International Criminal Justice and the Global South: Extraversion and State Agency

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Abstract

Why do states of the Global South initiate international criminal justice processes for domestic atrocity crimes? The phenomenon of Southern agency regarding international criminal justice presents an empirical and theoretical puzzle given the Southern states' defence of Westphalian sovereignty, or the juridical equality of states and domestic non-intervention. International criminal justice challenges this notion of sovereignty by directly prosecuting individuals under international law through international courts. This thesis rejects this theoretical notion that international criminal justice curbs sovereignty, and argues that the initiative for international criminal justice processes is a type of short-term political strategy adopted by Southern state actors to strengthen specific aspects of their statehood. In doing so, the thesis challenges the dominant theoretical explanations of Southern state preference that relies on their relative weakness and the power of external factors, such as Great Power interests or transnational activist networks, and reclaims the possibility of agency for Southern state actors. The argument is derived from a theory developed in this thesis, referred to as *judicial extraversion,* or a counter-structural theory of strategic action that links the politics of statehood in the Global South and the political opportunities inherent in the nature of international criminal justice, namely, the individualisation of responsibility, criminalisation of specific forms of violence, and the privileged status of the state in the international criminal justice system. It develops this theory through the qualitative case studies of Uganda's self-referral to the International Criminal Court (ICC), Cambodia's request for an international criminal tribunal to the UN, and the counterexample of Colombia's special domestic criminal justice process for paramilitary demobilisation. The thesis finds that relative weakness of Southern states is insufficient to explain engagement with international criminal justice, and highlights the possibility of paradoxical agency. Finally, the findings suggest that, under particular circumstances, international criminal justice can be used to entrench the authority of weaker states in the international system.

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INTRODUCTION

The post-World War II (WWII) period has experienced a rapid growth in the criminal prosecution of individuals responsible for mass atrocities, specifically war crimes, crimes against humanity, and genocide.[1] The establishment of the International Military Tribunal (IMT) at Nuremberg, and the subsequent IMT at Tokyo[2] after WWII were the first major international endeavours articulating the new norm of individual *criminal* responsibility for such atrocities. The creation of these mechanisms precipitated what Sikkink famously denoted as the "justice cascade"[3]—the worldwide spread of the idea that individuals, irrespective of their political power or status as state agents, should and could be tried in court for their responsibility in planning, aiding, and carrying out mass atrocities. Following the end of the Cold War, the "cascade" picked up steam in the form of domestic prosecutions for grave violations of human rights, especially in Latin America, as well as prosecution by foreign courts and the establishment of international *ad hoc*[4] and 'hybrid'[5] criminal tribunals. In 2002, the move to prosecute perpetrators of

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[1] These crimes are collectively known as 'atrocity crimes' or 'core crimes' under International Criminal Law. The terms atrocity crimes and mass atrocities will be used interchangeably throughout the thesis.

[2] Official name is the International Military Tribunal of the Far East (IMTFE).

[3] Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W Norton & Company, Inc, 2011), 5.

[4] Referring to the war crimes tribunals established by the UN following WWII. They are restricted in their respective jurisdiction to specific situations and territories, and are not permanent bodies. These are: the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR).

[5] A 'hybrid' tribunal refers to a court where both the institutional apparatus and applicable law combine international and domestic aspects. International judges and prosecutors work alongside domestic counterparts; domestic law and international law is applied. See: Laura A. Dickinson, "The Promise of Hybrid Courts," *American Journal of International Law* 97, no. 2 (2003): 295; Sarah M. H. Nouwen, "'Hybrid Courts': the Hybrid Category of a New Type of

atrocity crimes under international law reached a new milestone with the establishment of the permanent International Criminal Court (ICC). These institutional developments were augmented by the increase in international legal instruments, including treaties, conventions, and the recognition of customary international law, which acknowledged and required the obligation to prosecute perpetrators of atrocity crimes under international law. This gave birth to what is commonly referred to as 'international criminal law' (ICL).[6] The accumulation of these institutions and rules represents what International Relations (IR) scholars call the "atrocities regime" or international criminal justice system.[7]

International Crimes Court," *Utrecht Law Review* 2, no. 2 (2006): 190. Suzanne Katzenstein, "Hybrid Tribunals: Searching for Justice in East Timor," *Harvard Human Rights Journal* 16 (2003): 245. Also referred to as 'internationalized' tribunals. The two terms will be used interchangeably in this analysis.

[6] ICL in a broad sense includes individual criminal liability for transnational crimes such as drug trafficking, piracy, and air sabotage. See: Gerhard Werle, *Principles of International Criminal Law* (The Hague, The Netherlands: T.M.C. Asser Press), 54.

However, current usage of the term 'international criminal law' is mostly limited to the "core crimes" of ICL, which refer to 'atrocity crimes' such as genocide, crimes against humanity, and war crimes. Some legal commentators include torture as a distinct and separate crime since the adoption of the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN Torture Convention) in 1984, although torture can also constitute a war crime or crime against humanity if it occurs within the context of war, or in a widespread or systematic manner, respectively. See: Antonio Cassese, *International Criminal Law*, 2nd ed. (Oxford, UK: Oxford University Press, 2008), 4.

The crime of aggression is considered a "core crime" by many legal commentators. It is included in the Rome Statute of the ICC Art. 5.1(d), Art.5.2. However, the definition of the crime remains controversial, and has not been developed jurisprudentially to the degree of the other core crimes since the end of the Nuremberg IMT. Furthermore the focus on inter-state behaviour that underpins the definition of the crime of aggression sets it apart from the rest of the "atrocity crimes" which are primarily focused on mass levels of violence against civilians or other protected persons. For these reasons, for the purpose of this analysis, the discussion of "core crimes" will exclude the crime of aggression. See: Werle, *Principles of International Criminal Law*, 54. See further: Kriangsak Kittichaisaree, *International Criminal Law* (Oxford, UK: Oxford University Press, 2001), 206-25. Grant M. Dawson, "Defining Substantive Crimes within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression," *New York Law School Journal of International and Comparative Law* 19 (1999).

[7] Christopher Rudolph, "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals," *International Organization* 55, no. 3 (2001): 656. Kenneth W. Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities and Internal Conflict," *American Journal of International Law* 93, no. 2 (1999): 361.

In more recent years, this rapid development of the international criminal justice system has come under increasing attack for showing a bias against the so-called 'Global South,' in particular with regards to the ICC indictments of the Sudanese President Omar Bashir and Kenyan President Uhuru Kenyatta.[8] Critics have accused the ICC, as well as the entire international criminal justice system, of creating a 'neo-imperial' strategy dominated by more powerful, predominantly Western, states of the Global North.[9] However, this criticism regarding international criminal justice overlooks the historical fact that, since the late 1990s, initiatives to prosecute individuals under ICL for mass atrocities emerged almost exclusively from the states of the Global South themselves. Specifically, several Southern states have appealed to the international community to investigate and prosecute alleged crimes in the context of internal or regional conflicts.[10] In 1997, the government of Cambodia requested the UN to establish an international trial to prosecute senior leaders of the Khmer Rouge for atrocities committed during its regime, and after lengthy negotiations, the Extraordinary Chambers of the Courts of Cambodia (ECCC) were

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[8] For example: Eric Latiff, "Africa: ICC a Toy of Declining Imperial Powers- Uhuru Kenyatta," *Capital FM* (2013), http://allafrica.com/stories/201310130080.html; "Omar al-Bashir celebrates ICC decision to halt Darfur investigation," *The Guardian* (2014), http://www.theguardian.com/world/2014/dec/14/omar-al-bashir-celebrates-icc-decision-to-halt-darfur-investigation.

[9] For example: Conor Foley, "Beware Human Rights Imperialism," ibid. (2009), http://www.theguardian.com/commentisfree/2009/jun/23/human-rights-imperialism-western-values.

[10] The establishment of the Special Tribunal for Lebanon (STL) can be considered as an example of a Southern state requesting investigation and prosecution by an international institution for the purpose of establishing individual criminal responsibility. However, it is not considered in this analysis as it is controversial as to whether the crimes under the jurisdiction of the court, especially the crime of 'terrorism,' are under the purview of international criminal justice. Furthermore, while the STL was created by international institutions, the tribunal relies only on domestic criminal law. See: G. Serra, "Special Tribunal for Lebanon A Commentary on its Major Legal Aspects," *International Criminal Justice Review* 18, no. 3 (2008); N. N. Jurdi, "The Subject-Matter Jurisdiction of the Special Tribunal for Lebanon," *Journal of International Criminal Justice* 5, no. 5 (2007). M. Milanović, "An Odd Couple Domestic Crimes and International Responsibility in the Special Tribunal for Lebanon," ibid.; M. Wierda, H. Nassar, and L. Maalouf, "Early Reflections on Local Perceptions, Legitimacy and Legacy of the Special Tribunal for Lebanon," ibid.

established in 2003.[11] In 2000, President Kabbah of Sierra Leone wrote to the then-UN Secretary General Kofi Annan requesting the international community to bring to justice those responsible for the atrocities committed during the 1990s civil conflict, resulting in the establishment of the Special Tribunal for Sierra Leone (SCSL). To date, following the establishment of the ICC in 2002, five African states—Uganda,[12] the Democratic Republic of the Congo (DRC),[13] the Central African Republic (CAR),[14] and Mali[15]—have utilised the mechanism of 'self-referral,' or the voluntary surrender of jurisdiction regarding situations involving their own citizens and territories to the newly formed court.[16] Côte d'Ivoire, on the other hand, publically requested the ICC prosecutor to open investigations under his *proprio motu* powers.[17]

1. RESEARCH QUESTION

The cases of international criminal justice processes initiated by the Global South enumerated above vary in their characteristics. Some, such as the ICC self-referrals, are purely 'international' cases, in the sense that prosecutions of alleged perpetrators

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11"Patronage Politics, Donor Reforms, and Regime Consolidation in Uganda," *African Affairs* 104, no. 416.

12 ICC, "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC," (2004).

13 "Prosecutor receives referral concerning Central African Republic," (2005).

14 "Prosecutor receives referral of the situation in the Democratic Republic of Congo," (2004).

15 Ministere de la Justice, Republique du Mali, "Renvoi De La Situation Au Mali"; "ICC Prosecutor Opens Investigation."

16 *Rome Statute of the International Criminal Court*, (2002/07/01/). Art.14

17 *Proprio Motu* refers to the Prosecutor's power to initiate consideration of a situation with the objective of submitting it to the Pre-Trial Chamber of the Court to authorize further official investigation. *Rome Statute* Art.15. President Ouattara is seen to have taken this rather unusual route of initiating an ICC investigation due to the fact that Côte d'Ivoire had not ratified the Rome Statute at the time of the request. However, while Côte d'Ivoire was not an official state party to the ICC, it had accepted the jurisdiction of the Court over the country since 2003. President Ouattara reaffirmed this acceptance of the jurisdiction in a letter to the ICC. See: "Côte d'Ivoire: President Ouattara Wants ICC Investigation; OTP to Seek Pre-Trial Chamber Authorization," http:www.iccnow.org/?mod=newsdetail&news=4476.

are carried out by international tribunals using international law. Others, such as the ECCC and SCSL, resulted in institutional arrangements of a more hybrid nature, combining domestic and international instruments as well as personnel.[18] However, the cases share common ground in two aspects: first, the states themselves explicitly requested international criminal prosecution to address largely domestic situations, in the context of internal or regionally bounded conflicts; and second, the states in question are weaker states of the Global South—the very states that are increasingly accusing the international criminal justice for holding a negative bias against them. The question thus arises: *why do states of the Global South initiate prosecutions of atrocity crimes through international or internationalized tribunals?*

The core analytical proposition of this thesis is that the 'choice' by Southern states to internationally prosecute can be best explained by dismantling the assumption of the state as a unitary actor, and examining the link between domestic and international politics surrounding international criminal justice in specific cases. The central argument is that the agency of Southern states is facilitated and shaped by the political opportunities and incentives presented to domestic actors by the particular nature of ICL, and the international criminal justice system as a whole. I therefore advance a theory of *judicial extraversion,* or a theory of strategic action by Southern state actors that utilises the political opportunities inherent in the core characteristics

[18] The SCSL was created by a UN Security Council resolution, combines both domestic criminal law and ICL, and employs both domestic and international legal personnel. See: Alison Smith, "Sierra Leone: Law, Policy, and Practice," in *Internationalized Criminal Courts: Sierra Leone, East Timor, Kosovo, and Cambodia*, ed. Cesare P. R. Romano, Andre Nollkaemper, and Jann K. Kleffner, International Courts and Tribunals Series (Oxford, UK: Oxford University Press, 2004), 130-37. The ECCC was established through an agreement between the UN General Assembly and the Cambodian government, and is implemented through a legislative act of the Cambodian Parliament. It applies both domestic criminal law and international law. It combines both domestic and international personnel for legal and support staff. See: Ernestine E. Meijer, "Extraordinary Chambers in the Courts of Cambodia for Prosecuting Crimes Committed by the Khmer Rouge: Jurisdiction, Organization, and Procedure of an Internationalized National Tribunal," ibid.

of international criminal justice—namely, the individualisation and criminalisation of specific forms of violence under ICL, and the continued importance of the state in the system of international criminal justice.

While the behaviour of Southern states is often said to be determined by external factors—such as Great Power interests or pressure by transnational activists—the theory of judicial extraversion is based on the central argument that states of the Global South should be understood as agents that have the capability to exercise a degree of explicit agency with respect to international criminal justice. Scholars from the tradition of comparative African and Third World politics such as Clapham, Chabal, Bayart and Daloz, have argued that weaker states have a long tradition of exercising agency in perverting, subverting, and circumventing the strong pressures exerted by greater powers, suggesting that the condition of weakness does not negate the possibility of purposeful strategic action.[19] Agency, from this perspective, is not defined by the total absence of external constraints, but is both embedded in and enabled by the structural and societal context of the actors.[20] In fact, it has been suggested that the condition of relative weakness itself has been used as a productive resource for political action, with Southern states exploiting both their material disadvantages as well as perceived vulnerability for economic and political rent.[21] From this perspective, the central research question can be restated as the following:

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19 Christopher Clapham, *Third World Politics: An Introduction* (London: Routledge, 1985), 3-5; *Africa and the International System: Politics of State Survival*, Cambridge Studies in International Relations (Cambridge, UK: Cambridge University Press, 1996), 4-7. Jean-Francois Bayart, "Africa in the World: A History of Extraversion," *African Affairs* 99 (2000): 218-19; Patrick Chabal and Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* (Oxford, UK: James Currey, 1999), xix-xx.

20 William Brown, "A Question of Agency: Africa in International Politics," *Third World Quarterly* 33, no. 10 (2012): 1895-98.

21 Bayart's theory of 'extraversion' most explicitly details this kind of political behaviour. The link between the theory of extraversion and agency in the politics of international criminal justice will be further elaborated in subsequent sections of this introduction as well as Chapter One. Bayart, "Africa in the World: A History of Extraversion."

why do some states of the Global South choose to prosecute their own citizens through international criminal justice mechanisms, given the variance of attitudes and behaviours regarding international criminal justice between states, and across time?

Within this larger theoretical framework of strategic action, the thesis will also elaborate not only on the possibility of agency, but also the nature of agency exercised by Southern states. Under what conditions was the choice for international criminal justice made possible, and how was it restrained? Furthermore, *who* in particular within the state was expressing such agency? Second, how do certain shared characteristics of Southern states—such as the relative weakness in the international sphere, the prevalent threat of external intervention, and the significant role of external legitimation in establishing sovereign authority—influence the preference for international criminal justice?

This chapter will provide the background for the ensuing analysis. To this end, it will first discuss the existing theoretical approaches to explaining state preferences for international criminal justice, and discuss their respective weaknesses in the context of addressing Southern agency. Second, it will present what I will call a 'domestic-political framework' as an alternative theoretical approach to understanding state preferences, and introduce the theory of extraversion, which will be further explored in Chapter One as the basis for developing the theory of judicial extraversion. It will then turn to discussing the methodological approaches taken in the research, as well as introducing the cases to be considered and the rationale of their selection. Finally, it will present a brief overview of the following chapters.

2. Explaining State Preference: Alternative Theories

Despite the increasing number of international criminal justice initiatives originating from the Global South, existing theories explaining why states would want to pursue strategies of international criminal justice have focused primarily on explaining why states of the Global North came to establish war crimes tribunals, highlighting the gap in existing literature regarding the behaviour of Southern states. For example, based on the history of the WWII IMTs and the *ad hoc* tribunals, academic commentators, such as Bass and Rudolph, have argued that international criminal tribunals are a negotiated result of domestic preferences based on liberal norms and the self-interest of powerful, mostly Western states.[22]

Theories that either directly address, or provide insights into, the preference and behaviour of Southern states—such as establishment of international tribunals for the purpose of investigating and prosecuting specific incidents, as well as referring cases to already existent international courts—can be categorized into three broad types. First, the bulk of the literature on international criminal justice explain state preference for international criminal prosecutions through the asymmetry of power in the international system, particularly between the Global North and South. Such theories focus on the strategic interests of Northern states as well as the relative power of the norms championed by the Global North, and their influence on the preferences of states elsewhere. Second, constructivist theories focus on the overall spread of the norm of individual criminal responsibility for mass atrocities in understanding the behaviour of states regarding international criminal justice. Finally, rationalist theories understand state preference for international criminal justice as

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[22] Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ and Oxford, UK: Princeton University Press, 2000); Rudolph, "Constructing an Atrocities Regime."

being derived from specific types of cooperation problems, both within the domestic and international spheres.

2.1 Theories of Power Asymmetry

One strand of existing theories based on the asymmetry of power in the international system argues that Southern preference for international criminal justice is a result of coercion by Northern states. The most direct form of this argument casts international criminal justice as a 'neo-imperial' endeavour that masks the ambitions of powerful states. This type of argumentation has been particularly prevalent with the increasing criticism of certain African states regarding the ICC.[23]

A more subtle form of argument contends that the initiation of international criminal justice processes is a result of international pressure, especially from powerful Western states such as the U.S. or organisations such as the European Union (EU). For example, it has been acknowledged that the EU's policy of conditionality, which tied cooperation with international criminal prosecution efforts with economic aid, played a significant role in prompting state cooperation with the *ad hoc* tribunals.[24] Literature regarding the development of the ICC suggests that the decision to pursue—or not pursue—certain international criminal justice cases is a result of politics between Great Power states, such as the U.S., and the ICC itself, without reference to the 'host' states, which the actual trials pertain to.[25]

With regards to the particular case of the self-referral to the ICC by the DRC, for instance, commentators have argued that Joseph Kabila, the interim president at the

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23 John Philpot and Sebastian Chartrand, eds., *Justice Belied: The Unbalanced Scales of International Crimnal Justice* (Montreal: Baraka Books, 2014).

24 Victor Peskin and Mieczysław P. Boduszyński, "Balancing International Justice in the Balkans: Surrogate Enforcers, Uncertain Transitions and the Road to Europe," *The International Journal of Transitional Justice* 5 (2011): 53-54.

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

time of the referral, was strongly persuaded by international pressure from the ICC Office of the Prosecutor (OTP) and from important donor nations, such as France and the EU.[26] The self-referral by Kabila, in this context, is understood as a result of the normative preference of the Global North, rather than that of the DRC or Kabila. Others have suggested that agency expressed by states of the Global South, in any given post-atrocity context, is merely a proxy of Great Power interests at stake. For example, Mahony has argued that the Sierra Leonean President Kabbah's request to the international community to establish an international tribunal for his country's civil war was due to pressure from the British government, which saw that a legitimized and peaceful removal of President Charles Taylor of Liberia, who played a significant role in the Sierra Leonean conflict, served British interests.[27] In other words, such theories negate the agency expressed by Southern states as a superficial or performative act, suggesting that Southern states have expressed preference for an international criminal prosecution at the bidding of a more powerful Northern state.

A second strand of literature of power asymmetry focuses on more complex forms of structural or discursive power relations between the Global North and South. These types of theories contend that there were no direct forms of pressure, and therefore entertain the possibility of Southern agency, but rather place emphasis on the power of liberal norms that underpin the idea of international criminal justice in the international sphere. Barnett and Duvall thus argue that "world views" can also

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[26] Jacqueline Gies and Alex Mundt, "When to Indict: International Criminal Indictments, Peace Processes, and Humanitarian Action" (paper presented at the World Humanitarian Studies, 2009 2009), 213; Benjamin N. Schiff, *Building the International Criminal Court* (Cambridge, UK: University of Cambridge Press, 2008).
[27]Chris Mahony, "Prioritising International Sex Crimes before the Special Court for Sierra Leone: Another Instrument of Political Manipulation?," in *Thematic Prosecution of International Sex Crimes*, ed. Morten Bergsmo (Beijing: Torkel Opsahl Academic Publisher, 2012), 60-61, 68-72.

have structural power based on the position of the actor espousing the idea. In other words, the liberal norms of rule-of-law and human rights are picked up by non-Western states not because such states have internalized the norm, but because they are compelled to do so because such norms are backed by powerful Western states.[28] In this vein, it could be argued that certain norms and ideological foundations of the international criminal justice system may have gained prominence precisely because they largely originated from the Global North. Moghalu, for example, has argued that the idea of criminalization of war crimes in the Western liberal tradition is a "hegemonic" norm, suggesting not only that Northern states use international criminal justice to maintain and construct hegemony, but also the emergence of the idea that individuals should be held criminally accountable in it of itself is a manifestation of Northern power.[29] Legal anthropologists such as Clarke add weight to this view by providing ethnographic detail on both how norms espoused by more powerful states influenced the institutional design of international criminal tribunals,

[28] Stern argued that, in the context of establishing *opinion juris*, two different kinds of rationales are involved, depending on the individual state's "position of power within the international order." While more powerful states are likely to feel freely bound to international law, other weaker states will "feel bound because they cannot not want to be, because the rule is imposed upon them." Brigitte Stern, "Custom at the Heart of International Law," *Duke Journal of Comparative and International Law* 11, no. 1.See also: Michael Beyers, "International Law," in *The Oxford Handbook of International Relations*, ed. Chris Reus-Smit and Duncan Snidal (Oxford, UK: Oxford University Press, 2008), 624; Martti Koskenniemi, *The Politics of International Law* (Oxford and Portland, Oregon: Hart Publishing, 2011), 222.

[29] Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crimes Trials* (Stanford, California: Stanford University Press, 2008), 13. On the argument that human rights norm in general is an example of pervasive Western 'world-culture' see: Martha Finnemore, "Norms, Culture and World Politics: Insights from Sociology's Institutionalism," *International Organization* 50, no. 2 (1996); Thomas Risse and Kathryn Sikkink, "The Socialization of International Human Rights Norms into Domestic Practices: Introduction," in *The Power of Human Rights: International Norms and Domestic Change*, ed. Stephen C. Ropp and Kathryn Sikkink (Cambridge, UK: Cambridge University Press, 1999).

and how the influence exerted by certain states shaped the norms underpinning the atrocities regime itself.[30]

The weakness of such power-centric arguments is twofold. First, they generate overly deterministic accounts based on a minimalist understanding of both agency and passivity. The focus on the normative dominance and interests of Northern states to explain Southern behaviour regarding international criminal prosecutions in effect negates the agency of Southern states, and replaces it with a uniform narrative of passivity. If Southern states express agency, either through public statements, official communications to international organisations, or actions and statements towards their own domestic constituency, these utterances and actions are considered to be superficial performances. It is important to acknowledge the extent and effect of external influences. After all, the reality of the hierarchical power structure of the international system means that we would be hard pressed to find an explanation of state behaviour in the Global South that totally excludes the effect of external influence. Nevertheless, it seems equally pertinent to contextualise this alleged 'passivity' of Southern state actors.[31] Handel, in his study of weak state politics in the international system, argues that the degree of passivity is determined not only by the relative position of the state, but also by "internal characteristics"

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30 Kamari Clarke, "Rethinking Africa through its Exclusions: The Politics of Naming Crimianl Responsibility," *Anthropological Quarterly* 83, no. 3 (2010); *Fictions of Justice: The International Criminal Court and the Challenge of Legal Pluralism in Sub-Saharan Africa* (Cambridge, UK: Cambridge University Press, 2009); Ann Sagan, "African Criminals/African Victims: The Institutionalised Production of Cultural Narrative in International Criminal Law," *Millenium: Journal of International Studies* 39, no. 1 (2010).

31 See, for example: Stephanie G. Neuman, "International Relations Theory and the Thirld World: An Oxymoron?," in *International Relations and the Third World* (Hampshire and London: Macmillan Press, 1998). Carlos Escudé, "An Introduction to Peripheral Realism and its Implications for the Interstate System: Argentina and the Condor II Missile Project," ibid. On hierarchy in international relations in general see: David A. Lake, *Hierachy in International Relations* (Ithaca, New York: Cornell University Press, 2009). Ian Clark, *The Hierachy of States: Reform and Resistance in the International Order* (Cambridge, UK: Cambridge University Press, 1989). Edward Keene, *Beyond the Anarchical Society* (Cambridge, UK: Cambridge University Press, 2002).

such as "national character" or contingent factors such as "style of leadership."[32] Thus, while the relative weakness of the state may influence such internal characteristics, it may not be the singular determinant.

Secondly, such arguments are overly deterministic in another sense: the claim that within every expression of agency by a Southern state to initiate international criminal trials, a more powerful state is exerting its pressure, fails to account for the variance in the degree and type of pressure exerted by Northern states in each case. The most significant example is the self-referral to the ICC by Uganda. Many commentators have argued that Uganda and its President Museveni have adeptly instrumentalized the ICC for political gains, such as diverting international attention away from the humanitarian crisis of the Internally Displaced Persons (IDP) camps in Northern Uganda, or creating a pretext for military incursions into neighbouring countries.[33] For example, Branch asserts that Uganda stood to gain "very secular benefits from the ICC intervention," especially if it could be assured that the Court would only prosecute the Lord Resistance Army (LRA) rebels.[34] While it is possible that Uganda is an exception rather than a rule, Uganda's action hints at the possibility of initiative and strategic action from the Global South, calling for further investigation and elaboration.

2.2 CONSTRUCTIVIST THEORIES

One strand of constructivist theories argues that the expansion of liberal norms of rule-of-law and human rights protection is the driving force behind the international

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32 Michael Handel, *Weak States in the International System*, 2nd ed. (London: Frank Cass, 1990), 44-45.
33 Schiff, *Building the International Criminal Court*, 199.
34 Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics and International Affairs* 21, no. 2 (2007): 179-63, 83.

criminal justice system.[35] Because states are assumed to prefer their respective domestic values and processes to be played out in the international context, liberal states are assumed to inherently prefer legal procedures to illiberal measures of accountability, such as political trials or executions.[36] Simultaneously, the assumed preference for international criminal justice by liberal states is seen to be confined within the boundaries of self-interest. For Bass, this means that liberal states will only propose war crimes trials when the domestic public is the most outraged and therefore more willing to subsume the cost of establishing such tribunals.[37] For Neier, war crimes tribunals were established precisely because they were the cheapest way of responding to public moral outrage.[38] Rudolph goes a step further to suggest that normative preference will not trump economic and strategic concerns, and thus liberal states will selectively initiate legalist responses to mass violence only in situations of less strategic importance.[39]

This explanatory model faces significant difficulties in accounting for the surge of interest in international criminal prosecutions from the Global South. The most obvious weakness of this theory comes from the fact that the Southern states that have requested an international criminal intervention were precisely those that lacked liberal democratic politics. Secondly, the theoretical expectation inherent in the

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35 Rudolph, "Constructing an Atrocities Regime," 681.
36 Bass, *Stay the Hand of Vengeance*, 20-23, 28-36. Keck and Sikkink, in a study of transnational advocacy for human rights, reached a similar conclusion that in general, states with liberal, law-based traditions have difficulties resisting normative arguments for legalist accountability measures. Margareth E. Keck and Kathryn Sikkink, *Activisit Beyond Borders: Advocacy Networks and International Politics* (Ithaca, New York: Cornell University Press, 1998), 117-19, 207-09.
37 Bass, *Stay the Hand of Vengeance*, 8.
38 Aryeh Neier, *War Crimes* (New York: Times Books, 1998), 129; E. Neumayer, "A New Moral Hazard? Military Intervention, Peacekeeping and Ratification of the International Criminal Court," *Journal of Peace Research* 46, no. 5 (2009); Caroline Fehl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches," *European Journal of International Relations* 10, no. 3 (2004): 373.
39 Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities and Internal Conflict," 371; Keck and Sikkink, *Activisit Beyond Borders: Advocacy Networks and International Politics*, 83-84.

explanatory model is that initiative for international criminal justice will come from outside of the state in which the violence happened. The phenomenon of Southern agency, in which Southern, illiberal states voluntarily invited international investigation and prosecution into events that have occurred in their own societies, is wholly unaccounted for.

More recently, constructivist theories of the development of the international criminal justice system have highlighted the role of transnational actors in disseminating the specific norm of individual criminal accountability for grave human rights violations and atrocity crimes.[40] Sikkink's influential account of the "justice cascade," for example, posits that the spread of criminal prosecutions for human rights violations, including the core atrocity crimes under ICL, has been due to "active domestic entrepreneurship" of advocates regarding the initial emergence of the idea that such violations needed to be criminally prosecuted, and a combination of "transnational emulation and transnational norm entrepreneurship" for the practice of individual criminal prosecution to spread.[41]

From this perspective, the request of Southern states for international judicial intervention in the wake of domestic atrocity crimes is a consequence of the success of the justice cascade, or the consolidation and growing purchase of the norm of individual accountability across the globe. Indeed, many states of the Global South have shown strong rhetorical support for the idea of international criminal justice, and have rapidly and enthusiastically ratified the Rome Statute of the ICC (hereafter

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[40] For literature on norm diffusion and transnational activism in general, see: Martha Finnemore and Kathryn Sikkink, "International Norm Dynamics and Political Change," *International Organization* 52, no. 4. Keck and Sikkink, *Activisit Beyond Borders: Advocacy Networks and International Politics*. Kathryn Sikkink, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America," *International Organization* 47, no. 3 (1993).
[41] *The Justice Cascade*, 246.

Rome Statute).[42] At the same time, since the end of WWII, the Global South has been the site of most instances of mass violence,[43] and, despite pockets of positive developments, afflicted by weak rule-of-law and judicial institutions.[44] Thus, the argument would follow that Southern states, unable to dispense criminal justice in a credible and effective manner themselves, are utilizing the institutional forums available to them to realise the norm of individual criminal accountability.[45] Legal scholarship regarding international criminal justice has also taken this view, assuming that preference for individual criminal accountability is already widespread, and states will choose the legal forum based on legally determined criteria—jurisdiction of the court and domestic capacity to prosecute.[46]

This strand of constructivist argument leaves open the possibility of some agency by the Southern state. Nonetheless, these arguments are problematic. On the one hand, despite its rapid institutional growth, international criminal justice remains a controversial issue.[47] The efficacy and morality of prosecuting individuals for atrocity crimes continue to be vehemently debated, with many academic commentators and policy-makers suggesting alternative definitions and mechanisms of 'justice.'[48]

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42 Sub-Saharan African states have been particularly enthusiastic in the ratification of the Rome Statute. Beth A. Simmons and Allison Danner, "Credible Commitment and the International Criminal Court," *International Organization* 64, no. 2 (2010).
43 Lotta Themner and Peter Wallnesteen, "Armed Conflict, 1945-2011," *Journal of Peace Research* 49, no. 4 (2012). Kristine Eck and Lisa Hultman, "UCDP One-sided Violence Dataset," ibid.44, no. 2 (2007).
44 See, for example: M. Agrast et al., "WJP Rule of Law Index 2013-2013," (Washington, DC: The World Justice Project), 23-57. Sub-Saharan Africa, Middle East and North Africa, the Caribbean, South America score relatively lowly on the deliverance of criminal justice, for example.
45 Sikkink, *The Justice Cascade*, 248.
46 Cassese, *International Criminal Law*.
47 Mark J. Osiel, "Why Prosecute: Critics of Punishment for Mass Atrocity," *Human Rights Quarterly* 22, no. 1 (2000). Tony Evans, *The Politics of Human Rights: A Global Perspective* (London: Pluto Press, 2001).
48 See, for example: Jack Snyder and Leslie Vinjamuri, "Trials and Errors: Principle and Pragmatism in Strategies of International Justice," *International Security* 28, no. 3 (2003).

On the other hand, and perhaps more importantly, even if it is accepted that individuals should be criminally prosecuted for mass atrocities, it is still debatable whether states would consider *international* tribunals to be the best means to prosecute their *own* citizens. This is particularly the case for states from the Global South, which have been the most vehement in guarding the traditional principles of domestic non-intervention and juridical equality of sovereign states, due to their historical experience of colonisation and their comparative weakness in the international system of states—not only in terms of economic and military capacity, but also discursive capacity, or the ability to participate and influence the development of international norms, laws, and standards.[49] This raises the question as to whether—and why—Southern states would be willing to prosecute their citizens in front of international courts under international law.

Indeed, despite the preponderance of atrocity crimes in the Southern hemisphere, the decision to allow for direct international judicial intervention by the aforementioned states is an exception rather than the rule. The appeals to the international community by Southern states for the investigation and prosecution of alleged crimes under ICL have largely been a concurrent development with the increasing demands of alternative forms of individual criminal accountability, such as the establishment of regional courts with the ability to adjudicate under ICL.[50] Moreover, some states that have initially requested the judicial intervention of the international community have often subsequently withdrawn their request, demanding that they be allowed to assert sole jurisdiction over the situations, without any substantive changes to their judicial capacity. Such inconsistencies cast

[49] Rahul Rao, *Third World Protest: Between Home and the World* (Oxford, UK: Oxford University Press, 2010), 24-25.
[50] Drew Mitnick, "African Union Considers Proposals to Add International Criminal Jurisdiction to the Pan-African Court," http://hrbrief.org/2013/04/african-union-considers-proposals-to-add-international-criminal-jurisdiction-to-the-pan-african-court/.

doubt as to how deeply these states were committed to the norm of individual criminal accountability in the first place.[51] The variation in policies adopted by Southern states regarding the international prosecution of atrocity crimes, thus, presents an empirical puzzle in our understanding of the development of international criminal justice.

2.3 Rationalist Theories

Rationalist theories provide for the possibility of agency by Southern state actors and account for the variance in state behaviour by focusing on the strategic interests in engaging with the international criminal justice system. For example, commentators such as Abbott and Mayerfield have conceptualized the policy preference for international criminal tribunals as arising from a particular cooperation problem between states.[52] In a decentralized international criminal justice system, individual states will have less incentive to unilaterally bring perpetrators to justice, even if they respectively believe individuals should be held criminally accountable for mass crimes.[53] An international criminal tribunal, therefore, will centralize prosecution and therefore facilitate cooperation between states. This conceptualisation allows for the agency of Southern states to manifest itself, and can also account for changes in state preferences over time.

However, this argument is problematic, as Fehl has pointed out, in that it presupposes a near-universal normative consensus regarding individual criminal accountability for mass atrocities without accounting for the continued controversy

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[51] Emma Mutaizibwa, "Uganda: Museveni Turns From ICC Admirer to Critic," *The Observer*, 2013/06/09/ 2013.
[52] Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities and Internal Conflict." Jamie Mayerfield, "Who Shall be the Judge? The United States, the International Criminal Court, and the Global Enforcement of Human Rights," *Human Rights Quarterly* 25, no. 1 (2003).
[53] Abbott, "International Relations Theory, International Law, and the Regime Governing Atrocities and Internal Conflict," 374-75.

precipitated by various mechanisms of international criminal justice.[54] More significantly, this model of explanation essentially explains the broad institutional choice between universal jurisdiction—under which foreigners can be prosecuted for foreign crimes by other national courts—and international criminal tribunals, rather than the specific choice between international and domestic criminal tribunals for a given trial, reducing the utility of rationalist explanations in understanding Southern agency regarding international criminal justice.

Simmons' study on the ratification of the Rome Statute for the ICC, on the other hand, suggests that international criminal justice institutions serve as a self-binding mechanism of the government vis-à-vis domestic actors, including potential rebel groups or opposition.[55] Using the framework of credible commitment theory, Simmons argues that ratification of the Rome Statute raises the expected *ex post* costs of reneging—in other words, committing unlimited violence against opponents in the case of internal conflicts—by governments, as the ICC theoretically provides for punishment of government agents as well.[56] ICL, in this perspective, is considered to be a two-level commitment—both domestic and international—that prevents future prisoner's dilemmas in conflict situations and establishes cooperation between state and non-state actors.

However, this explanation raises a second weakness of rationalist theories. While the theory of credible commitment gives a plausible account as to why states would bind themselves to *future* possible international criminal justice interventions, it is difficult to see how this can elucidate why states would initiate international criminal prosecutions at a specific moment, in response to particular atrocities. It can be

[54] Fehl, "Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches," 369-70.
[55] Simmons and Danner, "Credible Commitment and the International Criminal Court."
[56] Ibid., 234.

assumed that the incentives arising from long-term future commitments, such as the ratification of the Rome Treaty, and short-term future actions, such as the initiation of a criminal trial, would be substantially different. The wholesale extension of the credible commitment theory to the active pursuit of international criminal justice policies, thus, seems problematic.

3. Towards a Theory of Judicial Extraversion

Three specific weaknesses of existing explanations have been highlighted. First, the prevailing theories show a Northern-centric bias, overemphasising the role of the Global North, and the asymmetry of power in the international system, in determining the establishment of international criminal tribunals or initiation of international criminal trials. While this Northern-centric framework has been useful in elucidating the process of establishment of earlier war crimes tribunals, such as the Nuremberg IMT or the *ad hoc* tribunals, it projects a thin understanding of agency, negating the possibility of strategic and explicit policy choices by the Global South. Second, existing constructivist theoretical models lack specificity, especially with regards to the legal forum in question: the explanation of why international tribunals were sought out in particular is left in wanting. Thirdly, rationalist explanations fail to capture in their models the phenomenon of states referring their *own* cases to international tribunals, or provide an account as to why states would choose to actively initiate trials at a particular moment.

Two more fundamental issues arise from the existing literature. First, the theories discussed above treat preferences for international criminal justice as exogenous from the system of international criminal justice itself. The normative preferences of states, or the strategic cooperation problems both amongst states and between state and non-state actors, are assumed to exist prior to the establishment of international criminal justice institutions. Tribunals are seen to be the results of, or a solution to, pre-existing preferences or conditions. In other words, criminal justice mechanisms are seen as a product of politics, either in terms of power politics between states or institutional design by states.

International criminal justice, however, can also change politics. As I argue in Chapter One of this thesis, the distinctive nature of ICL, in comparison to traditional public international law, is the ability of ICL to have direct jurisdiction over individuals without the mediation of domestic law or judicial institutions. This, in effect, establishes the *individual* as a stakeholder in international politics, creating what Bassiouni referred to as the "trilateral relationship" between the state, international law, and the individual.[57] This creation of the trilateral relationship, and the consequent change in the relationship between the state and international law, provides the mechanism through which ICL can influence politics. This effect is analogous to the phenomenon observed by Simmons regarding international human rights law. She argues that the ability of international human rights law to directly empower domestic constituencies, bypassing the traditional boundary of domestic jurisdiction of the state, can produce political change. In other words, international legal instruments also "*alter* politics, especially in fluid domestic settings."[58]

Secondly, the existing theories have failed to explicitly take into account the type of political strategies made available to, and actively pursued by, states of the Global South due to their particular conditions of statehood. Specifically, three aspects of the politics of statehood in the Global South are relevant. First, Southern states in particular are subject to an international system of hierarchy, maintained through

57 Sikkink, *The Justice Cascade*, 100. See also: Ruti G. Teitel, *Humanity's Law* (Oxford, UK: Oxford University Press, 2011), 75-76.

58 Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (Cambridge, UK: Cambridge University Press, 2009), 12. Emphasis original.

both formal structures and informal arrangements.[59] Second, the historical condition of decolonization has led to a rigid perspective on international legal order that privileges the stability of juridical statehood and territorial sovereignty.[60] And third, the condition of weakness, in terms of domestic economic and institutional development, prevalent in the Global South has influenced the nature of the South's engagement both with the international system, exacerbating the condition of hierarchy, and domestic constituents, creating acute concerns of survival and security within the state.[61] These characteristics of the Global South, according to some scholars, have given rise to specific forms of political behaviour unique to the Global South.[62] Given that the criminal prosecution of individuals for atrocity crimes under ICL requires interaction with international institutions, negotiations with external actors, and the involvement of domestic political processes, it seems plausible that strategies of international criminal justice are also pursued within the overarching parameters of Southern statehood. Although some existing theories take aspects of Southern statehood into account, such as the condition of international hierarchy or internal weakness,[63] they do not explicitly consider the possible effect of Southern statehood on determining state preferences for international criminal justice.

The approach taken in this thesis addresses these two main issues by adopting a framework of analysis that emphasizes the linkages between domestic and

[59] See: *supra* note 49.
[60] For example, see: Clapham, *Third World Politics: An Introduction*. Boaz Atzili, "When Good Fences Make Bad Neighbors: Fixed Borders, State Weakness, and International Conflict," *International Security* 31, no. 3 (2007). Robert Jackson, *Quasi-States: Sovereignty, International Relations and the Third World* (Cambridge, UK: Cambridge University Press, 1990).
[61] Mohammed Ayoob, *The Third World Security Predicament: State Making, Regional Conflict, and the International System* (Boulder, London: Lynne Rienner Publishers, 1995), 172-76.
[62] Mark Beeson, "Sovereignty Under Siege: Globalisation and the State in Southeast Asia," *Third World Quarterly* 24, no. 2 (2003). Bayart, "Africa in the World: A History of Extraversion."
[63] Gies and Mundt, "When to Indict: International Criminal Indictments, Peace Processes, and Humanitarian Action."; Peskin and Boduszyńki, "Balancing International Justice in the Balkans: Surrogate Enforcers, Uncertain Transitions and the Road to Europe."

international politics, which highlights the dynamic relationship between the international criminal justice system and the domestic politics of the Global South. The obvious foundation for such a framework is within the varieties of domestic-political theories in IR.

Domestic-political IR theories can be broadly defined as counter-structural theories that unpack the unitary actor assumption of states, [64] and thereby utilize characteristics of the domestic political sphere to understand state behaviour and preferences.[65] While internal political arrangements—such as regime type, national cultures, and interest group or coalition formation—of a state can determine the type of foreign policy decisions a state carries out in the international sphere, influencing the state's reactions to external structural conditions, domestic characteristics also provide a "filter" through which the impact of the international environment is conveyed to the internal society.[66] Ultimately, the state is a "janus-faced" entity that responds to and is influenced by both external and internal conditions.[67]

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[64] James D. Fearon, "Domestic Politics, Foreign Policy, and Theories of International Relations," *Annual Review of Political Science* 1, no. 1 (1998): 291-92.

[65] Examples include: Robert D. Putnam, "Diplomacy and Domestic Politics: the Logic of Two-Level Games," *International Organization* 42, no. 3 (1988).;Peter J. Katzenstein, "International Relations and Domestic Structures: Foreign Economic Policies of Advanced Industrialized States," ibid.30 (1976); Jack L. Snyder, *The Ideology of the Offensive : Military Decision Making and the Disasters of 1914*, Cornell studies in security affairs (Ithaca N.Y.: Cornell University Press, 1984); Jeffrey W. Legro, "Culture and Preferences in the International Cooperation Two-Step," *American Political Science Review* 90, no. 1 (1996); Thomas Risse-Kappen, "Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies," *World Politics* 43, no. 4 (1991).; Peter Gourevitch, "The Second Image Reversed: The International Sources of Domestic Politics," *International Organization* 32, no. 4 (1978).;Robert Keohane and Helen V. Milner, eds., *Internationalization and Domestic Politics* (Cambridge: Cambridge University Press, 1996); Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*.

[66] Matthew Evangelista, "Domestic Structure and International Change," in *New Thinking in International Relations Theory*, ed. Michael W. Doyle and G. John Ikenberry (Boulder, Colorado: Westview Press, 1997).

[67] Ibid. See for example: Barnett, Michael. 1990. "High Politics is Low Politics: The Domestic and Systemic Sources of Israeli Security Policy 1967-1977." *World Politics.* Vol. 42

3.2 THE NATURE OF POLITICS OF INTERNATIONAL CRIMINAL JUSTICE

Nonetheless, the whole-scale application of an interlinked domestic-political framework to the politics of international criminal justice in the Global South is problematic, given that its generic formulation does not specify the *nature* of the relationship between external conditions and internal characteristics. In other words, it does not fully capture what is at stake in the interactions between domestic and international politics in the specific instance of international criminal justice.

An anodyne interpretation of the politics of international criminal justice would suggest that the politics surrounding the international criminal prosecution is shaped by a normatively charged debate, in which opposing sides compete for the realisation—or non-realisation—of the normative ideal of holding individuals accountable for particular types of mass violence. In effect, the differentiated interest between groups and individuals regarding international criminal prosecutions would translate into different levels of normative commitment. Former 'perpetrators,' it might be expected, would show lower levels of normative commitment, and therefore react against international criminal justice, while 'victims' would show higher levels of normative commitment, inviting in international criminal prosecutions. However, as the previous literature review on rationalist theories indicated, international criminal justice may have further political utility beyond the prosecution of individual perpetrators for atrocity crimes. This suggests the

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No.4 (July); Doyle, Michael. 1986. "Liberalism and World Politics." *American Political Science Review.* Vol. 80 (December); Evangelista, Matthew. 1995. "The Paradox of State Strength: Transnational Relations, Domestic Structures, and Security Policy in Russia and the Soviet Union." *International Organization,* Vol. 49 No.1 (Winter); Katzenstein, Peter J. 1976. "International Relations and Domestic Structures: Foreign Economic Policies of Advanced Industrial States." *International Organization.* Vol.30 No.1 (Winter); Risse-Kappen, Thomas. 1991. "Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies." *World Politics.* Vol. 43 No. 4 (July); Solingen, Etel. 1994a. "The Domestic Sources of International Regimes: The Evolution of Nuclear Ambiguity in the Middle East." *International Studies Quarterly.* Vol.38 No. 4 (June) possibility that international criminal justice creates interest groups within the state that are based on factors other than the distinction between victims and perpetrators, or levels of normative commitment.

APPLYING 'EXTRAVERSION'

Consequently, this thesis proposes to draw insights from theories that directly examine the political and economical 'payoffs' of international phenomena, including those arising from the 'unintended' consequences that go beyond its percieved objectives. Comparative African political theory has provided a useful baseline model to expand the understanding of the nature of the domestic and international politics of international criminal justice. Theories of "extraversion," initially developed by Bayart, take on a broadly interlinked domestic-political framework while arguing that post-colonial Sub-Saharan African states have a particular objective when engaging with the international system.[68] More specifically, they seek to manipulate the external conditions for their autonomy,[69] compensating for the internal difficulties of autonomous power-consolidation by deliberating mobilizing resources "derived from their (possibly unequal)" dependent relationship with the external environment.[70] Unlike the more general domestic-political approach, extraversion theories treat the international sphere not only as a realm of politics in which a state necessarily has to participate to ensure its survival, but also as a possibly productive domain from which domestic actors can gain specific political and economic rent.

The application of this theory of extraversion to the politics of international criminal justice opens up the possibility of deliberate and strategic instrumentalization of the

[68] Bayart, "Africa in the World: A History of Extraversion."
[69] Ibid., 217-67.
[70] Ibid., 218.

processes and discourses of international criminal justice. It does so, however, without necessarily negating the possible role of normative commitments in the formulation of preference regarding international criminal justice.

4. RESEARCH DESIGN

To explain why states of the Global South initiate international prosecutions of atrocity crimes, committed in their jurisdictions, through international criminal justice mechanisms, this thesis will adopt a qualitative comparative case study method. It defines a qualitative case study as an intensive study of one or few spatially bounded phenomena at a single point in time, or over a period of time, with the objective of shedding light on the larger universe of cases.[71]

The research question and its subsidiary points of inquiry—regarding the nature, context, and condition surrounding the political behaviour of a state—seeks to probe the effect that international criminal justice has on the dynamics of domestic politics in Southern states. This implies that the key objective of this research is not confined to the probabilistic determination of causality between specific structural causes and their purported effect, but rather extends to the *logic* that underpins the causal effects.[72] Freedman has noted that the role of qualitative methodology in scientific inquiry is precisely to highlight the processes that establish causal

[71] J. Gerring, *Case Study Research: Principles and Practices* (Cambridge University Press Cambridge, 2007), 19-20.
[72] Ibid., 45.; Gary King, Robert O. Keohane, and Sidney Verba, *Designing Social Inquiry* (1994), 85.

relations[73]—but even on a more intuitive level, qualitative approaches allow for a more descriptive account that can emphasise political dynamics in detail.[74]

It is also imperative to define the parameters of this research within the broad rubric of qualitative case studies, and to justify my choice of cases and techniques of data collection. To this end, the following section will define the relevant terms operationalized for the research, delineate the universe of cases and specify the logic of the case selection, and discuss specific techniques of evidence collection to be employed.

4.1 Case Selection

This study will examine the following three cases: Uganda's self-referral to the ICC in 2003 regarding the LRA conflict; Cambodia's request to the UN to establish a tribunal of international character in 1997 regarding the Khmer Rouge era atrocities; and Colombia's enactment of the Justice and Peace Law (*Ley de Justicia y Paz)* in 2005 regarding the accountability and demobilisation of paramilitaries.

Defining the Universe of Cases

All three cases were selected from a broader universe of cases, determined by two general conditions deemed necessary for the study of international criminal justice. First, widespread and systematic violence, especially which resulted in high levels of civilian casualties, needed to have occurred. The nature of violence was deliberately not considered as a criterion in determining the suitability of the case, as how a particular violent episode is characterised, both in popular and academic discourse, can be considered not only as part of the rationale for why international criminal

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73 David A. Freedman, "On Types of Scientific Enquiry: The Role of Qualitative Reasoning," in *THe Oxford Handbook of Political Methodology*, ed. Janet M. Box-Steffensmeier, Henry E. Brady, and David Collier (Oxford, UK: Oxford University Press, 2008), 300-01.
74 This argument should not be taken too categorically; as Gerring noted, description is possible through quantitative methods as well. See: John Gerring, *Social Science Methodology: A Critical Framework* (Cambridge, UK: Cambridge University Press, 2001), 122-24.

justice was pursued, but also the *result* of such processes. Thus, in selecting cases, I did not attempt to distinguish between political violence, ethnic violence, and human rights violations given the danger of selection bias issues.[75]

Secondly, only episodes of mass violence that occurred after WWII were considered. This is reflecting the fact that both the core crimes under ICL—save war crimes—themselves, as well as the international norm to criminally prosecute individuals by a legal process have a relatively short history, and the latter can be argued to be a direct result of post-WWII IMTs. It would therefore be inappropriate to consider the initiation—or non-initiation—of international criminal justice regarding situations prior to some basic articulations of relevant legal and normative standards. Furthermore, the temporal limitation to situations after WWII is an implicit acknowledgement of the fact that while some states may be able to create new international norms and institutions, such as the case of the Allied Countries in creating the Nuremberg and Tokyo IMTs, for weaker states in the international system, it is far more difficult to radically change international normative expectations or broader political developments. In other words, it was deemed less feasible for a weaker state to initiate or request a criminal process of an international nature in the absence of an existing precedent or discourse regarding an international criminal mechanism.

Using the "Major Episodes of Political Violence" database by the Centre for Systemic Peace (CSP),[76] the applicable universe of cases were narrowed down to 104

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75 Barbara Geddes, "How the Cases You Choose Affect the Answers You Get: Selection Bias in Comparative Politics," *Political Analysis* 2, no. 1 (1990): 132-33.
76 Monty G. Marshall, "Major Episodes of Political Violence: 1946-2014" *Centre for Systematic Peace* (Lat updated: 16 Apr., 2015) http://www.systemicpeace.org/warlist/warlist.htm

instances of violent episodes.[77] While the definition of what constitutes a 'weak' state is inherently relational, four cases in which arguably 'Great Power' states were involved or were the sites of violence were excluded.

POSITIVE CASES

Two different logics of case selection were employed from this point. First, the two cases of Uganda and Cambodia were selected as 'positive' cases through a broad application of Mill's "Method of Agreement," or selection of cases with the same outcome (dependent variable).[78] The dependent variable was defined as the 'request for international criminal justice initiatives,' indicating the initiation of preliminary investigations with the explicit purpose of determining the suitability for prosecution, under ICL by an international or internationalized body. Examples will thus include, *inter alia*, official letters to the Office of the Prosecutor of the ICC, official statements by the state's delegates to international organizations, and letters by governments to the UN through approved official channels of communication. Applying these definitions to the universe of cases, seven cases can be considered as relevant to this analysis: the self-referrals to the ICC by Uganda, the DRC, the CAR, and Mali; request of a *proprio motu* investigation by the ICC Prosecutor by Côte d'Ivoire; requests for the establishment of international tribunals under the auspices by the UN by Sierra Leone and Cambodia. The establishment of the STL by the request of the Yemeni government to the UN Security Council is not considered, as it remains a controversial case, given the jurisdictional ambit of the tribunal.[79]

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[77] Seven instances of violent episodes that started prior to 1991 were included because they continued and concluded after during or after 1991.
[78] Andrew Bennett, "Case Study Methods: Design, Use, and Comparative Advantages," in *Models, Numbers, and Cases: Methods for Studying International Relations*, ed. Detlef F. Sprinz and Yael Wolinsky-Nahmias (Ann Arbor: Michigan: University of Michigan Press, 2004), 31-32.
[79] See *supra* note 10.

Three further considerations were taken into account to select the final two cases. First, in order to control for exogenous international developments the temporal scope of the cases were limited to the late 1990s and early 2000s. The reasoning behind this temporal scope was both analytical as well as practical. On an analytical level, the late 1990s and early 2000s represent the early days of international criminal justice development in which the infrastructure and norm of international criminal justice was less developed. This makes proactive initiatives of Southern states even less likely, making it a 'hard case' for theory development.[80] On an empirical level, there is more information available regarding earlier international criminal justice initiatives, and considering the sensitive nature of atrocity crimes, it was assumed that access to information for more recent cases will be restrictive. Secondly, given that the theory of extraversion, from which this thesis draws its theoretical insights from, was developed through comparative African cases, it was deemed necessary to examine cases other than African cases to test the general applicability of the theory. In other words, by selecting diverse cases,[81] this thesis aims to control for underlying similarities between the African cases that may not have been explicitly considered with in the general theory of extraversion. Finally, the case selection methodology was limited by practical considerations, such as fieldwork safety and feasibility.[82]

Certain methodological literature had cautioned against such case selection based on the dependent variable, as it can result in biased inferences.[83] However, this general 'rule' can be impractical in many instances of qualitative research. For example, as Ragin argues, similarities in outcome do not preclude the possibility that there are

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[80] J. Gerring, "Case Selection for Case-Study Analysis: Qualitative and Quantitative Techniques," in *The Oxford Handbook of Political Methodology*, ed. Janet M. Box-Steffensmeier, Henry E. Brady, and David Collier (Oxford: Oxford University Press, 2008), 653-54.
[81] Ibid., 651-53.
[82] The case of Sierra Leone was initially considered as a candidate for research; however, the ebola crisis made access to interview subjects nearly impossible.
[83] King, Keohane, and Verba, *Designing Social Inquiry*, 129-31.

"fundamental," or in other words, qualitative differences among the cases that are difficult to detect using a case selection method based on the value of the explanatory variables.[84] Regarding this research in particular, the selection of two cases in which agency was apparently expressed by Southern states regarding international criminal justice, positive cases will highlight the conditions under which international criminal justice becomes an attractive strategy, and specify the type of elite political actors and strategic games involved.

NEGATIVE CASES

Secondly, Colombia was selected as a 'negative' case or counter-example to the Ugandan and Cambodian cases, based on a broad application of Mill's "Method of Difference."[85] In other words, while the extent of violence and international context makes Colombia a likely candidate for international criminal justice, its government actively sought a domestic alternative, particularly in 2005 when external pressure for international criminal justice was mounting.

It is particularly important that the case did not have a divergent outcome by omission—the option of international criminal justice was simply not available—but as a result of a deliberate and self-conscious policy of the government. This aspect of the Colombian situation as a case allows for two theoretical considerations: first, by varying the dependent variable of the theoretical framework (the institutional setting/circumstance of *international* criminal justice), the inclusion of Colombia provides for an investigation of the conditions under which an international criminal justice mechanism is specifically pursued.

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[84] Charles C. Ragin, "Turning the Tables: How Case-Oriented Research Challenges Variable-Oriented Research," in *Rethinking Social Inquiry: Diverse Tools, Shared Standards*, ed. Henry E. Brady and David Collier (Lanham, MD and Oxford, UK: Rowman & Littlefield Publishers, 2004), 129.

[85] Bennett, "Case Study Methods: Design, Use, and Comparative Advantages," 31.

A table summarising the case study selection is below:

	Positive Cases		Negative Case
	Uganda	Cambodia	Colombia
Context	Internal conflict between government and rebel group; mass civilian casualties	Internal violence by government against civilians	Internal conflict between government and several irregular armed groups; mass civilian casualties
Outcome	ICC-Referral Government	Request for an International Criminal Tribunal to the UN by Heads of Government	Enactment of a Domestic Legislation for a Pseudo-Criminal Process (Satisfies Criteria for Positive Complementarity by the ICC)

4.2 Use of Sources

The thesis will utilise a combination of primary and secondary sources. To begin, the analysis will employ primary documentary sources, such as institutional memos and reports produced at the time of the decision-making process, transcripts of parliamentary debates, contemporary media reports, and official communications sent to international institutions, such as letters to the UN Security Council and ICC. Access and availability of such primary documentary sources vary between the three selected cases.[86] Some cases, such as Uganda, have published many primary documentary sources, including official recordings or parliamentary proceedings and committee reports. In other cases, in particular Cambodia, access to official documents is less facile. Official communications to international institutions, such as the ICC, are generally available through the archives of the institutions

[86] Access to sensitive material is generally a contingent process that requires continuous efforts of the researcher. For an overview of the various methods of access, see: Raymond M. Lee, *Doing Research on Sensitive Topics* (London: SAGE Publications, 1993), 119-42.

themselves. To compensate for the difficulty to access and lack of primary documents, this thesis will also utilise a range of secondary documentary sources, such as academic and policy literature. NGO reports, such as reports by Amnesty International, Human Rights Watch, and Crisis International will also be considered. Finally, it will supplement such primary and secondary documentary evidence with elite interviews.

Both types of primary and secondary sources—documentary and interview evidence—present unique benefits and challenges. The following section will consider some of these pros and cons in general, and the necessary precautions in utilising the sources.

Documentary Sources

Documentary sources, including both primary and secondary sources, will play a central role in reconstructing the events surrounding, and process leading to, a state's decision to request an international criminal prosecution for mass atrocities. Primary documentary sources, especially originating from the government actors can provide valuable insight into the professed rationale of the decision to initiate international criminal prosecutions. They can help to identify what the expected benefits or desired effects of the decision were, and if the actors had any preconceived notions regarding international criminal justice. They can also illuminate the type and quality of information these decision-makers were relying on, and what their responses were to changing circumstances and new information. Finally, we can determine the particular audiences that political elites were concerned with, both in terms of domestic and international constituency, by considering the type of documents produced in the process of decision-making.

However, the danger of accepting documents as "firm evidence" of what they report has been noted, as documents "construct particular kinds of representations with their own conventions."[87] This is a particularly poignant concern regarding documents of government bodies, UN agencies, and NGOs, as each organization represents a particular world-view and political agenda, potentially providing a skewed representation of events.[88] Problems associated with this "productive" nature a document—in the sense that it *produces* rather than simply regurgitates realities—have been most acutely raised in the context of the study of the Global South.[89] Doty, for example, has argued that the discourse representing the Global South, detectable not only through oral discourse but also in written, i.e. documentary, sources, is in it of itself an active component in the creation of identities and perceived realities of the Global South by the Global North.[90] This further complicates the process of interpretation from the perspective of the reader. Yet, by taking into account the authorship, potential audience, and function of the documents in the examination of their content, textual analysis can provide a rich picture of the circumstances in which they were produced.[91]

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87 Paul Atkinson and Amanda Coffey, "Analysing Documentary Realities," in *Qualitative Research: Theory, Method and Practice*, ed. David Silverman (London: SAGE Publications, 1997), 47.

88 Ferguson's account of the 'development industry' working in relation to Lesotho well elaborates this point. See: James Ferguson, *The Anti-Politics Machine: Development, Depoliticization and Bureaucratic Power in Lesotho* (Cambridge, UK: Cambridge University Press, 1990), 3-21.

89 Roxanne L. Doty, *Imperial Encounters: the Politics of Representation in North-South Relations* (Minneapolis, Minnesota, USA: University of Minnesota, 1996), 2. Dunn presents a similar, if more nuanced, argument regarding the perceptions of the DRC: Kevin C. Dunn, *Imagining the Congo: The International Relations of Identity* (New York, NY: Palgrave Macmillan, 2003).

90 Doty, *Imperial Encounters: the Politics of Representation in North-South Relations*, 2.

91 Uwe Flick, *An Introduction to Qualitative Research* (London: SAGE Publications, 2006), 259. For further discussion regarding the use of documents in social science research, refer to: Lindsay Prior, *Using Documents in Social Research* (London: SAGE Publications, 2003). Norman Fairclough, *Analysing Discourse: Textual Analysis for Social Research* (London: Routledge, 2003).

Elite Interviews

Evidence gathered from documentary sources will be corroborated with elite-level interviews. Interviews can, broadly speaking, contextualise documentary reports; elucidate the decision-making processes of individuals, identify the world-view, biases, or motivations of decision-makers; and help triangulate and reconstruct past events.[92] In cases where documentary sources are unavailable, interview data can uncover crucial information for understanding political processes.[93] There are, of course, obvious pitfalls to using interview material: respondents may be dishonest or even misleading, they are prone to human error, and they may be promoting specific agendas.[94] This is particularly a point of caution regarding topics such as international criminal justice, where the subject matter is highly controversial and emotionally charged. Interview subjects, especially those with official political capacities, may feel that strong public views regarding international criminal justice may hurt their domestic political standing by polarizing constituents. In some cases, political figures may feel the need to justify or glorify a controversial policy decision to defend their legacy, decreasing the reliability of the interview content. Furthermore, interviewing particular individuals regarding such highly controversial issues may put interviewees in personal danger, especially in post-conflict societies as those being considered in this research.

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[92] Darren G. Lilleker, "Interviewing the Political Elite: Navigating a Potential Minefield," *Politics* 23, no. 3 (2003): 207-08. For an overview of the literature on elite-interviewing, see: Zoe Slote Morris, "The Truth about Interviewing Elites," ibid.29 (2009).

[93] Davies argues that interviews are "inevitable" in the study of security and intelligence agencies, due to their inherently secretive nature. This insight can be easily translated to other sensitive areas of policy-making. P. H. J. Davies, "Spies as Informants: Triangulation and the Interpretation of Elite Interview Data in the Study of Intelligence and Security Services," ibid.21, no. 1: 74-75.

[94]James McEvoy, "Elite Interviewing in a Divded Society: Lessons from Northern Ireland," ibid.26, no. 3 (2006): 184.; Darren G. Lilleker, "Interviewing the Political Elite: Navigating a Potential Minefield," ibid.23 (2003): 211-12.

Despite such shortcomings, interviews seem necessary in the context of this research, as it is important to understand the perceived risks and gains associated with strategies of international criminal justice as understood by specific elite-level actors. Therefore, measures will be taken to mitigate the potential pitfalls outlined above. Davis, for example, gives one concrete solution to overcome such drawbacks—triangulation, or the systematic cross-referencing of interview material with other sources of data, such as secondary sources, other documentary sources, and data collected in other interviews as well.[95] In addition, on a more practical level, efforts will be made to establish rapport with the interview subject through repeated interviews, opting for private or semi-private settings rather than official or public spaces, and when possible and necessary, introductions by other people with previous rapport with the subject.[96]

It is necessary to distinguish the definition of an 'elite' level actor for the purpose of evidence collection and analysis. For the purpose of the analysis, I subscribe to a stricter definition of political elites, denoting individuals who are in close proximity to the decision making-process and institutions of power, often acting within an official capacity. Examples from within state institutions would include ministers, parliamentarians, the President, and military officials. From non-state groups, when appropriate, recognizable individuals such as paramilitary leaders, regional strongmen, or rebel group leaders will be considered. For the purpose of collecting evidence, however, the definition will be broadened to include individuals in close proximity to institutions of power without official capacity, as well as those with

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[95] P. H. J. Davies, "Spies as Informants: Triangulation and the Interpretation of Elite Interview Data in the Study of Intelligence and Security Services," ibid.21, no. 1: 77-79.
[96] Using intermediaries comes with its own problems. The researcher may be unfairly associated with the reputation of the intermediary, for example. However, using an intermediary may also be a way to gain confidence of the subject as a type of "insurance" to "spread the risk." Lee, *Doing Research on Sensitive Topics*, 123-24. Regarding the risk of using an intermediary: ibid., 131-32.

expert or specialized knowledge.[97] These would include local academics, journalists and relevant NGO staff.

Interviews followed a semi-structured format, incorporating a set of predetermined questions but with room for alterations based on the subject. Subjects were selected based on the position they held or their known involvement in the relevant decision-making process, following the process of "purposive sampling" as detailed by scholars such as Tansey.[98] After the initial round of interviews I broadened the scope of interviewees through a process of "snowballing," increasing the ambit of possible subjects by asking previous subjects for referrals and suggestions.[99] This method was particularly useful in the context of transitional or post-conflict politics in which institutional structures are weak. In such contexts, key players or influential individuals in the decision-making process were harder to identify relying on markers such as official titles of institutional capacities. In order to access such 'hidden' players, who may have inside insight otherwise inaccessible through documentary evidence, the research adopted a more fluid method of subject selection, including "snowballing," which also helped to broaden the scope of interviews to incorporate a variety of viewpoints.

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97 Lilleker, "Interviewing the Political Elite: Navigating a Potential Minefield," 207. See also: P. K. Burnham, W. Grant Gilland, and Layton-Henry Z, *Research Methods in Politics* (Basingtoke, UK: Palgrave Macmillan, 2004). Burnham, Gilland, and Z, *Research Methods in Politics*.

98 Oisin Tansey, "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling," *PS: Political Science and Politics* 40, no. 4 (2007): 768, 70. Tansey, "Process Tracing and Elite Interviewing: A Case for Non-Probability Sampling," 768, 770.

99 Ibid., 770.

5. Thesis Structure

Chapter 1 develops the theory of 'judicial extraversion.' It provides a conceptualisation of the Global South, highlighting the counterfactual nature of Southern initiatives for international criminal justice, and provides for a three-part composite definition of the state through the application of an interlinked domestic-political framework. It operationalizes this definition of the state to underscore the politics of statehood in the Global South and highlights the insights applied from theory of extraversion. It further specifies the inherent political opportunities of international criminal justice. Finally, the chapter will elaborate on how the political opportunities of international criminal justice are connected with the broader politics of the state in the theory of judicial extraversion.

Chapter 2 explains the Ugandan self-referral of the LRA conflict to the ICC. It provides a brief overview of the history of the referral including an introduction to the background of the LRA conflict. The second part of the chapter focuses on highlighting the nature of domestic politics in Uganda, especially the structural characteristics of the one-party democracy under President Museveni, and his position of power within the system, and the regime's relationship with the international sphere—both in terms of external actors and institutions. It will then turn to tracing the decision to refer the situation regarding the LRA to the ICC in the context of Uganda's particular domestic political system. Specifically, it will consider the elite-level political cleavages created by the LRA conflict and possibility of an international criminal intervention. It will identify the actors involved, what enabled or motivated them to consider the ICC referral, and the expected benefits of the referral. The chapter will end by giving a brief evaluation of the referral, considering whether the political outcome of the referral concurred with the expected benefits.

Chapter 3 considers the establishment of the ECCC in Cambodia. Following the overall structure of the previous chapter, it will provide a brief introduction to the historical background of the request, including the history of Khmer Rouge era and the atrocities committed. The second part of the chapter will examine the politics of the establishment of the ECCC between the period of 1993 until 1997, which covers the beginning of the UN-led political transition to electoral democracy and the signing of a formal written request to the UN Secretary General. It will first consider the players and dynamics of the politics under the power-sharing government established during the UN-led transition. It will then trace the disparate roles played by the possibility of an international criminal tribunal for Khmer Rouge era crimes at different critical junctures during this four-year period for the two rivalling actors within the power-sharing government. It will then delineate how and why in 1997 it was possible for the political rivals to agree on a public international request for international criminal justice, and evaluate the significance of this request.

Chapter 4 analyses the enactment of the JPL demobilisation framework in Colombia. It will provide a brief overview of the historical background of the conflict and the negotiations between the paramilitaries and Colombian government that preceded the JPL framework. It will then consider the respective political incentives and expectations of the government and paramilitaries, particularly with respect to criminal accountability. It will further examine the concurrent demands for accountability raised by international actors, in particular the preliminary examinations of the ICC. The second part of the chapter will then focus on the reaction of the Colombian government to rising international pressure, and how the government assessed the impact of international criminal justice and domestic accountability measures, respectively. It will then consider the relevant actors involved in the decision-making process, and conclude by comparing the establishment of the JPL framework with the previous cases of Uganda and Cambodia.

The **concluding chapter** provides a summary of the theory and the empirical findings. It also gestures towards theory modification and suggests further areas of research.

Chapter 1: A Framework for Explaining Southern State Behaviour

This chapter will establish a framework for explaining the behaviour of states from the Global South with respect to international criminal justice. It advances a theory of *judicial extraversion,* an interlinked theory of domestic and international politics, which conceptualises international criminal justice as an external condition that can be instrumentalized by Southern states to generate specific material or political benefits. Engagement with international criminal justice is therefore conceived of as a type of strategic political action. The theory advances three models of judicial extraversion, in which international criminal justice is used to augment the internal strength of the government, the external autonomy of the state, and the internal strength of particular state elites. Such strategic use of international criminal justice is rooted in the political opportunities inherent in the nature of international criminal justice—in particular, its prosecution of individuals by international tribunals under ICL. The chapter will argue that the individualisation and criminalisation of certain violent acts under ICL have the cumulative effect of de-politicizing the commission of mass atrocities by rendering what may be the commission of politically-charged violence by an entire socio-political system into a series of criminal acts committed by particular individuals. Simultaneously, the privileged status of the state as the creator and enforcer of international law in the international criminal justice system creates an asymmetry of access between different types of political actors, empowering state actors in relation to its internal or external competitors.

1. Definitions and Concepts

The theory of judicial extraversion is derived from an interlinked domestic-political framework, or a counter-structural analysis that assumes that state behaviour is determined not only by the structural conditions of the international system, but also by characteristics of the individual states that comprise that system. The theory of judicial extraversion, however, is not a generic theory applicable to all states but is focused on a particular set of states that share critical commonalities in their characteristics, commonly referred to as the 'Global South.' The first point of departure, thus, is to understand the common characteristics of these states, particularly in reference to their specific historical experiences and the resultant international status that conditions the interaction of these states with the international system.

1.1 Defining the Global South

The Global South, for the purposes of this thesis, refers to a relatively new group of states that came into existence through the process of decolonization, and are considered to be comparatively 'weaker' in the international system, either in terms of their material capabilities or normative influence. This includes the group of states established through mass-decolonization during the second half of the 20th century, as well as Latin American states that are considered to share similar characteristics and historical experiences despite their earlier genesis in the late 18th and early 19th centuries.[100] While the term Global South was created deliberately in the 1980s by

[100] The 'Global South' or the 'Third World' is increasingly defined by key characteristics of statehood rather than the historic moment of independence and decolonization alone. See:

transnational actors to create an apolitical reference for economically underdeveloped states, generally thought to be located in the Southern hemisphere of the globe, the category of the South included most, if not all, of the states within the 'Third World.'[101] The Third World was in many was a political project advanced by states with similar historical experiences of colonialism and international intervention that found themselves at the bottom of the international hierarchy, rather than a specific geographical region or status of economic development. As a result of this condition of relative weakness and historical experiences of external interferences, these states were primarily focused on securing the key "Westphalian" notions of sovereign statehood[102]—namely, norms of self-determination, sovereign equality, and territorial integrity.[103]

The present definition of the Global South deliberately places the South as the inheritor of such political project and characteristics of the Third World. The terms 'Global South,' and its corollaries the 'Third World' and 'periphery,' are wrought with conceptual ambiguity due to the inherent complexity of these labels, as well as dangers of politicization due to the negative connotations that are attached to them.[104] However, a concept of the Global South that focuses on the nature of its

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Roland Dannreuther, "War and Insecurity: Legacies of Northern andSouthern State Formation," *Review of International Studies* 33, no. 2 (2007): 10.
101 Rao, *Third World Protest*, 26.
102 Stephen D. Krasner, *Sovereignty: Organized Hypocrisy* (Princeton, NJ: Princeton University Press, 1999), 20. Brad Roth points out that the term 'Westphalian' state sovereignty is historically misleading—the origins of the present sovereign state legal order is more accurately traced to the 1945 UN Charter, as well as the geopolitical realities of the 1950s and 1960s. This analysis will refer to the absolutist model of sovereignty as 'Westphalian' to coincide with common usage. See: Roth, *Sovereign Equality and Moral Disagreement*, 54.
103 Brad R. Roth, *Sovereign Equality and Moral Disagreement* (New York; Oxford: Oxford University Press, 2011), 83-84.
104 Ayoob, *Third World Security Predicament*, 12-13.; J. P. Therien, "Beyond the North-South Divide: Two Tales of World Poverty," *Third World Quarterly* 20, no. 4 (1999).; H. Goulbourne, "Some Problems in the Analysis of the Political in Backward Capitalist Social Formations," in *Politics and State in the Third World*, ed. H. Goulbourne (London: Macmillan, 1979). ; James Mayall, *Nationalism and International Society* (Cambridge, UK: Cambridge University Press, 1990), 126.

international and domestic politics remains useful in clarifying the nature of the state, sovereignty, and the state-centric international system in the era following decolonization.[105]

The norm of sovereignty, or the right of a state to have exclusive authority to control and govern within a particular jurisdiction, and the companion principle of the juridical equality of states, constituted a particularly important part of the Third World agenda because these principles also established the norm of non-intervention, or the freedom from external interference in the domestic jurisdiction of states. International juridical equality of states denotes the absence of hierarchical subordination to foreign legal or political orders,[106] meaning that all states posses the same kind of rights and responsibilities vis-à-vis other states, creating an international legal order of equal units in which no state is superior to another.[107] Consequently, as no other state can legally impose its authority on another state's domestic population and territory, each state is free to exercise its authority in any way it sees fit without the interference of other states or actors (autonomy) and is the only entity that has the legitimacy to do so within the domestic sphere (exclusivity). As Henkin stated, "how a state behaved towards its citizens in its own territory was a matter of domestic jurisdiction, i.e., not any one else's business and therefore not business of international law."[108]

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105 For an overview of the origins of the concept, use, and controversies see: Marcin Wojciech Solarz, "'Third World': The 60th Anniversary of a Concept that Changed History," *Third World Quarterly* 33, no. 9 (2012).
106 Jean L. Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism* (Cambridge, UK: Cambridge University Press, 2012), 27.
107 Roth, *Sovereign Equality and Moral Disagreement*, 53-54.;Gerry Simpson, *Great Power and Outlaw States* (Cambridge, UK: Cambridge University Press, 2004), 27-28.
108 Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed. (New York: Columbia University Press, 1979), 228. See also: Mayall, *Nationalism and International Society*, 20.

This principle of non-intervention constituted one of the central claims of the Third World project, and was replicated by the subsequent demands of the Global South, [109] not only as a reaction against the threats of possible meddling by more powerful states, but also as a result of their shared history of persistent interference, most prominently in the form of colonial rule.[110] Adherence to the prerogatives of Westphalian sovereignty allowed Southern states to have legitimate, and juridical, cause to resist the potentially forceful interference of other more powerful states.[111] In this sense, the idea that sovereign states are juridically equal in the international system, despite differences in material strength, has a particularly significant resonance amongst Southern states. As Roth argued, sovereign equality is tantamount to the preservation of sovereignty of weak states.[112]

THE GLOBAL SOUTH AND INTERNATIONAL CRIMINAL JUSTICE

This definition of the Global South—as a group of weaker states whose interaction with the international system and other, more powerful, states is conditioned by its defence of Westphalian sovereignty—highlights the paradoxical nature of certain Southern state's decision to actively pursue international criminal justice. International criminal justice, in fact, challenges the notion of Westphalian sovereignty on three counts. First, the international criminal justice system contradicts the autonomy and exclusivity of the state in the domestic sphere by criminalizing certain behaviours of individuals through international law, and by constructing international institutions that can directly sanction transgressing individuals without relying on a domestic judiciary.

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[109] Rao, *Third World Protest*, 26.
[110] Roth, *Sovereign Equality and Moral Disagreement*, 83.
[111] Rao, *Third World Protest*, 25.
[112] Roth, *Sovereign Equality and Moral Disagreement*, 14-15.

Secondly, ICL undermines the juridical equality of states in the international sphere thorough its reliance on *jus cogens* norms, or "preemptory norms" legitimized on the basis of shared practice or perceived universal values,[113] rather than through the explicit consent of states. The principle of juridical equality implies that, formally, states can only be bound by rules and norms that they have explicitly agreed to, thus creating international law through formal delegation of authority.[114] Yet, ICL derives its existence through the common interest or conscience of the international community, claiming that certain heinous acts can be prescribe with or without the explicit consent of all states, as they "affect the interest of the world community as a whole," because "they threaten the peace and security of humankind," and "shock the conscience of humanity."[115]

Thirdly, the practice of international criminal justice, or the prosecution of individuals under ICL by international tribunals, further challenge the juridical equality of states by denying the traditional immunity granted to state officials. As juridical equals, states could not judge nor sanction one another's acts. It followed from this principle that officials formally acting on behalf of the 'state,' such as heads of states or diplomats, could not be sanctioned for acts committed in their official capacity. However, contemporary international courts have "almost exclusively" sided with the position of ICL over state sovereignty, suggesting that, on a jurisprudential level, the objective of achieving the "most effective and thorough possible prosecution of crimes under international law" has taken precedence over

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[113]Ian Brownlie, *Principles of Public International Law*, 7th ed. (Oxford, UK: Oxford University Press, 2008), 510.;Cherif M. Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," *Law and Contemporary Problems* 59, no. 4 (1996): 67-68.;Bruce Broomhall, *International Justice and the International Criminal Court* (Oxford, UK: Oxford University Press, 2003), 41.; *Vienna Convention on the Law of Treaties*, 115 U.N.T.S 331, (1969/05/23/), Art.53.
[114] Simpson, *Great Power and Outlaw States*, 28-29.Simpson, *Great Power and Outlaw States*, 28–29.
[115] Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes," 69.; Broomhall, *International Justice and the International Criminal Court*, 42.

the interests in protecting state sovereignty and maintaining the state-centric international system.[116]

As a result, the general assumption in the development of international criminal justice institutions was that states from the Global South, would be particularly resistant towards the prosecution of individuals through international criminal tribunals. For example, during the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court in Rome (hereafter the 'Rome Conference'), the drafters of the Rome Statute assumed that governments would be reluctant to give the ICC precedence over their national jurisdictions, as well as surrender citizens who were indicted by the court.[117] There is no indication that the drafting state parties expected any state to voluntarily invite an international court to investigate and prosecute crimes that have occurred in their territory and concerned their own citizens.[118] The baseline assumption throughout the negotiations was that states would be generally unwilling or unable to prosecute their own crimes. Furthermore, the *travaux preparatoires* suggest that the drafting state parties assumed that when an investigation was prompted by a third party, such as the UN Security Council or the ICC Prosecutor, the relevant state would be reluctant or outwardly resistant towards cooperating with the demands of the court. Thus, the drafting parties were largely focused on creating means by which third parties could initiate

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[116] Werle, *Principles of International Criminal Law*, 174. The personal immunity enjoyed by heads of state and government, foreign ministers, and diplomats only apply with regards to crimes under international law during their tenure in office, and only in regard to state criminal courts. Prosecution by international courts is always possible. Ibid., 177-78. The International Court of Justice (ICJ) noted that "[j]urisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility." *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, (2002).Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) (International Court of Justice 2002). Para. 60 See also: *Rome Statute*. Article 27

[117] Mahnoush Arsanjani and Michael W. Reisman, "The Law-in-Action of the International Criminal Court," *The American Journal of International Law* 99, no. 2: 386.

[118] Ibid.

investigations, and effectively function without becoming political tools of specific states or individuals.[119]

What this general assumption implies is that international criminal justice does not fundamentally alter the baseline preferences of the Global South in protecting Westphalian sovereignty. Alternative explanations, as discussed in the Introduction, have also subsumed this supposition, and have demonstrated mechanisms or dynamics through which Southern states act against this baseline interest, such as external pressure (theories of power asymmetry), the development of new international norms (constructivist theories), and the expectation of future benefit (rationalist theories).

The theory of judicial extraversion, in contrast, does not provide an explanation as to why the baseline preference to protect Westphalian sovereignty is altered. Rather, it provides a framework to consider how international criminal justice can assist a state in reclaiming its sovereign authority when that authority is compromised by external and internal factors. From this perspective, the historical defence of Westphalian sovereignty by Southern states provide the underlying rationale for strategic action regarding international criminal justice.

1.2 THEORIZING THE STATE IN AN INTERLINKED DOMESTIC-POLITICAL FRAMEWORK

If the definition of the Global South clarifies the impetus for engaging with international criminal justice by Southern states, the second point of departure is to operationalize the actor who is engaging in the strategic behaviour—or, in other words, the 'state.' Specifically, the present theory requires a definition of the state

[119] Mahnoush Arsanjani, "The Rome Statute of the International Criminal Court," *American Journal of International Law* 93, no. 1 (1999): 27.

derived from the analytical perspective of an interlinked domestic-political framework, drawn from the nature of international criminal justice.

Dismantling the Unitary Assumption of the State

The classical approach of structural IR theory view states as bounded politico-territorial entities that do not have legitimate authority over one another and therefore collectively subjected to a structure of international anarchy.[120] This is in part a reflection of the reality of the international system in the post-World War II era,[121] and also a result of the dominant analytical perspective that focused on the international structural conditions as a main determinant of state behaviour. Consequently, the internal characteristics of the politico-territorial unit, beyond its territorial bounded-ness, is not a significant part of the definition of the state.

However, this 'billiard ball' approach to statehood is patently insufficient in reference to a theory of judicial extraversion. On one level, domestic-political theories necessarily unpack the unitary actor assumption of the state in order to utilize characteristics of the domestic political sphere to understand state preference and behaviour.[122] But more significantly, a unitary definition of the state cannot capture the specific nature of international criminal justice. As discussed above, the direct prosecution of individuals under ICL by international courts inherently undermines the juridical equality of states and corollary principle of non-intervention, and therefore empirically dismantles the boundary between the externally bounded state

[120] David A. Lake, "The State and International Relations," in *The Oxford Handbook of International Relations*, ed. Chris Reus-Smit and Duncan Snidal (Oxford, UK: University of Oxford Press, 2008), 41-46.
[121] Barry Buzan, *People, States and Fear: An Agenda for International Security Studies in the Post-Cold War Era*, 2nd ed., ECPR Classics (Colchester, UK: ECPR Press 2007), 67.
[122] Fearon, "Domestic Politics, Foreign Policy, and Theories of International Relations," 291-92.

in the international sphere, and the specific internal characteristics of the state. This calls for a definition of the state that goes beyond its unitary assumption.

In addition, dismantling the unitary actor assumption provides for further analytical assumptions that elucidate the particular objectives and nature of international criminal justice. Liberal IR theory as advanced by Moravcsik, for example, hypothesizes that that interaction with the international sphere generates *differentiated* demands from societal individuals and groups.[123] This insight captures the political potential inherent in the application of ICL, as international criminal justice ultimately aims to establish individual criminal responsibility, rather than broader forms of historical or collective accountability. Consequently, groups and individuals within the domestic society may have radically different preferences for or against international criminal prosecutions depending on their prior relationship to the atrocities committed. On the crudest level, one can imagine a split of preferences between the 'perpetrators' and 'victims'; but on a more nuanced level, even within the broader group of 'perpetrators' different attitudes towards international criminal justice can be formed depending on the type of involvement each individual had—for example, between bystanders, followers, and instigators.

Furthermore, a non-unitary conceptualisation of the state can capture the *competition* between groups and individuals with differentiated preferences towards international phenomena. This competition can be regulated through set domestic political practices, such as democratic elections, but also through less-institutionalised means of politics such as elite compromise or coercion.[124] Furthermore, interaction with

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[123] Andrew Moravcsik, "Taking Preferences Seriously: A Liberal Theory of International Politics," *International Organization* 51, no. 4 (1997): 517.
[124] While Analytical liberal IR theory has been criticized for assuming both an analytical minimum assumption and normative preference for a liberal democracy, similar political dynamics that link domestic political competition and a state's international behaviour can

external conditions can create new dynamics of competition, or simply exaggerate the existing power dynamics in domestic politics. With regards to international criminal justice, this suggests that the state-level preference regarding international criminal prosecutions for atrocity crimes will be influenced by which political group or individual ultimately succeeds capturing the state, and thereby positions itself to decide foreign policy directions of the state in the international sphere.

The State in an Interlinked Domestic-Political Theory

The definition of the state derived from Political Science and Political Sociology, in contrast, provides an inward looking account that is generally focused on differentiating the state from the domestic 'society.'[125] According to this approach, the state becomes approximated to the "central government" and its constituent institutions,[126] but is unspecified regarding its the international nature. For example, Migdal defines the ideal type state in relation to domestic society as "an organization composed of numerous agencies led and coordinated by the state's leadership," or the central government, that "has the ability or authority to make and implement binding rules for all the people" as well as the "parameters of rule making for other social organizations in the given territory," using "force if necessary."[127] While the reference to a 'given territory' suggests the existence of an international space outside of the state, Migdal's definition does not provide details as to the nature of the state's interactions in this space. This approach, as it lends itself to a more detailed

be observed in different regime types as well, highlighting the possibility of generalizing specific insights drawn from Analytical liberal IR theory. For criticism, see: David Long, "The Harvard School of Liberal International Theory: A Case for Closure," *Millennium-Journal of International Studies* 24, no. 3 (1995). For an example of illiberal parallels, see: Philip G. Roeder, *Red Sunset: The Failure of Soviet Politics* (Princeton, NJ: Princeton University Press, 1993).

125 Buzan, *People, States and Fear*, 66.
126 For example,
127 Joel S. Migdal, *Strong Societies and Weak States: State-Society Relations and State Capabilities in the Third World* (Princeton, NJ: Princeton University Press 1988), 19.

definition of the internal characteristics of the state, was frequently utilised in earlier domestic-political theories that provided one-directional analyses of either the impact of domestic political arrangements on a state's international behaviour ("second-image" theory),[128] or the impact of the international system on domestic political arrangements ("second-image reversed" theory).[129]

However, such an inward-looking definition is inadequate to examine the politics of Southern preference for international criminal justice. A definition that simply differentiates the state from society cannot account for the fact that the practice of international criminal justice necessarily involves international institutions, and frequently draws in other states in the international system. Furthermore, an inward-looking definition cannot accommodate the fact that the development of the norm of prosecuting individuals for mass atrocities has had a strong transnational nature, with the active participation of international norm entrepreneurs, including other state actors. In other words, the characteristic of international criminal justice as both an international and domestic phenomenon requires an analytical turn to an *interlinked* domestic-political framework that encompasses both the internal and external dimensions of the state.

The analytical turn to an interlinked domestic-political framework has the further benefit of generating an explanatory theory that understands a state's preference regarding international criminal justice as a strategic choice, emphasizing the element

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128 Kenneth Waltz, *Man, the State, and War: A Theoretical Analysis* (New York,NY: Columbia University Press, 1954), 81-123. Putnam, "Diplomacy and Domestic Politics: the Logic of Two-Level Games." For example, see: Peter J. Katzenstein, "International Relations and Domestic Structures: Foreign Economic Policies of Advanced Industrialized States," ibid.30 (1976); Snyder, *The Ideology of the Offensive : Military Decision Making and the Disasters of 1914*; Legro, "Culture and Preferences in the International Cooperation Two-Step."; Risse-Kappen, "Public Opinion, Domestic Structure, and Foreign Policy in Liberal Democracies."
129 Gourevitch, "The Second Image Reversed: The International Sources of Domestic Politics." For example, see: Keohane and Milner, *Internationalization and Domestic Politics*; Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics*.

of active agency in initiating, or rejecting, international criminal prosecutions. Fearon notes that domestic-political theories inherently diverge from structural IR theories in that while the latter inevitably conceive of international state behaviour in an "evolutionary" perspective, in which the unit simply acts in response to the structural conditions of the system, domestic-political theories indicate that state behaviour can be determined through series of intentional choices by domestic actors.[130] Of course, in an interlinked framework, actor agency is implicitly constrained by the contiguous relationship between the international and domestic realm. Ultimately, however, this interlinked domestic-political perspective allows for a more nuanced elaboration of the nature and condition of agency of actors. More specifically, such a framework can highlight the particular political utility of international criminal justice, elaborating on the nature of the strategic game by specifying the type of political actors, scope and characteristic of the political objectives, and the domestic and international audience in question. In effect, it provides a contextualised understanding of agency that goes beyond the dichotomy of pure autonomy, on the one hand, and subjugation on the other. This is particularly relevant with regards to the analysis of Global South, as structural theories that focus on the relative balance of power among states can ultimately negate the possibility of proactive agency by weaker states.

Finally, a theory that is based on a singularly inward or outward-looking definition of the state fails to capture its interstitial nature as an entity that can control the influence of external phenomena in the domestic sphere. In the context of international criminal justice, this capacity of the state is particularly important. Generally speaking, as Nettl argued, the state's role as a "gatekeeper between

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130 Fearon, "Domestic Politics, Foreign Policy, and Theories of International Relations," 296.

intrasocietal and extrasocietal [sic] flows of action" is one of the classic loci of state power.[131] Literature on globalization has long argued that this function of the state, specifically conceived of as the central government, has been eroded with the increasing influence of other actors such as corporations, non-governmental organizations, and sub-state institutions. It is erroneous, however, to necessarily equate the increasing transnational flows among non-state actors with the decreasing significance of the state as a gatekeeper between the international and domestic realms. Rather, as Evans notes, the increasing transnational linkages and effect of international phenomena can provide opportunities to strengthen particular aspects of statehood, albeit in novel ways.[132] In addition, as it will be further detailed throughout this chapter, the state remains a particularly pertinent and powerful actor in the creation and implementation of international law.

Consequently, the development of an interlinked domestic-political theory to explain the politics of Southern preference for international criminal justice requires a composite definition of the state that encompasses both the internal dynamics arising from the characteristics of the state within its territorial boundaries, as well as its relations with other political entities as part of a broader international system. Most importantly, such a composite definition of the state needs to emphasise not only the duality of the state as both an inward and outward-looking entity, but also as an interstitial entity that regulates the relationship between the domestic and international sphere.

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[131] J.P. Nettl, "The State as a Conceptual Variable," *World Politics* 20 (1968): 563-4. See also: Peter B. Evans, "Transnational Linkages and the Economic Role of the State: An Analysis of Developing and Industrialised Nations in the Post-World War II Period," in *Bringing the State Back In*, ed. Theda Skocpol, Dietrich Rueschemeyer, and Peter B. Evans (Cambridge, New York: University of Cambridge Press, 1985), 192.

[132] Evans notes in the context of economic globalization that the increase in transnational flows in capital and trade expanded the domestic role of the state and strengthened its economic apparatus. "Transnational Linkages and the Economic Role of the State: An Analysis of Developing and Industrialised Nations in the Post-World War II Period," 216.

1.3 A Composite Definition of the State

Thus, for the purposes of this analysis, a three-part definition of the state will be adopted. The state will be conceptualised as (1) as the central government and its institutional apparatus, (2) an international juridical entity, and (3) an elite power structure. At this point it should be clarified that such a multifaceted definition does not imply that the aspects are mutually exclusive, or that one specific understanding of the state 'wins out' over the others in different circumstances. Rather, it is presented as composite definition, in which different facets of statehood can coexist.

(1) The State as Government & Its Institutions

The first part of the definition of statehood equates the state with the central government that claims sovereign jurisdiction over the given territory and its inhabitants.[133] This establishes the state as not only a territorially bound entity, but also as a coercive entity in which 'sovereignty' is the asserted right to act as both the sole rule-maker and "final arbiter" of actions carried out within its boundaries.[134] This primarily domestic conceptualisation of the state also implies the existence of a set of institutions that carry out, at minimum, the coercive functions of the state, such as the military, tax collection service, and judiciary.

Literature on the state, particularly those interested in the international actions of the state, has generally understood this internal definition of the state to be equated with the functional *ability* of the state to exercise control over its territory and people.[135] Jackson, for example, in his oft-cited thesis on the statehood in the Global South, has denoted this functional ability of the state as "empirical" or "positive"

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[133] This conceptualisation draws on the discussion on theories of statehood by Clapham. See: Clapham, *Africa and the International System*, 8-9.
[134] Ibid., 8.
[135] Roth, *Sovereign Equality and Moral Disagreement*, 59.

sovereignty.[136] In fact, this empirically demonstrated ability of the state to effectively control a given population within a bounded territory, or 'stateness,' is considered to be an *a priori* condition for the political entity to be recognized as a state by other political entities, including other states in the international system.[137] Furthermore, existing literature, particularly regarding conflict situations or political violence, has implied that there is an optimal level of empirical 'stateness' that needs to be demonstrated for a central government to be understood as the state, representing its territory and people. This is reflected, for example, in the categorization of states into "failed," "collapsed," or "weak" states.[138]

This definition of the state as the government, and its constituent institutions, however, do not focus on the capacity or ability of the government to 'act like a state,' but rather highlights the fact that the government is the institution that can *claim* to legitimately act as a singular authority and coercive force in the domestic sphere. This focus on the claim to domestic authority, rather than demonstrable capacity, raises the question of legitimacy, or the manner in which the claim is justified. Democracy is often cited as an ideological and procedural means of securing this legitimacy. But the legitimation of the state's claim to coercive force is not limited to a specific political system. Buzan, for example, provides a basis for a more abstract form of acceptance of the state, by arguing that a broad "idea of a

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136 Robert H. Jackson, "Quasi-states, Dual Regimes, and Neoclassical Theory: International Jurisprudence and the Third World," *International Organization* 41, no. 4 (1987): 529-30.
137 Max Weber, *Max Weber's Complete Writings on Academic and Political Vocations*, ed. John Dreijmanis, trans. Gordon C. Wells, Classics Series (New York: Algora Pub (Ebook), 2008), 156.
138 See, for example: Robert I. Rotberg, ed. *State Failure and State Weakness in a Time of Terror* (Washington, D.C: The Brookings Institution Press 2003).

state" needs to be constructed by the domestic population and supported by a widely shared political culture.[139]

Regardless of the theoretical basis for a state's legitimacy, the very fact that legitimacy can be contested and derived from multiple sources helps to clarify the two political objectives a state needs to pursue in order to ensure its survival. The first objective of politics for the state is, as implied by the emphasis on its status as a coercive entity, is to secure the practical capacity necessary to carry out its coercive functions. For example, by its very definition a state will need to continuously secure its monopoly over violence, and make sure institutions such as the judiciary or tax collection service have the necessary material and human resources to function.

The second political objective, as the discussion on legitimacy has implied, centres on securing the normative justification for the state's claim as the sole jurisdictional authority and coercive force within the domestic sphere. This entails not only establishing institutional structures and political practices through which legitimacy can be derived, such as representative democracy, but also mobilising discursive tools to create the ideological and normative foundations to justify the state's actions, and perhaps its very existence.

(2) The State as an International Juridical Entity

The second part of the definition of statehood conceptualises the state as an international legal entity, focusing on the role of the state as a member of the international system.[140] Sovereignty, from this external perspective, is, rather than the internal right to non-intervention, the right to juridical equality for each state, the

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139 Buzan, *People, States and Fear*, 74-83.

140 F. S. Northedge, "The International Political System," in *Rethinking International Relations*, ed. Fred Halliday (London: Macmillan, 1994), 78.

ability to enter into diplomatic relations with other states, and claim membership in international organizations, such as the UN General Assembly,.

The fact that states are juridical equals in the international sphere, as noted in the definition of the Global South, establishes the principle of non-intervention, strengthening the internal definition of the state as the sole jurisdictional authority in the domestic sphere. But in addition to protecting the domestic society from external interventions, this second aspect allows a political entity to actively participate in the international system. Membership in international institutions, such as the UN, and the ability to enter into diplomatic relations with other states can, in practice, be just as important as the state's ability to prevent the intervention of external actors in increasing its control over its territory and people. International institutions and bilateral, or multilateral, relations with other states can provide states with material and ideological resources that can be deployed in the domestic sphere to improve the functions of the government.[141]

Furthermore, the conceptualisation of the state as a member of an international system raises the question of legitimacy in the international sphere. What are the criteria of membership in this international system? This question of international legitimacy can also be framed as a question of recognition, or the moral or ideological basis of how already existing states in the international system identify other states as like-units. The basis of membership in the international system of states is a historically evolving practice. By the middle of the 19th century, as Keene argues, membership in the international system, and therefore the recognition of statehood, was dependent on a "standard of civilization."[142] This standard was not

141 Simpson, *Great Power and Outlaw States*, 54. Jean L. Cohen, "Whose Sovereignty? Empire Versus International Law," *Ethics and International Affairs* 18, no. 3 (2004): 13.
142 Keene, *Beyond the Anarchical Society*, 7.

only derived from an empirical demonstration of 'stateness,' or the technological and institutional capability to function as a government, but also from a sense of racial and cultural superiority of the West.[143] Following the end of World War II and the collapse of major empires, however, as Mayall argues, the principle of self-determination and popular sovereignty replaced the previous discriminatory 'standard of civilization.'[144]

Beyond the debate regarding the criteria of membership into the international system, the question of international legitimacy and recognition help to identify the type of politics the state is compelled to engage in in the international sphere. Not only does the state have to use its position as a gatekeeper between the international and domestic spheres to shield its territory and population from external influence, it also needs to interact with other states and international actors in order to gain recognition that it qualifies as part of the international system. Additionally, the state has the opportunity to actively participate in the international system in order to influence the very criteria of membership.

(3) The State as Elite Power Structure

Finally, the third part of the definition of the statehood conceptualises the state as a structure of power politics, dominated by elite political actors. The state, both as a domestic government or international juridical actor, has to identify a group of individuals that can be deemed to "represent" the state in the sense that their actions and statements are readily understood to carry the authority of the state as a whole.[145] The question of which individuals represent the state in its day-to-day running is

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143 Gerrit Gong, *The Standard of Civilization in International Society* (Oxford, UK: Clarendon Press, 1984). Jackson, *Quasi-States*, 16. Keene, *Beyond the Anarchical Society*, 7-8.

144 Mayall, *Nationalism and International Society*, 29-32. See also: Donald J. Puchala and Raymond F. Hopkins, "International Regimes: Lessons from Inductive Analysis," *International Organization* 36, no. 2 (1982): 257.

145 Clapham, *Africa and the International System*, 8.

generally seen as a strictly domestic affair, and is not considered significant in the context of international politics. However, as Moravcsik noted, the fact that state institutions are necessarily based on selective representation makes it problematic to simply regard the state as a corporate, unitary actor.[146] The selective nature of representation, in turn, implies that the interests of specific individuals or subset of individuals ("selectorates") can determine the preferences of the state, both regarding the domestic and international arenas of politics.[147]

This can be particularly significant in societies with a less developed or entrenched political culture of representational democracy, in which power structures are not insulated from broader societal interests and easily influenced by powerful individuals.[148] As Clapham notes, states can be seen as power structures, "imposed on societies and their physical endowments which they then seek to control in the interests of those who run them."[149] These power structures may be well integrated and connected with a broader social and economic base, making them relatively more representative in their interests. But the power structure may also only be a group of individuals that are "perched on top" of the people and territory, such as in the case of authoritarian states.[150]

2. THE POLITICS OF THE STATE

What Clapham refers to as the "mythology" of statehood renders these three conceptualisations of the state as un-problematically interlinked and concurrent,

146 Andrew Moravcsik, "The New Liberalism," in *The Oxford Handbook of International Relations*, ed. Chris Reus-Smit and Duncan Snidal (Oxford, UK: Oxford University Press, 2008), 238.
147 "'Wah, Wahn, Überall Wahn': A Reply to Jahn's Critique of Liberal Internationalism," *International Theory* 2, no. 1 (2010): 119.
148 Ersel Aydinli, "Governments vs States: Decoding Dual Governance in the Developing World," *Third World Quarterly* 31, no. 5 (2010): 694-96.
149 Clapham, *Africa and the International System*, 12.
150 Ibid.

resulting in a bundled definition.[151] Specifically, the distinction between internal and external definitions of the state are considered irrelevant due to the fact that states are imagined to exist as political entities prior to their entrance into the international realm of politics and law. States are considered to have governments that can effectively exercise and legitimise their claims as a coercive authority in the domestic sphere. The elites that conduct the day-to-day operations of the state, such as the president, the ministers, or other functionaries, are assumed to have been selected through justified means, which guarantee their relative representativeness of the overall population and therefore will act in the interest of the entire state, and effectively carry out its authority. Such internal characteristics of the state, in turn, provide the basis for international recognition of the state by other members of the international system, granting it juridical equality with other states, and therefore the right to membership into international institutions and protection from external intervention.

"Unbundling" The State

However, the idea of a tightly bundled definition of the state, in which all aspects of statehood are interconnected and necessary, is a kind of "conceptual slight of hand" that exaggerates the absoluteness of the concept of the state.[152] Throughout history and in practice, as Clapham demonstrates, the different conceptualisations of the state "very often do not coincide at all" and there are few, if at all, states in which "they are all realised in it is entirety."[153] For example, in extreme situations, the state can exist as an international juridical entity without necessarily being a government in

151 Ibid., 11.
152 Cohen, "Whose Sovereignty? Empire Versus International Law," 12. Lake provides a summary and typology of arguments made regarding historic 'deviances' from this absolute notion of the state. David A. Lake, "The New Sovereignty in International Relations," *International Studies Review* 5, no. 3 (2003): 310-15.
153 Clapham, *Africa and the International System*, 12.

the domestic sphere, such as governments-in-exile that are recognised by the international society but are non-existent institutionally within the territory. Although it is difficult to imagine a state without a group of recognisable political elites at least nominally entrusted to act on behalf of the political entity, it is feasible to consider a state in which different elites represent the external and internal state, or in which different groups of elites are contesting its claim over representation. Furthermore, different aspects of the state can exist in varying degrees, such as in the case of states with prominent autonomous regions or transitional states under the provisional authority of international organisations or other actors.[154]

The fact that states can exist without satisfying all three conceptualisations of the state indicates the possibility of a specific form of politics, in which being a state—as an international juridical actor, domestic government, or elite power structure—is both the objective of *and* resource for political strategies. In other words, the 'unbundled' nature of statehood creates the opportunity for states to use one aspect of its statehood to influence its other facets. The very foundation of the 'mythology' of statehood is in fact a clear example of such politics, in which political entities use its internally recognised government to receive recognition in the international sphere, thereby rendering itself a state as an international juridical actor.

THE UNBUNDLED STATE IN THE GLOBAL SOUTH

This type of politics, in which the state is both the object and resource of political strategies, is particularly relevant in the context of the Global South due to the historical conditions of decolonisation. The process of decolonisation in the post-1945 era actively unbundled the composite definition of the state, giving rise to a particular form of state politics. With previous standards of international recognition

[154] For example: Stephen D. Krasner, "Sharing Sovereignty: New Institutions for Collapsed and Failing States," *International Security* 29, no. 2 (2004).

no longer normatively acceptable, such as the 'standard of civilisation' as noted previously, colonized territories were granted recognition as equal partners to already-existing states by simply presenting the evident—or assumed—desire for self-determination and self-rule by the population.[155] This was in recognition of the relative weakness of the newly decolonised Southern states, under the assumption that stable and ready recognition of international juridical statehood would prevent further external interference.[156] Through this historical development, previously colonial territories became states by the way of an international fiat, and the two concepts of state-as-government and as international juridical actor became starkly decoupled.

This bifurcation of the inward and outward-looking definitions of the state in the decolonised Global South led to a political pattern in which the international recognition of statehood, and the subsequent extreme reluctance of the international community to withdraw that recognition, functioned as a political resource to attract external support for the state. This was particularly the case in contexts where the territorial integrity of the state was under threat, such as in the case of the rise of a secessionist rebel group.[157] External assistance, both in the form of material support as well as the reluctance of the international system to recognise new states, meant that states were generally able to successfully resist challenges to their territorial borders without necessarily obtaining total military victory against its challengers, or strengthening the effectiveness of its government.[158]

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155 Jackson, *Quasi-States*, 17-18. Jeffrey Herbst, *States and Power in Africa: Comparative Lessons in Authority and Control* (Princeton, NJ: Princeton University Press, 2000), 98.
156 Clapham, *Africa and the International System*, 19.
157 Robert H. Jackson and Carl G. Rosberg, "Why Africa's Weak States Persist: The Empricial and Juridical in Statehood," *World Politics* 35, no. 1 (1982): 3, 10-11.
158 Ibid., 10-11, 22-24.

The effects of such politics were often cast in negative terms as an explanation as to why weak or corrupt states are widespread in the Global South. For example, commentators such as Jackson and Rosberg described the international structure of a stable juridical state system as a negative incentive for a state to develop its internal capacity, resulting in states that are run by offices that "possess uncertain authority" with government institutions that are "ineffective and plagued by corruption."[159] Others, such as Clapham have argued that the fact that international recognition was given as a fiat meant that states both as a structure of political elites, and the domestic government faced little or no incentive to legitimise themselves vis-à-vis their internal population, resulting in disconnected structures that was not representative of the interest of the state as a whole.[160] Rather than providing security for the whole state, including its ordinary inhabitants, international juridical statehood was seen to provide particularistic benefits to the elites representing the state in the international sphere and entrenching the internal disorder of Southern states.[161] Jackson characterises this status as "quasi-statehood," implying the fact that these states did not fulfil the mythological ideal of the state as a tightly bundled entity between an internal government, a recognized international juridical entity, and a representative elite power structure.[162]

UNDERSTANDING EXTRAVERSION

This dynamic of "quasi-statehood" is part of a broader political strategy identified by Bayart as "extraversion." Extraversion is, as briefly introduced in the Introduction, an interlinked domestic-political theory that explains Southern state behaviour in the international sphere as the mobilisation of resources derived from its external

[159] Jackson, "Quasi-States, Dual Regimes, and Neoclassical Theory," 526-27.
[160] Clapham, *Africa and the International System*, 19.
[161] Ibid., 18-19.
[162] Jackson, *Quasi-States*. Jackson and Rosberg, "Why Africa's Weak States Persist: The Empricial and Juridical in Statehood."

environment, including conditions such as economic globalization, to compensate for their internal difficulties of autonomous power consolidation and legitimation.[163] Bayart explicitly acknowledges that, as in the case of the system of international juridical sovereignty described above, the relationship between the Southern state and the external conditions are "possibly unequal," particularly in the sense that the Southern states may not have had the opportunity to effectively influence or create the external conditions they are subjected to.[164] In this context, engagement with the external environment is transformed into means of generating material, economic, and political rent. The recipient of such rent can be the state as the internal government and its institutions, or primarily the elite power structure representing the state.[165]

The broader theory of extraversion that Bayart elaborates goes beyond the condition of "quasi-statehood" described by commentators such as Jackson in two significant aspects. Firstly, while the concept of quasi-statehood highlights the negative political effects of the unbundled state in the Global South, marked by disorder and ineffectiveness, the theory of extraversion provides for a more agnostic prognosis, particularly regarding the coercive capacity of the state as domestic government. For example, as Bayart demonstrates, African states were subject to international pressure to democratize during the 1990s. As a response to this external pressure, certain African states adopted the minimal procedure and discourse of democracy, in order to receive external support to strengthen various aspects of its internal government and its constituent institutions. For example, some states received material support to strengthen its transportation (to aid regional elections) and its domestic communication infrastructure (for the transmission of information),

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[163] Bayart, "Africa in the World: A History of Extraversion," 217-67.
[164] Ibid., 218.
[165] Ibid., 229-30.

ostensibly to aid the operations of the newly established democratic institutions and processes.[166] Furthermore, the acceptance of democratic procedure provided international legitimation of the government's claim as the jurisdictional authority through the veneer of representation and popular sovereignty.[167] These tangible and intangible resources were, in turn, funnelled into the state as government as well as the group of elites forming its power structure, rendering the international pressure for democratization into an external resource for extraversion. Although this may not have been the expected result of democratization, the increased resources and discourses of legitimation made available for the government, for example, had the potential of strengthening the state in the context of its internal government. Thus, while extraversion may not lead to the creation of benevolent, liberal, or democratic states per se, it creates the possibility to strengthen the state in the context of increasing its coercive capacity and domestic authority.

Secondly, and perhaps more importantly, the theory of extraversion highlights the *proactive* nature of the interaction between the Southern state and the international system. Specifically, the theory elucidates how a Southern state can voluntarily abrogate a particular aspect of statehood in order to strengthen another. The example of democracy clearly demonstrates this strategic trade-off. The state in this context is sacrificing its right to domestic non-intervention by accepting external pressure regarding its political system in return for resources to strengthen its domestic government.

166 Ibid., 225-26.
167 Ibid., 225-26.

3. A Theory of Judicial Extraversion

This thesis builds upon these insights drawn from the theory of extraversion to explain the voluntary initiation of international criminal justice by states of the Global South. While the traditional theory of extraversion is primarily focused on the material relationship between the international system and the Southern state, the extraverted theory of international criminal justice, or what I will call 'judicial extraversion,' conceptualises the ideational aspect of the international system as an external condition that can be mobilised to generate particular political and material benefits for the state—whether the state is conceived of as a bundled entity comprised of the central government, the international juridical actor, and the elite power structure, or simply one or two of these facets. Put differently, judicial extraversion is an interlinked domestic-political theory of state engagement with the international criminal justice system, in which Southern states are seen as proactive agents that exploit one aspect of statehood to generate 'rent' through international criminal justice in order to strengthen other facets of statehood.

3.1 Objectives of Judicial Extraversion: International Criminal Justice and The Three Aspects of the State

From the composite definition of the state we can consider three different objectives of judicial extraversion. First (1) is the use of international criminal justice to strengthen the state as the domestic government and its institutions; second (2) is the use of international criminal justice to enhance the state's status as an international juridical actor; and third, (3) is the use of international criminal justice to advance the interest of the state as an elite power structure. These objectives are neither self-contained nor exhaustive. Rather, they are ideal types of political behaviour used as a heuristic benchmark to highlight the trade-offs between diminishing different aspects of sovereignty to strengthen specific facets of statehood.. In some cases, multiple strands of judicial extraversion will be manifest in a single instance, while in others they might present themselves as a series of interlinked strategies that are difficult to separate. Consequently, these ideal types are delineated here as analytical devices that will clarify the additional components of the theory of judicial extraversion and motivate the empirical analysis of specific cases in the ensuing chapters.

FIGURE 1: OBJECTIVES OF JUDICIAL EXTRAVERSION

3.2 Forms of Judicial Extraversion: Unpacking International Criminal Justice

How, then, are the three objectives of judicial extraversion achieved? The theory presented here argues that regardless of which objective of judicial extraversion is pursued by state actors, particular aspects of international criminal justice, both in its operations as an international legal system as well as the inherent nature of ICL will be used as political resources. In other words, international criminal justice is considered to produce political opportunities by virtue of both its legal nature and its day-to-day operations. Three particular features of international criminal justice generate three different opportunities that can be used in the strategy of judicial extraversion, or 'forms' of extraverted strategy—namely, the individualisation of responsibility, criminalisation of specific violence, and the exploitation of the structural power of the state.

(1) Individualisation of Responsibility: Opportunity for Cost-Shifting

The first form of judicial extraversion stems from the fundamental nature of ICL itself—the creation of *individual* perpetrators for atrocity crimes. This aspect of ICL presents the possibility of politicization in the sense that political actors may be able to use international criminal trials to target individuals and, thus, eliminate rivals from the domestic political scene through charges of atrocity crimes. [168]

The politics of individualization, however, has further-reaching repercussions than the possibility of targeting specific individuals for political objectives. The individualization—or de-collectivization—of atrocity crimes speaks to a more fundamental conflict between the legal concept of the individual perpetrator and the nature of collective violence. The legal concept of the individual perpetrator provided a facile way of conceptualizing responses to 'unthinkable' or 'unimaginable' crimes.[169] However, simultaneously, the legal image of the individual perpetrator of atrocity crimes stands in tension with the fact that the commission of atrocity crimes involves wide-scale and systematic participation of a multitude of people. In fact, the

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[168] This was on of the prominent concerns raised during the Rome Conference. There was a widespread consensus amongst delegates that the abuse of ICL by individuals should be prevented, leading to the decision to limit the states' ability to trigger jurisdiction to the ICC to broadly defined 'situations' rather than individuals. See: "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court," (United Nations, 1998), 196. Para. 34

[169] Immi Tallgren, "The Sense and Sensibility of International Criminal Law," *European Journal of International Law* 13, no. 3 (2002): 565-66.

distinctive feature of the atrocity crimes, which sets them apart from "garden variety" domestic crimes[170] that can be adequately dealt with by existing municipal criminal law, is the very fact that the commission of such crimes requires mobilization—both active and passive—of a great number of people, oftentimes involving the entire society in question.

Such mass mobilization, in turn, points at two interrelated characteristics of atrocity crimes. On a primary level, mass mobilization denotes widespread participation,[171] which in turn implies the existence of various different types of complicit individuals, ranging from those who directly aided the execution of violent acts to those who were merely 'bystanders' who passively condoned the crimes.

On a deeper level, the participation of the masses generally indicate a level of systemization of violence, a degree of organization, and perhaps most importantly, a process of socialization that transforms an amorphous 'mass' into an objective-driven group capable of collective action. The ICTY, announcing the commencement of its first case, reflected on this fact by acknowledging that "most of the crimes [before us] do not result from the criminal propensity of single individuals" but rather "constitute manifestations of a collective criminality" in which a group carried out violent acts in concert or with a common objective.[172] Schabas echoes this view in his discussion of genocide in international law, emphasing not only the collective nature of the act, but also the importance of shared intent, stating that the "organizers and planners must necessarily have […] a

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170 Larry May, *Genocide: A Normative Account* (Cambridge, UK: Cambridge University Press, 2010), 12.
171 Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, UK: University of Cambridge Press, 2007), 26.
172 Mark J. Osiel, *Making Sense of Atrocity* (Cambridge, UK: Cambridge University Press, 2009), 6.

genocidal motive, *taken as a whole*."[173] From this perspective, genocide cannot be adequately understood as a collection of murders committed by many individual murders; nor can widespread and systematic torture be considered to be simply many acts of cruelty.

It is therefore unsurprising that, despite general adherence to the principle of individual agency amongst legal circles, the symbolic resonance of international criminal trials often equated the prosecution of individuals with the punishment of entire systems of violence. The international criminal justice system addresses this tension partially by focusing prosecutorial efforts to the architects of atrocities or what are sometimes referred to as "conflict entrepreneurs"—the political, social, and military leaders in the commission of mass crimes.[174] But regardless of who is being prosecuted, it is often understood by both the domestic and international audience that the prosecution is an accusation directed against an entire political project, including the discriminatory ideology or politics of the collective.[175] The historic significance of the Nuremberg IMT, thus, not only lies in the convictions of Goebbels and Göring, but also the de-legitimization of the Nazi ideology as a whole. Although the *Eichmann Trial* is not strictly an 'international' criminal trial in the use of the term in present day, the motivations of the Ben-Gurion government in abducting and prosecuting Eichmann was to attack not only the Nazi regime specifically, but also racist politics as a whole. Arendt quotes Ben-Gurion stating that

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173 William Schabas, *Genocide in International Law*, 2nd ed. (Cambridge, UK: Cambridge University Press, 2009), 305.
174 Drumbl, *Atrocity, Punishment, and International Law*, 26.
175 Gerry Simpson, *Law, War and Crime: War Crimes Trials and the Reinvention of International Law* (Cambridge, UK and Malden, MA: Polity Press, 2007), 13.

"[i]t is not an individual that is in the dock at this historic trial, and not the Nazi regime alone, but anti-Semitism throughout history."[176]

The previous discussion regarding the conceptual tension between the prosecution of the individual perpetrator and the collective nature of atrocity crimes leads us to the possible political effect of ICL. International criminal justice, from this perspective, inherently carries the opportunity to concentrate the symbolic guilt of the system on a select number of individuals on trial, creating political 'winners' and 'losers' amongst the violent parties. An optimistic interpretation of this type of politics arising from international criminal justice would be that international criminal trials could provide a cathartic event for a society to face the violence of the past, and therefore precipitate a type of symbolic purging. Simpson argues that international criminal trials can provide a "series of tests" a society needs to undergo so that a new type of politics can emerge, "untainted by the old."[177] Serbia, when transferring suspects indicted by the ICTY for war crimes, seemed to be fully aware of this fact: those indicted for war crimes were hailed as heroes who were being sacrificed in return for international aid and recognition of the country.[178]

A less optimistic assessment would be that the concentration of guilt on particular individuals for the perpetration of atrocity crimes could reduce the political cost of accountability measures after widespread and systematic violence. In short, individual criminal responsibility represents an opportunity to shift the cost of accounting for mass violence.[179] The obvious cost of an international criminal

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[176] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (London: Penguin Classics, 2006), 19.
[177] Simpson, *Law, War and Crime*, 13.
[178] Jelena Subotic, "The Paradox of International Justice Compliance," *The International Journal of Transitional Justice* 3, no. 3 (2009): 370-71.
[179] Kirsten. Ainley, "Responsibility for Atrocity: Individual Criminal Agency and the International Criminal Court," *Evil, law and the state: perspectives on state power and violence,*

prosecution, from the perspective of an individual, is the loss of personal liberty if found guilty, and if the proceedings were considered legitimate by domestic constituents, the loss of the right to participate in certain types of public life, such as politics. However, on a more symbolic level, individual members of the group may come to bear the transgressions of the political system as a whole, while the rest of society—and political actors who do not face direct criminal charges—can use the symbolic resonance of international criminal trials to regain legitimacy and 'rebrand' the political system as something distinct from the violent system of the past, feigning political transformation where there is none. The fact that early convictions of ad hoc tribunals focused on mid-level commandos and lower-level henchmen further reduces the expected political cost of an international criminal trial. [180]

(2) Criminalisation of Acts: Opportunity for De-politicizing Violence

The second form of judicial extraversion arises from the *criminalisation* of responsibility. The fact that ICL creates criminal responsibility for specific acts of violence creates additional political implications pertaining to the prosecution of atrocity crimes. Given the symbolic resonance of international criminal justice as a process against entire systems and ideology of politics, as discussed above, the criminalization of responsibility for mass atrocities can not only de-legitimize, but also de-*politicize* the objectives of the violent actors. For individuals representing the political projects behind mass violence, prosecution means not only the loss of individual freedom and right to participate in future legitimate political life, as noted

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Amsterdam & New York: Rodopi (2006): 146. This has led Evans to argue that the model of individual accountability is ill equipped to deal with the root causes of mass violence. Evans, *The Politics of Human Rights: A Global Perspective*, 32.

180 The early convictions of the ICTY, for example, had included individuals such as Tadić and Erdemović, who were rather indistinguishable foot soldiers. Subotic, "The Paradox of International Justice Compliance," 370-71.

above, but also the loss of the right of recognition of his or her organisation as a valid political entity that can demand, for example, right to self-determination. This is a particularly poignant point in the context of secessionist or rebel violence. Higgins has argued, in the context of the legal recognition of sovereignty under international law, that while, generally, there is a right to recognition as an independent sovereign state given that the "people" freely expressed their will for self-government, this is limited to instances in which the demands for self-government were expressed within the boundaries of international law. [181] Jurisprudentially, this conclusion rests on the principle that an illegal act cannot form a source for a legal right.[182] Thus, the designation, or implication, that an insurgent or secessionist group was *criminal* instead of political, is in effect denying the legitimacy of the group's claims to self-government and therefore re-establishing the exclusive authority of the state within its borders. 'Winning' in this context goes beyond the simple avoidance of responsibility for mass violence; it also refers to the ability of a political actor to place himself or herself firmly within the realm of the 'political' and therefore justify the use of certain types of violence. Conversely, the acts committed by the 'losers' are deemed a criminal act.

Furthermore, the criminalization of responsibility for mass atrocities by international criminal justice, coupled with the focus on individual perpetrators, provides the opportunity to shift the domestic and international discourse surrounding the violence from the possible broader, structural causes to the direct participation of specific individuals, further depoliticizing the context of widespread violence. Consequently, international criminal justice makes it possible to consider mass

[181] Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (London: Oxford University Press, 1963), 137-38.
[182] Known as *ex injuria jus non oritur*. Ibid., 139.

atrocities as an aberration, attributable to specific acts of moral transgression, rather than as a part of a wider pattern of systemic violence.

(3) A State-Centric Criminal System: Opportunity for Exploiting 'Structural power'

The final form of judicial extraversion is derived from the privileged role of the state in the system of international criminal justice. While theoretically, the subject of international criminal justice can be both state and non-state actors, the political opportunities for de-politicization and cost-shifting are not distributed equally between different types of domestic political actors. The structure of the system of international criminal justice is more easily accessible to state actors compared to non-state actors, transforming the political opportunities of international criminal justice into political strategies that can be deployed to increased the authority and power of the state, both in terms the domestic government and international juridical entity.

This is due to the role of the state in the international criminal justice system. On the most basic level, the state as an international juridical actor is represented in international institutions and multi-lateral or bi-lateral agreements, providing the means by which the state can influence the establishment of international criminal tribunals, definition of its jurisdiction, and overall operations. For example, the ICTY and ICTR were created through a UN Security Council Resolution,[183] pursuant to the Chapter VII of the Charter of UN, which vests the organization with the ability to determine necessary action with respect to "threats to the peace, breaches of the peace, and acts of aggression."[184] In establishing the *ad hoc* tribunals

[183] For the ICTY: *UN Security Council Resolution 808(1993)*, (1993/02/22/). For the ICTR: *UN Security Council Resolution 955 (1994)*, (1994/11/08/).
[184] *Charter of the United Nations*, chap. VII.

through the established state-based organs of the UN, pertinent features of the courts, such as the scope of the substantive and temporal jurisdiction, as well as the duration of the court and its rules of procedures, were left to the decisions of state actors. Although the permanence of the ICC seem to limit explicit opportunities for states to determine the scope of the trials and investigations, the fact that the Rome Statute establishes the ICC as a type of an international appellate court that intervenes as the last resort creates the possibility of state control over when and where the court intervenes. Specifically, the jurisdiction of the court is established through the principle of 'complementarity,' which establishes admissibility of a case to the ICC only when the national judiciary is found to be "unwilling" or "unable" to effectively and "genuinely" prosecute.[185] This not only firmly establishes jurisdictional primacy of the domestic courts, and therefore the internal authority of the state as a government, but also creates the opportunity for the state to influence which situations become admissible to the ICC by demonstrating different levels of willingness or ability to prosecute atrocity crimes. Furthermore, the structure of the hybrid tribunals gives explicit recognition of the role played by the state by incorporating not only national judicial personnel, but also by including in its jurisdiction domestic law and legal practices.

Thus, access to the international criminal justice system—defined as the ability to participate in international institutions such as the UN, multilateral conferences such as the Rome conference, and assume the role of the interlocutor or gatekeeper

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[185] *Rome Statute of the International Criminal Court*, Art.17.; Cassese, *International Criminal Law*, 342-43. For a general overview of complementarity, see: Carsten Stahn and Mohamed M. El Zeidy, *The International Criminal Court and Complementarity: from Theory to Practice* (Cambridge, UK: Cambridge University Press, 2011).; Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* (Oxford, UK: Oxford University Press, 2008). For a general overview of complementarity see: Stahn and El Zeidy, *The International Criminal Court and Complementarity: From Theory to Practice*; Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions*.

between international criminal tribunals and domestic judiciaries—can be seen as another type of political resource available to recognized governments. This provides the rationale for pursuing particularly *international* forums of international criminal justice, where the asymmetry of access between state and non-state actors will be the most pronounced.

In addition, the state as both an international juridical actor and domestic government maintains a significant role in providing the necessary link between domestic institutions, such as the national police force or prosecutor's office, and the international courts, which in turn creates opportunities for the state to exercise influence over international criminal justice processes. The international criminal justice system, unlike the domestic judiciary, does not have any enforcement agencies at its disposal, and therefore is obliged to use the national authorities of the relevant states as its intermediaries.[186] In this context, states are, for example, able to influence the international criminal prosecutions through the vital role they play in granting access to evidence, witnesses, and victims that are necessary for the prosecution and defense, as well as the capture and surrender of suspects. This interlocutory role of the state admittedly, holds true for most international institutions; however, the nature of criminal trials makes state cooperation a much more important and urgent matter, as international criminal tribunals must be able to protect victims and witnesses, as well as collect evidence swiftly before it is damaged or tampered for trials to be objective, effective, and expedient.[187] By maintaining the role as an interlocutor between the international investigators and the domestic resources needed for prosecution, the state retains the possibility of directing, perverting, and delaying the scope and focus of the investigation as well as indirectly influencing the

[186] Florian Jessberger, "International v. National Prosecution of International Crimes," in *The Oxford Companion to International Criminal Justice*, 208.
[187] Cassese, *International Criminal Law*, 346.

possible outcome of the trials. Furthermore, the necessity to apprehend alleged perpetrators can serve as justification for further military action or violent counter-insurgency measures, for example, by state armed forces, while non-state actor violence is delegitimized as criminal transgressions. While it is theoretically possible for non-state actors to also gain legitimacy as participants in the international law enforcement effort, the broader context of a state-centric legal system and the critical role of the state in the operations of the international criminal justice system render this scenario nearly impossible in practicality. As Ainley has argued, this allows the state as an entity to retain its "monopoly on legitimate violence" without having to actually subject itself to restraints on its behavior.[188]

FIGURE 2: THEORY OF JUDICIAL EXTRAVERSION

In sum, the theory of judicial extraversion is an interlinked domestic-political theory that utilizes a three-part composite definition of the state. The theory, derived from broader theories of extraversion, argues that the three aspects of the state—namely, the state as the government and constituent institutions, the state as an international

188 Ainley, "Responsibility for atrocity," 145.

juridical entity, and the state as an elite power structure—can be de-linked from one another, and precipitate a dynamic of politics in which certain aspects of the state itself are instrumentalized to strengthen its other facets. The theory of judicial extraversion utilizes this conceptualization of state politics to identify the different ways in which international criminal justice can be used strategically by states. It presents three ideal type objectives of judicial extraversion, in which international criminal justice is instrumentalized to strengthen specific facets of the state. Such objectives, in turn, are realized by utilizing three particular forms of political opportunities arising from the individualization and criminalization of responsibility for specific violent acts under ICL, and the structural power of the state generated from the state-centric system of international criminal justice

CHAPTER 2: UGANDA

Seeking Justice to Wage War

1. INTRODUCTION

On 16th December 2003, President Yoweri Museveni voluntarily referred the situation concerning the actions of the Lord's Resistance Army (LRA) to the Prosecutor of the ICC.[189] By this action, Uganda became the first state party to vest the ICC with jurisdiction over its territory.[190] Investigations regarding the admissibility of the situation referred began shortly after the referral, and in July 2005 five warrants of high-ranking individuals of the LRA were issued by the Pre-Trial Chamber II. These warrants were unsealed and opened to the wider public the following October.[191] To date, only one suspect is in custody of the Court.[192] Joseph Kony, widely understood to be the leader of the LRA, remains at large alongside two other suspects allegedly under his command, while one other suspect is presumed

[189] ICC, "President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC."

[190] Payam Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," *The American Journal of International Law* 99, no. 2 (2005).

[191] ICC, "Warrants of Arrest Unsealed Against Five LRA Commanders," http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/press%20releases/Pages/warrant%20of%20arrest%20unsealed%20against%20five%20lra%20commanders.aspx.

[192] Dominic Ongwen, an alleged Brigade Commander of the LRA, surrendered to the ICC on 17th January 2015. The case is currently ongoing. See: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1084.aspx

dead.[193] Why did Uganda, a Southern state generally protective of its classical sovereign rights, request an international criminal justice process regarding its domestic conflict with the LRA?

EXPLANATIONS

Existing literature on Uganda's self-referral to the ICC have, unlike other situations in the Global South that had been subjected to international judicial intervention, acknowledged the relative agency of Ugandan actors in this decision. In particular, they have highlighted the domestic political motivations on the part of President Museveni and his government, rather than the broader context of power imbalance between the Global North and South, or between a Southern state and an international institution.

The acknowledgement of Uganda's agency has been in part due to the fact that there were no explicit external 'coercers' that were pushing for a LRA indictment. Of course, Uganda's referral did not happen in a vacuum—international NGOs as well as IGOs such as UNICEF had been advocating for increased international attention regarding both the plight of the civilians in Northern Uganda as well as the pursuit of accountability for the LRA.[194] Furthermore, Uganda's self-referral also served the institutional interest of the newly established ICC, as starting its operations with a well-documented case referred directly by a member state was expected to "vastly simplify" the task of the OPT as well as increase the office's credibility.[195]

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193 ICC. "Situations" http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/Pages/situation%20index.aspx
194 Schiff, *Building the International Criminal Court*, 194-95; Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London, New York: Zed Books, 2006), 82-83.
195 Schiff, *Building the International Criminal Court*, 199.

Nevertheless, there is a strong consensus in the existing literature regarding the proactive role of the Ugandan government in referring the LRA conflict to the ICC.

Some commentators such as Akhavan, who served as a legal advisor to the Ugandan government on relations with the ICC, have argued that the decision to refer the LRA conflict to the ICC was driven by a genuine domestic desire for peace and security in Northern Uganda, in the context of "persistent international indifference." [196] An international criminal justice process was, according to this perspective, intended to decrease the level of violence by isolating the LRA leadership and facilitate national reconciliation through an apolitical trial. [197]

However, most commentators argue that the Ugandan government instrumentally pursued international criminal justice to advance more particularistic interests of the ruling elite, including that of President Museveni. Commentators have identified two broad objectives of instrumentalising international criminal justice. First, commentators have argued the referral to the ICC was a strategy to gain international legitimacy for the militarization of domestic politics. Nouwen and Werner, for example, argues that the self-referral was part of a "military strategy" to intimidate the LRA and an "international reputation campaign" to gain legitimacy for the arrest of political rivals.[198] Others such as Branch have contended that the referral was sought to gain international approval for not only the persistent conflict in Northern Uganda and the increased size of the military in this context, but also for the cross-border incursions of the Ugandan armed forces into the DRC, South

196 Akhavan, "The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court," 404, 10-11.
197 Ibid.
198 Sarah M. H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *The European Journal of International Law* 21, no. 4 (2010): 949.

Sudan, and CAR.[199] Second, existing literature have suggested that the ICC referral was a means for legitimising the increasingly oppressive politics under Museveni,[200] and obfuscating the violent misconduct and negligence committed by the state security forces.[201]

This chapter does not contest the broad consensus within existing literature that the self-referral was pursued by the Ugandan government for domestic political aims. However, the chapter will further the existing debate in two ways. First, while most commentators have understood the ICC referral as a continuation of the internal preferences of the National Resistance Movement (NRM), the ensuing analysis will contextualize the referral as a solution to a problem faced by the government at the *specific time* of the referral itself, opening up the possibility that the ICC referral was pursued as a means of addressing new situations and emerging challenges, rather than long-standing political tensions. Secondly, it will explain why international criminal justice *in particular* was pursued, focusing on incentives provided by the inherent nature and structure of international criminal justice mechanisms. In doing so, it will increase our understanding of the role that international criminal justice played in the overall political strategy of the Ugandan government. Finally, it will identify the conditions at the particular point in time of the referral that made international criminal justice an attractive option for the government.

The central argument of the chapter is that Uganda's self-referral to the ICC was a strategy of pursued by the Ugandan state to increase its flexibility in domestic

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199 Branch, "Uganda's Civil War and the Politics of ICC Intervention," 182-85. Lucy Hovil, "Challenging International Justice: The Initial Years of the International Criminal Court's Intervention in Uganda," *Stability* 2, no. 1 (2013): 4-5. Janine Natalya Clark, "The ICC, Uganda and the LRA: Re-Framing the Debate," *African Studies* 69, no. 1 (2010).

200 Adam Branch, *Displacing Human Rights: War and Intervention in Northern Uganda* (Oxford, UK: Oxford University Press, 2011), 78-81.

201 Tim Allen and Koen Vlassenroot, "Introduction," in *The Lord's Resistance Army: Myth and Reality*, ed. Tim Allen and Koen Vlassenroot (London: Zed Books, 2010), 16.

politics, in the context of particular internal and external threats made on the state as both the government and its institutions and power structure of specific national elites. The threats were a result of two interrelated factors. First, the Ugandan government and its institutions were increasingly being criticized for its track record regarding the LRA conflict. The continuous failure to bring an end to the conflict was creating an internal crisis of legitimacy and credibility for the government, particularly regarding its monopoly over violence and ability to provide security. Consequently, significant actors in international society, the domestic public, and amongst the domestic military elites were pressuring the central government to bring an end to the on-going violence in the Northern Ugandan provinces. However, the different actors were split on whether the conflict should end through a negotiated peace or total military victory, creating contradictory pressures on the government regarding its short-term political tactics. Secondly, the specific criticism regarding the LRA conflict was embedded within the broader context of increasing calls for change in political regime, threatening the stability of the elite power structure that had represented the Ugandan state both vis-à-vis the domestic society and international system of states. The early 2000s experienced an increase in calls for a transition to a multi-party electoral democracy from the one-party regime established in 1986 from an array of domestic and international actors. This challenge to the regime increased the urgency with which the central government needed to deal with the specific criticism regarding the LRA conflict.

The ICC referral in this context was a strategy of judicial extraversion employed by Ugandan state to enhance its flexibility regarding the LRA conflict. In effect, the referral allowed the state, both in terms of the central government and national elites, to continue military assaults in the Northern provinces by providing an expanded normative vocabulary and institutional tools to justify its decision to different audiences, including those who were pressuring for a non-military strategy regarding the LRA—namely, the international community, domestic public, and military elites.

This chapter will focus on the development between 1986, following the establishment of the National Resistance Movement (NRM) regime, until the ICC referral in 2003. First, it will provide a brief introduction to the history and nature of the LRA conflict, and its role in Ugandan domestic politics. Secondly, embed the politics of the ICC referral within the overarching system of politics under the NRM regime. Specifically it will examine the three sources of pressure regarding the continuation of the LRA conflict—the international community, domestic public, and domestic military elite—and their respective significance, particularly in terms of the broader developments within Ugandan politics. Third, it will evaluate the efficacy of the ICC referral with respect to its domestic political goals, and conclude by considering how the initial politics of the ICC referral can help explain the current position of the Ugandan government regarding international criminal justice.

2. The Politics of the LRA Conflict

The LRA is an armed rebel group formed in 1987 by Joseph Kony that has been waging war against the central Ugandan government until the present day. While the conflict has primarily affected the Northern region of Uganda, specifically the Gulu, Kitgum and Pader districts, which are largely inhabited by the Acholi ethnic group, as early as since 1995 LRA fighters are reported to have set up bases in neighbouring countries,[202] and by 2005 most of the conflict had migrated out of Northern Uganda, affecting populations in South Sudan, the DRC, and the CAR.[203]

The LRA is a broadly millenarian rebel group that espouses a radical vision of a new society, and professes to represent the grievances of the Acholi ethnic group. However, the LRA's vision of an alternative society is poorly articulated, and the scale of rampant atrocities it commits against the very population it professes to represent undermines the credibility of such professed aims.[204] The literature on this group frequently highlights the sheer scale of the violence committed against civilians. For example, the ICC warrant alleges that the LRA has

> established a pattern of brutalization of civilians by acts including murder, abduction, sexual enslavement, mutilation, as well as mass burnings of houses and looting of camp settlement; that abducted civilians, including children, are said to have been forcibly recruited against fighters, porters and sex slaves […].[205]

The abduction of children and use of child soldiers have been particularly highlighted by outside observers as an indication of the depravity of the group,[206] most recently reintroduced by the controversial internet campaign, "Kony 2012."[207]

Additionally, the representation of the conflict has been centred on what Finnström characterizes as the "religious and cosmological, even pseudo-cultural" aspects of the

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[202] Agence France-Presse, "Timeline of Uganda's Civil War," http://reliefweb.int/report/uganda/timeline-ugandas-civil-war.

[203] Office of the Spokesperson, "The Lord's Resistance Army," US Department of State, http://www.state.gov/r/pa/prs/ps/2012/03/186734.htm.

[204] Frank Van Acker, "Uganda and the Lord's Resistance Army: The New Order No One Orderd," *African Affairs* 103, no. 412 (2004): 336.

[205] ICC, "Warrant of Arrest Unsealed."

[206] Amnesty International, *Uganda: "Breaking God's Commands": The Destruction of Childhood by the Lord's Resistance Army*; Amnesty International, *Uganda: Child "Night Commuters" Fear Abduction*.

[207] Invisible Children, *KONY 2012*.

LRA.[208] A headline from *The Times,* for example, quotes Kony declaring that he "will use the Ten Commandments to liberate Uganda,"[209] while a *New York Times* article described the LRA as a "Christian" rebel group led by a "former faith healer who wears white robes and claims to talk directly to God."[210] Through both the brutality of the group as well as its professed spiritual aims, the LRA has garnered a rather mystical reputation as an incomprehensible organization, which is "notoriously difficult organization to analyse," with "arcane beliefs" and acts in a "seemingly irrational manner."[211]

2.1 Origins of the LRA Conflict: Failure of Power Consolidation

Emphasizing the LRA's seemingly 'irrational' or 'contradictory' behaviour, however, obscures the deep historical and political context of the conflict, and therefore underemphasizes its potential political significance. The LRA as an armed group has attained political significance that outweighs its actual military capacity, especially seen in comparison to the Ugandan state military, or the Ugandan People's Defence Force (UPDF). Though not a negligible armed force, the LRA has not posed an existential threat to the central NRM government. The LRA's military capacity has been largely limited to the northern part of the country, and as briefly noted above, in recent years generally been restricted to operations outside of the Ugandan borders. While this should not downplay the tremendous amount of suffering Ugandan civilians have endured throughout this conflict, it points to a discrepancy

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208 Sverker Finnstrom, "An African Hell of Colonial Imagination? The Lord's Resistance Army/Movement in Uganda, Another Story," in *The Lord's Resistance Army: Myth and Reality*, ed. Tim Allen and Koen Vlassenroot (London: Zed Books, 2010), 75.
209 Sam Farmar, "I Will Use the Ten Commandments to Liberate Uganda," *The Independent*, 28 June 2006.
210 James C McKinley Jr, "Christian Rebels Wage a War of Terror in Uganda," *The New York Times*, 5 March 1997.
211 Carbone, *No Party Democracy? Ugandan Politics in Comparative Perspective*, 59.

between the strategic threat posed by the LRA in military terms and the rhetorical significance the conflict came to have in Ugandan politics. Specifically, in the process of power-consolidation and nation-building by the NRM regime, the LRA came to represent a vast array of opposition sentiments to the central government, many of which that were erroneously attributed to the group.

Historical Origins

The symbolic status of the LRA and the North, as the site of opposition to the central government, originated from the 'divide-and-rule' strategy of governing different regions and ethnic groups under the British Empire. The colonial administration pursued a policy of preferential treatment of the South as the centre of industry and cash crop production, while the North was relegated "primarily as a source of cheap labour," creating stark differences in levels of economic development and overall wealth.[212] Simultaneously, the British systematically recruited rank-and-file members of the state security apparatus, such as the military and police, from Northerners, particularly from the Acholi ethnic group. This meant that despite the relative economic deprivation of the North, Northerners and the Acholi were strongly associated with the coercive power of the state.[213] Such dynamics of ethno-politics was continued in the post-independence regime under President Milton Obote (hereafter Obote I government), with the new government opting to maintain the significant presence of the Acholi in the national armed forces.[214]

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212 Ruddy Doom and Koen Vlassenroot, "Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda," *African Affairs* 98, no. 390 (1999): 7-8.
213 Chris Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006* (New York, Oxford: Berghahn Books, 2009), 42. Robert Gersony, "The Anguish of Northern Uganda," (United States Embassy, USAID Mission, Kampala, 1997), 6-8.
214 Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 53-56.

This association between Northerners and the Acholi with the state security apparatus formed under the colonial administration and the Obote I government put into motion a cycle of elimination and subsequent preferential treatment of the Acholi in successive governments. New governments formed after the fall of a pro-Acholi government systematically removed ethnic Acholi from state institutions, as a means of consolidating its power, which then prompted pro-North groups to stage internal rebellions to reinstate friendlier governments that would restore the North's preferential status within the state. For example, when Idi Amin overthrew the Obote I government, the Acholi were purged from the military ranks as well as the public sphere in general, with high profile Acholi leaders and members of the intelligentsia also being persecuted.[215] The Acholi regained their prominence in the state security forces in 1979 when the anti-Amin Ugandan National Liberation Army (UNLA)—which contained an estimated 30-40% of Acholi men— invaded Uganda, and re-instated Obote, establishing the Obote II government.[216]

EXCLUSION AND OPPRESSION: THE NRM/A AND THE NORTH

The NRM/A[217] continued this cycle of purges and counter-purges when it defeated the UNLA in 1986 under the leadership of Yoweri Museveni. The NRA rapidly established a military structure dominated primarily by Southerners, purging the

215 Gersony, "The Anguish of Northern Uganda," 8.
216 UNLA effectively became the national armed forces of the state during the Obote II government, and was charged with the unpopular task of carrying out unpopular and often violent orders to coercively consolidate state power and subjugate opposition groups, further emphasizing the perception that the Acholi ethnic group stood at the centre of state power. This special status of the Acholi in particular was furthered with the coup d'état by Acholi troops led by Bazillo Okello and General Tito Okello in 1985. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 57-58. For a general overview of the post-independence ethnic politics see: Sverker Finnstrom, *Living with Bad Surrounding: War and Existential Uncertainty in Acholiland, Northern Uganda* (Uppsala: Uppsala Studies in Cultural Anthropology, 2003), 71; Van Acker, "Uganda and the Lord's Resistance Army: The New Order No One Orderd," 339-40.
217 The National Resistance Army (NRA) refers to the military wing of the NRM political organisation.

ranks of Northern Acholi perceived to be associated with the previous regimes.[218] Furthermore the NRM perceived that the removal of Northerners from the political process more generally was necessary to establish its authority. Northerners were therefore systematically marginalized from the political transition process as well as the institutions of the new NRM government,[219] and were rejected from the inner power circle of the new interim government, with only four cabinet positions occupied by Northerners between 1986 and 1988.[220]

Such systematic marginalisation of the North continued even after the establishment of the so-called 'no-party political system,' known domestically as the "Movement" system under the 1995 constitution.[221] Under the Movement system, organised political activity outside of the NRM, including political parties, were legally banned, and political competition was to be carried out on the basis of individual merit.[222] This ostensibly was to promote a broad consensus-based politics that sought to move beyond the sectarian ethno-politics and regionalism of the past, including the preferential treatment of the North and Acholi ethnic group in the state security apparatus.[223] The establishment of the Movement system contributed to the NRM's consolidation of power by providing the opportunity to co-opt rivalling elites. Prominent non-NRM political figures, such as members of previous regimes, other

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218 Doom and Vlassenroot, "Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda," 13.
219 Branch, "Exploring the Roots of LRA Violence: Political Crisis and Ethnic Politics in Acholiland," 32–33; Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 60–61.
220 Aili Mari Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime* (Boulder, Colorado: Lynne Rienner Publishers, 2010). Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 64.
221 Aili Mari Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime.* (Boulder: Lynne Rienner Publishers, 2010), 11-13, 39-49.
222 Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 78-79.
223 Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime.*, 39-40.

political parties, and leaders of competing rebel groups were frequently given ministerial posts in return for their loyalty to the new government.[224]

However, participation of Northerners in central politics remained severely limited. By the time of the ICC referral in 2003, only three Northerners were able to retain their position in the cabinet, and mostly in ministries less influential within the overall government.[225] The situation was similar in local level governments as well, as the NRM was apprehensive of traditional Acholi socio-political leaders retaining their influence by dominating regional or local level governance and administrative structures. Consequently, ethnic Acholi in local governments were systematically replaced with marginal figures loyal to the NRM. [226] In effect, as Dolan argues, the NRM aimed to assert its dominance over previous regimes by establishing a state of "subordinate inclusion" of the North, or the incorporation under conditions of mass disempowerment, into the new political system.[227]

Simultaneously, the NRM government launched what Branch described as a "counter-insurgency without an insurgency" waged against the entire Acholi ethnic group, targeting not only suspected rebels amongst members of the previous regime's armed forces, but also civilians.[228] Despite Museveni's claim that the 1986

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224 Examples include leaders of the Democratic Party and Conservative Party; leaders, such as Moses Ali, of the Ugandan National Rescue Front (UNRF), a pro-Idi Amin group from the West Nile Region; and leaders, such as Dr. Andrew Lutaakome Kayiira of the Ugandan Freedom Movement (UFM), an anti-Obote and Okello group that was considered as an early competitor of the NRM. For more background, see: Chris Kiwawulo, "Moses Ali is King of West Nile," *New Vision*, June 19 2009.; Canada: Immigration and Refugee Board of Canada, "Uganda: Information on the Ugandan Freedom Movement (UFM) including its History, Organization and how it was coopted by the Government," (Canada: Immigration and Refugee Board of Canada, 1996).

225 Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime*, 49-50.

226 Anders Sjögren, *Between Militarism and Technocratic Governance: State Formation in Contemporary Uganda* (Kampala: Fountain Publishers, 2013), 150. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 64.

227 Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006*, 236-37.

228 Branch, "Exploring the Roots of LRA Violence: Political Crisis and Ethnic Politics in Acholiland," 35–36.

victory brought “total peace” to the North,[229] contemporaneous media accounts and oral testimonies suggest a widespread pattern of civilian harassment by the NRA, ranging from ill-disciplined lootings to more systematic “security swoops” or “screens” that detained hundreds of Northern citizens,[230] which led to allegations of grave human rights violations, such as extrajudicial killings.[231] Paradoxically, such ‘counter-insurgency’ measures aimed to secure the authority of the new Ugandan state under the NRM weakened the legitimacy of the central state within the Northern territories.[232] Violently oppressed by the new regime and systematically excluded from the national political process, the North, in a sense, was pushed to the brink of violence. As John Livingston Okello Okello, a former member of parliament representing the Kitgum district reflects, “[w]hen you close [legitimate and peaceful channels of politics] where do you want them to go? They will go back to the gun.”[233]

Furthermore, the volatile conditions created by the deliberate exclusion and violent oppression of the North was aggravated by the crisis of authority within the Northern Acholi community. The decommissioned UNLA soldiers, who were rejected from the national security forces, found it difficult to reincorporate into civilian life, leading to the creation of what Finnström described as the Acholi “lumpen-militariat”—a class of undisciplined, armed, and unemployed men.[234] These men challenged the existing forms of social authority within the region, and

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229 Museveni, *Sowing the Mustard Seed: The Struggle for Freedom and Democracy in Uganda*, 177.
230 Gersony, "The Anguish of Northern Uganda," 21-23. Timothy Kalyegira, "Insurgency in the Northern and Eastern Regions in 1986," *The Monitor*, 12 Dec., 2012.
231 "Breaking the Circle: Protecting Human Rights in the Northern War Zone," (London: Amnesty International, 1999), 13.
232 Branch, "Uganda's Civil War and the Politics of ICC Intervention," 34.
233 "Hostile to Democracy: The Movement System and Political Repression in Uganda," (Human Rights Watch, 1999).
234 Finnström, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda*, 71.

promoted an alternative structure of power dominated by the logic of violence.[235] This internal crisis of authority, exacerbated by the lack of access to legitimate political processes, contributed to the increasing militarization of the Northern territories.

"Back to the Gun": The North as a Centre of Insurgency

As a result, the North became the stage to a series of violent rebel movements against the NRM/A. The initial rebel movement was explicitly political in its aim: in March 1986, a combination of exiled Acholi political leaders and former members of the now-disbanded UNLA formed the Uganda People's Defence Army (UPDA) with the objective of recapturing power from the NRM/A. Despite initial successes and support from the Northern Ugandan population, the UPDA could not pursue successful military operations.[236] Towards the end of 1986, the UPDA was near defeat, with dwindling arms and increasing demoralization of its troops.[237] A new group, called the Holy Spirit Mobile Force (HSMF), under the self-professed spiritual leader Alice Lakwena, emerged in this context, allegedly pursuing spiritual and millenarian objectives to cleanse the Acholi society.[238] The UPDA and HSMF enjoyed a brief revitalization of the Acholi resistance through a military alliance—however, both movements were ultimately defeated by the NRM/A in 1987 through a combination of military victories and political manoeuvres.[239] Joseph Kony, allegedly a blood relative of Alice Lakwena, established the LRA as a direct inheritor

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[235] Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 62–64.
[236] Doom and Vlassenroot, "Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda," 14–15.
[237] Ibid., 15.
[238] For more information regarding the HSMF, see, for example: Behrend, *Alice Lakwena & the Spirits: War in Northern Uganda, 1985-96*.
[239] The NRA continued its military campaign against the UPDF-HSMF, while president Museveni offered a blanket amnesty to any rebel who stopped fighting, affecting the combat capabilities and morale of the rebels. NRA commander Major Salim-Saleh concludes the Gulu Peace Accord in 1988 with the UPDF alone, marginalizing the HSMF and precipitating its demise. Doom and Vlassenroot, "Kony's Message: A New Koine? The Lord's Resistance Army in Northern Uganda," 15.

of the objectives of the HSMF with the remaining forces of the HSMF and UPDA.[240]

In sum, the LRA conflict emerged from two socio-political origins that were rooted in the deliberate strategies of power-consolidation of the Ugandan state under the NRM: first, the overall political contestation that emerged with the marginalization and oppression of the Acholi ethnic group within the newly established domestic political order, and second, the internal crisis of authority amongst the Acholi with the sudden reintegration of former members of the armed forces. The continued violence in the North—the historic power-base for the former regimes—symbolized, in part, an implicit failure of the NRM regime to fully consolidate its authority.

2.2 PROFITING FROM WAR: POLITICAL ECONOMY OF THE LRA CONFLICT

Simultaneously, the very *process* of war against the LRA itself had become a tool of state power consolidation, particularly from the perspective of the elite power structure of the NRM government led by President Museveni. First, the NRM elites inhabiting the state apparatuses, particularly President Museveni, used the war against LRA and Joseph Kony as a means to justify their suppression of a wide array of opposition voices. Politicians, journalists, and civil society members who were critical of the NRM government were often labelled as "Konyists" or LRA supporters,[241] and at times were even prosecuted for aiding terrorist activities.[242]

240 Finnström, *Living with Bad Surroundings: War and Existential Uncertainty in Acholiland, Northern Uganda*, 77.

241 Joshua B. Rubongoya, *Regime Hegemony in Museveni's Uganda: Pax Musevenica* (Basingstoke: Palgrave Macmillian, 2007), 84; Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime*, 51.

Potential rivals to President Museveni in particular were accused of having alleged LRA connections as a means of intimidation and harassment. For example, when Kizza Besigye, once a military doctor for President Museveni and a member of the inner power group of the NRM/A since its days as a rebel group, established himself as a prominent voice against Museveni, the NRM government stated to insinuate connections between Besigye's political supporters and the LRA.[243]

Furthermore, the war also brought extensive opportunities for rent seeking behaviours by both the NRM political and military elites. Two forms of rent-seeking behaviours can be identified in the context of the LRA conflict. First, military officials used the war as a ruse for individual financial gain, both by exploiting civilians and siphoning official war resources. The local population has long reported how higher-ranking officers were using the military campaigns as opportunities for land-grabbing, cattle rustling from local Acholi civilians, looting resources from neighbouring countries such as Sudan, or engaging in black market economy.[244] Furthermore, even lower-ranking officers were involved in various forms of corruption, such as the "ghost solider" phenomenon, in which commanders would pad the official army payroll with dead or missing soldiers and pocket the extra pay.

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242 Since 2002, the legal basis for such prosecutions was the Anti-Terrorism Act 14/2002. For information regarding the law, see: "An African Hell of Colonial Imagination? The Lord's Resistance Army/Movement in Uganda, Another Story."

243 Although this incident falls outside of the direct temporal scope of this chapter, the treason and terrorism charges against Besigye in 2006 clearly demonstrates the NRM government's strategy. Besigye was brought forth in front of both military and civilian courts for allegedly colluding with the LRA. The pro-government newspaper, *New Vision,* claimed that a diary of a dead LRA commander named Besigye as the former army colonel who had "blessed" the insurgency in the North. All charges were dropped after the elections, and the allegations were considered as unsubstantiated slander by domestic and international media. Ronald Naluwairo, *The Trials and Tribulations of Rtd. Col. Dr. Kizza Besigye and 22 Others*, Working Paper Series (Kampala, Uganda: Human Rights and Peace Centre, 2006), 3-6.; Charles Etukuri and Emmy Allio, "Besigye Denies LRA," *New Vision*, 07 Jul., 2007.

244 Van Acker, "Uganda and the Lord's Resistance Army: The New Order No One Orderd," 353-54. "'The Dust Has Not Yet Settled': Victims' Views on the Right to Remedy and Reparation," (United Nations Office of the High Commissioner on Human Rights, 2011), 52-53.

Although the President would occasionally condemn the practice, lower-ranking officials thought the "ghost soldier" phenomenon was largely condoned by the government elites.[245] In fact, investigations later revealed that very senior members of the NRM government, including the President's own half brother, Lieutenant General Salim Saleh were implicated in the money-making scheme.[246]

Secondly, the LRA conflict provided credible justifications for the enlargement of the military budget, which in turn created further opportunities for clientalism and corruption. Since 1987, the Ugandan government has been receiving financial aid from external donors, most crucially including support from the International Monetary Fund (IMF) and the World Bank, who demanded the reduction of state institution.[247] However, as Branch points out, the continued war against the LRA meant that donors were willing to provide more leeway regarding the defence budget.[248] Consequently, the defence budget could be vastly enlarged, and was used by the NRM government to finance its extensive patronage networks.[249] Indeed, not only did the sheer size of the armed forces grow 40% from the mid-1990s until the time of the ICC referral,[250] but also the number of defence-related appointments increased exponentially during the same time period.[251] Most of these posts were

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245 "Uganda and the Lord's Resistance Army: The New Order No One Orderd," 354.

246 "Northern Uganda: Understanding and Solving the Conflict," (Brussels: International Crisis Group, 2004), 12-13. For a comprehensive overview of military corruption in the 1990s and early 2000s, including those related to the LRA conflict, see: Andrew M. Mwenda and Roger Tangri, "Military Corruption and Ugandan Politics since the Late 1990s," *Review of African Political Economy* 30, no. 98 (2003).

247 "Patronage Politics, Donor Reforms, and Regime Consolidation in Uganda," 452-53.

248 Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 79.

249 Ibid. Andrew M. Mwenda, "Uganda's Politics of Foreign Aid and Violent Conflict: The Political Uses of the LRA Rebellion," in *The Lord's Resistance Army: Myth and Reality*, ed. Tim Allen and Koen Vlassenroot (London: Zed Books, 2010).

250 Mwenda and Tangri, "Patronage Politics, Donor Reforms, and Regime Consolidation in Uganda," 459-60.

251 For example, there is a minister of defense, and a separate minister for security. Presidential advisors are also divided into security advisor and military assistant. Aside from the regular army, renamed as the Ugandan People's Defense Force (UPDF) since the enactment of the 1995 Constitution, there is a separate Presidential Protection Unit (PPU)

filled with individuals loyal to the NRM and the President in particular, transforming the formidable "military machine"[252] into a patronage network of the core elites within the NRM government.

2.3 "There Will Be No Compromise": NRM Preference for War

This duality of the LRA conflict—both as evidence of the regime's failure and process of power consolidation—meant that the NRM government had strong incentives to continuously pursue military action rather than negotiate for a peace settlement. The historical and political significance of the North and the LRA conflict served to further underscore the fact that the continued violence committed by the LRA in the North was evidence of the NRM's incomplete process of power-consolidation, heightening the importance of demonstrating its security capacity through military engagement. Simultaneously, given the instrumental use of the conflict situation, the government also faced negative incentive to engage in peace or ceasefire negotiation with the LRA. This resulted in a strong preference for continued military campaigns over negotiations regarding the LRA conflict.

While this does not mean that, as commentators such as Dolan had pointed out, the NRM government had a vested interest in swift *victory* per se,[253] it seems clear that between the years of 1986 and the ICC referral in 2003 the central government and the core NRM elites showed a consistent preference for military engagement with

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that functions as a private army for the President and consumes a significant amount of the defense budget. Finally, paramilitary organizations such as the Kalangala Action Plan have been established. Ibid., 460.

252 J. Oloka-Onyango, "New-Breed' Leadership, Conflict, and Reconstruction in the Great Lakes Region in Africa: A Sociopolitical Biography of Uganda's Yoweri Kaguta Museveni," *Africa Today* 50, no. 3 (2004): 37-38.

253 Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006*, 97.

the LRA.[254] President Museveni publically ruled out conversations with the LRA "bandits," and military advisors during this period continuously demonstrated confidence to the domestic public, claiming that the band of "few hundred" rebels can be defeated easily by the Ugandan national army.[255] It should be highlighted here that even before the ICC referral, the language of criminality was used to discredit the LRA and obscure the political causes of the continued conflict.

There were a few attempts to engage in peace negotiations with the LRA during the same period, some led by the government itself, while others were spearheaded by domestic civil society leaders or the international community. However, none of these negotiations were successful in ending the violence, largely due to the NRM government's inconsistent and lacklustre support for peace talks. For example, between late 1993 and 1994, the domestic and international public widely anticipated a negotiated settlement between the NRM government and the LRA, as Betty Bigombe, acting under the auspices of President Museveni as the Minister for the Pacification of the North, led a series of face-to-face negotiations with LRA leaders.[256] However, when Bigombe and the LRA leaders were close to a settlement, Museveni had a sudden change of heart and issued an ultimatum to the rebels to disarm and surrender to the government in seven days time. This not only humiliated the government's own negotiating team, but predictably led to the breakdown of the talks with the LRA resuming its attacks just three days after the President's announcement.[257] The situation was worse for civilian-led efforts for peace negotiations, as the government sabotaged attempts at meaningful dialogue by

[254] Two major military operations were initiated during this time: "Operation North," launched in 1991 and "Operation Iron Fist" launched in 1995 Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 50.
[255] Gersony, "The Anguish of Northern Uganda," 34.
[256] Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006*, 46, 86-89.
[257] Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 48.

publically stating that "[t]here will be no compromise" with the LRA, branding them "terrorists and criminals." [258]

3. THE POLITICS OF THE ICC REFERRAL

The decision to self-refer to the ICC by the NRM government thus takes place in the context of continued necessity and incentive for military engagement with the LRA. As will be argued below, the request for a judicial intervention from the ICC was not a radical shift from this previous preference for military campaigns. The following section will contend that the NRM government used the ICC referral as a form of judicial extraversion to address its diminishing international and domestic support, and obtain flexibility in its policy choices regarding the LRA conflict in order to effectively deal with divergent pressures from different actors.

3.1 DIVERGENT PRESSURES: CHANGING ATTITUDES REGARDING THE LRA CONFLICT

As the 2000s progressed, the NRM government was increasingly under fire from three constituencies that had played a significant role in consolidating and maintaining the NRM's power after its take-over of the government in 1986—the domestic public, military elite, and international community. Despite continuous claims of the government that it was close to achieving "total victory" [259] over the LRA, the persistent violence in the North and the consequent humanitarian crisis was creating a sense of anxiety and dissatisfaction amongst the three key constituencies of the regime. Furthermore, such discontent regarding the LRA conflict was escalating against a broader background of increasing internal and external pressures for political reform, specifically regarding the return to a multi-

[258] Alfred Wasike, "Museveni Rejects Rebel Compromise," *New Vision*, 20 June 1998.
[259] Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 50.

party electoral democracy,[260] and mounting suspicion regarding President Museveni's attempts to pervert the Movement system and personalise power,[261] adding potency to the specific criticisms regarding the LRA conflict.

The three groups, however, differed dramatically regarding how it wanted the NRM to change in its dealings with the LRA. While the domestic public and international actors increasingly pushed for a non-military solution to the conflict, such as a peace negotiation, the military elites continued to push for a military victory against the LRA. The following section will argue that the ICC referral in 2003 was a tactic of judicial extraversion adopted by the NRM government to increase flexibility in its political choices in the context of such divergent pressures, allowing it to continue military action to placate the military elites while simultaneously regaining the support of the domestic public and international community.

Consequently, rather than being a sign of the 'cascading' of the international norm of criminal accountability for atrocity crimes, or an example of a weak state being 'coerced' into accepting international criminal justice, the ICC referral was a conscious short-term tactic of the NRM government to enable continuous military engagement with the LRA.

Domestic Pressure: Demanding Peace

First, the domestic public was increasingly pressuring the government to bring a negotiated end to the LRA conflict, criticising the efficacy of the military campaigns. Unsurprisingly, the most fervent calls for a less violent approach to ending the LRA

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260 Micheal Bratton and Gina Lambright, "Uganda's Referendum 2000: The Silent Boycott," *African Affairs* 33, no. 1 (2001): 446-47. Refugee Law Project, "Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation," *Working Paper* 15 (2005): 7, 10.

261 Andrew M. Mwenda, "Personalising Power in Uganda," *Journal of Democracy* 18, no. 3 (2007). Roger Tangri, "Politics and Presidential Term Limits in Uganda," in *Legacies of Power: Leadership Change and Former Presidents in African Politics*, ed. R. Southall and H. Melber (Uppsala: Nordic Africa Institute, 2006).

conflict came from the Northern districts. The North has been, as discussed in the section above, a hotbed of anti-NRM sentiment due to historical conditions as well as the systematic marginalisation of the region from the national political process. Such dissatisfaction was amplified by the widespread perception that NRM and Museveni was cynically utilising the LRA conflict for illicit monetary profits or political strategies against opponents,[262] while the UPDF was either grossly incompetent or negligent in protecting civilians. It was common to encounter reports that the UPDF, nominally charged with protecting the Internally Displaced Persons (IDP) camps, would show up only after the most violent episodes of LRA attacks, substantially damaging the reliability of the troops in the region.[263] In fact, civilians in the region reported brutal treatment at the hands of the UPDF as well as the LRA throughout the conflict.[264]

Furthermore, such disapproval regarding the government's military campaigns against the LRA was only exacerbated by what was perceived as interference by the NRM elites, particularly President Museveni, in private efforts to negotiate peace with the LRA by prominent Northerners as discussed above. For example, in 2001, negotiations between the Acholi Religious Leaders Peace Initiative (ARLPI), an influential civil society group, and the LRA were disrupted by attacks by the UPDF.[265] While the UPDF explained that the attack was a result of a coordination mistake between the government and ARLPI, the ARLPI were nonetheless banned from further contact with the LRA,[266] effectively ending the conversations between the ARLPI and the LRA, which had seen piecemeal success since 1998. Furthermore,

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262 Refugee Law Project, "Behind the Violence: Causes, Consequences, and the Search for Solutions to the War in Northern Uganda," *Working Paper* 11 (2004): 23-24.
263 Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime*, 161.
264 See for example, "Abducted and Abused: Renewed Conflict in Northern Uganda," (Human Rights Watch, 2003), 41-43.
265 Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006*, 98.
266 Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime*, 166.

the NRM government continuously attacked key individuals that served as interlocutors between the government and the LRA, diminishing their legitimacy and effectiveness as negotiators.[267]

Such discontent of the Northern residents gained particular importance in the years leading up to the ICC referral in 2003 due to the shifting domestic political landscape, particularly pertaining to the declining support for the no-party Movement system. It is, indeed, rather unsurprising that the North was dissatisfied with the NRM and the results of its military campaigns against the LRA—in fact, Northern residents have been explicitly demonstrating their discontent by overwhelmingly supporting anti-Museveni candidates during the first parliamentary and presidential elections in the 1990s.[268] Yet, in the early days of the Movement political system, the dissatisfaction amongst the general public, particularly from the North, was not a critical factor in the government's consolidation and maintenance of power. The NRM/A in its early days relied on both its effectiveness as an armed group and, as discussed above, the co-optation of potential rivals of power through the Movement system. Public support, in this context, was gained and maintained through the NRM/A's ability to provide security[269] and by the establishment of an extensive vertical patronage network, which rewarded individuals loyal to the NRM in the local level with political appointments, kickbacks, and payoffs,[270] tightly linking

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267 Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006*, 99.

268 Rubongoya, *Regime Hegemony in Museveni's Uganda: Pax Musevenica*, 84.

269 Nelson M. Kasfir, "Movement, Democracy, Legitimacy, and Power in Uganda," in *No-Party Democracy in Uganda: Myth and Realities*, ed. Justus Mugaju and J. Oloka-Onayngo (Kampala, Uganda: Fountain Publishers, 2000), 62.

270 Elliott Green, "Patronage, District Creation, and Reform in Uganda," *Studies in Comparative International Development* 45 (2010): 92-94. ; Stefan Lindemann, "Just Another Change of Guard? Broad-Based Politics and Civil War in Museveni's Uganda," *African Affairs* 110, no. 44 (2011): 406.; Andrew M. Mwenda and Roger Tangri, "Patronage Politics, Donor Reforms, and Regime Consolidation in Uganda," ibid.104, no. 416 (2005): 457. See also: Margaret Wokuri, "This is 'Districtisation' Epidemic Not Service Delivery," *The Monitor*, 15 May 2010.

the Ugandan state as its central government with the elite power structure that inhabits it. The lack of popular support in the North, thus, was not a central concern to the central NRM government and its elites.

However, from 2000 onwards, the declining support for the no-party political system and the increasing possibility of a political transition to a multiparty electoral system presented the possibility of a unified, discontented Northern public catapulting opposition elites outside of the NRM patronage network into the national political sphere. In June 2000, as provided by the 1995 Constitution, a popular referendum was held to determine whether the no-party Movement system of politics would continue, or a transition to a multiparty electoral system would be implemented.[271] Although nominally the referendum resulted in an overwhelming support for the Movement system and President Museveni, the fact that only 51.1% of the registered voters participated despite massive state-led efforts to get out the vote, pointed towards an increasingly sceptical public.[272] The "silent boycott," as Bratton and Lambright described the referendum, did not go unheeded by the NRM elites.[273] After the referendum the National Executive Committee of the NRM appointed an ad hoc committee to explore the possibility of transitioning into a multiparty electoral system as early as the following year. The committee, contradicting the nominal result of the referendum recommended a transition to a more pluralist political system, stating that a well-managed transition to multi-party electoral politics can enhance the legitimacy of the NRM and take away ammunition for the growing

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271 Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime.*, 84-85.

272 In the June 2000 Referendum, 9,609,703 voters were registered, and 4,914,524 voters participated. For comparison, in the 1996 Presidential elections 72.9% (6,193,816) of the voters participated. Bratton and Lambright, "Uganda's Referendum 2000: The Silent Boycott," 442.

273 Ibid.

opposition by appeasing public sentiment.[274] Regardless of how well managed the transition was to be, however, a more open political arena implied that the disgruntled Northern public could use their common dissatisfaction to introduce new political players into the national sphere.

Against this backdrop of general decline in the support for the Movement system, the dissatisfaction of the residents in the war-torn North, gained increased significance for the NRM central government, and President Museveni himself. Unified and vigorous opposition by the Northern residents possessed the potential in a more open, multiparty electoral system, to destabilise the Ugandan state as understood as the NRM elite power structure by introducing competing actors. The NRM government, in other words, faced strong incentive to placate the Northern public specifically regarding the LRA conflict, either by adopting a new strategy for peace, or further justifying its military approach to the conflict to persuade disgruntled constituents.

International Criticism: War of Reputation

Second, the NRM government was under attack by international actors regarding its handling of the LRA conflict. Criticism by international actors were particularly salient because the NRM government readily employed strategies of classical extraversion, or in other words, relied heavily on the external recognition of the representatives of the Ugandan sovereignty, and therefore an international juridical entity, to gain the material and political support necessary to bolster its consolidation of domestic authority. For example, as discussed in the previous section on the political economy of the LRA conflict, development aid, particularly for the military,

274 Sabiti Makara, Lise Rakner, and Lars Svasand, "Turnaround: The National Resistence Movement and the Re-Introduction of a Multiparty System in Uganda," *CMI Working Paper* 12 (2007): 2-3; "Turnaround: The National Resistance Movement and the Reintroduction of a Multiparty System in Uganda," *International Political Science Review* 30, no. 2 (2009): 188-89.

was used to bolster patronage networks throughout the country. Declining international support, thus, meant fewer resources to deploy in the NRM government and elite's domestic strategies of power consolidation.

In initial years of the NRM government, the NRM and various international actors established a relationship of mutual benefit, in which as much as the NRM government needed external support to sustain its patronage network or consolidate claims of authority domestically, certain international actors also seemed to need the NRM government for their own political aims. Throughout the 1990s, Uganda was generally lauded as a rare success story in post-conflict development and stabilisation by many powerful liberal democracies of the Global North,[275] particularly the United States,[276] and international organisations, despite the NRM government's "semi-democratic" or "semi-authoritarian" tendencies.[277] Specifically, Uganda's ready acceptance of neoliberal economic policies, including structural adjustments mandated by the International Monetary Fund (IMF), as well as its nominal increase in economic development markers, made Uganda an attractive candidate for donor nations and international organisations who were endeavouring to justify their neoliberal approach to economic development.[278] This 'utility' of the Ugandan example created additional incentive for international actors to continue their support of the NRM government to ensure that the parable of economic success and post-conflict stability through the implementation of neoliberal policies did not suffer an embarrassing fall. Consequently, the NRM government could depend on a

275 Mwenda, "Personalising Power in Uganda," 23.
276 Peter Rosenblum, "Irrational Exuberance: The Clinton Administration and Africa," *Current History* 101, no. 655 (2002): 195.
277 This form of government is sometimes referred to as a "hybrid regime." See: Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime.*, 11-13, 39-49.
278 Giovanni Carbone, *No Party Democracy? Ugandan Politics in Comparative Perspective* (London: Lynne Rienner Publishers, 2008), 59.

continuous flow of developmental aid and external political support to bolster and maintain its domestic power.

However, the immediate years leading up to the ICC referral also witnessed a change in the attitudes of external supporters of the NRM regime. Generally speaking, donor nations began to question the growing authoritarian tendencies of Museveni, especially his flailing human rights records. Even the Americans began to express concerns about the "continuing human rights problems" and the lack of "genuine political pluralism."[279] Most importantly, donor nations began to specifically criticize Museveni's persistent military engagement with the LRA. For instance, the EU expressed explicit "reservations about the military option," and the United Kingdom Deputy High Commissioner concluded publically that the "war effort [in the North] has failed."[280]

International criticism regarding the LRA conflict reached its apex in 2003 with Jan Egeland's visit to Northern Uganda. Egeland, then the UN Under-Secretary for Humanitarian Affairs, declared the situation as the "most forgotten and neglected crisis in the world."[281] International NGOs, such as Human Rights Watch, had periodically attempted to alert the international community of the humanitarian crisis unfolding in the North, especially focusing on the issue of child abduction and forced conscription.[282] However, the tone of the criticism changed with Jan Egeland's visit. While previous commentaries had been focused on the atrocities

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[279] Project, "Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation," 7, 10.
[280] Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 73.
[281] "Kony War a Forgotten Crisis," *The Monitor*, 11 Nov 2003.
[282] The "master narrative" of the LRA conflict was that the LRA consisted of "evil" perpetrators, generally men, who abduct, maim, enslave, and kill children. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 134-35. See, for example: Human Rights Watch, "Uganda: Child Abductions Skyrocket in the North," *Press Release* (2003), http://www.hrw.org/en/news/2003/03/27/uganda-child-abductions-skyrocket-North.

committed by the LRA, the newly emerging discourse included the concerns regarding the plight of the Internally Displace Persons (IDPs). Since late 1996, the NRM government had begun a policy of "protected villages" or IDP camps in pre-existing local economic or administrative hubs, such as Gulu, ostensibly for the purpose of civilian protection. Although some people voluntarily entered such camps, the majority of the residents claimed that the UPDF virtually forced them into leaving their homes and to enter the camps in a series of "screening exercises," which initially targeted vulnerable members of the population such as women and children, but were rapidly expanded to men as well.[283] Failure to comply with the UPDF's orders to relocate to the camps could result in intimidation, bombing and burning of villages to force relocation, and even execution.[284] By March 2003, following large-scale incursions by the LRA and the UPDF under the military campaign Operation Iron Fist I, the population of IDP camps had escalated to over 800,000 people, or over 80 per cent of the total population of the war-affected districts.[285] While the professed military and humanitarian objectives of facilitating protection of civilians and the removal of "soft-targets" such as foodstuffs and other resources by concentrating the population into camps near military barracks had some strategic value,[286] the UPDF's inability—or unwillingness—to provide adequate protection, as well as the increasingly dire day-to-day conditions of the camps were met with scepticism amongst the UN and donor nations regarding Museveni's political commitment in solving the LRA conflict. Donor nations, especially those in the EU, and the UN began to exert more explicit pressure on

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[283] The screening exercises were called *panda giri,* Swahili for 'climb into the truck.' Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006*, 47.

[284] The UPDF announced that anyone found outside of the camps would be killed, for example. Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 77.

[285] Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006*, 108. IRIN, "Uganda: Focus on Deepening Crisis in the North," (2002), http://www.irinnews.org/fr/report/35208/advancedsearch.aspx.

[286] Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 76.

Museveni to effectively deal with the humanitarian crisis in the Northern districts, and scale back on the military operations against the LRA.[287]

The growing scepticism of Museveni's strategy regarding the conflict in the North was aggravated by the simultaneous scrutiny pertaining to Uganda's involvement in the DRC. The highly controversial military intervention in the Eastern Congo had proved to be a costly venture, resulting in international and regional embarrassment by the early 2000s.[288] Reports of military misconduct and corruption had seriously damaged the UPDF's reputation in the international sphere, implicating UPDF officers in the Eastern Congo in egregious crimes against humanity and human rights violations.[289]

The repeated failures and scandals resulting from Uganda's military engagements in the Northern Acholi regions and Eastern DRC prompted donor nations to question the UPDF's operations as a whole, and threatened to increase oversight on the military budget. Furthermore, heightened scrutiny regarding the IDP camps in the North prompted a series of direct international involvement in the region, such as the involvement of humanitarian relief agencies. The UN Office for Co-ordination of Humanitarian Affairs (UNOCHA) reported that the number of relief agencies operating in the region had increased from 6 in late 1990s to 60 in late 2000.[290] But most significantly, Egeland's public statement brought an influx of international assistance for "peace-building" efforts, such as support for the revitalisation of "traditional" Acholi leadership as a member of civil society, "traditional" reconciliation ceremonies, and other forms of civil society-based initiatives that were

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287 "Donors Propose Plan for Peace," *The Monitor*, 17 Dec. 2003.
288 Human Rights Watch, "Uganda in the DRC: Fueling Poltical and Ethnic Strife," (New York: Human Rights Watch, 2001).
289 ibid.
290 Dolan, *Social Torture: The Case of Northern Uganda, 1986-2006*, 52.

supposed to strengthen communal ties, promote reintegration of former combatants, and act as a deterrence against violence.[291] While such direct international interventions did not amount to a unified pressure on the NRM government to totally abandon the military campaigns in the North, they did increase the necessity for the NRM government to provide a strong alternative justification for its continued conflict in the North.

By the time of the ICC referral in 2003, the heightened concerns regarding the NRM government's handling of the LRA conflict, coupled with the broader scepticism regarding the NRM and Museveni's human rights record, were restricting the flexibility of the NRM regime to use the LRA conflict as a process of power consolidation, resulting in tangible losses to the government. For example, reflecting the souring relations between the former paragon of economic development and influential donor nations from the Global North, Uganda failed to join the elite group of African states that benefited from the American Millennium Challenge Fund.[292] What is important to note regarding such international pressure is, contrary to the expectations theories of international criminal justice that focuses on the power relations between the Global North and South, while powerful actors from the Global North and international organisations were insisting upon the NRM to change its approach towards the LRA conflict, they were not necessarily advocating for an international or domestic criminal accountability mechanism for the atrocity crimes. Rather, the concerns of the international actors largely echoed the demands of the domestic public in that they were focused on much more immediate goals of cessation of violence against civilians and the amelioration of the humanitarian crisis in the North.

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[291] Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 119-78.
[292] Kevin J Kelley, "Graft Costs Uganda and Kenya Millions in US Aid," *The East African* (2006).

A Dissenting Military Elite: Calls for Continued War

Thirdly, the NRM was faced with critical voices from within the military elites of the NRM government to *continue* military operations against the LRA, contrary to the demands of the domestic public and international actors. The interests and preference of such military elites were significant to the rest of the political elites of the NRM government because of the role the military played in the consolidation of power after the government take-over in 1986. As a relatively small rebel group that came into power by violently overthrowing the previous government, the NRM relied heavily on its proven ability to deliver stability through military victory to gain public support and legitimise its claim to authority, particularly in its early days.[293]

The military, particularly the military elites, were rewarded with a prominent position within the Movement system of politics as the provider of security, and embodiment of the NRM's claim of monopoly over legitimate violence.[294] For instance, the prominent role of the military was acknowledged in the 1995 Constitution, which provided for a small number of non-elected military representatives in parliament.[295] Furthermore, on a less formal level, high-ranking military officials have been consistently employed in positions of power, as parliamentarians, ministerial appointees, and even district-level civil servants.[296]

Embedding the military in key government institutions, as explicated in the section above, inherently had the potential to function as a dual edged sword—while the inclusion of the military into elite politics, in part, bolstered the authority of the government, it also bestowed the military with the capacity to exert a certain degree

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293 Kasfir, "Movement, Democracy, Legitimacy, and Power in Uganda," 62.
294 Rubongoya, *Regime Hegemony in Museveni's Uganda: Pax Musevenica*, 132.
295 Oloka-Onyango, "New-Breed' Leadership, Conflict, and Reconstruction in the Great Lakes Region in Africa: A Sociopolitical Biography of Uganda's Yoweri Kaguta Museveni," 62.
296 Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime.*, 142.

of leverage onto the Museveni government. Thus, the military, through Museveni's conscious design, was transformed into a powerful interest group within the NRM elite.

This embedded military elites were increasingly linking the military failures in the North with the overall disillusionment with Museveni's leadership, using the lack of total victory against the LRA as a justification for a far-reaching political reforms.[297] Elite dissenters from the military laid the blame of the continuation of the LRA conflict on the inadequacy of the political leadership demonstrated by President Museveni himself. Consequently, these military critics were calling for a change in leadership of the NRM, and even suggesting opening up the political system to find viable political alternatives to Museveni.[298] The criticism by prominent military figures carried added weight in this context, as many of these critics had, at least nominally, access to privileged information regarding the military campaigns against the LRA. For example, General Tinyefuza—a prominent member of military since the NRM's rebel days in the bush as well as the previous director of Operation North—was virulent in his criticism regarding Museveni's dealing with the LRA conflict.[299] Based on his experience directing Operation North alongside President Museveni, Tinyefuza argued that the lack of definitive success against the LRA was due to the lack of *political* commitment and strategies from the NRM elites, particularly the President himself. Conseqeuntly, Tinyefuza argued that the political leadership of the Movement system should take responsibility for the continued conflict in the North and step down, and take steps to transition to a multiparty

[297] Carbone, *No Party Democracy? Ugandan Politics in Comparative Perspective*, 47.
[298] "Military Muscle, Political Problems: The Government's Failure to End the LRA's Brutal Campaign Points to a Growing National Crisis," *Africa Confidential*, 5 Dec. 2003.
[299] Tripp, *Museveni's Uganda: Paradoxes of Power in a Hybrid Regime*, 159.

democracy.[300] Thus, the repeated failure to placate the LRA became linked to not only Museveni's personal legitimacy as President, but also the legitimacy of the Movement political system.

Such criticisms levied against the NRM political elites, and President Museveni in particular, noticeably did not include suggestions for alternative approaches to engaging with the LRA. Military elites were not interested in peace negotiations, as the domestic public and international community was suggesting, nor were they preoccupied with the issue of accountability. In fact, what the military elites were demanding was a better, and more, military campaigns that was supported by far-reaching political commitment from the non-military elites of the NRM. Without doubt, continued war served the interest of the military elites as the military stood to gain materially from the conflict, as discussed in the previous section. Furthermore, by attributing the lack of victory to inadequate political will, the military elites were conveniently exonerating themselves from the responsibility for the continued violence in the North.

In sum, the military elite's continued appetite for war, and their declining support for the Movement political system and President Museveni, was making it difficult for the NRM government to abandon military campaigns in the North, creating additional incentive for continuing the violence. Indeed, the intensity of the military offensive grew greater with the rise of critiques from the armed forces; during the 2001 Iron Fist I campaign, the President personally directed some of the offensives and made frequent public appearances in military fatigue, creating a public perception of a hands-on, high-stakes military operation.[301]

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300 Ibid., 65.
301 Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 52.

3.3 International Criminal Justice as a Consensus Political Strategy

The self-referral to the ICC by the Ugandan government, in sum, was made in response to divergent pressures from three key constituents in its consolidation of power—namely, the domestic public, international actors, and domestic military elites. On the one hand, the domestic public, particularly the residents of the Northern districts, and various international actors, were growing increasingly critical of the NRM government's military campaigns against the LRA, and were demanding for non-military strategies to end the conflict, such as peace negotiations. Such dissatisfaction and demands gained more weight against the broader context of declining support for the Movement system and President Museveni both at home and abroad, and the steady movement towards a political transition to a multiparty electoral system, which could directly threaten the stability of the NRM government and exclusivity of the elite power structure of the Ugandan state. The NRM government and its core elites, particularly President Museveni, thus, faced the need to either consider an alternative to war against the LRA or a stronger justification for their domestic and international audiences.

On the other hand, the domestic military elites were pulling the NRM government in the opposite direction, as they demanded the continuation of military campaigns against the North, contending that the lack of military success was a sign of weak political commitment. The military elites were invested in the persistence of military engagement with the LRA not only because of the political economy of the conflict that had primarily benefitted them, but also because by pointing the finger at the political elites of the NRM they could sidestep the blame that the negligence and inefficacy of the UPDF was prolonging the conflict and exacerbating the humanitarian crisis. Such criticism by the military elites was directly linked to their intensifying scepticism regarding President Museveni's leadership and the utility of the Movement political system, pushing Museveni and his political supporters to consider an even stronger commitment to military campaigns against the LRA.

In response to such divergent pressures, the NRM government and its political elites, including President Museveni, pursued a multi-pronged strategy that addressed each strand of critique, thereby producing a series of seemingly contradictory decisions. For example, President Museveni revised his previous hostility towards providing positive incentives for reintegration for rebel combatants and signed the Amnesty Act in 2000,[302] which allowed rebel combatants to enter a demobilisation process without the fear of possible prosecution, under the administration of the Amnesty Commission.[303] The Amnesty Act was a result of vigorous lobbying by civil society groups that had been already "doing amnesty" even before the formal promulgation of the law,[304] such as the ARLPI, as an alternative means of ending the LRA conflict. On the other hand, the UPDF continued its military action in the North, carrying out military campaigns such as Operation Iron Fist I and II. Furthermore, in 2002 the NRM government passed the Anti-Terrorist Act,[305] which effectively prevented LRA leaders from participating in the Amnesty process. Furthermore, the Anti-Terrorist Act provided an opportunity to regain the support of the Americans, by transforming Uganda into a useful ally in the Global War on Terror (GWOT). Although the LRA has no known ties to the GWOT's broader target of Islamic

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302 Ibid. Following the signing of the law, in 2001 President Museveni encourages the Parliament to provide support for the Amnesty Commission. Yoweri Kaguta Museveni, "State of the Nation Address," (2001).
303 Clark, "The ICC, Uganda and the LRA: Re-Framing the Debate," 145.
304 Project, "Whose Justice? Perceptions of Uganda's Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation," 7,10.
305 See *supra* note 54.

terrorism, the NRM government insinuated a loose, but nonetheless potent connection between the conflict in Northern Uganda and GWOT.[306]

A War of Discourse: ICC Referral as Justification

The ICC referral, in this context, was a flexible political tactic that allowed the NRM government to address the contradictory pressures it was facing. More specifically, it helped to create a unified discourse of justification for its actions that would minimise the charges of inconsistency or 'flip-flopping.' The role of the state in the international criminal justice system as the enforcer of ICL, as noted in Chapter One, has the potential to justify violence carried out by state security forces in the name of international law enforcement. This ambiguous relationship between violence and international criminal justice meant that, unlike peace negotiations and the full implementation of the Amnesty Act, the ICC referral provided an opportunity to continue military action if necessary—an option that was gaining increasing importance with the internal dissent arising from disillusioned military elites. However, the ICC still provided mechanisms for responding to the international and domestic criticisms by altering the discourse surrounding the conflict. The criminalisation of violence and emphasis on individual responsibility provided by ICL could obscure the political origins of the LRA conflict, and therefore the close connection between the violence in the North and the NRM's power-consolidation strategies. Furthermore, the discourse of crimes against humanity provided the alternative discourse to elevate the LRA as an enemy of all humanity, rather than a rebel group that is specifically challenging the authority of the NRM government, highlighting the international community's recognition of the NRM government's status as an international juridical entity as well as circumvent the accusation of

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[306] Jonathan Fisher, "Managing Donor Percpetions: Contexualzing Uganda's 2007 Intervention in Somalia," *African Affairs* (2012): 414-15.

institutional failure of the Ugandan state. In conclusion, the ICC referral by the NRM was a case of judicial extraversion, in which the NRM used its access to the ICC to strengthen the NRM government and its core elite power structure in light of increased internal and external pressures.

The idea to refer the LRA case was presented to both Museveni and the nascent court by international legal professionals, acting as foreign legal advisors to the Ugandan government. Among them was Payam Akhavan, the former first legal advisor to both the ICTY and ICTR.[307] This was not the first time the LRA case was suggested to the ICC. Already in 1998, the UNICEF staff in New York had suggested the Court should consider Joseph Kony and the LRA, four years before the ratification of the Rome Statute.[308] However, the ICC had been considering the Ituri conflict in the DRC as its inaugural case. Uganda's legal advisors succeeded in convincing not only the Ugandan government, but also the ICC, that the LRA case would be a relatively straightforward case, especially with the full support of a comparatively well-resourced central government. The OTP readily accepted this idea, and through this brokerage the conflict in Northern Uganda became the first case of the ICC.[309]

The evidence presented by Uganda to prove the admissibility of the LRA case under the principle of complementarity is not only legally controversial, but also points towards the political motivation underlying the decision to refer. The criterion of complementarity was argued on the terms of inability to capture and arrest the

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307 Nouwen and Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," 947.
308 Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 83.
309 Nouwen and Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," 947. Phil Clark, "Law Politics and Pragmatisim: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," in *Courting Conflict? Justice, Peace and the ICC in Africa*, ed. Nicholas Waddel and Phil Clark (London: Royal African Society, 2008).

suspects, rather than a proven judicial inability or unwillingness to try such violators of grave crimes against humanity. Legally, this was a controversial move,[310] as there has been a near universal consensus amongst legal circles since the deliberations of the preparatory committees that the ICC should have jurisdiction only when national *trial* procedures are not "available or may be ineffective."[311] Contrary to the widely held expectation in transitional justice and international criminal justice literature, in which criminal accountability is pursued to diminish violence, either from a long-term perspective through deterrence and signalling commitment to peace or a short-term perspective by threatening potential spoilers to peace, by formulating the plea for the ICC's intervention through its inability to apprehend the alleged perpetrators, the NRM government effectively strengthened the case for continued violent pursuit of the LRA rebels using the discourse of international criminal justice.

This political motive of the referral is further highlighted by the fact that it was initiated by the Ministry of Defence instead of the Ministry of Justice.[312] In Ugandan political circles the question of pursuing a strategy of justice was presented in tandem with the on-going military offenses in the North, rather than as a radical departure from the military campaigns. The nature of Defence Minister Mbabazi's parliamentary testimony underscores this connection between military and judicial engagements regarding the LRA. Mbabazi, in his response to inquiries regarding the jurisdiction and procedure of the ICC, conflates the involvement of the NATO forces and the establishment of the ICTY with the ICC. He states:

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310 "Law Politics and Pragmatisim: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," 43.

311 John T. Holmes, "Principle of Complementarity," in *The Making of the Rome Statute: Issues, Negotiations, Results*, ed. Roy S. Lee (Cambridge, MA: Kluwer Law International, 1999), 47.

312 Nouwen and Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," 949.

> How does ICC operate? […] So, for this Serbian, for example, there is an international force, which is hunting for that person. So, should Kony be indicted, and should he be indicted before we capture him, who will look for him in order to compel him to appear before this committee? It is not Uganda; […] it will be international forces. […][313]

It is unclear as to whether this conflation was deliberate or simply misguided. However, what does become apparent in Mbabazi's statement is that the objective of involving the ICC was primarily to further the military operations in the North. Military action by the Ugandan government thereafter had the international legitimacy as a campaign to enforce international law,[314] rather than as an internal security issue, providing the NRM with the justificatory language to persuade its continued military actions in the Northern in light of pressure from the domestic public and international actors to engage non-violently with the LRA.

The utility of the ICC referral as a means of justifying military campaigns highlights the political effects of the specific characteristics of international criminal justice. The transformation of the LRA conflict into an issue of international law enforcement is predicated on the individualisation of responsibility and criminalisation of specific violent acts under ICL. In other words, the ICC referral, and the subsequent investigations and indictments, disaggregated the responsibility for the conflict in the Ugandan North on to the specific individuals in the LRA leadership, such as Joseph Kony, and highlighted the criminal nature of specific acts of violence, rather than the broader political context of the conflict. Consequently, the ICC referral transformed the ideological and discursive underpinnings of the conflict itself, in which the LRA became a criminal group, the Acholi population became passive victims, and the government became the enforcer of justice.[315] This transformation of the nature of the conflict was at the crux of the tactic of judicial

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[313] 29th July "Parliamentary Debate Records," (Uganda: Hansard, 2004)
[314] Branch, "Uganda's Civil War and the Politics of ICC Intervention," 184.
[315] Ibid., 190.

extraversion by the Ugandan government, as the re-shaping the narrative of the conflict as criminal activity allowed for an alternative justification for further military action in the North in front of its domestic and international audiences.

A Sceptical Domestic Audience

The transformation of the conflict from an internal conflict borne out of historical grievances and specific political strategies, however, seemed to have had only limited success in the domestic sphere. Domestic perception of the motivations behind the ICC referral was highly sceptical. Many civil society members, especially those who had been involved in various aborted peace processes in the North, found the timing of the indictment highly problematic. A public statement released by Save the Children Uganda in 2004 well expresses the concerns of the domestic NGO community:

> [w]e have to realize this war primarily involves children [...] LRA leaders might apply even more strict discipline to prevent witnesses from escaping [...] [The ICC investigation] may also have implications for the present practices of rehabilitation and reintegration.[316]

This view that the ICC involvement would only increase the level of violence and atrocities committed by the LRA was echoed by many Ugandans, many of whom saw the referral as no more than a political manoeuvre to reassert President Museveni's international credentials,[317] further increase defence expenditures and use it as an excuse to harass political opponents under the pretence of assisting an international criminal investigation.[318]

Additionally, the negative reception of the Court's intervention was in part due to the perception that the ICC was conducting a biased investigation. Public memory and perception of the conflict included atrocities and egregious negligence

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316 Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 84.
317 Ibid.
318 Branch, "Uganda's Civil War and the Politics of ICC Intervention," 185.

committed by the UPDF officials as much as the violence inflicted by the LRA. However, the ICC "cleared" the UPDF of any wrongdoings in the early stages of its investigations,[319] resulting in the widespread distrust of the ICC amongst the Ugandan public as well as allegations of a back room political 'deal' that shielded the government from any international inquiry.[320] This controversial decision by the OTP was ostensibly based on the argument that the crimes allegedly committed by the UPDF was not sufficient "grave" enough to justify and international criminal trial, and was being dealt with by the Ugandan military tribunals, and therefore did not satisfy the admissibility criteria of "unable and unwilling."[321] Although it is not definitively known as to whether the Court decided to leave out the allegations of UPDF violations due to explicit pressure from the NRM government, it is not difficult to imagine that ICC investigators may have encountered less than enthusiastic support from the NRM government and UPDF with respect to inquires into their own conduct. In other words, the biased focus of the ICC investigation was most likely the result of Uganda's use of its structural power in the international criminal justice system.

Creating External Alliances

The transformation of the nature of the conflict, however, was successful in increasing the number of available military options the UPDF could take. Specifically, the involvement of the ICC elicited further, and vital, cooperation from Sudan. Independent observers have long concluded that Sudan's support for the

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319 Clark, "Law Politics and Pragmatisim: The ICC and Case Selection in the Democratic Republic of Congo and Uganda," 42-43.
320 "Statement by Chief Prosecutor Luis Moreno-Ocampo" Statement Transcript *International Criminal Court.* (14 Oct., 2005) https://www.icc-cpi.int/nr/rdonlyres/2919856F-03E0-403F-A1A8-D61D4F350A20/277305/Uganda_lmo_Speech_141020091.pdf
321 Branch, *Displacing Human Rights: War and Intervention in Northern Uganda*, 189.

LRA had essentially become its lifeline.[322] Thus, Sudan's willingness to both eliminate its support for the LRA and cooperate with the UPDF became a crucial factor in the success of any military operations in the North. Prior to the involvement of the Court, Sudan had shown weak commitment in supporting the UPDF offense against the LRA, largely due to Museveni's illicit support of the secessionist Sudan People's Liberation Army (SPLA) movement in Southern Sudan.[323] However, after the court's intervention and the subsequent increase in international attention regarding Sudan's pivotal role in prolonging the conflict, Sudan has proven to be a more committed and reliable partner in the chase for Joseph Kony. Although Sudan has not ratified the Rome Statute, under the Vienna Convention on the Law of Treaties, it is bound to refrain from "acts which would defeat the objective and purpose of the statute."[324] Based on this international legal stipulation the ICC brokered a bilateral deal between Sudan and Uganda in which Sudan publically pledged to assist the capture and extradition of LRA commanders.[325] Although this agreement was not fully followed through, Sudan did indirectly assist UPDF's military efforts against the LRA by cutting off its military and financial support for the group, as well as allowing the UPDF to cross Sudanese borders during the Iron Fist II operation. In effect, thus, the UPDF was able to expand its military operations in to foreign soil without formal declaration of war.

4. CONCLUSION

The decision to refer to the ICC was a result of the interaction between contradictory demands for a peaceful resolution to the LRA conflict, and continued

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322 Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 49. "Khartoum's Game: Despite Energetic Denials, Khartoum Continues to Help Kony and the LRA," *Africa Confidential*, Oct. 2005.
323 *Vienna Convention on the Law of Treaties*. Article 18.
324 *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 91.
325 Ibid.

military operations within the overall political context of the NRM regime. This prompted Museveni to search for a compromise solution that allowed for further military action in the North while placating the growing dissatisfaction both from home and abroad regarding continued warfare. The ICC was employed primarily as a discursive tool that provided an alternative justification for the military engagement with the LRA in the face of contradictory pressures from the domestic public, international community, and the domestic military elites. By transforming the characterisation of the LRA conflict from a domestic insurgency and humanitarian crisis to a series of criminal acts that can be attributed to specific individuals, the NRM government and its elites sought renewed support from the domestic public and international actors for the UPDF's continued operations in the North. While this had limited effect in convincing the domestic public, particularly the Northern residents, of the necessity for continued military action, internationally, the NRM was able to receive cooperation and implicit support from external actors for an expanded military campaign. Specifically, the discursive framing of the LRA conflict as primarily the criminal activities of men like Jospeh Kony allowed for the trans-border military operations and active cooperation from the neighbouring Sudanese government, increasing the overall effectiveness of the UPDF strategies.

The political utility of the ICC, however, was ultimately eroded. The ICC referral did expand the ambit of possible military strategies for the UPDF, as the characterisation of the LRA as a criminal group led by enemies of humanity, helped pressure the Sudanese government to withdraw its support for the LRA. The individualisation and criminalisation of the violence in the Ugandan North also resulted in some assistance from international actors, especially the US, following the controversial "Kony 2012" campaign. However, substantial international military support, as alluded to in Mbazizi's presentation to the Ugandan parliament, did not materialise. Furthermore, the justification of chasing after individuals responsible for crimes under international law did not prevent embarrassment for the regime regarding the continuing humanitarian crisis in the North, which, by 2006, had created over two million IDPs.[326] Finally, the domestic public was highly sceptical of the intent behind the referral, and the seemingly biased investigations of the ICC only exacerbated the public perception that the NRM government desired further war in the North. In other words, the strategy of judicial extraversion through the ICC only produced limited impact on changing the overall political effect and dynamics of the LRA conflict.

Moreover, the strategy of judicial extraversion became less relevant over time precisely because the exogenous developments that made the demands made on the NRM government regarding the LRA conflict from the domestic public, international community, and domestic military elites, particularly salient, had changed over time, reducing the pressure exerted on the government and its elites to respond to its various constituents. A constitutional referendum held in 2005 ended the Movement system, and prompted a transition to a multiparty electoral democracy, under which the NRM was transformed into a political party.[327] The transition to a multiparty system allowed for the rise of prominent opposition politicians, such as Kizza Besigye, and the reintroduction of various political parties that contested for seats both on the local and national level of politics. Despite such developments, the NRM, and in particular its leader Yoweri Museveni, has managed to consistently dominate the electoral system through "clever political strategizing"

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326 "On the Brink of a Deal: A Faction of the LRA is Ready to Come to Terms with Museveni; The Rest Will Move on to Cause Mayhem Elsewhere," *Africa Confidential*, 14 Mar. 2008.
327 The Commonwealth, "Uganda: Constitution and Politics."

and appropriation of state resources.[328] Given that the NRM had managed to continue to inhabit the central government and dominate the elite power structure that represents the Ugandan state, the dissatisfaction of the public regarding the LRA conflict seemed to have diminished in its threat.

Furthermore, with the LRA seemingly decreasing in numbers and operating almost exclusively outside of the borders of Uganda, the rebel group had ceased to become a legitimate security concern for the NRM government. Such changing circumstances and limited success of the ICC referral resulted in a dramatic change in preference by the Ugandan government. Uganda has, in recent years, been increasingly attempting to paint the ICC as a scapegoat that "stands between" the Ugandans and "peace," and claiming that the referral can be reversed.[329] Although this may not be possible legally, Museveni and the Ugandan government do have the ability to make the ICC proceedings nearly impossible. In effect, Uganda—as represented by President Museveni and the NRM—has reverted back to the assumed 'baseline' position of Southern states by placing the ICC within the broader discourse of neo-imperialism, and advocating non-intervention of international actors in affairs of sovereign authorities, such as criminal prosecution, highlighting the short-term targeted nature of judicial extraversion of the ICC.

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[328] Angelo Izama and Michael Wilkerson, "Uganda: Museveni's Triumph and Weakness," *Journal of Democracy* 22, no. 3 (2011): 67-68. See also: Makara, Rakner, and Svasand, "Turnaround: The National Resistance Movement and the Reintroduction of a Multiparty System in Uganda."

[329] IRIN, "Optimism Prevails, Despite Setback in Peace Talks," (2008), http://www.irinnews.org/report/77823/uganda-optimism-prevails-despite-setback-in-peace-talks.

CHAPTER 3: CAMBODIA

Judicial Extraversion in the Domestic Rivalry

1. INTRODUCTION

On the 21st of June 1997, the two co-Prime Ministers of Cambodia, Prince Norodom Ranariddh of the United National Front for an Independent, Neutral, Peaceful and Cooperative Cambodia (FUNCINPEC) and Hun Sen of the Cambodian People's Party (CPP), sent to the then-UN Secretary General Kofi Annan a letter requesting "similar assistance" from the international community as "efforts to respond to the genocide and crimes against humanity in Rwanda and the former Yugoslavia"[330] regarding the atrocities committed by the Communist Party of Kampuchea (CPK), commonly known as the "Khmer Rouge."[331] This put into motion the series of event that led to the establishment of the Extraordinary Chambers in the Courts of Cambodia (ECCC) almost a decade later. Pursuant to the

[330] United Nations, "Identical Letters dated 23 June 1997 from the Secretary General addressed to the President of the General Assembly and to the President of the Security Council," ed. General Assembly 51th Session; Security Council 52nd Session (1997).
[331] Historically, the term 'Khmer Rouge' was coined by King Norodom Sihanouk to refer to Cambodian leftists, including Communists, who in his view was not linked to the Vietnamese Communist party, and as a counterpoint to the 'right wing' 'Khmer Blue.' Some academics have contested the utility of this nomenclature for lacking in specificity; for example, David Chandler eschews the use of the term in its entirety in his book *The Tragedy of Cambodian History: Politics, War and Revolution since 1945*. However, 'Khmer Rouge' has been in common currency to refer to the core of the Central Committee of the CPK around Pol Pot during the 1970s. Given that this core group changed its name and political organisation repeatedly until its full dissolution in 1999, to avoid confusion, this analysis will refer to the core CPK leadership that was the central focus of the discourse on accountability as the 'Khmer Rouge leaders,' and the armed/political group directly under their control as the 'Khmer Rouges.' The period under political control of the Khmer Rouges will be referred to as the 'Khmer Rouge era.' For a summary of the debate surrounding the term 'Khmer Rouge' see: "What is Khmer Rouge?," *Searching for the Truth*, June 2000.

1997 letter, the Secretary General appointed a 'Group of Experts'[332] with the mandate to "evaluate existing evidence and determine the nature of the crimes committed by Khmer Rouge leaders in years from 1975 to 1979," assess the "feasibility of bringing Khmer Rouge leaders to justice including their "apprehension, detention and extradition or surrender" to the relevant criminal jurisdiction, and "explore options for bringing to justice Khmer Rouge leaders before an international or national jurisdiction."[333] Negotiations between the UN and the Cambodian government began the following year, and finally after five years of protracted and circuitous negotiations between the two parties, the ECCC agreement between the UN and the Cambodian government was ratified by the Cambodian National Assembly in 2004 and came into force in 2005.

The ECCC was the second 'hybrid tribunal' established under the broad rubric of the international criminal justice system, conceived of as a Cambodian domestic court that operates with "international participation and applies international standards."[334] As a result, the ECCC is supported through the UN Assistance to the Khmer Rouge Trials (UNAKRT), and is operated through the cooperation of international and domestic personnel. It is mandated with prosecuting crimes committed by "Senior leaders of Democratic Kampuchea," the regime established by the Khmer Rouges, and by "those believed to be most responsible," between the dates of 17 April 1975 and 6 January 1979, for crimes under national and international law.[335]

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332 The Group consisted of: Sir Ninian Stephen (Australia), Judge Rajsoomer Lallah (Mauritius), and Steven Ratner (USA).
333 Group of Experts for Cambodia, "Report of the Group of Experts of Cambodia established purusant to General Assembly Resolution 52/135," (16 March 1999).
334 "Introduction to the ECCC," http://www.eccc.gov.kh/en/about-eccc/introduction.
335 ECCC, "ECCC At a Glance," ed. ECCC (Extraordinary Chambers in the Courts of Cambodia) (Phnom Penh, Cambodia2013).

EXPLANATIONS

The focus of existing explanations regarding the establishment of the ECCC is, either implicitly or explicitly, centred on understanding why a criminal tribunal for atrocities committed in the 1970s was only established two decades later. Literature generally agrees that the delay in, and eventual establishment of, the ECCC was a result of a compromise between the normative objective of prosecuting the Khmer Rouges for atrocity crimes and the political reality. The significant difference between arguments lies in whether commentators consider the normative commitment for criminal accountability as coming from the Cambodian political elites, particularly the leaders of the CPP, or the domestic and international civil society. For example, authors such as Jarvis and Fawthrop, argue that the broader context of Great Power politics, such as the geopolitical rivalry between the U.S. and China, prevented the long-standing efforts of the Cambodian political elites, specifically the CPP leaders, to prosecute the Khmer Rouges for atrocity crimes.[336] Others, such as Ciorciari and Heindel, argue that, while the broader context of Cold War politics did play a part in the delayed politics of accountability in Cambodia, the fluctuating commitment of domestic political elites was the fundamental reason why justice was impeded.[337] Finally, commentators such as Etcheson, as well as Heder and Tittemore, argue that demands for criminal accountability originated from

[336] Helen Jarvis and Tom Fawthrop, *Getting Away with Genocide? Elusive Justice and the Khmer Rouge Tribunal* (London; Ann Arbor, MI: Pluto Press, 2004).
[337] John D. Ciorciari and Anne Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia* (Ann Arbor, MI: University of Michigan Press, 2014), 14-21.

domestic and international civil society,[338] and were realised only with the end of the Cold War and the general increase in the support for international criminal justice.[339]

The following analysis presents an alternative explanation regarding why the Cambodian state requested an international criminal justice mechanism for Khmer Rouge era atrocity crimes in 1997. While it is undeniable that, generally speaking, before the global dissemination of the norm of criminal accountability and the end of the Cold War, an international criminal justice mechanism would not have been feasible, the chapter argues that the specific timing of the 1997 request is a result of the power-sharing dynamics of the transitional government. Existing literature has broadly accepted the view that the driving force behind the domestic politics of Khmer Rouge accountability was the leaders of the CPP, and therefore equated the preference of the Cambodian state with that of the CPP elites. However, the following analysis will argue that this overlooks the critical fact that the 1997 request was made by a power-sharing government, in a form of a joint agreement between the CPP and FUNCINPEC. Furthermore, it does not account for the counterintuitive fact that the joint letter was composed during the most ferocious competition between the two parties leading up to the national elections. Why, then, was international criminal justice pursued in this particular juncture in Cambodian history?

This chapter finds that a joint request between the CPP and FUNCINPEC for an international criminal justice mechanism in 1997 for Khmer Rouge era atrocity crimes was made possible due to changes in the internal balance of power within the

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338 Craig Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide* (Wesport, Connecticut: Praeger Publishers, 2005), 141-66.

339 Stephen; Heder and Brian D. Tittemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge* (Phnom Penh, Cambodia: Documentation Center of Cambodia, 2004), 3-5.

power-sharing government. Accountability politics more generally had benefited the CPP at the expense of FUNCINPEC in the past, making a joint request for international criminal justice an unlikely outcome. However, as the CPP began to use the promise of immunity from prosecution to attract defectors from the Khmer Rouge factions, and thereby increase its armed and financial capacity, FUNCINPEC aimed to use international criminal justice to delegitimise the political deals between the CPP and the Khmer Rouges in an effort to shift the internal balance of power. Consequently, the 1997 request was a strategy of judicial extraversion pursued by the weaker party in the power-sharing government, who attempted to instrumentalize its access to the international system as a the representative of the Cambodian state as an international juridical entity.

The chapter will proceed as the following. First, it will provide an overview of the politics of accountability more generally, focusing on the different roles historical memory and criminal accountability for Khmer Rouge era atrocities played for different domestic political actors until the 1990s. This will provide the background for the various preferences regarding international criminal justice of the CPP and FUNCINPEC. Second, it will consider the nature of the power-sharing government and political dynamic that was put in place after the 1993 elections organized by UNTAC, and how this framework of politics shaped the discussions surrounding a possible criminal justice mechanism for Khmer Rouge-era atrocities, or the so-called Khmer Rouge Tribunal (KRT). Specifically, it will discuss how the KRT featured in the domestic rivalry between FUNCINPEC and CPP, particularly with regards to each party's efforts to attract defectors from the remaining Khmer Rouges and receive international legitimacy for their actions. Finally, it will examine the role of Hammarberg's initiative in this context, including the role of external interests and pressures, and consider the nature and level of agency exercised by the Cambodian actors themselves.

2. Understanding the Politics of Accountability: Historical Background

Since the end of World War II in 1945 and until the late 1990s, Cambodia had been mired in a series of regional and civil conflicts, resulting in extensive damage across the country and innumerable civilian casualties.[340] The international and domestic discussions regarding 'accountability,' however, have been almost exclusively concentrated on the atrocity crimes committed by the Khmer Rouge between 1975 until 1979. On April 17th, 1975, the Khmer Rouge entered the capital, Phnom Penh, and established the 'Democratic Kampuchea (DK)' regime.[341] Inspired by extremist Maoist principles, the Khmer Rouge leadership under Saloth Sar, better known by his nom de guerre 'Pol Pot' and his close associates such as Ieng Sary, Khieu Samphan, Nuon Chea, and Ta Mok, embarked on a social experiment of unimaginable scale with the objective of creating a "self-sufficient agrarian state immune to unwanted foreign influence,"[342] which would ultimately leave more than

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[340] For a general overview of the conflicts, see: David Chandler, *The Tragedy of Cambodian History: Politics, War, and Revolution since 1945* (New Haven, CT: Yale University Press, 1991); Ben Kiernan, *How Pol Pot came to Power: A Histoyr of Communism in Kampuchea, 1930-1975* (London: Verso, 1985); Craig Etcheson, *The Rise and Demise of Democratic Kampuchea* (Boulder, CO; London: Westview; Pinter, 1984).
[341] Grant Curtis, *Cambodia Reborn?: The Transition to Democracy and Development* (Washington, DC and Geneva: Brookings Institute Press and UN Research Institute for Social Development, 1998), 4. For a historical overview of this period, see: Etcheson, *The Rise and Demise of Democratic Kampuchea*; Chandler, *The Tragedy of Cambodian History: Politics, War, and Revolution since 1945*; Francois Ponchaud, *Cambodia Year Zero*, trans. Nancy Amphoux (London: Allen Lane; Penguin Books, 1978); Michael Vickery, *Cambodia: 1975-1982* (North Sydney, NSW: Allen and Unwin, 1984); Elizabeth Becker, *When the War was Over: The Voices of the Cambodian Revolution and its People* (New York: Simon & Schuster, 1986). From here on, the period under the control of the Khmer Rouges will be referred to as the Khmer Rouge era or DK regime, interchangeably.
[342] Ciorciari and Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, 2.

1 million Cambodians dead and most of the physical infrastructure of the country destroyed.[343]

The astonishing extent of the atrocity crimes committed meant that almost no one was spared from the effects—today, the government claims that up to 95% of the current Cambodian population was "victimized" by the Khmer Rouge, either directly or indirectly.[344] The damage done by the DK regime was not only felt by the everyday Cambodian, but also by the highest echelons of society. Leadership of both FUNCINPEC and CPP, along with other political parties active during the transition period, were affected personally by the DK regime and the Khmer Rouges, with some having experienced first hand the brutal rule of Pol Pot and others having lost family members and loved ones to the atrocities. The King himself had lost five out of his fourteen children.[345]

The extensive nature of the violence and crimes committed, however, did not result in a shared or consistent preference between different domestic political actors, including FUNCINPEC and the CPP. In fact, accountability politics in general regarding the Khmer Rouge era atrocities were considered to be an exclusive political strategy of the CPP to increase its domestic appeal as the ruling party, as well as gain international recognition as a legitimate political actor. FUNCINPEC,

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343 Curtis, *Cambodia Reborn?: The Transition to Democracy and Development*, 4-5. For more detail on the nature of the crimes committed during this period, see: Ben Kiernan, *The Pol Pot regime [electronic resource] : race, power, and genocide in Cambodia under the Khmer Rouge, 1975-79*, ed. Inc ebrary, 3rd ed.. ed. (New Haven,: Yale University Press, 2008); "Introduction: Conflict in Cambodia, 1945-2002," *Critical Asian Studies* 34, no. 4 (2002); Heder and Tittemore, *Seven Candidates for Prosecution: Accountability for the Crimes of the Khmer Rouge*; David Chandler, *Voices of S-21: Terror and History at Pol Pot's Secret Prison* (Berkeley, and Los Angeles: University of California Press, 1999); *The Tragedy of Cambodian History: Politics, War, and Revolution since 1945*.
344Phay Siphan, (Spokesperson for the Office of the Council of Ministers), interview with author, Council of Ministers' Office, 2nd Apr., 2014
345 Kay Johnson, "Cambodia's Mercurial Former King, Norodom Sihanouk, Dies at 89," *Time*, 15 Oct., 2012.

on the other hand, was perceived to be less receptive to direct discussions of accountability for Khmer Rouge era atrocitiy crimes.[346]

2.1 History of Instrumentalisation

This discrepancy between the two parties has its roots in both the historical legacy of the post-DK politics more generally, as well as the political instrumentalisation of early attempts at criminal justice by the subsequent regimes installed in Phnom Penh after the fall of the DK regime. The DK regime was effectively overthrown on the 7th of January 1979, with the capture of Phnom Penh by the 'Kampuchean National United Front for National Salvation' (Salvation Front)—a combined armed force of approximately 150,000 Vietnamese troops and Cambodian dissidents. The Salvation Front gained control over most of the country, pushing the remaining DK forces to peripheral provinces, and established the People's Republic of Kampuchea (PRK), a direct predecessor of the CPP.[347]

The fact that a Vietnamese-backed armed group established the PRK caused both an international and domestic crisis of legitimacy for the new regime. First, the new PRK regime was not recognised by the international community as the representative of the Cambodian state as an international juridical entity.[348] In fact, between 1979 and 1993, the PRK was unable to represent the Cambodian state in the United Nations. This was due to the fact that the Vietnamese support of the PRK was considered by both the United States and China as a sign of increasing geopolitical influence of Vietnam and its sponsor, the Soviet Union. This resulted in a rather peculiar situation in which both the U.S. and China continued its support for

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346 See, for example: Tom Fawthrop, "Cambodia: Royalists Oppose Celebration of Pol Pot's Fall," *Inter PressService*, 10 Jan 1996.
347 Jarvis and Fawthrop, *Getting Away with Genocide?*, 16.
348 Daniel Kemper Donovan, "Join UN-Cambodia Efforst to Establish a Khmer Rouge Tribunal," *Harvard International Law Journal* 44, no. 2 (2003): 553-54.

the deposed Khmer Rouges as a counterforce against the PRK, and by extension, the Soviet Union. The Chinese, for example, provided economic aid and, along with the Thai military, gave military support to the remaining Khmer Rouge armed forces along the borders.[349] While the US fell short of directly supporting the Khmer Rouge, it condoned the re-arming of the group by the Chinese and Thai military.[350] Simultaneously, the rest of the international community continued to recognise the ousted DK regime as the representative of the Cambodian state in the UN General Assembly until 1982. Even after 1982, when the DK regime was replaced by the "Coalition Government of Democratic Kampuchea (CGDK)"—a coalition of various Cambodian political factions-in-exile, including FUNCINPEC, under the nominal leadership of deposed King Norodom Sihanouk—the leaders of the Khmer Rouges maintained their position as representatives of Cambodian sovereignty in the international sphere as domineering forces within the CGDK.[351] This international support meant that two different, warring political groups represented the Cambodian state for nearly fifteen years, with the Khmer Rouges representing Cambodia as an international juridical entity, and the PRK representing the Cambodian state as the government and domestic elite power structure.

Secondly, the establishment of the PRK also did not immediately receive domestic support. Some parts of the domestic public were hostile to the idea of a regime established with the help of Vietnamese—Chea Vannath, a social activist who worked extensively with both former Khmer Rouge cadres and victims of the regime, recall that some members of the public viewed the establishment of the PRK

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349 Kiernan, "Introduction: Conflict in Cambodia, 1945-2002," 487.
350 Ibid.
351 Ibid., 488.

not primarily as the fall of the DK regime, but as the "invasion" of the Vietnamese.[352]

Additionally, the domestic reception of the PRK were further complicated by the fact that many of the PRK elites were, at one point, cadres of the Khmer Rouge themselves. For example, Heng Samrin, the head of state of the PRK, was formerly a commander in the DK regime armed forces; Chea Sim, the PRK Minister of Interior was the a District Chief in the DK regime; and Hun Sen, named the Minister of Foreign Affairs, was another former commander in the DK armed forces.[353] As a result, the leaders of the PRK were faced with the difficult task of differentiating their regime from that of the DK, and assuring the domestic population that the disastrous policies of the DK regime will not be repeated.[354]

Early Attempts at Judicial Extraversion

Faced with a dual challenge of gaining international recognition and domestic support, the new political elites of the PRK attempted a strategy of judicial extraversion by establishing their own 'international' criminal tribunal for atrocity crimes, specifically, the crime of genocide. On the 15th of July 1979, just months after the Khmer Rouges were ousted from Phnom Penh, the PRK established the 'People's Revolutionary Tribunal (PRT)' to try the "Pol Pot – Ieng Sary Clique for the Crime of Genocide."[355] The tribunals' jurisdiction was primarily based on the Genocide Convention, rather than domestic criminal law, and the defence team was

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352 Chea Vannath, (social activist), interview with author, personal residence, Phnom Penh, 02 Apr., 2014

353 Evan Gottesman, *Cambodia after the Khmer Rouge: Inside the Politics of Nation Building* (New Haven, CT: Yale University Press, 2003), 45-47.

354 Ibid., 60-61.

355 Jarvis and Fawthrop, *Getting Away with Genocide?*, 41-42.

drawn from American lawyers such as Hope Stevens and John Quigley,[356] in order to give the PRT claims as a tribunal of international concern.

This domestic 'genocide trial,' as some proponents of the PRT refer to it,[357] was explicitly aimed at persuading the international community, especially the powerful Western liberal states, to abandon their support for the Khmer Rouges and accept the PRK as the representatives of the Cambodian state as an international juridical entity. In other words, the establishment of the PRT was an attempt to strengthen the PRK's international standing by exploiting its status as the domestic government. Perhaps as a result of a fatal misreading of liberal Western culture, the PRK leadership made no secret about the political objectives of the PRT, and publically acknowledged that a criminal trial of the leadership of the Khmer Rouges were designed to pressure the international community to withdraw its support from the Khmer Rouges. The president of the PRT stated, for example, that:

> [t]rying Pol Pot-Ieng Sary clique for the crime of the genocide will […] expose all the criminal acts they have committed […] and on the *other hand show the peoples of the whole world the true face of the criminals who are posing as the representatives of the people of Kampuchea*.[358]

In August of the same year, Pol Pot and Ieng Sary were tried *in absentia* by the PRT, for crimes of genocide, "betraying the revolution and fatherland" and "creating war by invading Vietnam,"[359] After a five-day trial in Phnom Penh's Chaktomuk Theatre, both Pol Pot and Ieng Sary were found guilty and sentenced to death. However, the PRT and its sentence failed to gain the necessary international attention for the strategy of judicial extraversion to be of any avail. When the trial did on occasion

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356 Ibid., 43.

357 Helen Jarvis is one commentator who consistently refers to the PRT as the 'world's first genocide trial' See: ibid.

358 Press Conference by President Keo Chanda, cited in: Howard De Nike, John Quigley, and Kenneth J. Robinson, eds., *Genocide in Cambodia: Documents from the Trial of Pol Pot and Ieng Sary* (Philadelphia, PA: University of Pennsylvania Press, 2000), 49. Emphasis added.

359 Jarvis and Fawthrop, *Getting Away with Genocide?*, 42.

attract international interest, the spotlight was focused on the procedural irregularities and overtly political objective of the tribunal,[360] not the commission of atrocity crimes by the Khmer Rouges.

Domestically, however, the criminal prosecution of Khmer Rouge leaders provided some political utility for the PRK. On the one hand, a public trial of the best-known individuals of the DK regime, albeit *in absentia,* provided an opportunity to establish a *general* distinction between the DK and PRK by criminalizing the overall policies of the DK regime. While some commentators, including Thun Saray, a prominent survivor and participant in the PRT proceedings, noted that most victims "did not feel that it was real justice for them, [it was] just providing justification for the Vietnamese invasion of Cambodia,"[361] the PRT was, to a limited extent, able to instil in the domestic discourse that the newly established PRK was distinct from the DK regime, despite the shared ideological commitments and the previous involvement of the political leadership with the Khmer Rouges.[362] By criminalising and individualising the policies of the DK regime, the PRK political leadership was simultaneously able to distance themselves personally from the Khmer Rouges, while distinguish their version of 'political' communism and the DK regime's "genocidal" policies.[363]

On the other hand, by deliberately limiting the scope of the trial to individual criminal responsibility of the two of the highest-level leaders of the DK regime, it was also possible for the PRK to simultaneously concentrate the guilt and blame of

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360 Scott Luftglass, "Crossroads in Cambodia: The United Nation's Responsibility to Withdraw Invovlement from the Establishment of a Cambodian Tribunal to Prosecute the Khmer Rouge," *Virginia Law Review* 90, no. 3 (2004): 902.
361 Thuns Saray (President of ADHOC, human rights organisation, former member of the PRT), interview with author, ADHOC office, 27 Mar., 2014
362 Gottesman, *Cambodia after the Khmer Rouge: Inside the Politics of Nation Building*, 66.
363 Ibid.

the atrocities to a select number of people, without implicating the broader system of violence.[364] Hence, through the political effects of criminalisation and individualisation, the PRK was able to strengthen its claim as the internal representative of the Cambodian state as the government, and avoid antagonizing the very public it aimed to govern by sidestepping the question of responsibility for the large number of rank-and-file individuals that carried out the actual torture, killings, and other forms of brutalities against the general population.

Shaping the Historical Narrative

The PRK's selective use of criminal justice as a means of controlling the narrative of responsibility and guilt is also reflected in the processes to establish broader historical memory by the new regime. The PRK, which subsequently changed its name to the State of Cambodia (SoC), was deeply committed to the preservation of historical memory of the Khmer Rouge period, including the establishment of memorial sites, the preservation of oral and documentary history of the victims, and the initiation of national commemorative practices—insofar as the resulting narrative reinforced the criminality of the DK regime leaders. For example the PRK turned the S-21 prison in Phnom Penh into the now-infamous Tuol Sleng museum, documenting the incarceration, torture, and executions carried out by the DK regime.[365] Initially, the museum was only open to foreign visitors under the assumption that the preservation of sites of crimes may augment the strategy of

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364 Chapter One; For further discussion regarding the relationship between the autonomous individual perpetrator constructed through the process of criminal justice and the nature of mass violence, see: Drumbl, *Atrocity, Punishment, and International Law*, 26. May, *Genocide: A Normative Account*, 12.

365 Judy Ledgerwood, "The Cambodian Tuol Sleng Museum of Genocidal Crimes: National Narrative," *Museum Anthropology* 21, no. 1 (1997): 87-89.

judicial extraversion,[366] but was by 1980 open to the domestic public. Furthermore, in 1984 the PRK established the 20th of May as the "Day of Hatred/Revenge,"[367] during which public events were held at the Tuol Sleng museum and the Choeung Euk memorial ('Killing Fields'), where people were urged to "remember the crimes committed by the Khmer Rouges and think of revenge."[368]

The PRK also aimed its public anger against other political groups that it perceived to be complicit with the Khmer Rouges, and potentially could be a rival to the PRK's claim to Cambodian sovereignty, including FUNCINPEC. Not only was the fact that the CGDK included the Khmer Rouges emphasised to the domestic public, but indirect associations were made between the atrocities of the DK regime and the continued armed conflict between the PRK and armed coalition including FUNCINPEC. For example, during the 'Day of Hatred/Revenge' commemorations, official 'anger' was not only directed at the DK regime, but also the other political groups in the CGDK and their "American imperialist" and "Chinese expansionist" backers.[369]

2.2 Legacy of PRK/SoC's Accountability Politics

In conclusion, the early efforts at judicial extraversion, and the accompanying strategies to establish the domestic historical memory of the criminality of the individual DK leaders exhibit a clear pattern of the post-Khmer Rouge Cambodian leadership utilizing the issue of Khmer Rouge era atrocities to strengthen their claim

366 Because this was during the Cold War, in the end only people from Communist states were able to visit. Paul Williams, "Witnessing Genocide: Vigilance and Remembrance at Tuol Sleng and Choeung Ek," *Holocaust and Genocide Studies* 18, no. 2 (2004): 237-38.
367 The literal translation of the Khmer term, T'veer Chong Kamhaeng would be the 'Day for Tying Anger,' which roughly means 'Day of Maintaining Rage.' However, interviewees colloquially referred to it as the 'Day of Hatred' or 'Day of Revenge.' Jarvis and Fawthrop, *Getting Away with Genocide?*, 74.
368 Chea Vannath Interview
369 Amitav Acharya, Sorpong Peou, and Pierre P. Lizee, eds., *Cambodia-The 1989 Paris Peace Conference: Background Analysis and Documents* (Millwood, NY: Kraus International Publications, 1991), xix-xxxi.

over the Cambodian state, both internally and externally. Youk Chhang, the head of the Cambodian Documentation Centre (DC-Cam), refers to this consistent policy as part of the "social movement" phase of the PRK and SoC, in which there was a consistent and concerted top-down effort to shape the narrative of the Khmer Rouge era, and therefore solidify the PRK regime's position as the "saviours" of the Cambodian people.[370] One of the most lasting legacy of this "social movement" of the PRK/SoC is the establishment of the close link between the political objectives and legitimacy of the PRK political elites and the issue of accountability. In other words, despite the widespread and near-indiscriminate nature of the Khmer Rouge era atrocity crimes, the issue of accountability was transformed into a particular political tool that was closely associated with a limited group of political elites.

3. International Criminal Justice: In the Era of Transition

Given such a close historical link between the issue of Khmer Rouge era accountability and the political strategy of the PRK/SoC elites, it is not surprising that the existing literature regarding international criminal justice in Cambodia have considered the politics of international criminal justice in the 1990s almost exclusively from the perspective of the CPP, who were self-consciously the successors of the PRK and SoC.[371] The view that the politics of international criminal justice in the 1990s was but a small part in a longer history of accountability politics instrumentalized by the CPP/PRK/SoC was repeated even in conversations

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[370] Youk Chhang (Director of Documentation Centre-Cambodia, DC-Cam), interview with author, DC-Cam office, 21 Mar., 2014

[371] For example: Jarvis and Fawthrop, *Getting Away with Genocide*; Ciorciari and Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*; Kirsten. Ainley, "Transitional Justice in Cambodia: The Coincidence of Power and Principle," in *Transitional Justice in the Asia-Pacific*, ed. Renée Jeffery and Hun Joon Kim (Cambridge, UK: Cambridge Univeristy Press, 2013).

with more critical domestic civil society members.[372] As a result, the narratives of accountability for atrocity crimes conceive of a consistent and bundled image of the Cambodian state, particularly with regards to the domestic government and elite power structure.

However, it is important to note that the request for international criminal justice came as a joint appeal approved by both the CPP *and* FUNCINPEC. Given the previous discussion regarding the historical legacy of accountability politics, FUNCINPEC's acquiescence to a request for international criminal justice seems counterintuitive. Consequently, in order to fully grasp the circumstances behind the 1997 request and its nature, it seems necessary to consider the overall dynamics of politics during this period.

3.1 FUNCINPEC and CPP: Domestic Rivalry

The request for international criminal justice in 1997 was put forth by a power-sharing government established between the CPP and FUNCINPEC. The last of the series of civil and regional conflicts that had plagued Cambodia for decades formally came to an end with the signing of the 1991 Paris Peace Agreements between the warring Cambodian factions, including, among others, the CPP (referred to as the SoC at the time of the Agreement), FUNCINPEC, and the Khmer Rouges (referred to at the time as the National Army of Democratic Kampuchea, NADK). The Agreements were also signed by a host of observer states, which included internationally and regionally critical states such as the USSR, United States, Vietnam, and China, and mandated the establishment of the UN Transitional Authority in Cambodia (UNTAC) to oversee the process of the political integration

372 Youk Chhang Interview, Chea Vannath Interview

of previously warring factions, and assist in the post-conflict transition to an electoral democracy.[373]

CREATING A FRACTURED GOVERNMENT

Pursuant to such goals, UNTAC sponsored the first general elections held between the 23rd and 28th of May, 1993. Despite the fact that the Khmer Rouges ultimately boycotted the elections, and therefore jeopardized the stability of the Peace Agreements,[374] the elections were considered procedurally a success, with almost a 90% turnout of registered voters, and was legitimized by international observers as being "free and fair."[375] FUNCINPEC won the elections by a mere 3 per cent.[376]

The precarious victory of FUNCINEPC provoked a vehemently hostile response from the runner-up CPP. Even before the official results were finalised, and the CPP refused to accept the electoral results and requested a full investigation by UNTAC, accusing FUNCINPEC of electoral misconduct, notwithstanding the international approval for the electoral process in general.[377] Simultaneously, it began secret negotiations with former King Norodom Sihanouk in tandem with strategies of intimidation against FUNCINPEC and the international community, jockeying for a power-sharing agreement that would allow them to gain more power than they had legitimately garnered through the elections.[378] For example, certain members of the CPP leadership put pressure on FUNCINPEC and UNTAC by threatening to secede from the state by setting up an 'autonomous zone' in the eastern provinces. While it is highly unlikely that the CPP was fully prepared to partition the country,

373 Cambodia-UNAMIC, "Background," http://www.un.org/en/peacekeeping/missions/past/unamicbackgr.html.
374 David Roberts, *Political Transition in Cambodia: 1991-1999* (Richmond, Surrey: Curzon Press, 2001), 66-69.
375 "The Cambodian elections of 1993," *Electoral Studies* 13, no. 2 (1994): 2; Curtis, *Cambodia Reborn?: The Transition to Democracy and Development*, 16.
376 *Cambodia Reborn?: The Transition to Democracy and Development*, 10.
377 Roberts, *Political Transition in Cambodia: 1991-1999*, 105.
378 Ibid., 112.

and it is questionable as to how much control the central CPP leadership actually had over this secession effort,[379] this belligerent move of the CPP became a catalyst for the formation of a power-sharing government, officially known as the Royal Government of Cambodia (RGoC). Sihanouk became the monarch and head-of-state, and the two parties were to each produce a co-Prime Minister and co-Ministers for the key Ministries of Defence and Interior/National Security. Other ministerial portfolios were divided between the two parties. This logic of power sharing extended to even the local levels of the state bureaucracy, with each party appointing its own 'undersecretaries' of ministries and co-vice-governors.[380] The result was a fractured government and its constituent institutions that was held together only by a temporarily accommodation of conflicting interests, rather than a power-sharing government established under the principle of unity.

Predictably, the power-sharing arrangement was riddled with impasses and mistrust between each 'side' of the government. Neither party felt that they had 'won' by establishing the power-sharing government. FUNCINPEC felt robbed of its electoral victory, while the CPP felt that it was deprived of the recognition for *de facto* governing the country for almost two decades since the fall of the DK.[381] With the next elections scheduled for 1998, both parties began to strategize to fully consolidate their respective power in order to prevent another power-sharing agreement. This meant that the politics of the transitional era operated under a 'zero-

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379 Curtis argues that there is not enough evidence to suggest that the establishment of the 'autonomous zone' was a coordinated party-wide effort, and argues that it was a sideshow orchestrated by renegade hardliners within the party who were concerned that they would get side-lined in the negotiations between the CPP and FUNCINPEC. Heder, who produced the report for UNTAC's Education and Information division, argues that there was a concerted strategy on the part of the CPP to use threats of secession to force a power-sharing agreement. See: ibid., 108-10.
380 Curtis, *Cambodia Reborn?: The Transition to Democracy and Development*, 15-17.
381 Ibid., 20.

sum' logic, where gains to one party was considered a loss for the other, as it further reduced the chance of a decisive victory in the coming elections.

Given the definitive timeframe set by the electoral schedule, as well as the competitive dynamic created by the results of the 1993 elections, it is unsurprising that the intensity of this rivalry reached its peak in the summer of 1997, just a year before the general elections—and when the joint request for an international criminal tribunal for Khmer Rouge era atrocity crimes were sent to the UN. David Hawk, the head of the Cambodia field office for the UN High Commissioner for Human Rights at the time, recalls the political climate of that period as "explosive" and highly unstable, with increased political violence in the streets of Phnom Penh and rumours of an armed clash between the two rivalling political parties.[382] Indeed, less than a month after the letter requesting international assistance for a Khmer Rouge tribunal was sent off in June 1997, the CPP launched an armed attack—described by some in the UN as a 'coup d'état'—on FUNCINPEC, targeting key military officials associated with FUNCINPEC and other high-level politicians.[383]

3.2 Accountability in the Domestic Rivalry

The broader issue of accountability for Khmer Rouge era atrocities, as well as the possibility of international criminal justice for the alleged crimes, played two distinct roles in this context of this domestic rivalry for power between FUNCINPEC and CPP. First, in the early stages of the political transition, leading up to and directly following the 1993 elections, the issue of accountability was discussed in general terms by the two parties as part of an effort to advance opposing narratives of history.

382 David Hawk, (Head of Cambodian field office for the UN High Commissioner for Human Rights), skype interview with author, 7 Feb., 2014

383 Brad Adams, "July 1997: Shock and Aftermath," *Phnom Penh Post*, 27 Jul. 2007.

The CPP reiterated the atrocities committed by the Khmer Rouges during the DK regime, and the complicity of international and other domestic actors in preventing the Khmer Rouge leaders from being held fully accountable for their deeds as a means of galvanizing public support. During the Paris Peace Conferences, the CPP made rhetorical references to international criminal accountability to increase its relative bargaining power in the negotiations as the 'moral' actor that ended the atrocity crimes under the Khmer Rouges. Simultaneously, the CPP attempted to remove the Khmer Rouges as well as its perceived CGDK partners by calling for an international prosecution of the "genocidal gang" of the Khmer Rouge leadership for the crimes committed during the DK regime.[384] Domestically, in anticipation of the inclusion of their rivals such as FUNCINPEC in the transition process, the CPP continued to emphasise their relative moral supremacy vis-à-vis other political actors. For example, the CPP internal radio communications at the time show that on the 'Day of Hatred/Revenge' commemoration ceremonies party officials were instructed to reiterate in detail the torture and suffering under Pol Pot's regime.[385]

After the Peace Agreements were signed and preparations for the 1993 elections were put into motion, the CPP effectively continued the PRK's 'social movement' of utilising the memory of the Khmer Rouge era atrocitiy crimes as a means of mobilising domestic support. This was particularly the case in the countryside, where the CPP felt that the people were more sensitive to the memory of the DK regime.[386] Long Panhavuth, the Cambodian country officer for the Open Society Program, who served as a local staff at the Cambodian field office of UN High Commissioner for Human Rights during the transition period, recalls that the CPP leaders

384 Jarvis and Fawthrop, *Getting Away with Genocide?*, 90-100; Ciorciari and Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, 17.
385 "Introduction," in *On Trial: The Khmer Rouge Accountability Process*, ed. John D. Ciorciari and Anne Heindel (Phnom Penh, Cambodia: Documentation Center of Cambodia (DC-Cam)).
386 Youk Chhang Interview

"claim[ed] to be a hero, […] [and] whenever a [CPP] government official […] is in a public gallery they say 'you owe your life to me, so you should vote for me.'"[387]

Furthermore, CPP propaganda leading up to the 1993 claimed that all parties aside from itself existed to weaken the Cambodian state, and therefore re-establish the "genocidal Pol Pot regime."[388] Rejecting the CPP, and supporting FUNCINPEC thus, was tantamount to legitimizing the atrocity crimes committed by the DK regime. For example, CPP leaders, such as Chea Sim and Hun Sen, appeared in a host of public rallies, accusing FUNCINECP leaders for having direct "Khmer Rouge" connections and harbouring "genocidal" intent against the Khmer people.[389] During the rallies, CPP officials would engage the audience in a type of call-and-respond, which would typically go as the following:

> Which party gives life to the people? *The CPP*
> Which party kills people? *The Khmer Rouge and Pol Pot.*
> Which parties cooperate with Pol Pot? *FUNCINPEC and Son Sann.*[390]

Additionally, while the CPP leaders, Hun Sen, could demonstrate that they had suffered alongside the people, both under the DK regime and in the re-building of the country after their downfall, many FUNCINPEC leaders were émigrés who had returned after 1991. Youk Chhang has suggested that the "deep knowledge" possessed by the CPP of the "human rights situation" during the Khmer Rouge era as not only political and military leaders who ousted the Khmer Rouges, but also as

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387 Long Panhavuth (Programme Officer, Camboida Justice Initiative), interview with author, The Shop Café, 31 Mar., 2014
388 Kate Frieson, "The Politics of Getting the Vote in Cambodia," in *Propaganda, Politics and Violence in Cambodia: Democratic Transition under United Nations Peace-Keeping*, ed. Stephen; Ledgerwood Heder, Judy (Armonk, New York; London, England: East Gate Book, 1996), 194.
389 Ibid., 195.
390 Ibid.

victims themselves of the atrocities, contributed to the CPP's domestic legitimacy in the eyes of the public.[391]

FUNCINPEC countered this historical narrative with an alternative interpretation regarding the PRK/SoC regimes as a period of compromised Cambodian sovereignty. While FUNCINPEC did not directly comment on the atrocities committed by the DK regime, it attempted to sidestep the historical narrative offered by the CPP and characterised the establishment of the PRK as the invasion of the 'yuon,' a racially pejorative term indicating the Vietnamese, rather than the salvation of the Cambodian people. FUNCINPEC thereby positioned itself as a political force that will achieve full independence by driving out the remaining Vietnamese and Vietnamese influence from Cambodian political life. A FUNCINPEC campaign rally call-and-respond would emphasise FUNCINPEC's legacy as the royalist inheritor of the earlier independence movement against French and Japanese colonisation, while eschewing any mention of the Khmer Rouge:

> Is it true that we have independence now? *No!*
> If we want independence, what do we have to do? *Vote!*
> Vote for whom? *FUNCINPEC!*
> Who gave Cambodia independence? *Samdech Ev!* ("Papa Prince," Norodom Sihanouk)[392]

In effect, the broader history surrounding the Khmer Rouges and its interpretation had become one of the key issues that differentiate the two rivals in front of the domestic public. In this context of the domestic rivalry in the early days of the transition and the competing instrumentalization of historical narratives, the specific issue of criminal accountability largely took a back seat, both in terms of possible domestic and international prosecution. However, given the CPP's implicit

391 Youk Chhang Interview
392 Frieson, "The Politics of Getting the Vote in Cambodia," 200-01.

references to the past attempts at criminal accountability—however flawed—and the historical legacy of the PRK/SoC's use of accountability as a political strategy, it was general perceived by domestic observers that the CPP would be more willing to push for a criminal accountability measure for Khmer Rouge era atrocities.[393] FUNCINPEC leaders, on the other hand seemed to be more publically willing to cooperate with the Khmer Rouges, irrespective of their past crimes, making the royalist camp an unlikely supporter for criminal accountability. For example, Thun Saray, who by 1991 was the head of the human rights advocacy organisation Cambodian Human Rights and Development Association (ADHOC), recalled visiting the Ministry of Foreign Affairs around 1993-1994, when the half-brother of King Sihanouk and FUNCINPEC official, Prince Norodom Sirviduh, openly admitted that his party was "willing to share power" with the Khmer Rouges if it "can bring peace"—showing him an office space allegedly prepared for a Khmer Rouge official, if a power-sharing agreement was reached.[394]

Second, following the establishment of the power-sharing government and the intensification of the competition, the threat of criminal accountability served primarily as a strategy to convince the remaining Khmer Rouges to defect to the government. The Khmer Rouges, while effectively side-lined from national politics, continued to engage in direct conflict with the Royal Cambodian Armed Forces (RCAF), the official military of the RGoC, and carried out terrorist attacks throughout the countryside, attacking villages, kidnapping residents and foreigners, and bombing critical transportation infrastructure.[395] Academic commentators disagree in their analysis regarding the degree of actual seucrity threat posed by the

[393] Helen Jarvis, (Advisor to Minister Sok An, former ECCC Outreach officer, government advisor on accountability), interview with author, Ngon Restraunt, 25 Mar., 2014
[394] Thuns Saray (President of ADHOC, human rights organisation, former member of the PRT), interview with author, ADHOC office, 27 Mar., 2014
[395] Curtis, *Cambodia Reborn?: The Transition to Democracy and Development*, 36-37.

Khmer Rouges. While some have argued that the Khmer Rouge after 1993 was "for the first time since 1970" isolated and vulnerable,[396] and effectively moribund as an armed group and political organisation,[397] others have argued that the relative unity of the Khmer Rouges compared to the fractured power sharing government made their return to power likely.[398] The paucity of accurate information regarding critical facts such as the size of the Khmer Rouge armed forces, their preparedness for battle, and even the question as to whether their leader, Pol Pot, was still alive, may have exaggerated the sense of peril among the Cambodian political elites.[399] However, regardless of the actual level of direct threat the Khmer Rouges posed to the RGoC as a whole, their actions were fuelling a sense of general apprehension.

The RGoC responded to this perceived threat of the Khmer Rouge in two ways. On the one hand, as noted above, RCAF engaged in direct military battle with the Khmer Rouge armed forces. On the other hand, the RGoC actively sought to persuade remaining Khmer Rouges to defect to the government, and therefore diminish the overall power of the organization. In order to attract defectors, the Cambodian government endeavoured to provide guarantees for the Khmer Rouges—especially the rank-and-file armed combatants—that the government would protect the defectors and their families from retaliation, and support their integration into wider Cambodian society. In a joint national radio statement, for example, the two Prime Ministers Ranariddh and Hun Sen urged the rebels based along the Thai border to defect, stating that "the Royal government promises that the local authorities and the entire country" will "take care" of the safety and

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396 Nate Thayer, "Wither the Khmer Rouge?," *The Phnom Penh Post* (1993), http://www.phnompenhpost.com/national/whither-khmer-rouge.
397 Curtis, *Cambodia Reborn?: The Transition to Democracy and Development*, 36.
398 Sorpong Peou, *Conflict Neutralization in the Cambodia War: From Battlefield to Ballot-Box* (Kuala Lumpur: Oxford University Press, 1997), 74-75.
399 Ok Serei Sopheak (former advisor to CPP Minister of Interior, current governance consultant), interview with author, Royal Hotel, 2 Apr., 2014

livelihood of the defectors, and that members of the armed forces will be able to integrate into the RCAF and retain their ranks.[400] Once individual Khmer Rouges surrendered to the government, they and their families would often be showered with gifts and assurances from high-level politicians that there will be no "human rights, property violations, and no robberies" targeting them.[401]

But perhaps the most significant aspect of the incentives offered by the government was the ability and authority it possessed to shield—or target—individuals from criminal prosecutions for the atrocity crimes they had committed, both during the DK regime era and in the subsequent years of civil conflict. In 1994, after vigorous debate, the parliament adopted the "Law on the Outlawing of the Democratic Kampuchea Group," a type of lustration law that made membership in the Khmer Rouge—both with regards to the political wing and the armed forces—a criminal act.[402] While the legislation was not directly designed to prosecute alleged crimes committed under the DK regime, the atrocities committed between 1957 and 1979 by the Khmer Rouges provided the underlying rationale for the criminalization of the organization.[403] While a seemingly sweeping and stringent legislation, what was particularly significant regarding the so-called 'Anti-Khmer Rouge Law' was that it deliberately provided significant leeway for the government to use the possibility of criminal prosecution as a flexible tool for defection. For example, the law provided for a six-month time frame during which rank-and-file cadres could surrender to the government and avoid prosecution, encouraging immediate defection. The law, in addition, stipulated that this conditional amnesty was not applicable for 'leaders' of

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400 "Government Appeals for More Khmer Rouge Defectors as Push Continues," *Agence France-Presse* (1996).
401 Leo Dobbs, "Cambodia Pledges to Look After Rebel Defectors," *Reuters News* (1996).
402 Post Staff, "What the Law Says," *Phnom Penh Post* (1994), http://www.phnompenhpost.com/national/what-law-says.
403 Royal Government of Cambodia, "Law on the Outlawing of the Democratic Kampuchea Group," (1994).

the DK regime. The glaring omission of a clear definition of who would qualify as a 'leader' of the regime provided the government with a great deal of flexibility and possibility for future negotiation regarding the scope of the amnesty.[404] Ultimately, Anti-Khmer Rouge Law provided for an opportunity for the government to concentrate the responsibility of current and past crimes to less cooperative, or less useful, individuals within the Khmer Rouges rank and file in the process of internal power consolidation of the Cambodian state-as-government.

This use of criminal accountability as a negotiating 'stick' for the government to attract defectors from the Khmer Rouge provide the basis for the increasing convergence of preference regarding international criminal justice between the two parties. By 1996, despite increasing tension between the CPP and FUNCINPEC 'sides' of the government, the two parties are said to have reached a private agreement to jointly further pursue accountability measures—specifically regarding a possible international criminal tribunal for Khmer Rouge era atrocities.[405] This was a significant change in preferences for FUNCINPEC, which had generally eschewed direct discussions regarding the tragedies committed during the DK regime until this point. However, by 1996, both FUNCINPEC and the CPP were quietly considering options for a future 'Khmer Rouge tribunal,' potentially of an international character, requesting legislations drafts and legal advice for foreign professionals.[406] The CPP Prime Minister Hun Sen "repeatedly request[ed]" Yale University's Cambodian Genocide Program (CGP) to draft a law for the Cambodian government "calling upon the international community to establish an international tribunal for the Khmer Rouge […]."[407] The draft is said to have been vetted by the Cambodia's

[404] Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide*, 134-35.
[405] Former Government Advisor, Confidential Interview
[406] ibid.
[407] Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide*, 135.

Council of Ministers and presented to the National Assembly's Legislative Commission,[408] but given the fractured nature of the government at the time, it is unclear as to how much support or resistance the draft faced from FUNCINPEC ministers and members of parliament. However, simultaneously, FUNCINPEC is also said to have clandestinely requested technical advice from Taiwanese experts regarding a possible international tribunal for the Khmer Rouges.[409]

Khmer Rouge Defections: Tipping Point in the Domestic Rivalry

If FUNCINPEC and the CPP reached a mutual agreement that a 'Khmer Rouge tribunal' of an international character needed to be considered, especially in the context of encouraging defections from the remaining Khmer Rouge forces, why did the parties request legal advice regarding the potential tribunal separately and covertly? This was due to the fact that mass defection from the Khmer Rouges not only served to weaken the group as a whole, and therefore increase the Cambodian state's overall security situation, but also had the potential to serve as a 'tipping point' in the rivalry between FUNCINPEC and the CPP. Theoretically, surrendering or defecting Khmer Rouges forces were either incorporated into RCAF or given the means to re-enter civilian life. However, given the nature of the fractured power sharing government, it became increasingly attractive and feasible for the defecting Khmer Rouges to join one 'side' of the government, rather than to the RGoC as a whole. In fact, RCAF itself was not considered a fully unified or neutral force. With prominent CPP leaders controlling the key ministries of Interior and Defence, and the fact that the majority of the rank-and-file soldiers of RCAF had previously served in the army of the PRK/SoC, RCAF was considered to be primarily under

408 Ibid.

409 Thun Saray Interivew, Former Government Advisor, Confidential Interview

the control of the CPP.[410] Furthermore, despite strong international pressure to demobilize the armed forces of each political party, both FUNCINPEC and CPP continued to build-up their private armed forces.[411] In this context, defecting and surrendering Khmer Rouge cadres were given the opportunity to pledge their allegiance to only one party, and therefore provide the means for each party to increase its relative military and political strength.

In fact, both parties perceived the threat of a mass, single-sided defection of a Khmer Rouge faction to be great enough to completely change the outcome of the competition for power. As the 1998 elections were approaching, FUNCINPEC was proving to be the significantly weaker party in the domestic rivalry. Despite the fact that the electoral victory in 1993 had established FUNCINPEC as the 'senior' partner in the power-sharing government, FUNCINPEC lacked the domestic political resources to effectively consolidate its power, let alone participate in the day-to-day governing of the country. On the most basic level, FUNCINPEC simply lacked the manpower to function within the government—in fact, without its CPP coalition partner, FUNCINPEC loyalists alone would not have been able to fill the necessary government posts.[412] The CPP, on the other hand, had been operating as the *de facto* government for more than two decades at the time of the transition.[413] While the terms of power-sharing agreement were intended to rectify this imbalance between FUNCINPEC and CPP's control over the governing structures, in reality, FUNCINPEC was increasingly finding it difficult to implement the terms of the agreement. For example, regarding the governmental positions in the 174 districts—the administrative unit between a commune and province in Cambodia—an

410 Curtis, *Cambodia Reborn?: The Transition to Democracy and Development*, 21-22.
411 Thun Saray Interview
412 Roberts, *Political Transition in Cambodia: 1991-1999*, 133.
413 W Shawcross, *Cambodia's New Deal*, Contemporary Issues Paper (Carnegie Endowment for International PEace, 1994), 41.

agreement had been reached in 1995 to evenly distribute the top positions between the two parties. However, regardless of the agreement, the CPP insisted upon a formula that would put CPP officials in majority of the top positions, leading Ranariddh to openly criticize the coalition, stating that the power-sharing agreement was but a "slogan" under which FUNCINPEC was relegated to a "puppet" of CPP, increasingly endangering its position with respect to the 1998 elections.[414]

A mass defection of the Khmer Rouges solely to the FUNCINPEC-side of the government, however, had the potential to significantly improve the weakening power of the party, and therefore upturn the relative power balance between the two parties. Indeed, by the mid-1990s, the CPP's perception of the threat posed by the Khmer Rouges seemed to have been rooted in the potential effect of mass defection to FUNCINPEC, rather than the possibility of the Khmer Rouges mounting a direct, debilitating military offensive. By the end of 1994, Hun Sen was confident enough to tell the US Ambassador that the overall security situation had been stabilised, with many of the previous battle-zone provinces, such as Battambang and Siem Reap, relatively quiet, and that the number of Khmer Rouge defectors had become substantial.[415] However, the advisor to the CPP Minister of Interior during this period recalled that, although the Khmer Rouges were generally perceived to have weakened, the government officials were wary of their continued presence as the group was still significant enough that a mass defection to FUNCINPEC could easily decide the outcome of the competition between the two parties.[416]

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414 Pierre P. Lizee, "Cambodia in 1996: Of Tigers, Crocodiles, and Doves," *Asian Survey* 37, no. 1 (1997): 66.
415 US Embassy Phnom Penh, "Hun Sen's Current Views," in *94PHNOMPENH4053 (Wikileaks 697)* (Wikileaks, 1994).
416 Ok Serei Sopheak Interview

As a consequence, both parties sought to independently attract Khmer Rouge defectors, and therefore explored options to incentivize immediate and extensive defections without the knowledge or consultation of the other party, including the establishment of a Khmer Rouge tribunal of an international character. This competition between the two parties was further encouraged by the internal factionalisation and fragmentation within the Khmer Rouges during this time. The Khmer Rouges by 1996 had split into broadly two groups, one led by former DK foreign minister Ieng Sary, concentrated around the gem-rich province of Pailin and Malay, and another led by the 'hard-liners' of the group, such as Khieu Samphan and Ta Mok, based around the province of Anlong Veng.[417]

In this context, the two parties' respective interest in a criminal tribunal of an international character between 1996 and 1997 was based on the strategic benefit the threat of criminal prosecution offered in terms of attracting Khmer Rouges defectors. Thus, the nature of each party's preference, both in terms of the commitment to criminal accountability and the commitment to an international tribunal, is seen to be highly circumstantial and contingent—absent the role future criminal prosecution played in incentivizing defection, there is little to suggest that there was more fundamental commitment towards criminal accountability as such for Khmer Rouge era atrocity crimes. In fact, in the case of FUNCINPEC, while the party was requesting clandestine legal advice regarding international criminal justice, it was simultaneously advancing a contradictory historical narrative regarding the DK regime, and actively re-casting the ouster of the Khmer Rouges in 1979 by the

[417] Roberts, *Political Transition in Cambodia: 1991-1999*, 140.

Salvation Front as the invasion of the Vietnamese and the loss of Cambodian sovereignty.[418]

IENGY SARY DEFECTS TO THE CPP

As the year 1996 progressed, FUNCINPEC's position became increasingly more beleaguered. Prince Ranariddh was particularly under threat, as FUNCINPEC's continued inability to exercise meaningful authority as the senior partner in the government significantly compromised the party leader's credibility, both within his own party and amongst international observers.[419] At this particular moment of internal and external crises of authority, Ranariddh instructed the FUNCINEPC general and close confidant Nhek Bun Chhay to directly negotiate the defection of Ieng Sary with the aim of shifting the relative power balance between FUNCINPEC and the CPP, and also increase his own personal credibility as the party's leader.[420] Ieng Sary's faction was particularly important given the economic importance of Pailin and Malai, which was under the full control of Ieng Sary as a *de facto* autonomous region. Ieng Sary was also perceived to be more receptive to the idea of reintegrating into mainstream Cambodian society, and therefore more likely to be willing to negotiate for a better deal regarding defection, using the wealthy provinces and armed forces under his control.

General Nhek Bun Chhay's manoeuvres, despite the party's precautions, became known to the CPP side of the government, creating an increasing sense of anxiety in the capital. Members of the CPP started to accuse FUNCINPEC for "resurrecting […][the] pre-1990 alliance with the Khmer Rouge."[421] The *Far Eastern Economic*

[418] Ibid., 137.
[419] Ibid., 136.
[420] Lizee, "Cambodia in 1996: Of Tigers, Crocodiles, and Doves," 68.
[421] Roberts, *Political Transition in Cambodia: 1991-1999*, 140.

Review went as far as to claim that there was an agreement between FUNCINPEC and the Khmer Rouges to form an 'anti-Hun Sen' coalition in the 1998 elections.[422]

The events took a surprising turn in August 1996. Ieng Sary defected to the government, bringing along with a few thousand of armed forces under his control and their family members—but chose to join the CPP-side.[423] Hun Sen, in order to regain control over the situation, is said to have joined the negotiations alongside Ranariddh, and both prime ministers had agreed to provide Ieng Sary amnesty from criminal prosecution.[424] Despite the fact that it was Ranariddh's negotiators that had done months of groundwork for the defection, Ieng Sary explained that he chose to defect under Hun Sen's protection, as he "did not want to be on the side of the losers."[425]

The defection of the former foreign minister of the DK regime, who himself had been found guilty of 'genocide' under the PRT in 1979 and sentenced to death *in absentia,* meant that the CPP had to move away from its previous position regarding accountability for Khmer Rouge era crimes. Although hard evidence of the terms of the deal has not come to light, it is generally accepted by domestic Cambodian actors that the price of Ieng Sary's loyalty to the CPP was an absolute guarantee of protection from criminal prosecution.[426] Indeed, just days after Ieng Sary's defection, Hun Sen publically stated that he was "ready to forgive and protect Ieng Sary" and that in his capacity as prime minister, he was willing to "guarantee the life of Ieng Sary, the security of Ieng Sary, […] [Ieng Sary] should get credit and encouragement

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422 Nate Thayer, "Ambiguous Alliances: Can the Khmer Rouge Survive Pol Pot?," *Far Eastern Economic Review*, 3 Jul. 1997.
423 Agence France Presse, "Ieng Sary, Murderer of Intellectuals." (8 August, 1996)
424 Lizee, "Cambodia in 1996: Of Tigers, Crocodiles, and Doves," 69.
425 Roberts, *Political Transition in Cambodia: 1991-1999*, 141.
426 Lao Monghay, (human rights activist), interview with author, Relax Café, 28 Mar., 2015, Chea Vannath Interview, Ok Serei Sopheak Interview

to finish the war and bring peace and national reconciliation.[427] While Ranarridh is also known to have privately offered amnesty to Ieng Sary, it is accepted amongst individuals close to the Cambodian government that the CPP was perceived to be in a better position to carry out its promise. The CPP not only had near full control over the judiciary, but Ranariddh was also increasingly seen as an ineffective and unpredictable leader, who was not able to even keep his own party cadres in line.[428]

Ieng Sary's decision to pledge allegiance to the CPP was a critical turning point in the rivalry between the two parties, greatly strengthening the CPP and therefore all but eliminating the possibility of a FUNCINPEC victory in 1998. In order to upturn the power balance before the general elections in 1998, it became imperative for FUNCINPEC to undo the alliance between the Ieng Sary faction and the CPP. In this context, because the CPP had promised amnesty for the defecting Khmer Rouges, FUNCINPEC faced a strong incentive to promote criminal justice mechanism for crimes committed by Khmer Rouges in the 1970s, including Ieng Sary, in order to derail whatever guarantee of non-prosecution the CPP had promised to the defecting Khmer Rouge faction.

Indeed, despite having been widely perceived as supporting reconciliation with the Khmer Rouges, and having initially supported an amnesty deal for Ieng Sary,[429] Ranariddh suddenly countered Hun Sen's messages of reconciliation and acceptance with stringent calls for criminal accountability. Ranariddh's criticism of the CPP's decision to embrace Ieng Sary was twofold. First, Ranariddh questioned the legal validity of the guarantee of amnesty provided to Ieng Sary by Hun Sen as the CPP failed to go through proper constitutional channels. Not only was there no legal

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[427] Chhay Sophal, "Cambodia's Hun Sen Offers Ieng Sary Protection," *Reuters News* (1996).
[428] Thun Saray Interview; Lao Monghay Interview
[429] "Political Observers in Phnom Penh have Speculated that Tension Between Ranariddh and Hun Sen," *Agence France-Presse* (1996).

basis for a single political party to grant amnesty from future prosecution as well as pardon from past sentences, as the constitution of the RGoC authorised only the King to grant pardons, but Ranariddh also argued that because the 1994 'Anti-Khmer Rouge law' had outlawed the Khmer Rouges, the reintegration of the Pailin-Malai faction needed to be put to debate in the National Assembly—in which his party, FUNCINPEC, still held majority seats.[430] Secondly, Ranariddh questioned Hun Sen's normative position in guaranteeing amnesty for high-ranking DK regime official and Khmer Rouge leader, who he compared to "Hitler":[431] "we welcome the Khmer Rouge but who among them? […] all those monsters who the international community also recognizes as criminals? We must have some conditions."[432]

Ranariddh's criticism was echoed by the King himself, who proved to be extremely reluctant to grant a royal pardon to Ieng Sary. In fact, King Sihanouk repeatedly demanded that the two-thirds of the National Assembly authorise Ieng Sary's pardon before he formally signed the decree—an unlikely outcome given the objection of FUNCINPEC parliamentarians. Despite such overt criticisms and attempts at obstruction by both Ranariddh and the King, Hun Sen was ultimately able to secure a royal pardon for Ieng Sary. The King issued a formal pardon for the death penalty handed down by the 1979 PRT, as well as amnesty from prosecution under the 1994 'Khmer Rouge law.'[433] The King protested that he had been strong-armed into granting an official pardon and amnesty because Hun Sen had prematurely publicised King's 'pre-authorisation' of the pardon, which the CPP leader had promised to keep private until the two-thirds approval by the National Assembly had

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430 "Khmer Rouge Defection Promotes Further Division in Coalition Government,," *BBC Monitoring Service* (1996).
431 Patrick McDowell, "Prince Compares Khmer Rouge Turncoat as Hitler," *The Associated Press* (1996).
432"Cambodian Leaders Debate Future Role for Khmer Rouge Defectors," *Agence France-Presse* (1996).
433 Ciorciari, "History and Politics Behind the Khmer Rouge Trials," 64.

been met. Sihanouk vigorously chastised Hun Sen's dishonesty, and suggested that for his 75th birthday, all prisons in Cambodia should be evacuated since "whatever the crimes of these male and female prisoners […] nobody can claim that these faults or crimes are as serious as those committed by the Khmer Rouge."[434] Such vocal criticism notwithstanding, civil society members suspected that the Hun Sen had negotiated a deal with the King and managed to silence Ranariddh in the process.[435]

3.3 PROPOSING AN INTERNATIONAL KHMER ROUGE TRIBUNAL

Ranariddh and Hun Sen's request to the UN SG for an international tribunal concerning the Khmer Rouge era atrocities was sent in this context of the CPP's victory in the internal rivalry to attract Khmer Rouge defectors, and FUNCINPEC's overall inability to effectively consolidate power in preparation for the 1998 elections. The international request was, in part, a result of the initiative of Thomas Hammarberg, then serving as the Special Representative of the UN Secretary General for Human Rights in Cambodia. Hammarberg had initially approached Prince Ranarridh with the proposal of drafting a request to the UN Secretary General as a means of jump-starting a process of accountability for Khmer Rouge era atrocities. Subsequently, at the behest of Prince Ranariddh, a draft request was drawn up by Hammarberg and his office, with the assistance of other UN officials working in Cambodia, such as David Hawk. Ranariddh, acting as the representative of the Cambodian state as an international juridical entity, readily assented to the idea of sending a letter requesting international assistance for a criminal accountability process for Khmer Rouge era crimes, and signed the draft request presented by Hammarberg. The UN official then approached Hun Sen, and with the knowledge

434 "Breakaway Khmer Rouge Leader Ieng Sary says 'I was not part of the decision-making'," *BBC Monitoring Service* (1996).
435 Thun Saray Interview

that Ranariddh had already approved the letter, Hun Sen also gave his assent, resulting in the joint letter that resulted in the establishment of the ECCC.[436]

FUNCINPEC's Attempt at Judicial Extraversion: Delegitimizing the CPP's Deal with the Khmer Rouges

Proactively requesting an *international* criminal justice mechanism can thus be understood in the context of Ranariddh's rhetorical rejection of Hun Sen's amnesty deal with Ieng Sary. Although privately, Ranariddh agreed that an amnesty and pardon for Ieng Sary was inevitable, if not entirely desirable, as FUNCINPEC lost out in the competition to attract defections of the Khmer Rouges, a political strategy that de-legitimized CPP's deal with the Khmer Rouges became necessary. Requesting an international criminal tribunal was particularly useful following Sihanouk's pardon and amnesty, as the King's official decree had, to an extent, put an end to domestic channels of de-legitimizing Hun Sen's protection of Ieng Sary. However, the King's domestic pardon and amnesty did not forestall international prosecution, opening up the possibility to derail CPP's deal with the Ieng Sary faction. Hammarberg had, after all, stated in his report to the Commission on Human Rights in January 1997 that "[a] thorough discussion of the issue of impunity […] against the background of the gross human rights violations committed in the 1970s" was necessary, and argued that the domestic amnesty granted by the King in the previous year to Ieng Sary, for example, should not preclude other means of establishing responsibility, such as a truth commission.[437] In other words, the request for an international criminal tribunal was a strategy of judicial extraversion pursued by FUNCINPEC, exploiting its nominal status as the representative of the Cambodian state as an international

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436 Thomas Hammarberg, "Efforts to Establish a Tribunal Against KR Leaders," *The Phnom Penh Post* (2001), http://www.phnompenhpost.com/national/special-insert-efforts-establish-tribunal-against-kr-leaders.
437 "Report of the Special Representative of the Secretary-General for Human Rights in Cambodia," (31 Jan., 1997).

juridical entity, once the options for domestic strategies to overturn the alliance between the CPP and Khmer Rouges had been exhausted.

3.4 International Pressure and Cambodian Agency

On first glance, however, it also seems plausible to consider the request for an international criminal tribunal for Khmer Rouge era atrocity crimes as a result of international pressure, rather than strategic action by state actors, confirming the theories of power asymmetry discussed in the Introduction. Furthermore, the growing international interest in international criminal justice for the Khmer Rouges seem to confirm the constructivist theory of norm dissemination, reflecting the broader context of increasing interest in international criminal justice.

Indeed, compared to the previous decades, during which most powerful states lacked the political will for international criminal justice more broadly, and accountability for Khmer Rouge crimes more specifically,[438] the 1990s brought a dramatic increase in external interest for prosecuting Khmer Rouge era crimes. On the one hand, specific political developments in Cambodia and the region, such as the end of the Cold War and the subsequent shift in geopolitical interests in Southeast Asia as well as the conclusion of the 1993 Paris Peace Agreement that officially brought an end to the Cambodian civil conflict, paved way for discussion regarding the Khmer Rouge era crimes to be pursued with some realistic possibility of fruition. However, the increased international interest regarding Khmer Rouge era atrocities was also in context of the general surge in the interest regarding accountability for domestic atrocity crimes, which had already led to the establishment of the ICTY and ICTR.[439] Such developments ignited interest among Western liberal states in particular,

[438] Such states included: France, the Netherlands, Ireland, and Sweden. Jarvis and Fawthrop, *Getting Away with Genocide?*, 77.
[439] For example, see: Sikkink, *The Justice Cascade*.

specifically the US, in initiating a trial of international character to try the Khmer Rouge leaders.[440]

The period between 1993 until 2000, for example, showed a dramatic increase of activities from within different branches of the U.S. government regarding the investigation of Khmer Rouge era crimes as well as the capture and prosecution of Khmer Rouge leaders, specifically Pol Pot. David Scheffer, senior advisor to Madeline Albright and later the U.S. Ambassador-at –large for war crimes issues during the Clinton administration, recounts in his memoirs that as early as 1993 he was tasked to discuss options of accountability for Khmer Rouge leaders by Albright, who had been confirmed as U.S. ambassador to the United Nations shortly before.[441] More concrete measures started to emerge from other branches of the U.S. government as the years went on. For example, in 1994 U.S. Senator Chuck Robb successfully pushed through to passage the 'Cambodian Genocide Justice Act (CGJA),' which requested for the U.S. President to "encourage the establishment of a national or international criminal tribunal for the prosecution of those accused of genocide in Cambodia."[442] This legislative act also created the Special Office of Cambodian Genocide Investigation at the State Department, which in turn funded the Cambodian Genocide Program at Yale University and the Documentation Center of Cambodia (DC-Cam)—organisations that collected invaluable evidence

[440] Ciorciari and Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, 20.
[441] D. J. Scheffer, *All the Missing Souls: A Personal History of War Crimes Tribunals*, ed. Eric D. Weitz, Human Rights and Crimes Against Humanity (Princeton, NJ: Princeton University Press, 2012), 344.
[442] Ibid.

regarding alleged crimes that continue to serve individual victims, academic researchers, and the ECCC.[443]

While the growing American appetite for accountability for the Khmer Rouge era crimes seemed to have been, in part, a contingent development reliant on particular personalities—mainly the sustained interest of Madeline Albright and David Scheffer—the U.S. was not alone in its increased interest for Khmer Rouge accountability. The kidnapping and execution of British de-miner Christopher Howes triggered heightened pressure from the British public on the UK government to bring justice for crimes committed by the Khmer Rouge—including Howes kidnap and murder—which resulted in a series of Scotland Yard investigations that implicated high-ranking Khmer Rouge leaders, including Ta Mok.[444] Other states, such as Australia, France, and Japan started to show at least rhetorical support for a Khmer Rouge tribunal.[445]

Thus, the proposal by Hammarberg was made in the general context of growing interest within different parts of the international community for an accountability process of an international character regarding the Khmer Rouge era atrocity crimes. The existence of such increasing preference of powerful members of the international community, especially that of the U.S., prima facie suggests that the 1997 initiative by Hammarberg represents a formal expression of international pressure, restricting the agency of both 'sides' of the Cambodian government.

CIRCUMSCRIBED INTERNATIONAL PRESSURE: DIVIDED PREFERENCE

443 Ciorciari and Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, 20.
444 Jarvis and Fawthrop, *Getting Away with Genocide?*, 115.
445 Long Panhavuth Interview

However, despite such increased international attention on the issue of accountability for Khmer Rouge era atrocities, divisions within the international community, especially between key regional and international players, decreased the overall intensity and effectiveness of international pressure on Cambodia. In short, international pressure was not so sustained as to make an establishment of an international criminal justice mechanism for Khmer Rouge era atrocity crimes inevitable.

Perhaps most significantly, the growing appetite for international criminal justice for Khmer Rouge atrocity crimes excluded perhaps the most important player in the region, China, and thereby circumscribed the potency of international pressure. China, as part of the UN Security Council P5, not only was a powerful international actor that could potentially veto UN Security Council resolutions to establish an international criminal tribunal, but also was traditionally an influential regional power that had means to sway the Cambodian government. Simultaneously, China was reluctant to support an international effort for criminal accountability in the Cambodia. On a general level, China had reasons to fear the prosecution of an Asian leader for communist-era mass crimes as a precedent.[446] But more specifically, China had little interest in having its official and unofficial relationships with the Khmer Rouge come to light in front of an international criminal tribunal. It was no secret that international actors who were interested in creating an accountability mechanism for the Khmer Rouge era crimes had to tiptoe around the Chinese. In fact, the U.S. from the very early 1990s had already written off the option of creating a Security Council mandated tribunal, fearing a Chinese veto.[447]

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[446] Etcheson, *After the Killing Fields: Lessons from the Cambodian Genocide*, 154.
[447] Ciorciari and Heindel, *Hybrid Justice: The Extraordinary Chambers in the Courts of Cambodia*, 22.

The position of the Chinese not only made the establishment of a Security Council mandated *ad hoc* tribunal unlikely, but also the bargaining position of the Cambodian domestic actors was strengthened by this significant schism amongst key international actors. The Cambodian officer of the Open Society program, a long-time advocate for accountability for Khmer Rouge crimes, noted that both the international—or Western—community, including the UN, was well aware that their preference for an international criminal tribunal for Cambodia may not translate into effective pressure in a context where Cambodians could count on almost unconditional support from the Chinese.[448] Cambodian domestic political actors could approach the issue of criminal accountability with a certain degree of confidence—no matter what the preference was of powerful liberal Western states or the UN, Cambodians could use China's self-interest and geopolitical influence to their advantage and potentially carve out their independent position by playing one powerful international party off another.

While the Chinese were the most significant counter-balance for the Cambodian actors, it is important to acknowledge that the rest of the international community was far from unified. While it seems fair to claim that in general, liberal democratic states were showing heightened interest in Khmer Rouge accountability, even amongst such states there were varying levels of commitment to this objective, and conflicting agendas.[449] For example, Japan was a significant donor nation during the 1990s that was, in principle, in favour of establishing an international accountability process for the Khmer Rouge era crimes. However, Japan was also intent on preserving its legacy as a key player in a 'successful' transition, and therefore was not keen on pushing through policy agendas that would derail the relative stability

[448] Long Panhavuth Interview
[449] Caroline Hughes, *The Political Economy of Cambodia's Transition 1991-2001* (London and New York: RoutledgeCurzon, 2003), 99.

achieved by the Paris Peace Agreements and UNTAC. This resulted in what was considered a rather uncritical relationship between the Japanese and the Cambodian government, in which the Japanese was relatively unwilling to push through normative agendas that would upset the Cambodian actors, and therefore push them to withdraw from the transition.[450]

Thus, the existence of actors such as Japan and China meant that the Cambodian government had room to manoeuvre when presented with pressure from international actors, especially when it was about the issue of criminal accountbility for Khmer Rouge era crimes. As a former advisor to one of the co-Ministers of Interior—a key player in government as well as the CPP party leadership—noted, the government had learned through the experience throughout the transition period that "the international community is not monolithic" and that different actors within the international community could be "approached differently" especially with respect to contentious questions such as accountability and human rights.[451]

Asymmetric Agency

Such limitation to international pressure, however, was felt differently by FUNCINPEC and the CPP. As the weaker domestic party, FUNCINPEC was more vulnerable to international pressure. The CPP was not strongly dependent on international legitimation and support as a means of consolidating its overall power, with both its policy of attracting Khmer Rouge defectors and building-up its domestic patronage network within the government bureaucracy enjoying success, providing it with more leeway to express agency towards international actors. The history of the CPP as the successor party to the Salvation Front that overthrew the

[450] Thun Saray Interview; Mathieu Pellerin (consultant, at LICADHO, human rights organisation), interview with author, LICADHO office, 28 Mar., 2014
[451] Ok Serei Sopheak Interview

DK regime, as well as the KPRP of the State of Cambodia, also increased the CPP's relative agency regarding the international community. On one level, the CPP could point towards the previous lack of international interest in holding the Khmer Rouges accountable, and the complicity of many international actors in supporting the Khmer Rouges claim to Cambodian sovereignty as the 'hypocrisy' of the international community, including that of Western liberal states. Furthermore, however politicised and irregular the 'show trial' of 1979 was, the CPP could easily point towards the establishment of the PRT and the subsequent calls for an 'international investigation and prosecution' of Pol Pot and other Khmer Rouge leaders[452] as evidence of their 'commitment' to the idea of criminal accountability for the Khmer Rouges—drawing a particularly stark comparison to the noticeable silence of the international community during the same period. This history of complicity and negligence of the international community, especially Western liberal states that were championing international criminal justice in the 1990s, was an easy political resource the CPP could tap into to 'turn the tables' of discussions regarding accountability. Hun Sen, even as he was proclaiming the controversial amnesty for Ieng Sary, did not fail to shame the international community for its past behaviour, perhaps in a bid to silence possible criticism, stating that Cambodians:

> […]should not forget that the United Nations allowed Mr. Ieng Sary to make speeches there until the formation of the tripartite coalition in 1982. Moreover, between 1991 and 1993, the KR [Khmer Rouges] was still recognised by the United Nations. So, you are asked not to be too extremists.[453]

On the other hand, FUNCINPEC was becoming increasingly reliant on support from external actors to boost its domestic position vis-à-vis CPP, given its repeated failure to build up its power through internal means. As a result, for FUNCINPEC,

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452 Jarvis and Fawthrop, *Getting Away with Genocide?*, 82.
453 "Political Observers in Phnom Penh have Speculated that Tension Between Ranariddh and Hun Sen".

Hammarbergs' proposal was both an offer it could not afford to refuse as well as a timely opportunity. Not only could FUNCINPEC initiate a powerful discourse regarding the illegitimacy of Ieng Sary's pardon, but also, by positioning the party in line with what was perceived to be the position of the international community, it could expect to garner international goodwill as a credible domestic actor. This international context indeed played a significant role in the Cambodian decision-making process—for example, the then- FUNCINPEC Minister of Justice, Ouk Vithun, states that it was "very important" for the Cambodian government that there was perceived international support for the idea of Khmer Rouge accountability in the decision to actively take up Hammarberg's proposal.[454]

Regardless of the greater agency it could exercise vis-à-vis the international community, the CPP on the other hand, chose not to go against FUNCINPEC's decision to request an international criminal tribunal. Hun Sen, as he had jumped on FUNCINPEC's bandwagon of negotiating with Ieng Sary to keep the situation under control, seemed to have thought that it was better to be a participant in newly developing situations, and therefore increase the possibility of controlling the outcome, rather than staying on the sidelines.[455]

Furthermore, in the aftermath of the controversial Ieng Sary pardon, Hun Sen faced pressure both from the general domestic public as well as from within the party to demonstrate that the CPP party leadership was not becoming too cosy with the Khmer Rouge. In effect, it was facing a similar situation, albeit to a lesser extent, it had in the early days of the PRK, when the PRK leadership strove to separate themselves from the Khmer Rouges through a criminal accountability process.

[454] Ouk Vithun (former FUNCINPEC Minister of Justice, current legal advisor to the King), interview with author, K-West restaurant, 28 Mar., 2014
[455] Thun Saray Interview

Given that the CPP leadership remained relatively unchanged from the core members of the PRK, the enthusiastic embrace of Ieng Sary raised some concerns that the CPP leadership was protecting its own past as members of the Khmer Rouge. Prominent civil society members, such as Thun Saray, a former participant of the PRT, were questioning the CPP's professed commitment to 'justice' for the victims.[456] Internally within the CPP, high-ranking members, such as the Minister of Interior, was questioning the decision to grant Ieng Sary a de facto total amnesty from criminal prosecution.[457] Consequently, around the same time as the 1997 letter, Hun Sen is seen engaging in public media stunts to demonstrate his status as a 'victim' alongside the majority of the population. For example, the CPP Prime Minister visited the grave in Memot, a rural district in the Southeast of Cambodia, where his firstborn son—who died at birth during the DK regime—was buried. The highly staged media event seemed to be directed at his domestic critics who had insinuated that Hun Sen may be hiding Khmer Rouge era skeletons in his "revolutionary closet."[458]

In this context, while agreement to create an international criminal tribunal as such may not have had a significant effect in quelling the discomfort of the public and party members, but publically declining Hammarberg's offer would have had negative repercussions—especially after Ranariddh had enthusiastically accepted Hammarberg's initiative. Thus, ironically, Hun Sen and the CPP were locked into a position to follow the lead of its weaker opponent.

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[456] Ibid.
[457] Hammarberg, "Efforts to Establish a Tribunal Against KR Leaders".
[458] Sonni Efron, "Talk of Amnesty Splits Cambodia," *Los Angeles Times*, 6 Jul. 1997.

4. CONCLUSION

The joint-decision to send a request for an international criminal tribunal to the UN Secretary General, thus, was more of a tentative coincidence that arose from a convergence of different interests and motives, rather than a true agreement between rivalling parties. FUNCINPEC, as the beleaguered weaker partner in an uneasy coalition, required a strategy that would de-legitimise the CPP's allegiance with the Ieng Sary faction of the Khmer Rouges while increasing international support for itself. Furthermore, its domestic weakness meant that it was becoming increasingly difficult for the party to circumvent the esclating international pressure for Khmer Rouge accountability, leading to Ranariddh's endorsement of Hammarberg's initiative for international criminal justice. In other words, Ranariddh's request for an international criminal tribunal for Khmer Rouge era atrocity crimes was both an example of a strategy of judicial extraversion, employed to strengthen FUNCINPEC's position in the state as elite power structure as well as the national government, using its access to international actors as the representative of the state as an international juridical actor. For the CPP, on the other hand, the joint request was simply a strategy of 'least resistance,' pursued to avoid the public perception that it had become too accommodating to actors the party itself had labelled as 'genocidal criminals' in the past.

The experience of Cambodia, thus, demonstrates how preference for, or against, international criminal justice can be highly differentiated between domestic political actors, highlighting the utility of an interlinked domestic-political framework that espouses a composite and disaggregated concept of the state. The political dynamic between the CPP and FUNCINPEC further demonstrate how the differentiated interests regarding international criminal justice does not only arise because of the nature of international criminal justice, as discussed in Chapter one, but also because of very specific domestic political conditions. Furthermore, the role of the international community, primarily the UN but also powerful states such as the U.S. and China, and its relationship with Cambodian political actors suggest that weakness and agency can be contingent and circumstantial attributes, varying not only between states but within the state, creating room for proactive instrumentalization by weaker state actors, albeit in a restricted manner.

Finally, the way in which the request for international criminal justice came about in Cambodia suggest the highly conditional and short-term nature of judicial extraversion. The highly conditional nature of FUNCINPEC's decision to pursue judicial extraversion, and its convergence of interests with the CPP, is belied by the fact that even as Ranariddh was enthusiastically supporting Hammarberg's initiatve, his generals were making clandestine trips to Anlong Veng, the stronghold of 'extremist' Khmer Rouges such as Khieu Samphan and Ta Mok to arrange for their mass defection—with the promise of protection from criminal prosecution and future integration into Cambodian politics after the 1998 elections as bargaining chips.[459] Furthermore, once the CPP had secured its victory in the 1998 elections by the means of an armed coup de force against FUNCINPEC,[460] it reneged on its promise to Hammarberg to commit to an international criminal justice mechanism, and endorsed a policy of "national reconciliation."[461] In fact, when a civil society member posed the question of a Khmer Rouge tribunal following the CPP's

459 Roberts, *Political Transition in Cambodia: 1991-1999*, 144-45.
460 For a summary of events leading up to and after the July 'coup de force,' see: Sorpong Peou, "Cambodia in 1997: Back to Square One?," *Asian Survey* 38, no. 1 (1998).
461 Chris Fontaine, "Defections by Top Leaders Pull Plug on Dying Khmer Rouge," *Associated Press News Wires* (1998).

electoral victory in 1998, the King is said to have retorted: "do you really think we will ever have a tribunal?"[462]

[462] Lao Monghay Interview

Chapter 4. Colombia

Keeping Justice at Home in the Age of International Criminal Justice

1. Introduction

On the 25th of July 2005, Law 975, better known as the 'Justice and Peace Law' (*Ley de Justica y Paz*, hereafter 'JPL') was enacted by the then-President of Colombia Álvaro Uribe Vélez, establishing a domestic legal framework to regulate the issue of accountability for serious crimes, including atrocity crimes, committed by the members of the *Autodefensas Unidas de Colombia* (AUC, the United Self-Defence Forces of Colombia), the confederation of right-wing paramilitaries.[463] The law was a result of a political compromise between the executive branch of the government, the legislators, and the leaders of the AUC, during the broader demobilisation negotiations between the Colombian government and the AUC. The JPL framework created a special criminal and restorative justice process within the existing domestic judiciary that provided for special measures of investigations, confessions, prosecutions and sentencing of high-level paramilitary leaders and reparations for victims.[464] The Colombian government claimed that this law would "ease the peace negotiations with armed groups and the individual and collective reincorporation of

[463] "Ley 975 De 2005," in *45.980*, ed. El Congreso de Colombia (Diario Oficial, 2005).
[464] Kai Ambos, "The Colombian Peace Process (Law 975 of 2005) and the ICC's Principle of Complementarity," in *The Colombian Peace Process and the Principle of Complementarity of the International Criminal Court*, ed. Kai Ambos and Florian Huber (Berlin: Springer, 2010), 1-2.

the members into civil life, guaranteeing that the victims will have the right to truth, justice, and reparation."[465]

Negotiations for the JPL framework took place not only in a broader historical context of expanding interest in and infrastructure for international criminal justice, including the establishment of the ICC, but also amidst a specific interest by members of the international community regarding the alleged crimes committed by all parties of the Colombian conflict, ranging from the paramilitaries, government forces, and the left-wing guerrillas.[466] In fact, the wider Colombian conflict was one of the first situations that were under preliminary investigations by the OTP of the ICC.[467] This raises the possibility that the Colombian state deliberately chose to pursue a domestic criminal justice process, and endeavoured to prevent an international criminal justice process. From this perspective, the Colombian case presents a counter-example to the two previous cases of Uganda and Cambodia, in which domestic political actors actively pursued an international criminal justice process for addressing atrocity crimes within their jurisdiction. It raises the question as to why specifically a *domestic criminal* justice process was pursued in lieu of an international criminal justice mechanism.

EXPLANATIONS

While most existing literature on the demobilisation of the paramilitaries in Colombia acknowledges that the establishment of the JPL framework was influenced by various external factors, including the broader normative trend supporting international criminal justice and the impact of actors such as the US, ICC, and the

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465 Art.1, Law 975 of 2005 (Justice and Peace Law); translation from Isabella Bueno and Andrea Diaz Rozas, "Which Approach to Justice in Colombia Under the Era of the ICC," *International Criminal Law Review* 13 (2013): 212.
466 "Ley 975 De 2005," Art. 1.
467 "Situation in Colombia: Interim Report," (International Criminal Court, Office of the Prosecutor, 2012), 2.

Inter-American Human Rights System, commentators generally assume that the Colombian state preferred a domestic accountability mechanism in lieu of an international prosecution.[468] Some commentators, such as Kai Ambos, have suggested that the preference of the Colombian government for a domestic solution was an obvious result of the relative robustness of the constituent institutions of the state, particularly the judiciary.[469] Others, such as Catalina Diaz or Rodrigo Uprimny, have argued that the elites representing the Colombian state, specifically the President Uribe and his allies, have deliberately pursued a limited domestic mechanism for the AUC to protect themselves from legal censure, due to the historic and continuing linkages between the paramilitaries and the Colombian government.[470] The Colombian case therefore seems to confirm the broad theoretical expectation regarding the behaviour of Southern states that even if states accept the normative foundations of international criminal justice, they will seek to protect their own authority to criminally sanction their own citizens, unless they lack the institutional capacity to do so or are coerced by more powerful actors.

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468 For example, see: Ambos, "The Colombian Peace Process (Law 975 of 2005) and the ICC's Principle of Complementarity." Bueno and Diaz Rozas, "Which Approach to Justice in Colombia Under the Era of the ICC." Jennifer S. Easterday, "Deciding the Fate of Complementarity: A Colombian Case Study," *Arizona Journal of International and Comparative Law* 26, no. 1 (2009); Lisa J. Laplante and Kimberly Theidon, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz," *Michigan Journal of International Law* 28, no. 1 (2006). José E. Arvelo, "International Law and Conflict Resolution in Colombia: Balancing Peace and Justice in the Paramilitary Demobilization in Process," *Georgetown Journal of International Law* 37 (2005-2206). Maria Paula Saffon and Rodrigo Uprimny, "Uses and Abuses of Transitional Justice in Colombia," in *Law in Peace Negotiations*, ed. Morten Bergsmo and Pablo Kalmanovitz, Forum for International Criminal and Humanitarian Law (FICHL) (Oslo Torkel Ophsal Academic Publishers, 2010). Catalina Diaz, "Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia," in *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*, ed. Kieran McEvoy and Lorna McGregor, Human Rights Law in Perspective (Oxford and Portland, Oregon: Hart Publishing, 2008). Barreto Miguel Henriques, "Los Procesos de Paz en Colombia y El Rol de La Comunidad Internacional," *Revista Análisis Internacional* 5, no. 2 (2014).
469 Ambos, "The Colombian Peace Process (Law 975 of 2005) and the ICC's Principle of Complementarity," 14-16.
470 Diaz, "Challenging Impunity from Below: The Contested Ownership of Transitional Justice in Colombia."; Saffon and Uprimny, "Uses and Abuses of Transitional Justice in Colombia."

This chapter argues that the Colombian state's preference for a domestic criminal justice process is due to three interrelated factors. First, the Colombian state perceived its structural power in the state-centric international criminal justice system to be weak. Although as both drafter and signatory to the Rome Statute of the ICC, the Colombian state had the same kind of access to the international criminal justice system as the Ugandan and Cambodian state had, the experience of interacting with the Inter-American Human Rights System made it wary of its ability to control an international mechanism like the ICC. Secondly, the Colombian state had developed a complicit relationship with the paramilitaries, particularly seen from the perspective of the elite political structure that was occupying the central government at the time. Paramilitaries had formed a symbiotic relationship with the Colombian state, both flourishing as a virtual extension of state power and expanding in the absence of domestic state authority. Consequently, the perceived lack of structural power made international criminal justice a dangerous option as it had the potential to result in a serious loss of face for the Colombian government, both domestically and internationally. Finally, despite the on-going conflict and lack of state authority in certain geographical areas, Colombian political actors perceived the Colombian state as the government and its constituent institutions to be fundamentally robust, particularly in its judicial and legislative infrastructure. This meant that in comparison to the Ugandan and Cambodian cases, the Colombian state did not see it necessary to pursue a strategy of judicial extraversion. In sum, the Colombian government saw the ICC more as a threat to be managed rather than a political opportunity that could be manipulated for short-term strategic gain.

The following sections will focus on the discussions regarding accountability for paramilitaries in the broader context of the demobilisation negotiations between the

AUC and the Colombian government between 2003 and the establishment of the JPL framework in 2005. It will provide a brief overview of the Colombian conflict, concentrating on the nature of paramilitary groups, their role in the overall conflict, and their relationship with the Colombian state. Furthermore, it will delineate the interests and objectives of the AUC leadership and Uribe administration in engaging in the peace negotiations, and demonstrate how these disparate interests converged towards a common preference for a domestic accountability mechanism for addressing atrocity crimes, that included minimal criminal proceedings and reduced sentencing. It will then discuss how this approach was received by both domestic and international actors, and argue that despite the criticism regarding the Colombian government's approach, domestic opposition groups shared the preference for an internal process, while prominent external actors showed either diffuse preferences for or indifference toward international criminal justice. Finally, the chapter will conclude by analysing the implications of the Colombian experience for the theory of judicial extraversion.

2. PARAMILITARIES IN THE COLOMBIAN CONFLICT

The so-called "longest armed conflict in the Western Hemisphere"[471] has its origins in the bloody ten-year civil conflict (1948-1958) known as "*La Violencia*" ('The Violence')[472] between the two main political parties, the Conservatives and the Liberals, who mobilised armed groups recruited from their respective rural

[471] Laplante and Theidon, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz," 53.
[472] For a general history of *La Violenca* see: Charles Berquist, Ricardo Peñaranda, and Gonzalo Sánchez, eds., *Violence in Colombia: The Contemporary Crisis in Historical Perspective* (Wilmington, Delware: Scholarly Resources, 1992), 81-84; Paul Oquist, *Violence, Conflict, and Politics in Colombia* (New York: Academic Press, 1980). Marco Palacios, *Between Legitimacy and Violence: A History of Colombia 1875-2002*, trans. Richard Stoller (Durham and London: Duke University Press, 2006), 93-134.

supporters and criminal actors such as profession assassins.[473] The chaos created by the conflict between the two parties paved way for the establishment of a military dictatorship under Rojas Pinilla (1953-1957), who in turn launched a repressive campaign against what he deemed subversive elements of society, such as communists or peasant self-defence groups, inserting the state security forces into the cycle of violence alongside non-state political armed groups.[474] *La Violencia* finally came to an end in 1958 with the promulgation of a political agreement between the Liberals and Conservatives, which established a system of power-sharing governance between the two parties known as the "*Fronte Nacional*" ('National Front'; FN).[475] Ironically, the FN power-sharing agreement that ended the violence between the Liberals and Conservatives gave rise to establishment of other, primarily left-leaning, armed groups that felt excluded from the new political system,[476] including the *Fuerzas Armadas Revolucionarias de Colombia* (FARC, Revolutionary Armed Forces of Colombia) and *Ejécito Liberación Nacional* (ELN, Army of National Liberation),[477] resulting in a new cycle of violence between government forces and various guerrilla groups.

The underlying structural context for this broader internal violence and armed conflict in Colombia lies in the persistent domestic institutional weakness of the Colombian state, particularly regarding the reach of the central government in the

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473 Jennifer S. Holmes, Sheila Amin Guitérrez de Piñeres, and Kevin M. Curtin, *Guns, Drugs & Development in Colombia* (Austin, TX: University of Texas Press, 2008), 47.
474 Ibid.
475 Laplante and Theidon, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz," 53.
476 Daniel Pécaut, "Guerrillas and Violence," in *Violence in Colombia: The Contemporary Crisis in Historical Perspective*, ed. Charles Berquist, Ricardo Peñaranda, and Gonzalo Sánchez (Wilmington, Delaware: Scholarly Resources, 1992), 227.
477 The official history of FARC, for example, traces it origin to the peasant-based self-defence groups that arose in the 1960s, while the ELN traces its origins to a group of sixteen youths in 1962 that had been exposed to radical revolutionary ideology during an academic visit to Cuba. For further history on the various guerrilla groups, see: Eduardo Pizarro, "Revolutionary Guerrilla Groups in Colombia " ibid.

expansive Colombian interior.[478] In large portions of the territory, the central government was unable to efficiently collect taxes, or provide security for the rural residents well into the latter half of the 20th century.[479] Some experts estimate that almost 40% of the territory was under the control of an armed group that formed part of the state up until the early 21st century.[480] This vacuum of internal state authority gave rise to robust political parties, as well as insurgent movements and criminal protection rackets, which provided rural residents with security and access to resources in return for loyalty or economic rent.[481] In effect, the broader Colombian conflict was a result of a continuous struggle between the central government and various sub-state authorities vying to inhabit the key power structures of the state.

2.1 In the Absence or Extension of the State? The Duality of Paramilitaries

The paramilitaries, a relatively recent player in the broader conflict in Colombia,[482] also emerged from this crisis of internal authority of the Colombian state. From one perspective, the paramilitaries were opportunistic actors operating in the *absence* of the state, providing security for local economic and political interests against the guerrillas. Simultaneously, the paramilitaries functioned as a clandestine *extension* of the state, acting on behalf of specific state agencies and complementing the counterinsurgency measures of the national security forces. The following sections

478 Arvelo, "International Law and Conflict Resolution in Colombia," 416. Palacios, *Between Legitimacy and Violence*, 138.
479 Alex McDougall, "State Power and Its Implications for Civil War in Colombia," *Studies in Conflict & Terrorism* 32, no. 4 (2009): 327-28.
480 Nazih Richani, *Systems of Violence: The Political Economy of War and Peace in Colombia*, 2nd ed. (Albany, NY: State University of New York Press, 2013), 47.
481 McDougall, "State Power and Its Implications for Civil War in Colombia," 328.
482 Jorge A. Restrepo and Robert Muggah, "Colombia's Quiet Demobilization: A Security Dividend," in *Security and Post-Conflict Reconstruction: Dealing with Fighters in the Aftermath of War*, ed. Robert Muggah (London and New York: Routledge, 2009), 33.

will argue that this duality of the paramilitaries, as both a competitor as well as a creation of state institutions became a critical factor in determining the Colombian government's opposition to an international criminal justice process for the paramilitaries.

(1) In the Absence of the State: Private Right-Wing Violence

On the one hand, paramilitaries can be seen as arising from the absence of state authority in rural Colombia, created by private citizens in light of the guerrilla warfare waged by left-wing insurgencies. The conservative sector of Colombian society, such as Conservative politicians or right-leaning academics, have argued that paramilitaries are essentially self-defence mechanisms of the rural population, whose lives and livelihoods were threatened by the continuous violence between the guerrillas and government forces.[483] While peasant self-defence forces do have a historical precedent in Colombia, the modern paramilitaries were more akin to private armies of powerful traditional rural interests, such as landowners, cattle ranchers, and investors.[484] These rural socio-economic elites used paramilitary groups to not only protect their lives from the left-wing guerrillas, but also to protect their properties and maintain the traditional social order.

The economic interests behind paramilitary activities, however, were not limited to legitimate economic activity. Powerful criminal interests, including the *narcotraficantes,* or drug traffickers, rapidly emerged as the most powerful criminal group in Colombia by the 1980s, as well as more long-standing criminal groups such as the emerald mafia, contraband smugglers, and loan sharks, also created and supported

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483 Ricardo Posada Maya (Professor of criminal and public constitutional law, University Los Andes), interview by author, University Los Andes, 31 Jul., 2015

484 Mauricio Romero, "Paramilitary Groups in Contemporary Colombia," in *Irregular Armed Froces and Their Role in Politics and State Formation* ed. Diane E. Davis and Anthony W. Pereira (NY, USA: Cambridge University Press, 2003), 178.

paramilitary groups.[485] Paramilitaries in this context were used not only to protect the existing interests of the rural elites, but also to further the criminal activity and economic interests of groups such as the drug traffickers, by exploiting the weakness of state security forces.

In reality, the distinction between the use of paramilitaries by 'legitimate' rural economic interests and criminal organisations was blurred in practice. The boundary between legitimate economic elites and leaders of criminal organisations became increasingly complicated with time, as successful drug traffickers began to invest in rural real estate, transforming themselves into large land owners or cattle ranchers.[486] Furthermore, the astounding economic success of drug traffickers during the 1980s, such as the Medellín cartel under the leadership of Pablo Escobar, had made the *narcos* and their families targets of kidnapping and extortion by left-wing guerrillas. This prompted the establishment of narco-paramilitiary groups, such as the aptly named *Muerte a Secuestradores* (MAS, 'Death to Kidnappers'),[487] further obscuring the distinction between legitimate 'self-defence' and criminal activity.

Not only were the criminal groups aligning themselves with traditional rural economic interest, but the rural elites were also using paramilitaries for criminal activity, further blurring the boundary between 'self-defence' and 'criminal' paramilitaries. Large landowners have for decades utilised their private armed forces not only to protect their lives and properties from the left-wing guerrillas, but also to

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[485] Richani, *Systems of Violence: The Political Economy of War and Peace in Colombia*, 100. "Smoke and Mirrors: Colombia's Demobilization of Paramilitary Groups," (Human Rights Watch 2005), 15.
[486] Francisco Gutiérrez Sanín and Mauricio Barón, "Re-Stating the Sate: Paramilitary Territorial Control and Political Order in Colombia (1987-2004)," *LSE Crisis States Programme: Working Paper Series* no. 66 (2005): 13.
[487] Jasmin Hristov, *Blood and Capital: The Paramilitarization of Colombia* (Ohio University Press 2009), 65.

"remove peasants from land they wishes to expropriate or develop."[488] More often than not, the fight against left-wing guerrillas served as a pretext by the rural elite to use violence to eliminate rivals, or attack other social groups challenging their socio-economic dominance, such as trade unions or human rights activists.[489] In fact, both international human rights organizations such as Amnesty International and domestic groups such as the Comisón Colombiana de Juristas ('Colombian Commission of Jurists'; CCJ,) have demonstrated that the majority of massacres targeting civilians were carried out by paramilitary groups, rather than left-wing guerrillas.[490]

(2) As an Extension of the State: Paramilitaries as Proxy Counterinsurgency Agents

On the other hand, paramilitaries were used as proxy actors by the Colombian military to conduct counterinsurgency strategies against 'subversive' elements of the rural communities, ranging from actual members of left-wing guerrillas to civilians suspected of harbouring left-leaning political sympathies. The use of paramilitaries in the state's counterinsurgency strategies was formalised in 1965 with Decree 3398 and the subsequent Law 48 of 1968, which provided the legal foundations for the creation of "civil defence" organizations with the purpose of aiding the state in establishing "national security."[491]

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488 "The Paramilitaries in Medellín: Demobilization or Legalization? ," (Amnesty International 2005), 4.
489 Ibid., 3.
490 Ana María Rodríguez Valencia (Representative before the UN, CCJ), interview with author, CCJ Office Bogotá, 3 Aug., 2015
491 "Decreto Legislativo 3398 ", (Diario Oficial No. 31.842: Gobierno Nacional, República de Colombia, 1965). "Ley 48 de1968," (El Congreso de Colombia 1968). Decree 3398 stated that the maintenance of "civil defence" was not the "exclusive competency" of the national armed forces, and that "all Colombians are obliged to actively participate in national defence, when it is necessary for the public to defend the nation's independence and institutions." Preamble, "Decreto Legislativo 3398" Translation author's own.

For the subsequent two decades, the use of civilian armed forces in the state's counter-insurgency efforts against the left-wing guerrillas became an integral part in the Colombian state's internal defence efforts.[492] The paramilitaries assisted the military's official counterinsurgency measures as the "rear-guard" that would consolidate and maintain social order in territories reclaimed by the army from the guerrillas, often using extreme violence and extortion against civilians.[493] Consequently, the paramilitaries and the Colombian state had a symbiotic relationship, in which the paramilitaries were necessary to enhance the state's functional capacity and the state was necessary for the paramilitaries to gain legitimacy for their use of violence.

However, by the 1980s and throughout the 1990s, the paramilitaries developed a more complex relationship with the Colombian state. By 1989 the government officially distanced itself from the paramilitary groups through a series of presidential decrees establishing criminal penalties for the formation or operation of private armed groups.[494] "Self-defence" groups had to gain presidential approval confirming their legitimacy, and a commission was formed to study the "paramilitary

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[492] William Aviles, "Paramilitarism and Colombia's Low-Intensity Democracy," *Journal of Latin American Studies* 38, no. 2 (2006): 386. The use of armed civilians in counterinsurgency strategies in part stems from the Cold War counterinsurgency doctrines of the US, referred to as "The Doctrine of National Security." The core of this doctrine called for the strategic combination of military, paramilitary, political, psychological, and economic instruments to combat left-wing insurgencies. Many of the Latin American militaries, including that of Colombia, incorporated this doctrine into their counterinsurgency strategies. Richani, *Systems of Violence: The Political Economy of War and Peace in Colombia*, 100. Aviles, "Paramilitarism and Colombia's Low-Intensity Democracy," 386. For more background on the influence of Cold War US counterinsurgency doctrine on Latin American military strategies, see: Michael McClintock, *Instruments of Statecraft: US Guerrilla Warfare, Counterinsurgency, and Counter-Terrorism, 1940-1990* (New York: Pantheon Books 1992), 228.

[493] The army faced a "mobility problem" in the vast hinterland of Colombia, in which it could not effectively prevent guerrillas from re-entering territories the army had reclaimed. In: Gutiérrez Sanín and Barón, "Re-Stating the Sate: Paramilitary Territorial Control and Political Order in Colombia (1987-2004)," 5.

[494] "Decreto 815 de 1989," (Diario Oficial No.38.785, 19/04/1989). "Decreto 1194 de 1989," (Diario Oficial No.38849, 08/06/1989).

problem"[495] alongside a proposal for a special police force to dedicated solely to the eradication of paramilitary organizations.[496]

The increasing distance between the Colombian government and paramilitary groups was in part due to the sheer brutality of paramilitary violence against civilians. In fact, the government's own statistics in 1987 demonstrated that the paramilitaries were responsible for more civilian deaths than all the guerrilla groups combined.[497] But more significantly, the uneasiness of the domestic political establishment was due to the escalating power of the nacro-paramilitaries, whose interests were increasingly at odds with the counterinsurgency aims of the government. Emboldened narco-paramilitaries began to directly attack government officials and institutions when the national government and its political elites interfered with the activities of the drug cartels. For example, *Los Extraditables* ('The Extraditables'), a narco-paramiltiary group, bombed the headquarters of the national intelligence service, and is alleged to have blown up a domestic plane mid-flight in order to eliminate politicians who were keen on extraditing the cartel leaders to the US.[498]

The rift between the central Colombian government and paramilitary organisations was further intensified with the increasingly conciliatory approach of the former toward the left-wing guerrillas. The governments under Presidents Belisario Betancur (1982-1985),[499] Virgilio Barco (1986-1990),[500] César Gaviria (1990-1994),[501] Ernesto

[495] "Decreto 813 de 1989," (Diario Oficial No.38.785, 19/04/19891989).
[496] "Decreto 814 de 1989," (Diario Oficial No. 38785, 19/04/1989).
[497] Aviles, "Paramilitarism and Colombia's Low-Intensity Democracy," 392.
[498] Palacios, *Between Legitimacy and Violence*, 212. Mark Bowden, *Killing Pablo* (London: Atlantic Books, 2002), 80.
[499] Betancur, a populist Conservative, signed a ten-month truce with the M-19, the guerrilla group responsible for the kidnapping of family members of the Medellín durg cartel, as well as a truce with the FARC and ELN for three years between 1984 and. FARC was allowed to form a political party, called the *Union Patriotica* (UP) and participate in the 1986 elections. The agreement with M-19 collapsed after a commando of M-19 members stormed the Constitutional Court in 1985, while the agreements with FARC and ELN collapsed following the assassination of UP politicians after the 1986 elections.

Samper (1994-1998)[502] and Andrés Pastrana Arango (1998-2002)[503] all engaged in peace negotiations with guerrillas groups, reversing the more hardline approach of the previous governments. Against this backdrop of increasing engagement in peace negotiations, paramilitary groups were formally outlawed in 1989, and President Gaviria publically reaffirmed the state's vigorous oppos[ition]" to paramilitary groups in 1990.[504] The paramilitaries responded to what they perceived as the government's accommodation of the guerrillas, and the subsequent de-legitimization of the paramilitary groups, by acting as deliberate spoilers to peace by launching attacks on demobilised guerrilla combatants and otherwise disrupting the demobilisation process. In a particularly egregious example, paramilitary commandos assassinated some 3,000 members of the *Unión Patriótica,* the political party established by the FARC in 1984 following a demobilisation agreement with the Betancour administration, effectively ending the peace process and driving the FARC back into war.[505]

Nevertheless, the Colombian state as a whole did not fully withdraw its support for paramilitary groups. Rather, during the 1980s and 1990s, the institutional apparatus of the state was split in its position regarding the paramilitaries, with the political wing of the government officially distancing itself from paramilitary activity, while

500 Barco, a Liberal president, engaged in negotiations for disarmament and reintegration with various left-guerrillas. In 1989, the M-19 broke rank with the other guerrillas and agreed to disarm and reinter society.
501 Gaviria, a Liberal president, engaged in demobilisation negotiations with several smaller guerrilla groups, as well as the FARC and ELN.
502 Samper, a Liberal president had limited negotiations with the ELN, FARC, and other guerrilla groups with the assistance of civil society.
503 Pastrana, a coalition president supported by both Liberal dissidents and Conservatives, was elected with the platform of far-reaching peace negotiations with guerrilla groups, primarily FARC and ELN.
504 "Political Violence in Colombia: Myth and Reality ", (Amnesty International 1994), 54.
505 Laplante and Theidon, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz," 60. For an overview of the history of *Unión Patriótica,* see Steven Dudley, *Walking Ghosts: Murder and Guerrilla Politics in Colombia* (New York and London: Routledge, 2004), 77-88.

the national military continued its close relationship with paramilitary groups. The key issue behind the schism was the peace negotiations between the left-wing guerrillas and the Colombian government, largely spearheaded by the executive branch. In return for a relatively peaceful handover of power to the civilian government and a guarantee of neutrality in partisan politics, the Colombian national military had been granted a significant degree of autonomy from civilian oversight and exclusive authority to determine national security strategies since the end of the military junta.[506] As a result, the efforts by the executive branch to negotiate peace with the left-wing guerrillas were interpreted by the military establishment as an encroachment on their authority to determine domestic security policies.[507] The tension between the executive branch and the military leadership occasionally resulted in "open confrontation" in which the military leaders clearly disobeyed orders from their civilian counterparts.[508]

The military leadership, in this context, continued to support paramilitary groups as a means of sabotaging negotiations between the executive branch and the guerrillas. The relationship between the military and paramilitaries, however, was kept clandestine, with the military leadership choosing to hide the alliance between the two groups from the rank-and-file soldiers,[509] and eschewing direct contact with paramilitary leaders by using sympathetic intermediaries such as local businessmen or

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506 Richani, *Systems of Violence: The Political Economy of War and Peace in Colombia*, 11.
507 Romero argues that the disagreement regarding peace negotiations with the left-wing guerrillas also had an ideological component—the military, trained in counterinsurgency to fight the "enemy within" in the context of the Cold War, found it difficult to accept the political and social integration of left-wing guerrillas as part of a peace deal. Romero, "Paramilitary Groups in Contemporary Colombia," 189.
508 Ibid. During the presidency of Pastrana, for example, the internal tension between the military and executive branch over the attempted peace negotiations with the FARC was so high that 16 generals, 30 colonels, and a great number of officers threatened to resign their posts if talks with the FARC continued. See: Richani, *Systems of Violence: The Political Economy of War and Peace in Colombia*, 39.
509 "Smoke and Mirrors," 21.

politicians.[510] Such subterfuges notwithstanding, human rights organisations have documented that throughout the 1980s and 1990s, military battalions and paramilitary groups often coordinated their attacks and provided information to one another.[511]

In sum, the paramilitaries became embedded in an internal contestation amongst the different institutions of the Colombian state, particularly the military and the executive branch. They constituted a proxy actor that furthered the interest of one institution of the state at the expense of the other. They henceforth occupied a contradictory position regarding the Colombian state, on the one hand threatening the state's internal authority while on the other hand serving as a repressive tool of the state. This duality of the paramilitaries was aggravated by the fact that these groups simultaneously engaged in criminal activity, such as drug trafficking, while adopting the official rhetoric of the counterinsurgency of the state.

3. THE POLITICS OF ACCOUNTABILITY: DEMOBILISATION AND THE PURSUIT OF JUSTICE

This complex and complicit relationship between the paramilitaries and the government provided ample incentive for the government to eschew an accountability process in the context of demobilisation that could potentially highlight the historical links between paramilitary violence and the Colombian state, as well as acutely fracture the government and its elites from within. Furthermore, unlike in the cases of Uganda and Cambodia, the paramilitaries were in a position to

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510 "Political Violence in Colombia: Myth and Reality ", 20.

511 See, for example: Human Rights Watch, "The Ties that Bind: Colombia and Military-Paramilitary Links," in *Human Rights Watch Report* (2000). *The 'Sixth Division': Military-Paramilitary Ties and US Policy in Colombia* (New York, London, Brussels Human Rights Watch 2001).

directly negotiate the terms of the demobilisation process, wielding significant social, political, economic, and military power, and thereby with the means to avoid disadvantageous elements of the demobilisation process, including accountability.

However, as the following section will argue, the option of forgoing a measure of accountability was no longer available for the Colombian government in the 2000s, not only because of the broader international normative development of criminal accountability for atrocity crimes, but also because of explicit external pressure from powerful Northern states and international organizations. Specifically, demands for the prosecution and extradition of the paramilitaries by the United States, as well as the ICC's decision to consider the Colombian conflict as one of its cases for preliminary investigation, circumscribed the range of options the Colombian government could pursue during demobilisation negotiations.

The creation of the JPL framework was thus, in contrast to a strategy of judicial extraversion, a strategy of *subversion* in which the constrained Colombian government sought to accommodate both international normative developments and internal pressure from the paramilitaries without compromising the legitimacy of the government and its elites. As President Uribe stated, the demobilisation of paramilitaries was designed to seek "as much justice as possible, and as much impunity as is necessary."[512]

3.1 Designing Demobilisation: Obstacles to Amnesty

As noted above, the issue of accountability was embedded in the broader process of demobilising the paramilitaries. In May 2002, Álvaro Uribe won the presidential

[512] Felipe Gómez Isa, "Paramilitary Demobilisation in Colombia: Between Peace and Justice," *Fundación Para Las Relaciones Internacionales Y El Diálogo Exterior (FRIDE) Working Paper Series* 57 (2008): 1.

elections on a landslide on the promise that he would bring security to the country and restore the rule of law.[513] His approach, however, markedly differed from that of the previous governments in that, instead of pursuing peace through negotiations with the guerrillas, Uribe presented an alternative policy paradigm that combined a hard-line military approach against the guerrillas while shifting the focus of negotiations to the paramilitaries.[514]

Both Uribe's overwhelming victory in the polls and his subsequent decision to shift the focus of peace negotiations to the paramilitaries was derived from the experience of President Pastrana's disastrous attempts at negotiating with the FARC. The ambitious demobilisation negotiations with the FARC had failed to produce any concrete contributions towards ending the conflict. In fact, domestic critics of the administration have argued that the 'concentration zone' provided by the government for the purpose of negotiations, in which the FARC was protected from both the military and state police, allowed the guerrillas to regroup and replenish their resources, emerging from the failed negotiations stronger than ever.[515] The failure of the negotiations were in part a result of a deliberate and violent strategy of sabotage by the paramilitaries, who, with the support of the dissenting military, launched attacks on the guerrillas in order to derail the negotiation process.[516]

This experience greatly influenced the multi-pronged strategy presented by the Uribe government to reclaim the monopoly of violence, re-establish the rule-of-law, and set the stage for a more durable peace agreement with various armed actors. Known

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513 "Hardliner Elected Colombian President." *BBC News,* 27 May, 2002. Accessed 7 Mar., 2016 http://news.bbc.co.uk/1/hi/world/americas/2008674.stm

514 Bueno and Diaz Rozas, "Which Approach to Justice in Colombia Under the Era of the ICC," 214-15.

515 Douglas Porch and Maria Jose Rasmussen, "Demobilization of Paramilitaries in Colombia: Transformation or Transition?," *Studies in Conflict & Terrorism* 31, no. 6 (2008): 525-26.

516 Arvelo, "International Law and Conflict Resolution in Colombia," 423.

as the ‘democratic security’ policy,[517] this approach combined a hard-line military strategy against the guerrillas, particularly the FARC, with efforts to enhance the internal legitimacy of the state, specifically the government and its constituent institutions. In this context, the Uribe government pursued a reformed military strategy that greatly increased the presence of national and local armed forces, as well as the National Police, in pursuing counterinsurgency attacks in the rural areas.[518] Simultaneously, the Uribe government sought to deal with the ‘paramilitary problem’ as a first step in the efforts to end the broader conflict.

Consequently, in August 2002, just months after the elections, the new president opened channels of communication with the AUC, the federation of paramilitary groups. In addition, Uribe expanded the existing legal framework that regulated the individual and collective demobilisation and appointed a High Commissioner for Peace, Luis Carlos Restrepo, in order to facilitate the negotiations.[519] The AUC was receptive to the overtures of the government, and readily cooperated by declaring a unilateral ceasefire in December 2002, fulfilling the preconditions for full negotiations with the government for demobilisation.[520] Negotiations between the government representatives and the leaders of the AUC began in Santa Fé de Ralito, a ranching outpost in the northwest of Colombia, and in July 2003 the first agreement between the two parties was reached with the AUC agreeing to a demobilise its troops in by 2005, known as the *Pacto de Santa Fé de Ralito*, or the

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517 Ann Mason, "Colombia's Democratic Security Agenda: Public Order in the Security Tripod," *Security Dialouge* 34, no. 4 (2003): 396.
518 Thomas A. Marks, "Colombian Military Support for 'Democratic Security'," *Small Wars and Insurgencies* 17, no. 2 (2006): 204-05.
519 The resulting legislation was Law 782 of December 2002, which amended the Law 418 of 1997 and Law 548 of 1999.Laplante and Theidon, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz," 63.
520 Knut Andreas O. Lid and Jemima Garcia-Godos, "Transitional Justice and Victims' Rights Before the ENd of aConflict: The Unusual Case of Colombia," *Journal of Latin American Studies* 42, no. 3 (2010): 493.

Ralito Accord.[521] A second subsidiary agreement was reached in 2004, establishing a protected concentration zone protected by the military and national police force in which existing arrest warrants for paramilitary forces were suspended. This additional agreement was designed to consolidate the negotiations as well as to facilitate the verification of the demobilization process.[522]

From the very beginning of the negotiations, the AUC leaders were unsurprisingly adamant that they, and the majority of their men, would not be subject to criminal prosecutions as a result of the demobilisation process.[523] Avoiding accountability, particularly criminal accountability, not only served their personal interests, but also appeared to conform to the long-standing Colombian practice in negotiation of forgiveness and pardon for crimes committed in the context of armed conflict in return for the cessation of hostilities.[524] Traditional disarmament, demobilisation, and reintegration (DDR) frameworks in Colombia had been aimed at reintegrating ex-armed combatants into civilian society, rather than seeking accountability for the violence, whether it be in the form of criminal justice or other transitional justice mechanisms. This model of DDR had been consistently applied since the end of *La Violencia*, when General Pinilla and the military junta offered a general amnesty to all belligerents and were replicated by the government in subsequent negotiations with left-wing guerrillas. Between 1989 and 1994, five guerrilla groups —the *Movimiento de 19 Abril* ('M-19', Movement of April 19th), the *Movimiento Armado Quintín Lame* (MAQL, Quintin Lame Armed Movement), *Partido Revolucionario de los Trabajadores* ('PRT,' Revolutionary Worker's Party), *Ejército Popular de Liberación* ('EPL,' Popular

521 "Acuerdo de Santa Fe de Ralito para contribuir a la paz de Colombia."
522 Laplante and Theidon, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz," 63; Easterday, "Deciding the Fate of Complementarity: A Colombian Case Study," 72.
523 Saffon and Uprimny, "Uses and Abuses of Transitional Justice in Colombia," 366.
524 Laplante and Theidon, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz," 59.

Liberation Army), *Corriente de Renovación Socialista* ('CRS,' Socialist Renewal Movement)—were demobilized after peace negotiations with the government and were not subject to criminal prosecution.[525] The expectation of both the public and the government was that the demobilized groups would fully reintegrate into society as "relevant political forces," rather than be individually or collectively punished for the violence committed.[526] While most groups found it difficult to independently transform their armed movements into a specific political party, many of the demobilized guerrillas formed a critical part of the left-leaning political and social organizations through sustained participation in politics, policy-making, and public debate as members of NGOs, political parties, social organizations, and the media.[527]

The existing legal framework at the time of the Ralito Accords was largely in agreement with the traditional approach of providing protection from criminal prosecution for combatants in return for commitment to demobilization and reintegration into civilian life. Negotiations with the AUC was legally made possible through Law 782 of 2002, which extended the previous framework established by Law 418 of 1997 and Law 548 of 1999 for negotiating with left-wing guerrillas by amending the appropriate subject to armed groups in the "margins of the law," therefore providing the government with the legal tools necessary to negotiate individual and collective demobilization with paramilitary groups.[528] This legal framework, *inter alia,* provided amnesties for so-called political crimes, namely sedition and rebellion.[529] Individuals who voluntarily participated in the DDR

525 Alexandra Guáqueta, "The Way Back In: Reintegrating Illegal Armed Groups in Colombia Then and Now " *Conflict, Security & Development* 7, no. 3 (2007): 418.
526 Ibid.
527 Ibid., 418-19.
528 "Ley 782 de 2002," (Diario Oficial, 23 Dicimebre 2002).
529 "Inter-American Commission on Human Rights Follow-Up on the Demobilization Process of the AUC in Colombia: Digest of Published Documents (2004-007),"

process by confessing to their illegal activities, providing information regarding the organization's illegal activities, and handing over their arms, could be granted protection from prosecution, given that they were already investigated for or accused of political crimes and had not been handed down a final sentence.

Law 782, however, did not apply to all paramilitary troops. In theory, the benefits of this law only applied to individuals with pending investigations and prosecutions, leaving the status of other combatants ambiguous. But more significantly, Law 782, as well as the previous Law 418 and 548, did not extend the legal benefits to exceptionally "atrocious acts of ferocity or barbarism," which included acts of terrorism, crimes of genocide, crimes against humanity, kidnapping, and other crimes targeting civilians.[530] Nor did the legal framework allow for outright pardons or amnesties for crimes committed in the context of drug trafficking. Consequently, the discussions regarding accountability in the Ralito negotiations were focused on the fate of demobilized paramilitaries who did not fall under the jurisdiction of Law 782, particularly those who were suspected of, or had pending arrest warrants for grave human rights violations and atrocities, as well as drug trafficking.[531]

Three Obstacles to Amnesties

Extending the legal benefits provided by the existing legal framework to constitute a de facto general amnesty, as in the case of earlier DDR processes, proved problematic on three counts. First, the fundamental nature of paramilitarism made it difficult for the AUC to justify that it deserved the same treatment as the demobilized guerrilla movements. The public and legal justification behind the

(Organization of American States, Inter-American Commision on Human Rights, 2007), Para. 62.

530 "Ley 782 de 2002." Article 6.

531 "Inter-American Commission on Human Rights Follow-Up on the Demobilization Process of the AUC in Colombia: Digest of Published Documents (2004-007)," Para. 61.

general amnesties and pardons for left-wing guerrillas was rooted in the idea that violence committed with a political purpose is intrinsically different from criminal activity. Colombian legal and political tradition sanctifies the 'right to rebel' against the government.[532] Thus, violence committed for purely 'political' aims could be feasibly pardoned in return for a commitment to reintegration into society and non-violent political contestation. However, the status of paramilitaries as pro-systemic, pro-government forces that often acted as a proxy for state security forces, as well as their well-known link to criminal activities such as drug trafficking, made it difficult for these groups to justify that their crimes were 'political' in nature in the same context as the guerrillas.

Secondly, the international normative context, particularly pertaining to the issue of atrocity crimes and human rights violations, had shifted significantly since the 1980s. As the theory of 'justice cascade' has argued, a transnational network of human rights advocates had succeeded in disseminating the norms related to the criminalization and prosecution of human rights atrocities.[533] This normative development was particularly robust in Latin America. In fact, the 'justice cascade' literature has argued that Latin America, and in particular the experience of the political transition in Argentina, has served as a catalyst for the dissemination of the norms of accountability for grave human rights violations.[534] The Inter-American Court of Human Rights (IACrtHR) has promoted a particularly maximalist interpretation of this normative framework, arguing that the victims' right to "suitable and effective judicial remedies," including trials, when there has been

532 Ricardo Posada, Interview
533 See: Introduction. Also: Sikkink, *The Justice Cascade*.
534 Ibid., 60-128.

violations of their human rights was paramount,[535] delegitimizing the long-standing practice of *olvido y perdón en pro de la paz* (forgetting and pardon in favour of peace) in the peace negotiations.[536] For example, in the 1997 *Barrios Altos v. Peru* case the IACrtHR argued that every victim of human rights violations had the right to "obtain clarification of the events" through the "investigation and prosecution" of the State's competent organs.[537]

Furthermore, the establishment of the ICC presented the possibility of a direct international judicial intervention, challenging the traditional sovereign authority of the state by bypassing the domestic courts, if the national judicial response to crimes under international law was not deemed adequate. Colombia had ratified the Rome Statute of the ICC on the 5th of August 2002, just a few months before the AUC declared an official unilateral ceasefire. More significantly, the ICC began to make initial contact with the Colombian government soon after the Court began its operations, and in June 2004 decided to officially open preliminary investigation of the Colombian conflict.[538] This interest by the ICC meant that an insufficient judicial response to paramilitary violence could be deemed as evidence of unwillingness or inability to prosecute atrocity crimes by the Colombian judiciary, triggering the Court's jurisdiction under Article 17 of the Rome Statute.

Thirdly, the Americans were demanding that the AUC leaders be extradited to the US to be tried for drug trafficking related crimes. Many of the AUC leaders,

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535 Inter-American Commission on Human Rights, "Truth, Justice, and Reparation: Fourth Report on Human Rights Situation in Colombia," (Organization of American States, 2013), 63.
536 Laplante and Theidon, "Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz," 59.
537 Inter-American Court of Human Rights., *Case of Barrios Altos v. Peru*, Judgment of March 14, 2001, Series C No. 75, Para. 48.
538 Bueno and Diaz Rozas, "Which Approach to Justice in Colombia Under the Era of the ICC," 227-28; "Situation in Colombia: Interim Report," 2.

including Carlos Castaño and Salvatore Manucso, were wanted in the U.S. for crimes committed in relation to the AUC's involvement in cocaine and heroin.[539] The US's interest in prosecuting the AUC leaders was part of its general concern regarding the Colombian drug trade, which had been a central issue in US foreign policy in Latin America. This concern had reached its apex during President Clinton's administration, when drug trafficking was declared a national security threat,[540] and a comprehensive strategy to tackle drug trafficking was launched by the U.S. government in collaboration with its Colombian counterparts, known as "Plan Colombia."[541] Although the rhetorical justification shifted from counter-narcotics to counterterrorism during the Bush administration, America's interest in both general eradicating the Colombian drug trade, and holding individual members of the paramilitaries accountable in the process, continued throughout the tenure of the Uribe government. Consequently, the U.S. government, particularly its State and Justice departments, was wary that Uribe's negotiations with the AUC would result in a demobilisation scheme that would protect indicted AUC leaders from extradition.[542]

Avoiding Domestic Prosecution and Extradition: Goals of the AUC

The nature of paramilitarism, the changing international normative landscape, and extradition demands from the U.S. all meant that an alternative judicial framework for paramilitaries accused of grave human rights violations and drug trafficking-

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539 According to a report by the International Crisis Group, as many as fifteen AUC leaders were facing extradition orders on drug related charges at the time of the Ralito Accord. "Tougher Challenges Ahead for Colombia's Uribe," in *Policy Briefing* (Bogota/Brussels: International Crisis Group, 2006), 2.

540 Nina M. Serafino, *Colombia: Summary and Tables on US Assistance* (CRS Report No. RS21213) (Washington: DC, Congressional Research Service, 2002), 3-4, http://crs.wikileaks-press.org/RS21213.pdf

541 Annie R. Bird, *US Foreign Policy on Transitional Justice* (Oxford, UK: Oxford University Press, 2015), 125-26.

542 Ibid., 128.

related crimes needed to be discussed, separate from the existing Law 782. In designing an alternative judicial framework, the AUC leaders appeared to have had two main objectives: first, to avoid domestic prosecution for crimes committed outside of the ambit of Law 782, and to prevent extradition of individuals to the U.S. for drug trafficking.

These objectives are reflected in the manoeuvres and statements made by prominent AUC leaders leading up to the Ralito Accord. First, the AUC leadership attempted to justify its participation in the Colombian conflict as a *bona fide* political organisation that supported the broader political aims of the Colombian state, and therefore sought to reduce the possibility of domestic prosecution for non-political crimes. In other words, contrary to the objectives of a strategy of judicial extraversion, the AUC sought to de-criminalize its violence and emphasize the broader political context that it insisted provided the justification for participation in the internal conflict.

For example, Carlos Castaño, the public face of the AUC and one of its founding leaders, claimed that the AUC's operations went beyond armed conflict, and that it had hired "anthropologists, sociologists, and agronomists" to formulate policies addressing root causes of the conflict and advance the interests of the rural population.[543] Furthermore, the AUC was careful to present itself as respecting the authority of the Colombian state, justifying its existence as a 'last resort' effort to provide basic security to citizens when the government proved unable to do so. For instance, Salvatore Mancuso, a former landowner who became a key AUC leader, stated in a public interview that:

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543 Robin Kirk, "A Meeting with Paramilitary Leader Carlos Castaño," *The War Within: Counterinsurgency in Chiapas and Colombia*1998.

> [w]e have always called upon the state for its presence, its responsibility. We [took up arms] because its responsibility has not existed. We had to […] replace [the state] in different regions where we have had territorial control and acted as de facto authorities.[544]

This justification for the AUC's activities was also echoed in Mancuso's open appeal to the international community. In a letter addressed to the Peace Commissioner appointed by Uribe, Luis Carlos Restrepo, as well as Anne Patterson, the U.S. ambassador to Colombia and Kofi Annan, the Secretary General of the UN, Mancuso emphasized that the AUC comprised counterinsurgency forces that were fighting against "terrorist" organizations such as the FARC.[545]

Secondly, in the months leading up to the negotiations, the AUC leaders vehemently denied any direct connection with drug trafficking, in an apparent effort to avoid both domestic prosecution for drug related crimes as well as extradition to the U.S. In his open letter to representatives of the international community Mancuso also took pains to deny that that AUC leaders, including himself and Castaño, were involved in drug trafficking.[546]

Many Colombian civil society members as well as academic commentators share the view that avoiding extradition, in particular for drug trafficking, was amongst the chief concerns of the AUC leaders that shaped their approach to the DDR negotiations.[547] The perspectives of the AUC leaders themselves, however, are more ambiguous. While the paramilitary leaders were vocal in defending the AUC's

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544 *Habla Mancuso* ('Mancuso Speaks'), interview printed in Colombian weekly journal *Semana,* Aug. 11, 2003. Cited in Mauricio Romero, *Paramilitares y Autodefensas, 1982-2003* (Bogotá, Colombia: IEPRI, 2003), 52-69. Translation from Arvelo, "International Law and Conflict Resolution in Colombia."

545 Salvatore Mancuso, "Open Letter " (2002).

546 Ibid.

547 Ana María Rodríguez Interview; Jorge A. Restrepo (Director of Conflict Analysis Resource Centre, 'CERAC'), interview by autor, University Pontifica Javeriana, 29 Jul., and 5 Aug., 2015; Pablo Kalmanovitz, "Introduction: Law and Politics in the Colombian Negotiations with Paramilitary Groups," in *Law in Peace Negotiations*, ed. Morten Bergsmo and Pablo Kalmanovitz, Forum for International Criminal and Humanitarian Law (FICHL) Publication Series (Oslo, Norway: Internatioanl Peace Research Institute (PRIO), 2009), 11.

position as a ‘political’ armed movement and distanced themselves from drug traffickers, at least some of the higher level leaders seemed to have doubted the possibility of a U.S. extradition. According to email records provided by demobilised paramilitary combatants, allegedly showing correspondence between AUC leaders following secret discussions with Luis Carlos Restrepo in 2002, Castaño surmises that the Americans are not really concerned with “what happens in the future for Mancuso or Castaño,” and that they are simply “disposable” pawns that can be traded when greater national interests, such as petrol or access to strategically significant Colombian territory, are at stake—thereby demonstrating confidence that the AUC leaders will be able to avoid extradition if they cooperate with the government.[548] In fact, in 2006, Castaño had publically claimed that the AUC leaders and government representatives had reached a private deal in which the government pledged to prevent extradition to the United States.[549]

Preventing International Criminal Justice: Goals of the Government

The government, on the other hand, seemed comparatively more concerned with the possibility of an international judicial intervention. Some academic observers and civil servants have argued that the threat of an international criminal justice process, particularly that of the ICC, was not taken very seriously by the government.[550] However, examination of the behavior of government officials, as well as accounts of the discussions in Ralito, demonstrate that this disregard for the ICC was more of

548 "Documentos Exclusivos: Así Se Fraguó el Acuerdo de Paz con los 'paras'," http://www.verdadabierta.com/la-historia/la-historia-de-las-auc/2388-documentos-exclusivos-asi-se-fraguo-el-acuerdo-de-paz-con-los-paras.

549 This claim has not been verified by any governmental source. "Introduction: Law and Politics in the Colombian Negotiations with Paramilitary Groups," 11.

550 Sebastián Machado Ramírez (Advisor to the Attorney General’s Office, former coordinator of the Directorate of International Legal Affairs, Ministry of Foreign Affairs), interview by author, Attorney General’s Office, 29 Jul., 2015; Ana María Rodríguez Interview

a gradual process that developed as the government gained more confidence in the demobilization process and in its relationship with the ICC, particularly the OTP. For example, at the point of ratification of the Rome Statute, President Pastrana appended to the ratification act a declaration that would prevent the ICC from having jurisdiction over war crimes for a period of seven years, pursuant to Article 124 of the Statute, allegedly with the private consent of the President-elect Uribe with future negotiations with armed groups in mind.[551] However, it should be noted that this declaratory reservation did not cover crimes against humanity and crimes of genocide, and therefore did not fully protect the Colombian conflict from the possibility of international jurisdiction.

Furthermore, during the demobilization negotiations, some government representatives are said to have warned the paramilitary leaders of the possibility of an international criminal justice process. While the ICC preliminary investigations were not directly presented as an immediate threat, the government negotiators demonstrated that a judicial framework for accountability that was not considered "just" enough could open the possibility of a future international proceeding regarding paramilitary violence.[552]

The government's interest in avoiding international criminal justice was rooted in two broad interrelated concerns. The first was that a far-reaching and thorough investigation of paramilitary violence could result in embarrassment for the government. As noted above, the Colombian government had an ambiguous and complex relationship with the paramilitaries, in which the paramilitaries were both a symptom of state weakness as well as a tool of the state, carrying out the less-

[551] Alejandro Chehtman, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*, vol. 17, DOMAC Project (Reykjavik: DOMAC, Reykjavik University, 2011), 18.
[552] Confidential Interview

salubrious aspects of counterinsurgency strategies. The increasing violence and criminality of the paramilitaries, particular in relation to drug trafficking, as well as the changing international normative landscape in which human rights protection was taking a higher priority,[553] meant that the government was increasingly uncomfortable about revealing its historical relationship with the paramilitaries. Indeed, the government was not only less forthcoming about its connections with the paramilitaries, but was also actively seeking to distance itself from these groups, resulting in the outright ban of paramilitary organizations in 1989 as discussed above.

Some commentators have noted that, in addition to the government's general discomfort regarding its relationship with the paramilitaries, the Uribe administration in particular had reasons to fear an independent investigation of paramilitary violence, given his alleged connections with paramilitary groups and the Medellín cartel during his tenure as the governor of Antioquia.[554] President Samper's administration (1994-1998) established the *Asociaciones Comunitarias de Vigilancia Rural* (Community Associations of Rural Vigilance), or CONVIVIR, which were ostensibly organizations with limited "defensive functions" supporting the armed forces with intelligence about local communities.[555] In reality, CONVIVIR groups served as legitimate fronts for paramilitary groups, and effectively became "nurseries" for the AUC,[556] raising the suspicion that Uribe had a personal interest in obscuring the connection between CONVIVR and paramilitary violence more generally.

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553 Jacobo Grajales, "El Proceso de Desmovilizacíon en Colombia: Entre lo Político y lo Judicial," *Desafíos* 23, no. 2 (2011): 165.
554 Aviles, "Paramilitarism and Colombia's Low-Intensity Democracy," 407; Grajales, "El Proceso de Desmovilizacíon en Colombia: Entre lo Político y lo Judicial," 164.
555 Aviles, "Paramilitarism and Colombia's Low-Intensity Democracy," 397.
556 Mariana Escobar, "Paramilitary Power and "Parapolitics": Subnational Patterns of Criminalization of Politicians and Politicization of Criminals in Colombia " in *Unpublished Doctoral Thesis* (London School of Politics and Economics 2013), 16.

Such suspicion of Uribe's cynical motives in designing the judicial framework for accountability was retroactively intensified with the revelations regarding the influence of paramilitaries on national and regional electoral politics, known as the *parapolítica* scandal. Following demobilization in 2005, AUC ex-combatants provided ample evidence for how the paramilitary organization was able to infiltrate politics even at the national parliamentary level, and control the outcomes of local and national elections.[557] Although the extent and details of the *parapolítica* phenomenon was not known to the public at the time of the negotiations, the subsequent revelations that implicated many political figures close to President Uribe, including his cousin Mario Uribe and main political advisor Senator Carlos García, brought forth the accusation that Uribe's landslide election in 2002 was influenced by the AUC,[558] and therefore that the President had vested personal interest in avoiding an independent international investigation of the AUC.

Secondly, the government had a low expectation of its structural power within the international criminal justice system, thus doubting its ability to influence the process and outcome of an ICC investigation and prosecution. The complicity of the Colombian government in general with the paramilitary phenomenon, as well as the specific relationship between Uribe and the AUC, demanded a judicial mechanism whose ambit could be easily restricted or directed by the government and its constituent elites, particularly Uribe's supporters. However, the ICC at the time of

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557 For more information regarding the *parapolítica* scandal, see: Claudia López, "La Ruta de la Expansió n Paramilitar y la Transformación Política de Antioquia," in *Para Política: La Ruta de La Expansión Paramilitar y los Acuerdos Políticos*, ed. Mauricio Romero (Bogotá: Corporación Nuevo Arco Iris and Intermedio Editores, 2007); Claudia López and Óscar Sevillano, "Balance Político de la Parapolítica," *Cor-65* (2008).

558 Daron Acemoglu, James A. Robinson, and Rafael J. Santos, "The Monopoly of Violece: Evidence from Colombia," *Journal of European Economic Association* 11, no. S1 (2013): 21.

the Ralito Accord was considered an untested "black box."[559] Both members of the government as well as civil society was uncertain as to how zealous the ICC was going to be—in terms of how stringently it would interpret legal standards and how many suspects it would pursue. Thus many Colombian actors, including members of the government, had a tendency to overstate the powers and enthusiasm of the ICC, assuming that the Court would be difficult to influence.[560]

This expectation of a powerful and independent court was partly due to the ICC's relative youth. But also important in shaping attitudes about the government's limited space for influence was Colombia's regional experience of the IACrtHR[561]. The IACrtHR had not only presented a 'maximalist' view on the victims right to truth, justice, and reparations, in which broad amnesties in peace negotiations were effectively delegitimized, as discussed in the previous section, but had also ruled in the favour of victims in reparations cases against the Colombian government. This experience of a fiercely independent court that upheld robust human rights standards created the expectation within the Uribe administration that the new ICC would behave similarly.

The 'Bill of Penal Alternatives'

In sum, both parties in the negotiation had reasons to avoid an international criminal justice process, with the government faced with incentives to eschew a deliberate strategy of judicial extraversion. While the AUC was focused on de-criminalizing, and therefore politicizing their violence in the expectation of a lenient judicial treatment, the Uribe administration preferred an accountability mechanism that

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559 Henry Rivera (Researcher at International Centre for Transitional Justice, former member of domestic human rights NGO), interview with author, ICTJ office, 28 Jul., and 4 Aug., 2015

560 Ana María Rodríguez Interview

561 Ibid.

could be deliberately designed and controlled to minimize the impact of the proceedings on the legitimacy of the state as the central government.

Consequently, the government presented the draft bill for the 'Alternative Penal Code' to the parliament for approval. The Alternative Penal bill was drafted with virtually no consultation with actors aside from the government negotiators and the AUC leaders, and was conceived as a type of "probation regime," as Arvelo describes it, in which paramilitary combatants would avoid jail time in return for participation in the DDR process, and would instead spend time in the demobilized concentration zone.[562] This "alternative sentence" was only conditional upon the "good conduct" of the combatant and the active contribution to the "reparation of victims," which entailed the transfer of property to government institutions.[563] There was no requirement of full confession, nor did the bill provide for oversight by a judicial body.[564] Most significantly, the bill was embedded an alternative discourse of transitional justice,[565] which was presented as an explicit balancing act between the objectives of peace and the imperatives of justice. The government presented the bill as being based on a "restorative" idea of transitional justice and argued that criminal prosecution could become an obstacle for achieving reconciliation, and therefore lasting peace.[566]

In other words, the bill of Alternative Penalties was a pseudo-criminal process that was aimed at subverting possible external judicial processes, while allowing the paramilitaries to enjoy a de facto pardon for their crimes, and for the government to

562 Arvelo, "International Law and Conflict Resolution in Colombia," 433-34.
563 Ibid., 434.
564 "Colombia: Letting Paramilitaries Off the Hook," (Human Rights Watch 2005), 11-13.
565 See, for example: Ruti G. Teitel, *Transitional Justice* (Oxford, UK: Oxford University Press).
566 Saffon and Uprimny, "Uses and Abuses of Transitional Justice in Colombia," 366.

protect its legitimacy by preventing details of the paramilitary organizations from coming to light.

3.2 NEGOTIATING FOR 'JUSTICE AND PEACE'

The bill of Penal Alternatives, however, was met with strong resistance from a range of domestic and international actors, including members of parliament, domestic and international NGOs, and external actors such as the United Nations, the U.S. and other donor nations.[567] The proposed bill was accused of providing de facto impunity for the mass atrocities committed by the AUC, and neglecting the victims' rights to truth, justice, and reparations.[568]

DOMESTIC OPPOSITION: VICTIM-CENTRIC INTERESTS IN PARLIAMENT

The most significant opposition came from the members of parliament, not least because the Colombian legislature had the authority to pass the bill into law, but also because the small but strident group of parliamentarians encompassed both members of the opposition party, such as Senator Rafael Pardo and Senator Piedad Córdoba, and Uribe's allies such as Senator Gina Parody.[569] This crosscutting alliance was remarkable considering the widespread support Uribe had received at the time of his election, as well as the influence of *parapolítica* in the national legislature.[570] In fact, it was later claimed by the AUC leader Mancuso that the AUC had approximately 35% of the national legislators under its control through various methods of vote buying and intimidation.[571]

The members of the so-called "victim-centric" interest group within the legislature presented a series of counter-proposals to the government. This began a two-step

567 Chehtman, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*, 17, 20.
568 "Smoke and Mirrors."
569 Ibid., 51.
570 Jorge Restrepo, Interview
571 López and Sevillano, "Balance Político de la Parapolítica," 2.

negotiation in tandem with the broader discussions regarding the details of demobilisation, with one discussion being played out between the parliament and the Uribe administration in Bogotá, and the other occurring between the government negotiators and the AUC leaders in Santa Fé the Ralito. Domestic NGOs such as the CCJ channelled their lobbying efforts towards these members of parliament, putting forth alternative suggestions and highlighting the international standards for victims' rights to truth, justice, and reparations.[572]

The counter-proposals by the victim-centric parliamentarians, the most prominent example being the "Truth, Justice, and Reparations" bill, were largely in agreement with the Alternative Penal bill insofar as the legislators did not challenge the notion of reduced criminal penalty, or 'alternative sentencing,' as a guarantee for participation in the demobilisation process and a vehicle to facilitate reintegration. However, the counter-proposal by Senator Pardo, for example, differed in three critical ways. First, his proposed bill had stronger provisions for truth-telling, requiring demobilised paramilitaries to undergo a full confession and reveal basic information regarding the organization of the armed group and its illegal activities. Second, it proposed a reduced prison sentence, which was to be determined by a special criminal court following investigation by the General Prosecutor's office and hearings in front of a judge. Finally, benefits of the alternative criminal process were made contingent upon the full cooperation of the combatant regarding confessions and reparations.[573]

Pursuing a Domestic Strategy of Opposition

In opposing the Uribe and his administration, however, opposition members of parliament did not contemplate an externalized political strategy directly using

572 Ana María Rodríguez Interview
573 "Colombia: Letting Paramilitaries Off the Hook," 11-14.

international actors, would be expected of a strategy of judicial extraversion. While members of parliament were keen to use 'international standards' of truth, justice, and reparations as a means of strengthening their argument for a more stringent judicial mechanism for accountability for serious paramilitary crimes,[574] they did not directly reach out to external actors— such as donor nations or the ICC— to increase pressure on President Uribe and the AUC. Nor did they contemplate the possibility of an international criminal justice process in Colombia, in stark relief to the direct overtures to the UN made by the FUNCINPEC party in Cambodia. In other words, despite their vast differences, the opposition members of parliament and President Uribe were largely in agreement that an international criminal justice process that directly prosecuted Colombian citizens was a undesirable threat to sovereign authority.

This shared view within the broader government and its constituent elites, can be argued to reflect the prevailing "parochialism" of Colombian political culture.[575] Former Colombian President, López Michelsen, described his country as the "Latin-American Tibet," encapsulating the nationalistic and inward-looking approach to politics shared by many elements of society, including politicians, members of civil society, and the media.[576] But more specifically, Colombian parliamentarians and the Uribe administration, regardless of their differences regarding the accountability mechanism for paramilitaries, shared the view that the Colombian state apparatus was fundamentally robust, despite the long-standing internal conflict. Furthermore, as one prominent member of civil society noted, Colombians in politics and civil society generally were very proud of Colombia's ability to participate in international

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574 Ana María Rodríguez Interview

575 Henriques, "Los Procesos de Paz en Colombia y El Rol de La Comunidad Internacional," 233.

576 Ibid., 234.

legal developments, such as the negotiations of the Rome Statue, as a legitimate international juridical actor, but were uneasy about directly utilizing such institutions as it would suggest the inadequacy of the Colombian state institutions.[577]A former Senator, who was part of the 'victim-centric' interest group in parliament, expressed a similar view that, despite widespread criticism regarding the complicity of the government in the paramilitary phenomenon and suspicion regarding President Uribe's personal interest in shielding the AUC from prosecution, at no point did parliamentarians consider directly appealing to the international community to bypass the domestic process to achieve justice.[578] Politicians across the board, even if they believed Uribe was obstructing the victims' right to justice and acting on behalf of cynical personal interests, shared the general view that Colombia was a "functioning democratic state" in which the state as the central government and its constituent institutions can carry out its basic duties..[579] In particular, most actors were in agreement that Colombia possessed a capable judiciary that would be able to operate any special criminal justice mechanism established for addressing atrocity crimes, and therefore did not need an international mechanism.[580] As one human rights activist put it succinctly, Colombia was simply "not Africa."[581]

The common position reached by the Uribe administration and opposition members of parliament seem to confirm the alternative theoretical explanation regarding Southern state preferences for international criminal justice discussed in the Introduction, namely that preferences for or against international criminal justice processes will be determined by the relative strength of the state, measured in institutional capacity. In other words, states that are able to both politically and

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577 Jorge Restrepo Interview
578 Anonymous Interview
579 Anonymous Interview
580 Anonymous Interview
581 Ana María Rodríguez Interview

legally achieve an accountability mechanism for atrocity crimes will not seek international criminal justice mechanisms, reaffirming the basic principle of complementarity of the ICC.[582] However, it is important to note that the preference for a domestic criminal justice mechanism by Colombian political actors was determined primarily by the *self-perception* of institutional strength. While it is not erroneous to claim that Colombia is, indeed, a functioning democracy and has a strong judiciary despite its on-going conflict, the Colombian state was at the same time facing a continuous internal crisis of authority in which state could not extend its presence into the countryside and was struggling to reclaim its monopoly over violence. Furthermore, the prevalence of *parapolítica,* or the corrupt influence of paramilitaries in politics, also questions the validity of the state's internal strength, particularly seen from the perspective of ability to carry out autonomous action. Finally, in comparison to the Ugandan case, in which the Museveni government actively sought to portray itself as institutionally weak by highlighting the lack of military dominance over the LRA, the Colombian elites' collective self-perception as an internally robust state was not an obvious conclusion stemming from unambiguous evidence of institutional strength, but rather a relative notion that was adopted through the deliberate agency of actors.

International Pressure

In addition, while the bill of Penal Alternatives received strident opposition from the international community,[583] including from members of the transnational advocacy network for international criminal justice, such as Human Rights Watch,[584] all critics fell short of recommending a direct international judicial intervention regarding the

[582] See, for example: Ambos, "The Colombian Peace Process (Law 975 of 2005) and the ICC's Principle of Complementarity."
[583] For example, see: "Colombia: Observaciones sobre la Nueva Versión del Proyecto de Alternatividad Penal," (UN Office of the High Commissioner for Human Rights, 2003).
[584] "Colombia's Checkbook Impunity," news release, 2003.

paramilitary violence. The ICC itself was relatively sympathetic to the public position of the Colombian government that a truncated criminal justice process that decreased both the robustness of the judicial process as well as the possible punitive sentence was necessary for the peace process to go forward. The OTP of the ICC, which was in continuous communication with the Colombian government through official and unofficial channels, [585] did try to influence the outcome of the parliamentary debates by sending a public letter to the Colombian government in 2004 indicting that the OTP was actively "monitoring the situation" and that the Colombian government was required to design the accountability mechanism to comply with the international standards of "truth, justice, and reparations."[586] However, at the same time, the general position of the Chief Prosecutor, Luis Moreno Ocampo was that, notwithstanding the international and domestic criticisms regarding the deficiencies of the proposed bill, the Colombian government was making an "overwhelming effort" beyond the minimum expectations of the ICC. In other words, the OTP clearly signalled that it deemed the Colombian government's proposal as meeting the complementary principle of the Court, reducing the threat of an international judicial intervention. This position of the OTP further illustrates why the threat of the ICC was considered minimal by government officials in the later stages of the DDR process,[587] while during the initial conversations it was still regarded as a possibility.

The most significant critique of the bill of Penal Alternatives came from the United States. Yet, despite some calls from the U.S. Congress to its Colombian counterpart to conform to the international standards of human rights protection and criminal

[585] Bueno and Diaz Rozas, "Which Approach to Justice in Colombia Under the Era of the ICC," 229.
[586] Chehtman, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*, 17, 21.
[587] Interview SM, Interview MS

justice,[588] the main concern of the U.S. was the criminal prosecution and extradition of AUC leaders for drug trafficking, rather than the issue of accountability for mass atrocities criminalised under international law, particularly in reference to a potential ICC proceeding. For example, the U.S. Departments of State and Justice sent a letter to the Colombian Peace Commission, demanding that the proposed Alternative Penal bill be modified so that it would not affect the extradition of AUC leaders accused of drug trafficking.[589] Furthermore, members of the U.S. legislature raised concerns that the draft bill did not sufficiently address the broader "mafia-like structures" as it did not require the AUC leaders to fully disclose information regarding their illegal activities, and that the proposed penalty for the AUC leaders was too lenient in comparison to the drug trafficking charges they faced in the U.S.[590] This external pressure is said to have led to Uribe's unilateral decision to extradite fourteen AUC leaders to the U.S for drug trafficking crimes in May of 2008. These AUC leaders, including Salvatore Mancuso, were accused of carrying out illicit drug business from their prisons.[591]

4. CONCLUSION

In response to the strident criticism from internal and external actors, particularly from members of the Colombian parliament and from the U.S., two alternative bills were debated in parliament from April 2004 onwards. One was the "Truth, Justice, and Reparations" bill introduced by Senator Pardo, as discussed above, and the other was the government proposal known as the "Justice, Truth, and Reconciliation"

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588 Bird, *US Foreign Policy on Transitional Justice*, 128.
589 Ibid.
590 Ibid., 130.
591 Kalmanovitz, "Introduction: Law and Politics in the Colombian Negotiations with Paramilitary Groups," 12.

bill.[592] The two bills were consolidated into the draft JPL bill ,which was passed into law in July 2005 as Law 975.[593] The JPL framework, while retaining the core idea of the Alternative Penal bill that reduced sentencing and a truncated criminal process is desirable in the context of DDR, included elements from Senator Pardo's bill as well as demands from civil society to be more in line with international standards of prosecuting atrocity crimes. It established a special "Justice and Peace Prosecutor's Unit" within the General Attorney's office to exclusively deal with JPL cases, [594]and former combatants are now obliged to give a full confession regarding the details and nature of the crimes committed in order to qualify for the reduced sentence, [595] which was set at minimum five to maximum eight years.[596] Moreover, the special prosecutor's unit is charged with conducting a thorough criminal investigation following the full confession.[597] Victims were also provided the opportunity to participate in the criminal and subsequent reparation proceedings, strengthening the provision for victims' right to truth, justice, and reparations.[598]

The negotiation history behind the JPL framework highlights two main differences between the cases of judicial extraversion discussed in the previous chapters on Cambodia and Uganda, in which Southern states actively pursue international criminal justice, and the case of inward-looking subversion, in which a Southern state prefers a domestic criminal process to protect its sovereign authority. The first is that the perceived level of structural power within the international criminal justice system can influence the decision of an state to adopt a strategy of judicial

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592 Chehtman, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*, 17, 20.
593 Kalmanovitz, "Introduction: Law and Politics in the Colombian Negotiations with Paramilitary Groups," 14.
594 Ibid.
595 "Ley 975 De 2005," Art. 17.
596 Ibid., Art. 18.
597 Ibid., ARt. 29.
598 "Introduction: Law and Politics in the Colombian Negotiations with Paramilitary Groups," 15.

extraversion or a strategy of inward-looking subversion. Colombia, in comparison to the two previous case studies of Uganda and Cambodia, had a lower expectation of its ability to wield influence in the overall international legal system given its experience with the robust Inter-American System of Human Rights. This rendered the ICC as an unpredictable risk, rather than an external resource that could be instrumentalized for short-term benefits. Secondly, the self-perception of internal state strength can influence a state's preference for international criminal justice. Specifically, the willingness to use international criminal justice strategically as a means of judicial extraversion appears to be influenced by the state elites' self-perception of the cohesiveness of three aspects of statehood: international juridical entity, government and its institutions, and elite power structure. Colombian political elites, regardless of their position vis-à-vis the Alternative Penal bill or JPL framework, were unified in the belief that Colombia was a fully functioning state in which the state as government and its institutions, the state as elite power structure, and the state as international juridical actor all worked in conjunction with each other, and were linked through formalised institutional arrangements and democratic procedure. This results in the paradoxical suggestion that the strategy of judicial extraversion becomes more likely when a Southern state perceives its position in the international juridical sphere as strong, but its position as domestic elite power structure or governmental institutions as weak. It also reiterates the importance of the assumption guiding the inquiry in this thesis – namely, that the relative weakness of Southern states is an insufficient explanation for their preferences regarding international criminal justice. Indeed, the finding of this chapter, combined with the proceeding two, suggests that state weakness is too general a category, and needs to be unpacked into constituent parts to understand the nature of Southern state behaviour.

Finally, Colombia's JPL framework seems to demonstrate how global norms can influence the policy decisions of Southern states. Indeed, the international standard of truth, justice, and reparations, and the international norm of criminal accountability for mass atrocities, heavily influenced the negotiation process for an accountability mechanism that resulted in the JPL framework. This has prompted some commentators to argue that Colombia presents a case of "positive complementarity," or the influence of the ICC and its norms and standards on domestic practices of prosecuting atrocity crimes.[599] However, the discussion regarding the negotiation process of the JPL framework reveals that the adoption of such norms was far from seamless. In fact, the negotiation history demonstrates how Southern state actors manipulate and adapt international norms to suit their specific political aims. Specifically, the Uribe government is seen to be responding to international pressure by creating a framework that is punitive enough to avoid explicit international interference, either by the ICC or the United States, while providing sufficient flexibility as to protect its own image and enable the DDR process. In effect, the Uribe administration can be seen as instrumentalzing its interstitial power as the representative of the Colombian government, acting as both an agent of international and domestic interests.

Simultaneously, the Colombian case demonstrates how a relatively weaker state in the international system gains agency in light of a fragmented and diffuse international community. For example, while the Colombian government did receive pressure from the ICC to conform to its norms and standards, the pressure exerted by the ICC was significantly less poignant and immediate than the demands for extradition by the United States government. In this context, the fact that the U.S.

[599] Easterday, "Deciding the Fate of Complementarity: A Colombian Case Study."; Ambos, "The Colombian Peace Process (Law 975 of 2005) and the ICC's Principle of Complementarity."

and other international actors, including the ICC, had significantly different interests in the prosecution of AUC leaders created room for manoeuvre for the Colombian government, reflected in the truncated criminal justice process created by the JPL framework.

CONCLUSION

Why do states of the Global South initiate international criminal justice processes for domestic atrocity crimes? International criminal justice challenges the core tenants of Westphalian sovereignty, or the principles of juridical equality and domestic non-intervention through its direct prosecution of individuals through international courts under international law. Given that states of the Global South are seen to be very protective of the principles of Westphalian sovereignty, the phenomenon of Southern state preference for international criminal justice presents an empirical and theoretical puzzle. Existing literature has addressed this puzzle by arguing that Southern agency is a result of external pressure, international normative development, and rationalist calculation of future benefits.

By contrast, this thesis has stressed the agency of Southern states themselves in relation to international criminal justice. More specifically, it has argued that international criminal justice is pursued as a short-term strategic tool by Southern state actors to target specific crises of state strength. This argument is derived from what I call a theory of *judicial extraversion,* or the instrumental use of international criminal justice to strengthen specific aspects of the state. The state, in this theory, is both analytically and empirically a disaggregated entity, defined through a composite of three different facets: the government, the international juridical entity, and the elite power structure. State strength is therefore not an absolute or binary characteristic, but a differentiated concept that needs to be understood in reference to each facet of statehood. Furthermore, the state can still 'exist' without necessarily having all three facets realised. As I have shown, each facet of the state can not only form the objective of national-level politics, but also become a political resource that can be drawn upon to strengthen other areas of the state. From this perspective, judicial extraversion is a particular type of political action that primarily utilises the state's status as an international juridical entity and government, and therefore its access to the international criminal justice system. The particular features of international criminal justice—most notably its processes of individualisation and criminalisation, and its reliance on the state for implementation—enable it to be mobilized as an external resource to strengthen different facets of statehood.

Three objectives of judicial extraversion were identified in the initial theory: the use of international criminal justice to 1) further strengthen the state's status as an international juridical entity; to 2) strengthen the state as its government and constituent institutions; and to 3) strengthen the state as an elite power structure. In addition, three forms of judicial extraversion were identified from the political opportunities inherent in the nature and operations of the international criminal justice system. The tension between the individualisation of responsibility and the collective or systemic nature of atrocity crimes provides opportunities for cost shifting, as specific individuals can come to symbolically bear the responsibility of committing atrocity crimes. The criminalisation of specific violent acts has the effect of de-politicizing the violence by de-emphasizing the political underpinnings or implications of why the violence occurred. Furthermore, the privileged status of the state, in the international criminal justice system, as creator and enforcer of international law, provides the state with the ability to influence the process of international criminal justice ('structural power'). Here we return to the original diagram in Chapter One:

FIGURE 3: THEORY OF JUDICIAL EXTRAVERSION

The politics of engaging with international criminal justice is in effect an interaction between the domestic political dynamics among actors within states, and the interactions of those actors with external actors in the international sphere. The decision to initiate, or reject, international criminal justice is informed by three factors: the incentives arising from the conditions of domestic politics, the suitability of different forms of judicial extraversion in coping with such circumstances, and the interactions of the state with the international criminal justice system.

In the case of Uganda, I argued that the decision to self-refer the LRA conflict to the ICC by President Museveni's government was a tactic of judicial extraversion aimed at increasing the flexibility of the government regarding the LRA conflict. Specifically, judicial extraversion was pursued by politicians within the elite power structure of the state to protect their position within the government, in light of increasing scepticism of the military elites, growing domestic dissent, and international criticism regarding how the LRA conflict had been handled. The domestic public and international actors criticized the government and its elites, especially Museveni, for the humanitarian crisis in Uganda's North and demanded a shift from his previous commitment to military campaigns against the LRA. The military elites, in contrast, were pushing for further military engagement to enhance their economic and political position. More specifically, key military figures were using the lack of success in the armed campaigns as means of criticizing the political leadership and pushing for a change in government. In this context, the self-referral to the ICC allowed the NRM government to simultaneously address the divergent pressures emerging from the three groups. The individualisation of responsibility and criminalisation of specific forms of violence under ICL allowed Museveni's government to obscure the political background of the LRA conflict and its own role in escalating the violence by characterising the conflict as a series of criminal acts committed by individual LRA leaders. The ICC referral also provided the government with the necessary justification to continue military campaigns to appease its international and domestic critics, as it could now characterise the campaigns as a form of international law enforcement. Finally, the elevation of the LRA conflict from an internal crisis to a situation featuring international crimes enabled a re-characterisation of the Ugandan state, as represented by the NRM government. It shifted from a state unable to carry out its basic sovereign duties of providing security for its citizens, and hence opening up the possibility of a legitimate international intervention, to a partner in international law enforcement, providing the opportunity for the Ugandan state to reassert its juridical equality and agency in the international sphere.

The Ugandan experience, in sum, demonstrates how international criminal justice can be used to simultaneously strengthen all three aspects of the state as set out in

Chapter One, using three forms of judicial extraversion—namely, the individualisation of responsibility, the criminalisation of specific violence, and the use of the structural power of the state. Most significantly, the Ugandan example showed how the three objectives of judicial extraversion are not only pursued concurrently, but also form an interlinked feedback loop, reinforcing each other. First, the effects of individualisation and criminalisation enhanced the autonomy of the government vis-à-vis domestic society to continue its military campaigns. This, in turn, allowed for the interest of the political elite power structure to be advanced, countering the critique of the military elites. The strengthening of the political elites then further reinforced the government's position in society. Finally, the exercise of the structural power of the state in implementing the international criminal justice system allowed for the international juridical status of the state to be strengthened, which further buttressed the position of the political elites and government vis-à-vis key domestic constituents.

FIGURE 4: JUDICIAL EXTRAVERSION IN UGANDA

In the case of Cambodia, judicial extraversion was pursued by the weaker party in a domestic political rivalry as a means of enhancing its standing within the elite power structure. The weaker party, FUNCINPEC, exploited its external recognition as one of the representatives of the Cambodian state and international juridical entity to increase its domestic power relative to its rival, the CPP. The request for an international criminal tribunal for Khmer Rouge era atrocity crimes came at a time when the two members of the national power-sharing government, the FUNCINPEC and CPP parties, were engaged in an intense rivalry to consolidate their power in preparation for the upcoming national elections. At this critical juncture, the CPP received an additional boost in the form of more armed men and finances by convincing a powerful faction of the Khmer Rouges to defect to its party in return for a *de facto* immunity from prosecution. FUNCINPEC responded by requesting an international criminal justice mechanism in the form of a specific international criminal tribunal, and in doing so, it instrumentalized the UN's recommendation to pursue accountability for the crimes committed in the Khmer Rouge era, in order to delegitimize the deal struck between the Khmer Rouges and its rival political party. This strategy was made available to FUNCINPEC, despite its relative weakness, as it was still one of the actors perceived to represent the Cambodian state as an international juridical entity, providing it with the authority to negotiate with the UN, announce foreign policy agendas, and address international actors. While the CPP had the right to contradict FUNCINPEC's decision, as the other half of the Cambodian government, it nonetheless agreed to the official request. It did so under the assumption that it would be able to thwart any genuine efforts of international criminal justice in the future, given that—once the CPP had eliminated FUNCINEPC from the seat of government—it would take over the structural power of the state in the international criminal justice system.

The Cambodian experience therefore demonstrates how international criminal justice, and in particular its criminalisation of specific forms of violence, is used to advance the interest of the state as an elite power structure. FUNCINPEC utilised its access to the international criminal justice system as one of the representatives of the Cambodian state—i.e., as an international juridical entity—to delegitimize the alliance between the Khmer Rouge faction and the CPP. This use of judicial extraversion by FUNCINPEC, and the reluctant acceptance of the CPP, shows that there can be a variance in preference regarding international criminal justice between domestic actors, even when they are all part of the state as government or international juridical actor. In other words, being the representative of the 'state' is not necessarily a defining factor in determining a political actor's preference regarding international criminal justice. This variance in preference within the state may, as discussed in Chapter One, be determined by how each actor is affected by a future international criminal justice process. In the case of Cambodia, FUNCINPEC leaders were less likely to be under scrutiny in an international criminal justice investigation, considering their failure to attract support from the Khmer Rouges. However, the findings in the Cambodia case also demonstrate that the variance can be a result of the internal political dynamic exogenous to the international criminal justice system, such as the relative weakness of an actor in the domestic rivalry.

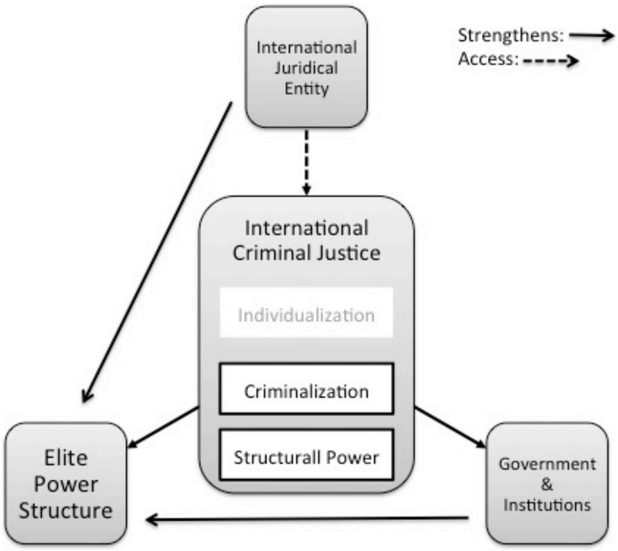

FIGURE 5: JUDICIAL EXTRAVERSION IN CAMBODIA

The case of Colombia and its demobilisation of the paramilitary groups served as a counter-example to the previous cases of Uganda and Cambodia. Unlike Uganda and Cambodia, the thesis argues that the Colombian state actively prevented the jurisdiction of the ICC and established a domestic criminal justice mechanism for the demobilised paramilitaries accused of atrocity crimes. Colombia's avoidance of international criminal justice was based on three specific rationales. First, the Colombian state as the central government had a complicated and complicit history with the paramilitary organisations. An independent investigation that exposed the continued links between the paramilitary violence and government counterinsurgency policy would have been a source of embarrassment for the state generally. Secondly, the Colombian state as central government underestimated its structural power in the international criminal justice system, partially influenced by its experience with the robust and independent Inter-American System of Human

Rights. It therefore did not expect that it would be able to influence the focus or scope of the prosecutions by the ICC. Thirdly, the Colombian state as its central government and constituent institutions, including the legislature, had a resilient self-perception as a 'strong' state and saw an international criminal justice process as an indication of weakness, solidifying the state's preference for a domestic criminal justice mechanism for the paramilitaries.

This preference of the Colombian state is in line with the general theoretical assumption discussed in the Introduction and Chapter One, in which, as weaker actors in the international system, Southern states are expected to resist international criminal justice in order to protect their sovereign authority. However, the Colombian experience also demonstrates that the relative weakness of the Colombian state vis-à-vis external actors is an insufficient explanation for its preference regarding international criminal justice. After all, the negotiations between the paramilitary groups and the government occurred in tandem with the preliminary examination by the ICC as well as the increasing pressure from the United States to extradite the leaders of the paramilitaries. The fact that the Colombian government was able to create a domestic accountability process and delay the extradition of the paramilitary leaders to achieve demobilisation reveals how Southern states are able to use their interstitial position between the international and domestic sphere to exercise agency, albeit in restricted circumstances. Furthermore, the preference of the Colombian state, particularly the executive branch of the government, is shown to reflect more specific historical contexts, such as its relation to the paramilitary phenomenon or the experience with regional human rights courts, rather than more structural or systemic factors such as the general condition of material or normative weakness.

Comparative & Theoretical Implications

The case studies present a number of comparative and theoretical implications to inform further research and theory development. On one level, the cases present three specific conditions that made judicial extraversion a more likely political strategy to be taken by a Southern state actor. First, the cases suggest that the domestic political context matters in the politics of judicial extraversion. Specifically, the context of internal political crisis, as well as the availability of other political strategies to address the general uncertainty stemming from such crisis, influenced the decision by state actors to employ judicial extraversion. As noted in Chapter One, international criminal justice does not fundamentally alter the general concern of protecting traditional sovereign rights by Southern states. Instead, particular circumstances alter the balance between the cost of derogating sovereign authority through the international prosecution of domestic crimes and the political benefits derived from international criminal justice. This balance, the case studies demonstrated, can be influenced by the internal political structures and arrangements of the state, such as its type of political system or specific institutional organisation.

For example, in the case of Uganda, the demands for a peaceful negotiated conclusion to the LRA conflict from the domestic public only became significant in the broader context of a gradual transition towards a multi-party electoral system. The political uncertainty stemming from the transition from a one-party to multi-party system amplified the importance of domestic support, as well as decreased the efficacy of the conventional methods used by the Ugandan government to pacify the domestic public, such as the creation of patronage networks and the use of oppressive politics, thereby necessitating an alternative strategy. The fact that, institutionally, the military was guaranteed a prominent position in domestic politics also contributed to reducing the number of domestic strategic options the government had regarding the LRA conflict, increasing the incentive for an extraverted strategy. A similar situation is replicated in the Cambodian case, as the overall increase in political uncertainty with the impending national elections decreased the relative cost of requesting an international criminal justice process from the perspective of FUNCINPEC. While the CPP sought additional political resources outside of the conventional realm of domestic politics by reaching out to the remaining Khmer Rouges, FUNCINPEC's failure to build up domestic public support, as well as to reach an alliance with the Khmer Rouge factions, resulted in an increased incentive for a strategy of extraversion. The case of Colombia, in contrast, did not exhibit a similar uncertain political crisis or transition. While the demobilization of the paramilitaries was, without doubt, a risky political gamble for the Uribe administration and the President himself, the negotiations themselves did not present a massive overhaul in the domestic political system in comparison to the imminent political transitions in the cases of Uganda and Cambodia.

Secondly, the fact that the preference for international criminal justice is influenced by the specific moments of political crisis also suggests that judicial extraversion is most likely pursued as a short-term tactic, rather than a long-term strategic preference. In other words, states can alter their preference for international criminal justice once the political crisis has subsided. This temporary nature of judicial extraversion was particularly pronounced in the Uganda case. As discussed in Chapter Two, once the political transition to a multiparty electoral system had been completed, and Uganda had received adequate international support for further military actions, the Ugandan government and President Museveni rapidly withdrew their support for their own ICC referral. In fact, just a decade after its self-referral of the LRA conflict to the ICC, Uganda has emerged as one of the chief critics of the ICC's operations in Africa.[600]

Such insights about the short-term nature of extraversion also hold significant implications for understanding the initiation of international criminal justice processes in the context of broader transition, such as the establishment of the Special Court for Sierra Leone (SCSL). The SCSL was established, formally, by a request by President Kabbah in 2000 to the then-UN Secretary General Kofi Annan following the end of the civil war in the 1990s.[601] While some existing theories have argued that Kabbah's request was a result of clandestine pressure from the United States and Britain,[602] the use of judicial extraversion in the context of uncertain political transition highlights the possibility of agency in situations such as Sierra Leone, in which the newly established post-conflict government was struggling to consolidate its power. The self-referral to the ICC by the DRC is another example that can potentially be understood through this relationship between political transition and international criminal justice. The DRC in 2003 had established a transitional government through a power-sharing agreement the central government, political opposition, and major regional rebel groups,[603] with the aim of adopting a new national constitution and holding general elections in two years time. In 2004, as the transition towards a constitutional electoral democracy is underway, President Joseph Kabila referred the conflict to the ICC.[604] Existing literature generally

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600 "Ugandan Leader Calls on Africa to Quit ICC," *Aljazeera* (2014), http://www.aljazeera.com/news/africa/2014/12/ugandan-leader-calls-africa-quit-icc-201412121712353977.html.
601 "Letter from the President of the Republic of Sierra Leone to the Secretary-General," (UN Security Council Report, 2002).
602 Mahony, "Prioritising International Sex Crimes before the Special Court for Sierra Leone: Another Instrument of Political Manipulation?," 60-61, 68-82.
603 Filip Reyntjens, *The Great African War: Congo and Regional Geopolitics, 1996-2006* (Cambridge, UK: Cambridge University Press, 2009), 254-55.
604 ICC, "Prosecutor receives referral of the situation in the Democratic Republic of Congo."

explains this self-referral as a result of international pressure, rather than directly in relation to the political transition and the uncertainty it accompanied.[605] The findings from this thesis, however, point towards the possibility that the self-referral of the DRC was also a strategic decision made to instrumentalize international criminal justice for the purposes of strengthening different facets of statehood.

Thirdly, the actors who represented the state mattered in each of the cases. The group of individuals that represent the state in the international sphere, as well as domestically as part of the government, can strongly influence the decision to engage in judicial extraversion because of the differentiated effect of international criminal justice. This was suggested in the Colombian case, where President Uribe's and his allies' personal connection with the paramilitaries likely influenced the decision to keep the prosecution of atrocity crimes within the country. But seen from the perspective of the relationship between political crisis and judicial extraversion, as discussed above, the influence of representation on the preference for international criminal justice may also be related to the relative position different political actors have in the overall domestic political dynamic. This was particularly clear in the Cambodian case. The fact that FUNCINPEC, despite being the weaker party of in the power-sharing government, formally retained claims of representing the Cambodian state in the international sphere, provided it with the opportunity to participate in the politics of international criminal justice. In other words, in the context of weakness in the internal rivalry with the CPP, FUNCINPEC's ability to directly access international organizations in it of itself became a usable political resource.

605 Schiff, *Building the International Criminal Court*, 213; Gies and Mundt, "When to Indict: International Criminal Indictments, Peace Processes, and Humanitarian Action," 8.

The impact of who represents the state on preferences for international criminal justice has significant implications in situations where there are a multitude of actors engaged in atrocity crimes. For example, in the aforementioned case of the DRC, the internal conflict involved a multitude of armed rebel groups, including the five groups that agreed to the peace agreement that established the power-sharing transitional government in 2003.[606] Given the circumstances, the fact that President Joseph Kabila, a relative newcomer to the conflict who had the "lightest balance sheet"[607] when it came to the perpetration of atrocity crimes, was given almost exclusive control over foreign policy, and thus given direct access to international institutions,[608] suggests the possibility that who was given authority over foreign affairs in the transitional government was significant in the DRC's self-referral of the ICC.

GOING BEYOND 'WEAKNESS'

On a more fundamental level, the thesis demonstrates that relative weakness alone, both in material and discursive terms, is not a sufficient factor to understand Southern state preference and behaviour regarding specific international phenomena, such as international criminal justice. As discussed in Chapter One, the category of the Global South already subsumes the historical experience of international intervention and involuntary subjugation as part of its constitutive characteristics, highlighting what I referred to as the 'baseline' preference of Southern states for protecting Westphalian sovereignty. Yet, the experience of international criminal

606 Signatories of the Inter-Congolese Dialouge, "Global and Inclusive Agreement on Transition in the DR Congo," http://reliefweb.int/report/democratic-republic-congo/global-and-inclusive-agreement-transition-dr-congo-inter-congolese.
607 Schiff, *Building the International Criminal Court*, 212; W. W. Burke-White, "Complementarity in Practice: The International Criminal Court as Part of a System of Multi-Level Global Governance in the Democratic Republic of the Congo," *Leiden Journal of International Law* 18, no. 3 (2005): 565.
608 Draft Constitution of the Transition, Articles 68 and 75.

justice in Uganda, Cambodia, and Colombia demonstrates that whether a state will assume its baseline position regarding international developments that challenge Westphalian sovereignty, such as international criminal justice, is not structurally pre-determined, but rather shaped by more specific factors.

On the most basic level, if weakness were the determining factor in Southern state preferences for international criminal justice, we would expect to see similar resistance from Uganda and Cambodia as in the case of Colombia. However, the variance in preference that we observe between the three states does not correspond to the relative weakness of the states. Most remarkably, it can be argued that Colombia was the *stronger* state at the time of the ICC preliminary investigations, in terms of its institutional stability or economic development, and in light of the fact that it was not facing an acute internal political crisis. Colombia was wary of presenting itself as institutionally weak to the international community, and therefore eschewed an international judicial mechanism, while both Uganda and Cambodia were willing to instrumentalize a certain degree of institutional weakness—that of the military in the case of Uganda, and the judiciary in the case of Cambodia—to generate political rent from the system of international criminal justice.

These findings suggest that the 'weakness' of Southern states need to be disaggregated into its constituent parts to provide a more accurate explanation of state behaviour. In the case of Uganda, it was not the relative weakness of the state vis-à-vis other states, such as donor nations, or international organisations, such as the ICC, that influenced Uganda's preference. Rather, it was Uganda's own declining internal and external strength, compared to its previous position before the discussions regarding political transition or changes in strategy for waging the conflict with the LRA began. In the case of Cambodia, the imbalance of power between the two parties in the power-sharing government meant that each part of the government had a different relationship to the international sphere, resulting in seemingly contradictory behaviour on the part of the Cambodian state as a whole. The preference for international criminal justice in Cambodia was not a result of the general weakness of the state, but the relative weakness of one political party in the power-sharing government.

UNCOVERING AGENCY

In addition, the cases demonstrate how the existence of external influence does not negate the possibility of agency by the weaker state. In all three cases there were a variety of external pressures regarding international criminal justice or accountability for atrocity crimes, as well as interference regarding the broader conflict situation in question. However, the degree of international pressure was often varied and inconsistent, and not all external actors were demanding an international criminal justice process, creating room for agency by the Southern state actors. In Uganda, international pressure was a significant factor in creating the preference for international criminal justice—but external actors were primarily concerned with the humanitarian situation in Uganda's Northern districts, rather than the particular issue of accountability for the LRA. In other words, international pressure mattered for Uganda, but as Chapter Two argued, international criminal justice was a means of circumventing the specific demands of international actors, rather than the result of external pressure. In the case of Cambodia, international pressure existed in the form of lobbing by specific individuals within international organisations and donor nations to consider an accountability mechanism for Khmer Rouge era crimes. However, external actors more broadly were neither unified nor singularly focused regarding the issue of international criminal accountability, and were more interested in pursuing heterogeneous and immediate geopolitical interests. This meant that Cambodian state actors had ample room to manoeuvre, playing off one external interest against another. Finally, in the case of Colombia, ironically, there was pressure from both the ICC and powerful donor nations, namely the United States, to criminally prosecute the paramilitaries. However, the two actors did not agree on the focus of the prosecutions, with the ICC concerned about atrocity crimes and the US concentrated on drug trafficking related offences. Furthermore, the strength of each actor was markedly different in the Colombian context, with the US considered a much stronger actor than the ICC, resulting in the eventual extradition of the paramilitary leaders—but the continued rejection of the ICC.

This thesis has also demonstrated how state agency can occur in paradoxical or counterintuitive forms. The cases illustrate how surrendering one's jurisdiction to an international court—a seemingly costly act that derogates one's sovereign authority and therefore circumscribes agency—can actually increase the state's agency under specific circumstances. Uganda's engagement with international criminal justice is the most vivid example. Faced with rising international criticism regarding the state's failure to provide security for its citizens and with demands to abandon its military campaigns, the Museveni government surrendered jurisdiction to the ICC. This decision, paradoxically, increased the autonomy with which the government could manage the LRA conflict as a result of the re-characterisation of the conflict as criminal enterprise by particular LRA leaders.

In theoretical terms, this form of paradoxical agency can be explained as the active subversion of the paternalism inherent in international criminal justice. International interventions such as the pursuit of international criminal justice, as Jean Cohen argues, effectively postulate a conditional system of sovereign statehood, under which the sovereign right to non-intervention is suspended when atrocity crimes are committed.[609] This argument implies that the suspension of sovereignty is legitimised when a redefinition of the internal polity is carried out through certain forms of violence—most notably, through acts such as the expulsion of ethnic groups, ethnic cleansing, genocide, or specific forms of crimes against humanity.[610] In effect, the discourse of individual protection, or the principle of "civilian inviolability," is now granted a critical role in determining the boundaries of domestic jurisdiction.[611]

However, this "new sovereignty,"[612] as Kofi Annan referred to it, has an inherently paternalistic undertone, particularly in the context of international criminal justice, as it implies the inability of the domestic polity to independently determine the boundaries between legitimate and illegitimate political actions.[613] It is worth recalling here the discussion regarding the reliance on *jus cogens* norms in international criminal jurisprudence in Chapter One, which demonstrated that, theoretically, the body that can determine the delineation between prescribed and permitted norms was no longer the state and its domestic polity, but the broader 'international community.'

Voluntary surrender of jurisdiction— either in the form of self-referral to the ICC or calls for international prosecution—circumvents this paternalism and gives power back to the original source, as the state in question itself actively engages in drawing the boundaries of domestic jurisdiction. Thus, calling for an international criminal investigation regarding an internal conflict is a counterintuitive way of re-establishing the exclusive right to jurisdiction in the domestic sphere. It also reasserts the ability

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609 Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, 196-98.
610 Ibid.
611 Anne-Marie Slaughter and William Burke-White, "An International Constitutional Moment," *Harvard International Law Journal* 43, no. 1 (2002): 8.
612 Kofi A. Annan, "Two Concepts of Sovereignty," *The Economist*, 18/09 1999.
613 Cohen, *Globalization and Sovereignty: Rethinking Legality, Legitimacy, and Constitutionalism*, 204.

of the state to function as a full member of the international legal order,—albeit in an *ex post facto* manner—as well as exercising its rights as an equal participant.

In sum, the three cases analysed through the theory of judicial extraversion reveal how agency is a contextual and relative attribute, which is not negated by the simple fact of relative weakness of a state in the international system. International criminal justice, seen from this perspective, is a resource or opportunity that creates the political space in which Southern states can exercise agency by manipulating external and internal limits on their sovereign authority.

LIMITATIONS OF JUDICIAL EXTRAVERSION: BEYOND THE GLOBAL SOUTH?

The application of the theory of judicial extraversion, as presented in this thesis, has been limited to the states of the Global South. But is this theoretical boundary necessary? Can the theory be expanded to help elucidate the preference and behaviours of other states regarding international criminal justice? As shown in the Introduction and Chapter One, the theoretical framework departed from the empirical fact of broad similarities between the specific states that initiated international criminal justice processes for domestic atrocity crimes. In short, the theory was inferred from the generic relative weakness of the states in question, and the related experience of external intervention and interference, including colonisation.

Nonetheless, the theory itself, and the insights drawn from its application, problematizes this undifferentiated conceptualisation of weakness by demonstrating the agency and contingent strength of the states in question. Weakness is shown to be a heterogeneous and circumstantial concept, determined by specific, rather than generic, conditions. Furthermore, the theory moves away from the influence of the historical experience of colonialism and past intervention to focus on the particular features of international criminal justice and the political dynamics generated from the composite nature of the state. In other words, the Global South only serves as a motivating condition for theory-building by highlighting the counterfactual nature of the phenomenon, rather than constituting a significant facet of the ensuing theory itself. This suggests the possibility of expanding the application of the theory to states outside of the Global South, where grave violations of ICL have been committed.

THE EFFECTS OF COSMOPOLITAN LAW IN A STATE-CENTRIC WORLD

Finally, the theory of judicial extraversion presents the fundamental question: what impact does the development of international criminal justice have on international politics? As discussed in Chapter One, ICL and international criminal justice are frequently considered as cosmopolitan developments that challenge the basic organising principle of the international political system, namely the external and internal sovereignty of states. For some, the challenge to the primacy of domestic jurisdiction by ICL and international criminal justice was seen as a triumph of global rule-of-law over politics. From this perspective, law, including ICL, and politics, including the traditional structure of the international system, were seen as each other's negative counter-parts, with law inhabiting an explicitly apolitical sphere of public life. For example, Nouwen and Werner observed:

> [p]olitics […] is portrayed as external to law, as something that needs to be overcome by independent organs acting on the basis of pre-given rules and principles. In this understanding, the Court's [ICC] fight against impunity is also a struggle with or even against politics.[614]

[614] Nouwen and Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," 942.

This is not an entirely erroneous view, given that the obstacles to holding individuals accountable for mass crimes and human rights violations were often created by the political power held by perpetrators, particularly state officials.[615] In this sense, the effect of international criminal justice on politics was the *retreat* of the political sphere—the triumph of law over power politics.

For others, the attack on the sovereign-state system did not result in a global rule-of-law, but was a project of neo-imperialism.[616] For proponents of this view, the rise of ICL and the international criminal justice system is part of the discourse and mechanisms through which neo-imperial conquest is manifested and legitimated.[617] This position is frequently echoed in the present day by African states critical of the ICC.[618]

The theory of judicial extraversion, however, takes a radically different view. It argues that, under particular circumstances, international criminal justice and ICL can be used to entrench the authority of existing states—particularly weaker states of the international system. Specifically, the theory of judicial extraversion has highlighted how international criminal justice can favour the state as an actor in comparison to sub-state groups or individuals, since it can be used as a resource to strengthen the state as the government, international juridical entity, and elite power structure. In fact, the very tension between the continuation of the sovereign state-

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615 Sikkink, *The Justice Cascade*, 231-32.
616 Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000); Purdy Jedediah and et al., "The Revival of Empire," *Ethics and International Affairs* 17, no. 2 (2003); Koskenniemi, *The Politics of International Law*.-227; Nico Krisch, "International Law in Times of Hegemony," *European Journal of International Law* 16, no. 3 (2005): 398.
617 Michael Ignatieff, "The American Empire; the Burden," *The New York Times Magazine* (2003); Hunter Robert Wade, "The Invisible Hand of the American Empire," *Ethics and International Affairs* 17, no. 2 (2003). For a summary of the neo-imperial argument, see: Jean L. Cohen, "Whose Sovereignty? Empire Versus International Law," ibid.18, no. 3 (2004): 2.
618 Latiff, "Africa: ICC a Toy of Declining Imperial Powers- Uhuru Kenyatta"; Michael Pizzi, "South Africa threatens to withdraw from the ICC, allegeing anti-African bias," *Al-Jazeera America*, 12 Oct. 2015.

centric international system and the development of cosmopolitan international law, such as ICL, produces additional means by which the state can further strengthen itself, both vis-à-vis domestic competitors and within the international system. This argument points towards the fact that despite the perceived radicalness of ICL, the impact of international criminal justice can be surprisingly conservative. International criminal justice, from this perspective, simply provides an alternative means through which traditional politics in states of the Global South can be played out.

The findings point towards one area of a state's strength that may be influenced by the practice of international criminal justice—namely, the coercive capacity of the state, or the commission of state violence. Literature on international criminal justice has generally focused on whether the development of ICL and international criminal justice has a deterrent effect on the commission of future violence,[619] or on whether it has a positive or negative effect on peace negotiations.[620] However, the case study of Uganda demonstrated how the process of international criminal justice could be used to justify the commission of violence by state security agents, such as the national army. While it is difficult to generalize from this one case, the theoretical framework of judicial extraversion at least implies the possibility of states proactively using international criminal justice to legitimise violence as a means of law enforcement, particularly in the context of on-going conflict. More significantly, the state-centric structure of international criminal justice suggests that, if indeed international criminal justice can enable violence, it will be more likely by state

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619 Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?," *American Journal of International Law* (2001).

620 For example: Neumayer, "A New Moral Hazard?."; Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism," *Human Rights Quarterly* 31 (2009); Rachel Kerr and Eirin Mobekk, *Peace and Justice: Seeking Accountability after War* (Cambridge, UK: Polity Press, 2007).

agents, rather than non-state agents, given the structural power of the state in the international criminal justice system.

This alternative view of international criminal justice rather dampens the optimism amongst transnational activists and certain scholars regarding the ability of international criminal justice to combat impunity for atrocity crimes—in other words, to 'speak justice to power'. The theory of judicial extraversion suggests that, while prosecution of perpetrators for atrocity crimes is not inherently precluded, the possibility of instrumentalization implies that justice, when served, will most likely be selective, with non-state actors or weaker domestic political actors bearing the brunt of the responsibility.

This has been the criticism levied on the recent prosecution of Laurent Gbagbo, the former president of Côte d'Ivoire, by the ICC. Gbagbo is accused of killing up to 3000 people in 2010 in the process of holding on to his power, following his defeat in the presidential election in 2010 against current-president Alassane Ouattara.[621] Although Côte d'Ivoire is not a signatory state to the ICC, Ouattara *de facto* self-referred the situation of the election violence to the ICC by declaring that Côte d'Ivoire will, temporarily, accept the jurisdiction of the ICC.[622] While the ICC Prosecutor has promised even-handedness in her investigations, critics argue that the ICC has been forced to take sides, focusing on the deposed Gbagbo rather than the incumbent Ouattara.[623]

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[621] Jason Burke, "Former Ivory Coast President On Trial for 'Unspeakable' Crimes," *The Guardian*, 28 Jan., 2016.
[622] "Côte d'Ivoire: President Ouattara Wants ICC Investigation; OTP to Seek Pre-Trial Chamber Authorization".
[623] Alana Tiemessen, "The International Criminal Court and the Politics of Prosecutions " *The International Journal of Human Rights* 18, no. 4-5 (2014).

This possibility suggests that, in practical terms, international criminal justice practitioners need to be wary of the demonstrations of cooperation and initiative by state actors. Indeed, the ICC seems to have learned its lesson. The Court is now moving away from its over-reliance on self-referral cases, and selecting its own cases through the OTP's *propio motu* powers (the Prosecutor's independent ability to initiate investigations).[624] Nevertheless, the tension between the cosmopolitan ideals that drove the emergence of international criminal justice and the persistent state-centric nature of the international system exists, even with the increasing initiative of international criminal justice practitioners. While the ICC's self-selection of cases can circumvent political instrumentalization of international criminal justice by states in the initial stages, it does not change the fundamental fact that the ICC is reliant on state cooperation for its investigations. The controversy regarding the alleged atrocity crimes committed in Kenya in 2007, in which the Court was forced to drop its charges due to the non-cooperation of the Kenyan state[625] demonstrates just how difficult it is for the cosmopolitan ideal of international criminal justice to be achieved in a state-centric international system.

The theory of judicial extraversion also suggests the possibility that international criminal justice may be able to contribute to peace and stability—just not in the way it was expected to. If the initial vision of international criminal justice promoted by scholars and transnational activists was to decrease the level of mass violence against civilians and achieve sustainable peace through the establishment of rule-of-law, the theory of judicial extraversion suggests that stability, or negative peace, can be achieved by contributing to the creation of a strong state at a time of internal crisis.

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624 *Rome Statute of the International Criminal Court*, Art. 15 bis.

625 David Blair, "ICC Drops Case Against Kenya's President as Country 'Failed to Cooperate' with Criminal Investigation," *The Telegraph*, 5 Dec. 2014.

The normative judgement as to whether that is a positive or negative development in the international system is not part of the scope of this present inquiry. However, it does leave us with the fundamental question of what the objective of international criminal justice is—what are we, as the international community, aiming to achieve through ICL and the practice of international criminal justice?

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List of Interviews

Colombia

All interviews were conducted in Bogotá, Colombia

Ana María Rodríguez Valencia (Representative before the UN at CCJ), interview with author, CCJ Office, 3 Aug., 2015

Anonymous Interview, former Senator

Confidential Interview

Henry Rivera (Researcher at International Centre for Transitional Justice, former member of domestic human rights NGO), interview with author, ICTJ office, 28 Jul., and 4 Aug., 2015

Jorge A. Restrepo (Director of Conflict Analysis Resource Centre, 'CERAC'), interview by autor, University Pontifica Javeriana, 29 Jul., and 5 Aug., 2015

Maria Alejandra Encinales (Head of Treaty Section, Ministry of Foreign Affairs), interview by author, Ministry of Foreign Affairs office, 30 Jul., 2015

Miguel Samper (Former Vice-Minister of Justice), interview with author, The Gun Club, 24 Jul., 2015

Ricardo Posada Maya (Professor of criminal and public constitutional law, University Los Andes), interview by author, University Los Andes, 31 Jul., 2015

Sebastián Machado Ramírez (Advisor to the Attorney General's Office, former coordinator of the Directorate of International Legal Affairs, Ministry of Foreign Affairs), interview by author, Attorney General's Office, 29 Jul., 2015

Cambodia

All interviews were conducted in Phnom Penh, Cambodia unless otherwise noted.

Chea Vannath, (social activist), interview with author, personal residence, Phnom Penh, 02 Apr., 2014)

David Hawk, (Head of Cambodian field office for the UN High Commissioner for Human Rights), skype interview with author, 7 Feb., 2014

Former Government Advisor, Confidential Interview

Helen Jarvis, (Advisor to Minister Sok An, former ECCC Outreach officer, government advisor on accountability), interview with author, Ngon Restraunt, 25 Mar., 2014

Long Panhavuth (Programme Officer, Camboida Justice Initiative), interview with author, The Shop Café, 31 Mar., 2014

Lao Monghay, (human rights activist), interview with author, Relax Café, 28 Mar., 2015

Mathieu Pellerin (consultant, at LICADHO, human rights organisation), interview with author, LICADHO office, 28 Mar., 2014

Ok Serei Sopheak (former advisor to CPP Minister of Interior, current governance consultant), interview with author, Royal Hotel, 2 Apr., 2014

Ou Virak (former president of the Cambodian Centre for Human Rights), interview with author, personal office

Ouk Vithun (former FUNCINPEC Minister of Justice, current legal advisor to the King), interview with author, K-West restaurant, 28 Mar., 2014

Phay Siphan, (Spokesperson for the Office of the Council of Ministers), interview with author, Council of Ministers' Office, 2nd Apr., 2014

Thun Saray (President of ADHOC, human rights organisation, former member of the PRT), interview with author, ADHOC office, 27 Mar., 2014

Youk Chhang, (Director of Documentation Centre-Cambodia, DC-Cam), interview with author, DC-Cam office, 21 Mar., 2014