged Russian, Qatari, Saudi, Kuwaiti, Iranian, Turkish and U.S. support for actors committing crimes in Syria and beyond. The introduction of aiding and abetting demonstrates a shortsightedness in U.S. policymaking that allowed those seeking to advance independent prosecution of aggression to embed an unintended consequence of aiding and abetting—the de facto criminalization of waging war by proxy. The United States allowed aiding and abetting as a mode of liability at a time of its economic and military predominance when it was best able to control international criminal justice case selection, meaning empowering success of prosecution advanced its interest.<sup>244</sup> The line graphs below demonstrate U.S. predominance by 1993, when the United States was able to establish the ICTY without opposition at the Security Council. Those dynamics have changed.

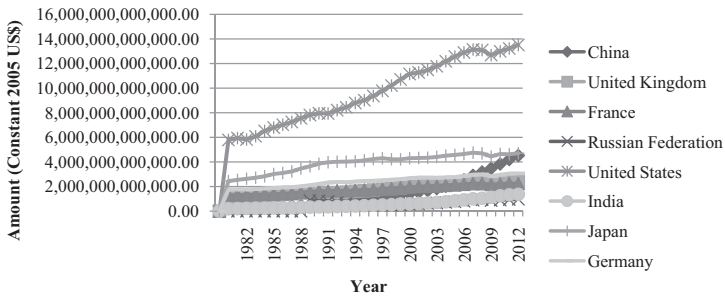
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### Military Expenditure



### GDP



(World Bank, World Development Indicators, <http://data.worldbank.org/data-catalog/world-development-indicators>.)

U.S. interests benefitted from empowered prosecutions<sup>245</sup> able to secure convictions of perceived adversaries such as Charles Taylor during a period of unrivalled U.S. military and economic predominance.<sup>246</sup> However, those short-to-medium-term interests are confronted by the possibility of ICC jurisdiction over situations where U.S. nationals have aided or abetted crimes. Additionally, U.S. support of armed groups—direct or indirect—despite their propensity to commit core international crimes, is a key U.S. foreign policy instrument. The United States secured an international criminal law framework that excludes ICC assertion of jurisdiction over U.S. nationals for the crime of aggression.<sup>247</sup> It failed to foresee the combination of aiding and abetting and *proprio motu* prosecutorial discretion triggering de facto ICC jurisdiction over waging war by proxy on the territory of states Parties. Perhaps most importantly, the emergence of aiding and abetting impedes a key instrument of U.S. regime change strategy on the territory of states Parties—supporting armed groups and citing responsibility to protect after a scaled up conflict.<sup>248</sup>

To this end, weak states secured and entrenched protection from war by proxy waged by powerful states, neighbors, or regional powers, whilst also securing primacy of jurisdiction via complementarity. Neither powerful nor weak state governments retain an interest in the emergence and exercise of universal jurisdiction within domestic justice systems. The emergence of the domestic exercise of universal jurisdiction constitutes the most significant advance of independent case selection of core international crimes cases—an advance of great impact for senior U.S. government actors.<sup>249</sup>

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244. Note the graphs below demonstrating global economic and military power.

245. VICTOR PESKIN, *INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION* (2008).

246. *World Bank Development Indicators*, *supra* note 53.

247. Claus Kress & Leonie Von Holtendorff, *The Kampala Compromise on the Crime of Aggression*, 8 J. INT'L CRIM. JUST. 5, 1179-1217 (2010).

248. Chris Mahony, *The Political and Normative Drivers of the Special Court for Sierra Leone and the Truth and Reconciliation Commission*, in *EVALUATING TRANSITIONAL JUSTICE: ACCOUNTABILITY AND PEACEBUILDING IN POST-CONFLICT SIERRA LEONE* (Kirsten Ainley, Rebekka Friedman, & Chris Mahony eds., 2015) (forthcoming 2015) (on file with author) [hereinafter *The Political and Normative Drivers*].

249. Chris Mahony, *Victor's Justice: What's Wrong with the Warlord Charles Taylor's Conviction*, THE ATLANTIC, (Apr. 30, 2012), <http://www.theatlantic.com/international/archive/2012/04/victors-justice-whats-wrong-with-warlord-charles-taylors-conviction/256522/>.

V. CONSIDERING AN INTERNATIONAL CRIMINAL JUSTICE TRAJECTORY OF U.S. INFLUENCE

This part identifies key elements of case selection independence, how they have changed since the end of the Cold War, and how a particularly independent prosecutor drove greater engagement with many of the more complex elements. This part considers how these elements varied between the tribunals and what this means for those seeking independent or captured case selection. Making linear assertions about U.S. capacity to shape international criminal law in the post-Cold War era is complicated by the sequential awkwardness of the overlapping cases of the ICTY, ICTR, SCSL, and ICC. However, design and functional trends can be observed by considering key elements of U.S. case selection across cases.

Perhaps the most significant constraint on case selection independence the United States enjoys (among other states) is that of primacy. The ICTY, ICTR, and SCSL enjoyed primacy over domestic courts prior to the ICC's relinquishing of primacy under complementarity. The ICC prosecutor's *proprio motu* discretion to trigger jurisdiction led the United States to prefer a complementarity safeguard for itself and its allies.<sup>250</sup> However, the ICC was designed after the ICTR and before the SCSL.

An explanation for the absence of primacy at the SCSL may be the weakness of Sierra Leone's government and the diminished sovereignty cost of an institution designed by the United States with diminished input from Security Council member states. U.S. confidence in endowing the SCSL with primacy also drew from the court's disproportionate dependency on cooperation both from a U.S. government ally, the Kabbah government in Sierra Leone—due to its location in Sierra Leone—and from the United States, due to the SCSL's financial dependence.<sup>251</sup> Conversely, in a sign of U.S. control of the design of the ICTR compared to its ally—the Tutsi Rwandan government—Rwanda voted against the Security Council resolution creating the ICTR.<sup>252</sup>

The ICC enjoys broad territorial jurisdiction, yet triggering an investigation of any situation commonly requires ICC negotiations with a

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250. Telephone Interview with Roger Clark, *supra* note 56; Interview with former Rome Conference delegate and ICC member, *supra* note 56.

251. *The Political and Normative Drivers*, *supra* note 248.

252. 79 MARI KATAYANAGI, HUMAN RIGHTS FUNCTIONS OF UNITED NATIONS PEACEKEEPING OPERATIONS 310 (2002).

State Party, placing the United States in a similarly peripheral role to that occupied by Rwanda during the negotiations of ICTR jurisdiction over crimes relating to the conflict in Rwanda and the Great Lakes. In an indication of U.S. confidence that an ICTR prosecution would not consider U.S. culpability or that such consideration could be controlled, the ICTR Charter produced jurisdiction over all parties to the conflict, including over U.S. behavior that aided and abetted crimes. U.S., U.K., and French designing actors appeared not to consider prosecution of their own nationals as a serious threat.<sup>253</sup>

U.S. confidence in these tribunals was well founded. Built into the design of the courts were critical U.S. levers of control that could constrain prosecutors were they to begin pursuing cases viewed as failing to advance the U.S. interest. At the ICTR the United States was able to assert control over the prosecution when Carla Del Ponte, the ICTR prosecutor, continued pursuing crimes committed by the U.S. ally in the Rwandan conflict—Paul Kagame’s RPF. U.S. Ambassador at Large for War Crimes Issues, Pierre Prosper, informed Del Ponte she would be removed as ICTR prosecutor were she to not stop her investigations and sign over jurisdiction to the Rwandan government for RPF crimes.<sup>254</sup> When she refused, she was removed.<sup>255</sup>

ICC complementarity provides to states Parties the primacy of jurisdiction the U.S. government sought to compel Del Ponte to give to Paul Kagame’s Rwandan government. The SCSL suffers jurisdictional constraints that exclude U.K. government and non-governmental actors culpable of crimes because they acted “with the consent of the Government of Sierra Leone”.<sup>256</sup> Using jurisdictional elements of case selection independence, we observe increased seizure of primacy by states from international criminal justice, compromising international criminal justice case selection independence.

Increasing capture, particularly by powerful states, has occurred since the Del Ponte moment.<sup>257</sup> The most influential functional elements are those relating to personnel and budgetary capacity. These

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253. Interview with Senior Legal Advisor, U.S. Dep’t of State, in Washington, D.C. (Sept. 9, 2014).

254. DEL PONTE, *supra* note 32, at 231-33.

255. *Id.*

256. Agreement between the United Nations and the Gov’t of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Annex, art. 1(2), 2178 U.N.T.S. 138 (2002) (containing the text of the Statute for the Special Court of Sierra Leone).

257. For an example, see the capture of the prosecution in the SCSL case cited above or the capture via the selection of prosecution personnel at the ICC OTP.

elements, working together, also drive demand for other forms of cooperation. A court's limited capacity to procure cooperation does not mean efforts are fully exhausted. In both fiscal and personnel procurement elements the ICTR and ICTY enjoy greater independence, with a guaranteed budget and a contested prosecutor's election. The ICC enjoys a similarly secure budget and a similarly independent election process. However, unlike other States Parties, Russia and China, two key P5 members, held no interest in a captured ICTR prosecutor. Their demands for ICTR OTP independence produced Carla Del Ponte, a norm entrepreneur prepared to independently pursue crimes in Rwanda.<sup>258</sup> Del Ponte's willingness to assert case selection independence by pursuing cases confronting U.K. and U.S. interests constituted a moment—the "Del Ponte moment"—where international criminal justice case selection independence peaked, triggering U.S. alarm as to the threat to U.S. self-interest of case selection independence and increasing focus on ensuring pliant prosecution personnel.<sup>259</sup>

Confronted with Del Ponte's independence, the U.S. and U.K. governments not only removed her, but also cast far greater diplomatic concentration on ensuring SCSL OTP and ICC OTP personnel would not confront their interests.<sup>260</sup> The hybrid design of the SCSL gave the United States elevated control as the primary donor to a court dependent on voluntary contributions. The United States selected the SCSL Prosecutor from its own Department of Defense, provided that prosecutor with information directing him towards Charles Taylor, and threatened to cut off funding when the prosecutor began to consider prosecutions viewed as antithetical to the U.S. interest, including against actors such as Libyan leader Muammar Gaddafi, Burkinabé President Blaise Compaore, and arms dealer Ibrahim Bah.<sup>261</sup> As a

258. DEL PONTE, *supra* note 32.

259. Telephone Interview with Michael Miklaucic, Former Deputy Ambassador-at-Large for War Crimes Issues, U.S. Dep't of State (Sept. 20, 2011).

260. *Id.*; Interview with former Rome Conference delegate and ICC member, *supra* note 56. For a description of the politicization of the SCSL Office of the Prosecutor personnel, see Chris Mahony, *Prioritising International Sex Crimes Before the Special Court for Sierra Leone: One More Instrument of Political Manipulation?*, in THEMATIC PROSECUTION OF INTERNATIONAL SEX CRIMES (Morten Bergsmo ed., 2012) [hereinafter *Prioritising International Sex Crimes*]; *The Political and Normative Drivers*, *supra* note 248.

261. David Crane, *The Investigation, Indictment, and Arrest of Charles Taylor: A Regional Approach to Justice*, Address Before the Baldy Centre for Law and Social Policy, University of Buffalo (Feb. 17, 2010); Telephone Interview with David Crane, Former Chief Prosecutor, SCSL (May 17, 2007 & Aug. 17, 2010); Scheffer, *supra* note 226, at 334-39. For a deeper discussion of the



consequence, post-Del Ponte international justice case selection independence declined, turning international justice into a captured instrument no longer serving its purpose.

Del Ponte's attempts to pursue RPF crimes constitute the final genuine attempt to pursue those most responsible for crimes by any party in opposition to U.S. interests. Keohane et al.'s demand that justice independence explanations focus on court decisions against designing interests brings into focus U.S. influence over international criminal justice case selection that compromises its interests. Del Ponte's willingness to pursue RPF leaders was followed by SCSL willingness to pursue only those of political expediency to the Sierra Leonean government, which was followed by the ICC's active avoidance of UPDF crimes in Uganda and hesitance to engage with the situation in Colombia.

A. A "Justice Contraction": *The Increasing Capture of International Justice Case Selection*

While the "justice contraction" caused by the "Del Ponte moment" is concerning, of greater concern for independent international crimes prosecution is the Rome Statute's permanent status. Weak and powerful states drew on civil society's deference to a narrative emphasizing a need for a higher quantity of international crimes prosecutions, using complementarity to intertwine the international crimes prosecution norm with the constraining interest of state primacy. As a consequence, realist state actors reduced sovereignty costs via complementarity, which also forms a fig leaf to civil society demands for increased incidents of international crimes prosecution. As complementarity's weakness is illuminated and entrenched by court decisions, a formerly hesitant U.S. government has re-engaged in situations that advance its "interests and policies."<sup>262</sup> The fact the United States still refuses to acknowledge ICC jurisdiction over its nationals<sup>263</sup> may indicate concerns that an independent prosecutor could re-emerge. OTP *proprio motu* discretion, potentially over U.S. nationals, constitutes an element of case selection independence advance that continues to focus U.S.

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political antecedents to and the negotiation implementation of this strategy and its effect on justice outcomes, see *The Political and Normative Drivers*, *supra* note 248; *Prioritising International Sex Crimes*, *supra* note 260; Mahony, *supra* note 249.

262. Colum Lynch, *War Crimes Envoy Has Personal Touch*, WASH. POST, (Nov. 27, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/26/AR2009112602411.html>.

263. 22 U.S.C. §§ 7421-33 (Westlaw through Pub. L. No. 114-40).

concerns and policies on the prosecutor's agency.<sup>264</sup> However, the Rome Statute also constitutes P5 ceding control over international criminal justice to other governments. U.S. hesitance, therefore, also indicates its preference for the increased control it enjoys under the hybrid SCSL model. Contextualizing that advance is the U.S. realization of the opportunity to lock the international community, but not itself, into a system it negotiated while it was the world's sole superpower—one tolerating aggression but stigmatizing methods of war that harm its interests. States seeking independent prosecution of core international crimes existed during the Rome Conference, as they do now.<sup>265</sup> They constitute the minority, however, meaning the key international justice concessions have been trades in realist interest between powerful and weak states, rather than between states and norm entrepreneurs seeking independent prosecution of international crimes cases. A former Rome Conference delegate and member of the ICC during its infancy responded as follows to the question of whether the second prosecutor, Fatou Bensouda, would more independently pursue international crime cases:

I think that Fatou Bensouda was selected in order not to do that. So I think for the moment, the institution is fully controlled, even more. In 2003, there was still the struggle to control. Now the institution is controlled. And that will not happen. That will simply not happen in the foreseeable future. So, frankly speaking, sometimes I agree with [redacted] when he says the only hope is to scale down the international justice system and to try to develop the national judicial system [referring to universal jurisdiction]. Maybe he's right. And I say it with a lot of sadness because really, I work countless hours in order to create this. I did, I had no life but to be involved in that. But at the same time it's good when you're young to put your full energy on something you believe in. It's good, that's part of life, even if ten years later you realize that you have been

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264. David Bosco, *The War Over U.S. War Crimes in Afghanistan is Heating Up*, FOREIGN POL'Y, (Dec. 3, 2014), <http://foreignpolicy.com/2014/12/03/the-war-over-u-s-war-crimes-in-afghanistan-is-heating-up-icc-hague/>.

265. Predominantly small and often island states formed an early nucleus arguing for an independent entity. Interview with former Rome Conference delegate and ICC member, *supra* note 56; Telephone interview with Roger Clark, *supra* note 56; Interview with former Rome Conference delegate and ICC member, *supra* note 68.

investing energy in vain . . . I guess that now the game is over.  
And the game is over for a long time.<sup>266</sup>

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This comment from a former diplomat at the Rome Conference and officer within the ICC OTP during its early years indicates the extent to which state (particularly U.S.) self-interest has prevailed over international crimes case selection independence in international justice.

#### VI. SHIFTS IN AVAILABILITY OF STATE LEVERS OVER INTERNATIONAL CRIMINAL LAW ENFORCEMENT

This part considers the shift in U.S. influence over international criminal justice case selection with the shift from ad hoc and hybrid tribunals to an environment dominated by a permanent ICC. By identifying the trend away from negotiation to establishing tribunals in response to situations and towards ICC-to-government direct negotiations, this part also identifies where U.S. resources will increasingly be focused—on enabling or impeding states' own efforts to prosecute crimes themselves and engage with the ICC.

Conventional institutional design and state delegation analysis bore greater applicability to the ICTR and SCSL than to a permanent ICC. Investigations into situations before the ICC are not bargained by groups of states, unless the Security Council triggers jurisdiction.<sup>267</sup> Abbott and Snidal cite power differentials among designing actors as instructing the impact of states' and norm entrepreneurs' interests.<sup>268</sup> While the ICTR and SCSL both broadly reflect Security Council power differentials, states—not international institutions—most commonly trigger ICC situations. Delegation of ICC jurisdiction is more likely to occur on the basis of state-to-institution bargaining, where states leverage off the primacy of complementarity to direct investigations against adversaries. The 'game' becomes about developing, with or without external assistance, a state's domestic criminal process so as to exclude sovereignty costs of delegation while retaining political control over domestic proceedings.<sup>269</sup> While the 'game' is becoming one primarily played by weak states more likely subject to investigations, powerful states also enjoy influence through selective provision of justice sector reform assistance to weak states. As signaled in this Article, regional

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266. Interview with former Rome Conference delegate and ICC member, *supra* note 56.

267. Rome Statute, *supra* note 2, at art. 13(b).

268. Abbott & Snidal, *supra* note 3, at 421-56.

269. Rome Statute, *supra* note 2, at art. 17.

bodies like the AU, potentially wielding their own complementarity-compliant processes, also may act as intermediaries or weak state supporters.

Similarly, regional bodies and powerful states may instrumentalize their own interpretations of states' domestic proceedings by threatening (implicitly or explicitly) to trigger ICC jurisdiction via a state referral. U.S. government comments in June 2010 hint at that strategy's application to Sri Lanka.<sup>270</sup> To this end, understanding the data available to states to make accusations becomes increasingly important. For states seeking to preempt or shape norm entrepreneurs' approach, understanding available information also constitutes a strategic advantage over weak states. Reports that U.S. and U.K. intelligence agencies are spying on NGOs suggests those states already realize that advantage.<sup>271</sup>

While powerful states enjoy the advantages of employing more sophisticated measures,<sup>272</sup> the ICC endows weak states and norm entrepreneurs with the power to trigger investigations, or prompt OTP triggering of investigations.<sup>273</sup> This power has already been deployed by a group of Egyptian lawyers against Barack Obama, by a Canadian national against his own government, by the Comoros Islands against Israel, and by the Muslim Brotherhood against the Egyptian government.<sup>274</sup> As already emphasized, a key emerging weak state lever is increased scope for complementarity-empowered forum shopping,

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270. *Top US war-crimes official visits Sri Lanka*, TAMILNET, (Jan. 6, 2014), <https://www.tamilnet.com/art.html?catid=13&artid=36959>.

271. James Ball & Nick Hopkins, *GCHQ and NSA targeted charities, Germans, Israeli PM and EU Chief*, THE GUARDIAN, (Dec. 20, 2013), <http://www.theguardian.com/uk-news/2013/dec/20/gchq-targeted-aid-agencies-german-government-eu-commissioner>.

272. Powerful states enjoy greater bureaucratic and intelligence gathering capacity and therefore greater capacity to identify effective methods of shaping case selection in a particular situation or of supplying evidence or leads for investigations that shape case selection.

273. Rome Statute, *supra* note 2, at arts. 13(a), 15.

274. Patrick Howley, *Obama Accused of Crimes Against Humanity in International Court*, DAILY CALLER, (Nov. 9, 2013), <http://dailycaller.com/2013/11/09/obama-accused-of-crimes-against-humanity-in-international-court/>; *International Court Asked to Investigate Alleged War Crimes, Canada*, MEDIA WITH CONSCIENCE NEWS, (Nov. 10, 2013), <http://mwcnews.net/focus/letters-to-editors/33273-war-crimes-by-canada.html>; Dan Kedmey, *Egypt's Muslim Brotherhood Takes Struggle to ICC*, TIME, (Jan. 7, 2014), <http://world.time.com/2014/01/07/egypts-muslim-brotherhood-takes-struggle-to-icc/>; *ICC Opens Initial Probe Against Israel over Marmara Raid*, TIMES OF ISRAEL, (May 14, 2013), [http://www.timesofisrael.com/comoros-files-complaint-against-israel-at-icc/?fb\\_comment\\_id=475344555871283\\_4007323](http://www.timesofisrael.com/comoros-files-complaint-against-israel-at-icc/?fb_comment_id=475344555871283_4007323).

particularly as regional organizations consider availing courts to member states.<sup>275</sup>

A. *The Global Economic Order and U.S. Control of International Criminal Law Enforcement*

The availability of state levers to affect case selection is also instructed by a shifting global economic order. The examined cases suggest weak states are benefitting from increased competition amongst powerful states in two ways. First, the Security Council is becoming less active on issues of international justice. Second, a shifting global economic order is providing weak states with increasing options for economic patronage and allowing greater assertiveness towards international institutions.

A less active Security Council has emerged from the 2008 global financial crisis. Post-Cold War U.S. predominance at the Security Council is increasingly challenged when confronting Russian or Chinese interests, particularly when they act together. For example, in Syria, analogous interests are at hand to those of the 1993 establishment of the ICTY in the former Yugoslavia. Russia, with Chinese support, has blocked Security Council statements and resolutions condemning abuses in Syria, and is unlikely to allow an ICC referral.<sup>276</sup>

China has taken a similar position on Myanmar.<sup>277</sup> Myanmar and Syria constitute states of significant Chinese and Russian interest. On the other hand, though China is Sudan's primary economic patron, it declined to veto ICC referral of Sudan, suggesting China may seek to maintain prestige where its interests are insufficiently significant or threatened.<sup>278</sup> The increasing sophistication of weak state approaches to complementarity, as discussed above, diminishes the likelihood of *proprio motu* assertion of jurisdiction. The ICC prosecution, therefore, is becoming more dependent on weak states, where crimes occur, to trigger prosecution investigations (State Parties may also trigger jurisdiction in situations where the ICC has jurisdiction but have been reluctant to breach other states' sovereignty in such a fashion). That

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275. Elizabeth Dickinson, *Bahrain Selected as HQ of Arab Court for Human Rights*, THE NATIONAL, (Sept. 3, 2013), <http://www.thenational.ae/news/world/middle-east/bahrain-selected-as-hq-of-arab-court-for-human-rights>; *Ecuador Proposes Creation of Regional Criminal Court*, XINHUA, (Nov. 19, 2013), [http://news.xinhuanet.com/english/world/2013-11/19/c\\_132900614.htm](http://news.xinhuanet.com/english/world/2013-11/19/c_132900614.htm).

276. *UN Security Council: Seize Chance for Justice in Syria*, HUMAN RIGHTS WATCH (Sept. 17, 2013), <https://www.hrw.org/news/2013/09/17/un-security-council-seize-chance-justice-syria>.

277. Stewart Manley, *Gauging the Economic and Political Costs to China of Article 13(b) Referrals of Sudan and Myanmar to the International Criminal Court*, 7 U. PA. E. ASIA L. REV. 333, 333-96 (2013).

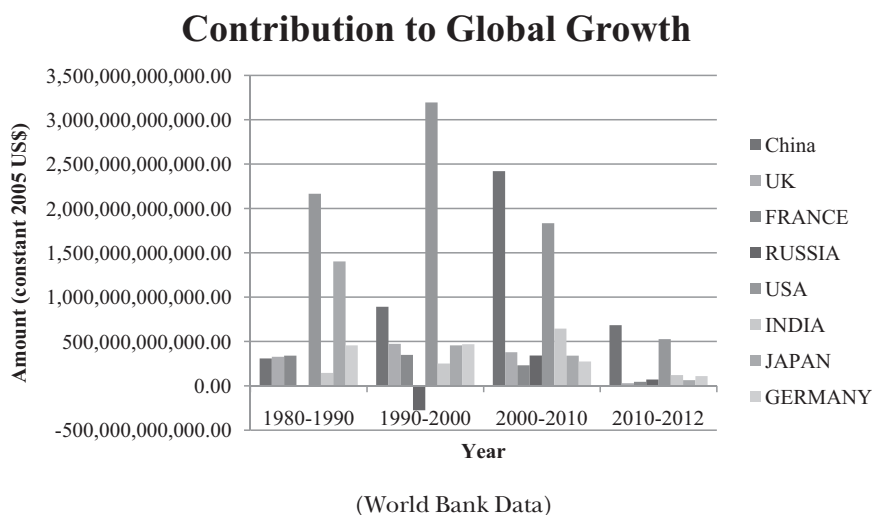
278. *Id.*

dependence strengthens the hand of weak state governments in engaging the ICC at the expense of U.S. influence.

U.S. influence is also diluted by weak states' increased options for economic patronage in a shifting global economic order. China's 2013 statement supporting an AU resolution rejecting ICC jurisdiction over senior state personnel, its increased security cooperation, and its significant economic engagement with weak states—especially in Africa—challenges U.S. capacity to apply human rights pressure.<sup>279</sup> The dramatic shift from 1990s U.S.-driven global growth to 2000s China-driven growth is illuminated below.<sup>280</sup>

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The ad hoc and hybrid tribunals demonstrate the power of hegemonic stability, where a 'victor's justice' can be pursued when a hegemon is able and willing to assert itself. That environment stands in contrast to the emerging global economic rebalancing of power in which contemporary international criminal justice functions. In Rwanda, a U.K.-U.S.-employed ICTR supported a U.K.-U.S.-backed Rwandan regime, as the SCSL did in Sierra Leone alongside a strategy of

279. Statement by Ma Xinmin, in The Hague (Nov. 2013); Simon Ndonga, *Kenya, China pact to secure borders, waters*, CAPITAL NEWS, (Jan. 3, 2014), <http://www.capitalfm.co.ke/news/2014/01/kenya-china-pact-to-secure-borders-waters/>.

280. *World Development Indicators (WDI) & Global Development Finance*, WORLD BANK (July 2013), <http://knoema.com/WBWDIGDF2013jul/world-development-indicators-wdi-global-development-finance-gdfjuly-2013>.

Liberian regime change. In Uganda, a U.S.-conscious and nascent ICC OTP, captured from within by Anglophone agency, demonstrated the power of a unipolar global order. The design and function of these courts occurred during circumstances of unquestioned U.S. economic and military predominance, at the Security Council where the United States had fewer states to persuade, but also under increasing capacity for norm entrepreneur mobilization in an internet-era accompanying globalization. As the rate of globalization slows, according to international political economists Kenneth Abbott and Duncan Snidal, so too will the rate of international law expansion, suggesting hegemonic stability was assisted in driving an advance in independent international crimes case selection by globalization.<sup>281</sup> ICL scholar William Schabas suggests there is potential for a cyclical international justice downturn after an active decade following the ICTY's establishment.<sup>282</sup> That analysis suggests that the readjustment of international crimes case selection independence mirrors shifts in the global economic order. That shift is also a natural manifestation of the compromise of weak state and powerful state realist interests that captured the ICC's design, diluting U.S. scope to shape international criminal law enforcement compared to predecessor international criminal courts. Those two changes diminish the capacity of powerful states to employ justice instruments while increasing that capacity for weak state governments. Consensus is emerging between weak and powerful states that the Rome Statute advances their interests. That consensus causes, as Epstein and O'Halloran note, diminished independence, unlike the East-West disagreement that produced a norm entrepreneur ICTR prosecutor.<sup>283</sup>

VII. UNIVERSAL JURISDICTION AND U.S. CAPACITY TO CONTROL INTERNATIONAL CRIMINAL LAW ENFORCEMENT

A shift in power to trigger international justice may have consequences for armed conflict. Institutionalization of international crimes 'locks-in' historical narratives and state policy.<sup>284</sup> The international relations impact of increasing weak states' ability to trigger interna-

281. Abbott & Snidal, *supra* note 3, at 456.

282. William Schabas, *The Banality of International Justice*, 3 J. INT. CRIM. JUSTICE 11, 545-51 (2013).

283. DAVID EPSTEIN & SHARYN O'HALLORAN, A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999).

284. David, *supra* note 7.

tional criminal justice processes remains unclear. Communications of evidence to the OTP in the hope of triggering *proprio motu* jurisdiction constitutes an available course of action to advocates of independent enforcement, inside and outside government, and attach variant levels of stigma and consequence to those implicated.

However, the ease with which states may trigger complementarity renders the chance of consequent *proprio motu* action remote. The remoteness of norm entrepreneur-initiated investigations may cause those seeking more independent case selection to consider processes outside international criminal justice. Cases examined in this Article illuminate the politicization of domestic processes.

Extra-territorial domestic exercise of universal jurisdiction is very different. Universal jurisdiction's scope exceeds that of international criminal justice, and bluntly confronts the U.S. interest in controlling international criminal law enforcement. These proceedings do not necessarily require the crimes to have been committed on the territory of the state conducting the proceedings or by that state's nationals.<sup>285</sup> The model is exemplified by the proceedings against General Augusto Pinochet in Spain or Charles (Chucky) Taylor, Jr. (former Liberian President Taylor's son) in the United States, for international crimes committed in Chile and Liberia respectively.<sup>286</sup>

The United States Torture Act's<sup>287</sup> disregard of the nationality of the victim or alleged offender provides the United States discretion to prosecute non-U.S. nationals without affiliation to the United States—a power they have demanded other states cede.<sup>288</sup> The U.S. government has proven adept at constraining other government's inclination towards broader exercise of universal jurisdiction. Belgium formerly enjoyed jurisdiction over crimes committed on other territories without the accused's presence on Belgian territory during the trial. Sensitive cases existed before the Belgian courts against former Chi-

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285. Bassiouni, M. Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81 (2001).

286. Both Pinochet and Taylor were indicted for crimes committed in their respective home states by prosecutors in other domestic criminal justice systems. A.N., Dec. 3, 1998 (R.J., No. 19/97, p. 12182) (Spain); United States v. Belfast, 611 F.3d 783, 796 (11th Cir. 2010). Speaking of the US prosecution of Charles (Chucky) Taylor, Jr., Elise Keppler, of Human Rights Watch stated that: "This shows the U.S. government wants to see justice for torturers". Vanessa Blum, *Ex-Liberian Leader's Son Faces U.S. Torture Charges*, SUN SENTINEL (Dec. 7, 2006), [http://articles.sun-sentinel.com/2006-12-07/news/0612061148\\_1\\_charles-mcarthur-emmanuel-torture-charges-chuckie-taylor](http://articles.sun-sentinel.com/2006-12-07/news/0612061148_1_charles-mcarthur-emmanuel-torture-charges-chuckie-taylor).

287. 18 U.S.C. §§ 2340-2340A (Westlaw through Pub. L. No. 114-40).

288. *Id.*; Wolfgang Kaleck, *From Pinochet to Rumsfeld: Universal Jurisdiction in Europe 1998-2008*, 30 MICH. J. INT'L L. 927 (2008).



nese President Jiang Zemin, former Israeli Prime Minister Ariel Sharon, against former U.S. President George H.W. Bush, former Secretary of Defense Richard Cheney, former General Norman Schwarzkopf, and former Chairman of the Joint Chiefs of Staff, Colin Powell.<sup>289</sup> The United States, threatening Belgium with the economic consequences of the removal of NATO headquarters from Brussels, was able to compel Belgium's government to constrain its universal jurisdiction regime, by providing prosecutorial discretion not to pursue cases not 'in the interests of justice' where the accused is not on Belgian territory.<sup>290</sup> The United States, with accompanying pressure from China, also successfully procured constraint of Spain's universal jurisdiction regime, previously viewed as a trailblazer in challenging impunity from international crimes.<sup>291</sup>

Senior U.S. officials have refrained from travelling to Europe after a German prosecutor indicted Donald Rumsfeld for torture and Swiss torture victims initiated proceedings against George W. Bush.<sup>292</sup> While the processes against senior U.S. officials quickly ceased,<sup>293</sup> the comparative impact on impunity, and the diminished capacity of the U.S. government to prevent the triggering of domestic criminal processes suggests domestic exercise of universal jurisdiction poses a greater threat to U.S. control over international criminal law enforcement. That issue was raised by comments from a former OTP officer who also worked to establish the ICC: "International criminal justice is used in order to calm down the willingness of some states to go too far in universal criminal jurisdiction, and I say that institutions like the ICC were used very effectively to calm down the willingness to improve

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289. The case against former Chinese President Jiang Zemin was for crimes against Falun Gong practitioners, while the case against former U.S. President George H.W. Bush, former Secretary of Defense Richard Cheney, former General Norman Schwarzkopf, and former Chairman of the Joint Chiefs of Staff, Colin Powell were for crimes committed in the 1991 Gulf War. Kaleck, *supra* note 288, at 932-33.

290. *Id.*

291. Spanish law requires that the suspect be a Spanish national, a foreigner habitually resident in Spain, or a foreigner in Spain, whose extradition has been denied by Spanish authorities. For torture and enforced disappearance, the law requires the suspect or victim is a Spanish national and the suspect's presence in Spain. The courts may only otherwise prosecute where Spain has received and denied an extradition request. Ashifa Kassam, *Spain Moves to Curb Legal Convention Allowing Trials of Foreign Rights Abuses*, THE GUARDIAN (Feb. 11, 2014), <http://www.theguardian.com/world/2014/feb/11/spain-end-judges-trials-foreign-human-rights-abuses>.

292. Mahony, *supra* note 249.

293. Kaleck, *supra* note 288, at 932-33.

universal criminal jurisdiction.”<sup>294</sup>

Universal jurisdiction enjoys greater case selection independence than international criminal justice and therefore poses a greater threat to impunity of U.S. nationals. An issue of significance for the influence of the United States over international criminal law enforcement is whether the two forums complement one another or compete. Public consideration of processes to prosecute crimes in Syria under domestic exercise of universal jurisdiction in Europe or elsewhere have been comparatively scarce comparative to demands for international or internationalized prosecutions.<sup>295</sup> Focusing civil society upon international justice and away from domestic exercise of universal jurisdiction advances U.S. capacity to shape international criminal law enforcement. The United States may only allocate the scarce diplomatic resources available to it (albeit greater than any other nation state). Directing scarce resources towards a single entity—the ICC OTP—rather than the multitude of actors that might trigger domestic exercise of universal jurisdiction increases U.S. capacity to control international criminal justice enforcement. Civil society demands for Security Council referral of situations such as that in Syria rather than advocacy demanding establishment or triggering of processes under universal jurisdiction advances the U.S. interest of international crimes enforcement control. A further, as yet unexplored, issue of significance for U.S. influence over international criminal law enforcement is whether international criminal justice has dampened or energized domestic efforts to establish extraterritorial jurisdiction over international crimes. If the United States holds an interest in impeding the establishment and utilization of domestic regimes of universal jurisdiction, does it therefore have an interest in the continuation of the ICC despite diminished functional influence comparative to ad hoc or hybrid courts?<sup>296</sup>

The United States has employed an inconsistent approach to domestic exercise of universal jurisdiction in its own courts. Chucky Taylor Jr. was sentenced to 97 years on January 9, 2009, “under a 1994 law that permits the federal government to prosecute anyone suspected of carrying out torture outside the country as long as the suspect is a US

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294. Interview with former Rome Conference delegate and ICC member, *supra* note 56.

295. An interesting indication of this imbalance are the results of searches using the terms ‘Syria ICC’ or ‘Syria universal jurisdiction’ on major news websites.

296. The author is currently considering these questions within a broader research project that considers whether post-Cold War international criminal justice has become more independent of political pressure, or more captured by it.

citizen, legal resident or is present in this country, regardless of nationality.”<sup>297</sup> Days later, President Barack Obama went on national television and stated that he viewed waterboarding as torture and that he would stop it.<sup>298</sup> However, he indicated that he would provide de facto immunity to those that ordered torture—that he wished to “look forward as opposed to looking backwards.”<sup>299</sup> In April 2009, he stated, “nothing will be gained by spending our time and energy laying blame for the past . . . we must resist the forces that divide us, and instead come together on behalf of our common future.”<sup>300</sup>

Section 2340A of The United States Torture Act enables the prosecution of the crime of torture, defined “to include acts specifically intended to inflict severe physical or mental pain or suffering,” but does not include such pain or suffering incidental to lawful sanctions.<sup>301</sup> The United States Torture Act also provides for “federal extraterritorial jurisdiction over such acts whenever the perpetrator is a national of the United States or the alleged offender is found within the United States, irrespective of the nationality of the victim or the alleged offender.” This regime constitutes one less restricted than that of Spain subsequent to U.S. and Chinese pressure, for example. Use of U.S. diplomatic pressure has enabled the United States to use universal jurisdiction itself to prosecute persons on its territory—when it is politically expedient—while also applying sufficient pressure to curtail a rapidly expanding forum that challenged U.S. impunity for core international crimes.

The stigma attached to Bush administration officials indicates that prosecution of international crimes cases under universal jurisdiction may be moving beyond the influence of the U.S. government despite recent efforts to constrain domestic jurisdictions in countries such as

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297. *Taylor’s Son Sentenced in US for Torture in Liberia*, THE GUARDIAN (Jan. 9, 2009), <http://www.theguardian.com/world/2009/jan/09/charles-taylor-jr-torture-liberia>.

298. Jennifer Parker, *Obama on Cheney: Waterboarding is Torture*, ABC NEWS (Jan 11, 2009), <http://blogs.abcnews.com/george/2009/01/obama-on-cheney.html>.

299. David Johnston & Charlie Savage, *Obama Reluctant to Look Into Bush Programs*, N.Y. TIMES (Jan. 11, 2009), [http://www.nytimes.com/2009/01/12/us/politics/12inquire.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2009/01/12/us/politics/12inquire.html?pagewanted=all&_r=0).

300. Potential political sensitivities the President may have sought to avoid include that the torturers were U.S. employees, plus an investigation might have appeared to have been an attack on the Republican political party the President had just defeated in the 2008 election. Glen Greenwald, *Obama’s Justice Department Grants Final Immunity to Bush’s CIA Torturers*, THE GUARDIAN (Aug. 31, 2012), <http://www.theguardian.com/commentisfree/2012/aug/31/obama-justice-department-immunity-bush-cia-torturer>.

301. 18 U.S.C. §§ 2340-2340A (Westlaw through Pub. L. No. 114-40).

Belgium and France.<sup>302</sup> It is domestic exercise of universal jurisdiction, not international criminal justice, which constitutes the primary threat to the impunity of senior U.S. government actors bearing greatest responsibility for core international crimes.

VIII. THE U.S. INTEREST IN SCALING UP CONFLICT WITHIN STATES  
GOVERNED BY UNFAVORABLE REGIMES

Another issue U.S. policymakers appear to have failed to contemplate is the medium to long-term consequences of the behavior the current international criminal justice system accommodates. The failure of weak states to procure some semblance of case selection independence over the crime of aggression has significant consequences for U.S. capacity to initiate or encourage armed conflict—a circumstance that may be viewed as advancing the interest of the predominant military power. However, the decriminalization of war by proxy may also enable behavior antithetical to the medium to long term U.S. interest.

What does the combination of a diluted definition of the crime of aggression alongside the norm of the responsibility to protect (R2P) mean as precedent for the behavior of U.S. allies? and adversaries? Support for armed groups within other states may scale up armed conflicts to the point that the gravity of abuses allows the responsibility to protect to be cited as justification for armed intervention. While this strategy may be of utility to the United States as the greatest military power, other states may employ the same methods to attempt to draw the United States into conflict against its interests. Might we frame differently Russian, Iranian, Turkish, Saudi, Qatari, Kuwaiti, and U.S. support for government and anti-government forces?

Unfortunate trends exist in the relationship between the capacity to trigger international criminal justice investigations, sanctions, the responsibility to protect, and the likelihood of internal instability escalating into armed conflict—resulting in regime change. An example is where the SCSL was established as part of a multi-pronged U.S. strategy to effect regime change in Liberia.<sup>303</sup> That strategy employed the SCSL

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302. 107 RICHARD DICKER, *A FEW REFLECTIONS ON THE CURRENT STATUS AND FUTURE DIRECTION OF UNIVERSAL JURISDICTION PRACTICE* (2013).

303. Telephone interview with Victoria Holt, former staffer to U.S. Ambassador to the U.N., Richard Holbrooke (Jan. 13, 2011); Telephone interview with Kevin Linskey, former staffer to Senator Judd Gregg (Dec. 13, 2010); Tim Weiner, *Solitary Republican Senator Blocks Peacekeeping Funds*, N.Y. TIMES (May 19, 2000), <http://www.nytimes.com/2000/05/20/world/solitary->

as a mechanism to stigmatize Charles Taylor to the extent that multilateral sanctions could be passed at the Security Council disabling his ability to repel an insurgency indirectly funded by the U.S. government via Guinea, its ally.<sup>304</sup> A similar sequence of events occurred in Libya in 2011 where the Security Council, without waiting to consider the findings of an ongoing U.N. Commission of Inquiry established by the UNGA, referred the situation in Libya to the ICC.<sup>305</sup> The Security Council, acting under Chapter VII and citing the responsibility to protect for the first time since the 2006 Darfur resolution, imposed an arms embargo, a travel ban, and an asset freeze on designated Libyan officials and entities.<sup>306</sup> At the time of the referral to the Security Council in late February 2011, Libyan government forces had allegedly killed 233 people while the ICC prosecution cited between 500 and 700 dead during the month of February 2011.<sup>307</sup> The United States, accompanied by its NATO allies, used a calculated level of military force accompanied by the stigma of an ICC indictment and economic sanctions to remove the Gaddafi regime.<sup>308</sup> The absence of the scale of offending in a situation as the instructing Security Council criteria for Security Council referrals to the ICC was illustrated by absence of action on Sri Lanka the following month. The following month a U.N. panel of experts reported to the Security Council that between 40,000 and 75,000 civilians were killed at the conclusion of the conflict between the government of Sri Lanka and Tamil rebels in 2008-2009 and urged the Security Council to refer that situation to the ICC.<sup>309</sup> Among other interests in Sri Lanka at the Security Council is China's close relationship with the government that might be jeopardized were

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republican-senator-blocks-peacekeeping-funds.html. For a deeper discussion of the political antecedents to and the negotiation implementation of this strategy and its effect on justice outcomes, see *The Political and Normative Drivers*, *supra* note 248; *Prioritising International Sex Crimes*, *supra* note 260; Mahony, *supra* note 249.

304. Mahony, *supra* note 249.

305. S.C. Res. 1970 (Feb. 26, 2011); Rep. of the Human Rights Council on the Situation of Human Rights in the Libyan Arab Jamahiriya, U.N. Doc. A/HRC/S-15/2 (2011).

306. *Id.*

307. *Libya Government Should Demand End to Unlawful Killings*, HUMAN RIGHTS WATCH (Feb. 20, 2011), <https://www.hrw.org/news/2011/02/20/libya-governments-should-demand-end-unlawful-killings>; First Rep. of the Prosecutor of the International Criminal Court (May 4, 2011).

308. A. Mehrdad Payandeh, *The United Nations, Military Intervention, and Regime Change in Libya*, 52 VA. J. INT'L L. 355, 371-383 (2012).

309. U.N. Secretary-General, *Report of the Panel of Experts on Accountability in Sri Lanka*, 40, 66-72 (Mar. 31, 2011).

it to allow the Security Council to trigger ICC jurisdiction. The referral was not forthcoming.

This part demonstrates the relationship between the stigma of an international justice indictment and how self-interested actors might use power over case selection to direct that stigma to help displace or protect a particular government. While the United States may view the triggering of an indictment of perceived adversaries as in its interest, they neglect the context of a shifting global economic order. A framework that allows states to seek to remove adversarial governments by supporting armed groups, triggering a narrative, stigmatizing government actors with international justice indictments, and militarily intervening under the justification of humanitarian intervention is dangerous for global peace and security and for long-term U.S. interests.

## IX. CONCLUSION

A realist explanation of absent criminal consequences for aggression, accompanied by a controlled norm of criminal culpability for violations of international humanitarian law, suggests powerful states can escalate conflict by supporting armed opposition to adversary governments, procuring criminality that justifies intervention under R2P—an instrument of great utility when seeking to encroach upon adversaries’ respective spheres of influence. While the United States may view this as a useful instrument, it may also constitute an instrument its adversaries and allies use in a way that impinges its interests. States’ willingness to employ this strategy may increase as the global economic order shifts.

OTP elements that sought to employ a ‘too scientific’ approach were, as in Uganda, excluded from the investigation and analysis of the Ituri situation.<sup>310</sup> This behavior advanced the U.S. interest by producing a case selection that avoided a U.S. ally and pursued a U.S. adversary. As in Uganda, senior OTP personnel also sought to ensure those elements were excluded from any potential Pre-Trial Chamber oversight of OTP case selection.<sup>311</sup> Finally, the OTP, advanced the imprecision of how senior an accused is required to be, facilitating the pursuit of politically insensitive cases and preserving impunity for those beyond the OTP’s political appetite. A more empowered OTP relatively free from judicial

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310. Interview with former Rome Conference delegate and ICC member, *supra* note 56.

311. Prosecutor v Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Prosecutor’s Application to Separate the Senior Legal Advisor to the Pre-Trial Division from Rendering Legal Advice regarding the Case (Oct. 27, 2006).

oversight over case selection enabled the United States to focus its diplomatic resources on the prosecution to maintain its influence over ICC enforcement of ICL.

Where ICC jurisdiction is triggered beyond U.S. control, both it and weak states may design and implement domestic processes protecting senior political and military actors from domestic and ICC prosecution. Complementarity's enabling of the realist state self-interest of primacy of jurisdiction constitutes a step forward for ICL enforcement at international institutions acceptable to the U.S. interest. Complementarity excludes ICC primacy in situations where the United States has determined ICC jurisdiction to be against its interests, including situations involving U.S. nationals and allies. In the Israeli situation, for example, complementarity provides a buffer for the Israeli government where investigations of Israeli Defense Force conduct in Gaza in 2014 may meet the complementarity threshold.<sup>312</sup> However, the United States has ceded the capacity to trigger and shape international justice processes to weak states via the inclusion of *proprio motu* and state-referred triggering of jurisdiction. In these situations the United States walks a fine line between seeking to maintain ICC relations and constructive pressure for positive case selection outcomes on the one hand, and ensuring U.S. nationals and allies will not be pursued on the other. Were Israeli settlement activity or conduct constraining the Palestinians to within Gaza's borders interpreted to constitute "deportation or forcible transfer of population," "apartheid," or a transfer of its own population onto occupied territory,<sup>313</sup> it would be more difficult for the Israeli government to establish processes demonstrating it is able and willing to prosecute these alleged crimes. In such a situation, the U.S. threat of any means necessary to remove U.S. nationals or allies from ICC custody could come into play as a source of pressure on the ICC prosecution.

U.S. influence has been comparatively constrained by the seizure of greater functional influence over the ICC by weak states. Weak states seek to maximize the utility of shaping case selection while ensuring powerful state levers of control do not impinge the interests of weak

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312. *Israel Opens More Criminal Investigations Into Its Conduct During the Summer War in Gaza*, SPUTNIK (Dec. 7, 2014), <http://sputniknews.com/middleeast/20141207/1015596188.html#ixzz3RDhKzkfW>. The U.S. Congress has also responded with condemnation at the Palestinian decision to sign the Rome Statute and trigger investigations of IDF conduct. See Josh Ruebner, *Activists Protest One-Sided Hearing on Palestine and the ICC*, THE HILL (Feb. 6, 2015), <http://thehill.com/blogs/pundits-blog/international/231943-activists-protest-one-sided-hearing-on-palestine-and-the-icc>.

313. Rome Statute, *supra* note 2, at arts. 7(1)(d), 7(1)(j), 8(2)(b)(iii).

state governments. To this extent, contestation of case selection control between weak states and powerful states has moved from Statute negotiating in New York and Rome to the arena of functional elements such as complementarity adherence and cooperative pressure from states or regional organizations on their behalf. Greater U.S. engagement with domestic processes and regional organizations is therefore required to establish and maintain its influence over ICL enforcement.

Perhaps the most significant development unforeseen by U.S. policy-makers seeking to decriminalize waging war by proxy is that of the mode of liability of aiding and abetting core international crimes. While confronting the short-to-medium term U.S. interest, this development may advance the long-term U.S. interest by protecting it and its allies from armed conflict and accompanying abuses waged via proxies by its future adversaries.

Functional influence over ICL enforcement by international justice institutions has pivoted away from powerful states such as the United States towards weak states and regional organizations that represent them. While this evolution diminishes U.S. influence over the function of ICL enforcement, it also locks in weak states to definitions of ICL and jurisdictional constraints that preference the realist self-interest of the United States over objective application of ICL to fact that confront U.S. interests.