Writing Sample for Franziska Boehme

Contact: fboehme@gettysburg.edu

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Chapter 1: Introduction

Two episodes illustrate the importance of state cooperation for the functioning of the International Criminal Court (ICC, or the Court). On 24 November 2013, authorities of the Democratic Republic of the Congo (DRC) arrested Congolese legislator Fidèle Babala Wandu. Babala Wandu has been charged by the ICC for conspiring with others to coach and bribe witnesses in the ICC trial of former Congolese vice president Jean-Pierre Bemba. The Congolese authorities acted on the ICC's arrest warrant and detained Babala Wandu. North of the DRC, in the Sudan, President Omar al-Bashir is still in power—eight years after the ICC issued two arrest warrants for crimes against humanity, war crimes, and genocide. Despite these high-profile charges, al-Bashir continues to travel around the globe, including to many ICC states parties (i.e. states that have ratified the Rome Statute) that have failed to follow up on their commitment despite their legal obligation to arrest him.

The ICC lacks its own police force, and so it depends on the cooperation and assistance of states parties, non-member states, and international organizations (IOs) to put suspects on trial. State cooperation is *the* pre-condition for the achievement of the Court's mission to end impunity. In contrast, the *absence* of cooperation leaves suspects at large, makes evidence unattainable, and obstructs the Office of the Prosecutor's (OTP) efforts to build successful cases. An ICC official phrased the importance of state cooperation in the following way:

> Without the support of states, this court is basically just us in a building. We can issue any statement or decision or whatever we want but as soon as we step outside the doors of this building, we need the cooperation of states, the host state, the Netherlands, and to go anywhere else, every step of the way, even to enter a country, we need the consent of the state.[1]

[1] Interview 004.

Critics posit that the high hopes that accompanied the Court's creation—that it would deter mass atrocities and end impunity—have failed to materialize. They point to the limited number of cases and completed trials at the ICC. Since the Court's formal establishment in 2002, ICC judges have issued arrest warrants and summons to appear against 40 suspects in 24 court cases. 12 of 40 have been detained in the ICC detention center and have appeared before the Court. 11 persons remain at large and are not in the Court's custody. Charges have been dropped against five individuals due to their deaths. Charges were either not confirmed or were dropped or vacated against eight persons. ICC judges have issued five verdicts: four guilty verdicts (Jean-Pierre Bemba, Thomas Lubanga Dyilo, Germain Katanga, and Ahmad al-Faqi) and one acquittal (Mathieu Ngudjolo Chui). For many observers, this record paints the picture of an ineffective institution that has achieved little in 15 years of operation. Table 1 presents the current situation countries, the number of issued arrest warrants and summons to appear (thus representing the total number of *potential* trials), and the number which have been executed and remain open.

Table 1: Overview of Arrest Warrants (AW) and Summons to Appear (SA)

Situation Country	**Number of AW and SA**	**Executed AW and SA (accused in ICC custody or on trial)**	**Open AW or SA (minus deaths, charges dismissed, vacated)**
Georgia	0	0	0
Mali	1	1	0
Côte d'Ivoire	3	2	1
Kenya	9	6	3
Libya	4	1	2 (1 died)
Sudan	7	0	5 (1 died)
DRC	6	5	1
CAR (I and II)	5	5	0
Uganda	5	1	1 (4 died)
TOTAL	**40**	**21**	**13 (6 died)**

In addition to the meager record of trial completion, the ICC has drawn criticism for its prosecution focus. Of currently ten situations (Court parlance for a time-bound event in a country, such as a conflict), only one is not in Africa. For 14 years, until January 2016 when the ICC's OTP opened an investigation into Georgia, all ICC situations had been in Africa. Despite conducting preliminary examinations (a pre-investigation phase) in other continents that occasionally involved Western powers, the OTP has declined to open official investigations outside of Africa. In addition, the OTP has charged heads of state and leading state officials, which has prompted a stark backlash from some African countries, accusing the Court of bias against Africa and derailing fragile peace processes.

This dissertation does not deny that the Court bears responsibility for its litigation mistakes, slow trials, and political backlash. Important research has highlighted the political underpinnings of ICC decision-making.[2] However, this research contributes to an emerging topic in ICC research that takes the role of states' support for the Court seriously.[3] While much scholarship has studied the creation of the Court and its impact on justice and peace,[4] compliance with the Rome Statute has only recently been examined more closely. Often it is not the Court that breeds its own bad record but actually the states in charge of enforcing arrest warrants and bearing the legal responsibility to comply with ICC decisions.[5] Critics' arguments about the lack of Court ineffectiveness are intimately tied to the lack of state cooperation in vital areas such as arrests and surrender.

[2] E.g. Bosco 2014; Tiemessen 2014.
[3] Bosco 2014; Hillebrecht and Straus 2017.
[4] To name a few: Schiff 2008; Deitelhoff 2009; Simmons and Danner 2010; Chapman and Chaudoin 2013.
[5] This point was also made by Meernik 2008.

Compliance and cooperation with the ICC is an inherently political question.[6] Per the Court's founding treaty, the Rome Statute, all ICC states parties are legally obliged to cooperate with the Court. However, while the Court has the *legal* power to demand a state's cooperation, it is less powerful politically. The Court's judicial chambers can make findings of non-compliance against states parties and can refer the matter to the Court's legislative body, the Assembly of States Parties (ASP), and the UN Security Council (UNSC). The ICC can also persuade state leaders and other international actors of its effectiveness and work. But beyond, the Court cannot coerce states into action. The *politics of compliance and cooperation* lie at the heart of the state-ICC nexus. My dissertation provides insight into this important topic by analyzing compliance and non-compliance with the Rome Statute and by examining how states support the Court through Court-supportive discourse and diplomacy.

This research thus acknowledges the deeply political nature of international courts.[7] On the one hand, international courts are IOs created through multilateral treaties. However, they can act more independently of member states, thus functioning less like agents of state but rather as trustees.[8] Once created, the ICC's Chief Prosecutor can initiate cases on her own will, a power which opens up the Court to more critique from states. International courts are created to be independent and neutral[9] and this is sought to be ensured through their international makeup, legal professionalism,[10] their location away from conflict area, all to "trump national

[6] I use the terms 'cooperation' and 'compliance' interchangeably here. While 'cooperation' can be defined more broadly politically, this dissertation is concerned with rhetoric as a form of cooperation as well as compliance with arrest warrants (Art. 89). This compliance is contained as 'cooperation' in the Rome Statute's Part IX 'International cooperation and judicial assistance.'

[7] Nouwen and Werner 2011.

[8] Alter 2008.

[9] This is the Court's rational-legal authority, which make it an attractive organization to which states delegate: Alter 2008; Barnett and Finnemore 2004.

[10] ICC officials point out the strictly legal reasoning that guides their decision-making: Interviews 002, 003, 004, 006.

sovereignty."[11] However, despite these efforts at insulation, other political actors may want to exert control over them and may want to "hamper investigations and block indictments by withholding valuable evidence in their possession."[12] The dissertation speaks to this debate as I chronicle states' efforts at bypassing the Court's decisions or hampering its work.

This Introduction is divided into several sections: The next two sections present the two main research questions driving this dissertation. In them, I present my answers to the research questions on which I will further elaborate in the following chapters. Then, I sketch out the dissertation's contributions to ongoing debates in International Relations (IR) about norm resistance and compliance with International Law (IL). Next, I describe the methodology used for answering the questions. The last sections provide some background on the importance of state cooperation for the Court, existing research on the Court, the legal controversies surrounding it, and an overview of upcoming empirical chapters.

Main Questions and Arguments

This dissertation is about the ICC and the institutional context in which it operates. I investigate ways in which states parties to the Court have lent support to the Court or not. The goal of the dissertation is two-fold. First, I engage in theory building by developing a cooperation framework that can help researchers categorize a country's cooperation behavior toward the Court at a specific point in time as well as longitudinally. The framework has been created inductively based on the two case studies in this dissertation. In addition, I engage in theory testing of common compliance explanations. In charting two states' cooperation behavior over time, I seek to explain why South Africa and Kenya cooperated the way they did.

[11] Peskin 2008: 6.
[12] Ibid.

Going beyond existing accounts of state cooperation with the ICC and criminal tribunals,[13] I combine legal and non-legal means of engagement with the Court in a new cooperation framework. While legal means refer to mandatory obligations states take on as states parties to the Rome Statute, including ratification, domestic implementation, and compliance with court requests, non-legal means are voluntary behaviors that occur outside of the Rome Statute framework but that can nonetheless have an important impact on the Court. States can encourage other states to join the ICC, thus enlarging the Court's territorial jurisdiction, and attest to its important work, thereby strengthening the Court's profile and legitimacy. But states can also undermine the Court by lobbying against, fostering counter-narratives, or advocating for withdrawal from the ICC. This range of behaviors reflects more accurately the multifaceted relationship between the ICC and its states parties.

Depending on the extent to which states support the Court through diplomacy and statements (non-legal, voluntary means) and compliance with the Rome Statute's legal obligations (legal, mandatory means), states can be separated into four categories: model cooperators (high legal and non-legal cooperation), cheap talkers (low legal cooperation but pro-ICC statements), pro-forma cooperators (legal cooperation but low non-legal cooperation), and non-cooperators (low legal and non-legal cooperation). Table 2 displays these behaviors and types.

[13] Peskin 2008; Bosco 2014; Hillebrecht and Straus 2017.

Table 2: Overview of Cooperation Types

	Compliance with the Rome Statute	**Non-Compliance with the Rome Statute**
Pro-Court diplomacy and statements	*Model Cooperators*	*Cheap Talkers*
Anti-Court diplomacy and statements	*Pro-Forma Cooperators*	*Non-Cooperators*

While I elaborate on how the case studies fit into the framework in the 'methodology' section below, three caveats are in order. First, the framework does not assume that states remain one type of cooperator over time. Rather states can shift from one cell to another as they come to differently assess their relationship with the Court. Second, the framework takes seriously that states can be simultaneously cooperating through one means but fail to cooperate in the other. The 'pro-forma cooperators' and 'cheap talkers' categories exemplify this reality. On the one hand, states may issue pro-Court statements but when it comes down to executing a court request, they may fail to comply. On the other hand, states may comply with court requests and signal a veneer of cooperation while at the same time undermining the Court through diplomacy or discourse. Third, while presented as distinct cells here, the borders between compliance and non-compliance as well as between pro-Court and anti-Court diplomacy and statements are not as rigid as implied in the typology. Rather, they can be seen as ends of a spectrum as I present below. However, for analytical clarity, I introduce the types here in this table.

Country Statements about the ICC

In Chapter 3, I investigate the discursive aspect of non-legal engagement and how states have expressed loyalty and critique of the Court over the years. Using statements and rhetoric as one form of cooperation builds on the idea of concordance as one indicator for norm robustness.

Concordance refers to the extent to which rules are accepted "in diplomatic discussions and treaties (that is, the degree of intersubjective agreement)."[14] Concordance then seeks to capture the extent to which states agree that the norm and rules are acceptable. Thus, I include discourse and rhetoric here to achieve a fuller picture of state cooperation with the ICC since it has been used as an important indicator for norm acceptance and adoption.[15] Moreover, it aligns with how ICC officials perceive state cooperation, namely to include broader political support for the Court such as public statements.[16]

In the case of the ICC, we can gauge this support through analyzing what states say about the ICC in another forum, the UN. Here, many states affirm their approval or air critiques of the Court. Through public expression of support they tie their reputation to the Court. My analysis does not suggest that country statements about the ICC have concrete effects. Rather, I highlight that what countries say about the Court is one indicator of support for the Court. If ICC states parties widely criticize the Court for its actions, this points to serious institutional problems of legitimacy and effectiveness.

The content analysis of country statements at the UN about the Court shows that states support the Court and the accountability norm for which it stands. Rhetoric from African states parties has been overwhelmingly positive, pointing repeatedly to the continent's early support for and continued loyalty to the Court. Expressions of loyalty outnumber critical statements. Interestingly, the most frequently voiced critique is not of the Court itself but of the lack of cooperation by other states, mostly concerning the non-execution of arrest warrants. Rather than shaming peers by calling them out in public, states often used their statements to highlight the consequences of non-cooperation. This suggests that speech acts are seen as a vehicle to air

[14] Legro 1997: 35.
[15] Dixon 2017; see also the Chapter 2.
[16] Interviews 001, 002, and 004; see also Chapter 2.

grievances and maybe persuade other states that Court reform is necessary. This other-blaming defies common perceptions of the Court as the source of inefficiency and illegitimacy. However, states also raise critiques of the Court, most importantly its finances and its prosecution focus on Africa. Budgetary critiques are however also often calls for the UN to help fund those ICC cases that were initiated by UN Security Council (UNSC) referrals.

This supportive environment at the UN contrasts starkly with the increasingly critical environment at the AU. An analysis of AU Assembly summit decisions shows that the AU Assembly only started passing ICC-critical decisions once al-Bashir was charged. As long as the Court charged rebel leaders, no AU decision had been devoted to the Court. Pre-2009 decisions on justice relate to the merger of the AU's Court of Justice with the African Court on Human and People's Rights. Starting with the AU's two 2009 decisions expressing regret over the al-Bashir charges and calling on AU member states *not* to cooperate with the ICC's arrest warrant for al-Bashir, the organization has become more vocal on the Court's record. From here on, the AU tried to delay the Sudan and Kenya cases for one year through the UN (deferral), directly criticized the first ICC Chief Prosecutor Luis Moreno-Ocampo, and condemned the selective prosecution of Africans. These statements and actions by the AU laid the groundwork for a discourse in which non-compliance with the al-Bashir arrest warrant has become acceptable and common arguments about the detrimental impact of prosecuting sitting leaders on peace processes became widely circulated.

The analyses at both venues present some noteworthy differences. While at the UN, states widely admonish the non-arrests of al-Bashir in some African states, these non-arrests are applauded at the AU as African countries were merely implementing prior AU decisions. Second, while states at the UN emphasize the mutual importance of peace and justice, AU decisions

repeatedly prioritize peace over justice. Third, immunity of heads of state presents a particularly controversial issue at the AU. The analyses attest to the contrasting environments and 'moods' toward the ICC at these venues and they show that despite continuing African support for the ICC at the UN, this African support for the ICC fails to materialize in AU Assembly decisions.

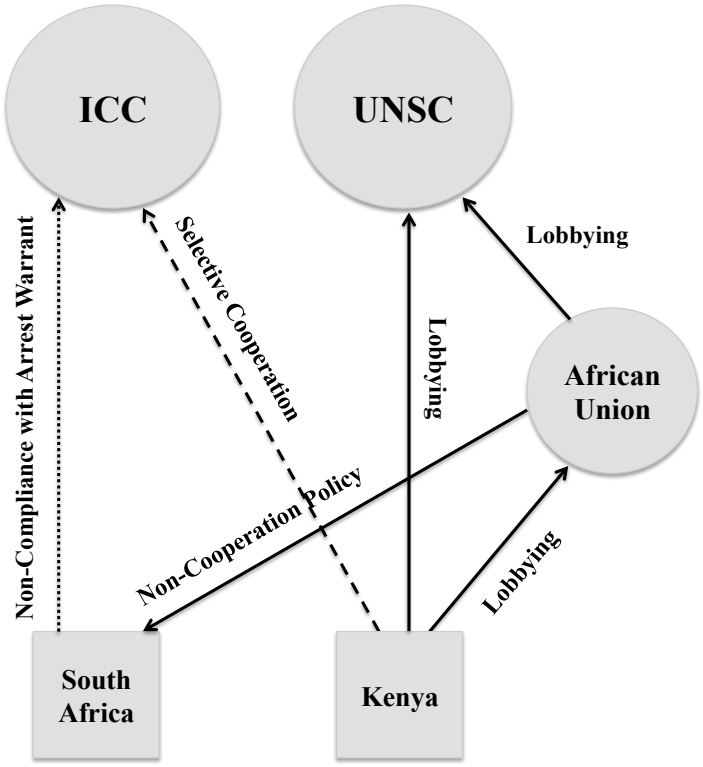
Explaining Cooperation Behavior

In addition to analyzing the grievances and praise states have levied at the ICC, this dissertation investigates the cooperation behaviors and the rationales of two states parties, South Africa and Kenya. In these two case studies, I trace the engagement between the respective governments with the Court and seek to explain why they behaved the way they did. Whereas the content analysis chapter provides a very positive picture of cooperation through a high level of public support for the Court at the UN, these cooperation incidents reveal a bleaker picture. Cooperation incidents are concrete state decisions about complying or not with a court request issued by the ICC, such a request for arrest and surrender. On the one hand, requests for arrest and surrender are arguably the most important court request a state can be called on to execute because they directly bring suspects into the courtroom. However, arrest and surrender are not the only court requests that states are obliged to execute, among them also providing access to witnesses, bank records, sites, etc.

The case studies provide a bleaker picture of cooperation with the Court because both involve prosecutions against current leading state officials. In these court cases, the interests between the domestic elites and the ICC are not aligned, making cooperation less likely. In both court cases, ICC-critical governments, such as Sudan, Rwanda, Kenya, Ethiopia, and Uganda, have succeeded in fostering anti-ICC decisions at the AU. As Chapter 4 shows, the AU's non-cooperation policy has propelled African states into loyalty conflicts when al-Bashir has visited

their territory: They have to choose between staying loyal to the AU, thus bolstering their continental reputation, and the ICC and arrest al-Bashir, thus likely compromising their reputation in Africa. Chapter 5 highlights the Kenyan government's behavior, which has included leveraging the AU to amplify its anti-Court message and delegitimizing the Court domestically. The AU has emerged as an important intermediary actor in the ICC-state cooperation context. Thus, two compliance factors situated at the domestic level (elite interest alignment and reputation concerns) are important but also the regional organization's role in amplifying grievances against the Court. Figure 1 visualizes this cooperation context.

Figure 1: Cooperation Context for South Africa and Kenya



The AU's resistance efforts have been successful as the South Africa and Kenya chapters show: In both the Sudan and Kenya court cases, current ICC Chief Prosecutor Fatou Bensouda

has suspended further action and dropped charges, basing her office's decisions on the lack of cooperation by the Sudan, the UNSC, and other countries who have failed to arrest al-Bashir and the selective lack of cooperation by the Kenyan government. As a result of AU action then, we can observe other ICC states parties, who have been in a position to arrest al Bashir, take advantage of an existing Court-critical discourse and AU decisions to not cooperate in his arrest, effectively providing justifications for non-arrest, sanctioned by the regional organization, in direct contrast to the ICC.

While the case studies illustrate the explanatory power of compliance explanations focused on interest-alignment and reputation, several prominent explanations prove less useful in explaining South Africa and Kenya's behavior. International-level compliance theories fail to convincingly explain compliance decisions with ICC arrest warrants as the enforcement mechanisms are notoriously weak in human rights treaties, and the ICC has no enforcement power itself. While there is some evidence that outside pressure by major trade partners had some effect on African leaders moving summits to avoid hosting an ICC suspect, no country or organization has tied the execution of ICC arrest warrants to substantial benefits to incentivize compliance as had been the case with arrest warrants for the International Criminal Tribunal for the Former Yugoslavia (ICTY). Moreover, some prominent domestic-level theories do not satisfactorily explain why South Africa, often seen as a poster child for compliance, failed to arrest al-Bashir and why Kenya partly cooperated with the ICC in the court case against Uhuru Kenyatta. For instance, lack of state capacity could be seen as a reason for non-compliance. However, while the cases represent Global South countries, compliance decisions were made at the highest level of government rather than by some ministries, as is the case in other

international agreements. Here, we see the South African executive disregarding domestic pro-compliance court decisions and the Kenyan executive mobilizing state resources against the ICC.

Table 3 presents the explanations for cooperation and non-cooperation in each of the case studies. Bolded are the explanations that feature in both cases. What stands out as shared are interest misalignment and the importance of reputation. In both cases, the interests of the sitting government and the ICC differed: While the ICC wanted al-Bashir arrested and wanted to see Kenyatta on trial for the crimes he committed, the sitting governments had no interest in delivering al-Bashir to The Hague or to cooperate fully with the ICC, thus incriminating themselves more in the *Kenyatta* case. Moreover, both countries feature important regional outlooks. For South Africa, its foreign policy shifted since the 1990s toward a more Africa-centered foreign policy. Thus, South Africa had much to lose in terms of its regional reputation had it arrested al-Bashir. Not arresting him allowed the country to act in line with AU policy and fellow African ICC states parties. In turn, Kenya's actions against the Court also feature an important regional dimension as the Kenyan government led the continental movement against the Court and for mass withdrawal. In contrast to South Africa's puzzling *non-cooperation*, the Kenyan government's *cooperation* seems puzzling.[17] Given that the interests between the government and the ICC were so diametrically opposed, why did the government cooperate at all? I argue that the Kenyan government cooperated to some degree because outright cooperation refusal would have hurt the government's reputation for compliance with IL and because Kenyatta and Ruto promised during the 2013 election that they would continue their good faith cooperation with the Court.

[17] On the usefulness of puzzling cases, see Klotz 2008: 51.

Table 3: Overview of Compliance Explanations in the Case Studies

	Compliance	Non-Compliance	Alternative Explanations
South Africa	**Early: global reputation concerns**	**Interest misalignment** **Regional reputation concerns** and foreign policy priorities	Lack of state capacity Domestic civil society
Kenya	**Reputation concerns** Dependence networks Domestic support for ICC	**Interest misalignment** Absence of international accountability pressure Domestic mandate against ICC	Lack of state capacity Domestic civil society

Contributions of the Dissertation

The project contributes to several scholarly debates on global governance, transitional justice norms, and compliance with IL. First, by introducing a new cooperation framework, I add to the conversation about how to properly classify state behavior toward the Court. I argue that states can openly seem to be supportive of the Court by engaging in pro-ICC discourse or complying with court requests while at the same time undermining the Court and its associated norms through other channels. In a departure from previous scholarship, I include discourse and statements as a distinct form of cooperation. These deserve attention as they can have serious implications for the Court's legitimacy. Supportive Court discourse signals to other states that the Court is seen as a legitimate actor and is trusted by states parties. Statements of principled support for the Court help build and sustain an 'enabling environment,' which grants the Court legitimacy. In contrast, statements critical of the Court can undermine the Court's legitimacy and thus harm cooperation further. The Court-discourse emanating from the AU and some African capitals has often been described as a 'backlash' against the Court, and trumps the Court-supportive rhetoric from other African states in many media accounts. However, I find evidence of high support from most African ICC states parties—findings that cast doubts on frequent

media accounts of the troubled 'ICC-Africa relationship.' Moreover, African leaders' decisions at the AU show that their criticism of the Court relates exclusively to charges against sitting heads of states and not overall ICC action.

Second, the dissertation highlights the AU's agency in global governance. In much research, Africa becomes the passive recipient of Western or Chinese actions and norm diffusion efforts. The dissertation contributes to research highlighting African agency by showing how individual African states and the AU in particular play powerful roles in shaping states' interaction with the ICC. The AU can be said to function as a norm 'antipreneur' to the ICC's accountability for heads of state norm by providing a stage for ICC-critical African leaders and a venue where ICC-critical decisions could be passed that provide legal justifications for non-compliance with ICC arrest warrants. Through their regional organization, ICC-critical states were able to engage in institution weakening of the Court. All three empirical chapters attest to the AU's important role by tracing its actions and positions on the ICC over time. These regional political dynamics are overlooked in the theories focusing on the domestic level, on bilateral and international pressure and legitimacy theories. This regional level—a meso-level between the domestic and international—does not feature prominently in existing compliance studies.

With regard to compliance explanations, the chapters lend support to domestic-level explanations, especially rationalist arguments about interest alignment between state leaders and the ICC as well as reputation concerns. This means that compliance is strategic rather than caused by managerial problems as suggested by the management approach to compliance.[18] Cooperation is forthcoming when the interests of the ICC and the government in charge of making cooperation decisions are aligned. This has been the case in the early years of the Court's existence when both South Africa and Kenya supported the Court through legal and non-legal

[18] Chayes and Chayes 1993.

means, thus placing them in the 'model cooperators' category. In these earlier court cases, rebel leaders and the domestic political opponents of incumbents were charged, hence posing little risk to sitting governments. However, this changed in 2009 when the Court started charging leading state officials in the Sudan and in Kenya. Cooperation with the Court by these two countries declined and we see increasing efforts to weaken the Court. In that sense, the charges against al-Bashir represent an 'exogenous shock'[19] that changed the cooperation trajectory between several African countries and the ICC.

Moreover, the dissertation's case studies reveal the methodological utility of studying specific compliance incidents *years after* a state's initial commitment, ratification, and domestic implementation. This unit of analysis provides purchase on two aspects compliance scholars are interested in: time and causal factors. Investigating cooperation incidents takes seriously that compliance does not end with ratification or the passage of domestic implementation legislation. The ICC represents a useful institution to study when we are interested in the temporal dimension of compliance as states are called on to perform specific compliance actions after years or decades have passed. Moreover, a longitudinal focus on concrete compliance behavior can shed light on whether other considerations by the current government might impact compliance as other leaders might calculate costs and benefits differently or might be differently influenced by international peers or regional organizations. These longitudinal analyses contribute to filling an existing gap in the literature on compliance that has not taken time into account sufficiently: "[T]he time dimension is crucial for compliance, and yet it is hardly addressed or incorporated in empirical studies of compliance."[20]

[19] For the methodological usefulness of 'exogenous shocks' in longitudinal analyses, see Klotz 2008: 53.
[20] Lutmara, Carneirob, and McLaughlin Mitchell 2016: 560.

The largely negative compliance record that I seek to explain in the case study chapters adds to more skeptical studies about the ICC's potential for justice and deterrence. In cases when leading state officials are charged, the ICC has faced serious obstacles. Some states, like Sudan, have openly refused to cooperate with the ICC. Others, many of them ICC states parties, have declined to arrest al-Bashir during his visits to their countries, justifying their non-arrests with the contradictory AU non-cooperation policy. Kenya, with its own leaders charged by the Court, has walked a middle path of selective cooperation in which some requests were complied with while others were not, all the while the government sought to discredit the Court's Kenyan cases. The range of these behaviors shows that when charges are levied against powerful state officials, these are unlikely to go far at the Court. While the Court has an incentive to issue charges against sitting heads of state—after all it is supposed to charge those 'most responsible' regardless of official capacity—the reality of these cases has shown the formidable challenges they entail, especially when they go against the policy of the AU.

Methodology

To answer the research questions of when and why states cooperate with the ICC, I use a qualitative methodology that combines a comprehensive content analysis with two in-depth case studies. The content analysis of country statements analyzes how rhetorical support for the Court has developed temporally and regionally. The case studies allow me to assess the explanatory power of various compliance factors through process tracing. As data sources, I rely on UN and AU records, ICC documents, newspaper sources, and elite interviews with Court officials, researchers, and NGO officials. These interviews were conducted in The Hague in January and June 2015, in South Africa in July 2015, and in Kenya in October/November 2016.

I operationalize cooperation in two ways: 1. Voluntary non-legal means of engagement, and 2. mandatory compliance with Rome Statute obligations. First, to analyze how ICC support and critique have developed temporally and regionally, I completed a content analysis, coding countries' expressions of public support for the Court at the UN. These statements represent the 'Court discourse'—the way state leaders and officials talk about the Court—and it tells us about the expectations that states have of the Court and the reasons for continued support for or critique of the Court. I created a dataset of ICC-related statements made at the UN General Assembly, coding a total of 605 statements by countries and regional groupings of states. I coded all countries' statements from 2002 to 2016 with the qualitative data analysis software NVivo. The unit of analysis is references that either express support, critique, or threaten exit. Moreover, based on a textual analysis of AU Assembly decisions, I created a timeline of ICC-related decisions passed by the AU Assembly to chart when and why the regional organization became critical of the ICC. I explain the coding and analysis process in more detail in Chapter 3.

In addition to a Court-supportive discourse, states can cooperate with the Court more tangibly through concrete compliance actions. This type of cooperation is codified in the Rome Statute and can be measured by looking at instances in which countries have complied with court requests, i.e. official letters demanding concrete state action, such as providing evidence or arresting charged persons. Data analysis of court requests is complicated by the confidentiality requirement. States are to keep court requests confidential and arrest warrants often remain sealed for years. However, arrest warrants are the most accessible requests to study because they are ultimately unsealed, and the outcome—transfer of a suspect to the Court—is clearly observable. In addition, non-compliance with arrest warrants and other court requests can be traced through ICC litigation. However, this litigation only serves as an indictor for non-

compliance once the ICC starts legal proceedings against a state, suggesting that a certain threshold of delay in execution of that request has been crossed.

Of this universe of 40 charged individuals, I chose two court cases that represent variation on the dependent variable (non-cooperation and selective cooperation): 1. the ICC arrest warrants for al-Bashir in June 2015 and South Africa's non-compliance with them, 2. Kenya's oscillation between non-compliance and compliance in the investigation against Kenyan President Kenyatta. I argue that the outcomes vary because when the governments of South Africa and Kenya were called on to execute a specific court order, their behaviors varied. The outcome I am interested in explaining in South Africa is the non-arrest of al-Bashir, which I label non-compliance because the South African executive's actions ran counter to the ICC arrest warrant. Kenya's assessment is based on the government's multiple actions toward the Court in the investigation against Kenyatta. I argue that Kenya engaged in selective cooperation because it can be situated between the pro-forma and non-cooperators.

While the outcomes differ, the two case studies also share important similarities. Most importantly, both cooperation incidents involve sitting heads of state. From a domestic cost-benefit analysis of the leader, cooperating with the Court when it investigates state officials of the leader's own circle or party or the leader him/herself, is very costly. In contrast, cooperating with the ICC in a court case against a domestic rival can yield important potential benefits, such as that person's arrest and removal from domestic power struggles. In light of these considerations and since previous research has suggested the more forthcoming cooperation record of countries in which rebel leaders and domestic political are subject to ICC arrest warrants,[21] this presents an important shared characteristic between the two countries. Thus, both cases studies are instances of state cooperation under 'difficult' conditions, i.e. when we would

[21] Interviews 001, 004; Hillebrecht and Straus 2017.

expect non-cooperation to be forthcoming. Moreover, both are states parties to the ICC as well as AU member states, hence both states are subject to similar regional and international pressures for compliance. Considering these aspects, they represent a 'most similar design' that were chosen to tease out relationship between domestic politics and compliance pressure and factors.[22]

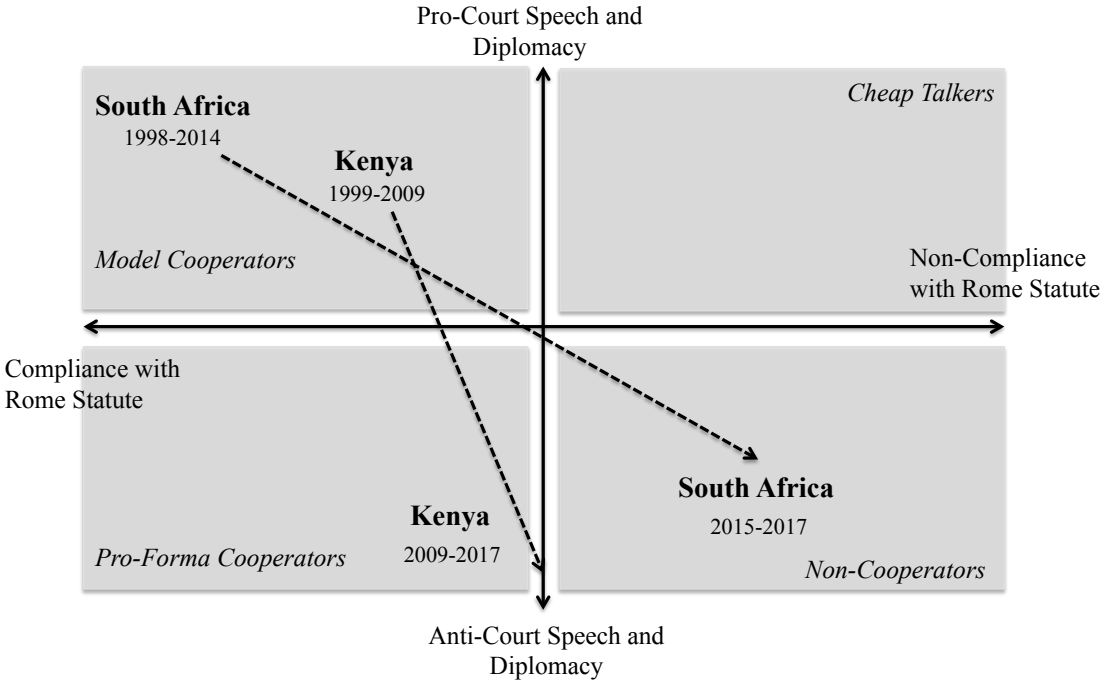
However, both countries differ in some important ways, which suggests that the explanations between the two will differ and they can yield insights into the explanatory leverage of common compliance theories. South Africa is not a situation country, hence its citizens do not face ICC charges. However, it plays an important role as a potential country to arrest ICC suspects should they enter South African territory. In terms of domestic-level factors, South Africa represents 'likely' case for compliance given its independent judiciary, active civil society, and high democracy scores. Moreover, South Africa can be called a model cooperator for the early years of the Court's existence. This makes the non-compliance all the more puzzling at first sight. In Chapter 4, I explain the country's shift. In the Kenya case study, leading state officials were charged in 2010 and two of those indictees then became head of state and Deputy President in 2013. In contrast to South Africa, Kenya has been rattled with several election violence episodes and ethnic tensions. Corruption runs high and the judiciary is less independent and thus provides less of a check on the executive than in South Africa. Both case studies thus explore puzzling cases: South Africa was a 'likely' case for compliance yet it failed to arrest al-Bashir; Kenya was a 'likely' case for non-compliance yet the government complied to some extent.

While my focus lies on explaining concrete cooperation decisions, I trace each country's cooperation record over time. This tracing highlights shifts in cooperation behavior. The explicit shift in behavior happens in South Africa with the non-arrest of al-Bashir despite rising dissatisfaction with the ICC in the African National Congress (ANC) in earlier years. In Kenya,

[22] Levy 2008.

the shift occurs with the charges against leading Kenyan officials in 2009 and 2010 when the government starts to lobby the UNSC and other African countries to delay the cases and then oppose the cases on various grounds. Rather than outright refusal to cooperate, Kenyatta repeatedly promised to keep cooperating with the Court and partially complied with some court requests, thus making the country a middle form between 'pro-forma cooperators' and 'non-cooperators.' Figure 2 presents visually these shifts over time. Notice that this typology only refers to different cooperation indictors and types, not to explanations of cooperation and compliance.

Figure 2: Cooperation Shifts by South Africa and Kenya



Let me briefly illustrate how I conducted the case analyses using the example of South Africa. First, I used primary and secondary sources, such as ICC publications and legal documents as well as scholarly and policy publications, news articles, and reports by civil society

organizations to construct a timeline of how South African officials have described the Court over time and the steps they took to comply with the Rome Statute. This preliminary work suggested a high support for the Court. To study the path to non-compliance, I completed an in-depth case analysis through process tracing with the help of primary, secondary, and elite interview data to assess whether other factors than the ones theorized in existing research had impacted the executive's decision.[23] Fieldwork in South Africa that allowed for semi-structured interviews with experts on South African foreign policy and a workshop with the Deputy Minister of Justice and Constitutional Development helped to shed light on the events.

These two case studies present a rather bleak picture of compliance. However, I do not wish to present this non-cooperation as a homogenous African phenomenon. There is no continental consensus on the ICC in Africa: Many African countries continue to support the Court, several attempts at mass exit failed, and despite all the AU exit efforts and rhetoric only Burundi is actually following through with exit as of May 2017. However, I show that the AU represents an important node in the resistance network. The Conclusion contrasts the AU's involvement in these cases against sitting heads of state briefly with other court cases in which the trial completion record has been better.

The International Criminal Court: State Cooperation, Jurisdiction, and Controversies

ICC and State Cooperation

The treaty establishing the ICC, the Rome Statute of the International Criminal Court, was adopted in Rome on 17 July 1998 by 120 states. It entered into force on 1 July 2002 after having been ratified by 60 states. The 63-page document sets out the institutional design of the Court, its jurisdiction, crimes covered, funding, etc. and contains detailed provisions pertaining

[23] George and Bennett 2005; Levy 2008.

to state cooperation and the distinct obligations of states parties and non-member states. Pursuant to Article 86, "[s]tates Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court." States can assist the Court in various ways including identifying and locating witnesses, evidence gathering, questioning persons, examining sites and exhuming graves, conducting searches and seizures, or protecting victims and witnesses and preserving evidence, as well as the identification, tracing, and freezing of assets and instruments of crime, such as weapons or vehicles.

Legally, ratification of the Rome Statute is the official step to becoming a state party to the ICC. Beforehand, states sign the treaty that obliges them, in good faith, to refrain from actions that go against the purpose or spirit of the treaty; however, they are not legally bound by it. After ratification or accession, a state's full cooperation ability hinges on the adaption of domestic law. For instance, the crimes covered under the statute must be criminalized domestically. To do that, domestic penal codes may have to be changed to ensure that domestic law enforcement can actually arrest a suspect or that a state actually possesses legal authority to transfer arrested individuals to the Court.[24] Hence, a country's domestic implementation is a crucial step to a state's compliance with its legal obligations under the Statute.

Jurisdiction and Triggers

The ICC has jurisdiction over three international crimes: crimes against humanity, war crimes, and genocide—which the Rome Statute deems "the most serious crimes of concern to the international community as a whole."[25] Articles 6 through 8 specify the three crimes. In addition,

[24] Schiff 2008: 153.
[25] Rome Statute of the International Criminal Court, Article 5(1).

countries wanted to include aggression as a crime but failed to reach a consensus on its definition in 1998. It was only in 2010 during the Review Conference in Kampala when states parties adopted amendments to the statute defining aggression and deciding on the conditions for the exercise of jurisdiction. Hence, the Court cannot exercise jurisdiction over the crime of aggression until at least 30 states parties have ratified or accepted the amendments and two-thirds of all states parties decide to activate the jurisdiction at any time after 1 January 2017.

The Court currently has ten situations. Table 4 presents these in reverse chronological order. After the ICC opens an investigation into a country for a specific situation, the OTP can bring specific charges against responsible persons in that situation.

Table 4: Overview of ICC Situations and Triggers

Situation Country	**Date ICC opened investigation**	**Trigger**
Georgia	January 2016	proprio motu
Central African Republic II	September 2014	State self-referral
Mali	January 2013	State self-referral
Côte d'Ivoire	October 2013	proprio motu
Libya	March 2011	UNSC referral
Kenya	March 2010	proprio motu
Darfur/Sudan	June 2005	UNSC referral
Central African Republic	May 2007	State self-referral
Uganda	July 2004	State self-referral
Democratic Republic of the Congo	June 2004	State self-referral

Cases can reach the ICC in three different ways. First, a state party can refer a situation within its own state to the Court. Five of the ICC's ten current situations have reached the Court this way. A second trigger for ICC action is a referral by the UNSC. While ICC jurisdiction relies on nationality and territory, a non-member state's situation can be referred to the Court by the UNSC through a binding resolution under Chapter VII of the UN Charter. In that case, the

country, by virtue of being a UN member state, has to comply with the ICC's investigation. The Council referred the situations in Sudan and Libya to the Court in 2005 and 2011. The third trigger is for the ICC Chief Prosecutor to act on her own initiative (proprio motu). This has happened three times so far: Kenya, Côte d'Ivoire, and Georgia.

Controversies: Counter-Movement, Head of State Immunity, and ICC Effects

To set the stage for the following chapters, I want to highlight three important controversies surrounding the ICC. A first controversy relates to the countermovement to the Court, which provides the backdrop to this dissertation and which is detailed in the coming chapters. Spurred by the ICC's issuance of arrest warrants against sitting heads of state, several African countries, led by Sudan, Kenya, Uganda, and non-member states such as Rwanda and Ethiopia started issuing ICC-critical statements. Several arguments have been made. First, heads of state should be immune. The argument holds that in customary IL sitting heads of state enjoy immunity, and that by legally obliging states to arrest sitting leaders, these states are forced to act contrary to customary IL. The second argument relates to the Court's decision-making. Critics posit that the ICC is not independent but instead acts as an extended arm of its funders, mainly Western European states. Third, much criticism against the ICC is actually criticism of the Court's ties to the UNSC. Different sets of states have criticized how the UNSC failed to refer some cases to the Court, most prominently Syria in recent years, how it failed to act on repeated non-compliance with arrest warrants, and it fails to defer ongoing cases for one year. This linkage between the Court, a judicial organ supposed to apply neutral rules across cases, and a political organ such as the UNSC has important implications for the perception of the Court's work and states' cooperation with it.

A common critique of the Court has been its decision to not investigate the actions of Western governments, such as the actions of UK troops in Iraq, but focusing its energy on cases arising in Africa.[26] This inconsistent application of legal standards, i.e. selective prosecution, has cost the Court dearly in the public perception of its legitimacy. For instance, Ethiopian foreign minister Tedros Adhanom Ghebreyesus is quoted as saying in 2013 that "[t]he Court has transformed itself into a political instrument targeting Africa and Africans"[27] and that it was "condescending" toward Africa.[28] Other leaders who often engage in this rhetoric are Uganda's President Yoweri Museveni and Zimbabwe's Robert Mugabe as well as those charged by the Court, Kenyan President Kenyatta and al-Bashir. Often this has been depicted as the common African position against the Court: "Unfortunately this view has gained traction over the past few years and, through concerted and self-interested political machinations by the ICC's opponents on the continent, has been marshalled into an institutional position against the court at the level of the AU."[29] Thus, it is important to note the enormous variation of African views vis-à-vis the ICC. ICC officials often point out the good cooperation they receive from most African states despite the media's (and this dissertation's) attention on cases of non-cooperation:

> Well, my impression is that most of our African states parties respond very well to our cooperation requests and indeed are very cooperative. And the loud criticism that you hear very often from Africa mainly originates from a small number of African states, a number of African leaders, many of which are actually not states parties to the Rome Statute. There is a very small number of states parties among those that are critics of the ICC. On the whole, our African constituency remains very supportive of the court just that that support is not often heard publicly that much. Much of the criticism is based on what we would see as a distortion or misunderstanding of facts or a one-sided view of the reality.[30]

[26] Schabas 2014; Bosco 2014: 123.
[27] Taylor 2015.
[28] Hickey 2013.
[29] du Plessis and Gevers 2011: 2.
[30] Interview 004. The sentiment was also expressed in Interview 001.

In addition to ties to the UNSC and lack of independence, the Court has been criticized for its handling of cases against heads of state. It has long been a part of customary IL that senior government officials enjoy immunity, and for the longest time state officials were deemed immune even for the gravest breaches of IL (impunity model). However, this has changed in recent decades as leading officials have increasingly been brought to justice, a process Sikkink has called the 'justice cascade.'[31] However, legal debate continues on whether this immunity exists for international crimes such as those covered in the Rome Statute and whether it exists for heads of state of third parties—states that have *not* committed to the Rome Statute. This legal controversy goes beyond the confines of this dissertation.[32] Suffice it to say that some argue that al-Bashir remains immune from prosecution because he is a sitting head of state of a third party.

In addition, and with this legal argument in mind, the AU has argued for head of state immunity and has passed a non-cooperation policy. This non-cooperation policy has been used as legal justification for non-arrests of al-Bashir across several African countries. On the one hand, AU decisions are not explicitly deemed 'binding' in the AU's Constitutive Act. However, one can argue that these decisions are indeed binding. First, Article 23 spells out the consequences for failing to abide by AU decisions, hence suggesting that the AU indeed intends these decisions to be binding. Second, under the implied powers doctrine, one can argue that the broad objectives of the AU imply that "the organisation cannot fulfil its purpose absent the ability to make binding decisions in respect of its member states."[33] Thus, African countries were under two competing legal obligations—to arrest al-Bashir via the ICC arrest warrant and to not

[31] Sikkink 2011.
[32] For a legal discussion on whether heads of state are immune from prosecution for international crimes in *foreign domestic courts*, see Akande and Shah 2010; Wardle (2011) argues that sitting heads of state continue to enjoy immunity.
[33] du Plessis and Gevers 2011.

arrest him as per the AU decision. This provided them with the legal 'out' for the preferred political decision to not arrest a fellow African leader.

It is important to highlight that I do not wish to portray the AU as an enemy of the ICC. I argue that with regard to immunity of sitting heads of state, some African countries and the AU have taken positions counter to the ICC. However, this does not necessarily translate into other areas. I emphasize in Chapter 3 that the AU has not taken a more general position on the ICC outside of the Court's cases against sitting heads of state. In fact, the AU cooperates with the ICC to some extent in other regards. According to an ICC official, the AU support has been reluctantly forthcoming in cases against AU peacekeepers:

> We had difficulty for many years to get the AU to distinguish between the Bashir/Darfur government file and the other ones. While we don't agree with their opposition to this file, we try to say 'irrespective of your opposition on Bashir and the rest, this case is about an attack on AU peacekeepers, surely you have an interest in cooperating.' So finally, recently they have started to cooperate a little bit on this and they provided us a few items, both Registry and OTP, Registry was dealing on behalf of defense, which was publicly known, so we have some cooperation, a little bit from AU.[34]

Chapter Outline

The following chapter will delve more deeply into the theoretical underpinnings of this dissertation. I will present the two literatures from which I draw and to which I seek to contribute—transitional justice norms and compliance with international law—and discuss the cooperation framework that I propose in greater detail. The first empirical chapter, Chapter 3, presents states' expressions of support for and critique of the Court at the UN as well as the development of the AU's stance on the Court. The chapter shows that rhetoric about the Court has remained overwhelmingly positive and that instead of faulting the Court, many states fault

[34] Interview 006.

one another's lack of state cooperation with arrest warrants as one reason for the ICC's meager trial record. The chapter also shows that the AU has become increasingly critical of the ICC since 2009 and that criticism has been restricted to the court cases against sitting heads of state.

Chapters 4 and 5 are devoted to the case studies on two countries' engagement with the Court over time with the goal to explain their ultimate compliance decisions. First, I analyze the rationales behind South Africa's non-arrest of al-Bashir in June 2015, arguing that the decision needs to be understood in light of a loyalty conflict between the country's commitment to the AU and the ICC. In addition, I briefly contrast the South Africa case with other African countries that failed to arrest al-Bashir, suggesting that the AU's non-cooperation policy played an important role in hampering progress in the *al-Bashir* court case. In Chapter 5, I shift to Kenya's selective cooperation record with the Court, showing how the country turned to the AU to diminish the ICC's legitimacy and to stymy progress on the ICC's Kenyan court cases.

In Chapter 6, I summarize the main findings and discuss their implications for broader theoretical discussions and the future of the ICC and transitional justice. I contrast the findings of the South Africa and Kenya case studies with other ICC cases in which cooperation has been more forthcoming. These brief analyses provide a window into future avenues for research and they attest to the leverage of the interest alignment argument so that state cooperation has been more forthcoming in ICC cases against rebel leaders. While this presents the cases under analysis in this dissertation as more anomalous, they show the political obstacles the ICC can encounter when running contrary to states' interests.