ABSTRACT

Can international treaties generate broadly influential norms when the legal agreements themselves are rejected by the most powerful states in the international system? Despite valuable scholarship focusing on their initial creation of “non-great power” treaties, few studies have sought to systematically examine the subsequent impact of these initiatives. The present dissertation addresses this gap through a detailed assessment of two archetypal cases, the Antipersonnel Mine Ban Treaty and Rome Statute of the International Criminal Court.

To do so, I develop a theory of treaty influence that emphasizes the role of legal instruments in generating international norms, and an associated methodology to identify these social effects. I argue that treaty members may build a community of obligation without the direct support of powerful states, and that these efforts may come to implicate even those states that resist the binding commitments of the legal agreement. The Mine Ban Treaty and Rome Statute have thus powerfully shaped the way in which states across the international system conceive of appropriate conduct with respect to the use of certain weapons and the punishment of grave international crimes. The extensive changes in state practice and discourse are particularly notable since both treaties seek to overturn a prior international consensus that permitted vastly different behaviour.

This dissertation has important implications for both international relations theory and practice. Most generally, I demonstrate that influential international laws and norms need not depend on great power leadership, and may derive from a broader array of actors including middle powers and non-governmental coalitions. Ultimately, I argue that the strategic calculation adopted by treaty proponents—that global norms can be more effectively promoted via rigorous treaties with incomplete membership, rather than by weaker agreements initially endorsed by great powers—presents a viable pathway to generating widely respected international norms. In this sense, the focus of the present research is applicable to a wide array of current and prospective regulatory efforts in fields such as global finance and trade, security, human rights and the environment.
PREFACE


Interviews conducted for this dissertation were approved by the University of British Columbia’s Behavioural Research Ethics Board (BREB), certificate No. H08-02981.
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<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ANC</td>
<td>African National Congress</td>
</tr>
<tr>
<td>AP</td>
<td>Antipersonnel (Mine)</td>
</tr>
<tr>
<td>APIC</td>
<td>Agreement on Privileges and Immunities of the International Criminal Court</td>
</tr>
<tr>
<td>APII</td>
<td>Amended Protocol II, Convention on Certain Conventional Weapons</td>
</tr>
<tr>
<td>AU</td>
<td>African Union</td>
</tr>
<tr>
<td>CAHWCA</td>
<td>Crimes Against Humanity and War Crimes Act, Canada</td>
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<tr>
<td>CAR</td>
<td>Central African Republic</td>
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<tr>
<td>CAT</td>
<td>Convention Against Torture</td>
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<tr>
<td>CCM</td>
<td>Convention on Cluster Munitions</td>
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<tr>
<td>CCW</td>
<td>Convention on Certain Conventional Weapons</td>
</tr>
<tr>
<td>CICC</td>
<td>Coalition for the International Criminal Court</td>
</tr>
<tr>
<td>CPA</td>
<td>Comprehensive Peace Agreement, Nepal</td>
</tr>
<tr>
<td>DRC</td>
<td>Democratic Republic of the Congo</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>GoU</td>
<td>Government of Uganda</td>
</tr>
<tr>
<td>ICC</td>
<td>International Criminal Court</td>
</tr>
<tr>
<td>ICCLR</td>
<td>International Centre for Criminal Law Reform and Criminal Justice Policy</td>
</tr>
<tr>
<td>ICCPR</td>
<td>International Convention on Civil and Political Rights</td>
</tr>
<tr>
<td>ICRC</td>
<td>International Committee of the Red Cross</td>
</tr>
<tr>
<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<tr>
<td>ICTY</td>
<td>International Criminal Tribunal for the Former Yugoslavia</td>
</tr>
<tr>
<td>IR</td>
<td>International Relations</td>
</tr>
<tr>
<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<tr>
<td>MBT</td>
<td>(Antipersonnel) Mine Ban Treaty</td>
</tr>
<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
</tr>
<tr>
<td>NILD</td>
<td>National Implementing Legislation Database</td>
</tr>
<tr>
<td>NSAG</td>
<td>Non-State Armed Group</td>
</tr>
<tr>
<td>OTP</td>
<td>Office of the Prosecutor, International Criminal Court</td>
</tr>
<tr>
<td>PITF</td>
<td>Political Instability Task Force</td>
</tr>
<tr>
<td>PRIO</td>
<td>Peace Research Institute Oslo</td>
</tr>
<tr>
<td>SCCED</td>
<td>Special Criminal Court on the Events in Darfur</td>
</tr>
<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<tr>
<td>SPLM/A</td>
<td>Sudanese People’s Liberation Movement/Army</td>
</tr>
<tr>
<td>UCDP</td>
<td>Uppsala Conflict Data Program</td>
</tr>
<tr>
<td>UK</td>
<td>United Kingdom of Great Britain and Northern Ireland</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
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<tr>
<td>UNSC</td>
<td>United Nations Security Council</td>
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<tr>
<td>US</td>
<td>United States</td>
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Our family has also faced its share of tragedy, with the untimely passing of my father, Stephen Bower. No words can adequately convey the tremendous loss that his death meant for the many people that loved and respected him. He was a wonderful husband, father, son and friend – a man of great integrity whose grace and courage were matched only by his love of his family. His absence is felt by each of us, in our own way, every day. This dissertation is dedicated to his memory, with sincere gratitude for the life that he made possible. I would additionally like to thank the Royal Canadian Mounted Police for allowing the use of their motto in the dedication. This gesture in no way signifies their endorsement of the findings presented herein.
For Staff Sergeant Stephen Ronald Bower (June 29, 1942 – September 13, 1991):

A great man, taken from us far too soon.

*Maintiens le Droit*
CHAPTER ONE:
NON-GREAT POWER TREATIES IN INTERNATIONAL RELATIONS

In the early hours of July 18, 1998, in a large plenary hall of the United Nations Food and Agriculture Organization in Rome, delegates to the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened for the final vote on a draft Rome Statute. This was the culmination of many tough, painstaking negotiations over the course of years. Fanny Benedetti and John Washburn—two keen observers of the International Criminal Court’s genesis—nicely captured the tense spirit of the final diplomacy:

The committee of the whole assembled at first in the Red Room…. In this cramped and inconvenient space with too few seats, representatives of NGOs and governments alike thronged the aisles and sides. India and the United States asked for votes on their proposed amendments to the complete draft text of the statute for the international criminal court, which Chairman Philippe Kirsch of Canada had introduced. Following a scenario carefully choreographed by the bureau of the UN Secretariat, Norway’s delegation and other speakers addressed the conference before the vote was taken. They pronounced the chairman’s text a delicately balanced and painfully achieved package and claimed that—if any element of it were to be changed—the package would fall apart. When India’s amendment was defeated by 114 votes out of 148 cast an exuberant uproar ensued. It was a celebration that the package had held with the support of a majority that would give it legitimacy.

In the biggest and most emotional demonstration of the evening, cheering, hugging, weeping, and rhythmic applause followed the similar defeat (by 113 votes) of the U.S. amendments. The intense reaction reflected a fear many participants had harbored: that even at the last minute the strenuous diplomacy of the United States in Rome and its blunt bilateral maneuvers around the world would succeed either in putting the conference in impasse or in rendering largely impotent the eventual court.¹

A final vote on the complete draft Statute ensued, and electronic scoreboards displayed the outcome: 120 states in favour, with seven states voting against,² and 21 abstentions. This achievement followed only a year after the successful conclusion, in Ottawa, of a comprehensive ban on antipersonnel landmines that developed in strikingly similar conditions of great power

² Though no official record was made public, it is widely understood that the seven negative votes were cast by China, Iraq, Israel, Libya, Qatar, the United States of America, and Yemen.
resistance and with the associated dilemma of whether to accept a less ambitious agreement in order to gain the endorsement of key states.

Even in the midst of the initial excitement of their creation, both treaties faced significant challenges, most notably the fact that prominent global powers like China, the Russian Federation and the United States of America refused to join the agreements, calling into question the future efficacy of the agreements. The Antipersonnel Mine Ban Treaty (MBT) and Rome Statute of the International Criminal Court (ICC) are puzzling because they defy the assumption—held by contemporary observers and prevailing academic accounts—that multilateral initiatives require the support and active participation of the great powers. These treaties are thus relative rarities in international governance in that they were created without achieving the support of the very states typically assumed to be most consequential to their subsequent success. This led some to suggest that the institutions were fatally flawed from the outset and were therefore unlikely to realize the high hopes of their proponents.

This scepticism raises a question of fundamental importance to the study of contemporary international governance: Can treaties succeed in generating broadly respected international

---

3 I employ the term “great powers” to encompass the most materially powerful states in the international system, meaning principally China, Russia, and the United States, though many observers might now add India to this list. In doing so, I follow Mearsheimer’s definition of great powers as those states “having sufficient military assets to put up a serious fight in an all-out conventional war against the most powerful state in the world.” This definition has the virtue both of relative precision—in that it is more easily defined and operationalized than more diffuse notions of “major powers,” etc.—and greater breadth, in that it includes states other than the single U.S. hegemon. While I regularly employ “great powers” throughout this dissertation, my focus is ultimately on the larger question of whether treaties created without the support of these key states can nonetheless prove influential across the entire range of states in the international system. John Mearsheimer, The Tragedy of Great Power Politics (New York: W.W. Norton & Company, 2001), 5. Exceptions to this general trend are noted in fn. 12, page 6.

norms and legal obligations when they lack the coercive, instrumental and legitimating support frequently associated with the most materially powerful states? And if so, how would we know if and when this is occurring – how might treaties exert influence, and what evidence can be marshalled in order to assess institutional efficacy? Focused attention on “non-great power” treaties is a recent development in the discipline, and to this point the literature has yet to fully engage with the difficult task of evaluating subsequent institutional performance. This is an important subject for exploration, as the implications of “middle power” and transnational civil society leadership in creating international institutions can only be fully understood by assessing the empirical outcomes of these initiatives. At the broadest level, then, this dissertation seeks to provide a more rigorous theoretical and empirical accounting of the MBT and ICC after their first decade in existence as crucial cases in assessing the broader strategy of attempting to foster new international norms without the support of great powers. How successful have the treaties been in generating widespread adherence, and what variance can be observed in these outcomes?

The starting point for this study is to conceptualize treaties as focal points in the development of international norms, which I define conventionally as “collective expectations about proper behaviour for a given identity.” Norms often lack codification in an explicit written text but nonetheless exert important influence in defining the appropriate type and range of actor behaviours and, more fundamentally, contribute to the constitution of their identities and interests. Negotiated legal agreements, however, are particularly valuable to the genesis of norms as they articulate a set of social expectations that are further formalized as legal rules

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6 Here there are strong parallels with customary sources of international law, as authors like D’Amato and Byers have previously explored in detail. See Anthony A. D’Amato, The Concept of Custom in International Law (Ithaca, N.Y.: Cornell University Press, 1971); and Michael Byers, Custom, Power, and the Power of Rules: International Relations and Customary International Law (Cambridge: Cambridge University Press, 1999).
“constitut[ing] specific applications of norms to particular situations.”7 The treaty-making process thus helps to clarify the content and scope of these constituent standards of appropriate behaviour in the international community. Once established, legal institutions provide a structure through which existing norms and rules may be progressively elaborated, contested, or replaced.8 Hence while only part of the larger process of norm-building, multilateral treaties are a prominent way in which intersubjective social standards may be generated and promoted within the international system and, as I will demonstrate, pose implications beyond the boundaries of the legal agreement itself.

Thinking of treaties as normative structures brings to bear the extensive scholarship in International Relations on the impact of norms in both constituting and regulating the conduct of international affairs; I draw on these insights extensively in this present study.9 The basic argument I wish to advance is that non-great power treaties enjoy far greater influence than sceptics realize, and they do so because of the inherently interconnected nature of contemporary international law and the international system more broadly. Treaties do not reside—they are not judged, observed, or resisted—in isolation, but rather exist as part of a much larger network of norms and rules that structure international practice. It is this quality of social embeddedness which gives international treaties their legitimacy and facilitates the creation of communities of obligation even in the absence of the political authority and enforcement capacity provided by

8 Of course, the content of relevant norms does not always match the existing international law in a given issue area, and norms may be more or less permissive than the formal legal strictures. See Ward Thomas, The Ethics of Destruction: Norms and Force in International Relations (Ithaca: Cornell University Press, 2001), 42-43 and Sarah V. Percy, “Mercenaries: Strong Norm, Weak Law,” International Organization 61, no. 2 (2007): 367-397.
predominant political actors. At the same time, because they articulate and substantiate norms that exist beyond their strict legal definition, non-great power treaties may generate informal compliance and adaptation among non-party states even as these actors remain outside the formal legal agreement. This latter outcome would be especially surprising for the preponderance of scholars who regard voluntary consent as the basis of international obligation.

The Cases: Non-Great Power Treaties in Context

This dissertation employs case studies as the primary means of analysis.10 The Mine Ban Treaty and Rome Statute of the International Criminal Court are part of a relatively small sub-set of multilateral agreements that can be usefully conceptualized as “non-great power” treaties. This term is used here to denote diplomatic initiatives driven by a coalition of middle power states11 and transnational civil society actors that produced formal treaties that ultimately failed to attract the support of prominent states like China, India, the Russian Federation and the United States of America. While these global powers participated in the diplomatic efforts leading to the respective agreements, they were unable to steer the processes to an outcome they could accept. The United States in particular played an active role in the negotiations but ultimately refused to join either treaty, and has often worked against their purposes.

This experience is relatively atypical in the history of multilateralism. With some significant exceptions,12 efforts to achieve binding global regulations have been stewarded by the

10 George and Bennett define a case as “an instance of a class of events…. A case study is thus a well-defined aspect of a historical episode that the investigator selects for analysis, rather than a historical event itself.” Alexander L. George and Andrew Bennett, Case Studies and Theory Development in the Social Sciences (Cambridge, MASS: The MIT Press, 2005), 18.
12 For example, the Convention on the Elimination of Discrimination Against Women, the UN Convention on the Law of the Sea, the 1977 Additional Protocols to the Geneva Conventions, and the Kyoto Protocol to the Framework Convention on Climate Change all emerged without the endorsement of the United States among others.
most materially powerful states of the period, and legal obligations have consequently been limited to what these states would tolerate in order to ensure their inclusion in the treaty community. The success of the Ottawa and Rome negotiations is thus particularly notable as the lack of support from great powers is often enough to doom incipient cooperative efforts outright. A proposed fissile material ban, regulations on the small arms trade, and so on have stalled in the face of resistance from key states; efforts to develop a verification protocol for the Biological and Toxin Weapons Convention were similarly abandoned in 2002 when the United States indicated it would not accept the draft proposal. The MBT and ICC also run counter to the typical pattern in environmental governance, in which broad initial “framework” agreements are created to maximize inclusivity, with subsequent protocols negotiated in the hopes of strengthening the agreement over time.

The failure to gain acceptance from the great powers was not the result of a diplomatic oversight, but was rather a deliberate decision to seek more extensive commitments than were palatable to these states, as the basis for an effective legal regime. This strategy is premised on an assumption that global norms can be more effectively promoted via rigorous treaties with incomplete membership that may be expanded over time, rather than by weaker agreements initially endorsed by prominent actors. While the decision to pursue an absolute ban on

It is interesting to note that the United States has signed, but not ratified, each of these agreements. For a critique of assumptions regarding hegemonic leadership, see Robert A. Denemark and Matthew J. Hoffmann, “Just Scraps of Paper? The Dynamics of Multilateral Treaty-Making” Cooperation and Conflict 43, no. 2 (2005): 191.

For a discussion of material—principally military and economic—power, please see for example Benjamin O. Fordham and Victor Asal, “Billiard Balls or Snowflakes?: Major Power Prestige and the International Diffusion of Institutions and Practices” International Studies Quarterly 51, no. 1 (2007): 37-38; and the National Material Capabilities index from the Correlates of War Project. The latter is available online at www.correlatesofwar.org.


This has been termed the “law of the least ambitious program… where international management is established through agreement among all significant parties, and… collective action will be limited to those measures acceptable to the least enthusiastic party.” Edward L. Miles et al., Environmental Regime Effectiveness: Confronting Theory With Evidence (Cambridge, MASS: The M.I.T. Press, 2002), xiii.
antipersonnel mines resulted in the non-participation of key states, negotiators calculated that the absence of exceptions or exclusions would result in a more authoritative stigmatization of the weapons, and thus better address the humanitarian impacts posed by AP mines.\textsuperscript{16} Much the same calculus animated the negotiations that ultimately produced the Rome Statute of the International Criminal Court. Governmental and NGO advocates again assumed that a strongly independent Court would constitute a more legitimate and effective mechanism for promoting international justice than one in which powerful countries were granted special authority—via UN Security Council control of Court cases—in exchange for their participation.\textsuperscript{17} Negotiations on the Mine Ban Treaty and Rome Statute therefore proceeded even when it was clear that the US and others would not support—and might seek to undermine—the final agreements. In this sense, both treaties (and others which have developed under similar circumstances) face a particular set of challenges that differ from the more typical great-power led multilateralism.

Restricting the scope of my inquiry to two recent treaty cases makes sense for a number of reasons. Most obviously, the MBT and ICC offer important real-world examples of the central phenomena under study: the decision to pursue international treaties in the absence of support from major powers like the United States, and the parallel question of whether—and how—global norms may be successfully promoted under such conditions. These cases are directly implicated in the debate regarding the wisdom of institutional design choices (privileging strong legal rules over more expansive membership), and thus take account of George and Bennett’s suggestion that “the primary criterion for case selection should be relevance to the research


objective of the study.” At the same time, we also need to be aware of the danger posed by selection bias: by selecting as cases only those processes which resulted in formal treaties, we ignore a potentially large universe of cases which did not progress this far. These concerns are less pronounced in the present study, however, given my focus on the evaluation of non-great power cooperation in its current manifestations. Here the most important concern is to select cases that adequately represent the class of events under study, rather than on criteria that would maximize the variance on independent or dependent variables. This dissertation does not seek to test causal hypothesis derived from this or other theories via comparative case study methods or statistical analysis, but is instead directed towards building a theoretical account of non-great power treaty influence, and engaging in its subsequent empirical assessment. Basing the research around two prominent non-great power treaties is appropriate to these dual tasks.

The ban on antipersonnel mines and the creation of a permanent international criminal court would also appear to be unlikely subjects for substantial norm development, as theories of International Relations typically assume that states—and especially preeminent global powers—will resist highly restrictive international obligations that implicate core matters of national security policy. Both treaties seek to proscribe core prerogatives concerning the internal and external powers of the state and therefore constitute especially hard cases for international

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18 George and Bennett, Case Studies, 83.
19 George and Bennett, Case Studies, 22-25. This could include issues for which concerted efforts at treaty development have been attempted without success (e.g., regulation of the global trade in small arms and light weapons) and those for which normative development failed to get off the ground to any significant extent, a potentially unbounded set of possibilities. The latter in particular makes the attempt to arrive at some overall assessment of the ratio of “success” among the universe of possible cases necessarily elusive, though at the same time it means any claims about the success of the strategy arising from the two case studies under consideration will be importantly qualified by that overall context, an issue I will return to in the Conclusion for further consideration. On this see Audie Klotz, “Case Selection,” in Qualitative Methods in International Relations, eds. Audie Klotz and Deepa Prakash (New York: Palgrave Macmillan, 2008), 46-47.
20 George and Bennett, Case Studies, 83 and 112-113; and Klotz, “Case Selection,” 44-45.
cooperation above and beyond their more particular defiance of great power wishes. The Mine Ban Treaty places limits on the scope of military operations and thus represents a direct intervention in the war-fighting capacity of the state, as was clearly recognized at the time of its negotiation. The International Criminal Court for its part seeks to fundamentally restructure international expectations concerning the punishment of grave crimes, via an expansive and potentially invasive supranational oversight mechanism. It is, therefore, a major innovation in global politics that holds substantial implications for the practice of state sovereignty. International efforts in these areas should hold little hope of realizing widespread adherence, especially since many states likely to be implicated in the types of behaviours under their remit remain outside of the formal agreements and the treaties possess only limited capacities for enforcing compliance. Evidence of substantial actor change in matters of such fundamental concern would bolster the theoretical claims made in this study and would more broadly reaffirm the central constructivist contention that international normative and legal structures can exert meaningful independent influence in global politics.

The case selection is further framed by a series of additional conceptual and methodological factors. Treaties constitute a particular type of international obligation—as distinguished from other potential sources like customary international law and non-legalized forms of cooperation—and enshrine a formal and public collection of obligations. For this


reason, treaties provide a valuable baseline for assessment and are most easily evaluated against their own genre.\textsuperscript{24} The MBT and ICC may also be presented as a coherent conceptual category within the broader constellation of legal agreements because both serve the fundamental function of constraining the use of organized violence, whether individually or collectively.

Aside from their internal interest, there is also great benefit in studying institutional effectiveness from the perspective of a limited number of detailed case studies. This has distinct advantages over large-\textit{n} statistical methods for certain types of scholarship, and is justified by my particular interest in the dynamics of international legal influence. A quantitative research design could undoubtedly contribute important insights to some aspects of this endeavour – for example, by uncovering patterned connections between the participation of materially powerful states and the creation or ratification of treaties across a wide range of issue areas. A fine-grained examination of limited cases, however, allows the researcher to engage the kinds of evidence needed to uncover the often subtle ways that legal instruments and their constituent norms may inform changes in state policy. Detailed case studies thus are better able than large-\textit{n} correlational studies to dig deeper into the causal story of surprising results, such as the apparent widespread adherence to the mine ban norm by the United States and other non-parties, as discussed in Chapters 3 and 4. Hasenclever, Mayer, and Rittberger have thus argued that proponents of a norm-centred approach

should therefore make every effort to go beyond the confines of an almost exclusively theoretical argument and engage in empirical research that aims at assessing the concrete impact on foreign policy decisionmaking of the assumed autonomous compliance pull of legitimate norms and rules. The best way to make their case would be to come up with much more detailed and systematic observations which at the same time constitute serious puzzles for the rationalist research tradition and can be explained in a convincing manner by their own approach.\textsuperscript{25}

\textsuperscript{24} This is not to suggest that other forms of obligation are wholly excluded from this analysis, as rules of customary international law and more generalized norms necessarily interact with (and often inform) the standards codified in formal treaties. I address this issue in Chapter 2.

\textsuperscript{25} Andreas Hasenclever, Peter Mayer and Volker Rittberger, \textit{Theories of International Regimes} (Cambridge: Cambridge University Press, 1997): 174. A similar argument has been made by Lisa L. Martin and Beth A.
My dissertation seeks to do precisely this. At the same time, the sheer scale of the project—attempting to account for broad patterns of actor change across the entire international system of states—is manageable only by focusing on a limited number of treaty cases.

An empirical study of institutional effectiveness also necessarily implies some attempt to draw lessons from the analysis—what (if anything) is working, and why? Case analysis is valuable in this regard, as it forces researchers to draw analytic comparisons and contrasts, and thus make detailed consideration of contextual factors.26 This is worthwhile, as comprehensive comparative assessments of this kind are not, to my knowledge, available for the MBT and ICC. As the first step in a wider future research program, conceptual discipline can prove beneficial for subsequent efforts to expand the insights developed here to a broader array of potential subjects—for example, to other possible future treaty processes or existing regimes in other issue areas.27 The present study thus holds empirical and theoretical implications that will be relevant both to policymakers concerned with the prospective viability of pursuing international initiatives without key states, as well as scholars of international politics and law.

**Great Power Leadership and International Cooperation**

Given the historical record, it is perhaps not surprising that most political studies of multilateralism emphasize the contributions of predominant states in creating and stewarding international cooperative efforts. Within the English-language IR literature, attention has been focused even more narrowly on the United States as the chief facilitator of international

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26 Hence “there is growing consensus that the strongest means of drawing inferences from case studies is the use of a combination of within-case analysis and cross-case comparisons within a single study or research program” George and Bennett, *Case Studies*, 18.

cooperation. This tracks closely with the rise of the US as one of the two global superpowers in the post-1945 era, and its concurrent role as the principal initiator of multilateral governance institutions. Proponents of Hegemonic Stability Theory, for example, have closely associated the emergence of rule-governed systems with the initiative of the leading power(s) of the day. For Gilpin, “[states] enter social relations and create social structures in order to advance particular sets of political, economic, or other types of interests…. [T]he particular interests that are most favored by these social arrangements tend to reflect the relative powers of the actors involved.”

This of course raised profound questions about the prospects for cooperation during periods of great power transition, as subsequently addressed by other scholars. Robert Keohane’s path-breaking work on institutionalist theory was animated by a concern for whether the endurance a particular distribution of power is necessary or sufficient to ensure the stability of international cooperation over the longer term. Other authors have followed this lead to suggest that the United States—which is still the single most powerful state actor in the international system—may continue to dominate even as its relative position declines vis-à-vis other powers.

These approaches tend to focus on material forms of power, but a similarly rich literature has highlighted the fact that hegemons and other global leaders can and do exert important influence through the propagation of ideas and norms. Ikenberry and Kupchan thus emphasize a more subtle component of hegemonic power, one that works at the level of substantive beliefs rather than material payoffs. Acquiescence is the result of socialization of leaders in secondary nations. Elites in secondary nations buy into and internalize norms that are articulated by the hegemon and therefore pursue policies consistent with the hegemon’s notion of international order.

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Scholars in this vein have explored the idea that the United States may frequently seek to realize its interests through the deployment of “soft power,” often in legalized settings in which the units of transaction and/or the modes of diplomacy are value-driven and (often) not overtly coercive. These approaches are also typically pervaded by an interest in “the consequences of US behaviour for various multilateral organizations themselves.” Simon Reich has argued that the successful creation of a global norm “require[s] US support (as a hegemon) and its willingness to use tangible resources for implementation and enforcement.” As Foot, MacFarlane, and Mastunduno have recognized, the power of ideas associated with global leaders like the United States therefore has important implications for institutional growth and consolidation: “Because of the power and prominence of the United States, its behaviour is of major concern to America’s allies as well as its enemies, and is perceived as a matter of major consequence to the organizations to which the United States is linked, as well as to those which it is not.” This, too, is the underlying message of Byers and Nolte’s compendium study of US power and the development of international law.

This focus on the distributional context of cooperation is especially germane given the current experience of a US hegemon that often appears unwilling to bind itself fully to international legal standards. If the United States and other great powers are typically regarded as

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33 Foot, MacFarlane, and Mastanduno, *US Hegemony and International Organizations*, 7.
34 Reich, *Global Norms, American Sponsorship*, 15.
36 Michael Byers and Georg Nolte, eds., *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003). As is apparent already, my dissertation reverses this logic: while often setting the agenda, hegemons and other great powers may themselves be subject to—and influenced by—norms initially negotiated and promoted by less materially powerful states, often in combination with a diverse array of civil society actors.
so important to the prospects for multilateralism, their absence from such initiatives should also warrant close attention. Some recent studies have begun to explore this gap. Despite other valuable contributions, however, these accounts have had little to say about the consequences of legalization efforts, particularly on the question of whether international treaties can change global norms without the support of great powers. Articles by Price, Behringer, and Fehl, for example, have focused primarily on the strategies that middle power states and civil society actors might utilize in order to pursue multilateral accords in the face of US resistance. Studies of the genesis of the MBT and ICC offer a similarly important contribution to our collective knowledge concerning how these particular subjects became prominent issues and were codified through binding international agreements. Yet so far there has been much less systematic attention to the implications of these treaty-making efforts, specifically with respect to the subsequent acceptance of norms, and the resulting changes in state policy.

The 2009 volume Cooperating Without America, edited by Stefan Brem and Kendall Stiles, and the 2011 Living with a Reluctant Hegemon by Caroline Fehl represent the most focused attempts to theoretically and empirically engage with the subject of multilateralism in the absence of US leadership. In this respect, the volumes are a welcome contribution to a

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38 Behringer, “Middle Power Leadership.”
39 Fehl, “Living with a Reluctant Hegemon.”
nascent field of study. There are, however, two important limitations to the works that provide the impetus for this dissertation. First, the central concern of the authors is the initial cooperative process, rather than the subsequent consequences of these efforts: as Brem and Stiles acknowledge, “we focus in these cases on the decision to enter into the agreement rather than subsequent questions of interpretation, compliance, and enforcement.”\textsuperscript{42} Despite their interest in the outcomes of cooperation, therefore, the contributors to the Brem and Stiles volume stop short of systematically measuring norm adoption among those states that did ultimately join the agreement and those that remained on the outside. This is similarly the case in Fehl’s impressive and wide-ranging study. The present dissertation, by contrast, carefully assesses the extent of state adaptation in two key—and arguably hard—treaty cases.

A second limitation with the Brem and Stiles and Fehl volumes is that they repeat the common habit of focussing on the United States to the general exclusion of other established and emerging global powers.\textsuperscript{43} While this attention is understandable given the US’s preeminent international position during the post-World War II institutional expansion, countries like China, India and the Russian Federation also have an abiding interest in the development of international legal institutions. Their views and behaviour are therefore consequential to a more holistic assessment of legal effectiveness and norm diffusion.\textsuperscript{44} Indeed, extending the expectations of hegemonic resistance to other prominent states that may increasingly challenge the United States’ recent global pre-eminence only serves to further bolster scepticism concerning the viability of multilateral initiatives that defy the wishes of these great powers.

\textsuperscript{42} Stiles, “Introduction,” 3.
\textsuperscript{43} This theme is readily noted: “we accept the view that the US became the hegemon in the 1940s and that it still has this status today. By implication, ‘non-hegemonic’ describes all other players in the international system.” Stiles, “Introduction,” 2-3.
\textsuperscript{44} Of course, a broader list of “major powers” might also include the likes of Brazil, Germany, Japan and Nigeria on this list – all of whom, it should be noted, are members of both the Mine Ban Treaty and ICC.
The Normative Content of the Mine Ban Treaty and Rome Statute of the ICC

An analysis of the Mine Ban Treaty and Rome Statute must first come to grips with their principal features, since the content of the respective treaties is centrally relevant in an analysis of their efficacy. In doing so I also draw attention to the diplomatic choices that facilitated the creation of the formal legal agreements in the absence of support from great powers. This discussion is important as it identifies the key innovations that define each treaty, and hence the points at which compliance and non-compliance, endorsement and contestation take place.

The Antipersonnel Mine Ban Treaty

A prohibition on antipersonnel (AP) mines—under all circumstances and conditions—constitutes the foundational norm in the Mine Ban Treaty. To that end, the MBT draws inspiration from a broader principle of humanitarianism, as the Preamble makes clear:

Determined to put an end to the suffering and casualties caused by anti-personnel mines, that kill or maim hundreds of people every week, mostly innocent and defenceless civilians and especially children, obstruct economic development and reconstruction, inhibit the repatriation of refugees and internally displaced persons, and have other severe consequences for years after emplacement.

Indeed, as subsequent paragraphs demonstrate, the treaty is rooted in a long tradition of international humanitarian law. This is found most particularly in reference to the notion that the right to choose the methods of warfare is not unlimited, prohibitions on superfluous injury and unnecessary suffering, and an articulation of the twin principles of distinction and

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45 In my conception, each treaty is oriented around a core norm that provides its animating purpose, and is elaborated through associated rules and institutional elements that convert these standards into detailed commands or technical solutions. My thanks to Professor Katharina Coleman for suggesting this formulation.
46 I do not, however, seek to engage the extensive literature on negotiations and institutional design here. A recent review can be found in Emilie M. Hafner-Burton, David G. Victor and Yonatan Lupu, “Political Science Research on International Law: The State of the Field,” The American Journal of International Law 106, no. 1 (2012): 72-82.
discrimination. The reference to existing legal standards is vital to the normative structure of the MBT because it provides the particular rationale for prohibition. The assertion, in short, is that since antipersonnel mines—by their inherent characteristics—violate established principles of international humanitarian law, their use was de facto illegal and the MBT was thus merely formalizing this reality. This assessment amounted to a fundamental reversal of the burden of proof that has typically privileged claims of military necessity in the first instance against concerns for humanitarian impacts. In this respect, the MBT is a more recent expression of a long-term, if intermittent, effort at restricting the means and consequences of war.

This prohibitionary approach, however, sits uneasily with prior expectations concerning the legitimate conduct of warfare. Antipersonnel mines were previously regarded as largely uncontroversial weapons that should be subject to the same treatment as other conventional military technologies like artillery shells, rockets, and personal infantry weapons. The MBT therefore seeks to overturn a well-established international social standard that regarded AP

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landmines as unproblematic tools of war.\textsuperscript{52} It is particularly significant that the process leading to the Mine Ban Treaty was precipitated by widespread dissatisfaction with the outcome of negotiations on Amended Protocol II (APII) of the Convention on Certain Conventional Weapons, which was regarded as “overly complex and insufficiently stringent to deal with the extent of the humanitarian crisis [caused by AP mines].”\textsuperscript{53} It was widely understood at the time that the partial restriction on the landmines in APII was as much as could be achieved via consensus voting rules that included states like China, Russia and the United States that were resistant to a more far-reaching prohibition.\textsuperscript{54} Proponents of a ban on antipersonnel mines therefore felt that the immediacy and depth of the threat required an aggressive and unconventional approach; the innovation here was to utilize an ad-hoc negotiating forum and a close partnership between “like-minded” governments and transnational civil society actors under the umbrella of the International Campaign to Ban Landmines (ICBL).\textsuperscript{55} The purpose of the diplomacy was not to find the lowest common denominator that all states would willingly accept, but inversely, to establish a firm standard at the outset that actors would be encouraged to adopt. Indeed, the refusal to weaken the treaty via exceptions or amendments was crucial to maintaining the unity of the initial pro-ban coalition, though this strategic choice also provides the basis for non-party contestation.

The MBT entrenches a series of obligations designed to address the adverse humanitarian conditions associated with antipersonnel mines. First and most centrally, the treaty requires that


\textsuperscript{54} Rutherford, “Anti-Personnel Landmine Ban Convention,” 127.

States Parties *cease using* these weapons unconditionally.\(^{56}\) To supplement and give further effect to this obligation, the Mine Ban Treaty also includes a further set of prohibitions concerning the *production* and *transfer* of AP mines\(^{57}\), as well as positive commitments to *destroy all stockpiles* and *clear all mined areas* on territory under a state’s control.\(^{58}\) These behavioural injunctions are understood to comprise the core features of the mine ban norm.\(^{59}\) The treaty also outlines a set of expectations concerning the *domestic implementation* of legal obligations. Most notably, States Parties are required to “take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.”\(^{60}\) This has been interpreted as requiring the creation of national laws criminalizing violations of the treaty and, arguably, the establishment of a national authority to oversee implementation issues. Additionally, the MBT requires the submission of annual *transparency reports* detailing progress in the national implementation of treaty mandates.\(^{61}\) I include these features in the subsequent behavioural analysis so as to highlight the political dimensions of treaty compliance.\(^{62}\)

\(^{56}\) Mine Ban Treaty, Article 1.1(a).

\(^{57}\) Mine Ban Treaty, Article 1.1(b)

\(^{58}\) Mine Ban Treaty, Articles 4 and 5, respectively.

\(^{59}\) Herby and Lawland, “Unacceptable Behaviour,” 205. While the core obligations are phrased as absolute injunctions, there are some limited exceptions, as laid out in operative articles of the Treaty. On this see Maslen, *Commentaries*, 73. The MBT further operationalizes these commitments through legal rules—concerning, for example, the definition of “antipersonnel mines,” deadlines for completing the mine destruction and clearance, and dispute settlement mechanisms—designed to reinforce and give effect to the commitments. Mine Ban Treaty, Articles 2, 4, 5, and 10. For more detail on the negotiating history of the definition of “antipersonnel mine” see Maslen, *Commentaries*, 110-131.

\(^{60}\) Mine Ban Treaty, Article 9.


\(^{62}\) The MBT also incorporates emergent norms regarding mine action and victim assistance. The Mine Ban Treaty does not itself codify industrial standards for humanitarian demining, but rather provides an institutional context in which such standards have further evolved. In a similar vein, the treaty also contains a positive obligation to provide
The Mine Ban Treaty thus contains both constitutive standards of appropriate behaviour, and regulative rules governing the particular scope of these commitments. Most notably, the MBT is based around a foundational strategic calculation that the stigmatization of antipersonnel mines would be most effectively achieved via an uncompromising prohibition that permitted no exemptions. This is significant, as non-party states have focused much of their diplomatic energy in challenging the absoluteness of the mine ban norm. As Rutherford recounts,

The United States participated in the Ottawa Treaty final drafting conference in Oslo, but its delegation came with a series of requests that they wanted to incorporate into the treaty. The demands were presented in a take-it-or-leave-it package consisting of five interlocking components: exception for landmine use in Korea; deferral of the treaty's entry-into-force date; changes in the definition of an anti-personnel landmine; more intensive verification measures; and a withdrawal clause from the treaty in cases of national emergency. The demands were not accepted primarily because the [MBT] supporters wanted to achieve a ban with no exceptions. At the heart of the present assessment, therefore, is the question of to what extent the Mine Ban Treaty has realized widespread adherence with its particular set of obligations, and in light of these substantial challenges. I address this subject in Chapters 3 and 4.

The Rome Statute of the International Criminal Court

Compared to the relatively confined initiative to ban one particular weapon, the International Criminal Court constitutes a more complex and wide-ranging intervention in international politics. The Rome Statute codifies an extensive set of international humanitarian, assistance to mine victims within one’s own country, as well as to other mine-affected states, as articulated in Article 6. This has been further clarified in subsequent documents, most notably the Action Plans of the 2004 Nairobi Review Conference and the 2009 Cartagena Review Conference. However, given obligations relating to mine action and victim assistance remain largely uncodified as precise commitments in the MBT, and the subsequent difficulties in agreeing upon standardized measures, these particular norms are largely excluded from the proceeding analysis. Instead, I focus my attention on the positive and negative obligations contained in Articles 1 to 5 as the core legal elements to the prohibition on AP mines. For more information see Kerry Brinkert, “Understanding the Ottawa Convention’s Obligations to Landmine Victims,” Journal of Mine Action 10, no. 1 (2006). See also States Parties to the Antipersonnel Mine Ban Treaty, Ending the Suffering Caused by Anti-personnel Mines: Nairobi Action Plan 2005-2009; and Cartagena Action Plan 2010 – 2014: Ending the Suffering Caused by Anti-personnel Mines. http://www.apminebanconvention.org/review-conferences/. Rutherford, “Hague and Ottawa Conventions,” 40; see also Cameron, “Global Civil Society,” 95. On the political context of the absolute prohibition see also Maslen, Commentaries, 74-76.
criminal, and jurisprudential rules drawn from an array of treaty and customary sources, and creates a new institution for enforcing this resulting legal order.⁶⁴ At its most fundamental level, the purpose of the Court is “to try persons alleged to be responsible for the most serious crimes affecting the entire community as well as the peace, security, and well-being of the world”⁶⁵ – in effect, to promote the rule of law and end impunity for grave crimes at the international and domestic levels. In so doing, the Statute embeds a social expectation that judicial process and penal sanction constitute an appropriate response to grave international crimes.⁶⁶ The ICC is the first permanent international court charged with trying individual human beings for grievous crimes, and thus reinforces a recent expansion of international law to include individuals as subjects of criminal responsibility and punishment.⁶⁷ Yet this general mandate can imply very different configurations of rights and responsibilities, and the particular structure of the Rome Statute and resulting Court represents one of a variety of potential responses to the challenge of how to address international criminality.⁶⁸ Indeed, as will be argued below, the particular


⁶⁸ Indeed, as Struett points out, “[d]uring the negotiations [of the Rome Statute], a much wider range of approaches to constructing a permanent ICC was considered, with vastly different approaches to the powers, jurisdiction, and role of the new court.” Michael J. Struett, *The Politics of Constructing the International Criminal Court: NGOs, Discourse, and Agency* (New York: Palgrave MacMillan, 2008), 24-25.
institutional solution embodied in the Rome Statute represents both its foundational normative commitment and the principal point of contestation in the international community.

A primary consideration in the construction of the Rome regime was the scope of its mandate – what acts and actors should properly fall under the aegis of the Court. The ICC has jurisdiction over genocide, crimes against humanity, war crimes and—at some point after 2017—the crime of aggression.69 These core crimes are understood as the most serious forms of organized violence in the international system, to be distinguished from other types of international criminal activity like piracy, drug trafficking, and so on.70 Moreover, the distinct intentionality, scale, and context of the constituent acts—like murder, rape, and kidnapping—means that they should be regarded as a particularly egregious class of behaviours and not treated as simply more expansive instances of “common” crimes under existing domestic laws.71 The inclusion of certain crimes (with the necessary exclusion of others) thus elevates these acts and invests them with particular opprobrium. Yet these decisions were not especially innovative or controversial on the aggregate, since the Statute for the most part reflects established international customary and treaty-based law as well as the practice of recent ad-hoc criminal tribunals.72 The acts constituting genocide, crimes against humanity, and war crimes (though

72 Especially the Geneva Conventions of 1949 and Additional Protocols of 1977, and the Genocide Convention, in the case of the former, and the International Criminal Tribunals for Rwanda and the Former Yugoslavia in the case
notably not aggression) and the related modes of responsibility were therefore largely settled by the time of the 1998 Rome Conference.\(^\text{73}\) One of the significant contributions of the Statute is thus to bring together disparate strands of international law under a single legal architecture.\(^\text{74}\) In so doing, the Rome Statute helps to consolidate international legal practice both by reaffirming the special status of these crimes and adding greater precision to their substantive definitions.

The Court is further predicated on the assertion that all perpetrators—no matter their official role—must be held accountable for the serious crimes under the Court’s purview. To that end, the Rome Statute deviates from previous practice by rejecting legal *immunity* for Heads of State and other political figures, thereby reversing prior diplomatic norms concerning the special legal status of certain high officials.\(^\text{75}\) This innovation is complicated by the fact that the Statute also accommodates, and thus implicitly acknowledges the legitimacy of, established international obligations *between states* concerning these same forms of immunity.\(^\text{76}\) Hence this principle remains potentially contentious, as explored in Chapter 7. Finally, the Rome Statute adopts well-
accepted modalities of *jurisdiction* and applies to acts either committed on the territory of a State Party (even if committed by nationals from a non-party) or by the national of a State Party (on any territory).\(^7^7\) This does not include a more expansive assertion of authority via “universal jurisdiction,” a decision that negotiators believed would increase the acceptability of the resulting Statute by retaining a more modest reach for the new institution.\(^7^8\)

The Rome Statute largely reiterates existing international humanitarian and criminal law norms, and so the revolutionary nature of the ICC is primarily found in its specific solution to the problem of how to enforce compliance with the grave crimes regime.\(^7^9\) To do so the Rome Statute creates a new norm of internationalized procedural justice: while national authorities retain the primary responsibility for investigating and prosecuting atrocity crimes, they must do so via internationally-agreed standards of criminal law and with the implicit oversight of a supranational legal body. That body is itself available and able to investigate and prosecute when national authorities are unwilling or unable to do so. This configuration “represents a sharp contrast to the earlier normative solution” in which the responsibility for enforcing international criminal law rested solely with the domestic legal processes of sovereign states.\(^8^0\) This institutional architecture comes in three principal parts, concerning the “fundamental implementing obligations”\(^8^1\) of cooperation and complementarity, as well as the modalities by which the Court can assert its authority over crimes in the international system.

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\(^7^7\) Rome Statute, Article 12.2. See also Bourgon, “Jurisdiction Ratione Loci.”

\(^7^8\) I thank Professor Michael Byers for bringing this point to my attention. For an overview see Declan O’Callaghan, “Is the International Criminal Court the Way Ahead?” *International Criminal Law Review* 8, no. 3 (2008): 546-549.


First, states—primarily parties to the Rome Statute but also all UN members in instances of a Security Council referral—have a legal obligation to “cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.”\(^{82}\) This requires that the status and legal personality of the Court’s constituent entities, as well as the privileges and immunities of its staff, be duly recognized in national law.\(^ {83}\) Compliance with the obligation to cooperate also involves a host of more specific expectations including on matters of arresting and surrendering suspects, providing evidence and documentation, enforcing sentences, and other means of support.\(^ {84}\) Since the Court does not possess its own police force, the enforcement of criminal law necessarily relies on the active cooperation of states. And while the Statute does not determine how the obligation to cooperate will be operationalized in national law, it does require that domestic jurisdictions accommodate all necessary procedures to facilitate Court requests.\(^ {85}\)

Second, the ICC only possesses a limited independent capacity to investigate and prosecute cases, and so relies in large measure on the effective pursuit of justice at the national level. To organize this division of labour, the Rome Statute creates a new principle of complementarity whereby the Court shall defer to states “unless the State is unwilling or unable genuinely to carry out the investigation or prosecution.”\(^ {86}\) Complementarity as articulated in the Rome Statute and subsequent ICC practice is composed of a series of expectations regarding

\(^{82}\) Rome Statute, Article 86.
\(^{83}\) Rome Statute, Articles 3.3, 4, and 48, This includes the Office of the Prosecutor, Registry, Presidency and the Pre-Trial, Trial and Appeals Divisions. See Amnesty International, *International Criminal Court*, 19.
\(^{85}\) Rome Statute, Article 88. Article 88 lays out an “obligation of result” (i.e., to cooperate), but does not require states to adopt a specific course of action to meet that legal obligation. However, “[a]ccording to a well-established principle of international law, a State may not invoke provisions (or absence of provisions) of its internal law in order to avoid compliance with international obligations.” Annalisa Ciampi, “The Obligation to Cooperate,” in The Rome Statute of the International Criminal Court: A Commentary vol. 2, eds. Antonio Cassese, Paola Gaeta, and John R.W.D. Jones (Oxford: Oxford University Press, 2002), 1621-1622; see also Gaeta, “Official Capacity and Immunities,” 999.
how states should address acts of atrocity. The deference to national legal processes is based on a normative order in which all states have a duty to investigate, prosecute and punish grave crimes through their own domestic criminal procedures. The assumption underlying this exercise is that justice can be best realized by transforming national criminal systems, and not by centralizing legal activity within the ICC.\textsuperscript{87} To facilitate this, states must ensure that their national laws address all relevant aspects of the criminal law regime set-out in the Rome Statute, particularly by adopting ICC crimes as well as the Court’s jurisdictional regime, eliminating immunities for all national figures, and implementing appropriate criminal law procedures, including forms of criminal liability\textsuperscript{88}, fair trial standards\textsuperscript{89}, and specific modalities of criminal investigation and prosecution.\textsuperscript{90}

The broader purpose of the ICC regime is thus to facilitate the application of international criminal law to domestic jurisdictions and thereby create a homogenous legal regime. This produces a strong incentive towards legal standardization:

\begin{quote}
the more a national legal process approximates that of the ICC… the greater the likelihood that this process will be palatable and pass muster. This, in turn, suggests that… national institutions will model themselves along the lines of the ICC in order to maximize their jurisdiction. Complementarity, therefore, may encourage heterogeneity in terms of the number of institutions adjudicating international crimes, but homogeneity in terms of the process they follow and the punishment they mete out.\textsuperscript{91}
\end{quote}

For this reason, domestic legal transformation via the incorporation of the Rome Statute in national law provides a valuable metric—in addition to other behavioural measures—by which norm adoption can be assessed. This subject is explored in detail in Chapter 6.

\textsuperscript{87} This intention is articulated in the Preamble (especially paragraphs 4, 6 and 10) as well as Articles 1 and 17 of the Rome Statute.
\textsuperscript{88} Rome Statute, Articles 22-33.
\textsuperscript{89} Rome Statute, Articles 62-67.
\textsuperscript{90} Rome Statute, Articles 86-102. See also Amnesty International, \textit{International Criminal Court}, 7-18 and Chapter 7 of this dissertation.
Third and finally, the above discussion also implicates a central debate concerning the legal and political independence of the Court, and how this might relate to its effectiveness. From the outset, proponents among the Like-Minded Group\textsuperscript{92} and civil society actors were convinced that ICC could only achieve its stated aims if it was constituted as an autonomous legal entity. The Statute thus includes an array of procedural rules concerning how and under what circumstances the Court may assert its jurisdiction, and its legal relationship to the United Nations Security Council and non-party states.\textsuperscript{93} The Court will be able to consider alleged violations that occurred either on the territory of a state party, or were committed by the national(s) of a party to the Rome Statute. While stopping short of permitting universal jurisdiction for crimes committed by any citizen on any territory, the Statute does leave open the possibility that nationals from non-parties may be subject to ICC prosecution even though their governments do not accept the Court’s authority. This jurisdictional structure was strongly resisted by many prominent Court opponents on the grounds that it violates the foundational principle of voluntary state consent in international law. The Rome Statute also gives the Prosecutor the power to initiate investigations \textit{proprio motu} – that is, under his or her own initiative. This outcome went against the demands of many powerful delegations that in the absence of a self-referral by a party to the Statute, the sole right to launch proceedings would be vested with the United Nations Security Council.\textsuperscript{94} Yet these same features were central to the


Rome Statute’s popularity among a broader array of participants such that their elimination—in order to gain the endorsement of the United States, China, Russia and others—might have significantly eroded enthusiasm among prominent Court backers. As with the Mine Ban Treaty above, this strategic calculation is therefore at the heart of any judgement concerning the subsequent effectiveness of the ICC.

When taken together, the configuration of actors and responsibilities enshrined in the Rome Statute constitutes a particular institutional solution to the problem of how to effectively punish, and potentially deter, the most heinous international crimes. At the same time, the Statute also articulates a vision of appropriate behaviour wherein states are obliged to investigate and prosecute grave violations of international humanitarian and human rights law via agreed international procedures. This structure of state obligations overseen by a supranational authority is the basis for what I have termed the new internationalized procedural justice norm, and serves as the reference point against which state change is measured in this dissertation. The very existence of a permanent international court with the ability to exercise legal authority over the nationals of all states (both parties and non-parties to the treaty) holds substantial implications for traditional conceptions of state sovereignty, and is consequently a major development in international affairs. The legal regime defined by the Rome Statute is the product of a detailed negotiating process that achieved broad consensus among the 120 nations that voted in favour of the Statute in 1998. As with the experience of the Ottawa Process that produced the Mine Ban Treaty a year earlier, its creation was facilitated by diplomatic model that emphasized cooperative engagement among states and civil society, and avoided the great-power dominated

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diplomatic bodies of the United Nations system. Yet this particular outcome was neither guaranteed at the outset, nor uncontroversial then or in hindsight. For these reasons, determining the extent of state compliance and resistance is of vital importance to the broader question of non-great power treaty efficacy.

Assessing Non-Great Power Treaties

Despite their successful creation, the experience of the MBT and ICC nonetheless confronts international policymakers and scholars with an important challenge: what are the consequences associated with creating international treaties without the support of the most powerful states? Richard Price has highlighted three potential strategies for international cooperation in the face of great power ambivalence: proceed with regimes in the absence of great power support; formalize great power demands for unequal obligations and responsibilities; or abandon the notion of multilateral governance in favour of unilateralism and ad hoc coalitions. Yet despite its central importance, the appropriateness of institutional form in light of international power constraints has received surprisingly little sustained attention amongst the extensive literature in disarmament and international humanitarian law. My research gets to this core debate by placing practical questions of legal outcomes front and centre. If the interests of great powers need not always determine the content of multilateral efforts, the notion of

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95 For the ICC negotiations, the Preparatory Commission was “created and supervised directly and exclusively by the General Assembly to achieve a court independent of (although closely related to) the UN.” Benedetti and Washburn, “Drafting the ICC Treaty,” 4. Importantly, neither the United Nations Security Council nor the Economic and Social Council had any role in drafting the Rome Statute, thus denying major powers a veto over proceedings.

96 Price, “Hegemony and Multilateralism.”

97 Of course, there is a rich literature on the more general question of institutional design, typically associated with neoliberal institutionalist and rationalist approaches. See most especially the special issues of International Organization concerning “Legalization and World Politics,” 54, no. 3, (Summer 2000); and “The Rational Design of International Institutions,” 55, no. 4 (Autumn 2001), respectively.
whether or when they should—i.e., whether costs of their non-participation are “worth it”—needs to be assessed.

In recent decades there has emerged a greatly expanded interest in the “role of law as a systemic instrument of social and political regulation and change.”\(^9\)\(^8\) International Relations as it emerged in the United States has largely treated politics and law distinct fields of practice and scholarship, though concerted work over the past two decades has sought to bridge this gap.\(^9\)\(^9\)

The central concern, as I see it, is whether, and to what extent, shared expectations based in law and norms may develop in an international system that is politically composed of formally autonomous state units among other actors. As will become apparent in the next chapter, my approach draws on the fruitful connections already established between norm-centred approaches in IR and scholarly treatments of customary international law.\(^10\)\(^0\) The growing interest in international law in the IR literature has convincingly demonstrated the extent to which social, political and legal forces interact to define the contours of modern international relations. International law matters to the study of IR because, as Adriana Sinclair has noted, “[t]he language and conduct of politics has become increasingly legalised.”\(^10\)\(^1\)


enmeshed in the practice of international political life. The consequences of this embeddedness are more varied and subtle than often appreciated in the literature, and provide the space in which non-great power treaties may flourish.

The present study contributes to this literature by explicating the theoretical possibility of non-great power led cooperation, and by systematically assessing the extent of treaty influence in two archetypal treaty cases. The history of the processes by which the Mine Ban Treaty and Rome Statute were negotiated is well-worn territory, as is the so-called “new diplomacy” that underpinned these efforts. 102 I do not resurrect these debates here. Rather, I engage the question of whether and to what extent the respective treaties have succeeded in changing the social expectations and behaviours of states across the international system, even in light of the objections of certain powerful states. In my view, existing scholarship lacks a convincing answer as to whether the alternative diplomatic strategy embodied in the MBT and ICC has paid off, and what this may mean for the development of future agreements along similar lines. 103 With more than a decade now past since the conclusion of the two agreements, the time is ripe for a more comprehensive assessment.

To do so, I first develop a theoretical account of the social power of non-great power treaties rooted in constructivist international relations theory. As I show in Chapter 2, treaties serve to substantiate standards of appropriate behaviour in the international system, and in so

102 The term is reported by William Pace and Jennifer Schense to have been coined by then Canadian Foreign Minister Lloyd Axworthy in a speech at Harvard University. See Department of Foreign Affairs and International Trade, Canada, “The New Diplomacy: The UN, the International Criminal Court and the Human Security Agenda,” Notes for an Address by the Honourable Lloyd Axworthy, Minister of Foreign Affairs, to a Conference on UN Reform at the Kennedy School, Harvard University. April 25 1998. http://www.international.gc.ca/mines/process-ottawa-processus/1998-04-25.aspx?lang=eng&view=d. The reference is found in Pace and Schense, “Role of Non-Governmental Organizations,” 107 n. 4. See also Behringer, “Middle Power Leadership.”
103 Indeed, while a vibrant scholarly literature has documented how the MBT and ICC emerged and evolved, few studies have systematically explored the implications of these design choices for the subsequent process of achieving widespread state endorsement of treaty norms. One exception to this general pattern is Price, “Emerging Customary Norms,” assessing the customary legal status of the Mine Ban Treaty. I am indebted to Professor Price’s work on this subject, especially for its articulation of both behavioural and discursive indicators of norm status.
doing are connected to a web of prior constitutive norms (like sovereign statehood, the binding nature of freely assumed treaty obligations and diplomatic practice) and legalized and non-legalized institutions in other issue areas. It is this “nested” quality that gives international legal institutions their influence in shaping the content and practice of international affairs. At the same time, the legal character of a formal treaty contributes to this effort by adding greater clarity and precision to incipient social norms. To the extent that treaties exist within a context of collectively held expectations, they rely on social conceptions of appropriateness as the basis of their legitimacy and may assert influence even in the absence of coercive enforcement. In this sense, legal authority may exist independent of the instrumental capacity provided by materially powerful states. The networked quality of treaties also holds important implications for non-party states (including great powers), since they cannot fully escape the broader development of international norms associated with the particular treaties. Such states may then be drawn toward even those obligations they officially reject, by virtue of their association with other, associated norms, principles and institutional forms. This latter possibility is unanticipated by accounts that emphasize the consensual basis of law.104

Demonstrating these complex manifestations of treaty influence also requires a method for seeking out relevant evidence through the concerted application of detailed empirical data. An effective treaty will substantiate new legal commitments and norms that shape state policy and hence the conduct of international politics; the study of institutional impact must therefore account both for their development as legal entities and their subsequent influence in changing

104 As should be clear from the preceding discussion, I rely on a broader conception of “power” than the materially-based notion employed by most realist and neoliberal scholars. In particular, my preferred approach emphasizes the social dimensions of power and authority: “Power is the production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate.” Michael Barnett and Raymond Duvall, “Power in International Politics,” International Organization 59, no. 1 (2005): 39. See also Byers, Custom, Power, 5; and Thomas, Ethics of Destruction, 11. I address this issue more fully in the following chapter.
actor behaviour. I undertake this assessment in two stages, first by assessing the extent of global compliance with treaty obligations, and then contextualizing these patterns through a close study of state discourse concerning the treaties’ legal and normative status. Since treaties demand specific changes in actor policy, a careful assessment of behavioural indicators provides a baseline for judging institutional impact. At the same time, attention to discourse—when considered in relation to the empirical record of (non)compliance—permits a more nuanced account of the reasons for observed behavioural outcomes, specifically whether the states in question regarded their actions as conforming with relevant treaty obligations. This dual approach provides a richer view of how legal institutions may influence state policy—by relating evidence of what states say to what they do—and explicitly includes the possibility of informal adaptation by non-parties. For example, the decision by the United States, China and Russia to support ICC referrals for alleged crimes committed in Darfur and Libya would appear to be highly relevant evidence of these gradual socializing effects. Hence standards of appropriate behaviour can emerge even in cases where they are resisted by powerful states, and may come to influence these ambivalent actors. Such findings carry important policy implications that I return to in the Conclusion to this study.

**Structure of the Dissertation**

This dissertation is divided into three main sections. Chapter 2 concerns how we should understand and assess the prospects of non-great power treaties. In it I present a theoretical account of how such treaties may defy the wishes of materially powerful states to become independent sources of influence in the international system, and a complementary set of methodological tools for evaluating this potential. The following five chapters then transition to
empirical analysis of the core cases, and assess the Mine Ban Treaty and International Criminal Court in Chapters 3 and 4, and 5 through 7, respectively.

Finally, in the Conclusion (Chapter 8) I return to the question of whether the creation of the MBT and ICC were wise – that is, whether the costs associated with losing the support of great powers was justified in light of the empirical record. A few authors have tentatively engaged this subject already,\(^{105}\) my aim is to provide a more systematic basis upon which to render such judgements. This necessitates an articulation of the chief trends uncovered in the preceding analysis, set against a counterfactual consideration of how alternative institutional arrangements might have addressed the cooperative challenges that propelled the treaty-making effort in the first place. Understanding the efficacy of existing treaties is therefore vital to determining whether, and under what conditions, future legalization efforts should seek to replicate the process that characterized the genesis of the MBT and ICC regimes. “Without a rich understanding of how international law influences the behaviour of key actors, one cannot design effective political and legal strategies to accomplish shared, or even individual, goals.”\(^{106}\) Careful empirical research, informed by a coherent theoretical account of treaty influence, is essential to this effort. The present study of the Mine Ban Treaty and International Criminal Court will therefore offer valuable insights into the broader concern of whether treaties may succeed in the face of resistance from great powers, and suggest grounds for assessing the suitability of non-great power diplomacy in other issue areas.


\(^{106}\) Jutta Brunnee and Stephen J. Toope, *Legitimacy and Legality in International Law* (Cambridge: Cambridge University Press, 2010), 5. At the same time, this study is also envisioned as the prelude to a more fine-grained assessment of the mechanisms by which the present treaties have been promoted and internalized, to be undertaken in subsequent research.
CHAPTER TWO:
A SOCIAL THEORY OF NON-GREAT POWER TREATY INFLUENCE

Can international treaties serve as independent sources of authority when they are rejected by the great powers, and if so, how? Rendering an adequate assessment requires that we develop both the conceptual architecture to explain how treaties may generate obligation under such conditions, and the methodological tools to demonstrate these impacts. This chapter is organized with these two primary goals in mind. I first expand on some important studies drawn principally from constructivist IR theory to develop a more specific account of the prospects for non-great power treaty influence – that is, the potential for promoting authoritative norms and legal commitments in instances where the formal agreements are rejected by the most powerful actors in the international system. My central premise is that the capacity for treaties to generate compliance—and, more deeply, obligation—is not strictly tied to, or reliant upon, the distribution of material power in the international system. In many instances international legal institutions do closely correspond to the interests of dominant state actors, but this need not always be the case. Indeed, the power of international law is underappreciated in much of the prevailing International Relations scholarship, which often focuses narrowly on the restraining potential of norms and rules without due attention to their constitutive function in defining actor identities and interests. This has meant that IR as a discipline—and particularly the prominent realist and neoliberal institutionalist schools—is ill equipped to address some of the most interesting features of contemporary international cooperation. This argument is developed in the first section of this chapter via a brief review of the relevant literature.
In the second section I provide an account of the social content of international law, and suggest how treaties may contribute to the development of international community based in law and, for non-party states, norms. To this end, I make a series of related claims. First, I argue that the basis of legal obligation is inherent in the practice of law as a social institution. Second, and relatedly, law’s legitimacy is further rooted in its particular criteria that set it apart from other forms of order. Third, the interconnected nature of international laws and norms helps explain how legal institutions like treaties may defy the wishes of powerful actors to promote strong international standards of behaviour.

The next section draws out the implications of these theoretical moves for the particular concern of this study with the efficacy of non-great power treaty making. In so doing, this dissertation reverses the common logic of legal impact in two important respects. On the one hand, I suggest that a treaty may exert influence over its members without resort to the agency typically associated with leading states. Because the obligatory status of law is predicated on notions of appropriate action, it is not dependent on, and can thus exist independent of, particular concentrations of material power. This helps explain how legal institutions can emerge and potentially flourish in the absence of great power support, and suggests more diffuse sources of agency in promoting norms, to include “middle powers,” civil society actors and treaty bureaucracies. On the other hand, the impact of treaties may be felt even by those states that resist binding legal obligations, mainly because these institutions tend to inculcate a type of legalized norms whose influence may transcend the more limited boundaries of voluntary membership. In these dual respects, a community of obligation can develop even if it fails to formally capture all of the most relevant international actors (at least initially). This holds important consequences for how we should evaluate the status and impact of the Mine Ban
Treaty and Rome Statute of the ICC, as I demonstrate in the final two sections of the chapter. As distillations of normative reasoning, treaties may themselves be studied in the same fashion as international norms more generally. IR scholarship has extensively explored the instrumental and social logics through which norms may impact the conduct of state actors, and this dissertation employs many of these insights. This approach is therefore sensitive to important advancements made in synthesizing insights from both rationalist and constructivist IR perspectives.¹

International Relations, Law and the Promise of Non-Great Power Cooperation

International law has long been recognized as a key component of the architecture governing relations between states, and there have been extensive efforts to integrate legal scholarship and International Relations. Despite this sustained attention, international law has often been relegated to a second-order concern in IR, and regarded as at best an ancillary tool in the development and maintenance of international order. This is especially apparent in rationalist theories—most notably variants of realism and neoliberal institutionalism—in which international legal institutions are typically understood as subordinate to the goals and interests of the states that create them.

One important consequence of these utilitarian accounts has been a tendency to emphasize the role of materially powerful states in the creation and maintenance of international law and institutions, to the exclusion of other actors and potential forms of power.² This expectation is prominent in the realist (and especially structural realist) tradition, in which

international anarchy imposes severe limitations on the prospects for genuinely reciprocal and non-exploitative cooperation. As a consequence, the international system is held to be underwritten by material power, and international governance is created and sustained through the deployment of military and economic assets. Multilateralism can only function when backed up by coercive authority, and is thus conditioned by the willing engagement of major powers.

Institutionalist scholars have expanded the conditions under which cooperation may emerge and endure, but still assume the centrality of material power in achieving the distributional and organizational gains that motivate cooperative efforts. This is because international institutions coordinate state interactions on the basis of existing interests, and do not create new identities and preferences in the near-term.

At any given point in time, the status quo structures of the international system tend to reflect the dispositions and goals of the most powerful states, even as these institutions may endure beyond the relative decline of their creators. And, while absolute gains make cooperation more attractive than realists allow, institutionalist scholars also acknowledge that the threat of cheating still exists and, like realists, assume that effective agreements can only be ensured through monitoring and enforcement. The provision of collective goods therefore requires leadership, typically provided by a dominant power or

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powers. Thus even for more optimistic liberal theories, powerful states tend to possess disproportionate influence over the creation and function of institutions.7

For realist and institutionalist theories cooperation is valued instrumentally, and is only expected to occur when it is beneficial, either because it provides an additional means of exerting control in the international system, or because it efficiently structures mutual gain among self-regarding units. And, more fundamentally, legal processes do not themselves alter the content of state identities or their resulting preferences, and therefore merely respond to pre-existing goals. Institutions emerge and endure because they are useful, and not due to any deeper sense of fidelity to the law as a normatively valuable or legitimate social enterprise. As a result, compliance is assumed to be based on coercive or material incentives rather than obligation to the law itself in the service of social purposes. The scope of legal influence is further circumscribed in these theories since both approaches share a positivist view of international law in which legal commitments may only be enacted via the voluntary consent of state actors.8 This view is consistent with the prevailing account in international legal scholarship, which has assumed that purposive action—typically via ratification of treaties and responses to other legal developments involving custom—is the mode through which state actors accrue legal obligations and thus become part of a legal community.9 Treaties thus cannot set obligations for non-parties, and so should hold no influence over those states that choose to remain outside of their formal legal ambit. At the same time, legal institutions are expected to prove a weak constraint on the

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8 Abbott et al., “The Concept of Legalization;” Goldsmith and Posner, Limits of International Law. See also Byers, Custom, Power, 8 and 17.
practice of even those states that voluntarily adhere to their dictates since “most treaties require states to make only modest departures from what they would have done in the absence of an agreement.”\textsuperscript{10} Treaties concluded among non-major states should thus be particularly ineffectual since they will only ratify the existing intentions of less consequential international actors, and lack the type of enforcement mechanisms assumed to be essential to ensure effective compliance.

Despite the prominence of this view among scholars and policymakers, the attention to these material and instrumental dynamics ignores potentially significant sources of governance in the international system. There are at least three substantial problems with the aforementioned approaches that are relevant to this study. First, the expectation of great power leadership marginalizes instances of law-making among other actors including non-major states, civil society groups and organizations themselves, and thus leaves scholars unable to persuasively account for some real-world instances of multilateralism. Yet as Chapter 1 explained, the Mine Ban Treaty and Rome Statute emerged under precisely these conditions. To the extent that the contributions of “middle power” states (like Canada, Brazil, Norway and South Africa) and transnational civil society are diminished, we therefore lack a coherent means of addressing a foundational feature of the new diplomacy.

Second, an account of state interests as exogenous and effectively static leads to an assumption that international law rarely exerts an independent effect on behaviour since it only ratifies what states would willingly do anyway.\textsuperscript{11} Yet quite in contrast to the view that the ban on antipersonnel landmines and the creation of a permanent international criminal court were “easy” policy decisions, the decision to join the negotiated consensus was less pre-determined, and often


substantially more complex, than such a theoretical account would assume. Many leading states faced considerable resistance from key domestic constituencies, most frequently the military and its civilian bureaucratic structures. These objections were often driven, for Western states at least, by concerns over how the treaties would affect their ability to continue to participate in military operations with non-parties, most notably the United States. The lesson here is that the implications of strong legal restraints ultimately bear no less heavily on those states that elect to voluntarily submit to a treaty’s authority, though a central contention of this dissertation is that legal institutions may also pose informal constraints on non-parties. As such, the MBT and ICC cannot be explained simply in relation to their limited importance or as implying comparatively unproblematic demands among a smaller community of willing states. Rather, the implementation of legal norms should be regarded as a matter of interest for the full spectrum of states in the international system.

Finally, and most centrally for this study, a theoretical account that privileges material power in international affairs tends to obscure the importance of other, primarily social, forms of obligation and leads to a diminished view of the sources of treaty influence. Ruggie has previously pointed out that rationalist IR theories are unable to fully account for the obligatory force of international institutions, since legal authority does not appear to be reducible to mere instrumental advantage. This dissertation therefore conceives of treaties as social structures, as addressed in recent decades by scholars of constructivism and customary international law.

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12 Price, “Reversing the Gun Sights.” According to Fehl, “[t]he EU endorsed the Canadian-led ‘Ottawa Process’ only after prolonged internal divisions: whereas Austria, Belgium, Ireland and Germany were early core group members, other European states took much longer to accept both the goal of a total ban and the Ottawa Process as such.” Fehl, “Living with a Reluctant Hegemon,” 266. This subject is addressed at length in Chapters 3 and 4.


14 For example: D’Amato, Concept of Custom; Reus-Smith, “Politics and International Legal Obligation;” Byers, Custom, Power; Finnemore and Toope, “Comment on ‘Legalization and World Politics’;” Reus-Smith, Politics of International Law; Price, “Emerging Customary Norms.”
For constructivists, law possesses meaningful influence and yet is itself situated within and subject to an international political system – that is, it both constitutes, and is a product of, politics. On the one hand, legal institutions inform the construction of actor identities and define appropriate forms of behaviour for these actors. Treaties and other institutions serve as focal points for the negotiation, consolidation and promotion of norms, and thereby contribute to the articulation and elaboration of community standards (like the content of legitimate statehood) that are central to the modern practice of international relations. Legal rules and norms also act as arbiters of proper conduct, regulating the behaviours of constituent actors in the international system. International law gains its legitimacy and obligatory status from precisely this dual role of defining actors and their relationships, and adjudicating their subsequent actions. As will be explored at length in subsequent chapters, the ban on antipersonnel mines and the creation of a permanent international criminal court are significant because they each seek to overturn a prior status quo that permitted vastly different behaviour. In the case of the MBT, the use of AP mines was previously a widespread and acceptable practice in warfare that received little attention as anomalous or especially worthy of sanction. And while the international community has long recognized genocide and war crimes as acts of particular opprobrium, the Rome Statute entrenches a new social expectation wherein states will investigate and prosecute grave international crimes or defer to a supranational legal body with power to carry out its own criminal trials. The transformative potential of international law is rooted in this ability to

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substantially remake existing normative structures and thus, inform the content of identities and subsequent interests and behaviours.

On the other hand, the international system conditions the processes by which norms and laws are promoted and adjudicated. “[B]ecause norms are geopolitically constructed, their specific content and application will tend to reflect the broad interests of powerful states in international society over time.” Thus power as conventionally defined still features in a constructivist account, and IR and legal scholars have convincingly demonstrated the pre-eminent role powerful states often play in (re-)creating legal institutions. Certain states are disproportionately consequential to the maintenance of the international system owing to their unique interests and because they possess the material resources to shape new institutions—though their robust diplomatic capacities—and enforce existing laws. Finnemore and Sikkink’s work on norm consolidation, for example, suggests that the tipping point leading to a “norm-cascade” will typically rely in large part on the support of the most influential state actors of the time. However, this is not always the case, and this dissertation argues that treaties may emerge and exert substantial influence without the leadership of the great powers. Since norms are not simply derived from material power but also from broader social processes, there exist both greater constraints on prominent states, and more opportunities for less powerful states to exert influence in international affairs, than is often appreciated.

Attention to the constitutive role of norms and laws also provides an additional, compelling account for why states create formal treaties and subsequently feel the need to meet the obligations they have agreed. Beyond their presumed efficiencies, constructivists suggest that

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19 Finnemore and Sikkink, “International Norm Dynamics,” 901.
the legitimacy of legal institutions derives from their role in constituting the identities and interests of subject actors, thereby acting as points of reference in debates regarding the nature of proper action. Treaties are employed not merely because they are useful (though they often are), but more fundamentally because they are deemed to represent an appropriate means of structuring complex relationships among international actors.\footnote{Ruggie, “Multilateralism;” Reus-Smit, “Constitutional Structure of International Society.”} As a particularly acceptable form of reasoning and justification, law has become a primary organizing principle in contemporary international affairs. Over time, states—as the primary units of the international system—have been socialized into this “climate of legality” in which a general belief in law as an abstract good leads these same states to seek recourse to specific rules to govern their behaviour.\footnote{Reus-Smit, “The Politics of International Law,” 29-31. See also Thomas M. Franck, The Power of Legitimacy Among Nations (Oxford: Oxford University Press, 1990).}

The same can be said for the decision to obey rules once established. The utilitarian premise embedded in realist and institutionalist thinking assumes that either coercion or consent to be the basis of state compliance with international agreements.\footnote{Mearsheimer, “False Promise of International Institutions;” Michael Glennon, Limits of Law, Prerogatives of Power: Interventionism After Kosovo (New York: Palgrave, 2001); Michael Glennon, “How International Rules Die,” Georgetown Law Journal 93, no. 3. (2004-2005): 939-991; Goldsmith and Posner, Limits of International Law.} While undoubtedly reflecting key motivations, these formulations are incomplete as they obscure the social sources of obligation that are chronologically prior to any particular legal rule or process. Thus a treaty is to be obeyed not simply because it is deemed valid in isolation, but more fundamentally because one of the assumptions at the heart of international practice is that legal systems are worthy of adherence.\footnote{Byers, Custom, Power, 7.} It is in this sense that Reus-Smit speaks of constructivism as offering an “anterior conception of international legal obligation.”\footnote{Reus-Smit, “Politics and International Legal Obligation,” 613.} While compliance is undoubtedly driven in part by the desire of state actors to advance self-interested goals like improving organizational
efficiency, bolstering their reputation or avoiding sanctions, these considerations are given meaning by a pre-existing belief in the legitimate status of law.\textsuperscript{25} This helps explain why compliance is generally the default position against which any deviations must be justified.\textsuperscript{26} In ignoring the constitutive function of rules, rationalist theories are consequently unable to fully capture the content and meaning of obligation or account for the potential that legal institutions may hold in re-shaping international politics.

**Building a Community of Obligation Through Law: International Treaties as Sites of Norm Development**

For non-great power treaties to prove broadly effective, they must generate a sense of obligation within two distinct audiences. A treaty must first be able to claim obedience among its members without the coercive and legitimating assistance provided by materially powerful states. At the same time, the full impact of a multilateral agreement can only be realized by encompassing these important states within its legal sphere. In short, a treaty is only fully successful when the policies and actions of all relevant actors—including non-parties to the agreement—reflect adherence to its norms and rules. Yet as noted already, this goal, and especially the latter part, is antithetical to the way scholars have typically thought of the genesis of legal authority. A strictly consensual account of international law would suggest that treaties will be largely irrelevant for non-parties, and exerting meaningful influence over these actors is

\textsuperscript{25} Under such circumstances, state policies correspond to behavioural expectations associated with the relevant norms—i.e., rule following—rather than a strictly instrumental effort to maximize short-term utility. Friedrich Kratochwil, “How Do Norms Matter?” in *The Role of Law in International Politics*, ed. Michael Byers (Oxford: Oxford University Press, 2000), 57.

impossible since they have explicitly chosen to remain outside of the legal agreement. This
leaves us with an incomplete community of consenting states.\textsuperscript{27}

Might there be other means by which a community of obligation based (at least partly) in
law may develop in an international system composed of formally autonomous and self-
regarding state units? This topic has been a central concern for a variety of IR approaches, but
has found a particular home in the English School,\textsuperscript{28} amongst constructivist scholars\textsuperscript{29}, and
critical theorists like Andrew Linklater.\textsuperscript{30} I draw on some of these important insights here to
develop an argument concerning the role that formal multilateral agreements play in promoting
international norms – in other words, how treaties can serve as key institutions for consolidating
social expectations in an international society composed of actors that disagree about a great
deal, including the desirability of the treaties themselves. In what follows, I argue that
international law’s influence comes from the dual sources of its basis as a social phenomenon,
and its internal criteria. These features serve to moderate the influence of raw material power in
shaping international outcomes. The transition to a legalized context is important to a treaty’s
subsequent prospects, since it inculcates norms with a distinct status based in a particular mode
of reasoning and justification. At the same time, the fact that individual treaties are part of a

\begin{footnotesize}
\textsuperscript{27} Of course, there are some issue areas—such as the protection of certain geographically focused endangered
species—where the participation of great powers like China or the United States may not be particularly important
to achieve the purposes of the norm or legal rule. However, for reasons that I allude to in Chapter 1, I believe that
both the MBT and ICC are examples of global regulatory institutions in which materially powerful states have
valuable potential roles to play, as is further anticipated by prevailing theories in the IR literature.

\textsuperscript{28} Among the most prominent of these are Bull, Anarchical Society; Martin Wight, Systems of States, ed. Hedley
Bull (Leicester: Leicester University Press, 1977); Barry Buzan, “From International System to International
Society: Structural Realism and Regime Theory Meet the English School,” International Organization 47, no. 3

\textsuperscript{29} Representative samples include Finnemore, National Interests; Thomas Risse, “International Norms and Domestic
Change: Arguing and Strategic Adaptation in the Human Rights Area,” Politics & Society 27, no. 4 (1999): 526-
556; Kathryn Sikkink, Sanjeev Khagram and James Riker, eds., Restructuring World Politics: Transnational Social
Movements, Networks, and Norms (Minneapolis: University of Minnesota Press, 2002); and Reus-Smit, Politics of
International Law.

\textsuperscript{30} Andrew Linklater, The Transformation of Political Community: Ethical Foundations of the Post-Westphalian Era
\end{footnotesize}
much larger social system—composed of other legal regimes, generic constitutive principles, and non-legal norms—means that their influence is not necessarily limited to their formal membership. Indeed, treaties substantiate norms as well as rules, and it is in this former respect of changing broader social expectations regarding legitimate behaviour that a treaty may influence even those states that reject binding obligations stemming from the formal agreement.

The key point is that a community of obligation is constructed by the actions and reactions—both purposive and incidental—of all actors within the international social system. In this respect, this approach shares useful parallels with scholarship on customary international law since both highlight the social, intersubjective nature of authority, and the potential this creates for the accrual of international obligations in the absence of explicit endorsement by states.\(^3\) In this way, I hope to demonstrate, the social potential of legal institutions is more expansive than strictly consent-based accounts would allow. It is only by acknowledging this that we can fully appreciate how non-great power treaties can exert influence in the international system.

*International Law as a Distinct Form of Social Order*

Both English School and subsequent constructivist approaches have made clear that any society is characterized by a constellation of principles, norms and rules that define relevant actors and organize their interactions in mutually meaningful ways. While international law is by no means the only form that such social ordering can take, it does possess a special position and role in contemporary international affairs. John Ruggie and Christian Reus-Smit have persuasively argued that multilateralism and contractual international law have become dominant

modes of operation in contemporary international society.\textsuperscript{32} They are “generic” structural features of the international system in the sense that “they provide the basic framework for cooperative interaction between states, and institutional practices transcend shifts in the balance of power and the configuration of interests, even if these practices’ density and efficacy vary.”\textsuperscript{33} Ruggie has sought to locate the unique purpose of multilateralism not in its simple function but its social intent: multilateralism is not defined merely in reference to its coordinating role—since this can apply to other forms of order—but rather by the values that underpin it. These ordering principles “specify appropriate conduct for a class of actions, without regard to the particularistic interests of the parties or the strategic exigencies that may exist in any specific occurrence.”\textsuperscript{34} In particular, the social content of multilateralism is posited to generate a logic of indivisibility among members, as well as expectations of “diffuse reciprocity” and a rough equivalence in the benefits of cooperation. What Ruggie is hinting at here, though he does not follow the implication through to its full conclusion, is that to have the desired effect ordering principles must be situated within a wider social system that applies to a coherent and mutually understood class of actions and actors.

Reus-Smit builds on this conception, and his account is especially useful in clarifying the linkages between particular institutional configurations and the prior determination of socially appropriate roles and identities.

I come to see international society as more than a ‘practical association’, as a ‘constitutive association’ in which debates over who counts as a legitimate actor, over kinds of purposes that are socially acceptable, and over appropriate strategies, prefigure and frame the rational pursuit of interests. In such a world states create institutions not only as functional solutions to co-operation


\textsuperscript{33} Reus-Smit, \textit{Moral Purpose of the State}, 4.

\textsuperscript{34} Ruggie, “Multilateralism,” 11.
problems, but also as expressions of prevailing conceptions of legitimate agency and action that serve, in turn, as structuring frameworks for the communicative politics of legitimation.\textsuperscript{35}

Law thus has a feedback effect on politics, as it helps to define the proper boundaries of international action, but its more particular features only make sense in a social system that has already defined the scope of appropriate actors—largely, but not exclusively, sovereign states—and the means by which they may be permitted to act upon and within the system. Reus-Smit identifies three core constitutional structures—concerning the moral purpose of the state, sovereign status of constituent actors, and a concept of procedural justice (how to develop rules of international conduct)—that have varied across time to generate distinctive fundamental institutions.\textsuperscript{36} In the modern society of states, this configuration of principles has produced an individualistic conception of statehood which privileges a contractual legalistic order that is conceived as being autonomous from politics and embodying both a “distinctive language and practice of justification, and a horizontal structure of obligation.”\textsuperscript{37}

Fundamental institutions like multilateral diplomacy and international law thus are themselves embedded within a broader social system: prior constitutional norms (which define legitimate statehood and rightful action) inform the content of these institutions, which in turn provide the regulatory frameworks for regimes in specific issue areas.\textsuperscript{38} This structure has profound implications for the design of particular treaties and subsequent expectations of compliance, as legal rules are created in the shadow of the constitutive norms of the international system.\textsuperscript{39} “It is thus the correspondence between individual norms and rules and the underlying


\textsuperscript{36} Reus-Smit, Moral Purpose of the State, 6-8.


normative structure of the international society which determines the tendency of governments to observe specific injunctions.\footnote{Hasenclever, Mayer, and Rittberger, Theories of International Regimes, 172.} While compliance is undoubtedly driven in part by the desire of state actors to advance self-interested goals like improving organizational efficiency, bolstering their reputation or avoiding sanctions, these considerations are given meaning by a prior notion of the legitimate status of law as a foundational means of ordering international affairs.\footnote{Franck, Power of Legitimacy.} Rule following is thus fundamentally driven by a sense of fidelity to commitments, that is, a belief that laws should be observed because of their contribution to a good social order.\footnote{Reus-Smit, “Politics and International Legal Obligation,” 592.} This social conception of law also provides an account of how treaties can become vectors for the consolidation and promotion of norms in the first place, since legal structures are not distinct from broader intersubjective processes of meaning-making in the international system. In other words, treaties are a prominent means by which role identities\footnote{Role identities can be understood as subjective understandings about the nature and meaning of an actor that rely on the judgment of other actors outside of the referent. In this sense, role identities are necessarily social and intersubjective: “role identities are not based on intrinsic properties and as such exist only in relation to Others…. One cannot enact role identities by oneself.” Alexander Wendt, Social Theory of International Politics (Cambridge: Cambridge University Press, 1999), 227.} and behavioural expectations are defined and refined amongst international actors, and these processes can come to include actors that formally resist the specific legal innovation in question.

*The Criteria of Legality and the Special Status of Legal Norms*

Reus-Smit’s account, while advancing a compelling account of legal institutions as social constructs, gives only a partial explanation of how contractual international law is internally obligating, suggesting that its legitimacy is tied to its position within a hierarchical social arrangement. The particular content of the law is considered less relevant than the social system in which it is located—since the latter have differed among historical epochs—though
like Ruggie, Reus-Smit recognizes that “[r]ightful law” has to emanate from those subject to it and must equally apply to all applicable actors.\footnote{Reus-Smit, \textit{Moral Purpose of the State}, 9.} Jutta Brunnee and Stephen Toope have recently extended these insights to more clearly identify the particular features that give modern contractual law its obligatory status.\footnote{For a critique of this approach—arguing that Brunnee and Toope “naturalize” the criteria of legality and in so doing do not account for fundamental changes in legal practices over time—see Christian Reus-Smit, “Obligation Through Practice,” \textit{International Theory} 3, no. 2 (2011): 344-346. This is an important qualification, though one that is less problematic here as I limit my focus to contemporary manifestations of contractual international law.} In their view, “[w]hat distinguishes law from other types of social ordering is not form, but adherence to specific criteria of legality: generality, promulgation, non-retroactivity, clarity, non-contradiction, not asking the impossible, constancy, and congruence between rules and official action.”\footnote{Brunnee and Toope, \textit{Legitimacy and Legality in International Law}, 6-7.} The distinction between general social norms and legal norms can thus be principally found in their internal qualities, with the latter evincing a distinctive structure and process of creation and regeneration.\footnote{Finnemore and Toope, “Comment on ‘Legalization and World Politics’,” 750; similarly, Brunnee and Toope, \textit{Legitimacy and Legality in International Law}, 16.} Law is not simply composed of formal agreements with clear textual sources—what some scholars term “hard law”\footnote{Kenneth W. Abbott and Duncan Snidal, “Hard and Soft Law in International Governance,” \textit{International Organization} 54, no. 3 (2000): 421-456.}—but encompasses a distinctive form of interaction and resulting reciprocal expectations governing relationships among actors. At the same time, these legal criteria provide greater clarity in the meaning and scope of norms, and in so doing generate greater pressures for compliance. “Precision reduces the plausible deniability of violation by narrowing the range of reasonable interpretation…. For these reasons, violating a treaty is often asserted to have more serious reputational consequences than reneging on a political commitment, \textit{ceteris paribus.”}\footnote{Beth A. Simmons, “Treaty Compliance and Violation,” \textit{Annual Review of Political Science} 13 (2010): 277. Similarly see Hafner-Burton, Victor and Lupu, “Political Science Research on International Law,” 54. For one application of this account see James D. Morrow, “When Do States Follow the Laws of War?” \textit{American Political Science Review} 101, no. 3 (2007): 559-572.}
The treaty-making process thus marks a qualitative transition in the ontological status of norms to what I have already termed “legal norms” or “treaty norms.” This change is significant because it signals a move towards alternative modes of action that are held to be more dispassionate and technocratic than non-legalized environments.\(^{50}\) Legal discourse is distinct in its employment, as “actors enter the realm of international law when they feel impelled not only to place reasoned argument ahead of coercion but also to engage in a distinctive type of argument in which principles and actions must be justified in terms of established, socially sanctioned, normative precepts.”\(^{51}\) It is in this sense that Sarah Percy speaks of law as a “public declaration” in support of principled commitments.\(^{52}\) This is not the same as saying that formalism in and of itself creates obligation.\(^{53}\) Rather, law is ultimately made meaningful as an ongoing process in which actors re-construct their social and political environment:

Actors assume the existence of a set of socially sanctioned rules, but international law ‘lives’ in the way in which they reason argumentatively about the form of these rules, what they prescribe or proscribe, what their jurisdictional reach is, what new rules should be enacted, how these relate to established rules, and about whether a certain action or inaction is covered by a given rule.\(^{54}\)

The clarity and routinization provided by legal criteria is crucial to the social legitimacy of treaty norms as it generates the conditions under which actors may appeal to legal institutions in adjudicating disputes and framing the range of appropriate policies. That is, the internal characteristics of law give coherence to social processes of deliberation and argumentation, and

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\(^{52}\) Percy, “Mercenaries,” 387.

\(^{53}\) Abbott et al., “The Concept of Legalization.” For a response, see Finnemore and Toope, “Comment on ‘Legalization and World Politics’.” As Sinclair has pointed out, law is often not determinate in particular situations, and so allows for contestation in its meaning and implications. Sinclair, *International Relations Theory*, 10 and 37-60. And, as Percy has shown in the context of international responses to mercenaries, the increased precision given to a norm via legalization does not necessarily lead to improved effectiveness. Percy, “Mercenaries.”

thereby provide a structure around which new or existing standards may be promoted, contested, interpreted, and replaced.\textsuperscript{55}

The legitimacy of international law, in this account, is rooted in a belief that law is neutral in its form and mode of adjudication, with legal institutions portrayed as offering a more or less autonomous source of decision-making removed from a spare, unregulated political realm in which material power is expected to dominate.\textsuperscript{56} Of course international law is not genuinely a-political, as we know that political forces frequently intervene in the creation and interpretation of international law and equally, that powerful actors employ legalistic processes to validate their policy preferences.\textsuperscript{57} But it remains the case that legal practice is often reified as a distinct form of social order in which different forms of argumentation and judgement prevail. What is interesting about law, then, is that it is both of politics, and yet may be presented as also being above politics and especially particular configurations of political power. This particular quality has vital implications for the manner in which international treaties serve to disseminate norms, both in respect of those states that have joined a given treaty, and for those resistant parties that remain outside of the formal legal agreement.

The key point here is to note that international law’s influence derives not solely from its social context but also from the particular criteria and procedures by which it is enacted, assessed, and modified. Norms help to structure international affairs by creating categories of


\textsuperscript{56} Hence “international law derives its political power from the ideology of international law, the core idea of which is that international law is ultimately distinguishable from, and superior to, politics.” Shirley V. Scott, “Identifying the Source and Nature of a State's Political Obligation Towards International Law,” Journal of International Law and International Relations 1, no. 1-2 (2004-2005): 54. See also Brunnee and Toope, Legitimacy and Legality in International Law, 6-7.

meaning (defining identities and institutional procedures) and regulating forms of appropriate
behaviour, and these processes are given greater precision and clarity when formalized through a
legal initiative. Legalized norms and rules may be viewed by their subjects as social “facts” in
the sense that they can bear on the calculations of other constituent actors, but at the same time,
this only makes sense because specific laws are embedded within broader, intersubjectively-
defined systems of meaning in which legal commitments are held to be specially obligating.\textsuperscript{58} To
the extent that the obligatory force of international law is to be found in its distinct social
position and characteristics, we should see some residue of these legal criteria in the discourse of
states and other actors, a subject taken up in detail below.

\textit{Network Effects and the Spread of International Norms}

These characteristics matter principally because, as acknowledged already, treaties exist
within both a stratified system of prior or superseding values, principles and norms, and a
horizontal arrangement of legal regimes in other issue areas. Individual treaties are thus part of
the international social system by virtue of their shared reliance on foundational (legal and non-
legal) norms like sovereign statehood, multilateral diplomacy and contractual law, with the latter
including the general expectation that treaty commitments will be honoured (\textit{pacta sunt
servanda}). These structural norms are increasingly supplemented by more explicitly aspirational
standards concerning human rights and democracy, among others.\textsuperscript{59} Together, these globally
recognized—if not always equally respected—ordering principles provide a common language
and basis for mutual recognition (who gets to participate) and practice (what behaviours are
appropriate in a given situation and how to justify various actions) that shapes the conduct of


\textsuperscript{59} Sandholtz and Stiles, \textit{International Norms}, 17-23.
international affairs. For example, various studies have demonstrated the complex ways in which the international abolition of slavery led by Great Britain in the early 19th Century was deeply influenced by evolving notions of individual human dignity and equality, while others have shown how norms of sovereignty and human rights informed the decolonization and anti-apartheid movements more than a century later. In both instances (and many others besides), the more particular developments in one issue area were made possible by connections to other, often temporally prior global values. Sandholtz and Stiles have found similar processes at work in a variety of cases of norm change including prohibitions on piracy and territorial conquest and more contemporary shifts in the treatment of refugees and the promotion of democracy. International law thus helps to constitute the international system precisely because it is part of a much larger network of social practice.

Individual treaties are therefore not isolated phenomena, but are rather embedded within webs of recurring practice and meaning. This social density and interdependence is key to the influence that international law can command. This is because legal institutions build on established social and legal norms and gain impetus and legitimacy from these connections:

Mutually reinforcing and consistent norms appear to strengthen one another; success in one area (such as abolishing slavery) strengthens and legitimates new claims in logically and morally related norms (such as human rights and humanitarian intervention)...Change in one set of norms

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60 Ellis, “International Regimes,” 280.
63 Sandholtz and Stiles, International Norms.
may open possibilities for, and even logically or ethically require changes in, other norms and practices.\textsuperscript{64}

Hence, “only through social interaction, and the participation in shared practices, can actors develop an ‘internal commitment’ to observe the law.”\textsuperscript{65} The interconnected nature of legal institutions allows actors to make appeals by analogy to other norms or legal entities, and thereby replicate and reinforce the social legitimacy of legal process.\textsuperscript{66}

The impact of these processes can be felt even by those states that do not recognize the legal authority of a given treaty. All states are embedded within the international legal and social system, and as such, even if they reject a particular institution they are still implicated in the broader complex of values from which it derives. For most states most of the time, it is simply harder to avoid commitments that are plausibly associated with prior generalized international norms or more particular legal rules in other analogous situations.\textsuperscript{67} This concept of treaties as nodes in a larger network of social expectations serves as the basis for a community of obligation, and provides the source of a treaty’s influence and authority even in instances where the legal validity of rules is challenged.

**Non-Great Power Treaties and International Obligation**

How can this theoretical account operate in practice? The previous discussion is especially relevant to the more particular concern with non-great power legal authority as it suggests how legal norms may exist independent of constellations of material power in the international system. The special status of international law—derived from its social position and


internal criteria— and its role within a broader social system is central to its ability to generate obligation. This has important implications for both the formal members of a treaty, and the wider community of states that, regardless of their views toward a particular institution, remain part of the international system in which law operates.

*Treaties and State Parties*

This dissertation contends that the members of a treaty may generate a powerful community identity—manifested as compliance with and endorsement of treaty norms—in the absence of coercive threats or material incentives provided by dominant states. International law is not simply politics by other means, but a separate source to which actors can appeal in structuring and adjudicating their actions. Parties to a particular treaty have agreed to a set of obligations underpinned by broader social expectations concerning the appropriateness of law and the observation of commitments; it is this quality that holds the potential to raise the costs of violations and the benefits of adherence beyond what can be provided by material inducements or punitive sanctions alone.68

This community effect is possible since, as a result of their position within an international normative system, treaties possess distinct structural effects in promoting standards of appropriate behaviour. This has two phases. First, it is now well established that multilateral negotiations often serve as means of building affinity with norms among international actors.69 Finnemore and Sikkink’s work on the “norm life-cycle,” for example, is sensitive to the important role that diplomacy plays in consolidating emerging international norms, while Keck

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68 For an earlier articulation see Chayes and Chayes, “On Compliance.”
and Sikkink’s “boomerang” model of norm diffusion also relies on such an assumption in examining the prospects of transnational civil society engagement in promoting global norms.\textsuperscript{70} This is significant since multilateral processes often represent a diverse array of views in the international system, and take-on a “quasi-legislative” status as constitutional moments in shaping responses to global challenges.\textsuperscript{71} Caroline Fehl has persuasively argued that transnational civil society actors were especially successful in shaping state acceptance of an independent ICC that would by its design impose significant sovereignty costs on participants. This, in turn, was only conceivable due to an emerging view that had come to “perceive impunity for atrocities as a common problem [for the international community] in the first place.”\textsuperscript{72} Thus exposure to diplomatic processes can exert social pressures on state actors to endorse new ways of thinking with respect to matters of cause-and-effect (the humanitarian impact of antipersonnel mines as outweighing concerns for military utility) or rights and responsibilities (the legal validity of an independent supranational criminal court) in the international system.

Second, a vibrant literature has also demonstrated that once established, institutions help coordinate successive efforts to generate compliance with and internalization of these new behavioural standards.\textsuperscript{73} Treaties like the MBT and ICC hold regular meetings in which state representatives interact on the basis of sovereign equality\textsuperscript{74} and which frequently include the direct participation of civil society actors. Treaty fora thus offer a venue for discursive interventions as various actors seek to promote their vision for the legal community—including the scope of obligations and the specific content of behavioural expectations—and where appeal

\textsuperscript{72} Fehl, “Explaining the ICC,” 382. See also Chapters 5 and 7 of this dissertation.
\textsuperscript{74} Byers, \textit{Custom, Power}, 36.
to “the law,” rather than the exertion of raw material power, is meant to determine outcomes.\textsuperscript{75} Over time, these structured engagements can themselves generate greater affinity for legal norms and the re-construction of actor identities.\textsuperscript{76} Treaties “can therefore be thought to catalyze the process of international norm diffusion by providing a site within which the ideas held by policymakers from one country can be effectively transmitted to the representatives of another.”\textsuperscript{77} Institutions thus facilitate persuasion and social learning\textsuperscript{78} as well as “the distribution of social rewards and punishments”—such as status, sense of belonging, shame and exclusion\textsuperscript{79}—and additionally offer a vector through which material inducements such as side payments and sanctions may be directed.\textsuperscript{80} I do not explore these individual-level socialization mechanisms in this dissertation, but rather use the brief discussion here as a means of illustrating how treaties may serve to promote standards of appropriate behaviour and, equally, suggest how norms may in turn shape state policies.

This account does not assume that all members necessarily deeply identify with constituent treaty norms from the outset. States may initially join a treaty for reasons such as

\begin{footnotesize}
\begin{enumerate}
\item As such, “role conceptions and identities might change on the basis of continued and routine co-operation. As a virtuous cycle begins, States might learn to establish more inclusive notions of identity which discourage free-riding, increase diffuse reciprocity, and thus enhance the willingness to bear some costs for the ‘us’ or even the new ‘we’.” Kratochwil, “How Do Norms Matter?” 58.
\item Johnston, “Treating International Institutions.”
\end{enumerate}
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coercion or an instrumental response to incentives. Yet socialization processes will tend to have an aggregative effect for those actors within a treaty community: “[e]ven where ratification of the treaty is not motivated by commitment to the norms embodied in the treaty, the act of ratification and the continued fact of membership in the treaty regime may also serve to slowly transform the country’s practices as it gradually internalizes the norms expressed.” Moreover, even putatively rational and self-interested employment of legal standards to justify policy ultimately reifies “the law” as the proper arbiter of acceptable action. This has implications for treaty members since they are now subject to a specific set of legally binding obligations. Heather Smith-Cannoy, for example, has found that governments often sign human rights treaties in order to placate domestic constituencies and secure international economic goods in the form of aid or more favourable trade terms. Yet these instrumental incentives nonetheless provide new avenues for individuals and groups to apply these new legal commitments in holding their governments to account. “An actor that wishes to draw on the ideology of international law to advance its interests must therefore engage in discourse that aligns its preferred policies as closely as possible with international law's source of political power.” Even ostensibly self-seeking behaviours thus ultimately rely on an intersubjective agreement on the basic contours of proper behaviour; hence instrumental motivations have normative sources and effects, further reinforcing the need to integrate rationalist and constructivist assessments of norm impact.

Treating multilateral agreements as normative structures provides a useful account of how State Parties may build a community of legal obligation in the absence of great powers. The

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fact that treaties are embedded within hierarchies of more generic principles and norms, and connected horizontally to other legal regimes in associated issue areas, serves to reinforce their potential legitimacy and authority. The social and technocratic quality of legal discourse is equally vital to the health of a treaty and opens space for traditionally less powerful actors—both small and “middle power” states and members of transnational civil society including lawyers, peace activists, national and international bureaucrats and members of the non-political state apparatus like judges—to operate within the international system in meaningful ways. Concerned parties can assess the actions of other actors on the basis of established legal injunctions and in a social setting in which violations are understood to be qualitatively different from other types of anti-social behaviour in non-legalized environments. Indeed, as I show in Chapter 4, MBT member states have frequently framed instances of compliance and violations in the context of specific treaty commitments and in light of parallel norms and rules and a generalized belief that agreements must be kept. This social density, rather than coercive capacity, provides the basis for a community of legal obligation, and thus compliance, among treaty parties.

*Treaties and Non-Party States*

The networked quality of treaties also holds important implications for states that remain outside of the legal agreement. International law is part of a much larger social system that encompasses all state actors, and individual treaties are connected to the wider web of legal and non-legal principles, norms and rules.85 As such, states typically cannot escape the broader milieu in which a particular treaty is located, and have to deal with “the law” even when they refuse to consent to a given legal innovation. States are therefore vulnerable to a variety of processes by which their prior acceptance of constitutive principles—like the legitimacy of

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85 Non-parties are thus part of a larger normative structure anchored by a legal agreement.
contractual law in ordering international relations and the resulting general need to observe legal commitments—or related rules and norms in other issue areas can generate pressures towards compliance with the more particular agreement that has achieved a sufficient critical mass of international support.  

There are two important consequences of this general argument to highlight here. First, even overtly hostile states rarely reject new legal institutions in their entirety. Such states may endorse the broad objectives of a treaty but find themselves unable or unwilling to apply the more particular obligations. In subsequent chapters I argue that the widespread endorsement of a norm of “humanitarian effect” has led prominent non-parties to a partial accommodation with the Mine Ban Treaty. Similarly, while the United States and others openly reject various institutional features of the ICC, they generally do not contest the underlying—and pre-existing—legal principle that individuals should be subject to criminal prosecution for grave violations of international humanitarian and human rights law. Hence formal membership does not exhaust the ways in which treaties and associated norms may bear on the formation and execution of state policy; this important caveat would be lost were we to focus on ratification and accession to legal agreements to the exclusion of other forms of obligation. By the same token, previous diplomatic practice typically permitted the inclusion of reservations so as to allow states with significant objections to join a legal agreement nonetheless. This strategy was expressly rejected in the cases of the MBT and ICC, as a means of ensuring a more rigorous set of legal commitments and resulting norms. A key question, therefore, is whether the prohibition on reservations has led to better compliance and norm adherence (even while excluding some states

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86 Multilateral agreements with few formal adherents would have difficulty reaching this threshold. However, as I explain in Chapters 3 and 5, both the MBT and ICC have clearly achieved this level of support.
from formal membership) than might otherwise have been the case. I take up this consideration in the Conclusion to this dissertation, in light of the empirical findings of Chapters 3-7.

Second, while non-parties do exhibit sincere objections to legal developments, contestation often contains within it the seeds of greater accommodation. This may come in a variety of forms. Resistant states might for example partially comply with treaty obligations, by ending some behaviour prohibited by the agreement. In such cases, norms can have the effect of foreclosing previously unexceptional behaviours and simultaneously increasing the perceived importance of such acts, rendering any policy reversal a more substantial political issue that it would have been otherwise. The US decision to abandon research and development of all new types of antipersonnel mines—including those that US maintains should not be subject to a global prohibition—is an important example of this phenomenon, and is addressed in Chapter 3. These behavioural adaptations may be mirrored in changes in state discourse that reflect a closing-off of certain rhetorical strategies due to a sensitivity to the social expectations fostered by a treaty. Even apparently cynical policies can then have lasting consequences for the development of norms. Scholars like Risse, Ropp and Sikkink have demonstrated that hypocrisy—expressing support for a legal development or norm while continuing with contrary behaviours—can generate pressures to more full adapt to new norms.87 Charges of insincerity are associated with cognitive dissonance in which non-parties are challenged to square their resistance with apparent support for broader principles, and thus bring their particular behaviours in line with stated ambitions. Hence resistance to a treaty is important precisely because it reflects legal and normative reasoning: even denying its legal applicability, non-parties frequently engage with the norms and constituent obligations embedded in the treaty, and

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thereby reinforce its relevance. This accords with established scholarship on customary international law, which makes clear that the development and refinement of international norms is not limited to the purposive actions of consenting states, and can occur through acquiescence or the unintentional recognition of a given norm or rule.\(^8^8\) From this perspective, the decision by China, Russia and the United States not to oppose the United Nations Security Council referrals with respect to Darfur and Libya represents a substantial development in the expansion of ICC legitimacy, as examined in Chapter 7. A key issue thus concerns the nature of the challenge—whether the resistance is overtly political in nature, completely rejecting the applicability of law to the domain in question, or more legal in nature, contesting the narrow legal rule.

The social density of the international system thus holds important consequences for the ability of states to resist unwelcome legal developments in a particular issue area. In light of the connections between various norms and legal rules, it is highly significant that non-parties frequently participate in meetings of the MBT and ICC as observers, and are therefore subject to the same socialization processes for State Parties discussed above. These processes may lead, over time, to further engagement by non-parties with the treaty and an incremental adoption of its legalistic language and constituent norms; this can occur informally, initially by changing cost-benefit calculations with respect to informal compliance, and ultimately, perhaps, by altering the definition of interests to correspond with treaty obligations. This, in turn, provides the most likely avenue for generating further behavioural adaptation and drawing such states toward formal acceptance of the treaties.

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\(^{8^8}\) Byers, *Custom, Power*. 
Assessing Non-Great Power Treaties

How do we know when a treaty has achieved widespread influence in the international system? The question of institutional effectiveness has received extensive treatment in International Relations and the fields of environmental regulation and human rights. Yet prominent accounts fail to address the full range of ways in which legal institutions can “matter” in the international system. The literature on compliance has often operationalized rule following in terms of ratification of the legal agreement, and in so doing ignores the impact that norms contained within treaties may have on non-party states as well.\(^89\) Many other studies have focussed attention on changes in the outcomes of state policy, or more holistic assessments of improvements in the status of international goods.\(^90\) Existing accounts of the antipersonnel mine ban and International Criminal Court tend to share a similar focus on regulative measures.\(^91\)

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89 Simmons, “Treaty Compliance.”
While a number of impressive early studies detailed the normative context of the emergence of the Mine Ban Treaty and Rome Statute, few have sought to extend these insights to the subsequent implementation phase, and none have offered an integrated analysis of various behavioural and discursive indicators of institutional effectiveness during the more than decade since the respective treaties’ creation.

This dissertation is not intended to rigorously test competing hypotheses of treaty impact, but is rather an attempt to employ a limited number of cases to generate detailed empirical observations concerning the efficacy of two archetypal non-great power treaties. To do so it provides an assessment of the impact of legal norms across the entire international system of states as opposed to among a more discrete community of individual actors. States are recognized as the primary constituents of the international system, and are as such accorded special status as creators and subjects of international law. Only states may sign and ratify international treaties of the kind under assessment in this project, and so the impact on these actors is of central importance in assessing treaty effectiveness. For this reason, this dissertation does not systematically assess the impact of the MBT and ICC on other types of international


92 See, for example, Price, “Reversing the Gun Sights;” various contributions to Cameron, Lawson and Tomlin, To Walk Without Fear; Fehl, “Explaining the ICC;” Deitelhoff, “Discursive Process of Legalization;” Marie Tornquist-Chesnier, “How the International Criminal Court Came to Life: The Role of Non-governmental Organisations,” Global Society 21, no. 3 (2007): 449-465; and Stueart, Politics of Constructing the ICC.

93 Javier Alcalde Villacampa, “The Mine Ban Treaty, New Diplomacy and Human Security Ten Years Later,” European Political Science 7 (2008): 520. To be sure, some authors have addressed the normative content of treaty implementation, but these important efforts have been limited either in terms of the substantive scope of their assessment or the time period in which the research was undertaken. See Price, “Emerging Customary Norms;” Ralph, “International Society;” Judith Kelley, “Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements,” American Political Science Review 101, no. 3 (2007): 573-589; and Herby and Lawland, “Unacceptable Behaviour.” I am indebted to Professor Price in particular for suggesting a conceptual method by which to integrate regulative and constitutive measures of institutional impact.

94 Thomas, Ethics of Destruction, 20.
actors like non-state armed groups (NSAG) or multinational corporations, though I do provide some tentative findings with respect to the former.\footnote{This simplifying decision should not be interpreted to suggest that such actors are unimportant to the progressive expansion of international humanitarian law, or to deny the valuable work by scholars and practitioners in this regard. Indeed, I intend to extend the current research methodology to NSAG more comprehensively in subsequent research.}

The impact of formal treaties can be studied in much the same way as norms more generally. Yet despite extensive attention, scholars of international relations and law have yet to agree on any one single method for identifying a strong norm when they see one.\footnote{Richard Price, “Detecting Ideas and Their Effects,” in The Oxford Handbook of Contextual Political Analysis, eds. Robert E. Goodwin and Charles Tilly (Oxford: Oxford University Press, 2006), 252-253. See also Finnemore and Sikkink, “International Norm Dynamics;” and Andrew P. Cortell and James W. Davis Jr., “Understanding the Domestic Impact of International Norms: A Research Agenda,” International Studies Review 2, no. 1 (2000): 65-87.} The challenges of assessment are largely owing to the social and inherently intersubjective nature of norms, and “the mutually constitutive and recursive nature of the relationship among norms, interests, and power.”\footnote{Thomas, Ethics of Destruction, 20.} When norms serve a regulative function, they may be among a variety of relevant factors permitting or restricting an observed outcome. Moreover, to the extent that norms inform the content of strategic decision-making, the distinction between ideational and instrumental action is largely collapsed.\footnote{Fearon and Wendt, “Rationalism v. Constructivism.”} By the same token, when norms constitute actors, their impact on subsequent actions is subsumed within prior changes in the composition of actor interests which may be subtle and more difficult to discern for an outside observer.\footnote{“[W]hen a norm is internalized, moral or instrumental judgements underlying the norm can recede so far into the background as to become invisible in decision-making processes.” Thomas, Ethics of Destruction, 39} What is more, norms are not static, binary entities exerting uniform influence across actors and time, but dynamic features of a complex international social system. “Norms fall on a continuum of strength, from mere discursive receptivity… through contested models… to reconstructed ‘common wisdom’,”\footnote{Jepperson, Wendt, and Katzenstein, “Norms, Identity and Culture,” 55.} and may do so in varying degrees within and among actors.
These features not only make it difficult to isolate particular causal processes, but more fundamentally raise important questions concerning the appropriateness of treating norms as “causes” of actions in the first place. Norms are not well suited to assessment by exclusively positivist methods, insofar as they fail to correspond to the basic notion of causality that the presence or absence of a variable can be said to produce a given outcome. This dissertation, by contrast, regards legal norms as logics that inform action, rather than deterministic mechanisms in their own right.¹⁰¹ Constructivist international relations theory offers a rich toolkit for conceptualizing the influence of treaties and developing a method for their assessment. Research has demonstrated that norms not only constrain the range of policy options by restricting or permitting certain types of actions, but also serve to inform the very content of actor identities.¹⁰² Such constitutive effects in turn effect compliance by redefining actor interests, as captured in the widely used definition of norms as “collective expectations about proper behaviour for a given identity.”¹⁰³ Moreover, scholars of customary international law have long recognized that legal obligations may stem from formal consent-based mechanisms like treaties and other negotiated documents, as well as via longer-term processes whereby actor behaviour and discourse comes to reflect a “generalized consensus” concerning the content of the law in the absence of specific codification or consent from constituent state actors.¹⁰⁴ Scholarship on customary international law thus provides a useful analogue for the study of how norms may bear on both formal treaty members and non-parties.

¹⁰¹ “Norms may ‘guide’ behavior, they may ‘inspire’ behavior, they may ‘rationalize’ or ‘justify’ behavior, they may express ‘mutual expectations’ about behavior, or they may be ignored. But they do not effect cause in the sense that a bullet through the heart causes death or an uncontrolled surge in the money supply causes price inflation.” Friedrich Kratochwil and John Gerard Ruggie, “International Organization: A State of the Art on an Art of the State,” International Organization 40, no. 4 (1986): 767.
¹⁰⁴ Byers describes customary international law as “a set of shared beliefs, expectations or understandings held by the individual human beings who govern and represent states.” Byers, Custom, Power, 151. See also D’Amato, Concept of Custom and Roberts, “Traditional and Modern Approaches.”
By treating norms as “reasons” contributing to outcomes, a central constructivist insight is to suggest that their impact will be to shape the range of acceptable options open to actors in complex and often subtle ways. Problematizing state interests in this way can help to account for what might otherwise be regarded as anomalous behavioural changes if we were to assume that the relevant actors hold fixed and essentially immutable preferences. First, norms may be conditionally held, and thus internalized only in the shallow sense that they make some actions more or less desirable and “provide a reason to give pause before pursuing certain courses of action – acting as what can perhaps be characterized as ‘ethical speed bumps.’” More substantially, norms may become “highly valued but not unconditionally taken for granted” in that they may be violated under extreme circumstances, though the threshold for noncompliance is raised substantially. Finally, a deeply internalized norm (or constellation of norms and rules in a treaty) may become so fundamental to an actor’s identity that it is accepted in a subconscious sense. Under these conditions, violations are essentially unthinkable and contrary practices never enter the policy-making process. A deeply-internalized norm forecloses certain behavioural options even before they can be considered, and is thus non-instrumental in its impact.

Accommodating the range of ways that norms of different degrees of robustness may have effects, therefore, demands a partial reliance on interpretivist methods, as detailed below, as well as behavioural compliance indicators. To summarize: an effective treaty will substantiate new legal commitments and norms that shape state policy and hence the conduct of international politics. A holistic measure of treaty efficacy thus requires both evidence that state behaviour accords with the given obligations and that this empirical pattern derives from a belief in the

legality of the treaty or the legitimacy of its underlying norm.\textsuperscript{108} Without this latter feature, 
compliance could be epiphenomenal. Legal rules and norms may thus be advanced and contested 
through the behaviour of the constituent actors of the international system and their discursive 
patterns of reasoning and justification in qualifying their positions vis-à-vis the law(s) in 
question.\textsuperscript{109} This in turn permits more nuanced assessment of contingent, incomplete, and at 
times contradictory patterns of change within and among actors.

\textit{Behavioural Compliance}

First, evidence of legal influence is manifested in widespread compliance – behavioural 
change among a majority of international actors in line with treaty core obligations as well the 
myriad specific procedural injunctions. Rule following is crucial because the efficacy of 
international treaties relies on the willingness of states to implement their directives. Moreover, 
behavioural support reinforces the legitimacy of legal constraints as repeated compliance 
compounds the sense that the attendant norms and rules have been broadly accepted.\textsuperscript{110} Indeed, 
informal rule following frequently represents a first step to internalization as state actors become 
comfortable with new international norms, even as they may continue to reject the particular 
legal innovation from which these obligations originate. For these reasons, compliance is heavily 
valued as evidence of treaty status.\textsuperscript{111}

\begin{flushright}
\begin{footnotesize}
\textsuperscript{110} As Byers has noted, treaty making is relevant to the development of international norms “partly because of the legitimate expectations which are created – to the effect that States will subsequently behave in a manner which is consistent with those treaties’ provisions.” Byers, \textit{Custom, Power}, 125.
\textsuperscript{111} Simmons, “Treaty Compliance.”
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Yet precisely how compliance correlates to norm strength is a matter of some debate.\textsuperscript{112} The health of legal instruments is assessed largely in relation to “the relative degree of supporting as compared to opposing practice,”\textsuperscript{113} though there is no single formula for determining how much compliance—how much rule following among what percentage of states—is sufficient.\textsuperscript{114} Ratification of a legal instrument is an important indicator in this regard, as it signals the formal political acceptance of legal obligations. However, ratification on its own is insufficient for two reasons. First, states that oppose legal institutions may nonetheless begin to align themselves with the very norms they officially reject. Focusing strictly on adherence would miss this important form of treaty influence; this study, by contrast, dedicates considerable attention to this possibility. Conversely, it is possible that the formal adoption of treaties will not in and of itself result in greater alignment with the relevant norms. For example, important studies in the field of human rights have begun to demonstrate significant gaps between the ratification of legal agreements and actual change in state practice.\textsuperscript{115}

As political change is a gradual process, it is also likely that there will be discrepancies in the rate and extent of behavioural change among relevant actors, not to mention the possibility of backsliding. Compliance exists along a continuum, and treaty rules are rarely if ever observed with perfect regularity. The extensive violation of a norm or legal rule would result in its decline

\textsuperscript{112} As Simmons points out, scholars and practitioners often disagree about the precise object, motivation, and outcome of compliance efforts. Beth A. Simmons, “Compliance with International Agreements,” \textit{Annual Review of Political Science} 1, no. 1 (1998): 78 and 89.

\textsuperscript{113} Byers, \textit{Custom, Power}, 162.


and eventual abandonment.\textsuperscript{116} Short of this point, however, a treaty can sustain some violations without losing its authority\textsuperscript{117}; in determining this threshold, the nature and degree of behavioural challenges are important. There are at least three axes along which non-compliance may vary. First, treaties often contain an implicit internal hierarchy whereby some norms are understood to matter more than others and their violation or adherence is viewed as more consequential. For example, even rare instances of AP mine use might be weighed far more heavily in assessing the health of the Mine Ban Treaty than relatively more frequent cases where State Parties fail to meet deadlines for clearing known minefields. In a similar sense, while possessing an equality in their legal sovereignty, states are nonetheless highly unequal in terms of their social status within the international system.\textsuperscript{118} Consequently, the violation of a norm by a powerful or otherwise “specially affected” state is more destructive than similar behaviour on the part of a small, peripheral state.

Second, the nature of non-compliant behaviour is also of key concern: direct, explicit challenges are more damaging than covert or particularistic ones, since they imperil the status of the norm or rule as settled or “normal.”\textsuperscript{119} Third and finally, it is important to recognize that not all cases of non-compliance—irrespective of their severity—stem from the same motivations. Many states lack the material resources and institutional capacity to meet their international obligations, regardless of the dispositions of state actors. \textit{Ceteris paribus}, more rule following indicates healthier norms and a stronger treaty, but this is not always the case. We should be careful not to automatically conflate compliance and rule influence, therefore, since in some cases non-compliance may be driven by a lack of state capabilities rather than resistance to treaty

\textsuperscript{116} Glennon, “How International Rules Die.”
\textsuperscript{117} Price, “Emerging Customary Norms,” 114.
\textsuperscript{118} Byers, \textit{Custom, Power}, 36-37.
\textsuperscript{119} Price, “Emerging Customary Norms,” 114.
norms themselves. Capacity, however, is not easily separated from questions of political will: an absence of genuine concern for international commitments may impede the development and deployment of sufficient national resources, and incapacity may be used as a convenient excuse to obscure deeper resistance to these obligations.\textsuperscript{120} Determining the causes of (non)compliance is thus complex precisely because adherence to norms and rules is a contingent process beholden to numerous political and material forces, and it is such nuances this dissertation will seek to capture.

\textit{State Discourse and the Status of Treaty Norms}

Behavioural metrics taken in isolation are therefore an incomplete measure of norm strength because they lack any sense of the \textit{motivations} that inspired the behaviour. Integrating an analysis of state practice with attention to the ways in which actors define and justify their behaviours can provide the context necessary for a richer view of treaty influence. Scholars of IR have long held that justifications for state behaviour matter in the development of norms and, similarly, scholars of customary international law have demonstrated that \textit{opinio juris} constitutes a crucial second source of customary legal obligation. At its heart, \textit{opinio juris} is based in an interpretative judgement concerning “those shared understandings which enable States to distinguish between legally relevant and legally irrelevant State practice.”\textsuperscript{121} This closely mirrors the IR conception of norms as intersubjectively constituted meanings, and this project therefore looks to bring the two traditions together for methodological guidance. State discourse provides a valuable repository of evidence concerning the progress and reception of legal norms: “because

\textsuperscript{120} This point is made persuasively in the context of the ICC in a recent Human Rights Watch report. Human Rights Watch, \textit{Making Kampala Count: Advancing the Global Fight against Impunity at the ICC Review Conference} (New York: Human Rights Watch, 2010), 51. \texttt{http://www.hrw.org/reports/2010/05/10/making-kampala-count-0}.

\textsuperscript{121} Byers, \textit{Custom, Power}, 148-149.
norms by definition embody a quality of ‘oughtness’ and shared moral assessment, norms prompt justifications for action and leave an extensive trail of communication among actors that we can study.”

122 These judgements are made indirectly, via the diplomatic statements and policy positions of official state representatives. 123 Key to this assessment are indications that state actors regard certain behaviours to be legal obligations or, for non-party states, that their actions are rooted in an affinity with constituent treaty norms. This suggests that compliance is influenced by the obligatory force of the treaty, rather than “solely non-legal reasons such as habit or convenience.”

Discursive practices offer useful evidence of the influence of treaty norms for two reasons. On the one hand, it seems reasonable to assume that statements made by professional diplomats in formal institutional settings constitute an accurate reflection of state policy. 125 On the other hand, even if such declarations reflect only a cynical or otherwise inaccurate portrayal of state views, they are made in a public forum and as such remain consequential to the development of international legal norms. “Discursive interventions contribute towards establishing a particular structure of meaning-in-use which works as a cognitive roadmap that facilitates the interpretation of norms.”

Rhetorical interactions are thus one prominent way in

122 Finnemore and Sikkink, “International Norm Dynamics,” 892. Yet it is extremely difficult—and perhaps impossible—to accurately account for the genuine psychological dispositions of individual human actors within a corporate structure, so opinio juris is best understood as comprising “statements of belief [about the legality of a given action] rather than actual beliefs.” Roberts, “Traditional and Modern Approaches,” 758.

123 For the purposes of this study, I follow scholars such as D’Amato in focusing on the official statements of government representatives in relevant treaty fora. See D’Amato, Concept of Custom, 89-90 and 160; also Roberts, “Traditional and Modern Approaches,” 757. I address this topic in more detail below.


125 “Facts based on shared understandings about ideas are still facts, and factual conclusions can be reached concerning their existence. Therefore, a review of such primary sources as the texts of international instruments, diplomatic archives, diaries of conference delegates and state policy makers, and personal interviews should yield reasonably clear evidence about the existence of and bases for the norms in question.” Thomas, Ethics of Destruction, 44.

which states re-create their social environment, and even disingenuous statements have the potential to contribute to the (re)production of legal norms and contribute to their solidification as social facts. Thus, while official discourse tells us little about the private views of individual human representatives, it does constitute highly relevant evidence of state beliefs, and provides crucial evidence for norm effects by suggesting whether compliant behaviour is ultimately driven by considerations of obligation to the treaty and its constituent norms.

The clearest indication of treaty influence comes through a convergence of practice and discourse, wherein norm-confirming behaviour is mirrored by statements that make specific reference to the treaty as a source of obligation. However, the discursive positions of actors can provide telling evidence of treaty influence above and beyond the strict reality of their behaviour. Indeed, a key insight from the constructivist literature is that the authority of norms may endure even in the face of some contrary practice. This view has been reinforced in legal decisions by the International Court of Justice among others, and is central to the contemporary view of the development of customary international law. Discursive change can thus provide important evidence of a “hardening” of the validity of a norm even in the absence of parallel changes in state practice.

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127 Byers, Custom, Power, 19.
128 In the Nicaragua Case, for example, the International Court of Justice found that “absolutely rigorous conformity with the rule” was not necessary to demonstrate a customary legal rule against foreign intervention: “In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.” International Court of Justice, “Case Concerning Military and Paramilitary Activities in and Against Nicaragua,” Nicaragua v. United States of America, Judgement (Merits) (June 27, 1986), 98 at paragraph 186. http://www.icijorg.docket/index.php?p1=3&p2=3&k=66&case=70&code=nus&p3=4. In a similar vein, “American and British courts among others have ruled that customary law [prohibiting torture] exists primarily due to opinio juris even in the face of state practice which widely violates the norm.” Price, “Emerging Customary Norms,” 113.
Indeed, violations offer uniquely productive moments in which to clarify the content of a treaty norm and “define and discipline a particular practice as an aberration.” Central to this process is the interpretive context of behavioural acts, since different rhetorical strategies have the potential to impact the status of norms in varying ways. States, whether formal parties or not, may seek to conceal violations, suggesting that the norm or rule in question has risen to such a level that non-compliance implies an unpalatable political cost. Denials—in effect de facto rhetorical support for a norm—are thus of crucial importance in assessing the status of a new legal institution, even when detached from actual practice. Hypocrisy can thus be politically significant and legally productive: the fact that actors must conceal their behaviour, rather than openly declaring their non-compliance, provides strong evidence that a treaty has gained a degree of acceptance such that behaviour that challenges the norm or rule is no longer considered appropriate, even if it continues to occur in the shadows. The customary prohibition of torture is instructive here: while such abuse undoubtedly occurs with some frequency, state agents typically do not openly declare their activities, and indeed go to great lengths to conceal them. Thus a treaty—and its underlying norms—has gained a measure of influence if actors no longer seek to justify or defend their non-compliance as unproblematic.

Alternatively, actors may seek to qualify their violations as the product of “special” conditions that do not challenge the general authority of the treaty. Non-parties may similarly

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130 For this reason, covert non-compliance does not directly threaten the status of legal norms or their broader institutions, but rather “constitute[s] legally relevant State practice in support of a rule prohibiting the actions in question.” Anthony A. D’Amato, “Custom and Treaty: A Reply to Professor Weisburd,” Vanderbilt Journal of Transnational Law, 21, no. 3 (1988): 469. See also Byers, Custom, Power, 149.
131 The debate concerning so-called “enhanced interrogation techniques” employed during the administration of George W. Bush would seem to challenge the robustness of the anti-torture norm both in terms of the practices employed, and the semantic games deployed by senior administration officials. Nevertheless, it remains interesting that U.S. leaders were unwilling to openly declare “torture” to be permissible, and indeed went to great lengths to reframe their activities as constituting a different, and less problematic, form of behaviour. On this subject, see Ryder McKeown, “Norm Regress: US Revisionism and the Slow Death of the Torture Norm,” International Relations 23, no. 1 (2009): 5-25; and Brunnee and Toope, Legitimacy and Legality in International Law, 220-270.
accept the general principles enshrined in an agreement while resisting its specific legal restrictions, often because the aforementioned treaty is deemed unsuitable in present circumstances; this may occur even in instances where no clear violations have taken place.

Making these kinds of particularist claims can reinforce the perceived legitimacy of the treaty—even if only for other states—and the view that contrary actions are normally unacceptable.132 The invocation of exceptional politics, while not ideal from the perspective of treaty proponents, does not necessarily wholly undermine the constitutive effects of norms since such claims are ultimately predicated on an acceptance of the normal legitimacy of the legal claims.

On the other hand, states may simply reject the authority of the legal instrument and, in so doing, assert that their violations are uncontroversial. Alternatively, actors may challenge the treaty without explicitly violating its protocols, particularly by questioning the legitimate authority of the legal institution or disputing its application to a given situation.133 These forms of direct challenge are the most threatening, as they imperil the prospects that the emergent norm could gain widespread adherence. In both circumstances, attention to the content of official rhetoric can tell us much about the present status of the treaty. Here we are especially concerned with evidence of the subject of contestation and, by extension, the status of perceived obligations arising from the treaty. A central concern is thus whether “challenges or rejections of the norm [are] directed at the central validity claim of the norm per se, or are they directed at the definitional margins?”134

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132 Again, the ruling in the Nicaragua case is instructive, as the Court found that “[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule. International Court of Justice, “Nicaragua Case,” 98, at paragraph 186.
133 Cortell and Davis Jr., “Understanding the Domestic Impact of International Norms,” 69.
Contestation also implicates the agency of other actors in the process of supporting or challenging legal norms.

Precisely because state behavior within regimes is interpreted by other [actors], the rationales and justifications for behavior which are proffered, together with pleas for understanding or admissions of guilt, as well as the responsiveness to such reasoning on the part of other states, all are absolutely critical component parts of any explanation involving the efficacy of norms. Indeed, such communicative dynamics may tell us far more about how robust a regime is than overt behavior alone.\footnote{Kratochwil and Ruggie, “International Organization,” 768.}

States and civil society representatives have a range of options in how they interpret and engage instances of contestation, and may highlight transgressions and engage in public condemnation or choose to downplay the violations or disputes and pursue non-confrontational, cooperative solutions.\footnote{Price, “Detecting Ideas,” 262.} This raises the important question of what strategies—publicizing violations versus looking the other way, punishment versus engagement—are best able to promote robust norms, and what reactions constitute evidence for norm weakness or strength.\footnote{Over time, normative standards may continue to evolve and generate pressures for further regulation or the reinterpretation of existing rules. This approach therefore acknowledges the structural power of treaties, while at the same time highlighting the fact that “actors contribute—through practices—to the (re)construction of that normative structure while they are guided by it, nonetheless.” Wiener, “Contested Compliance,” 195.} In principle, then, it is possible for a treaty to achieve broad influence even in the face of resistance from some states, though this is made more difficult if the states in question are widely understood to be politically significant actors in the international system. In particular, so-called “specially affected states” and “persistent objectors” would seem to be especially important to qualifying any assessment of the global effectiveness of a multilateral treaty.\footnote{Price, “Emerging Customary Norms,” 115. For a more detailed discussion, please see Byers, Custom, Power, 142-146, 149 and 180-183.} These categories are considered in the empirical chapters to follow.

Behavioural and discursive indicators should properly be seen as interactive sources of evidence of treaty impact, in that each complements, qualifies, and contextualizes the other.
Without this more holistic approach, we are bound to miss important ways in which legal institutions influence the content and conduct of international affairs. At one level, the integration of rhetorical frames is vital if we are to fully appreciate the influence legal institutions may have on actors in the international system. Attention to regulative outcomes (such as formal treaty membership or compliance with specific rules) in isolation, while revealing valuable empirical patterns, is unable to account for the underlying reasons for observed actor change and thus necessarily provides only a partial view of treaty impact. In many instances, statistical studies will reveal little causal impact from formal institutions, particularly because treaty-driven behavioural change may be difficult to disentangle from the numerous factors bearing on policy formation and because—as with relatively new treaties like the MBT and ICC—some observable effects may only reveal themselves over long periods of time. This integrated approach to assessing treaty influence also helps to address the contingency inherent in the development of international norms and laws. Norms are deeply influenced by social and political forces, and therefore do not advance along a unidirectional trajectory but instead reside in an ongoing cycle of development, challenge, and reformulation.139 The obligations that accrue in the international system may defy the purposive efforts of individual states. This latter insight is problematic for positivist treatments of IR and international law that emphasize “an individualistic and voluntaristic ontological conception of the international system.”140 Evidence of these processes is thus important both in assessing the relative influence of the treaties in question, but also as a means of accounting for the changes as norm-driven and not the result of other exogenous forces (distribution of power, material incentives, domestic

political constraints, etc.). This dissertation therefore seeks to integrate the two forms of treaty impact, in order to improve our conceptual tools and resulting empirical assessments.

**Research Design**

In Chapters 3-7, I evaluate the impact of the Mine Ban Treaty and Rome Statute of the ICC on the basis of the analytic framework developed above. Following my conception of norms and laws as both regulative and constitutive, the data should address two distinct but related issues: (a) the empirical extent of *behavioural change* since treaty creation; and (b) the *perceived status* of the treaty norms among relevant actors. This research design—and especially the latter emphasis on logics of (non)compliance—therefore also seeks to account for the question of *why* states are or are not adhering to the obligations of the MBT and ICC, and to relate the empirical findings to theorized roles that norms play in shaping international political life.

As both treaties together contain an extensive set of commitments, the immense data requirements implied by this project mean that it is impossible in a single dissertation to provide a detailed analysis of the processes of norm internalization for every relevant actor in the international system. To overcome this challenge I develop a new dataset of compliance with core obligations for each treaty case covering both formal parties and non-parties. Since the MBT and ICC require significant alterations in behaviour, we can compare actual progress against the “optimum institutional consequence”\(^{141}\) defined by the legal expression of these norms in specific rules found in the respective treaty texts. The purpose of this effort is two-fold: first, to highlight general patterns of norm-health; and second, to identify especially intriguing instances of compliance or non-compliance to target for closer scrutiny. In this analysis, states

are treated as discrete units in the study – it is the state, not individual policymakers, which consents to be bound by a treaty and implement its rules.

Evidence of global treaty status is drawn from established secondary sources including civil society monitoring efforts, news reports, treaty bodies and academic observers. In the case of the MBT, this process is replicated for multiple years since the creation of the treaty so as to capture the trajectory of global compliance over the past fifteen years. Due to the lack of an annual reporting mechanism for the ICC, a time series assessment is not undertaken here. Standardized measures for each treaty regime allow a direct comparison between states as well as within each state-case, considering the relative degree of conformity with different treaty obligations, at different points in time. The similar approach employed for each treaty also allows some assessment of the relative success of the MBT and ICC side-by-side, though the differing purpose and functions of each treaty limit the extent of their direct comparison. Greater detail concerning the type and content of the specific indicators, coding rules, and related issues can be found in the Appendix to this dissertation.

To get at the intersubjective context of international legal impact, this study devotes considerable attention to the discursive practices of states. The extent to which states have endorsed (or not) relevant legal norms should be reflected in their formal discourse, particularly in the form of official statements at treaty meetings. This reflects a theoretical commitment to understanding institutional fora as focal points for discursive agency and normative influence.¹⁴² Importantly, though non-parties are not officially subject to these fora, they may still feel the reach of such diplomatic mechanisms. Non-parties frequently attend meetings as observers and are the subject of intensive lobbying campaigns by civil society actors and other states. In these ways, the same legal-normative discourses apply to states outside of the formal remit of a treaty.

¹⁴² Risse, “‘Let’s Argue!’”; Johnston, “Treating International Institutions.”
Where relevant, official statements are supplemented by additional sources such as in-person interviews, speeches and policy statements. In all cases, I seek evidence of contestation of or sensitivity to normative claims, or to a more general sense of the treaties as reflecting “appropriate” or “legitimate” practice, or otherwise reflecting an established obligation (or not). A systematic assessment of official discourse offers a wealth of information concerning the evolving political climate and state responses to it. The timing of political decisions can be compared with agent discourse and referenced against interventions by outside actors (criticism from NGOs, appeals from treaty bodies, etc.) as a way of further clarifying treaty influence.

**Conclusion**

This dissertation seeks to provide as complete an assessment as possible of the impact of two non-great power treaty initiatives. While valuable in its own respect, such an endeavour can also contribute to the broader question of whether the strategic choice encapsulated in the “new diplomacy” provides a useful model to be replicated in other issue areas. As Wendt suggests, “[r]ather than explaining why we have chosen the road we have taken, which is only indirectly relevant to where we should go from here, the effectiveness problematique can tell us why some choices worked and some did not, which could directly affect the next ones we make.”

143 A properly constituted study must therefore attend to the context in which state actions occur, and posit counterfactuals so as to better understand the role that the respective treaties—and their constituent norms—may have played in observed outcomes. That is, whatever the empirical results of this study, the answer to the question of how successful such strategies can be ultimately must put it in the broader context of: compared to what? The present study returns to this challenge in the concluding chapter, and seeks to draw some insights from the detailed study

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143 Wendt, “Driving With the Rearview Mirror,” 1044.
of two treaties that may illuminate possibilities and potential pitfalls for other efforts at non-great power treaty making efforts in the future. To render such judgements, however, first requires a systematic analysis of the impact of the Mine Ban Treaty and Rome Statute of the International Criminal Court, which is undertaken in the next five chapters.
CHAPTER THREE:
STATE BEHAVIOUR AND THE ANTIPERSONNEL MINE BAN TREATY

The previous chapter suggested that adherence to the norms and rules of legal agreements represent a baseline for assessing treaty impact. This, in turn, requires attention to both the patterns of state behaviour and the attendant processes of reasoning and justification whereby state actors endorse or contest these purported obligations. This chapter begins this analysis with respect to the first of two core case studies in this dissertation, the Mine Ban Treaty, focusing here on measures of treaty compliance. Chapter 4 then deepens and contextualizes this initial analysis, drawing attention to the discursive positions of state actors. When taken together, these dual features provide a detailed means of assessing the breadth and depth of acceptance of the Mine Ban Treaty and associated norm across the international system.

Measuring State Compliance: Development of an Original Dataset

In order to systematically account for behavioural practice across the international system and over time, I developed a new dataset evaluating 195 states between 1997 and 2009. To do so, I analyzed the yearly Country Reports from the International Campaign to Ban Landmine’s flagship Landmine Monitor, and coded each state with an ordinal measure reflecting non-, partial, and full compliance with the core MBT norms. In particular, I emphasize the primary negative obligations concerning a ban on the use, production, transfer, and stockpiling of

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1 The dataset is principally based on the 193 member states of the United Nations but also includes a few entities—such as Niue and the Holy See—that are not UN members, but that have had substantial interaction with the MBT. The dataset thus records 193 states in 1999, and 195 in 2009; this reflects political changes including the dissolution of the former Yugoslavia. Given the end point of this study, the dataset does not systematically include the newly-created state of South Sudan, except with respect to its membership in the MBT regime.
antipersonnel mines—what the ICBL refers to as the “ban policy side” of the campaign\(^2\)—as well as the positive obligation to clear all known mined areas under a state’s control. Finally, in order to more fully capture the specifically political dynamics of treaty compliance, this chapter briefly considers the record of national transparency reporting and the incorporation of the Mine Ban Treaty into domestic law. For reasons of parsimony and clarity, additional features of the treaty, especially those relating to victim assistance and international support for mine-affected states, are not addressed here.

In order to capture change over time, this procedure was replicated for three temporal periods: 1997-1999 (from conclusion of the treaty to the first Meeting of the States Parties), 2000-2004, (up to the first Review Conference), and 2005-2009 (up to the second Review Conference). This offers insight into aggregate patterns of norm consolidation and the trajectory of global compliance, while at the same time retaining the flexibility to engage in fine-grained assessment of particular states and treaty injunctions. A state could only have one score for any given indicator in each of the temporal periods. Confirmed or suspected violations were only coded once per time period, regardless of number of discrete incidents, with the lowest possible score for each indicator utilized. Thus, any instance of violation during a given temporal period would result in a score of 0 for that indicator; this produces a deliberately conservative measure of norm adherence since any non-conformance would cancel-out other (potentially substantial) patterns of compliance. In some instances where yearly accounting is relevant—in charting the expansion of MBT membership and the annual trend-line of state use of AP mines—the dataset is supplemented by reference to the Executive Summary of the *Landmine Monitor*. In these two

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cases I have also extended the analysis to include data from 2010 and 2011. A detailed
description of indicators and coding rules can be found in the Appendix to this dissertation.

**Membership**

The vitality of a legal institution is partially judged in relation to its formal community of
members. In this regard the Mine Ban Treaty fares quite favourably. The MBT was initially
signed by 122 states on December 3-4, 1997; by mid-1999, 74 states had ratified the treaty. The
MBT became fully operational on March 1, 1999 in what is “believed to be the fastest entry into
force of any major treaty ever.”\(^3\) A further 61 states were signatories during the same period.
This too is significant; while the act of signature does not constitute full acceptance of treaty
obligations, common practice in international law dictates that signatories are “obliged to refrain
from acts which would defeat the object and purpose of a treaty.”\(^4\) In this sense, signatories can
be held to have signalled their endorsement of the spirit and principles of the agreement.

Since 1999, ratifications have continued to mount, with 1999-2001 witnessing a
particularly sharp increase as a number of states—many of whom were early supporters of the
treaty—completed their domestic ratification processes. As of July 2012, there are 160 State
Parties to the MBT and 36 non-parties (including two signatories) (Figure 1).\(^5\) The extent and
pace of ratifications and accessions bodes well for the MBT, since widespread and diverse
membership is vital to the health of legal norms. “The large number of States Parties to this

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http://www.the-monitor.org/index.php. The threshold of 40 ratifications needed to trigger entry-into-force of the
agreement was reached with Burkina Faso’s deposit of its instrument of ratification on September 16, 1998.


http://www.icbl.org/index.php/icbl/Universal/MBT/States-Parties and
http://www.icbl.org/index.php/icbl/Universal/MBT/States-Not-Party. This figure includes the new state of South
Sudan.
demanding treaty has strongly countered conventional wisdom that suggests the more stringent a legal instrument, the more difficult it is to attract adherents.”\textsuperscript{6}

\textbf{Figure 1: MBT Membership, 1999-2012}

The influence of legal norms may be especially felt in instances where compliance is complicated by factors that raise the stakes for ratification or accession. A common critique of international treaties is that, as consensual agreements, they merely reflect policy outcomes that states would willingly accept already; that is, they do not independently generate significant behavioural change.\textsuperscript{7} Yet as noted in Chapter 2, constructivist IR scholarship has convincingly


\textsuperscript{7} Downs, Rocke and Baroom, “Good News About Compliance;” von Stein, “Do Treaties Constrain or Screen?”
demonstrated that norms may possess a much wider scope of influence than often appreciated by sceptical approaches. Interestingly, some 24 states—including Colombia, Liberia, the Philippines and Uganda—joined the MBT in the midst of violent conflict.8 A change in political conditions can also stimulate new interest in binding legal obligations. To that end, a further 13 states joined the treaty shortly after the end of armed hostilities and/or a significant transition of government.9 The newly created state of South Sudan, for its part, acceded to the MBT as one of its first acts as an independent political entity, while border disputes with its northern neighbour continue to generate instability.10 It is worth reflecting on these developments, since realist and rationalist perspectives would expect such states to avoid obligations that require they abandon a potentially useful weapon, or in instances where states lack the capacity to make the necessary legal, political, and military adaptations.

Instead, one significant effect of the Mine Ban Treaty has been to serve as a symbolic demonstration of responsible statehood. The perceived legitimacy of the mine ban norm appears to have been instrumental in a number of cases in shifting the political conditions in favour of formal membership. In referring to his country’s accession, the Turkish delegate noted that

[t]his was a bold decision. Turkey is situated in an extremely volatile region, with many of its neighbours outside the Convention. Moreover, Turkey was engaged in a struggle against terrorism. Nevertheless, sharing the vision and goals of the Convention Turkey took the leap for a better world…. Turkey remains committed to its obligations stemming from the Convention and continues to exert every effort to fulfil them.11

8 The following states ratified or acceded to the Mine Ban Treaty during internal armed conflicts, or while their armed forces were engaged in foreign military campaigns: Afghanistan, Algeria, Burundi, Central African Republic, Chad, Colombia, Cote d’Ivoire, Democratic Republic of Congo, Haiti, Iraq, Liberia, Namibia, Nigeria, the Philippines, Rwanda, Senegal, Solomon Islands, Somalia, South Sudan, Sudan, Turkey, Uganda, Ukraine, and Zimbabwe.
9 Angola, Cambodia, Eritrea, Ethiopia, Guinea-Bissau, Indonesia, Mexico, Niger, Peru, Serbia and Montenegro, Sierra Leone, Tajikistan and Timor-Leste.
Thus norms can generate pressures to adopt binding legal restraints even in instances where to do so bears directly on a state’s freedom of action in highly consequential aspects of national policy. Again, such processes are suggestive of a rapidly strengthening international standard of appropriate behaviour, as discussed in greater detail in the subsequent chapter.

On the other hand, the continued resistance of many states presents a substantial challenge to the consolidation of the mine ban norm. Prominent global actors like the China, Russia and the United States have yet to join the treaty, as have other important regional actors including Egypt, India, Iran, Israel, Pakistan, and South Korea. Moreover, many of the remaining non-members are significant past and present users of AP mines, and possess the largest stockpiles of the weapons. In terms of their geopolitical influence, then, these states would seem to be highly significant to the realization of an effective international treaty, especially when that agreement directly implicates the security functions of the state. The impressive number of State Parties is thus moderated somewhat by the fact that only four new members have joined since 2007.\textsuperscript{12} Within the MBT community, a view exists that the pool of likely members has been nearly exhausted, and the many non-parties are simply unprepared to endorse the treaty in the foreseeable future.\textsuperscript{13} For this reason, universalization has decreased in priority as a topic for lobbying and political engagement by the ICBL and other state and civil society actors.\textsuperscript{14} At the same time, the theoretical account advanced in this dissertation suggests that the normative dynamics of treaties may still have informal effects on resistant states, as I describe below.

\textsuperscript{12} Tuvalu, South Sudan, Finland and Somalia.
\textsuperscript{13} Kerry Brinkert (Director of the Implementation Support Unit of the Antipersonnel Mine Ban Treaty), interview with the author, Geneva, October 30, 2009 and December 8, 2010. Additional analysis is provided by the Universalization Contact Group. Documents on file with the author. I return to this important subject when analyzing non-party discourse in the proceeding chapter.
\textsuperscript{14} A more limited sub-set of non-parties—including the Marshall Islands, Mongolia, Nepal, Poland, and the United States—have been identified by the ICBL as the most likely targets for accession during the near- to medium-term. Katarzyna Derlicka (Advocacy and Campaigning Officer, International Campaign to Ban Landmines), interview with the author, Geneva, December 7 2010.
Additional actions also provide important signals concerning the extension of the mine ban norm. By one reading, states that have registered their formal disapproval of the Mine Ban Treaty in various international fora should be considered “persistent objectors,” and thus exempted from any broader international norm arising from the treaty. The most relevant external forum for assessing any such sentiment is the annual United Nations General Assembly resolution on the Mine Ban Treaty, since these resolutions explicitly promote universal membership.\(^{15}\) Refusing to join the resolution may thus reasonably be interpreted as a form of sustained and public resistance to the treaty. It is therefore arguably significant that Cuba, Egypt, India, Iran, Israel, Pakistan, Republic of Korea, Russia, Syria, and the United States (among others) have consistently abstained from this annual resolution.

Yet there are two significant rebuttals to this that weigh heavily in the present assessment of membership status. First, prominent non-parties do not in fact represent the only relevant constituency in judging the health of the mine ban norm. As Byers has noted, states that are “specially-affected” by a given legal innovation are generally understood to possess special importance in informing its development. Yet this determination need not strictly correspond to measures of material power, but would include all those states most directly impacted by the rule-making process.\(^{16}\) This measure of specially-affected status would include not just those states that retain large arsenals or may wish to use AP mines, but also those states that are implicated in the humanitarian purpose of the mine ban norm. In this latter respect, the MBT

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\(^{16}\) Byers, *[Custom, Power]*, 38.
does substantially capture the relevant community: all of the 12 most mine-affected states are now treaty members, and most joined early on. This group also accounts for approximately half of all mines emplaced globally at the time of the treaty’s founding.\footnote{Afghanistan, Angola, Bosnia-Herzegovina, Cambodia, Croatia, Eritrea, Iraq (Kurdistan), Mozambique, Namibia, Nicaragua, Sudan, and Somalia. Somalia acceded to the MBT in April 2012. Of the 72 mine-affected states globally, 45 are parties to the Mine Ban Treaty. See Department of State, United States of America, Bureau of Political-Military Affairs, Office of Humanitarian Demining Programs, \textit{Hidden Killers: The Global Landmine Crisis} (Washington, D.C., September 1998). \url{http://www.state.gov/www/global/arms/rpt_9809_demine_toc.html}.}

Moreover, the extent of opposition from powerful MBT opponents may not be as uniform as their formal membership status suggests. Indeed, this dissertation seeks to demonstrate that international treaties may often stimulate changes in accordance with norms in the absence of official adherence to a legal agreement via ratification or accession. In this vein, many prominent non-parties recognize the desirability of the ban at some future point, as discussed in the next chapter. Non-parties are also frequent observers at official MBT meetings, and participate in sessions by making statements and engaging in discussions with other states. In this light, it seems highly relevant that a number of non-parties have voted in favour of the annual UNGA resolution. Georgia, Finland, Sri Lanka have all done so every year since 1997, while China has followed suit since 2005; other states have similarly endorsed the MBT via the UNGA vote.\footnote{Azerbaijan, Kazakhstan, Laos PDR, Marshall Islands, and Morocco, among others.} Finland has recently joined the treaty, offering an important example of how such rhetorical support can be a meaningful presage to formal adoption at a later date.

Just as significantly, no states have voted against the resolution, but have rather uniformly chosen to abstain from the vote entirely.\footnote{The only state to have recorded a “no” vote was Lebanon in 1999; after the vote, Lebanon informed the Chair that it had intended to abstain.} Such acts would seem to fall below the threshold of persistent and transparent resistance as commonly understood as necessary in order
to undermine an emerging customary rule in international law.\textsuperscript{20} In this sense, UNGA voting patterns may offer limited, contingent evidence of a potentially widening scope of obligation incorporating non-party states.\textsuperscript{21} This view accounts for the considerable emphasis that the ICBL has placed on the UNGA resolution as a demonstration of international support for the aims of the mine ban norm.\textsuperscript{22} Nevertheless, it would be wise not to read too much into such votes in isolation, as the relative cost of such demonstrations is low since the UNGA resolutions impose no specific legal obligations; in this respect, their contribution to the extension of the mine ban norm is limited.\textsuperscript{23}

However, when combined with other behavioural indicators, the unwillingness of non-parties to take more decisive action against the MBT takes on greater import as a sign that the central validity claims of the mine ban norm have a wider appeal than ratifications alone would suggest. Indeed, as will be demonstrated below, state practice even among non-parties has been largely in conformance with core treaty rules. The common understanding under international law “implies that the standard of ‘specially affected’ states requires that practice among those states be ‘extensive’ and ‘virtually uniform’” in order to impact the development of a customary legal principle or norm.”\textsuperscript{24} This is one useful metric to help assess norm robustness, and adherence to MBT obligations among the most mine-affected states clearly meets this standard,


\textsuperscript{21} As Byers points out “many non-industrialised States and a significant number of writers have asserted that resolutions and declarations are important forms of State practice which are potentially creative, or at least indicative, of rules of customary international law.” Byers, \textit{Custom, Power}, 135. A similar process may be at work in respect of treaties as well. However, Byers also acknowledges that the legal value of UNGA and other resolutions has been rejected by a number of powerful states. See Byers, \textit{Custom, Power}, 41-2, 58-60 and 135.

\textsuperscript{22} Indeed, the ICBL frequently lobbies non-parties to vote in favour of the resolution, and suggests that this is a key way that such states may demonstrate progress towards accession. Derlicka, interview 2010.

\textsuperscript{23} Byers, \textit{Custom, Power}, 157. This view was reflected in some interviews conducted for this dissertation. For example, one such opinion held that the annual UNGA vote constituted only a marginal part of state policy, and was thus not necessarily a valuable indicator of commitment to MBT norms. Brinkert, interview 2010.

\textsuperscript{24} Price, “Emerging Customary Norms,” 121.
while contrary behaviour among prominent non-parties—though an obvious impediment to the consolidation of the mine ban norm—is more varied and ambiguous, potentially limiting the degrading effects of their resistance.

While not captured systematically in this analysis, the role of non-state armed groups must be briefly considered in the context of a potentially widening norm prohibiting antipersonnel mines. According to *Landmine Monitor 2009*:

A significant number of NSAGs have indicated their willingness to observe a ban on antipersonnel mines. This has taken place through unilateral statements, bilateral agreements, signature to the Deed of Commitment administered by Geneva Call, and most recently through the “Rebel Group Declaration of Adherence to International Humanitarian Law on Landmines” developed by the Philippines Campaign to Ban Landmines.\(^{25}\)

Any figure is difficult to determine with precision, as “NSAGs may split into factions with different policies, go out of existence, or merge with a state.”\(^{26}\) However, the NGO Geneva Call has registered 42 NSAGs as signatories to its *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*.\(^{27}\) Non-state actor endorsement of the mine ban norm is significant for two reasons. First, since NSAGs are frequent participants in contemporary armed conflicts, their inclusion in restraints on the use of force is beneficial both for increasing the congruence of law with real world practice (capturing more of the behaviour the MBT seeks to prohibit) and widening the community that is subject to international humanitarian law.\(^{28}\)

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\(^{27}\) Please see [http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm](http://www.genevacall.org/resources/list-of-signatories/list-of-signatories.htm), Geneva Call, *Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action*. [http://www.genevacall.org/Themes/Landmines/landmines.htm](http://www.genevacall.org/Themes/Landmines/landmines.htm).

\(^{28}\) For example, under the Deed of Commitment, signatory non-state actors agree “[to treat] this commitment as one step or part of a broader commitment in principle to the ideal of humanitarian norms, particularly of international humanitarian law and human rights, and to contribute to their respect in field practice as well as to the further development of humanitarian norms for armed conflicts.” Geneva Call, *Deed of Commitment*, Article 5.
Second, this socialization can push state actors to endorse MBT commitments, by generating pressures to emulate the achievements of their non-state adversaries, signalling that the conditions of the conflict have changed and inviting reciprocity, or through the direct integration of former rebel actors into the political and military structures of the state. For example, the decision by the Sudan People’s Liberation Movement/Army (SPLM/A) to sign the Deed of Commitment, and the subsequent conclusion of the Nuba Mountains Ceasefire agreement between the Government of Sudan and the SPLM/A in January 2002, paved the way for Sudan’s ratification of the MBT as well as South Sudan’s recent accession.29 Thus international norms created by treaties can reach even those actors that cannot access the legal institutions directly, and in so doing, can generate pressures for states to conform to new international behaviours. In these respects, non-state armed groups have the potential to play a significant, if presently underappreciated, role in the diffusion of global norms. For these reasons, some states—most notably Colombia—sought to explicitly include non-state armed groups within the legal scope of the MBT during the treaty’s drafting.30 However, this effort was resisted by other states, and was ultimately dropped in order to facilitate negotiations.31 As a result, “[t]he [treaty] obligations are addressed to States Parties, and do not seek to bind entities other than States directly.”32 To the extent that non-state actors are regulated within the remit of

30 See Maslen, Commentaries, 55 and 67 regarding the Colombian effort to have the preamble of the MBT expressly refer to NSAGs. The final preambular paragraph to MBT refers to the “parties to an armed conflict”, though Maslen argues that the claim that this renders the MBT implicitly applicable to NSAGs is “not persuasive”. See Maslen, Commentaries, 67 and n. 74.
31 Maslen, Commentaries, 78.
32 Maslen, Commentaries, 77.
the MBT, it falls on states—as the legal members of the treaty—to enforce compliance. For this reason, states remain the primary units of analysis in this study.

**Empirical Evidence of Treaty Influence: Compliance with the Mine Ban Treaty**

While membership in the MBT community is an important demonstration of state commitment to the mine ban norm, a holistic test of treaty influence also requires an assessment of adherence to its obligations. This section briefly summarizes an aggregate view of MBT compliance across the international system. I then turn to a detailed consideration of the key treaty indicators in turn. For each state—both parties and non-parties—an aggregate “compliance score” was generated by combining the scores for seven discrete indicators concerning the use, production, transfer and stockpiling of AP mines, as well as the clearance of mined areas and measures of national transparency and legislative implementation. As discussed in greater detail in the Appendix, each indicator was scored either as 0 (indicating non-compliance), 0.5 (indicating partial compliance or a suspected violation), or 1 (full compliance). The indicators were weighted equally, and the sum compliance score gives a snapshot of relative adherence on a state-by-state basis across the international system.

This aggregate global overview evidences reasonably high levels of compliance with core MBT injunctions; moreover, there have been positive increases across virtually all individual indicators over the three temporal periods. State Parties to the Mine Ban Treaty have an average compliance score of 5.73 out of a possible 7 points in the 2005-2009 dataset; this equates to a compliance rate of nearly 82%. Among treaty members we can see a 0.78-point increase since the first (1997-1999) assessment, which shows that State Parties have been progressively implementing the MBT, albeit slowly. Unsurprisingly, the rate of compliance among non-parties
is considerably lower, with an average of 3.56 (50.86%) in 1997-1999 declining to 3.41 (48.71%) for 2005-2009. This reflects the fact that many states with comparatively higher rates of compliance had not completed their ratification procedures by mid-1999; their subsequent change of membership status left behind a sub-set of 39 states that did not join the MBT between 1997 and 2009 and in which non-compliance is more pronounced. Within this group of persistent non-member states there has been only minimal increase in compliance, from 3.03 at the outset to the 3.41 score cited above. However, on the most significant metrics of mine use, production and transfer, non-parties averaged a score of 2.43 out of 3 (81%) in the 2005-2009 period. This suggests that even those states remaining outside of the treaty are nonetheless adhering to many of its core injunctions, as explored in detail below.

When taken together, these measures produce a combined global average of 5.26 points for all states, or a just over 74% compliance rate for the 2005-2009 period; these values too have steadily increased since the advent of the treaty. Table 1 summarizes the primary trends: “n” represents the number of states in the given category and temporal period, while “#” reflects the absolute point total, and “%” translates this into percentage form (based on a 7-point scale).

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33 This measure is skewed by the fact that some treaty obligations like the completion of national implementing legislation are unachievable for non-parties; moreover, non-parties have been judged to be non-compliant (coded as 0) with stockpile destruction and mine clearance obligations unless they have formally announced their completion to the contrary. In these respects the dataset may systematically under-estimate the degree of partial compliance among non-parties on these measures.
Table 1: Overview of MBT Compliance

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<td>48.29</td>
<td>38</td>
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A more fine-grained analysis reveals a particular pattern to compliance. To briefly preview this assessment, while the core injunctions of the treaty receive widespread adherence—even among non-parties—the more particularly political features of national legislation and transparency reporting lag significantly behind. This is suggestive of the difficulties, noted by various authors, in translating behavioural injunctions into domestic legal and bureaucratic practice.

Use of Antipersonnel Landmines

The absolute ban on the use of AP landmines sits at the very heart of the normative order created by the MBT, and it is here that the effects of a robust prohibition should be most meaningfully observed. As Price has previously noted, antipersonnel mines have been regarded for much of their history as uncontroversial weapons, to be employed—within the normal bounds of international humanitarian law—as would other “conventional” munitions like artillery shells, rockets, and personal infantry weapons. While detailed figures are generally not available, the United States Department of State and the International Campaign to Ban Landmines have estimated that between two-and-a-half and four million antipersonnel mines

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34 Somalia is excluded from the dataset, as available information was insufficient to conduct an accurate assessment; the same goes for the newly created state of South Sudan. Please note that all categories reflect the membership status of states during that temporal period. For example, Finland and Tuvalu are treated here as non-party states, reflecting their membership status up to 2009.

35 Price, “Reversing the Gun Sights” and “Emerging Customary Norms.”
were emplaced annually in the 1970s, 1980s, and 1990s; as of 1998, over 70 countries were infested with a total of 60-70 million mines.\textsuperscript{36} Thus for the Mine Ban Treaty to be considered effective, it must substantially overturn the prior norm by which the use of antipersonnel mines was a widespread and legitimate feature of warfare.\textsuperscript{37}

In this regard, the pattern of state use of AP mines over the past fifteen years seems strongly indicative of the strengthening influence of the Mine Ban Treaty and associated norm. Since 1999 the \textit{new} deployment of landmines has declined dramatically across the international system. 17 state actors were confirmed to have used AP mines between 1997 and 1999; this figure has fallen precipitously in the years since (Figure 2). Since 2007, only two states—Myanmar and the Russian Federation—have regularly deployed landmines as part of their military operations. Russia is believed to have refrained from new mine use between 2009 and 2011, leaving Myanmar as the sole persistent state user of AP landmines.\textsuperscript{38} However, since the completion of this dataset, four additional states appear to have used AP mines. Credible allegations have emerged that the Turkish Armed Forces engaged in a limited deployment of antipersonnel landmines in at least two instances in 2009.\textsuperscript{39} Violations by a State Party would be especially damaging since it would provide specific challenge to the absolute nature of the mine

ban norm from within the legal community of treaty members. More recently, three additional non-party states—Israel, Libya (under Muammar Gaddafi), and Syria—along with Myanmar are reported to have used antipersonnel landmines during 2011. These developments cut against the broader pattern of substantially declining reliance on the weapons.

Figure 2: AP Mine Use, 1999-2011

Despite the recent partial reversal, the overall pattern clearly reveals substantially reduced use of antipersonnel mines since the advent of the Mine Ban Treaty. This trend line is significant in part because it is not matched by a parallel decline in the frequency of violent conflict in the international system. While the total number of armed conflicts has ebbed globally, organized

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41 This chart is derived from the annual Executive Summaries of the Landmine Monitor reports. The dashed line represents developments after the conclusion of dataset reporting in mid-2009.
violence remains common. Moreover, intra-state conflicts—precisely those in which inexpensive and uncomplicated weapons predominate—continue in significant numbers. Yet the use of AP mines is now exceedingly rare. Indeed, when evaluating the MBT dataset in terms of state-conflict episodes, restraint is the overwhelming outcome. Of the 297 instances of state actors involved in internal or external armed conflict in the three dataset periods, 250 (84%) resulted in the non-use of antipersonnel mines. Were it not for the effective stigmatization of the weapon, we would expect AP mines to feature in a greater number of these conflicts, many of which had featured past use of the weapons. Even leaving aside genuine questions concerning their utility (especially for the modern mechanized warfare of advanced industrial armed forces), the sheer abundance and availability of antipersonnel mines suggests that something

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42 There were 52 active “state-based armed conflicts” in 1991, as contrasted with 32 in 2007. Similarly, instances of “non-state armed conflicts” dropped from 33 in 2002 to 18 in 2007. Finally, while there has been more dramatic variation over time, “campaigns of one-sided violence” were at their lowest levels in 1991 (23) and 2007 (24). This data is derived from the Human Security Report Project’s Organized Violence Statistics. http://www.hsrgroup.org/our-work/security-stats/Organized-Violence.aspx. Definitions of the three categories of armed violence can be found at the same site.

43 To make this assessment I simply count the instances where a state has been involved in an armed conflict (intra-state or inter-state) for each temporal period in the dataset, and then compare this against the number of cases of non-use of AP mines. Because it is frequently impossible to determine the precise start and end point of mine use (and thus reliably count the number of individual years), I rely on the temporal periods employed in my dataset; any use during that period is scored as such for the entire period. State-conflict episodes are the preferable measure, since this formulation isolates the key dynamic at play, as state actors may utilize AP mines (or not) in one or more concurrent conflicts. While this approach increases the apparent number of conflicts—since the same conflict may be counted for more than one state and in multiple temporal periods—this downside is offset by the improved precision in counting compliant and non-compliant behaviour over time. I use the Correlates of War (inter- and intra-state) and Major Episodes of Political Violence datasets for this count. Information on the datasets is available at http://www.correlatesofwar.org/COW2%20Data/WarData_NEW/WarList_NEW.html and http://www.systemicpeace.org/warlist.htm, respectively. In order to account for individual state contributions to the coalition military activities in Afghanistan and Iraq, I expand on the datasets by counting each individual troop-contributing nation for these engagements. Based on official figures, 51 states have contributed troops to coalition military operations in Afghanistan and Iraq. See for example, http://www.isaf.nato.int/troop-numbers-and-contributions/index.php; and http://www.centcom.mil/en/countries/coalition/. This includes a number of non-parties to the MBT, such Georgia, the Korean Republic, Singapore, and the United States, all of whom have nonetheless refrained from using AP landmines in these conflicts.


45 See Chapter 1, page 17, note 49.
more than altered material conditions is responsible for this dramatic change in observed
behaviour.

The Mine Ban Treaty has been especially effective in consolidating behaviour among its
members. With the notable (alleged) exception of Turkey, no other State Party has been
confirmed to have employed antipersonnel mines since their ratification of the MBT. This is
significant because, as noted above, violations from within the legal community would be
especially damaging to its perceived authority. Angola, Ecuador, Ethiopia, Guinea-Bissau and
Senegal\textsuperscript{46} are known to have used antipersonnel mines as signatories to the MBT, but the actions
in all cases ceased in advance of full membership. Nevertheless, the willingness to defy implied
obligations detracts from the generally positive compliance picture concerning the non-use norm.

As noted already, international law holds that signatories are bound not to act in contravention of
the spirit of their legal commitments.\textsuperscript{47} It is also troubling that five states—Burundi, Cambodia,
Rwanda, Sudan, and Uganda—are suspected of employing mines as signatories or full parties,
though these allegations could not be decisively confirmed.\textsuperscript{48} But importantly for the present
assessment, in all of the above-mentioned cases, the state in question has responded to the
charges by pledging fidelity to the legal obligations of the treaty.\textsuperscript{49} While problematic, therefore,
the manner in which proven or suspected violations have been addressed can actually serve to
reinforce rather than degrade the mine ban norm, as I explain in Chapter 4.

\textsuperscript{46} Senegal deployed antipersonnel landmines after ratification but before entry-into-force of the treaty.
\textsuperscript{47} Vienna Convention on the Law of Treaties, Article 18.
\textsuperscript{48} Wareham, “Evidence-Based Advocacy,” 54.
\textsuperscript{49} Burundi, Cambodia, Ethiopia, Rwanda, Sudan, and Uganda have all denied using AP mines. For its part, Turkey
subsequently announced the initiation of a formal investigation into the alleged instances of mine use; this
announcement was not accompanied by any attempt to qualify or otherwise justify the potential use. Republic of
Turkey, Statement of Turkey to the Intersessional Standing Committee on the General Status and Operation of the
2010/. The Turkish delegation has made similar statements at subsequent MBT meetings.
The dominant pattern of non-use also extends to those states currently not party to the Mine Ban Treaty. It is particularly notable that the United States appears not to have used AP mines in any of its interventions since the 1991 Gulf War.\footnote{For a detailed discussion, please see the United States of America General Accountability Office, \textit{Military Operations: Information on U.S. Use of Land Mines in the Persian Gulf War}, GAO-02-1003, September 30, 2002. \url{http://www.gao.gov/products/GAO-02-1003}.} This restraint includes the military invasions of Afghanistan and Iraq, though there is some confusion as to whether landmines may have featured in the former conflict.\footnote{For example, Human Rights Watch reported in 2001 that “[o]n October 10, the third night of the military action by the United States and United Kingdom against Taliban positions and facilities, B-52 and B-1 bombers reportedly dropped “area munitions,” including CBU-89 Gators. The CBU-89 Gator is a mixed-mine system containing both antipersonnel and antivehicle mines.” Human Rights Watch, \textit{Backgrounder: Landmine Use in Afghanistan} (October 2001), 4-5. \url{http://www.hrw.org/legacy/backgrounders/arms/landmines-bck1011.htm}. See also Michael Byers, “The Laws of War, US-Style,” \textit{London Review of Books} 25, no. 4 (February 20, 2003). \url{http://www.lrb.co.uk/v25/n04/michael-byers/the-laws-of-war-us-style}.} If proven conclusively, this would represent a setback for the deepening authority of the non-use norm. However, the ambiguity here may actually buttress the prohibition enshrined in the MBT: even if true, the fact that this allegation remains unverified speaks at least in part to a desire among US officials to obscure any such actions. This in turn reflects a sensitivity to demands of an international norm, albeit one that the US does not officially endorse as legally binding. It is therefore interesting to contrast this apparent restraint with American efforts to legitimize practices like waterboarding that are commonly understood to constitute torture.\footnote{McKeown, “Norm Regress;” and Brunnee and Toope, \textit{Legitimacy and Legality in International Law}, 220-270.} These policies also have important compounding effects over time as previously unexceptional practices are removed from the menu of “normal” policy options. As Price notes, the international stigmatization of AP mines has increased the political salience of the issue such that any future decision to resume mine use would involve the most senior decision makers.\footnote{Price, “Emerging Customary Norms,” 127. See for example David Alexander, “U.S. Halts Use of Long-Life Landmines, Officials Say,” Reuters News Service, February 14, 2011. \url{http://www.reuters.com/article/2011/02/14/us-usa-landmines-idUSTRE71D6F020110214}.} This can have the effect of reinforcing the exceptional nature of AP mines, and thus further raising the threshold for future use. In sum, then, despite policy statements to the
contrary (discussed in the next chapter), recent practice suggests a marginalization of AP mines in the military operations of the United States and other prominent non-parties.

Thus in many cases, therefore, behavioural change—*de facto* compliance with the non-use norm—may precede an official endorsement of the Mine Ban Treaty. Chapter 2 argued that the emergence of a new international legal process can generate pressures to conform to rules even as a state assesses the prospects of joining a treaty. Often this can occur in situations where armed conflict had previously featured substantial contrary behaviour. It is significant to note, for example, that the Turkish Armed Forces prohibited the use of antipersonnel mines in January 1998, while still in the midst of hostilities with Kurdish rebels. According to the Turkish delegate, the decision was made “due to the changing defensive concept of border areas as well as the enhanced activities related to the prohibition of [antipersonnel mines] in the world.”

Such statements offer further evidence that the mine ban norm has influenced the articulation of state policies, here by generating an alternative conception of military necessity in light of a new international social standard.

The resolution or moderation of some violent intra-state conflicts can also provide conditions for declining mine use. For example, the 2006 Comprehensive Peace Agreement (CPA) that officially ended hostilities between the Government of Nepal and the Maoist insurgency explicitly prohibited the use of AP mines and committed both sides to engage in the clearance of mined areas. There appears to have been no resumption of mine use since. Thus

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international norms may influence the composition of domestic practice even before formal adherence to a legal instrument. This gradual modification of state policy in line with international standards offers a viable avenue to future treaty membership, and it is conceivable that the CPA may serve as the catalyst for greater engagement with the MBT, potentially leading to formal accession. The Turkish case is instructive in this regard, as a very similar process appears to have been at work here. In this way, initially limited domestic processes may provide openings for further engagement with international legal agreements.

Finally, AP mine use by non-state armed groups has similarly “decreased markedly over the past decade,” though detailed reporting in this regard is made difficult by the frequent lack of transparency and access to armed groups and conflict zones. Nonetheless, the general trend line is positive: “Over the past 10 years, at least 59 NSAGs across 13 countries have committed to halt use of antipersonnel mines.” Engagement by Geneva Call in promoting adherence to their Deed of Commitment is encouraging in this regard. As suggested already, the inclusion of non-state actors is relevant to the full universalization of the anti-landmine norm though this dissertation does not consider NSAG compliance systematically.

Though still early in the life of the treaty, the trend line is remarkably consistent: the employment of AP mines has increasingly become an aberration in international practice. This conclusion is all the more striking given the fact that until the mid-1990s, the use of AP mines

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56 This view has been expressed by some civil society campaigners associated with the ICBL. Purna Shova Chitrakar (Chairperson of the Nepalese Campaign to Ban Landmines), interview with the author, Geneva, December 3, 2010. See also Landmine Monitor 2009, 1042 regarding potential progress toward Nepalese accession and its linkages to the broader peace process. However, government representatives have been careful to draw distinctions between the two initiatives, and suggest that the AP landmine moratorium in the CPA in no way commits Nepal to joining the MBT. Second Secretary of the Permanent Mission of the Federal Democratic Republic of Nepal to the UN and other International Organizations and Embassy of the FDR of Nepal in Geneva, interview with the author, Geneva, December 7, 2010. Name withheld by request.

57 ICBL, Landmine Monitor 2009, 10.

was widespread and extensive. The empirical record would therefore suggest a strengthening norm against the use of antipersonnel mines that is endorsed by the overwhelming majority of state actors. The effect of this expanding norm has been to render the use of AP mines a highly exceptional occurrence. And, as will be explored later, to the extent that violations of the non-use injunction persist, they are understood in qualitatively different terms than prior to the mine ban movement’s emergence.

*Production, Transfer and Stockpiling of AP Landmines*

Closely associated with non-use are additional injunctions concerning the production, transfer and stockpiling of antipersonnel mines. These are critical to the efficacy of the treaty and ban norm because they constitute the enabling conditions for mine use. Here too the record is broadly suggestive of a strengthening prohibition. The stigma associated with AP mines has had a particularly notable impact in shifting state practice with respect to the production and transfer of the weapons. As with mine use above, production of antipersonnel landmines has decreased markedly over the life of the MBT. In 1999, 12 states were still engaged in production; this held nearly constant for much of the next decade. However, by 2009 the number had been cut in half, with only six active (or assumed to be active) producers.\(^59\) According to the most recent information, only India, Myanmar, and Pakistan are thought to be engaged in ongoing production.\(^60\) This trend provides important evidence of the effective stigmatization of AP landmines driven by the mine ban movement and resulting treaty. It is estimated that more than

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\(^{59}\) The ICBL identifies 12 states as antipersonnel mine producers: China, Cuba, India, Iran, Myanmar, North Korea, South Korea, Pakistan, Russia, Singapore, the United States, and Vietnam. However, this list includes all states that have not formally renounced the right to produce mines; the number of states proven or suspected of actively producing landmines is a much smaller subset of this list. ICBL, *Landmine Monitor 2010*, 14-15.

\(^{60}\) *Landmine Monitor 2011*, 13.
50 states produced landmines at some point during the past half-century; of that total, 38 have now definitively ceased production.

[These] include a majority of the big producers in the 1970s, 1980s, and early 1990s — those who bear much of the responsibility for the tens of millions of mines now in the ground. Eight of the twelve biggest producers and exporters over the past thirty years have signed the treaty and stopped production: Belgium, Bosnia, Bulgaria, Czech Republic, France, Hungary, Italy, and the United Kingdom. Other significant producers that have signed include Germany, Croatia, Chile, and Brazil."61

Formerly large-scale producers like Egypt, Israel and Poland—all of whom have yet to join the treaty—have followed suit in officially abandoning the practice.62

Major non-party military powers like the United States and China also appear to have informally halted production activities in recent years. The United States has not produced any form of AP mine since 1997, and there are no plans to resume procurement. Significantly, two systems currently under development—the XM-7 Spider Networked Munition and the Intelligent Munition System—have recently been modified so as to conform to the requirements of the Mine Ban Treaty.63 Both systems had come under significant criticism from civil society campaigners and the United States Congress due to their proposed victim-activation function.64

This is yet another example of how international norms may foreclose policy options that were unexceptional or unproblematic in a prior epoch. The empirical record therefore suggests changing practice among treaty members as well as hold out states. This pattern is highly

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62 Interestingly, these states appear to be clear instances where concerted civil society engagement produced significant political gains. Wareham reports that “[The ICBL] was largely responsible for obtaining formal public statements of policies renouncing production by four [non-party] states (Egypt, Finland, Israel, and Poland), by repeatedly requesting these governments to formalize their position in writing and make it public.” Wareham, “Evidence-Based Advocacy, 59.


64 It now appears that both the Spider and IMS have been converted to solely command-detontated systems. For more information on this please see ICBL, *Landmine Monitor 2009*, 1141-142 and Marina Malenic, “Vice Chief Tells Senator Army Will Not Procure Victim-Activated Spider” *Inside the Army* May 26, 2008.
significant, as states with substantial past behaviour are particularly relevant to the consolidation of a social expectation against landmine production.

A very similar pattern can be discerned in respect to the transfer of AP mines. No cases of confirmed transfer have been recorded since 1997, and the few states suspected of providing mines to foreign entities strenuously deny the allegations.\textsuperscript{65} This contrasts with an estimated 34 states that exported antipersonnel mines prior to the advent of the MBT.\textsuperscript{66} To the extent that it endures at all, the “global trade in antipersonnel mines has consisted solely of a low-level of illicit and unacknowledged transfers.”\textsuperscript{67} Moreover, most prominent producers have enacted legislative prohibitions or moratoria on future AP mine transfer, including the United States, China, India, Israel and South Korea.\textsuperscript{68} This amounts to what the ICBL has termed “[a] \textit{de facto} ban on the transfer of antipersonnel mines” and one that “is attributable to the mine ban movement and the stigma that the Mine Ban Treaty has attached to the weapon.”\textsuperscript{69}

As with production, states that were deeply implicated in the creation of the humanitarian mine problem are an important constituency for assessing the transformative effects of an international norm. The near-complete absence of AP mine transfer is thus strongly suggestive of a dramatic change in the way in which the weapons are conceived in international society. Formerly prominent producers and exporters like Italy, Belgium, Canada, and the United Kingdom were instrumental to the creation and promotion of the mine ban. This rapidly

\textsuperscript{65} These states are Eritrea, Ethiopia, Iraq, Iran, Rwanda, and Yemen.
\textsuperscript{66} ICBL, \textit{Landmine Monitor 1999}, 7.
\textsuperscript{67} ICBL, \textit{Landmine Monitor 2009}, 4.
\textsuperscript{68} The ICBL reports that “Russia has had a moratorium on the export of antipersonnel mines that are not detectable or equipped with self-destruct devices since 1 December 1994. The moratorium formally expired in 2002, but Russian officials have stated, most recently in June 2009, that it is still being observed. Russia is not known to have made any state-approved transfers of any type of antipersonnel mine since 1994.” ICBL, \textit{Landmine Monitor 2009}, 1068. Other former producers like Cuba, Egypt and Vietnam have announced that they too no longer export – albeit without the backing of a formal legislative decree. The U.S. moratorium was initially enacted via National Defense Authorization Act of 1993, Pub L. No. 102-484, Section 1365(c) (1993). The moratorium has been extended on a number of occasions, as recently in the Consolidated Appropriations Act of 2008, Pub Law. No. 110-161 (2008), Section 634(j), at 486.
\textsuperscript{69} ICBL, \textit{Landmine Monitor 2009}, 4.
crystallizing norm has similarly generated pressures for states outside of the formal legal agreement, most commonly via the legislative moratoria noted above. Such acts are significant both for their practical effects—reducing the availability of AP mines—and for their symbolic reinforcement of the humanitarian principles and prohibitionary norm at the heart of the MBT. By way of comparison, despite the efforts of civil society campaigners, a similar success in stemming the flow of small arms and light weapons has not been realized.

Finally, progress in the destruction of national stockpiles is a further important measure of state adherence to the mine ban, since the physical elimination of AP mines is necessary to ensure they do not enter operational use at a later date. Here again compliance has been extensive: as of mid-2009, 158 states—including six non-parties—are judged to have no remaining stockpiles, save for those permitted to be retained for training purposes (Figure 3). Of those, 63 State Parties have never possessed AP mines, or destroyed their stocks prior to joining the treaty. In one respect this may be interpreted as a sign that the MBT did not impose significant new constraints on many members and thus provides only a weak independent influence on state policy. Yet this view is incomplete for two reasons. First, the majority—60%—of States Parties did possess antipersonnel mine stockpiles at the time of their ratification; the record of compliance on this score has been an important indicator of treaty health. Moreover, a few states completed destruction prior to joining the treaty, and with these

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71 Article 3 of the Mine Ban Treaty states that “Notwithstanding the general obligations under Article 1, the retention or transfer of a number of anti-personnel mines for the development of and training in mine detection, mine clearance, or mine destruction techniques is permitted. The amount of such mines shall not exceed the minimum number absolutely necessary for the above-mentioned purposes.” However, the precise nature of this exception has been debated since the conclusion of the treaty and no precise agreement currently exists.  
72 See ICBL, Landmine Monitor 2009, 16, n. 19. This list conforms with the dataset developed by this author. This includes some that had stockpiles in the past, but used or destroyed them prior to joining the Mine Ban Treaty, including Eritrea, Rwanda and Senegal.
obligations thus in mind. In total, approximately 44 million AP mines have been destroyed by State Parties between 1997 and 2011.\textsuperscript{73} Furthermore, a number of states have reported the destruction of subsequently discovered stockpiles, in keeping with established best practices.\textsuperscript{74}

Second and perhaps more significantly, the elimination of these weapons in the military arsenals of the overwhelming majority of states has reinforced the authority of the mine ban norm by placing AP mines beyond the realm of “normal” military operations. To overcome the force of the injunction would therefore require the more substantial decision to re-constitute domestic production capacities or acquire mines from foreign sources. In this respect, the normative and material effect of the treaty has been to remove antipersonnel mines from the “menu of options” across a large portion of international society.

On the other hand, the optimistic view of a strengthening norm is challenged by the fact that Belarus, Greece, Turkey, and Ukraine all failed to meet their stockpile destruction deadlines, placing them in serious breach of their legal obligations under the MBT. These represent the first substantive violations by State Parties; it is also significant that, in the case of the first three states, non-compliance has continued for more than three years. Moreover, all four states retain large stockpiles, with over ten million AP mines remaining to be destroyed among them.\textsuperscript{75} These


\textsuperscript{75} As of November 2011, mines were retained in the following quantities: Belarus (3.3 million), Greece (953, 285), and Ukraine (5.9 million). International Committee to Ban Landmines, Statement on Stockpile Destruction, 11th Meeting of States Parties to the Mine Ban Treaty, Phnom Penh, Cambodia, December 1, 2011. \url{http://www.apminebanconvention.org/meetings-of-the-states-parties/11msp/what-will-happen/day-5-thursday-1-december/}. In June 2011 Turkey announced that it had completed domestic destruction of its mine stockpiles, and had transferred the remaining 22,716 “ADAM”-type mines to Germany for immediate destruction, thus rendering itself compliant with Article 4 of the Mine Ban Treaty. Republic of Turkey, Statement to the Standing Committee on Stockpile Destruction, Geneva, June 20, 2011. \url{http://www.apminebanconvention.org/intersessional-work-programme/june-2011/stockpile-destruction/statements/}.
violations are damaging for the consolidation of the mine ban norm, and particularly so since the acts in question have not been met with a forceful response from other State Parties. To the extent that non-compliance is not widely denounced as atypical and unacceptable, it risks eroding the strength of the taboo. As Brunnee and Toope have pointed out, failures in this regard “can be indicative of a lack of ‘congruence’ between existing norms and international practice.”

Yet the discourse of the non-compliant parties suggests that contrary practice has not been “normalized” in these cases: none of the implicated states has asserted a right to retain mines in contravention of the MBT, and each party has instead sought to characterize their violations as the product of specific technical challenges, as addressed in detail in Chapter 4.

Non-party compliance with Article 4 of the Mine Ban Treaty is much less extensive than for other indicators discussed above. The retention of some 165 million AP landmines by the 37 states outside the MBT undoubtedly weakens the authority of the mine ban norm even as the overwhelming majority are held by a very few states. In particular, the continued existence of large stockpiles undercuts the process of stigmatizing mines as “abnormal” weapons. Indeed, while a number of prominent non-parties—including China and Russia—have engaged in substantial destruction efforts in recent years, these processes are directed against AP mines that do not conform to the less stringent requirements of Amended Protocol II to the Convention on Certain Conventional Weapons. The object of compliance is thus a different source of obligation, and one that imposes a lower standard than the absolute ban enshrined in the MBT. I address this important subject extensively in the next chapter as well.

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76 Brunnee and Toope, Legitimacy and Legality in International Law, 113.
77 The ICBL reports that “[t]he vast majority of these stockpiles belong to just three states: China (estimated 110 million), Russia (estimated 24.5 million), and the US (10.4 million). Other states with large stockpiles include Pakistan (estimated six million) and India (estimated four to five million).” ICBL, Landmine Monitor 2009, 17.
78 Amended Protocol II requires that Parties not employ anti-personnel mines that are undetectable (that is, lacking sufficient metallic content to be detectable by conventional means) or that are not self-destructing or self-deactivating. See Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on May 3, 1996. http://www.icrc.org/ihl.nsf/FULL/575?OpenDocument.
Figure 3: State Compliance With MBT Articles 4 and 5, 1999-2009

Clearance of Mined Areas

Article 5(1) of the MBT requires that all State Parties “destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.”

While accorded less attention in this study, mine clearance is an important feature of the broader prohibitionary effort as it reinforces the humanitarian purpose of the treaty. For this reason, widespread compliance with Article 5 contributes to (and is thus indicative of) the health of the mine ban norm. As Figure 3 demonstrates, state progress in clearing mined areas has been much

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79 This graph reflects, respectively, the number of states that have completed stockpile destruction or had no stockpiles to declare, and the number of states that have completed the clearance of all known mined areas or that were mine-free at the outset.

80 For more information please see Maslen, Commentaries, 165-184.
less dramatic than the destruction of mine stockpiles. By the time the Mine Ban Treaty entered into force in 1999, 103 states had already declared themselves to be mine-free; this included 48 states that were by then full parties, 33 signatories, and 22 non-parties. This represents a baseline of unaffected states for which the obligations arising from Article 5 were largely irrelevant. A decade later, the number of states having completed demining has risen to 118, of which 106 are States Parties, two remain signatories, and 10 are non-parties. In the overwhelming majority of cases, mine-free status occurred prior to, and thus independent of, ratification of the MBT; as of 2011, only 18 States Parties have subsequently declared their completion of their Article 5 commitments.\textsuperscript{81}

The relatively small increase in fully-compliant states, and the fact that more than 70 states remain mine-affected, underscores the challenges inherent in addressing widespread antipersonnel mine contamination. In this regard, the ICBL has claimed that “[e]nsuring full compliance with these mine clearance obligations is arguably the greatest challenge facing States Parties.”\textsuperscript{82} As of late 2010, 26 states have sought—and received—extensions to their 10-year clearance deadlines, as permitted under the MBT.\textsuperscript{83} While envisioned within treaty rules, the nature of many of these extensions suggests a certain ambivalence toward the clearance obligation. On the one hand, many states receiving extensions exhibited limited effort during their initial compliance period; on the other hand, even severely affected states have frequently made only “disappointing” progress due to various impediments.\textsuperscript{84} In particular, the ICBL has

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{81} ICBL, \textit{Landmine Monitor 2011}, 2 and 22.
\item \textsuperscript{82} ICBL, \textit{Landmine Monitor 2009}, 37.
\item \textsuperscript{83} Algeria, Argentina, Bosnia and Herzegovina, Cambodia, Chad, Chile, Colombia, Croatia, Democratic Republic of the Congo, Denmark, Ecuador, Eritrea, Guinea-Bissau, Jordan, Mauritania, Mozambique, Nicaragua, Peru, Senegal, Tajikistan, Thailand, Uganda, United Kingdom, Venezuela, Yemen, and Zimbabwe. \textit{Landmine Monitor} 2011: 23.
\item \textsuperscript{84} For documents pertaining to the various extension requests, please see http://www.apminebanconvention.org/background-status-of-the-convention/clearing-mined-areas/article-5-extensions/states-parties-requests-for-extension/.
\item \textsuperscript{85} ICBL, \textit{Landmine Monitor 2009}, 37-39.
\end{itemize}
\end{footnotesize}
highlighted insufficient survey of suspected mined areas; poor planning, management, and reporting structures; and insufficient resource allocation (both domestically and from international donors) as fundamental impediments to greater progress in mine clearance. In most instances, these failings are indicative of a lack of political commitment and engagement. In advance of the 10th Meeting of States Parties, the ICBL therefore expressed the view that persistent failure to demonstrate progress in clearance obligations should properly be regarded as a fundamental violation of the MBT.

**National Implementation and Transparency**

As suggested elsewhere in this dissertation, the political context of compliance is critical to a comprehensive accounting of how legal norms may influence state policy. Harold Koh, for example, has demonstrated that the internalization of international norms occurs in part through the “transposition” of these standards into domestic institutions. In seeking evidence of norm adherence, therefore, one focus should be the extent of national legislative and organizational

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86 The ICBL specifically singled-out Venezuela for having failed to initiate any clearance activities during its first decade as a State Party. At the 10th Meeting of States Parties, Venezuela announced that it had begun clearance of all known mined areas on its territory. A target date of 2014 for completion was also announced, though details on the process of this effort were limited. The ICBL has reported (in personal discussions) that “given the absence of sound reasons for delaying clearance… it was clear that the decision to delay, and ultimately begin, clearance was a political one.” Tamar Gabelnick, ICBL-CMC Policy Director, email correspondence with the author, July 24, 2012. Significantly, the Venezuelan announcement only came after the ICBL highlighted the potential violation; previously, “Venezuela had said (until we made a fuss about it) that it still needed [AP] mines to guard the border. In other words, they insinuated that they were using them, which is a violation of Article 1 of the [Mine Ban Treaty].” Gabelnick, email correspondence. Additional information was derived from Tamar Gabelnick, (then ICBL Treaty Implementation Director), interview with the author, Geneva, 7 December 2010.

change.\textsuperscript{88} In this regard, state practice reveals uneven implementation of Mine Ban Treaty commitments. As Figure 4 demonstrates, growth in both respects has been dramatic: 11 states had implemented comprehensive national legislation and 24 had designated a domestic authority\textsuperscript{89} to oversee national policy by 1999; by 2009, these figures had risen to 85 and 68, respectively. However, the pace of this increase is offset by the fact that more than half of all State Parties still lack suitable legal and bureaucratic structures to fully implement their treaty obligations. In these respects, the implementation of the Mine Ban Treaty remains incomplete.

\textbf{Figure 4: Creation of Domestic Legislation and National Authorities, 1999-2009}

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\end{figure}

\textsuperscript{88} In interviews with civil society practitioners, national legislation was frequently identified as an important means for states to institutionalize their commitment to MBT norms. Peter Kolarov (Head of Humanitarian Conventions Section, Office for Disarmament Affairs, United Nations Office in Geneva), interview with the author, Geneva, October 21, 2009. Camilla Waszink (Policy Adviser, Arms Unit, Legal Division, International Committee of the Red Cross), interview with the author, Geneva, October 23, 2009. For more on this subject, see Maslen, \textit{Commentaries}, 209-219 and 255-265.

\textsuperscript{89} As is outlined in in the Appendix, a domestic authority is understood as a civilian (non-military) body charged with coordinating national resources for meeting core treaty obligations and facilitating mine action.
A corollary of domestic implementation efforts is the broader expectation of transparency in the MBT regime. Article 7 of the Mine Ban Treaty requires that State Parties provide annual reports detailing their compliance with core provisions of the treaty.90 Here again the behavioural record is inconsistent. While the ICBL reports that 98% of State Parties have submitted an initial transparency report upon joining the treaty, many have done so well after the six-month deadline. Moreover, the compliance rate for subsequent annual reports has steadily declined over the past decade.91 While non-parties including Azerbaijan, Mongolia, Morocco, Poland and Sri Lanka have submitted voluntary reports, the general pattern suggests that transparency provisions have yet to become standard procedure for many states. In these twin respects, the empirical record cautions against an assumption that treaty commitments have been deeply internalized in domestic institutions.

Conclusion: Behavioural Patterns and the Impact of the Mine Ban Norm

What can we conclude about the status of state behaviour vis-à-vis the Mine Ban Treaty and associated norm? The pattern presented above is one of widespread compliance—even among non-parties—in relation to the most consequential obligations concerning use, production, and transfer of AP mines. In these ways, antipersonnel mines have been largely marginalized as tools of contemporary warfare. Violations do occur but, as explored in Chapter 4, even among non-parties these are typically denied outright or defended as the product of


special circumstances rather than unproblematic acts. This is all the more surprising given the prior prevalence of landmines in most states’ military doctrine and tactics.

The normative force of the MBT has therefore shifted antipersonnel mines into the realm of “exceptional” politics and away from the previous view of the weapons as uncontroversial features of conventional military arsenals. Behavioural change has occurred even without formal membership in the legal agreement, further emphasizing the fact that the Mine Ban Treaty has influenced the social expectations of all states in the international system. The impact of a legal initiative is most clearly apparent when “an emergent international rule induces states to engage in practices they would not otherwise perform.”92 As Price has suggested, stimulating a redefinition of “standard military practice” is a prominent way that international norms may exert influence in the international system.93 This observation is particularly striking with respect to actors that might find benefit in employing antipersonnel mines, such as conflict-prone states and powerful non-parties like the US. Many of the observed policy changes would thus be inconceivable absent the MBT and the associated diplomatic and civil society campaigns. The realist expectation that bans will follow (rather than precede) judgement of a weapon’s declining utility therefore fails to capture the totality of the processes at work in this case. Rather, the emerging pattern of state restraint with respect to antipersonnel mines is indicative of a strengthening prohibitionary norm instantiated by the Mine Ban Treaty.

In these respects, the MBT has already proven effective at substantiating new legal commitments for a wide array of actors, and has led to substantial changes in state behaviour even among those states that has thus far refused to join the treaty. However, while core injunctions have received widespread adherence, additional features of the mine ban norm have

not enjoyed similar respect. The continued existence of massive AP landmine stockpiles calls into question the depth of policy change among non-parties, and the non-compliance by four State Parties challenges the international commitment to an absolute ban on the weapons. The MBT has undoubtedly made it harder for states to deploy mines, but it has clearly not eliminated this prospect. More generally, persistent challenges concerning mine clearance, while rooted in technical problems, also underline the need for greater political engagement with, and commitment to, treaty obligations. Finally, the pace of domestic implementation of the Mine Ban Treaty leaves much to be desired for those who would hope to see treaty norms deeply embedded within national institutions.

The above analysis of state practice provides strong evidence of a widening international norm banning antipersonnel mines that strongly correlates with the advent of the Mine Ban Treaty. Indeed, the close temporal connection between the emergence of the mine ban movement and legal institution and the scale of behavioural change powerfully demonstrates the role that norms may play in altering state practice. Yet behaviour provides only a partial window into the effectiveness of international treaties; what states say about legal developments—how they articulate their conceptions of the nature and limits of obligations—is also indicative of the influence of international laws and norms. Discourse also helps to provide evidence for the assertion that the MBT is responsible for the observed changes in state behaviour. In this respect, Chapter 4 will serve to address the central claim of Chapter 2, namely that legal institutions like the Mine Ban Treaty can substantiate international norms even in the face of resistance from powerful states.
CHAPTER FOUR: STATE DISCOURSE AND NORMATIVE FORCE OF THE MINE BAN TREATY

The previous chapter demonstrated that the core obligations of the Mine Ban Treaty are receiving widespread adherence. Yet the reasons for this cannot be inferred directly from the behaviours themselves. To assign influence to the treaty requires evidence that compliance is motivated by an affinity for the obligations and social expectations enshrined in the treaty text. To get at this phenomenon I focus on the discourse of state representatives as indicative of the contemporary status of the mine ban norm. I first seek to establish the broad pattern of discursive support for the Mine Ban Treaty and associated norm. Here there is strong evidence for the theoretical claim that the networked quality of treaties is central to their influence: in particular, the association with previously accepted legal principles and rules has provided important impetus in generating state support for the mine ban norm and legal instrument. This phenomenon is widespread, so much so that even prominent treaty opponents have endorsed the humanitarian spirit upon which the treaty is premised. This itself is a significant development, as the dominant social understanding that antipersonnel mines present particular humanitarian challenges can be clearly contrasted with the prior view of weapons as unexceptional features of military arsenals. There are important qualifications to this general argument, however, which I return to in the final section of the chapter.

I next consider the status of treaties in instances where they are put under threat by real or apparent instances of non-compliance. State responses to charges that they have violated treaty obligations suggest whether (and to what extent) a norm has altered the political space within which diplomatic engagements must occur, and here again there is evidence that the MBT is
exerting significant impact. Finally, I return to the question of the treaty’s influence on non-parties, by systematically exploring the various logics by which such states maintain their opposition to the MBT. Careful attention to the diplomatic record reveals important ways in which the mine ban norm has already substantially altered the discourse of resistant states, while at the same time leaving open potentially damaging modes of contestation.

**Humanitarianism and the Discursive Legitimacy of the Mine Ban Treaty**

Robert Gard Jr. has observed that the crux of state support for the MBT concerns a willingness to endorse a new conception of antipersonnel mines that relies on an expanded application of existing international humanitarian law principles.

In deciding whether or not to subscribe to a treaty banning the use of anti-personnel mines… nations are obligated to assess not only the effectiveness of these weapons, to determine if they are indispensable to legitimate military operations, but also whether they are proportional to their effects. The issue, therefore, is not whether AP mines might under some circumstances have marginal military utility, but rather whether their use is not only essential but also proportional in relation to the military utility they may provide.¹

The treaty’s foundational normative claim is based on an assertion that AP mines pose a threat to civilian populations that outweighs concerns for military necessity, and that this problem can only be addressed through their complete abolition. This implies a substantial reversal of the metric by which the utility and appropriateness of the weapons is judged. Determining whether states have modified their views in light of this new social expectation is thus central to the evaluation of the impact of the Mine Ban Treaty and the broader ban norm.

¹ Gard Jr., “Military Utility,” 137.
States Parties and the Logic of Membership

Membership in the Mine Ban Treaty community confirms the theoretical account presented in Chapter 2 that legal developments gain much of their claim to legitimate authority from their networked connection to existing international norms and rules. To that end, State Parties frequently cite the treaty’s importance to the progressive development of international humanitarian law in explaining their decision to join the MBT. For many, this has been particularly articulated via a conception of cause-and-effect that prioritizes concerns for human suffering over military prerogatives. Croatia has thus asserted that “[a]ny country that is faced with having to deal first hand with the scourge of anti-personnel mines will confirm… anti-personnel mines cannot any longer be considered as a legitimate means for guarding national security. All we need do is talk to the landmine survivors… to see the necessity of this claim.”

In explaining its recent accession, Eritrea has similarly noted that it “has the practical experience of what land mines can cause to the safety, well being and development of a society. So when Eritrea acceded to the Ottawa Convention… it is based on the deep understanding and principled commitment of the use of such Convention.” This sentiment is echoed widely elsewhere.

The impact of the mine ban norm is especially apparent in instances where the policy change presents significant implications for the conduct of national security policy, since we would expect restrictive social standards to be least resilient under such conditions. This is the case for all states, though support from actors engaged in violent armed conflicts—and especially those which featured past mine use—provides especially compelling examples of how the Mine

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4 See for example the statements by Angola and Uganda at the Ottawa Convention Signing Conference. Ottawa, 2-4 December 1997. Notes on file with the author.
Ban Treaty has influenced the conception of state interests. To that end, “Sudan’s signing of the Convention, despite limited resources and its security concerns which are well known to all, stems from its deep conviction and its strong belief that humanity should get rid of such dangerous weapons which threaten the lives of innocent populations.”

Turkish representatives have similarly argued that the decision to accede to the Mine Ban Treaty was a “very brave decision” due to the domestic and regional security environment that includes concerns over cross-border smuggling and ongoing military operations against Kurdish rebels. Nonetheless, joining the MBT was important because it constitutes “one of the main dimensions of [Turkey’s] security policy.” The normative force of the treaty was thus instrumental in reshaping a basic expectation of state policy such that adherence to the prohibition of antipersonnel mines became the standard against which other competing interests—including the conduct of military operations—are assessed. This reflects both a constitutive redefinition of state identity in line with the humanitarian calculus of the ban norm, and the consequential acceptance of new behavioural standards reflecting this social role.

Among treaty members, therefore, the belief in the legitimacy of the prohibition of antipersonnel mines is now well established. It is in this spirit that South Africa has asserted that “the Mine Ban Treaty has irreversibly established itself as the international norm in banning antipersonnel mines.” Yet state views are not static, and widespread support for the Mine Ban

6 Dr. Maike Selcuk Sancar (Counsellor, Permanent Mission of Turkey to the UN Office at Geneva), interview with the author, Geneva, October 26, 2009. This account is replicated in the statements of other conflict-prone State Parties: “It is because we can no longer abide such grievous loss that we have heeded the call of human conscience, and have come here to end any further use, production, transfer and stockpiling of this rogue and shameful weapon.” Republic of the Philippines, Statement at the Ottawa Convention Signing Conference, Ottawa, December 3, 1997. Notes on file with the author.
Treaty did not emerge, fully formed, from nothing. Before the advent of the mine ban movement, AP mines were not identified as especially horrendous weapons. Looking back from the vantage point of today, the acceptability of a prohibition for much of the international community may seem over-determined. But even states now rightly regarded as key supporters of the MBT were subject to the same transformation in their views. In the case of antipersonnel mines, the key feature of this process was a reconceptualization of landmines “as a humanitarian scourge” that were fundamentally incompatible with established standards of international humanitarian law. Richard Price has demonstrated how norm entrepreneurs succeeded in leveraging a conception of humanitarian impact within the framework of established legal principles—especially those relating to military necessity, proportionality and discrimination—and more specific treaty structures including the Geneva Conventions and Additional Protocols to assert the moral and legal imperative of a ban. Governments were persuaded that the effects of AP mines on civilian populations rendered them illegitimate from the perspective of accepted international law, and thus the new prohibition was only a logical extension of prevailing trends. This marked a profound transition from the prior view of AP mines as “force multipliers,” “sentinels,” or “deterrents,” and thus legitimate tools of warfare. This network effect was thus vital in shaping early support for a prohibition.


Once established, this standard rapidly came to be associated with a new role identity in the international system, wherein adherence to the mine ban became a socially desirable demonstration of responsible statehood. A number of states frequently associated with the global mine ban movement underwent such a transformative process from sceptical to ultimately supportive parties. It should be recalled that

[p]rior to the Ottawa Process, the Canadian government was highly defensive in response to NGO calls for a total ban. Arguments against AP mines based on humanitarian impact were countered with arguments based on military utility…. Although it had been formally reported that Canadian Forces had not used AP mines since Korea, officials argued the safety of Canadian soldiers would be jeopardized without them. They also argued that efforts to push CCW discussions further would be counter-productive to international efforts to resolve the problem. Canada would no longer be considered a serious player within the context of the negotiations.¹⁰

Yet this position was rapidly reversed in the face of an international campaign, and the use of antipersonnel mines came to be widely viewed as an inherently illegitimate act among a number of formerly ambivalent states. Italy therefore decided to join the mine ban movement and subsequent treaty “not because anti-personnel mines have in our view become militarily redundant or obsolete, but because we have accorded priority status to the disarmament and humanitarian aspects of the issue.”¹¹ Similarly, “the United Kingdom (UK) Ministry of Defence believe[d] that in renouncing anti-personnel mines it ha[d] lost an operational capability, but it ha[d] accepted to do so because of the humanitarian imperative.”¹²

¹⁰ Warmington and Tuttle, “Canadian Campaign,” 50. Similarly, Beier reports that “[a]t the beginning of the 1990s, even Canada, eventually among the most strident advocates of a ban, was dismissive of the suggestion that militaries would, should, or could give up their AP landmine stockpiles.” Beier, “Siting Indiscriminacy,” 305. For discussion of the evolution of Canadian policy deliberations during this period, please see Brian W. Tomlin, “On a Fast Track to a Ban: The Canadian Policy Process,” in To Walk Without Fear: The Global Movement to Ban Landmines, eds. Maxwell A. Cameron, Robert J. Lawson, and Brian W. Tomlin (Toronto: Oxford University Press, 1998), 185-211.


¹² Maslen, Commentaries, 13. Diplomats familiar with the negotiations confirm this view, and acknowledge the difficult nature of the decision. Guy Pollard (Counsellor in the Nuclear and Conventional Weapons Section, United Kingdom Delegation to the Conference on Disarmament), interview with the author, Geneva, December 8, 2010. See also Japan, Statement by Mr. Katsuyuki Kawai, Parliamentary Secretary for Foreign Affairs, at the Nairobi Summit for a Mine-Free World, Nairobi, Kenya, December 2, 2004. http://www.nairobisummit.org/high-level-
The transformative potential of legal processes is thus found in this instantiation of new social expectations that fundamentally reshape the terms of accepted political discourse. Price has suggested that the political leaders of like-minded nations “evidently felt it intolerable to be left outside the club of responsible international citizens once they judged that the balance had tipped such that resistance signalled outlier status.” According to Price, political leaders “evidently felt it intolerable to be left outside the club of responsible international citizens once they judged that the balance had tipped such that resistance signalled outlier status.” Accordingly, Jody Williams and Stephen Goose report that the awarding of the Nobel Peace prize to the ICBL was particularly instrumental in compelling Japan—long an ambivalent participant in the mine ban negotiations—to endorse the MBT as a centrepiece of Japanese policy. It is also widely believed that the death of Princess Diana, who had been intimately associated with the mine ban movement, added further pressure on the UK to join the ban. Adherence to the mine ban norm has remained a prominent symbol of international engagement, as demonstrated by the recent accession of the newly-created state of South Sudan:

It has been more than four months since the declaration of our independence on 9 July 2011, in which my country has promised the world it would honor all the principles of international law by playing an active role in peace and world security. This is a promise we take seriously. My country acceded to the [Mine Ban Treaty] on 11 November 2011. Having seen the devastation including severe injury and environmental damage caused by landmines during the twenty-one years of fighting for freedom, the movement / army of liberation of the people of Sudan banned the use of landmines in all combat operations. We have defended the cause of the treaty before becoming a state.

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13 Price, “Reversing the Gun Sights,” 635.
There are two things to note in this passage. First, the statement is clearly intended as an expression of responsible statehood in which political legitimacy is demonstrated by an adherence to the prevailing standards governing affairs between states. Second, the humanitarian justification for the ban is explicitly framed in terms of existing principles of international law. This further illustrates the extent to which the Mine Ban Treaty has gained impetus from its connection to prior international rules and norms.

The impact of intersubjective understandings may occur even retrospectively. In one particularly fascinating example, “[t]he [previous] use of landmines by the African National Congress (ANC) during its struggle against the apartheid regime in South Africa was specifically criticized by the Truth and Reconciliation Commission for being indiscriminate in its effects.”¹⁷ Yet the subsequent response from the ANC was equally illuminating as to the influence of new role conceptions, as the organization suggested that it had abandoned the use of AP mines before the advent of the Mine Ban Treaty because the practice “was, according to its own principled humanitarian norms, leading to an unacceptable loss of civilian lives.”¹⁸ These cases powerfully highlight the way in which the emergence of the mine ban movement and subsequent negotiation of the MBT served as focal points in the development of a new international norm that rapidly replaced a prior standard of appropriate behaviour for many international actors. The brief discussion also draws attention to the competing concerns and interests at play in the formulation of state policy, and suggest that national identities and interests are not immutable “facts,” but are instead subject to significant redefinition over time.

¹⁷ Maslen, *Commentaries*, 11.
As the above examples demonstrate, the shift to full legal recognition of the emergent mine ban norm often occurred rapidly. In other instances, sensitivity to obligations has accumulated more gradually, as state actors are drawn toward the treaty as part of an evolving role identity within the international system. Rhetorical endorsement of legal norms thus often precedes full behavioural compliance. Prior to its accession, Belarus made clear that “Belarusian public opinion and [the] Belarusian Government view successful implementation of the Convention on the Prohibition of Anti-personnel mines as one of the important conditions for strengthening international security.”¹⁹ In this case, a lack of financial and technical capacity for destroying mine stockpiles was held to be the only impediment to immediate membership, as discussed below.²⁰ Importantly, Belarus explicitly acknowledged the obligations of membership and did not oppose these commitments in their own right; once the hurdles were overcome, Belarus dutifully acceded to the treaty. Other conflict-prone states like Ethiopia, Indonesia, Sudan and Turkey have similarly made a point of signalling their support for the humanitarian purpose of the Mine Ban Treaty, even while arguing that domestic conditions—most notably internal or external hostilities—precluded earlier accession.²¹ In doing so, the relevant actors endorsed the authority of the Mine Ban Treaty and associated norm, and expressed a serious intention to comply with its obligations.

²⁰ Belarus was consistent in its claim of hardship from the outset of the MBT process. See for example Republic of Belarus, Statement at the Ottawa Convention Signing Conference, Ottawa, December 3, 1997 and statements by Col. Luchina, Deputy Chief of Staff, Corps of Engineers, General Staff, Armed Forces of the Republic of Belarus at the Intersessional Standing Committee meetings of December 7, 2000 and February 6, 2003. All documents and notes on file with the author.
Such statements of support are not mere diplomatic niceties. Rather, the adoption of pro-treaty discourse can signal an important transition in the sensitivity of actors to relevant legal obligations and broader social expectations. It is first of all significant that non-members would seek to frame their policies in reference to a legal standard they had yet to join. The deliberate invocation of the humanitarian purpose of the Mine Ban Treaty is thus important in demonstrating its accruing sense of legitimacy among the community states. More telling still is the extent to which the prohibitionary norm embodied in the MBT has led to a revised conception of national security. The example of Turkey’s moratorium on mine use—as described in Chapter 3—was explicitly justified in light of “the changing defensive concept of border areas as well as the enhanced activities related to the prohibition of [antipersonnel mines] in the world.”22 This change also has more direct political consequences for these states, as the partial endorsement of the mine ban norm increased the pressure from the ICBL and treaty parties to progressively close the gap between their stated aims and actual policies. For example, Belarus’ decision to rely on claims of technical incapacity had the effect of narrowing the range of reasons it could access in justifying its non-membership. Discussions of future accession consequently focused on these more favourable terms. The same dynamic was at work with the other late-adopters mentioned above: by framing their status vis-à-vis the treaty via specific criteria (principally the amelioration of armed conflicts), each state defined their prospective future membership in terms that could be assessed by outside actors. This provided a rhetorical opening that was exploited by treaty proponents to push for future compliance and accession. It is therefore notable that this discursive support has continued after formally joining the treaty.

In sum, therefore, membership in the Mine Ban Treaty is frequently associated with a thorough-going professed affinity for the normative purpose of the legal instrument. State Parties

22 Turkey, 5th MSP.
often frame their support for the MBT in reference to pre-existing international law standards; hence, network effects have a vital role in shifting state conceptions of legitimate practice. Just as importantly, State Party discourse contains explicit reference to the treaty as the expression of a new international social standard: the legalized environment of the Mine Ban Treaty is thus the reference point for the broader norm banning landmines. This vision of appropriate behaviour cuts sharply against the prior status quo, and specifically confronts questions of military utility and national interests. The implications of membership are therefore significant, and are best explained in reference to the social account of legal influence developed in this dissertation.

Non-Parties and Normative Pulls

These same social pressures to ally with new norms enshrined in a treaty may also bear on states that continue to remain outside of the legal agreement. The empirical record reveals that the central prohibitionary norm has widely permeated the discourse of non-party states. Virtually every state still outside the MBT has expressed support for the humanitarian aims of the ban, and has identified AP mines as a significant and enduring threat to civilian populations.23 Thus

Sri Lanka is well aware of the harmful and deadly effects of the anti-personnel mines and is concerned about the innocent civilians who have lost their lives and limbs because of anti-personnel mines…. Although, Sri Lanka is not a signatory to the convention we have taken all possible action to minimize the threat of anti-personnel mines to civilian life.24

23 This includes China, Cuba, the D.P.R.K., Egypt, Finland, Georgia, India, Iran, Israel, Kazakhstan, Korea, Kyrgyzstan, Lao P.D.R., Lebanon, Libya, Marshall Islands, Micronesia, Mongolia, Morocco, Nepal, Oman, Pakistan, Poland, Russia, Saudi Arabia, Singapore, Sri Lanka, Syria, Tonga, Tuvalu, United Arab Emirates, the United States, and Vietnam. Only Myanmar and Uzbekistan appear to have made no specific endorsement of the humanitarian objectives of the Mine Ban Treaty.
In a similar fashion, Iran “fully share[s] and sympathize[s] with the concern of the international community over the tragic consequences of AP [mines] which kill or maim hundreds of people every week, mostly innocent and defenceless civilians, especially children.”

The nature of these interventions strongly suggests that the association of actors with prior international legal developments has impacted the way in which non-parties conceive of the meaning and application of AP mines. For its part, China has pointedly associated the MBT will a long history of international legal efforts to ameliorate the effects of war:

From the St. Petersburg Declaration and the Geneva Conventions, one can see the greatness of mankind and the progress it has made, testifying that humanitarianism, an important symbol and core element of our civilization, has become the common aspiration of all modern states. It is this common spirit of humanitarianism that we discern in the Ottawa Convention… signifying a new and important effort to preserve human safety. It is for this reason that we applaud the objective in the Convention.

The Chinese Government attaches great importance to humanitarian issues and supports the efforts by the international community in addressing the humanitarian problems caused by landmines.25

Resistant states have therefore frequently endorsed the goals of the MBT, while at the same time seeking to avoid the binding effects of the specifics of its legal obligations. Indeed, then U.S. President Clinton was the first world leader to call for the eventual elimination of AP mines.26

And while continuing to assert their legitimacy under some contingencies, the US has emphasized that it “is committed to eliminating the humanitarian risks posed by landmines.”27

India has also expressed the view that “[a] mine-free world is our shared vision.”28 In this vein,

India remains committed to the objective of a non-discriminatory, universal and global ban on anti-personnel mines through a phased process that addresses the legitimate defence requirements of States, while at the same time ameliorating the humanitarian crises that have resulted from an irresponsible transfer and indiscriminate use of landmines. Other prominent non-parties including China, the Korean Republic and Pakistan have endorsed this formulation.

Even states directly implicated in military operations involving antipersonnel mines have accepted the principled basis of the MBT. While it remains one of the few recent users of mines, the Russian Federation has nonetheless advocated “taking continuous efforts towards [the] goal [of a total ban on AP mines]…. Russia understands no less than anybody else the humanitarian component of the problem. We share the feelings of solidarity with innocent victims of anti-personnel mines…” And Israel—a state that has been conspicuously absent from most mine-
related discussions—has indicated that it “supports a gradual process… to reduce the indiscriminate use of landmines, toward the eventual goal of a total ban.” Some non-parties have gone as far as to explicitly recognize the legal authority of the MBT even while they maintain policies directly at odds with the treaty. According to Nepal, which had previously employed mines domestically, “[i]t is an established fact that the use of antipersonnel mines is an act of severe criminal nature.”

Thus despite an enduring attachment to the utility of AP mines—discussed at length below—many non-party states are nonetheless receptive to the humanitarian basis of the mine ban, including their ultimate eradication. While incomplete, this suggests a strengthening norm associated with the Mine Ban Treaty, since even states that refuse to abandon AP mines entirely have been compelled to express support for the purposes of the ban. Even if undertaken for cynical reasons of avoiding international critique rather than the sincere endorsement of norms, the political consequences of such rhetorical shifts are important since they reinforce the legitimacy of the underlying logic of the ban, and thereby narrow the range of acceptable policy positions. This has frequently manifested as a partial re-conception of military utility that

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32 Israel, Statement by Mr. Giora Becher, Director, Arms Control and Disarmament Department, Ministry of Foreign Affairs, at the 1st Meeting of States Parties, Maputo, Mozambique May 3-7 1999. Document on file with the author.
qualifies the value of AP mines against norms of humanitarian protection.\textsuperscript{34} In making such concessions, non-parties often invoke the same normative justifications shared by treaty proponents, and demonstrate a willingness to employ universally accepted principles derived from the laws of war as the basis for evaluating the efficacy of antipersonnel mines and their prohibition. The advent of the mine ban movement has produced a constitutive change in international society in which even states that resist the legal expression of a norm are nonetheless inclined to partially accept a new role identity as upholders of widely accepted humanitarian norms that dramatically modifies the previous conception of a weapon formerly in frequent use. As anticipated in Chapter 2, this association with other international standards—what I have termed network effects—provides the basis for non-party recognition of the mine ban norm. Such statements thus highlight important ways in which discourse may outstrip, and even directly conflict with, official policy.

This shift has significant political implications, as the competing demands of maintaining an official position asserting the utility of AP mines while at the same time acknowledging the humanitarian logic underpinning the Mine Ban Treaty introduces a form of dissonance that can be exploited by domestic and international actors to push for further change. As anticipated in the work of Risse, Ropp and Sikkink among others, pro-ban advocates have been able to leverage the space provided by partial endorsements of the mine ban norm to pursue argumentatively rational persuasion, and various forms of social pressure.\textsuperscript{35} These processes, in turn, can open the door to further reconsideration of fundamental identities and interests, as state


actors face internal and external pressure to align their formal policies with declared aspirations. This has been the experience of more recent adopters of the MBT like Eritrea, Indonesia, Sudan, Turkey, as discussed above. As a consequence of these normative developments, non-party states face an international environment defined in part by an expanding web of community standards and obligations, and surrounded by a web of advocates. These features of the international social system cannot be fully limited by a reliance on state consent. Thus, while this dissertation focuses primarily on the structural effects of norms at a global level, it is important to recognize that international norms generate the conditions for agency by other actors—including diplomats, civil society representatives and international bureaucracies—in promoting those norms in both international and domestic environments.36

Just as significant for the consolidation of the MBT is the fact that this qualified endorsement from key non-parties arguably invalidates any legal claim as a “persistent objector” to the parallel international norm.37 As Beier has noted, “a norm proscribing a given practice may be binding when a transgressor demonstrates an acceptance of its central validity claims even though it might persist in violating these same principles.”38 Discursive change—in the form of adopting pro-norm positions—thus frequently provides more proximate evidence of the widening influence treaties that would be missed if focused solely on formal membership status. However, many non-parties do retain particular objections to the Mine Ban Treaty, and this fact problematizes any contemporary assessment that the mine ban norm has been effectively


universalized. The divergence between qualified, general recognition of MBT norms, and an enduring opposition to the treaty under present circumstances is addressed in detail in the final section of this chapter.

“Exceptional” Politics: Denials, Justifications, and the Status of the Mine Ban Norm

The observed shift in social expectations has been largely reinforced in moments when the prohibition embodied in the Mine Ban Treaty has come under specific challenge. Constructivist scholars recognize that norms may endure and continue to assert authority in the face of some contrary behaviours. In rendering an assessment of the impact of violations on the status of the mine ban norm, we are here chiefly interested how the given act is situated within the scope of possible behaviours – that is, whether it is understood as a genuine aberration from the regular pattern of state action, or a foreseeable (if regrettable) outcome that is to be expected. “Important here is the intersubjective phenomenon that the transgressor feels compelled to justify (or deny) the violation because of mutually shared expectations that such behaviour is normally unacceptable and requires defence to reconfirm the status of the violator as a legitimate member of international society.”39 The nature of subsequent discourse is therefore vital to the assessment of treaty and thus norm health above and beyond the strict reality of behaviour.

Public Denials

Reports of violations have frequently been met with vigorous denials from implicated actors. In response to allegations that his country had used landmines during operations in the Democratic Republic of the Congo, the Zimbabwean delegate to the Second Meeting of States Parties emphatically denounced the charges, and reiterated Zimbabwe’s support for the MBT:

we strongly feel that this forum is not meant for making wild and unsubstantiated allegations against states Parties to the Convention.... Such a falsehood only serves to destroy the spirit of the Convention. ICBL’s failure to provide evidence or concrete facts for the past two years to show that Zimbabwe is using anti-personnel mines in the Democratic Republic of Congo does not only invalidate these accusations but also smacks of a hidden agenda against my country on its own part.... Zimbabwe will never be diverted or deterred from implementing the provisions of the Ottawa Convention because we have victims of landmines and we know the dangers of using landmines. In fact, Zimbabwe has assumed a leadership role in championing the ban on the use of landmines and their ultimate destruction.\textsuperscript{40}

This response is typical of a pattern that is apparent with other states including Burundi\textsuperscript{41}, Ethiopia\textsuperscript{42}, Georgia\textsuperscript{43}, Guinea-Bissau\textsuperscript{44}, Senegal\textsuperscript{45}, Sudan\textsuperscript{46}, and Uganda\textsuperscript{47}. Responses of this kind are important evidence of an expanding sense of obligation in the international community that can be traced directly to the MBT. Indeed, were it not for a strengthening norm prohibiting the use of AP mines, such incidents would likely go unremarked-upon, and there would be little reason for states to issue denials or otherwise obscure their behaviour. Even if the alleged acts did not in fact take place, and the state was wholly entitled to dispute incorrect information, it is

\textsuperscript{40} Republic of Zimbabwe, Statement at the 2\textsuperscript{nd} Meeting of States Parties, Geneva, September 13, 2000. Notes on file with the author.


\textsuperscript{46} Sudan, 2\textsuperscript{nd} Meeting of States Parties; and Sudan, 3\textsuperscript{rd} Meeting of States Parties.

\textsuperscript{47} After allegations surfaced regarding the use of AP mines by Ugandan security forces during the violence in Kisangani, the government vigorously denied the charges and pledged a full investigation. The results of this internal process were never divulged. Republic of Uganda, Statement by Uganda at the 3\textsuperscript{rd} Meeting of States Parties, Managua, Nicaragua, September 18-21, 2001. Uganda subsequently repeated this position, and also denied that they had resumed production of AP landmines. Republic of Uganda, Statement of Uganda at the Intersessional Standing Committee Meetings, Geneva, January 28 – February 1, 2002. Notes and documents on file with the author. See also ICBL, Landmine Monitor 2009, 757-772.
significant that violations of the Mine Ban Treaty are deemed sufficiently important as to be worthy of response at all. Many treaties are violated and the infringements are often given little notice. It is only because antipersonnel mines have come to be so widely condemned that states should seek to specifically distance themselves from such behaviours.

Two further points are important here. First, the denials have not come solely from full treaty parties, which might be motivated by a fear of sanction—including loss of material benefits or social opprobrium—relating to the non-observance of contractual commitments. A number of the above-mentioned states were not members of the MBT at the time, and possessed no legal obligations according to a traditional consent-based reading of international law. The apparent need to refute accusations—whether factual or not—stemmed instead from a concern for international standing or reputation. Second, the allegations considered here have typically not been framed as more generic violations of the laws of war, such as deliberately targeting civilians or using disproportionate military force per se. Rather, the crux of each challenge and response centred on a much more particular assumption that AP mines, as a specific class of weapons defined by the criteria of the MBT, were particularly illegitimate. A number of conflicts have therefore featured accusations of mine use among belligerents that had the apparent intention of discrediting the opposing side. These developments only make sense in an

\[48\] Thus, in assessing the use of AP mines during the rebellion of 1998, the ICBL determined that “[t]he mines in Bissau seem to have been used in a manner consistent with military doctrine of recording minefields.” Yet the same report went on to note that “[a] Junta spokesperson was quoted recently as saying the use of mines in the conflict is a lamentable situation since Guinea-Bissau is one of the signatories of the Mine Ban Treaty.” See International Campaign to Ban Landmines, “Guinea-Bissau Country Profile,” in Landmine Monitor 1999 (New York: Human Rights Watch, 1999). http://www.themonitor.org/index.php/publications/display?act=submit&pqs_year=1999&pqs_type=lm&pqs_report=guinea_bissau&pqs_section=#Heading2906.
international environment in which the specific prohibition concerning AP mines has expanded beyond a merely consensual commitment among sovereign units to become a prominent independent marker of legitimacy.

_De facto_ rhetorical support for a social standard, even when detached from actual practice, is thus of crucial importance in assessing treaty and norm influence. The fact that actors must conceal their behaviour—rather than openly declaring their non-compliance—provides strong evidence that the mine ban norm has gained acceptance among a significant constituency in the international community such that public violations imply an unpalatable political cost. Behaviour that challenges the core injunctions of the treaty is thus no longer considered appropriate, even if it continues to occur in the shadows. The customary prohibition of torture is instructive here: while abuse undoubtedly occurs with considerable frequency, virtually no one claims that torture is an acceptable or “normal” practice. State agents do not openly declare their activities, and indeed go to great lengths to conceal them or redefine practices they engage in as not constituting torture.\textsuperscript{50} For this reason, covert non-compliance—so long as it does not rise to the level of chronic violation—does not directly threaten the status of norms or their broader institutions, but rather “constitute[s] legally relevant State practice in support of a rule prohibiting the actions in question.”\textsuperscript{51}

\textsuperscript{50} McKeown, “Norm Regress;” Brunnee and Toope, _Legitimacy and Legality in International Law_, 220-270.

\textsuperscript{51} D’Amato, “Custom and Treaty,” 469; Byers, _Custom, Power_, 149.
Exceptional Claims

In a different vein, a number of states have acknowledged violations of the MBT, yet at the same time sought to portray these actions as fundamentally unique or aberrant situations that were not in keeping with a more general respect for treaty obligations. Thus at the Second Meeting of States Parties in September 2000, the Angolan Ambassador specifically identified the ongoing civil war as necessitating his government’s use of antipersonnel mines while signatories to the Mine Ban Treaty:

We ask your understanding for the few antipersonnel mines that the… Armed Forces of Angola, have planted around strategic facilities, when the troops of Mr. Jonas Savimbi wanted to seize power by force, ignoring democratic institutions and bombing villages, communes and certain big cities of the country in an indiscriminate and blind manner. Allow us, Mr President, to affirm here that mining or re-mining land has never been a right of the Angolan state...but rather...the unique way to survive for those that suffer from the injustice and murderous madness of the rebels. The mines that the Angolan army have used are marked and well located, they do not represent any danger for the population nor any difficulty to find them or destroy them.52

Angola’s statement is interesting both for its claim to exceptional mitigation, and for the fact that the acknowledged violations were framed as a limited and humane transgression within previously existing restraints of international law.53 Azerbaijan, Eritrea, and Sri Lanka have respectively made similar statements in confirming past mine use.54

53 Notably Amended Protocol II to the Convention on Certain Conventional Weapons. This legal instrument is discussed further below.
54 In the case of Azerbaijan, “our country was forced to use landmines as a measure of containment from possible resumption of hostilities.” However, “Azerbaijan stopped planting of additional mines.” This latter claim is confirmed by various Landmine Monitor reports. Thus, the use here likely refers to the continued “passive” reliance on existing minefields. Republic of Azerbaijan, Report Under Article 7 of the Convention. November 18, 2008. www.unog.ch/80256EF600585943/288httpPages%29/A5378B203CBE9B8CC12573E7006380FA?OpenDocument
“In the context of the internal armed conflict, the Sri Lankan armed forces were compelled to use anti-personnel landmines for legitimate defensive purposes. Minefields were laid by the security forces in keeping with internationally accepted standards including marking and recording procedures. However, since the signing of the ceasefire agreement on 22nd February 2002, Sri Lankan armed forces have not laid any landmines.” Democratic
In one respect, such claims are inherently problematic for the absolute prohibition of antipersonnel mines, as they suggest some—even highly circumscribed—conditions under which their use might be permitted. Stuart Maslen has argued that Angola’s defence was based on a view “that the Convention should implicitly allow an exception to the core obligations amid an ongoing armed conflict.” The net effect might therefore be to erode the authoritative absoluteness of the ban norm and degrade the central premise of the legal prohibition. While this concern is appropriate, the implications for the broader health of the MBT may not be especially severe. First, the language of the Angolan intervention quoted above can be read as a narrower and more dramatic anomaly, a truly special case in which the purported survival of the state is at stake. As with Azerbaijan and Eritrea, the particular severity of the situation was presented as a necessary exception to a more general support for the MBT, and was not held to lead to a generalized right to use the weapons. In this sense, the exceptional circumstances actually serve to reinforce the authority of the prohibition under normal conditions, and in which the very criteria and scope of “normal” has been greatly expanded. This again is a substantial change from the prevailing pattern before the mine ban movement, in which AP mines were regarded as thoroughly unexceptional weapons. Thus the threshold for violations remains exceedingly high, even if the absolute prohibition has been breached in some discrete cases.

Just as importantly, the justifications were not endorsed by other states—and especially State Parties—as qualifying as legitimate exceptions to the prohibition. Without making reference to any instance in particular, the delegates to the second Meeting of States Parties were clear in their condemnation of on-going mine use: “[w]e implore those States that have declared their commitment to the object and purpose of the Convention and that continue to use anti-

55 Maslen, Commentaries, 77.
personnel mines to recognize that this is a clear violation of their solemn commitment. We call upon all States concerned to respect their commitments.\textsuperscript{56} While some states have justified their use of AP mines under limited conditions, they have not deployed this claim as a means of systematically challenging the legitimacy of the Mine Ban Treaty, and State Parties have not recognized these cases as producing \textit{de facto} exceptions to the universal prohibition concerning AP mine use.\textsuperscript{57}

In much the same fashion, Belarus, Greece, Turkey, and Ukraine have each sought to qualify their failure to meet their respective stockpile destruction deadlines as the result of special circumstances. Interestingly, all have justified the violations in terms of technical challenges, and have not attempted to question the legitimacy of the underlying obligation. Referring to their earlier statements regarding the difficulties associated with the destruction of PFM-type mines\textsuperscript{58}, Belarus and Ukraine have since reiterated that they lack the independent capacities to meet this legal commitment. The violations are moreover held to be the result of the inability of the European Commission, as the contracting partner, to find suitable tenders for the destruction contracts.\textsuperscript{59} These conditions are said to be exacerbated by the numerous national projects aimed at decommissioning Soviet-era weapons which collectively exact “a heavy


\textsuperscript{57} The limits of any normative “slippage” are further reinforced by the fact that numerous other State Parties have refrained from employing AP landmines during ongoing armed conflicts, as described in Chapter 3.


burden for the [n]ational budget… and demand substantial engagement of human resources."60

Greece has similarly blamed its non-compliance on contractual and technical challenges associated with the tendering process and the selection of two private companies to undertake destruction.61 At the same time, the Greek delegation has repeatedly evidenced sensitivity to their outlier status: “the Ministry of Defence [has] proceeded rapidly in the necessary exploratory contracts with other relevant companies in their effort to accelerate the process, taking into consideration the image and prestige of my country on an international level and our respect, regarding our obligations that derive from our participation in the Ottawa Convention.”62 Finally, Turkey has mounted perhaps the most systematic defence in asserting that its choice of destruction techniques—in particular its need to comply with European environmental standards regarding hazardous materials—had necessitated the delay in achieving full compliance.63 Turkey’s framing of the challenge is especially interesting, as it has associated itself with purportedly superior operational standards in excusing its non-compliance, and thereby

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cultivated an image of a serious and responsible actor.\textsuperscript{64} In November 2011, Turkey announced that it had destroyed all of its remaining mines, and was thus in full compliance with Article 4.\textsuperscript{65}

In these four cases, therefore, substantive violations of the MBT have not been used as a means of engaging in a broader challenge of the treaty. Rather, the states in question have instead sought to highlight the exceptional nature of their situations in justifying their non-compliance. At the same time, all have reiterated their support for the spirit and purpose of the MBT, and have done so by explicitly recognizing the specific content of legal obligations as defined by the Mine Ban Treaty.\textsuperscript{66} This suggests two important theoretical points. First, the relative precision and public transparency provided by legalized rules has shaped the responses from treaty parties, as the actors in question have had to frame their policies in terms of agreed commitments articulated by the treaty text. Second, the available discourse offers evidence of the conditioning effect of legal processes and norms, particularly by narrowing the range of socially legitimate behaviours. In justifying violations, states claiming “exceptional” mitigation are concurrently reaffirming the existing legal agreement as the appropriate metric of appropriate behaviour for members of their social community. Making these kinds of particularist claims underscores the view that contrary actions are normally unacceptable, and thus reinforces the intersubjective status of treaty obligations.\textsuperscript{67}

\textsuperscript{64} The Turkish government further sought to underscore a claim that it was already in \textit{de facto} compliance with the treaty as it had destroyed or rendered inoperable all of its stockpiles. Republic of Turkey, Statement at the 10\textsuperscript{th} Meeting of States Parties to the Mine Ban Convention, Under Agenda Item 11c Concerning Article IV of the Convention, Geneva, December 2, 2010. \url{http://www.apminebanconvention.org/meetings-of-the-states-parties/10msp/what-happened/day-4-thursday-2-december/}. This was reiterated in the interview with Dr. Sancar.


\textsuperscript{66} See for example the statements regarding stockpile destruction by Belarus, Greece, Turkey and Ukraine at the 10\textsuperscript{th} Meeting of States Parties. Available online at \url{http://www.apminebanconvention.org/meetings-of-the-states-parties/10msp/what-happened/day-4-thursday-2-december/}.

\textsuperscript{67} Price, “Emerging Customary Norms,” 114.
**Unexceptional Violations**

Much more troubling from the perspective of enlarging the normative consensus, therefore, are instances where states make no particular effort to address their non-compliance through specific denial or qualification. The Russian Federation, for example, has repeatedly acknowledged using antipersonnel mines “to protect facilities of high importance” in Chechnya, Dagestan, Tajikistan, and along the border with Georgia.\(^6\) This use has been presented as an unexceptional part of regular operational policy. The apparent restraint over the past three years, as detailed in Chapter 3, has not been accompanied by a formal rejection of past practice, or any suggestion that this will continue to be observed in the future. More recently, the governments of Libya (under the Gaddafi regime) and Syria have made no specific efforts to justify their use of AP mines as anything other than the normal conduct of military operations against internal enemies. Others including China, India, Israel, Pakistan, and the United States have similarly acknowledged past mine use and have asserted a continued right to employ the weapons. To the extent that such claims endure, they threaten to significantly impede the gradual expansion of the ban norm’s authority among states that resist the formal restraints of the MBT. In particular, what is at risk is a scenario in which the majority of states endorse a strict legal prohibition, while a sub-set of (often powerful) states continue to defend the utility of antipersonnel mines as a legitimate weapon of war, albeit under certain defined conditions, as described below. Such conditions would seem to exclude the possibility of universalizing the MBT via appeals to the customary status of the constituent treaty norms.

Yet as I explain more fully in the final section of this chapter, these policies still indicate an evolving view of AP mines within a changed international legal and political context. Among

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\(^6\) ICBL, *Landmine Monitor* 2009, 1071. Discussions with Russian officials—as noted in the same report—“indicated that forces of the Ministry of Defense, Ministry of Interior, and Border Guards used mines.”
those states that do not deny or justify norm-violating behaviour, few choose to openly highlight such acts, and instead seek to avoid scrutiny of their military operations. This diplomatic avoidance itself suggests that the status of the mine ban norm has become established to such an extent that the use of antipersonnel mines is no longer regarded by the wider international community as unproblematic. Rather than ignoring inconvenient developments, therefore, non-party states are still part of an international social system in which shifting expectations have forced all constituent actors to acknowledge—if not endorse—the mine ban as a feature of the international environment.

Responses to Violations and the Impact on Legal Norms

Non-compliance is much more significant to the extent that contrary behaviours become a regular feature of international practice and discourse, since this would serve to erode the authority of norms. Hence as Price has previously noted, “violations provide the most opportune moments to define and discipline a particular practice as an aberration.”69 A key issue, then, is how relevant actors respond to acknowledged non-compliance—how routine, in effect, has deviance become—and the subsidiary question concerning the appropriate strategies for concerned parties. The record here is mixed, with State Parties and non-governmental campaigners seeking to forge a delicate balance between positive engagement and critique.

The International Campaign to Ban Landmines has long argued for unambiguous statements of support for the mine ban norm in the face of contrary challenges:

The ICBL has always maintained that the annual Meetings of State Parties should not just take stock of treaty implementation, but should also serve the purpose of reinforcing the new international norm against any use or possession of antipersonnel mines by anyone. The ICBL has condemned, and we have called upon States Parties to condemn loudly and consistently those who choose to stay outside of the norm, particularly those who continue to use antipersonnel

69 Price, “Reversing the Gun Sights;” 117.
mines. In the past year, we have again been disappointed with the response to our call. Mine Ban Treaty States Parties have not condemned instances of use regularly or forcefully enough, and, to our knowledge, have taken few if any steps to penalize mine users, diplomatically or otherwise. This meeting, and the meetings related to the Convention on Conventional Weapons, are the prime opportunities for speaking out to stigmatize the use of this barbaric weapon.\(^{70}\)

With that in mind, the ICBL has frequently questioned state practices directly, and sought to stimulate broader discussion of violations among treaty participants.\(^{71}\) For example, the ICBL has publicly criticized states—like Angola, Greece, and Turkey—that have violated core treaty obligations, and has raised questions as to the political commitment to the MBT from these actors.\(^{72}\) In recent years the ICBL has continued to condemn the use of AP mines, most recently by Israel, Libya, Myanmar and Syria in 2011.\(^{73}\) As anticipated in Chapter 2, treaty proponents have utilized MBT meetings to engage in discursively rational interventions in support of the treaty, and have relied on the legal status of the Mine Ban Treaty to classify violations as particularly significant deviations from socially acceptable practice. Some states have taken up the prompt from the NGO community and have expressed concern at the impact non-compliance may have on the health of the mine ban norm.\(^{74}\)


\(^{71}\) International Campaign to Ban Landmines, Statement on Stockpile Destruction, at the 2\(^{nd}\) Review Conference (Cartagena Summit), Cartagena, Colombia, December 2, 2009; and Notes for ICRC Intervention on “Universalisation,” 2\(^{nd}\) Review Conference of the Mine Ban Treaty (Cartagena Summit), Cartagena, Colombia, December 1, 2009. http://www.cartagenasummit.org/daily-summaries-and-statements/day-3-tuesday-1-december/.

\(^{72}\) With regard to the latter, the ICBL has highlighted insufficient political will as the primary cause of non-compliance: “Greece and Turkey simply started the destruction process far too late. Had they initiated the planning process earlier, they would not have had any difficulty meeting their deadlines.” ICBL, Statement on Stockpile Destruction, 2\(^{nd}\) Review Conference. Privately, ICBL campaigners have expanded this public critique to question the sincerity of official commitments to meeting state obligations, and have described the violations as “careless” and “silly.” Katarzyna Derlicka (Advocacy and Campaigning Officer, International Campaign to Ban Landmines), interview with the author, Geneva, October 22, 2009.


\(^{74}\) Declaration of the 2\(^{nd}\) Meeting of States Parties, 11, paragraph 6. Similarly, see Review of the Operation and Status of the Convention, 2. See also the Commonwealth of Australia, Statement on Agenda Item 9(e) Destroying Stockpiled Antipersonnel Mines at the 2\(^{nd}\) Review Conference of the Mine Ban Treaty (Cartagena Summit), Cartagena, Colombia, December 2, 2009. http://www.cartagenasummit.org/daily-summaries-and-statements/day-4-wednesday-2-december/.
Engagements have had the effect of generating greater sensitivity to legal obligations for states like Greece by increasing the perceived social costs of non-conformance.\textsuperscript{75}

Yet public naming-and-shaming may come at a price, especially in the context of a legal community predicated on a spirit of “cooperative compliance… that assumes goodwill on the part of all States Parties and emphasizes resolution of issues in a nonconfrontational manner and assistance to help States Parties to meet their obligations rather than criticism for failing to do so.”\textsuperscript{76} In many instances, therefore, constructive engagement has been the preferred means of reinforcing treaty norms; this is the strategy preferred by the International Committee of the Red Cross, for example.\textsuperscript{77} State Parties have often sought to praise targeted states for their progress and downplay violations, while at the same time calling for increased efforts to meet treaty obligations. In this respect the available discourse reveals internal hierarchies concerning the assessment of the origins and impact of non-compliance. Belarus and Ukraine are typically judged to be subject to significant constraints in their ability to independently complete stockpile destruction; these acknowledged technical challenges result in a generally permissive approach. The consistent nature of statements from these states suggests that such claims are not mere excuses, deployed for the purposes of deliberately avoiding their obligations. The ICRC and State Parties have therefore typically refrained from openly criticizing the two states.\textsuperscript{78}

\textsuperscript{75} As per footnote 62, above.

\textsuperscript{76} Stephen D. Goose, “Goodwill Yields Good Results: Cooperative Compliance and the Mine Ban Treaty,” in Banning Landmines: Disarmament, Citizen Diplomacy, and Human Security, eds. Jody Williams, Stephen D. Goose and Mary Wareham (Lanham: Rowman & Littlefield Publishers, Inc., 2008), 106. A view has been expressed that over time, State Parties may grow tired of making the same statements at each meeting and may sense a declining impact from their interventions. Brinkert, interview 2010.

\textsuperscript{77} For example, “we would like to warmly welcome the participation here in Cartagena of 20 States not parties and to express appreciation for the explicit support nearly all of them have expressed in various fora for the humanitarian objectives of the Convention”. ICRC, Notes for ICRC intervention on “Universalisation,” 2\textsuperscript{nd} Review Conference. Diplomats familiar with the MBT meetings have suggested that naming-and-shaming tactics are likely to backfire and have negative implications for the health of the political dialogue. Pollard interview 2010.

\textsuperscript{78} See for example International Committee of the Red Cross, Statement on Stockpile Destruction, at the 10\textsuperscript{th} Meeting of States Parties, Geneva, December 2, 2010. Canada, Statement Regarding Stockpile Destruction –
while Greece and Turkey have been subjected to greater critique, the general tendency has been to assume good faith and publicly emphasize the successful features of state policy. Unsurprisingly, instances of landmine use—especially from non-party states—have been met with the most overt criticism from other states, as the Syrian example demonstrates.

What might be the effects of these competing approaches on the health of the norm? As already noted, official critiques of other treaty members are politically unpopular, especially within the professional diplomatic community. Among State Parties there thus exists a strong preference for non-confrontational meetings. While salutary for the purposes of a positive environment, the current approach to compliance shifts the burden of norm-enforcement onto a more limited number of state and civil society actors and results in a highly decentralized and ad hoc process. By contrast, clear public condemnations are valuable in reinforcing the international stigma against norm-violating behaviours. Civil society actors have suggested that the absence of coordinated and persistent critique from treaty members has resulted in less social compliance, at the 2nd Review Conference of the Mine Ban Treaty (Cartagena Summit), Cartagena, Colombia, December 2, 2009. www.cartagenasummit.org/daily-summaries-and-statements/day-4-wednesday-2-december/. "We commend Greece and Turkey for proceeding with national stockpile destruction programmes using their own resources. While it remains a concern that neither has yet completed its programme, we note with satisfaction stockpile destruction efforts by Greece and Turkey." Statement by the Co-Chairs of the Standing Committee on Stockpile Destruction (Italy and Zambia), The Status of the Implementation of Article 4, 2nd Review Conference of the Mine Ban Convention (Cartagena Summit), Cartagena, Colombia, December 2, 2009. http://www.cartagenasummit.org/daily-summaries-and-statements/day-4-wednesday-2-december/. However, as noted above, civil society campaigners are privately more critical of both states, and express frustration with the pace of, and political commitment to, meeting missed destruction deadlines. See for example, Canada, Department of Foreign Affairs and International Trade, “Canada Remembers Victims and Condemns Repression on the Anniversary of Syrian Uprising,” Ottawa, March 15, 2012. http://www.international.gc.ca/media/aff/news-communique/2012/03/15a.aspx?lang=eng&view=d; Norway, Ministry of Foreign Affairs, “Norway Condemns Use of Landmines in Syria,” Oslo, March 14, 2012. http://www.regjeringen.no/en/dep/ud/pressesenter/pressemeldinger/2012/landminer.html?id=675079; European Union, Statement by the High Representative Catherine Ashton Condemning the Continued Repression and Violence in Syria and Marking the Anniversary of the Uprising, Brussels, March 15, 2012. A 123/12. http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/129013.pdf. Gabelnick interview 2010. Goose, “Goodwill Yields Good Results,” 108-109. In addition to decreased transparency and efficiency, ICBL campaigners worry that this approach generates a perceived divide between certain states and NGOs and the bulk of State Parties, leading to an “us versus them” mentality. Gabelnick interview 2010.
pressure on non-compliant states than might otherwise have been possible.\textsuperscript{83} Just as significantly, diplomatic recognition of compliance challenges can inadvertently suggest an endorsement of exceptions to established legal rules. To the extent that state discourse seeks to downplay the significance of non-compliance, it can reinforce the emerging normalization of aberrant behaviours and compound the malign effect of the initial violations. In this light, the limited and rather mild responses from other State Parties may actually be more problematic for the enduring health of the MBT than the initial acts themselves. This suggests that greater public engagement in defence of the mine ban norm is warranted, though a broader research agenda should seek to establish the effects of such public activism on the health of a variety of international norms.\textsuperscript{84}

One further observation that emerges from this brief discussion is the extent to which the legal community defined by the Mine Ban Treaty is consequential to the broader development of the prohibitionary norm. The evidence presented here suggests that treaty proponents—both State Parties and associated civil society actors—employ legal criteria to both define and discipline violations of the Mine Ban Treaty, insofar as the treaty is regarded as the benchmark of the more generalized ban norm. For treaty parties, the expectation that states will observe their legal commitments adds further potency to the more widely applicable social taboo governing antipersonnel mines. These same processes bear on questions of membership in the MBT, as those remaining on the outside of the treaty must justify their continued resistance rather than merely regarding this as an unexceptional fact. It is therefore necessary to return to the question

\textsuperscript{83} In an interview, an ICRC representative expressed “disappointment” at the limited response from State Parties concerning missed stockpile destruction deadlines. Interview with Camilla Waszink, Policy Adviser, Arms Unit, Legal Division, International Committee of the Red Cross. Geneva, 23 October 2009. This view has been reinforced in numerous meetings with ICBL representatives.

\textsuperscript{84} Richard Price, “Transnational Civil Society and Advocacy in World Politics,” \textit{World Politics} 55, no. 4 (2003): 585-586. See also the brief discussion in the Conclusion.
of how AP mines are conceived by states currently outside of the MBT legal order, and how that might reflect upon the international authority of the mine ban norm.

**Non-Party Discourse and the Universalization of the Mine Ban Norm**

A central assertion of this dissertation is that norms embodied in multilateral treaties may have effects even on those actors that officially resist their legal application. As demonstrated already, non-party responses to the landmine issue are more varied than their formal membership status in the MBT alone would suggest. Rendering a more holistic assessment of treaty impact thus requires attention to the various ways that the mine ban norm has shifted the social environment in which non-party states must operate. Of particular interest are the reasons employed by non-parties to explain their continued resistance to the legal obligations of the treaty. The differing nature of these justifications offers telling evidence concerning the extent to which the mine ban norm has already exerted influence among current treaty holdouts.

**Material (In)Capacity**

A number of states have signalled that their current outlier status is the result of technical and material impediments rather than opposition to the treaty and ban norm itself. For the Laos People’s Democratic Republic (the state with the most severe concentration of unexploded ordinance on Earth), an inability to meet treaty obligations, and a concern that these commitments will distract from more pressing tasks, is at the root of its failure to join the MBT:

Our concern is to be not able to comply with the 10 years deadline [to clear all mined areas on a state’s territory]. Of course, there is possibility for extension of the deadline. But given the large scale contamination of the country, how many extensions with the States Parties agree to grant to Lao PDR?

…[O]nce the Convention enters into force for Lao PR, the latter will have to devote all efforts to locate, mark and destroy anti-personnel landmines in known or suspected mined areas, and to abandon or stop UXO clearance activities. If this is the case, it will be difficult for the Lao
Government to endorse this concept or principle, because actually, most of the accidents are caused by UXO.\textsuperscript{85}

While lacking these severe challenges, a number of small Pacific island states have justified their non-membership through a similar logic.\textsuperscript{86} States that lack extensive foreign and security policy institutions frequently find it difficult to stay on top of the myriad commitments present in modern international relations. Mongolia, for instance, has indicated that international assistance would be necessary to ensure it was able to meet its membership obligations; this support appears to be a precondition for accession.\textsuperscript{87}

Claims of this kind are less detrimental to the legitimacy of the mine ban norm because the stated source of non-compliance is material incapacity, rather than principled opposition. It is worth remembering that Belarus and Ukraine previously tied their eventual entry to a resolution of technical challenges. Such impediments to ratification can therefore be overcome.\textsuperscript{88} Moreover, such examples further demonstrate how non-parties frequently engage with the implications of new treaties, suggesting yet again that legal developments not only bear on formal treaty


\textsuperscript{86} For example, the Marshall Islands has noted that “limited technical capacity, as well as a variety of immediate and pressing demands, including the effects of global climate change, severely constrain our ability to rapidly respond to all of our complex treaty commitments.” Republic of the Marshall Islands, Statement by Ms. Rina Tareo, Charge D’Affaires of the Mission to the United Nations, Intersessional Standing Committee Meetings, Geneva, June 2 2008. http://www.apminebanconvention.org/intersessional-work-programme/june-2008/gs-summary-and-statements/.

\textsuperscript{87} Mongolia, Statement by Mr. Gunaajav Batjargal, Deputy Director, Department of Multilateral Cooperation, Ministry of Foreign Affairs and Trade, at the 9\textsuperscript{th} Meeting of States Parties, Geneva, November 26, 2008. http://www.apminebanconvention.org/meetings-of-the-states-parties/9msp/what-happened/day-3-wednesday-26-november/.

\textsuperscript{88} Of course, in some cases material incapacity and technical challenges may pose greater impediments to resolution than principled objections. For example, one might argue that enacting sufficiently robust reductions on carbon emissions is beyond the scope of many states, regardless of the depth of acknowledgement of the problem and the political will needed to address it. I do not engage this subject in any detail here, other than to simply point out that the experience in the MBT case may not be reflected in all multilateral issue areas.
members. It is therefore significant that current non-parties like Laos, the Marshall Islands, and Mongolia have sought to ally themselves with the principles and commitments of the Mine Ban Treaty: “[a]lthough Laos is not yet party to the Ottawa Convention, it has no objection against the provisions of the Convention”, and is in compliance with the majority of its requirements.89 Price has previously suggested the adoption of legalistic language is a key process through which states may progressively internalize the social expectations of legal obligations.90 For this reason, the three above-mentioned states are frequently identified as among the states most likely to join the Mine Ban Treaty.91

National Security and Claims of Necessity

A number of non-parties have invoked specific security conditions as the cause of their continued ambivalence towards the Mine Ban Treaty. For example, Armenia and Azerbaijan have blamed their intractable conflict over Nagorno-Karabakh for their failure to join, and have tied their own accession to compliance by the other side.92 Others including Cuba, Lebanon, Morocco, Nepal, South Korea, and Sri Lanka have followed suit in claiming that their particular security environment precludes accession to the MBT at this time, as antipersonnel mines provide a necessary means of defence. In a variant of this logic, Georgia and Somalia have long held that an inability to assert effective control over the entirety of their national territory—in effect, a deficit of security capacity—renders compliance with treaty obligations impossible.93

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89 Laos, 8th Meeting of States Parties and Intersessional Standing Committee, June 2008.
91 Brinkert, interviews 2009 and 2010; Derlicka interviews 2009 and 2010.
92 For a concise statement see Azerbaijan, Report Under Article 7.
Yet in keeping with the theme introduced above, in most cases claims of special circumstances are coupled with a general recognition of the legitimacy of the mine ban norm and an emphasis on extensive informal compliance.

The Government of Azerbaijan has supported from the outset the idea of having a comprehensive international legal document on prohibition of use, stockpiling, production and transfer of antipersonnel mines…. Azerbaijan shares all concerns [of the Mine Ban Treaty] and is involved neither in transfer, transportation, nor in production of antipersonnel mines.\(^94\)

On a number of occasions, Georgia has similarly stated that it “shares the principles and objectives of the Ottawa Convention…. Georgia is convinced that the negative impact of landmines far outweigh their military value”\(^95\) Thus even in situations of formal ambivalence, many non-parties feel it necessary to explicitly associate themselves with the core obligations of the MBT. It is important to note that this rhetorical strategy invokes both the particular legal criteria of the treaty and the humanitarian framing rooted in established principles of international law, further reinforcing the point that legal developments gain influence within interconnected networks of social meaning. The effect of the mine ban norm has thus been to exclude previously acceptable forms of discourse, such that non-parties express support for a legal institution to which they cannot fully adhere. This can then “entrap” these actors within a rhetorical framework in which a significant discursive change—reversing the position in favour of a broader claim to the “normalcy” of antipersonnel mines—would be recognized as a major deviation with political consequences.\(^96\)

These statements also create space for domestic constituencies and international proponents to further pressure states to formalize support for norms via adoption of binding legal


\(^95\) Georgia, 7th Meeting of States Parties. Similarly, “If not for the current military situation… Sri Lanka would have been among the first group of member countries who have ratified the convention.” Sri Lanka, 1st Meeting of States Parties.

\(^96\) For a discussion in the context of human rights norms, see Risse and Sikkink, “Socialization of International Human Rights Norms,” 16 and 27.
commitments. Finland and Poland, for example, have long insisted that the elimination of AP mines could only occur once alternative military systems were available to replace these operational functions, including border security (Finland) and protection of anti-tank mines (Poland). Yet these states have remained among the MBT’s most consistent supporters:

Poland’s position with respect to the Convention… remains unchanged. We endorse the ideals upon which the Ottawa process has been anchored and thus signed the Mine Ban Treaty [in] December 1997. We are fully committed to the Mine Ban Treaty and are taking every possible effort to ratify it at the soonest possible date…. It is also worth reiterating that Poland—even though not a state-party to the Convention—has partially implemented the Mine Ban Treaty. We do not produce, export or use anti-personnel mines in the military operations. Neither do we have any mined areas on the territory of Poland.

In lieu of immediate membership, one of the proximate effects of the MBT has thus been to progressively foreclose policy options that violate the terms of the norm. The cases of Finland and Poland are archetypal of such a process, as the political desire to adhere to the mine ban stimulated a dedicated search for alternative technologies to replace AP mines in military doctrine. This effort has coincided with, and been informed by, a perceived improvement in the

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97 The primary strategic concern for both nations has been perceived vulnerability to a Russian invasion on their eastern borders. In previous Polish military doctrine, antipersonnel mines were envisioned strictly as a means of protecting deployed anti-tank mine fields. Dr. (Colonel) Marek Zadrozny (Counsellor and Military Adviser, Permanent Mission of Poland to the United Nations Office in Geneva), interview with the author, Geneva, October 27, 2009; and personal email correspondence with Dr. Zadrozny, June 16, 2012. Given similar geographic and historical concerns relating to a perceived threat from the Russian Federation, it is interesting to compare the experiences of Finland and Poland with those of the Baltic states. Estonia, Latvia, and Lithuania all previously cited fragile security conditions as the reason for their ambivalence to the MBT. After being granted membership in the North Atlantic Treaty Organization, all three joined the Mine Ban Treaty. For brief analysis, see Paul Chamberlain and David Long, “Europe and the Ottawa Treaty: Compliance with Exceptions and Loopholes,” in Landmines and Human Security: International Politics and War’s Hidden Legacy, eds. Richard A. Matthew, Bryan McDonald, and Kenneth R. Rutherford (Albany, New York: State University of New York Press, 2004), 87-88.

98 Republic of Poland, Statement by H.E. Zdzislaw Rapacki, Head of the Polish Observer Delegation, at the Intersessional Standing Committee Meetings, Geneva, April 23, 2007. http://www.apminebanconvention.org/intersessional-work-programme/april-2007/gs-summary-and-statements/. Similarly, Republic of Finland, Statement at the 4th Meeting of States Parties, Geneva, September 18, 2002. http://www.apminebanconvention.org/meetings-of-the-states-parties/4msp/dailysummaries-and-statements/update-day-3/. Finland and Poland have previously indicated that antipersonnel mines constitute a key component of military doctrine and can only be eliminated once suitable alternative defensive systems are developed. Interestingly, both states have noted that they do not have active minefields; rather mines are retained in stockpiles in peacetime, and would only be deployed in the event of an attack.
security challenges facing the two states. Finland therefore ratified the MBT in January 2012 and Poland is expected to follow suit shortly. Clearly, then, pro-norm discourse was not mere rhetoric as sceptics would maintain, nor are such cases adequately captured as states doing what they would have done anyway in absence of treaty.

Constructivists have convincingly argued that material conditions are not transcendental, but are only given meaning through processes of social interaction. The experience of the Mine Ban Treaty suggests that while concerns for military utility and necessity can impede the full acceptance of treaty obligations, they may also interact with evolving conceptions of security to produce greater internalization of legal norms over time. The decision by Finland and Poland to formally join the MBT occasioned a psychological shift in which relevant policy actors accepted that national security goals could be achieved without antipersonnel mines. The critical factor here appears to be the interaction of an external authoritative standard with domestically derived perception of interests, in which the latter were revised in view of a powerful social stigma concerning the weapons. This is precisely the mechanism articulated by Price’s 1998 article on the emergence of the mine ban norm. To this end, interview subjects

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101 Derlicka interview 2010; Brinkert, interview 2010; Dakash interview, and Zadrozny interviews 2009 and 2010. Interestingly, this occurred within the uniformed armed forces prior to some members of the political elite. According to interview sources, a 2003-2004 internal review by the Polish Armed Forces concluded that AP mines were no longer essential to their operational plans. This led to the 2004 announcement that Poland would ratify the Convention by 2006. Subsequent national elections resulted in a more nationalistic government in Poland that created favourable conditions for some defence experts and advisers to try to convince decision makers that renunciation of AP mines would evidently be harmful to the Polish defence system. The new Minister of Defence has been identified as the primary source of the decision to reverse the earlier commitment and delay ratification, initially until 2015. However, the Polish Ministry of Foreign Affairs has long been supportive of the MBT, and a compromise solution has been reached for official ratification in 2012. Zadrozny interview 2010 and Derlicka interview 2010. I thank Dr. Zadrozny for helpful clarification of this point in subsequent email correspondence.

102 Price, “Reversing the Gun Sights,” especially 632 and 635.
repeatedly noted the significant social pressure facing Finland and Poland from civil society actors and State Parties, especially those within the European Union. Ultimately, the legitimacy of the mine ban norm has made it politically intolerable to remain outside of a community to which both states otherwise naturally align.

The above suggests that the real or perceived improvement in security conditions can lead to an increased sensitivity to legal norms. Such processes may be especially prevalent in the wake of significant political transitions. Nepal and Sri Lanka, for example, have suggested that the conclusion of long-running violent insurgencies may improve the prospects for future MBT accession. Yet such assessments are not strictly rooted in a material judgement that mines are no longer useful (as a realist account would suggest), but rather rely to a substantial degree on shifting conceptions of the appropriate behaviour in light of other valued principles occasioned by the Mine Ban Treaty and its association with prior international humanitarian law standards. This influence on the evaluation of opportunities and consequences is a foundational way that norms influence the construction of state interests, with consequent impacts on decision-making and policy. These processes, however, are fragile, and may be arrested or reversed. As such, the refusal to immediately adopt the mine ban as leaves room at both political and operational levels to envision the use of AP mines. For example, it appears that despite the recent cessation of hostilities, the armed forces of Nepal and Sri Lanka both wish to retain AP mines in case of renewed insurgencies. Thus, in the absence of the formal commitments inherent in a binding legal agreement, the internalization of treaty norms remains nascent.

104 Derlicka interview 2010.
Utility, Humanitarian Impact, and the Enduring Significance of AP Landmines

Benesch et al. have argued that the Mine Ban Treaty can be plausibly identified as a customary rule of international law—and for our purposes a broadly valid international norm—once prominent states “subscribe to the ban against [antipersonnel mines], or, at least, when those states cease to defend their use of the weapons.” A review of the empirical record would suggest that these conditions have been largely realized. Indeed, the number of confirmed mine users, as well as rates of production and transfer, have declined rapidly since 1997. And, as detailed above, non-party states have broadly endorsed the humanitarian basis of the MBT and acknowledged their desire for the eventual eradication of antipersonnel mines, even while stopping short of accepting a legal ban under current conditions. On these terms, AP mines appear to have been widely stigmatized in international society.

However—and much more problematic for the extension of the mine ban norm—attention to the discursive record reveals that many prominent non-parties continue to envision a military role for AP mines. Among these states, resistance to the MBT extends beyond the more discrete concerns discussed above, and is instead premised on a broad invocation of military necessity and the legitimate right of state self-defence. Thus in its 2004 policy review the United States announced that it “will not join the Ottawa Convention because its terms would have required us to give up a needed military capability.” This merely restated the prior official view that antipersonnel mines remain vital to operational plans for the defence of South Korea and ensuring the efficacy of anti-vehicle mine systems.

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105 Benesch et al., “International Customary Law.”
106 Interestingly, this very fact belies any materialist claims that the landmine ban was an easy case international governance of a weapon with dubious utility.
107 United States Department of State, Fact Sheet.
108 United States, Anti-Personnel Landmines: Seeking Support for U.S. Positions at Oslo Conference; and Proposed U.S. Amendments, both presented at the Oslo Diplomatic Conference, September 1997. Documents on file with the author. These fundamental concerns were noted by President Clinton soon after the conclusion of the MBT: “One of
This perspective is reflected in the discourse of other non-parties. In the Israeli view, AP mines continue to provide an essential means of securing threatened borders and “ensuring the operational requirements and safety of our troops and civilians.” The Russian Federation has been less candid, but its views can be inferred from the reliance on antipersonnel mines in military operations in Chechnya and elsewhere. Indeed, interview subjects have indicated that Russian officials remain sceptical of the MBT, and are unlikely to significantly revise their views in the foreseeable future. The Chinese government has asserted that

[to some countries, especially developing ones, (antipersonnel landmines), as a defensive weapon, (are) still an important military means for safeguarding national sovereignty and preventing foreign invasion. Under the present situation, when international conflicts [pop] up here and there, and foreign interference is on the rise, APLs are still of important practical significance for countries like China, who lack advanced defensive weapons, to defend their national sovereignty and territorial integrity.

India has similarly highlighted “the limitations of [the Mine Ban] Convention in not addressing national security concerns of States with long land borders wherein minefields at frontiers will continue to form an important component of defensive layout.” Thus embedded within this necessity discourse are frequent allusions to the value of landmines in providing an inexpensive

the biggest disappointments I've had as President, a bitter disappointment for me, is that I could not sign in good conscience the treaty banning land mines…. I couldn't do it because the way the treaty was worded was unfair to the United States and to our Korean allies in meeting our responsibilities along the DMZ in South Korea, and because it outlawed our anti-tank mines while leaving every other country intact. And I thought it was unfair. But it just killed me…. Thinking and feeling lead you to the conclusion that this treaty should be ratified.” United States, White House Office of the Press Secretary, Remarks by the President at Comprehensive Test Ban Treaty Event, Washington, D.C.: White House East Room, October 6, 1999. Notes on file with the author. See also Maslen, Commentaries, 8. In this respect, U.S. policy on landmines features fundamental continuity between the Clinton and George W. Bush administrations.

109 Israel’s situation is unique in the international arena: It is one of the only nations whose borders remain threatened and contested by some of its neighbouring military forces. Israel is engaged in ongoing defensive operations against terrorists who attack civilians and infiltrate our borders. Thus, we remain uniquely unable, at present, to stand behind the immediate enactment of a total ban on landmines.” Israel, 1st Meeting of States Parties. Similarly, see Korea, Ottawa Conference.

110 Brinkert, interview 2010; Derlicka interview 2010; and Peter Kolarov (Head, Humanitarian Conventions Section, Office for Disarmament Affairs, Geneva), interview with the author, Geneva, October 21, 2009.

111 China, 1st Meeting of States Parties; and China, 5th Meeting of States Parties.

112 India, 6th Meeting of States Parties. See also Beier, “Siting Indiscriminacy.”
defensive capacity. This has been repeated by a variety of less powerful states including Cuba, Egypt, Kazakhstan, Kyrgyzstan, Libya, Mongolia, Syria, Uzbekistan and Vietnam.\footnote{A related strand of this critique argues not only that antipersonnel mines are acceptable weapons, but equally that the prohibitionary norm enshrined in the MBT may be fundamentally discriminatory. Egypt and Libya (prior to their respective revolutions) have given the most extensive articulation of this line of reasoning, and argued that the Mine Ban Treaty not only does not recognize the defensive needs of smaller states, but is actually prejudicial to their interests because it ascribes the legal obligation for clearing AP mines to the state on whose territory the emplaced mines reside, rather than the state(s) who initially laid them. See for example Arab Republic of Egypt, Statement by Egypt at the Nairobi Summit for a Mine-Free World (First Review Conference), Nairobi, Kenya, December 3, 2004; and the Great Socialist People's Libyan Arab Jamahiriya, Statement by H.E. Ambassador Najat M. Al-Hajjaji, Permanent Representative to the United Nations in Geneva, at the Intersessional Standing Committee Meetings, June 17, 2005. Documents on file with the author.}

Despite the variously expressed content of necessity-based objections, all are ultimately grounded in a commitment to the enduring utility of antipersonnel mines in at least some circumstances.\footnote{Beier, “Siting Indiscriminacy,” 312.} Yet these views are set against a widespread recognition of the severe impacts AP mines present to civilian populations, which was itself the product of the initial genesis of the mine ban movement in the early 1990s. For many MBT opponents, the solution to this apparent disconnect was to seek to avoid a complete ban on AP mines by inverting the central causal claim of the mine ban movement—that landmines by their design are inherently indiscriminate—and instead emphasizing the particular conditions of their use as the cause of unacceptable humanitarian impact. “Landmines, by this logic, are not illegitimate – only such practices as result in dire human consequences.”\footnote{The key distinction here is that APII regulates—rather than bans altogether—the use, production, stockpiling, and transfer of antipersonnel landmines. In particular, Article 5(2) of the treaty permits the use of AP landmines that...} In the view of many non-parties, then, \textit{restrictions} on the use of antipersonnel mines, rather than an outright ban, are the most appropriate means of addressing the threat AP mines pose to civilians. In particular, 1996 Amended Protocol II to the Convention on Certain Conventional Weapons (CCW) has been widely endorsed by prominent opponents of the Mine Ban Treaty as providing the appropriate balance of regulation while still recognizing the prerogatives of military powers.\footnote{Brinkert, interview 2009.} According to the Chinese delegation to the
CCW Review Conference, “These important measures [enshrined in AP II] will effectively prevent the irresponsible use of landmines which caused civilian casualties and injuries and reduce the threat of landmines to the peaceful life of civilians.”

This framing reverses the assumptions of agency and intent central to the mine ban movement to argue instead that the nature of mine use—rather than the existence of the weapons themselves—constitutes the source of adverse outcomes.

In announcing its new policy on antipersonnel mines in February 2004, the Bush administration explicitly adopted this framing, and asserted that a reliance on newer “smart” mines would alleviate suffering caused by older technologies at a more acceptable cost.

[T]he President's policy focuses on the kinds of landmines that have caused the humanitarian crisis, namely persistent landmines, and it extends to all persistent landmines because the roads and fields we are helping to clear, in the Balkans, Africa, Asia and elsewhere, are infested with lethal anti-vehicle landmines in addition to the live anti-personnel landmines…. The evidence is clear that self-destruct and self-deactivate landmine munitions do not contribute to the grave risks of civilian injury that we find with persistent landmines that can and do, literally, wait for decades before claiming an innocent victim…. In sum, the President's policy strikes an appropriate balance that accommodates two important national interests: It takes significant and comprehensive steps… toward surmounting the global problem caused by persistent landmines, while at the same time meeting the needs of our military for defensive capabilities that may save American and friendly forces' lives in combat.


The key feature of the US approach was to identify the persistence of landmines as the source of their humanitarian impact, and thus their impermissibility under existing humanitarian norms. Yet these features could be, it was argued, eliminated via technical changes and were not inherent in the class of weapons themselves. Seen in this light, it is possible to assert the legitimacy of AP mines as “normal” weapons subject to proper design and use. While not necessarily endorsing the technological solution implied by the 2004 Bush policy, the majority of states currently outside of the MBT regime have sought to justify their retention of antipersonnel mines by contesting the indiscriminacy claim at the heart of the mine ban norm. Fundamental to this alternative view is the assertion that antipersonnel mines can be employed in ways that respect the central principles of discrimination and proportionality that are the basis of existing international humanitarian law.

There are thus two separate legal institutions governing antipersonnel mines in contemporary international society. In the view of many practitioners, APII and the MBT are reinforcing and mutually compatible: despite considerable overlap in their subject matter, the treaties differ in terms of the breadth of the weapons they address, and the depth of the obligations they impose. Many states that remain outside of the Mine Ban Treaty are parties to Amended Protocol II, as are the majority of State Parties to the MBT. When taken together, then, APII and the MBT provide an overlapping web of legal obligations governing the possession and

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121 Indeed, some have gone so far as to argue that if the continued use of AP mines avoids employment of other, less discrete forms of violent force, they may result in a more humane outcome. Korea, Ottawa Conference. See also Beier, “Siting Indiscriminacy,” 313.
122 Kolarov interview.
use of antipersonnel, anti-vehicle, and various improvised weapons.\textsuperscript{123} From the perspective of this dissertation, however, the enduring preference of some prominent states for the lower legal standard enshrined in Amended Protocol II holds direct implications for the prospective universalization of the mine ban norm. In short, supporters of the APII approach endorse the view that a properly designed and enforced regulatory regime can achieve the same humanitarian aim—to reduce or eliminate civilian casualties caused by antipersonnel mines—as a complete ban. APII is thus best understood not as a parallel or subsidiary legal standard, but rather a different source of authority that undermines a prospective international consensus surrounding the prohibitionary AP mine norm. This repurposing of the humanitarian discourse thus suggests one way in which the network effects discussed in Chapter 2 may actually provide grounds for \textit{challenging} the extension of non-great power treaties and norms, by providing a plausible alternative configuration of norms and rules to justify divergent policy choices.

Here again, though, there are also important limits to non-party contestation implied by the theoretical account developed in this dissertation. The most salient point is that emergent norms subsequently enshrined in a treaty also have wider application as social standards bearing on all actors in the international system. It should be recalled that the negotiation of Amended Protocol II was itself a response to the early efforts of the nascent mine ban movement. Hence even without endorsing the MBT itself, non-party states have largely accepted a reconstructed understanding of the longstanding and previously stable principle of military necessity, so as to recognize the salience of humanitarian norms in the evaluation of the legitimacy and legality of antipersonnel mines.\textsuperscript{124} This shift is incomplete, as the above section has demonstrated.

\textsuperscript{123} States that have yet to join the Mine Ban Treaty are still subject to APII’s regulatory regime governing anti-vehicle, antipersonnel, and various improvised weapons. For State Parties to the MBT, the Mine Ban Treaty constitutes the binding—and more stringent—set of commitments with respect to AP landmines.

\textsuperscript{124} I thank Professor Byers for suggesting this point.
However, it is important not to lose sight of the extent to which the re-conception of a formerly central practice of warfare represents a genuinely transformative event in world politics.

One major effect of the mine ban movement for non-parties, therefore, has been to narrow the conditions under which antipersonnel mines may be permissibly employed, since APII also places restrictions on their use. The strategic avoidance of the ban through an alternative legal structure thus reflects the influence of the mine ban norm in shaping expectations concerning appropriate behaviour. Indeed, it is only because the ban norm has become so pervasive that non-parties must continue to publicly justify their non-participation in terms of other standards.¹²⁵ This in turn has the effect of reaffirming the legal realm as the legitimate arbiter of state action and provides grounds for assessing policy outcomes on the basis of intersubjectively negotiated criteria. Hence even general endorsement of the humanitarian purpose of the Mine Ban Treaty is not mere cheap talk as sceptics would suggest, since the instrumental use of moral discourse—agreeing with international norms without sincere internalization in order to achieve other political, economic or social (status) ends—can lead to a form of rhetorical entrapment that generates further socialization pressures over time. Findings from the literature on human rights norms offer an instructive parallel here.

The more [states] ‘talk the talk,’ however, the more they entangle themselves in a moral discourse which they cannot escape in the long run. In the beginning, they might use arguments in order to further their instrumentally defined interests, that is, they engage in rhetoric. The more they justify their interests, however, the more others will start challenging their arguments and the validity claims inherent in them. At this point, governments need to respond by providing further arguments. They become entangled in arguments and the logic of argumentative rationality slowly but surely takes over.¹²⁶

¹²⁶ Risse and Sikkink, “Socialization of International Human Rights Norms,” 16; also 27.
This discursive shift can therefore offer initial impetus to further pressure and change. “These developments have made it increasingly difficult for the holdouts to square their rhetoric with their actual conduct and, to the extent that they jockey to share in the new moral high ground associated with the prohibition… they are apt to find themselves bound by some measure of the obligations that accompany it.”  

Adopting the principled framework advanced by ban advocates has thus left opponents of the Mine Ban Treaty vulnerable to subsequent assessments on these grounds by pro-ban constituencies that attempt to hold them to account. Evidence that the restrictions embodied in Amended Protocol II have not stemmed the tide of new antipersonnel mine victims, for example, would likely generate further social pressure to formally adopt the full prohibition. Determining the relative humanitarian impact of the two treaties would thus go a long way to informing these political and legal debates, and is thus a valuable subject for future research.

More broadly, then, the Mine Ban Treaty’s influence among non-party states is evident to the extent that it has further clarified the humanitarian threat posed by antipersonnel mines and thereby served as a focal point for the discursive agency of external actors like states, civil society actors and international institutions themselves to pressure for the fuller adoption of the MBT and its norm. Even in the absence of a legal commitment to the full prohibition, non-parties bear the marks of the social expectations embodied in the Mine Ban treaty, and must now engage with the prohibitionary norm as a reality of international politics. The fact that many non-parties to claim an enduring right to employ antipersonnel mines must therefore be understood in the context of a rapidly declining rate of actual use, production and transfer internationally. Recognition of the MBT as a feature of international society also reaffirms the general presumption that legal procedures are the appropriate means of structuring international practice.

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concerning the use of force, thus further marginalizing pure power politics from the menu of options available to non-parties and especially great powers.  

These developments have the effect of further entrenching the underlying premise upon which the MBT is predicated because the associated discursive interventions are tied to the broader universe of norms and rules that structure international society. As Richard Price has noted, non-parties “that have sought legitimacy for their efforts to resist an emerging obligatory norm on AP landmines have been able to do so only by reinforcing the constitutive and customary norms of warfare and humanitarian law, and it is those very norms which lend support to an emerging customary norm against the use of AP landmines.” This conforms to the theoretical account advanced in Chapter 2 to the effect that norms gain authority from their network associations and may come to influence even those states that do not recognize the specific treaty as a legally binding obligation. Amended Protocol II might therefore be properly understood, for some states at least, as an intermediary stage in full adoption of mine ban norm, in which the employment of a humanitarian discourse ultimately has the effect of drawing non-parties progressively closer to the Mine Ban Treaty’s normative and legal community. In this respect, the widespread acceptance among non-parties for a complete ban at some future point seems increasingly significant.

**Conclusion: The Normative Status of the Mine Ban Treaty**

In order for the Mine Ban Treaty to be judged effective at changing state policy concerning antipersonnel mines, we must be able to ascribe observed patterns of change to the influence of the treaty and its norm, rather than mere coincidence. Identifying the ways in which

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behaviour and discourse converge and diverge is therefore an important cut at the heart of a holistic account of MBT influence, and provides a means of detecting effects of norms that may transcend formal legal membership.\textsuperscript{130} What can we conclude from the preceding analysis?

Explicit public endorsements from State Parties suggest that much of the observed compliance is owing to a strong fidelity with the legal obligations enshrined in the MBT. For these states, the mine ban movement generated a change in which antipersonnel mines acquired a new meaning in the context of a parallel redefinition of the scope and limits of national security and the content of state interests. In short, AP mines have come to be seen as exceptional weapons via longer-term changes in social conceptions concerning the appropriate conduct of war, and more particularly in an altered view of the balance between military utility and humanitarian impact embodied in the Mine Ban Treaty. It is this fundamental shift that has driven adherence to treaty rules, rather than epiphenomenal factors like convenience or pre-existing policy symmetries.

An accruing sensitivity to community obligations is also apparent in states that are not members of the legal agreement. The various positions deployed by non-parties—whether based in narrow terms of capacity or security, or relying on broader conceptions of military necessity—largely concede the premise advanced by mine ban proponents that the widespread use of antipersonnel mines generated a pervasive humanitarian crisis. At the same time, most current non-parties have endorsed the goal of an ultimate prohibition, even if this remains a distant target. Non-parties must now operate in an international system that has experienced a rapid change in a heretofore-stable expectation concerning the accepted use of military force. The

\textsuperscript{130} Without closely tracing the policy process discrete countries there is naturally a limit to the kind of causal claims one can make in this respect. Instead, the purpose of this chapter has been to trace official discourse across the international system as a whole, to establish correlations between behaviour—as presented in Chapter 3—and norm commitment which in turn provides important if necessarily incomplete evidence of treaty influence.
mine ban movement was clearly the focal point for this shift, and these states frequently reference the MBT even as they seek to justify their continued non-participation. Thus stating broad support while still resisting the specific legal commitments of the treaty is not necessarily mere cynical statecraft. “Rather, engaging in such legal discourse can mark a crucial step in the process of legal obligation imparting its influence on the identities and purposes of states.”\textsuperscript{131} Indeed, this effect is apparent in the extent to which even resistant states have qualified and narrowed their expectations concerning the legitimate scope of antipersonnel mines. Even when constrained within the parameters of Amended Protocol II instead of the Mine Ban Treaty, contestation takes place on legal and empirical terms, rather than more base political or economic grounds. This is itself a notable development and evidence of the broader social effects initiated by the mine ban movement and resulting treaty and norm.

Moreover, the MBT appears influential even in moments where its authority is challenged by violations. The pattern of rhetorical denials, obfuscations, and qualified justifications further illustrates the discursive authority and disciplinary effect legal institutions may have in international society. Indeed, were it not for the existence of a robust international legal institution and norm prohibiting AP mines, the political costs of public non-conformance would be considerably lower. Exceptions to date have tended to reinforce rather than degrade the status of the mine ban norm as a legal and social obligation, especially because the volume of violations (and the response to them) has not led to a normalization of contrary practice. Discursive interventions over actual and alleged non-compliance frequently refer to the Mine Ban Treaty as the explicit standard against which actions are to be assessed; this is a significant way that the MBT can be said to have altered the international social environment. At a minimum, then, dominant global discourses have the effect of reinforcing the sense of

antipersonnel landmines as a “special” category of weapons. This represents a clear departure from the prior status quo in which mines did not warrant special attention as particularly problematic tools of warfare. Recent US critiques of Syrian mine use, for example, are only comprehensible in light of this revised social understanding.\(^\text{132}\)

The experience thus confirms the theoretical account developed at the outset of this dissertation in two particular respects. First, the prohibition on antipersonnel mines has clearly benefitted from a strategic association with foundational principles of international humanitarian law, most notably military necessity, discrimination and proportionality. Yet at the same time, this process also involved the application of existing law to new circumstances that helped to reconstruct the meaning of these prior legal standards. Thus the stigmatization of AP mines draws authority from the broader web of established norms and rules, but equally implies the reconsideration of these standards in a new social setting. These processes are interactive, further illustrating the dynamic social environment in which international law resides. Second, both treaty members and non-parties have frequently invoked the Mine Ban Treaty as the relevant standard in assessing the contemporary status of antipersonnel mines. For State Parties, the MBT is unambiguously the basis for a legal community; while some prominent non-parties do find alternative legal basis in Amended Protocol II, their interactions suggest that the reach of the MBT in setting social expectations is unavoidable. The lesson here is that while the Mine Ban Treaty is not universally observed as a legally-binding institution, the treaty anchors a broader social norm and provides the basis for a diverse set of obligations in the international system.

\(^{132}\) “[W]e have very credible reporting that the Syrian regime is now planting anti-personnel landmines on some of the escape routes that refugees have been using to flee the violence and to take shelter in neighboring countries like Turkey and Lebanon. So using something that was designed for purely military purposes to fence their own people in, it’s just horrific.” United States of America, Department of State, Daily Press Briefing by Victoria Nuland, Spokesperson, Washington, D.C., March 13, 2012. http://www.state.gov/r/pa/prs/dpb/2012/03/185696.htm.
Scholars have rightly regarded the Mine Ban Treaty as an archetypal example of how international legal institutions and norms may be created in the face of great power opposition. What has been much less apparent to this point is whether the initial diplomatic strategy has been borne out by subsequent experience. The preceding analysis demonstrates that in the case of antipersonnel mines, the theoretical interest in the social influence of such initiatives is well placed. The MBT has proven effective at substantiating new legal commitments for a wide array of actors—as evidenced by its extensive formal membership—and has shaped state conduct even among non-parties. The available evidence thus strongly suggests that the Mine Ban Treaty—as both a legal and social phenomenon—has substantially shifted international expectations concerning the appropriateness of AP mines. Their stigmatization has shaped the ways that states across the international system conceive of their obligations and, more fundamentally, render judgements regarding appropriate conduct. These social processes are reflected in the behavioural patterns illuminated in the previous chapter, and provide a convincing explanation for these empirical observations. In a number of respects the International Criminal Court presents some different conclusions on this score, as will be addressed in the next three chapters.
CHAPTER FIVE:
STATE BEHAVIOUR AND THE ICC

How should we evaluate the influence of the International Criminal Court, given its internal complexities and multifaceted roles? As Nicole Deitelhoff has observed,

[a]lthough the Rome statute formally establishes an institution, the ICC being designed to enforce the compliance with already existing norms, it also established a new norm: the duty of international prosecution of serious violations of humanitarian law…. This establishment of a duty to international prosecution, however, represents a sharp contrast to the earlier normative solution… which demanded that international crimes should be nationally prosecuted.¹

At its core, therefore, the Rome Statute seeks to establish a new international norm concerning the appropriate response to grave crimes. One the one hand, states are now obliged to investigate and (if necessary) criminally sanction individual human beings for acts of atrocity, via a set of internationally-negotiated judicial standards. On the other hand, by joining the Rome Statute, states accept a new supranational body with the authority to conduct its own investigations and trials, and to evaluate (and potentially intervene in) domestic legal proceedings. In this latter respect, the normative innovation of the Rome Statute concerns the willingness of states to turn over some measure of their sovereign right to prosecute their nationals to a permanent international body over which they cannot exercise complete control.

[The] goal [of many delegates at the Rome negotiations] was to limit the future discretion of individual states by obligating them to support prosecutions under specified circumstances, and by shifting decision-making authority from national government officials to judges and prosecutors independent of any state or particular group of states. More broadly, their goal was to shape what governments will in the future consider acceptable behaviour. This effort (which is continuing) is political but also legal; it is an attempt to achieve political goals through law.²

This expectation of domestic prosecution conditioned by supranational oversight is the essence of the ICC’s norm of internationalized procedural justice identified in Chapter 1. This dual set of

¹ Deitelhoff, “Isolated Hegemon,” 151.
responsibilities serves as the reference point against which state change is measured in this dissertation.

In this sense, the ICC is both a judicial institution—whose impact can be judged largely in relation to the volume of investigations and trials and their outcomes—and a political body aimed at transforming the policies of constituent international actors. Indeed, it was recognized early on that “if the ICC is to become a successful global court that prosecutes persons for international crimes notwithstanding the international political context, the adoption of the statute must usher in a sea change in national attitudes.”

In order to assess the wisdom of the strategy of proceeding with such an institution without the great powers, I focus not on matters of technical legal procedure but rather on this latter diffusion of ICC norms across the international system. Antonio Franseschet has argued that “[t]he apparently strong endorsement of the ICC by a wide variety of states suggests that a reasonably wide consensus is now available on the ‘rule of law’ globally.” The progress associated with the ICC and parallel ad-hoc tribunals has led Lee and Price (among others) to conclude that “while incomplete and with significant shortcomings,” we are witnessing “the increasing criminalization of international and even domestic violent conflict and repression.” On the other hand, many sceptics remain unconvinced that the ICC—as a key component of the international justice architecture—will

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alter the calculations of states, or indeed that it has become sufficiently entrenched in the international system to withstand even modest challenges to its authority.\(^6\)

What view best captures the current status of the institution, and how would we know? Despite considerable attention to the development of the ICC within international legal and IR scholarship, the question of the Court’s political impact has yet to addressed in a satisfactory fashion. To do so requires a different set of measures that draw attention to the ways in which the ICC has contributed to changes in state responses to grave crimes, and an attempt to systematize this analysis across the entire international system. This chapter commences this effort by providing an overview of behavioural compliance with the ICC. I begin by briefly situating the Court within the broader development of a norm of individual criminal accountability for past atrocities, to demonstrate the kinds of legal and normative linkages that are central to the theoretical account developed in Chapter 2.

I then turn my attention to the ICC as a particular manifestation of this phenomenon, by first assessing the current state of formal membership in the treaty community. Here I suggest that, despite important limitations, the ICC already includes a number of states that are significant to the determination of a robust international legal regime and norm. I then briefly review the evidence concerning ICC influence on behaviour – that is, whether there is a discernable decrease in relevant crimes since the advent of the Rome Statute. Establishing the causal grounds for this deterrent effect, I will suggest, is methodologically fraught and has not been satisfactorily accomplished thus far, and this observation implies the need for a broader

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array of indicators of institutional effectiveness. I take this up by considering state compliance concerning both changes in domestic judicial practice and assistance with Court activities. Chapter 6 then supplements this analysis by presenting an original dataset measuring the incorporation of Rome Statute features in domestic law. This provides an important connection to the behavioural patterns discussed here, and further illustrates the ways in which the ICC has already begun to shape the conduct of international affairs. These observations are then further deepened through an exploration of the discursive politics of the ICC, undertaken in Chapter 7.

The “Justice Cascade” and the International Criminal Court

As established in Chapter 1, the International Criminal Court seeks to improve upon prior practice concerning the punishment of atrocity. While much of the attention is naturally paid to the specific institutional structures of the Court, it is also important to recognize the broader social evolution of which the ICC is a prominent part, since this has theoretical and empirical consequences for assessing the health of the procedural justice norm embodied in the Rome Statute. The goal of this section is thus to concisely set out the empirical basis for the claim that a dramatic recent shift in social expectations concerning individual criminal accountability for violations of international humanitarian and human rights law. In exploring this theme, I seek to situate the International Criminal Court within this broader system of norms and rules governing the punishment of grave crimes, and to connect this discussion to the subsequent assessment of behavioural change and compliance with the Rome Statute more particularly. Determining independent effects of an institution like the ICC is very difficult, given the overlapping legal and normative structures at work. While some scholars would regard this as an impediment, this phenomenon also reaffirms the central argument of this dissertation concerning network effects.
Until fairly recently, the dominant expectation in both international and domestic realms was one of impunity, as political and military leaders would not be retroactively punished for past acts of genocide, crimes against humanity and war crimes.\(^7\) While the international military tribunals in Nuremberg and Tokyo—along with parallel judicial processes in a variety of states—revived an interest in international criminal law, this nebulous subject was largely sidelined during the Cold War.\(^8\) Since the late 1970s, however, there has been a rapid growth in the use of legal processes to address widespread violations of human rights or the laws of war. These efforts have, moreover, explicitly targeted senior state officials in a reversal of historical practice and norms. This radical change in social expectations—what Sikkink has termed the “justice cascade”\(^9\)—involves both domestic human rights trials and the institutionalization of criminal law in new international courts and tribunals. Together, these processes “comprise an interrelated, dramatic new trend in world politics toward holding individual state officials, including heads of state, criminally accountable for human rights violations.”\(^10\)

The shift in global practice in favour of a norm of individual criminal responsibility can be partially captured through a quantitative assessment. Figure 5 presents domestic and foreign third party prosecutions of government officials or state agents for human rights abuses.

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\(^8\) After World War I, there was some brief interest in prosecuting the German Kaiser Wilhem II “for a supreme offence against international morality and the sanctity of treaties;” this plan was quickly abandoned after the Dutch government gave the Kaiser asylum. “During the interwar years, there was little activity within international organizations concerning the establishment of international criminal tribunals.” William A. Schabas, “International War Crimes Tribunals and the United States,” *Diplomatic History* 35, no. 5 (2011): 770 and 771. Similarly, see Gary J. Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000).


committed in transitional democratic states. Kim and Sikkink have noted that “[t]he great bulk of enforcement of core human rights norms now occurs” in these national legal settings.

**Figure 5: States With Human Rights Prosecutions, 1979-2006**

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12 Hunjoon Kim and Kathryn Sikkink, “Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries,” *International Studies Quarterly* 54, no. 4 (2010): 942. It has been argued that domestic prosecutions provide the most authentic evidence of the health of an international norm of accountability for grave crimes, since it is presumed to be more difficult to try one’s own citizens for abuses. Sikkink, *Justice Cascade*, 245.

The above chart demonstrates that “[s]tates increasingly are holding the human rights abusers of previous regimes criminally accountable for their human rights violations.”\textsuperscript{14} This trend has important implications for the emergence and subsequent consolidation of the Rome Statute, as will be shown below. The practice of individual criminal accountability has been reinforced at the international level as well, in the form of new international and hybrid criminal institutions, as Figure 6 documents. Indeed, since 1992 there has been a rapid expansion of these legal entities, with eight such courts and tribunals currently in operation.

\textbf{Figure 6: Active International, Ad-hoc and Hybrid Tribunals, From Year of Creation}

\textsuperscript{14} Sikkink and Booth Walling, “Impact of Human Rights Trials,” 433.
It is particularly notable that these internationalized legal processes have been responsible for the first three indictments of sitting Heads of State—in Slobodan Milosevic (ICTY), Charles Taylor (SCSL) and Omar al-Bashir (ICC)—which have been rightly regarded as watershed moments in the development of international legal accountability. When taken together, the available data thus “reveal an unprecedented spike in state efforts to address past human rights abuses both domestically and internationally since the mid-1980s.” While far from universal, this empirical pattern “represents a significant increase in the judicialization of world politics” that signifies an important shift toward the use of legal processes to address grave crimes and, most notably, a reversal of the prior norm of impunity for high-ranking state officials. These developments are fully commensurate with the theoretical account developed in Chapter 2, since individual legal institutions are connected to, and thus largely informed by, evolving norms and practices across the international system, many of which first found expression in national contexts. Recent experience thus shows that “the huge disjuncture between the treatment of crime in the domestic and international realms has started to narrow.”

The emergence of judicial and other mechanisms encompassed in the justice cascade can be seen as a response to the unprecedented violence of the twentieth century, with global wars giving way to various forms of civil conflict in the latter half of the century. Yet criminal punishment has also been regarded as a forward-looking means of promoting peace by providing

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18 As Sikkink points out, the norm of judicial accountability for grave international crimes is “nested” within the broader global human rights movement and associated with other non-penal approaches (including truth and reconciliation processes, reparations, etc.) to the pursuit of reconciliation and social reconstruction after violence and/or political transitions. Sikkink, Justice Cascade, 16-17.
19 Sikkink, Justice Cascade, 17-18.
a public forum in which to stigmatize past abuses, thereby deterring future atrocities. A brief review of the empirical evidence provides some general support for this, as an expansion of conflict after 1946 was followed by a sharp decline in the scale of armed violence in the past two decades. As Figure 7 makes clear, state-based (inter-state and intra-state) armed conflicts grew substantially after World War II—and particularly prior to the establishment of domestic criminal trials—but then rapidly subsided after 1992, corresponding to the end of the Cold War and (associated) dramatic increase in individual criminal accountability outlined above. Indeed, the conclusion of the global confrontation between the United States and Soviet Union provided the political space for a renewed push to create a permanent international criminal court.

Interestingly, while the quantity of conflicts has abated only recently, the magnitude of the violence when measured in terms of direct conflict fatalities began to improve far earlier, dropping from over 33,000 in 1950 to approximately 500 by 2007. Here again the period around 1989 appears as a turning point in the declining rate of battle deaths, as would be expected given the decline of many proxy wars associated with the Cold War. While these statistics do not provide a causal account for the observed changes, they do suggest that warfare has become dramatically more humane for recognized combatants over the course of the past 60 years. Yet this is of limited value in assessing the impact of the justice cascade in general, and the ICC in

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21 This chart is derived from data presented on the Human Security Report Project (HSRP) website. “State-based armed conflicts” are defined by the HSRP as “fighting between two armed groups, at least one of which is a government.” “Battle deaths” refer to “reported and codable deaths that are the direct result of combat between warring parties in a conflict.” See http://www.hsrgroup.org/our-work/security-stats/overview-security-stats.aspx. Accessed June 11, 2012. The HSRP relies on data originally from the Uppsala Conflict Data Program. Additional information on definitions and access to the full original dataset is available at http://www.pcr.uu.se/research/ucdp/. See in particular the UCDP/PRIO Armed Conflict Dataset, Version 4 – 2011, 1946-2010. http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset.
particular. First, the decline in warfare is most plausibly connected to the end of the Cold War, rather than emerging legal processes themselves. Domestic and international trials are clearly one significant feature of this trend, though determining the relative causal impact is a task reserved for future scholarship. I do, however, briefly consider the impact of the ICC on these processes below. Second, the statistical overview does not encompass non-combatant abuses and fatalities, which are a prominent feature of contemporary conflicts. The Rome Statute consequently devotes considerable attention to crimes—such as rape and other sexual offences, recruitment of child soldiers and other abuses of the civilian population—that are not captured in the above graph. As I show further below, existing data on the magnitude of many constituent ICC crimes is sparse and unsystematic, further justifying my current assessment of the Court.

While the desire for punishment is understandable given the sheer scale of violence in the past century, Sikkink is correct to point out that the “this wave of prosecutions was by no means preordained.” Rather, the dramatic trend towards judicial responses to grave crimes—including by holding senior officials accountable for past abuses—represents a genuine revolution in intersubjective expectations concerning appropriate responses to atrocities. This dissertation focuses particularly on the International Criminal Court as one prominent manifestation of a broader trend toward individual criminal accountability for violations of international humanitarian and human rights law. It is now well established that “[t]he Court is the centrepiece of an emerging system of international criminal justice which includes national courts, international courts and hybrid tribunals with both national and international components.” The ICC offers a particularly vibrant example of the way in which network effects contribute to the

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22 My thanks to Professors Michael Byers and Katharina Coleman for providing helpful suggestions in this section.
development of international norms and laws. At the same time, the Rome Statute substantiates a particular institutional solution—and associated social expectations—for enforcing the broader criminal accountability norm discussed above. It is therefore important to return to the more specific assessment of how the International Criminal Court and its norm of internationalized procedural justice have influenced state conduct with respect to the punishment of grave crimes.

**Membership in the ICC Treaty Community**

In seeking evidence of the expanding influence of the Court, one should first look to the breadth of its formal community of member states. The Assembly of States Parties has noted that “[u]niversality of the Rome Statute… is imperative if we are to end impunity for the perpetrators of the most serious crimes of international concern… and guarantee lasting respect for and enforcement of international justice.”

Fransceschet’s claim of a growing consensus around the rule of law in general, and the ICC in particular, would seem to find support in the development of ICC membership. The Rome Statute entered into force on July 1, 2002, after achieving 60 ratifications; this rapid transition from drafting to full legal personality is comparable to that of the Mine Ban Treaty. Since then membership in the Court has expanded rapidly, and as of July 2012 there are 121 State Parties to the Rome Statute. This compares favourably with other key human rights treaties including the 1966 International Covenant on Civil and Political Rights (ICCPR) and 1984 Convention Against Torture (CAT), which have 167 and 150 parties

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respectively. This is particularly the case when considering the Statute’s recent creation: indeed, only 66 states ratified or acceded to the ICCPR during the first 15 years of its existence, while 117 did so in the similar period for the CAT.\textsuperscript{28}

A further 31 states are currently signatories to the Rome Statute.\textsuperscript{29} As noted already, while the act of signature does not constitute full acceptance of treaty obligations, common practice dictates that signatories are “obliged to refrain from acts which would defeat the object and purpose of a treaty.”\textsuperscript{30} In this sense, signatories can be held to have signalled their endorsement of the spirit and principles of the agreement. When taken together, therefore, the Rome regime can lay claim to 152 states—or approximately 78% of the 196 recognized in this study—that possess at least a minimal official recognition of ICC norms. Consequently, Eve La Haye has argued that these patterns of endorsement provide strong evidence of an emerging consensus among the society of states concerning the legitimacy of the Court and its underlying obligation for combating impunity.\textsuperscript{31} This snapshot, however, is a blunt instrument, as it does not account for the differential impact that powerful states (many of whom remain non-parties) have on the development of international laws and norms.

As with the Mine Ban Treaty, the nature of ICC adherents is an important factor in judging the impact of an institution. The development of international laws and norms is usually understood to be especially contingent upon the endorsement of those states particularly

\textsuperscript{28} 24 states have joined the ICCPR and 32 have joined the CAT since 2000, during the period of the Rome Statute’s expansion.
\textsuperscript{30} Vienna Convention on the Law of Treaties, Article 18.
\textsuperscript{31} Eve La Haye, \textit{War Crimes in Internal Armed Conflicts} (Cambridge: Cambridge University Press, 2008), 165.
implicated in the types of acts under scrutiny, and thus for whom the new standards impose substantial constraints on current or potential future behaviour.\footnote{Byers, \textit{Custom, Power}, 38; Charney, “Progress in International Criminal Law,” 463.} A key lesson from the theoretical discussion in Chapter 2, however, is that international legal structures establish social expectations that are often associated with more broadly accepted norms and rules, and are therefore consequential to all actors in the international system. There are hence a couple of distinct constituencies worthy of consideration when assessing the contemporary status of the International Criminal Court.

One significant finding is that persistent violence and instability has not proven an impediment to many states joining the ICC. Indeed, of the 36 states engaged in internal armed conflicts during the dataset period, 12 (33\%) of have become full members of the Court, while a further 10 are signatories.\footnote{Afghanistan, Burundi, Central African Republic, Chad, Colombia, Republic of the Congo, Democratic Republic of the Congo, Nigeria, Philippines, Senegal, Sierra Leone, and Uganda are full State Parties. The following states signed (but have yet to ratify) the Rome Statute during internal armed conflicts: Algeria, Angola, Cote d’Ivoire, Egypt, Eritrea, Guinea-Bissau, Israel, Russian Federation, Solomon Islands, and Sudan. The figures cited here exclude the coalition military operations in Afghanistan and Iraq, discussed below. Since the interest here is with states that signed or ratified the Rome Statute in the midst of armed conflict, this also does not include armed conflicts that ended prior to the drafting of the Statute and states that joined the ICC before the outbreak of violence (as in the case of Kenya and Mexico) or substantially after the cessation of hostilities (as with Cambodia). The level of membership among states with internal armed conflicts is however modest when compared with the remaining population of non-conflict states, 105 (66\%) of which are State Parties with 23 additional signatories (14\%). Information on armed conflicts is derived from the Correlates of War and Major Episodes of Political Violence datasets, as described above.} While not a full State Party, Cote d’Ivoire also voluntarily accepted the jurisdiction of the Court for acts committed on its territory since 2003.\footnote{Republic of Cote d’Ivoire, \textit{Déclaration de Reconnaissance de la Compétence de la Cour Penale Internationale}, April 18, 2003; and \textit{Confirmation de la Déclaration de Reconnaissance}, December 14, 2010. \url{http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/}.} A further five states—Guinea, Liberia, Namibia, Serbia, and Tajikistan—joined the ICC soon after the end of hostilities, at a time when the post-conflict transition was fragile and the nature of the political settlement was uncertain.\footnote{With the exception of Liberia, the violence ended prior to the entry-into-force of the Rome Statute and as such, the ICC would not have jurisdiction over these conflicts. However, the decision to join the Court in these instances...} These are surprising developments, since states engaged in various
forms of organized violence are inherently more vulnerable to the types of crimes under the ICC’s remit than those at peace; we might therefore expect such states to be most resistant to binding obligations that may disproportionately impact their own leaders and nationals. These cases therefore provide a partial rebuttal to the critical view that “most countries that are engaged in or anticipate armed conflicts giving rise to war crimes have not joined the ICC regime.”

The implications of this point are even broader still, as many otherwise peaceful and stable states have prominent international roles as peacekeepers and members of military alliances, and therefore face a potential scenario in which their nationals might commit crimes under ICC jurisdiction in the course of their various engagements. Since the 2002 entry into force of the Rome Statute, 40 State Parties have participated in international military conflicts, principally as part of the multinational coalitions in Afghanistan and Iraq. These states have thus placed themselves voluntarily within the authority of an international court that directly or indirectly imposes constraints on the conduct of military operations. This fact was recognized by

is still relevant to this assessment due to the potential for a renewal of hostilities and, hence, future exposure to ICC jurisdiction.

36 Struett, Politics of Constructing the ICC, 143. Simmons and Danner have proposed a rationalist theory that attempts to account for this finding by regarding the ICC as a mechanism for providing credible commitments to domestic constituencies: “all else equal, unaccountable autocracies that have endured recent internal conflict have decided to cooperate with the ICC in surprising numbers… This pattern suggests that some governments rationally use the ICC to tie their hands as they make tentative steps toward conflict resolution.” Beth A. Simmons and Allison Danner, “Credible Commitments and the International Criminal Court,” International Organization 64, no. 2 (2010): 227. More broadly see Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” International Organization 54, no. 2 (2000): 217-252. For other rationalist treatments of treaty membership, see Jay Goodliffe and Darren G. Hawkins, “Explaining Commitment: States and the Convention Against Torture,” The Journal of Politics 68, no. 2 (2006): 358–371; and Oona A. Hathaway, “Why Do Countries Commit to Human Rights Treaties?” Journal of Conflict Resolution 51, no. 4 (2007): 588-621. I do not consider this theoretical account here, but return to the question of why states have joined (and resisted) the Court in Chapter 7.


38 The following State Parties to the Rome Statute have contributed forces to Operation Enduring Freedom, the International Security Assistance Force, and/or the military occupation of Iraq: Albania, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Dominican Republic, Estonia, Finland, France, Georgia, Germany, Greece, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Korean Republic, Latvia, Lithuania, Luxembourg, Macedonia, Mongolia, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom. See http://www.isaf.nato.int/troop-numbers-and-contributions/index.php; and http://www.centcom.mil/en/countries/coalition/.
many states including those most closely associated with the development of the Court. And, as explored in detail below, the Rome Statute also requires substantial alterations to national laws and practice that have far-reaching domestic political and legal consequences for all members of the Court. Hence it would be incorrect to regard the ICC as an obviously low-cost commitment ex ante, because to do so assumes that the consequences of legal exposure were both minimally invasive and predictable from the outset. Even states with little apparent risk of an ICC investigation still face sovereignty costs by virtue of their membership, as tentative preliminary processes with respect to Afghanistan have demonstrated. Yet as Sikkink also explains, a decision to join the Court as easy “cheap talk” holds the risk of backfiring for states with greater potential legal exposure, since the full scope and intent of the Court only have become apparent with the issuance of indictments and arrest warrants. By this point, however, early ratifiers were “self-entrapped” by the legal commitments they had consensually made.

Membership in the ICC legal community is frequently driven by a close affinity with the legal and normative purpose of the treaty, as I demonstrate in greater detail in Chapter 7. For many states, the creation of an international court was conceivable due to an existing familiarity with legal principles (such as the core crimes, modes of liability, and so forth) that would form the core of the new international institution. But as scholars like Caroline Fehl and Nicole Deitelhoff have persuasively demonstrated, the content of the Court is not well accounted for by rationalist theories that attribute institutional outcomes to a functional coordination of pre-

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determined state preferences. The new model of criminal accountability that ultimately emerged was not preordained, but rather coalesced as the result of concerted domestic and international norm entrepreneurship by civil society actors and middle-power states.

The dramatic change in the draft [International Law Commission] text between 1994 and 1998 was largely due to the persuasive discursive power of NGOs and the like-minded states. They tipped the balance in favor of a strong and independent court, and created such great momentum that they swept the majority of state parties along, neutralizing opposition from powerful states like the United States, China, and India which ‘found their own preferences trumped by a coalition of smaller states.’

The enmeshment within a particular diplomatic environment was therefore instrumental in creating the conditions for a foundational shift in state identities and, consequently, interests. As with the Mine Ban Treaty, the key to building momentum was changing social conceptions such that notions of responsible statehood and rightful action came to be closely associated with support for a Court defined by its relative autonomy from political forces like the UN Security Council or the individual or collective demands of the great powers. Deitelhoff argues that this process hinged on the ascendancy of a normative frame that equated an effective Court with universal applicability without political biases or interference; this was contrasted with an alternative—and formerly dominant—frame that privileged the inclusion and leadership of great powers like China, Russia and the United States.

Network politics were again crucial to this process, as norm entrepreneurs sought to connect the proposed ICC with widespread state support for the existing legal rules and

42 Fehl, “Explaining the ICC;” Deitelhoff, “Discursive Process of Legalization.” In contrast, Hathaway has argued that “[t]he observation that countries that ratify treaties generally have better human rights ratings on the whole than those that do not does not mean that ratifying countries have better ratings as a result of ratifying the treaties. Rather, it is possible that this observation arises because the same factors that lead to good human rights ratings also lead countries to ratify human rights treaties. For this reason, a demonstration that countries' conduct usually conforms to their voluntarily accepted treaty obligations does not provide an answer to those who are skeptical of international law, as law that has no effect on behavior cannot really be said to be law at all.” Hathaway, “Do Human Rights Treaties Make a Difference?,”1989.
44 Deitelhoff, “Discursive Process of Legalization,” 51-52. Generally, see Benedetti and Washburn, “Drafting the ICC Treaty.”
procedures, including the ad-hoc tribunals. This strategic use of legal precedent and social pressure thus led to the “rhetorical entrapment” of many delegations wherein “it became simply inappropriate to publicly oppose the ICC.”45 This in turn led to a tipping point in which a plurality of states—focused around the leadership of the Like-Minded Group—came to endorse the evolving view of an independent court as the normatively appropriate response to the problem of individual and collective impunity. For many states including Japan, the close association between the Rome Statute earlier international treaties like the 1949 Geneva Conventions and 1977 Additional Protocols was vital to their membership, as endorsement of the prior legal standards facilitated subsequent ratification of the Statute.46 Of the 68 states commonly identified as members of the Like-Minded Group that advocated for the ICC, 61 are current State Parties and four are signatories to the Statute.47 Early support for the Court has thus largely carried through to formal membership in the resulting institution.

Because of this lineage, support for the ICC has often been rooted in past experiences with atrocities and subsequent judicial responses.48 Of the 48 states that conducted at least one transitional human rights prosecution between 1979 and 200949, 37 (77%) are parties to the

47 Brunei Darussalam, Singapore and Swaziland have not signed the Rome Statute, while Cote d’Ivoire, Egypt, the Solomon Islands and Zimbabwe are signatories. The full list of Like-Minded states is found in Parliament of the Commonwealth of Australia, ICC Report, 110.
48 Sikkink, Justice Cascade, 31-83.
Rome Statute, while a further three are signatories. This phenomenon vividly illustrates the manner in which the ICC is embedded within larger legal and social developments concerning the punishment of atrocity. Domestic criminal prosecutions frequently drew upon existing international criminal law principles in framing both the possibility of and procedures for holding senior officials accountable for past human rights abuses. In turn, these experiences helped to inform the further refinement of norms and rules that would find expression in the Rome Statute. The case of Argentina is especially instructive in this regard, as this state was at the forefront in developing domestic human rights trials for former high-ranking officials. Less than a decade later, Argentine diplomats were deeply involved in the negotiation of the Rome Statute, and a former prosecutor of the junta trials, Luis Moreno-Ocampo, became the first ICC Chief Prosecutor. “[T]he Argentine case shows the possibility that a country can move in three decades from being a major violator of human rights to a country whose citizens have made major innovations in the struggle for human rights.”

The role of the Court as a reference point for responsible statehood has been mirrored in more recent political transitions as well. It is of great symbolic importance, for example, that the Rome Statute was the first international treaty that the new Tunisian regime acceded to in the wake of the popular revolution that overthrew President Ben Ali. ICC observers have suggested that the decision to ratify the Rome Statute and similar human rights agreements was explicitly intended by the new Tunisian regime to underscore the extent of the break with the former

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50 The significant regional variation in national prosecutions also broadly mirrors that of ICC membership. The Americas and Europe accounted for fully 80% of prosecutions during this period, while Africa undertook 13% and Asia and the Middle East and North Africa together only accounted for 7%. Of the 121 current members of the Court, 60 (slightly less than 50%) are from the Americas and Europe, 32 (27%) are from Africa, 17 (14%) are from Asia and the Pacific, and 2 (less than 2%) are from the Middle East and North Africa. Sikkink, *Justice Cascade*, 22.

regime.\textsuperscript{52} Other states including Mexico, Peru and Serbia have similarly endorsed the ICC in the wake of political transitions in which political elites sought to demonstrate a break with past abuses.\textsuperscript{53} These brief examples strongly hint at the intersubjective context of legal processes in which actor identities and roles come to be associated with particular ways of behaving as signified by a formal commitment to legal rules and norms. The extent of ICC membership, when compared with state opinion on such matters decades before, should therefore weigh in favour of the institution’s contemporary significance and challenge the sceptical view that treaties merely ratify existing state preferences and thus tend not to pose substantial new burdens.\textsuperscript{54}

However, this view of an expanding legal community is challenged by the fact that a number of prominent states remain opposed to the Court. As Byers has noted, “powerful States, given the broader range and greater frequency of their activities, are more likely than less powerful States to have interests which are affected by any particular legal development.”\textsuperscript{55} It is therefore highly significant the leading global powers of the United States, China and Russia, along with regional actors like Egypt, India, Iran, Israel and Turkey, continue to reject the legal

\begin{itemize}
\item \textsuperscript{52} Members of the Coalition for the ICC Middle East and North Africa (MENA) section, interview with the author. New York, December 15, 2011.
\item \textsuperscript{53} Republic of Mexico, Statement by Mr. Gómez Robledo, at the United Nations General Assembly, 60\textsuperscript{th} session, 46\textsuperscript{th} plenary meeting, New York, November 8, 2005 A/60/PV.46. With respect to Peru, the analysis was provided by Michelle Reyes Milk (Outreach Liaison for the Americas, Asia and the Pacific, Coalition for the International Criminal Court), interview with the author, New York, December 19, 2011. Relatedly, senior officials from the Republic of Serbia and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have specifically identified the importance of political transition—notably the end of the Milosevic regime and emergence of a new government—as vital to generating greater political accommodation with the ICTY and the will to enact the requisite institutional changes. Comments made during the side-event “Use of National Experiences in Complementarity Capacity Building: Examples from Serbia,” during the 10\textsuperscript{th} ICC Assembly of States Parties, New York, United Nations Building, December 15, 2011. Vladimir Cvetkovic (Legal Adviser to the Embassy of Serbia, The Hague, Netherlands), interview with the author, The Hague, September 14, 2009. See also Coalition for the International Criminal Court, “The Serbian Coalition: Advocating for the ICC After Karadžić’s Arrest,” The Monitor 37 (2008): 16. \url{http://www.coalitionfortheicc.org/?mod=browserdoc&type=5}.
\item \textsuperscript{54} Generally, see Downs, Rocke and Barsoom, “Good News About Compliance,” 380; Hathaway, “Do Human Rights Treaties Make a Difference?,” 1989; and von Stein, “Do Treaties Constrain or Screen?”
\item \textsuperscript{55} Byers, Custom, Power, 38.
\end{itemize}
validity of the Court. These states possess a substantial proportion of the material assets—including global military capacity, economic output and population—typically associated with power in International Relations scholarship. This has led some to conclude that the Court may prove inherently unable to consolidate its authority in the face of the continued resistance of these key states.\footnote{Charney, “Progress in International Criminal Law,” 460.}

Yet formal legal status is not the only indicator of the validity of a norm associated with—but not fully limited to—a treaty, especially as the particular legal instrument is connected to other prior and evolving international standards. It was argued in Chapter 3 that votes in global bodies like the United Nations General Assembly can offer important evidence of state dispositions toward a treaty irrespective of their official membership. Scholarship on customary international law regards such actions as evidence of state practice contributing to the development of international norms (\textit{opinio juris}), while for my purposes the justifications of these votes can also be assessed as discursive evidence (see Chapter 7). The annual UNGA resolution on the International Criminal Court is the most relevant source for such speech acts, particularly as the resolution is explicitly understood as providing a political endorsement for the ICC.\footnote{As the Dutch delegate recently noted, “The draft resolution before us serves three main objectives. First, the draft resolution serves to provide political support for the International Criminal Court as an organization, for its mandate and aims, and for the work it is carrying out. Secondly, it serves to underline the importance of the relationship between the Court and the United Nations on the basis of the Relationship Agreement, as both the United Nations and the Court have a central role in enhancing the system of international criminal justice. Finally, the draft resolution serves to remind States and international and regional organizations of the need to cooperate with the Court in carrying out its tasks.” Netherlands, Statement by Mr. Schaper, Representative of the Netherlands, at the United Nations General Assembly, 65th session, 52nd plenary meeting A/65/PV.52 November 23, 2010. This language was reiterated in prior sessions.}

It is therefore significant that all nine resolutions relating to the Court have been adopted by consensus without a vote.\footnote{Annual resolutions relating to the International Criminal Court can be found at http://www.un.org/en/ga/documents/index.shtml.} Equally important is the fact that only two states\footnote{Sudan (2008 and 2010) and the United States of America (2002-2010).} have taken the opportunity to speak against the resolution and disassociate their delegations from the consensus,
and only one—the United States—has done so each year. On the one hand, passage of the
resolution under effective unanimity might offer an indication of the growing status of the ICC,
and especially of an underlying, generalized acceptance of the Court’s basic principles among
non-parties.\textsuperscript{60} On the other hand, the fact that few states are willing to publicly voice opposition
to the Court in this venue suggests at minimum that the ICC has gained a degree of legitimacy
such that overt dissent is politically unpalatable. This in turn, offers some evidence of the
residual influence of norms in changing expectations of appropriate behaviour and raising the
perceived (often indirect, social) costs of going against this position. Nonetheless, the US policy
of persistently withdrawing from the UNGA consensus is a notable exception to this pattern.
Refusing to join the resolution—especially when combined with discourse rejecting the Court—is a sharp challenge to the treaty particularly given its sustained and public nature.

While formal membership suggests a quite widely-accepted institution and norm, this
indicator is not in itself sufficient evidence of the myriad ways that treaties may shape the
conduct of international affairs, for a couple of reasons. First, the act of ratification or accession
does not itself guarantee that State Parties will respect their legal obligations, as previous
scholarship has established.\textsuperscript{61} Second, this equally does not tell us whether non-parties may
informally comply with treaty injunctions and may come to reflect the social expectations
embedded in the Rome Statute. A narrow focus on legal status misses the fact that states may
often recognize antecedent rules and norms subsequently enshrined in a given treaty regardless
of their endorsement of or resistance to the latter institution.

\textsuperscript{60} Nevertheless, it would be wise not to read too much into such votes, as their relative cost of such demonstrations
is low since the UNGA resolutions impose no specific legal obligations; in this respect, their contribution to the

\textsuperscript{61} For example, see Hathaway, “Do Human Rights Treaties Make a Difference?,” 1981; and Hafner-Burton and Tsutsui, “Justice Lost!”
The ICC and the Consolidation of Criminal Accountability for Grave Crimes

The ICC and the Conduct of Warfare

Given the scope and purpose of the International Criminal Court, a key question in assessing its operation is whether its emergence has influenced the conduct of armed violence in the international system. The ability of the Court to moderate and perhaps deter atrocities has been the subject of some focused attention in recent years. Two general causal pathways are proposed by which the ICC may decrease abuses. First, the Court—through its own agents or external state and civil society actors—may inform combatants about the content of the Rome Statute and the nature of prohibited acts; in these cases, the ICC would serve to educate actors about their responsibilities under international law and persuade them to adhere to these standards. Second, the Court may play a more directly coercive role, by demonstrating a credible capacity to punish violations of international humanitarian and human rights law; combatants might then refrain from engaging in prohibited acts for fear of facing judicial punishment in domestic courts or in The Hague. More broadly, these processes should through their publicity function help to delegitimize acts of atrocity and thereby help to shift perceptions regarding appropriate behaviour within domestic societies. “By creating a global consensus to assign criminal responsibility and provide appropriate punishment to those most responsible for

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atrocities of concern to the international community as a whole, the ICC will ultimately lead to their reduction and cessation.”

These hypotheses seem plausible, yet the available literature suffers from two substantial methodological problems that limit the ability to study these phenomena directly. On the one hand, despite extensive quantitative research on the onset, duration and magnitude of warfare, there is a pervasive absence of detailed data concerning the specific types of violence captured within the Rome Statute’s jurisdiction. Major international conflict datasets including the Correlates of War Project, Major Episodes of Political Violence, UCDP/PRIO Armed Conflict Dataset, the Human Security Report Project and the Armed Conflict Location and Events Dataset address global trends in violence but do not code this information in a way that would allow a researcher to reliably track the occurrence of particular types or categories of crimes. There is currently no way, for example, to trace instances of rape (as genocide, a crime against humanity or a war crime) across time, nor are there clear grounds by which to do so for the vast majority of the other roughly 65 separate crimes identified in the Rome Statute. There are some limited exceptions, but the findings are generally tentative at best. For example, the Political Instability Task Force (PITF) State Failure Problem Set has documented genocides and politicides on an annual basis. The data reveals a precipitous drop in these crimes since 1989, and a more modest decline since 1998; yet the relatively limited number of data points—a change from three in 1998 to one in 2008—does not provide much grounds for extrapolating larger trends. Similarly, while there appears to be a considerable decline in the number of

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64 http://www.pcr.uu.se/research/ucdp/datasets/ucdp_prio_armed_conflict_dataset/.
65 http://www.acleddata.com/. Citations for the other datasets are found elsewhere in this dissertation.
conflicts in which child soldiers have been employed, accurate data concerning the total number of child soldiers, the scale of abuse and so on is elusive.\textsuperscript{67} Lastly, James Morrow’s sophisticated analysis of state compliance with the laws of war focuses on eight broad categories of violations (rather than specific legal rules), and ends its temporal study in 1991, well before the advent of the Rome Statute.\textsuperscript{68} In short, at this point the necessary large-\textit{n} empirical data from which we might make informed judgements concerning patterns of crimes do not exist.

Second, the very pursuit of such systematic data is problematic since we can never know the full universe of possible violators. That is, determining the total number of individuals who might commit acts of atrocity—as compared with those that had the opportunity but (for a variety of reasons) chose not to—seems fundamentally impossible. Consequently, “[m]easuring the actual deterrent effects of the Court’s work will be hard to quantify. As many variables are present in conflict situations, the prevention of atrocities is inherently difficult to gauge.”\textsuperscript{69}

Some interesting anecdotal evidence, however, does provide tentative evidence in support of the hypotheses noted above. In the Democratic Republic of the Congo,

[\textit{t}]he trial of [Thomas] Lubanga, arrested on charges of recruitment, enlistment and use of child soldiers, is set to start in June 2008. Human Rights Watch researchers documented important effects of this first arrest. While it is not clear if crimes reduced as a result, one impact was that other suspected war criminals expressed fear of possible future arrest. The confirmation of charges hearing against Lubanga also increased awareness that the recruitment and use of children as soldiers constitute crimes. For example, some leaders of armed groups in eastern DRC instructed children to lie about their age and to hide when child protection workers arrived.\textsuperscript{70}


\textsuperscript{69} Punyasena, “Conflict Prevention,” 68.

In Uganda, the indictment of senior leaders of the Lord’s Resistance Army (LRA) has been identified as one of the factors that led the group to seeking a peace agreement with the Ugandan government. In this case, the stigmatizing effect of the indictments led to the isolation of the LRA, and has had a notable impact on the group’s capacity:

Since the mid-1990s the LRA’s only state supporter has been the Sudanese government in Khartoum…. Not long after the ICC referral was announced, Sudan agreed to a protocol allowing Ugandan armed forces to attack LRA camps in southern Sudan. This access weakened the LRA’s military capability…. The International Crisis Group (ICG) notes that the ICC’s involvement ‘upped the stakes’ for Khartoum as it could fall within the ICC’s criminal investigation in Uganda for supporting the LRA. In October 2005 the government of Sudan signed a memorandum of understanding with the court agreeing to cooperate with arrest warrants issued against LRA commanders. Though the Sudanese government continued to support the LRA to some degree, it did so in a much more surreptitious manner.\footnote{Sara Darehshori and Elizabeth Evenson, “Peace, Justice, and the International Criminal Court,” Oxford Transitional Justice Research Working Papers Series no. 10, Centre for Socio-Legal Studies, University of Oxford, May 19, 2010, 9. http://www.csls.ox.ac.uk/otjr.php?show=currentDebate10. Similarly, see Grono and O’Brien, “Justice in Conflict,” 16.}

Interestingly, it appears that the LRA made the withdrawal of the ICC indictments a core condition of the peace talks in 2006, and initiated the negotiations with this goal in mind.\footnote{Dareshori and Evenson, “Peace, Justice, and the ICC,” 2, 10-11; and Grono and O’Brien, “Justice in Conflict,” 15.} Civil society actors have reported that “[i]n speaking with commanders in the bush or their delegates at the negotiations… ‘ICC’ is usually the first and last word out of their mouths.”\footnote{Cited in Darehshori and Evenson, “Peace, Justice, and the ICC,” 11.} This provides an intriguing example of the way that the Court’s operations have impacted the calculations of a group that has appeared largely impervious to the influence of international law. Relatedly, the indictments appear to have generated some emulation, as “the ICC’s attempt to hold the LRA leadership criminally liable for its atrocities in northern Uganda has embedded accountability and victims’ interests in the structure and vocabulary of the peace process.”\footnote{Grono and O’Brien, “Justice in Conflict,” 16.}

In these respects, ICC operations do appear to have had the anticipated educational effects in at least some discrete cases. These initial, limited findings broadly correspond to
evidence from other contexts, most notably Sikkink’s research on human rights trials in Latin America. These conclusions, however, are highly tentative and, as Rodman rightly notes, there are many reasons to suspect that the deterrent effect of the ICC may be substantially limited in ongoing armed conflicts. Future research in the field of human rights and transitional justice should therefore seek to connect these discrete anecdotes in theoretically informed cross-national studies, backed up (where possible) with systematic data concerning the scale of violence. For the time being, this brief overview demonstrates the need for a broader array of indicators of ICC influence. Developing just such measures is the purpose of the remainder of this chapter and Chapter 6.

The Rome Statute and Domestic Legal Change

One prominent way that the ICC might stimulate greater respect for international law is through a demonstration effect that generates legal changes in national societies: “an increase in the number of national prosecutions in the next 5-10 years of individuals charged with genocide, crimes against humanity or war crimes, could… be reasonably credited to a beneficial, knock-on ‘contagion’ effect of the ICC’s presence.” In many cases, ratification of the Rome Statute has led to the diffusion of practices via the creation of new laws to address ICC crimes and procedures. Fifty-eight states—including prominent members of the Like-Minded Group such as Australia, Canada, Germany and New Zealand—have developed legislation to incorporate.

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75 For a summary, see Sikkink, Justice Cascade, 257-269. Additional discussion can be found in Sikkink and Booth Walling, “Impact of Human Rights Trials;” and Kim and Sikkink, “Explaining the Deterrence Effect.”
76 Rodman, “Darfur and the Limits of Legal Deterrence.”
some or all Rome Statute crimes. In Latin America—the subject of many antecedent domestic human rights trials—Argentina, Chile, Colombia, Costa Rica, Nicaragua, Panama and Uruguay modified their national laws to address ICC jurisdiction; a further six (Bolivia, Brazil, Dominican Republic, Ecuador, Paraguay and Peru) have draft legislation pending. Similar processes have also been undertaken by some non-party states including Turkey. In many cases, this was the first time that these international crimes had been included in national laws, reflecting the particular influence that the development of the International Criminal Court has had on the transmission of international norms to domestic environments.

The process of legal implementation has also generated further institutionalization, as with the creation of a dedicated Priority Crimes Litigation Unit in South Africa. After ratification of the Rome Statute, current ICC target states including Central African Republic, Colombia, the Democratic Republic of the Congo, Georgia and Uganda have created or

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86 Darehshori and Evenson, “Peace, Justice, and the ICC,” 21-22
modified judicial institutions ones in order to address alleged ICC crimes at the national level. In doing so, these states bear the marks of international norms and rules on domestic legal practice. For example, since 2006 the military courts of the DRC have invoked aspects of the Rome Statute in some of their judgements. “This welcome development in the practice of the national courts has led to advances in the case-law concerning international crimes as evidenced… [by the] progressive interpretation of Congolese law to include acts committed against male victims within the definition of rape.” The conviction of Mai Mai commander Gédéon Kyungu Mutanga and 20 other combatants in March 2009 was particularly notable for the fact that the judges applied the legal criteria of crimes against humanity found in the Rome Statute. Similar trials in Uganda and have also drawn on substantive and procedural aspects of the Statute.

One significant impact of the ICC and associated internationalized procedural justice norm, therefore, has been to generate pressures toward the (partial and still incomplete) standardization of state responses to alleged acts of grave criminality. In some instances, as with Colombia, Georgia and Kenya, domestic judicial processes are clearly intended to demonstrate


national political will and legal capacity, and thereby avoid a transfer of authority to the ICC via a complementarity challenge. Particularly interesting in this respect is the case of Sudan, a non-party to the Statute:

On 7 June 2007, the Sudanese government announced the establishment of the Special Criminal Court for Events in Darfur (SCCED) in response to the announcement by the [ICC Office of the Prosecutor] about the opening of investigations in Darfur. The jurisdiction of SCCED included acts constituting crimes under the Sudanese Penal Code and charges relating to violations cited in the report of the Commission of Inquiry and, any charges pursuant to any other law, as determined by the Chief Justice of Sudan. Furthermore, in November 2005, Sudan established two additional chambers for the SCCED and created special investigative committees to oversee the activities of SCCED. These were aimed at addressing the crimes in Darfur. The decree which established the SCCED was amended in November 2005 to include ‘international humanitarian law’ in the jurisdiction of the SCCED while two additional seats were established for Nyala and El Geneina.\footnote{Olugbuo, “Positive Complementarity,” 263. See also Republic of Sudan, Statement by Ambassador Sirajuddin Hamid Yousuf, Director, Department of International Law and Treaties, Ministry of Foreign Affairs, on behalf of the Sudanese Observer Delegation to the 5th Assembly of States Parties to the Rome Statute of the International Criminal Court, The Hague, November 24, 2006. \url{http://www.icc-cpi.int/Menus/ASP/Sessions/General+Debate/GENERAL+DEBATE+Fifth+session+of+the+Assembly+of+States+Parties.htm}.}

legal scrutiny. More broadly, observers remained concerned that many of these states simply lack the necessary judicial capacities to adequately address grave crimes.\textsuperscript{101}

Yet as with state responses to the mine ban, cynical apparent compliance with international norms can have important long-term effects. First, the use of legal processes can serve to reinforce an expectation that these procedures are the appropriate mode of operation, thereby locking-in this response for future scenarios. For example, the Kenyan Commission of Inquiry into Post-Election Violence recommended “the creation of a special tribunal with the mandate to prosecute crimes committed as a result of post-election violence.”\textsuperscript{102} However, the final report also proposed that in the event that no domestic tribunal could be agreed,

\begin{quote}

a list containing names of and relevant information on those suspected to bear the greatest responsibility for crimes falling within the jurisdiction of the proposed Special Tribunal shall be forwarded to the [Chief] Prosecutor of the International Criminal Court. The Prosecutor shall be requested to analyze the seriousness of the information received with a view to proceeding with an investigation and prosecuting such suspected persons.\textsuperscript{103}
\end{quote}

When the unity government failed to establish a tribunal, this sealed list was duly passed to the ICC Office of the Prosecutor, and formal indictments were forthcoming, as discussed further below. The key point here is that the Kenyan government was obliged to engage with the Court both as a State Party with legal obligations to the institution, and on the basis of its prior acceptance of a political agreement that specifically envisioned a potential reliance on the Court. While resisting the indictments, Kenya has nonetheless sought to frame its challenge in terms of the legal criteria of the Rome Statute, as evident in the government’s appeals to the Pre-Trial Chamber to vacate the cases.\textsuperscript{104} A similar pattern can be witnessed in other cases, whereby the

\textsuperscript{101} For example, Mattioli and van Woudenberg, “Global Catalyst,” 57.
\textsuperscript{103} Kenya, Waki Commission Report, 473. See also Murithi, “Spectre of Impunity.”
relevant states have sought to assert their sovereignty by upholding the norms of individual
criminal accountability and the ICC’s particular mode of complementarity.\textsuperscript{105} The very fact that
states often respond to actual or potential ICC investigations with their own domestic processes
powerfully demonstrates how international norms and legal structures may change how states
pursue their interests, by providing new benchmarks for appropriate action.

Second, the existence of new legal standards can provide valuable tools for domestic
actors to strategically bypass powerful veto players. The Colombian case illustrates this well:

For the Supreme Court, the ICC has been an important source of support and validation for its
efforts to pursue accountability in a hostile political climate. In a recent case, the Criminal
Cassation Chamber described its responsibility as ‘avoiding at all cost impunity for the crimes
allegedly committed and thereby to show the international community that intervention by the
international criminal justice system is not necessary because Colombia is able to try those
responsible for such crimes and to impose the punitive consequences established under national
criminal law.’\textsuperscript{106}

As with the Kenyan example above, these interactions reaffirm the legitimacy of the ICC
procedural justice norm—that is, domestic legal responsibility to ensure accountability for grave
crimes overseen by a supranational authority—as the appropriate means of addressing alleged
violations of international humanitarian and human rights law. More broadly, the reliance on the
procedural and substantive criteria of the Rome Statute to pursue domestic goals further
reinforces the legalistic basis of membership in the ICC treaty community.

The impact of the Rome Statute on domestic legal practice can also be seen in instances
that fall outside of the strict scope of the ICC itself. As an exemplar of this phenomenon, Canada

\textsuperscript{105} See for example, Republic of Colombia, \textit{Justice and Peace Law}; Sudan, 5\textsuperscript{th} Assembly of States Parties; Central
African Republic, Ministry of Justice, Declaration de la Republique Centrafricaine a l’occasion de la Conference de
Revision du Statut de Rome de la Cour Penale Internationale, Kampala, Uganda, June 1, 2010. Translation by this
author. Georgia, Statement Presented by H.E. Mr. Alexander Lomaia, Ambassador and Permanent Representative of
Georgia to the UN, at the International Criminal Court Review Conference. Kampala, Uganda, June 1, 2010.

\textsuperscript{106} Lyons and Reed-Hurtado, “Colombia,” 4.
recently used its *Crimes Against Humanity and War Crimes Act* (CAHWCA)\(^\text{107}\)—a centrepiece of its legislation implementing the Rome Statute in Canadian law—to prosecute Rwandan national Desiré Munyaneza for acts of genocide committed during the 1994 violence.\(^\text{108}\) A second individual, Jacques Mungwarere, is currently on trial on similar charges.\(^\text{109}\) While the criminal acts in these cases pre-date the entry-into-force of the Rome Statute (and hence fall outside its jurisdiction), they are closely associated with the international and domestic responses to atrocity traced above. Indeed, the genesis of the CAHWCA was itself a response both to noted gaps in prior Canadian legislation that impeded war crimes prosecutions\(^\text{110}\), and the more particular need to meet obligations deriving from Canada’s ratification of the Rome Statute. The CAHWCA incorporates verbatim the crimes enumerated in Articles 6-8 of the Rome Statute, thus demonstrating the influence that the Statute has had on the conception of grave international crimes, while at the same time illustrating the larger legal tradition in which the ICC is embedded.\(^\text{111}\) Other states including France\(^\text{112}\) and Germany\(^\text{113}\) have faced similar calls to pursue cases through the legal authority obtained in their ratification of the Rome Statute and other international legal agreements. Hence one notable impact of the ICC membership has been to


\(^{110}\) Currie and Stancu, “*R. v. Munyaneza*,” 834-835.

\(^{111}\) Canada, *Crimes Against Humanity and War Crimes Act*, Articles 3 and 4.


increase pressure on states not implicated in crimes under ICC jurisdiction to nonetheless address other related legal issues by virtue of their endorsement of norms and practices associated with the grave crimes regime in general and the Rome Statute in particular.114

State Cooperation With ICC Activities

The record of state compliance with ICC judicial activities provides additional evidence for the impact of the treaty and associated core norm. These metrics are, however, highly imperfect and partial. As a relatively new institution, there have only been a limited number of investigations and indictments that have generated the bulk of demands for state compliance. While the Court has made hundreds of requests for material support relating to its operations, these have typically been directed to only a few states in any given circumstance; and significantly, the vast majority of these requests are not made public.115 Hence it is not necessarily clear when, and to what extent, states are actually fulfilling ICC requests and so this cannot provide a fully satisfactory measure of compliance on its own. Yet keeping these caveats in mind, some broad patterns of state engagement can be discerned.

Since its inception, the Court has been active in seeking assistance for its operations. Between 2005 and 2011 the Office of the Prosecutor (OTP) recorded over 500 missions to collect information or request diplomatic support for its investigations.116 The details of these

115 “Pursuant to article 87 of the Statute, requests [are] often made on a confidential basis in order, for example, to protect the safety and security of victims, potential witnesses and their families, as well as Court staff; to maintain the integrity of investigations; to ensure the protection of information or to ensure the proper conduct and successful execution of operations.” International Criminal Court. Report of the International Criminal Court for 2006/07, Submitted to the United Nations General Assembly A/62/314 (New York, August 31, 2007), 11.
missions are not provided however, and so it is not possible to accurately determine the identity and number of states involved. Parsing the data from official Court reports\(^{117}\) does provide some further insight. Since 2007, the OTP has made over 650 requests for assistance to individual states, inter-governmental organizations (principally UN bodies) and non-governmental organizations in respect of on-going investigations and prosecutions. These requests have predominantly concerned three main issues: investigations on national territory (including requests for assistance, transmission of information and interviews); lifting of confidentiality; and access to financial assets.\(^{118}\) The OTP reports that cooperation has been “generally forthcoming,”\(^{119}\) with an initial 85% “execution rate” on its requests during 2007-2009 which has dropped to approximately 70% since 2009.\(^{120}\) No explanation is given for this decline.

A more fine-grained analysis of the available evidence suggests that certain types of requests have been particularly problematic. For example, since 2009 only 30% of requests to identify, freeze or seize personal assets have been “fully executed.”\(^{121}\) Equally, the Court has long noted that limited assistance in matters of arresting and surrendering ICC suspects remains a critical gap that adversely affects its institutional efficacy.\(^{122}\) Of the 26 arrest warrants or

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summonses to appear that have been issued thus far, 123 10 remain outstanding, with four of these active since 2005. 124 Among the remaining set, only six individuals have been delivered to the Court through the agency of states, with two arrest warrants voided by the death of the suspect and a further eight individuals appearing voluntarily. As such, the reports acknowledge the need for greater public and diplomatic support for the Court’s work, as well as greater coordination and political and legal commitment among states and other bodies. 125

At the same time, the early years of the Court featured a series of positive (and potentially surprising) instances of cooperation. For example, Uganda, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR) formally requested that the Court investigate alleged crimes committed during their civil armed conflicts, leading to the first three situations for the new institution. 126 Though not a full State Party, Cote d’Ivoire voluntarily accepted ICC jurisdiction under similar circumstances; despite recurring violence, the new government has subsequently reiterated its prior commitment. 127 These were largely unanticipated developments, and ones that call into question the political motivations underlying these decisions. Payam Akhavan has written that “[f]or Uganda, the referral was an attempt to engage an otherwise aloof international community by transforming the prosecution of [Lord’s Resistance Army] leaders into a litmus test for the much celebrated promise of global justice.” 128

The ICC Prosecutor has suggested that the self-referrals are clear evidence of political

123 This figure slightly diverges from the ICC’s, as the Court counts two separate warrants for President Bashir.
125 Assembly of States Parties, Report of the Court on Cooperation, paras 3 and 4 at 1.
127 See footnote 32, above.
commitment to addressing atrocities. However, some observers have voiced concerns that these initiatives were undertaken to weaken political opponents and thus may represent an instrumentalization of the legal process that belies deeper acceptance of ICC norms.

This discussion raises a couple of important issues that are directly relevant to my theoretical account. First, an international treaty contains legal commitments for State Parties that are reinforced by more generalized social expectations concerning the appropriate response in certain scenarios. These dual modes of obligation raise the consequences of non-compliance in a community that is maintained by the social value of conformance instead of coercive punishment. These pressures appear to be influencing the policies of affected states. The Office of the Prosecutor has, for example, concluded agreements with the governments of the DRC and Uganda (among others) to facilitate its investigations in those situations. It is also interesting to note that of the six suspects surrendered by states, three were handed over by the government of the Democratic Republic of the Congo and one by Cote d’Ivoire. These actions have thus far largely focused on political adversaries, but ICC processes also have direct implications for powerful actors associated with the current governments. All parties to the conflicts are subject to the legal authority of the Court, and so the initiating governments remain potential targets of


\[ \text{International Criminal Court, Report of the ICC for 2004, 6; also 10-11.} \]

\[ \text{The other two, Callixte Mbarushimana of the DRC and Jean Pierre Bemba of the Central African Republic, were arrested and surrendered by France and Belgium, respectively.} \]
an ICC investigation. In the Kenyan case, six individuals—including the former Minister of Higher Education, Science and Technology; the former Head of the Public Service; and the Deputy Prime Minister—voluntarily turned themselves in to the Court after being implicated in the ICC investigation; four have since had their charges confirmed.\textsuperscript{133} And despite the original focus on LRA atrocities, it has recently been reported that the ICC Office of the Prosecutor is now investigating alleged crimes committed by the Ugandan armed forces.\textsuperscript{134} Hence there are risks associated with the strategic use of the ICC legal process, even if one reads the motivations as largely self-interested.

Second, the instrumentalization of ICC legal processes nonetheless reaffirms the relevance of the Rome Statute as the appropriate metric for assessing state commitment to ending impunity for grave crimes. Nouwen and Werner note for example that “in both Uganda and Sudan warring parties have used the ICC’s intervention to brand opponents as \textit{hostis humani generis}, or enemies of mankind, and to present themselves as friends of the ICC, and thus friends of the international community.”\textsuperscript{135} While undoubtedly motivated by political calculations, these efforts still demonstrate the impact of norms bearing on instrumental processes: indeed, such calculations could not exist without an acceptance of the social reality of the ICC norm that produces costs and benefits worthy of consideration. It is interesting to note, for example, that Sudan signed a cooperation agreement with the OTP to aide in the arrest and surrender of LRA suspects, and reportedly provided information for the Prosecutor’s investigation, prior to the announcement of indictments in the Darfur situation.\textsuperscript{136} Early cooperation from authorities in the CAR, DRC, Uganda and others has also reinforced expected ways of behaving that narrows

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\item \textsuperscript{133} Uhuru Muigai Kenyatta, Francis Kirimi Muthaura, William Samoei Ruto and Joshua Arap Sang.
\item \textsuperscript{135} Nouwen and Werner, “Doing Justice to the Political,” 941.
\item \textsuperscript{136} Olugbbo, “Positive Complementarity,” 265-266.
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future policy choices. Conforming to the expectations of the treaty community thus sets a precedent that other actors (including fellow governments and civil society groups) can exploit to hold governments to account if they fail to continue to meet the standards they purportedly endorse. It is in this context that the (thus far limited) domestic trials in states like Colombia, the Central African Republic, the Democratic Republic of the Congo and Uganda—discussed in the previous section—take on greater significance as evidence of the transformative potential of legal processes in imprinting social expectations on state actors.

This dissertation has therefore insisted repeatedly that the impact of treaties can be felt not only by its formal community of members, but also by the broader society of states. The decision of the United Nations Security Council to refer the cases in Darfur (Sudan) and Libya to the ICC Prosecutor appears as a particularly prominent moment in the expansion of the Court’s global legitimacy, especially in light of the fact that three of the five veto-holding permanent members are not parties to the Rome Statute.137 These were remarkable developments since they directly contradicted the prior resistance to the Court among the great powers of China, Russia and the United States. The explanations associated with the votes clearly demonstrate how the Court has come to be associated with the cause of ending impunity for international crimes, a subject I take up more fully in Chapter 7. The Russian delegate therefore noted that

[t]he members of the Security Council have frequently reaffirmed that the struggle against impunity is one of the most important elements of a long-term political settlement in Darfur and the Sudan as a whole. All who are guilty of gross violations of human rights in Darfur must be duly punished…. We believe that the resolution adopted today by the Security Council will contribute to an effective solution in the fight against impunity in Darfur in the context of providing for the normalization and stability of the situation in that region of the Sudan.138

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The US decision to deploy military advisors to aide in the capture of Lord’s Resistance Army suspects in central Africa is also emblematic of this mode of justification.\textsuperscript{139}

These examples serve to further highlight how the instrumental employment of international institutions presupposes the legitimacy of their underlying norms. Indeed, using indictments to stigmatize political actors like Omar al-Bashir and Muammar Gaddafi only has impact because of a prior intersubjective understanding that grave violations of international humanitarian and human rights law are impermissible. It is particularly significant that it was the ICC—and not some ad-hoc legal entity—that was selected as the vehicle for pursuing accountability. This reinforces the social expectation that the Court—and its associated structure of complementarity—is the appropriate institution for addressing grave international crimes when domestic remedies fall short.

These developments must still be set against instances of states flouting the obligations and commands of the Court. The Sudanese government, for instance, has refused to hand over citizens wanted by the Court, and President Omar al-Bashir—himself presently under ICC indictment—has applied extensive diplomatic effort to persuade other regional actors to reject his warrant of arrest. This is significant since Sudan (along with all other states) is under a legal obligation to comply with the Court as a result of UN Security Council Resolution 1593.\textsuperscript{140} The United States for its part has sought to undermine the institutional efficacy of the ICC \textit{inter alia} by pressuring states to adopt bilateral agreements granting US citizens blanket protection from ICC proceedings, and embedding this principle of immunity in UN Security Council Resolutions

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\item United Nations Security Council, Resolution 1593.
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on peacekeeping operations in Bosnia\textsuperscript{141} and the referral of the situation in Darfur to the Court.\textsuperscript{142} Robert Cryer and William Burke-White regard the effort with respect to UNSC Resolution 1422 on Bosnian peacekeeping as particularly damaging:

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[T]he Resolution can be seen as an attempt to assert the supremacy of political considerations over law in two significant ways: not only by violating both the Rome Statute and the UN Charter, but also by trying to assert the old political order of the veto, secret meetings and self-serving interpretations of “security”, over a newly emerging, but still weak, legal order based on the enforcement of fundamental laws prohibiting the most heinous crimes. In so doing, the Security Council acted inconsistently with its own movement towards a system of security based increasingly on concerns about justice manifested by its creation of international criminal tribunals and determinations that violations of international humanitarian law constituted threats to the peace.\textsuperscript{143}
\end{quote}

These episodes suggest ways in which non-parties may invoke other, purportedly superior principles of international order to challenge the legitimacy of more particular treaty obligations. In the case of the so-called “Article 98” bilateral immunity agreements\textsuperscript{144}, the US actually employed the legal criteria of the treaty to pursue a campaign that would shield its own nationals from effective ICC oversight. In some instances, therefore, the association with prior international norms and rules may be exploited by resistant states to counteract unwelcome legal


\textsuperscript{142} “[N]ationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State;” United Nations Security Council Resolution 1593, operative paragraph 6. Similar language was included in Security Council Resolution 1497 (August 1 2003) that established a Multinational Force in Liberia.


\textsuperscript{144} Article 98(1) of the Rome Statute reads: “The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity.” In light of this, in 2002 American diplomats initiated a global effort to convince foreign states to sign bilateral non-surrender agreements barring them from transferring American nationals to the ICC. This subject is addressed in greater detail in Chapter 7. For more information see also Dapo Akande, “The Jurisdiction of the International Criminal Court Over Nationals of Non-Parties: Legal Basis and Limits,” Journal of International Criminal Justice 1, no. 3 (2003): 618-650; David Scheffer, “Article 98(2) of the Rome Statute: America’s Original Intent,” Journal of International Criminal Justice 3, no. 2 (2005): 333-353; and Kelley, “Who Keeps International Commitments.”
developments. These episodes thus draw attention to some potential limits of network effects in generating support for non-great power treaties.

Given the intersubjective way in which state policies are assessed and given meaning in an international social system, the response to these actions is perhaps of greater significance to the health of ICC and its associated norm than the acts themselves. For example, a number of states, including four ICC members (Chad, Djibouti, Kenya and Malawi) have allowed President Bashir to enter their territory without exercising their legal obligation to arrest and surrender him to Court custody.\textsuperscript{145} And a total of 102 states—including 48 ICC State Parties—signed Article 98 Agreements with the US\textsuperscript{146}, while the members of the Security Council authorized Resolutions 1422 and 1497 granting one-year exemptions from ICC jurisdiction to UN peacekeepers on non-party states as well as a parallel provision in Resolution 1593 on Darfur. Thus there is ample evidence of states endorsing (or at least acquiescing in) these and other efforts to contest the basic legal and operational premises of the Court.

Yet there are also many instances of resistance to anti-ICC activities. For example, a number of State Parties have made clear that President Bashir would be subject to arrest should he decide to visit, and some have withdrawn prior invitations.\textsuperscript{147} A US effort to achieve an indefinite extension of the immunity provision in Resolutions 1422 and 1497 was also successfully resisted by ICC proponents, as I discuss in Chapter 7. Equally, nearly half of all


\textsuperscript{146} Coalition for the International Criminal Court, \textit{Factsheet: Status of US Bilateral Immunity Agreements (BIAs)}, December 14, 2006. \url{http://coalitionforthecicc.org/?mod=browserdoc&type=12&year=2006}. The report includes information on 100 of these agreements.

\textsuperscript{147} Most recently, the African Union elected to move its annual meeting after the Malawian government (the original host state) refused to allow President Bashir to attend. British Broadcasting Corporation, “Ethiopia to Host Africa Union Summit After Omar al-Bashir Malawi Row,” June 12, 2012. \url{http://www.bbc.co.uk/news/world-africa-18407396}. 
states (including 57 State Parties) did not ultimately sign bilateral immunity agreements, with more than 50 publicly refusing to concede to US demands, often resulting in the loss of significant US economic and military assistance.\textsuperscript{148} It has been suggested that such decisions were frequently influenced either directly or indirectly by normative judgements concerning an “affinity for the [C]ourt or because of their respect for the rule of law.”\textsuperscript{149} For example, there is good reason to believe that a number of Eastern European governments—including Bulgaria and Serbia and Montenegro—explicitly avoided signing Article 98 Agreements as a consequence of concerns over their future membership in the European Union. This calculus was captured in the comment by then-European Commission President Romano Prodi that “[i]f Bulgaria bows to US pressure and signs an agreement granting ICC immunity for US citizens, it may [as] well forget about EU membership.”\textsuperscript{150} There are clearly instrumental concerns at work in these instances, albeit ones that engage the very social expectations under consideration here. Indeed, the use of EU membership as political leverage is only significant here because the EU had already adopted an official policy in support of the ICC and against US efforts to undermine the institution—a position that was explicitly framed in terms of fidelity to legal obligations and broader norms.\textsuperscript{151} This example thus further highlights the oft-repeated point that instrumental and normative forms of reasoning are interactive rather than mutually exclusive influences on state policy decisions, a subject addressed further in the discussion of state discourse.


\textsuperscript{149} Kelley, “Who Keeps International Commitments,” 586.


Conclusion

What are we to make of the various indicators presented above? Most broadly, the available evidence clearly demonstrates a rapidly expanding pattern of state behaviour in favour of pursuing individual criminal accountability for grave international crimes. These empirical trends, moreover, appear to be closely associated with the emergence and consolidation of new norms concerning the punishment of atrocity via judicial mechanisms, most recently embodied in the particular institutional solution and parallel norm represented by the Rome Statute. This can be contrasted with the prior era in which a generalized expectation of impunity—that is, the general absence of individual criminal responsibility for violations of international humanitarian and human rights law—governed relations within and between states. This is in itself a major transformation in the conduct of international affairs.

More specifically, the above discussion reveals extensive membership in the ICC treaty community, including among a number of states that would be particularly vulnerable to the legal authority vested in the Court. Endorsement of the Rome Statute via ratification or accession is itself the product of a longer-term accretion of practices, norms and rules at both the domestic and international levels, further reinforcing the network account of non-great power treaty influence proposed in Chapter 2. The Rome Statute has proven modestly effective at generating new legal commitments among parties (especially compared with other human rights treaties), though the extent of this effect is more modest than with the MBT. The pattern of membership does however raise important questions concerning the limits of this adaptation, especially as a number of powerful states remain outside the legal regime established by the Statute.

Engagement with the ICC has also generated changes to domestic practice both in respect of national responses to atrocities and cooperation with Court operations. Importantly, the
behaviour of non-parties in many instances appears conditioned by these normative developments, as is especially notable with respect to the actions of China, Russia and the US on the Sudan and Libya referrals. In order to appear as good international actors, states must increasingly accord—or at least appear to accord—with the procedural and normative commitments embodied in the Statute. Finally, states frequently rely on the legal criteria of the Statute in shaping their own policy responses. One recent review has therefore suggested that:

[i]n many countries reforms were adopted or initiated in the context of the ratification of the ICC Statute and the insertion of special legislation on international crimes now complements the domestic criminal law. One of the most significant results of the establishment of the ICC is, therefore, the increase of the potential of ‘National Prosecution of International Crimes’.¹⁵²

When taken globally, however, this optimistic reading has only been partially realized, as current responses to violations of international humanitarian and human rights law are clearly insufficient. Much of this capability gap, I will argue, can be attributed to the absence of adequate legal structures at the national level to investigate and punish grave international crimes. Carrasco notes for example that while “the Rome Statute played a significant role in the [updating] of international criminal law in Latin America,” this has rarely resulted in the completion of comprehensive implementing legislation covering all aspects of the Statute.¹⁵³

This experience is shared in other regions as well. To shed further light on this subject, in the next chapter I turn to another means of assessing the impact of the ICC and associated norm of internationalized procedural justice, by evaluating the incorporation of the Rome Statute into domestic law. This is directly relevant to the previous discussion since national implementing legislation is a main vector through which behavioural change in line with ICC obligations may occur.

CHAPTER SIX:
NATIONAL IMPLEMENTATION OF THE ROME STATUTE

Introduction: A New ICC Legislation Database

Due to the limits of other behavioural indicators discussed in the previous chapter, focusing on the domestic implementation of the ICC provides an additional means of assessing the impact of the Rome Statute and attendant norm of internationalized procedural justice. It is now widely recognized that the process of incorporating ICC crimes and procedures into national law—what other scholars have termed “internalization”\(^1\) or “enmeshment”\(^2\)—is necessary to allow states to participate fully in the legal regime established by the Rome Statute. Cooperation involves complex legal and bureaucratic arrangements implicating constitutional, judicial and diplomatic practices and as such, is not easily addressed in an ad-hoc fashion. Sufficient legislation is vital since, as Lee points out, “many of the Statute provisions are not self-executing or may be in conflict with the existing law.”\(^3\) Without a clear articulation of the relevant legal procedures, states are likely to find that some requests from the Court or other states cannot be undertaken due to complications with (for example) the transfer of sensitive documents, extradition of nationals to third parties and mandated immunities for senior political figures.\(^4\) These are precisely the kinds of compliance scenarios discussed in Chapter 5.

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\(^1\) Koh, “Bringing International Law Home.”
\(^3\) Lee, “States’ Responses,” 42-43. “Those States Parties that have seriously examined the question of implementation have come to the unanimous conclusion that, regardless of their legal tradition or normal practice, the Statute requires some form of domestic implementing legislation.” ICCLR, *International Criminal Court*, 13.
Domestic implementation also reinforces the Statute’s foundational expectation that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”

Providing for the full range of ICC crimes and procedures in domestic legislation is most effective way to ensure that states are able to undertake investigations and trials in line with these international standards on their own territory. This is important because the Court can principally be seen as an institutional structure—and associated norm—for enforcing existing international humanitarian and criminal law. The central innovation of the Rome Statute is not to outlaw certain acts *per se* (since most were already prohibited under international law), but rather to create a new procedure for punishing (and hopefully deterring) these crimes. The majority of this effort is intended to take place at the national level:

The Rome Statute established a permanent ICC that could only work if each state acted in good faith to define these crimes as crimes under its national law and then vigorously enforced that law through investigations and, where there was sufficient admissible evidence, prosecutions. Otherwise the ICC would be overwhelmed with cases.

As Kleffner has pointed out, the principle of complementarity “provides for a supervision of national criminal courts, supported by the threat that they relinquish the primary right to exercise jurisdiction if they fail to meet the relevant [Rome Statute] requirements.” It is for these reasons that scholars and practitioners have identified improvements in domestic legal practice, rather

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5 Rome Statute, sixth preamble paragraph. To that end, the fourth preamble paragraph states that “the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation”.


than the Court’s own judicial operations, as a crucial indicator of ICC influence over international efforts to end impunity for grave crimes.\(^8\)

National implementation is hence a key vector for norm dispersion, and offers important evidence of the *political* impact of international standards at the state level.\(^9\) Domestic incorporation of the Rome Statute is a principal metric in the assessment of national judicial capacity, and is an equally valuable indicator of political will and the concomitant commitment to international norms since it requires that state actors do something proactive in order to bring themselves in line with their legal obligations.\(^10\) These dual concerns are at the heart of the complementarity principle.\(^11\) As such, implementing legislation for the ICC can be thought of as an expression of sovereignty, as “[states] have criminalized the Statute crimes into their national laws in order to ensure that investigation and prosecution can take place under their jurisdiction.”\(^12\) Domestic implementation is thus both practically beneficial, as it closes gaps in the international capacity to try serious crimes, and normatively important as it establishes a particular global vision of the appropriate response to certain forms of criminality.

This concern for domestic legal incorporation also implicates non-party states, for two distinct reasons. On the one hand, states may modify their laws in anticipation of a future

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\(^8\) See for example Schiff, *Building the ICC*, 167; and Rastan, “Responsibility to Enforce,” 179. “As a consequence of complementarity, the number of cases that reach the Court should not be a measure its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.” Luis Moreno-Ocampo, Speech at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court, The Hague, The Netherlands, June 16, 2003, 2. [http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/Statement/](http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/Statement/).


ratification or accession, or to meet the standards of complementarity and thus forestall the potential reach of the Court via a UN Security Council referral.\textsuperscript{13} In such cases, national laws reflect an increasing parity with international standards embodied in the Rome Statute even as these same states remain outside of the formal legal community. For example, Rwanda’s \textit{Law No. 33 bis (2003)} incorporates the definitions of genocide, crimes against humanity and war crimes almost in their entirety, and additionally adopts the modalities for commander responsibility and the elimination of personal immunities as articulated in the Rome Statute.\textsuperscript{14} On the other hand, core features of the ICC legal regime—most especially core crimes and modes of jurisdiction—largely pre-date the Rome Statute and thus may already be found in the national laws of some non-parties. This reinforces a central contention of this dissertation whereby the connection to prior (and more broadly accepted) norms and rules can provide the basis for drawing ambivalent states toward new legal innovations. At the same time, the attention to antecedent and associated international norms also demonstrates why the assessment of an institution like the ICC as an isolated independent variable offers a misleading picture of treaty impact. Determining the extent of existing concordance between the Rome Statute and the domestic laws of non-party states is thus an important empirical contribution to the theoretical framework presented already. Legal texts also have the virtue of formality and permanence: they can be studied as “official” evidence of state policy, and can be compared against one another and external standards. For the above reasons, Theodor Meron has argued that the incorporation of international norms into national law “should be considered as among the best types of

\textsuperscript{13} Kleffner, “Impact of Complementarity,” 109-112.
evidence of [state] practice” in assessing the customary status of a legal norm or rule, which is a useful proxy for this study’s focus as well.  

In order to capture the current extent of national legislative concordance with the Rome Statute, I developed an original dataset that tracks the presence or absence of ICC features in domestic law across the international system. A few studies have previously sought to measure and assess the extent of national implementation of the Rome Statute, but these have tended to focus on a limited number of states, or have sought to quantify the existence (rather than detailed content) of legal developments. To my knowledge, this chapter presents the first systematic evaluation of implementing legislation in a global context.

Rather than attempting to assess the status of every element of the Rome Statute, I identify a more modest set of indicators classified under the rubrics of “cooperation” and “complementarity” that address primary aspects of the broader legal agreement. In doing so, I have selected those features that are most central to the Statute’s purpose and operation, and that represent particularly consequential or challenging commitments for states to observe. In this way, I seek to assess the implementation of ICC norms under the most difficult conditions. This process yielded 12 main indicators: six concerning complementarity (jurisdiction, immunity, commander responsibility, and the core crimes of genocide, crimes against humanity and war crimes) and six addressing cooperation (obligation to cooperate, special legal status of the Court,

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obstruction of justice, arrest and surrender, provision of documents, and enforcement of Court sentences). These were further informed by an extensive set of sub-indicators. The Appendix provides greater detail concerning data sources, the operationalization of individual indicators and their aggregation.

A couple of additional brief points are required before turning to the findings. This dataset is principally concerned with determining the extent to which core ICC commitments have found their way into national legal environments. Their presence in national laws would suggest a widening web of legal rules and norms, but this does not itself indicate causation. In many cases the decision to join the Rome Statute stimulated a process of legislative change, as states sought to close gaps in their ability to investigate and prosecute ICC crimes. However, the majority of states have thus far not completed this process, so a simple measure of the existence (or not) of an ICC implementation law is insufficient. It is also possible that such changes actually precede and are unconnected to the Statute itself—as with many states incorporating the crime of genocide well before 1998\textsuperscript{18} and under such circumstances would not demonstrate endorsement of the Rome Statute \textit{per se}. At the same time, the precise manner in which implementation occurs—whether through stand-alone legislation specifically incorporating the Rome Statute, or via various forms of ad-hoc modification of existing laws—will vary with the circumstances in each state.\textsuperscript{19}

Despite these drawbacks, establishing the presence or absence of particular ICC features in national legislation is valuable for assessing the contemporary scope of the Court as an institutional structure and its associated status as an international norm (that is, as the socially-

accepted means of addressing grave criminality). I argued in Chapter 2 that treaties rely to a large degree on prior principles, norms and rules as part of a web of international community expectations. These network effects should serve as a source of authority for the Rome Statute. Treaty parties can find historical antecedents to bolster the contemporary legitimacy and obligatory status of the Court and as such, ICC features with more established legacies should be more susceptible to widespread domestic incorporation. At the same time, for State Parties to develop a productive legal community based in the Rome Statute, they must ensure that the legal criteria upon which the Court is based are part of their own domestic law. Though the Rome Statute relies heavily on prior legal developments, the treaty itself can be said to have independent effects on state behaviour to the extent that its emergence can be correlated with subsequent changes in national law in response to the commitments enshrined in the treaty text.

This approach has the added virtue of allowing some consideration of how much of the ICC’s legal normative architecture is already shared by non-party states. This is itself important since the broader international environment of shared or overlapping norms is a vital conduit through which resistant states can be implicated in the work of new legal institutions they ostensibly reject. For example, the fact that many non-parties already recognize some Rome Statute crimes in their national laws narrows, but by no means resolves, the divergent visions for how best to organize and pursue international justice. Conversely, the absence of other legal features leaves gaps in the web of legal authority that will impact the ability of states to investigate and prosecute ICC subject crimes, and limits the scope of a parallel norm concerning the punishment of grave crimes via this particular model of procedural justice.

Finally, it is important to acknowledge that this dataset is not exhaustive. Data is drawn principally from specific implementing legislation, national criminal codes and codes of criminal
procedure; in some instances, legislation incorporating other international agreements (especially the Genocide Convention, Geneva Conventions and Convention Against Torture) is included. This approach therefore excludes other potentially relevant legal sources including military manuals and codes of conduct. Such sources are often not reliably available as public documents, and so for reasons of efficiency and consistency are excluded here. Every effort was made to locate relevant legislation for each state, but in some instances no such documents could be uncovered within reasonable search parameters. In the absence of available information, states are coded as non-compliant (i.e., the particular indicator is not present) with the hope that this dataset can be expanded during subsequent research.

National Legislation and the Incorporation of ICC Norms

Overview: Global Patterns of Legislative Change

In this section I briefly summarize the general trends concerning global incorporation of ICC features. For each state—both State Parties and non-parties—an aggregate compliance score was generated by combining the scores for 12 discrete indicators. These were weighted equally, and this composite measure gives a snapshot of relative adherence on a state-by-state basis across the international system. Table 2 summarizes these trends; “n” represents the number of states in the given category, while “#” reflects the absolute point total, and “%” translates this into percentage form.

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20 The present dataset contains 60 states (of 196 coded) for which substantive information is unavailable for more than 50% of the included indicators. These can be distinguished from instances where the author was able to confirm that relevant national legal provisions do not exist.
Table 2: Overview of ICC Compliance

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<thead>
<tr>
<th></th>
<th>n</th>
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<th>%</th>
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</thead>
<tbody>
<tr>
<td>States Parties</td>
<td>121</td>
<td>4.75</td>
<td>39.58</td>
</tr>
<tr>
<td>Signatories</td>
<td>31</td>
<td>0.80</td>
<td>6.67</td>
</tr>
<tr>
<td>Non- Parties</td>
<td>44</td>
<td>0.91</td>
<td>7.58</td>
</tr>
</tbody>
</table>

Thus far, there has been relatively modest incorporation of ICC norms in national legislation. At the time of writing, 58 of the 121 State Parties have enacted new laws or amended existing ones in order to specifically address some or all of the relevant Rome Statute provisions.21 State Parties have an average score of 4.75 out of a possible 12; this equates to a nearly 40% implementation rate. Hence the transmission of international legal standards is occurring slowly even for those states that have formally endorsed the constituent treaty. Some relevant patterns are visible within this aggregate data. Of the 39 states with implementation scores of 7 or above, 33 were members of the Like-Minded Group that—along with civil society actors—stewarded the negotiations for an independent Court.22 This fact speaks to the view that extensive incorporation of legal obligations is most likely in states that are already deeply committed to objectives of the treaty. However, unlike those (predominantly rationalist) scholars that regard endogeneity as a mark against the independent power of legal

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22 Andorra, Argentina, Australia, Austria, Belgium, Bulgaria, Burkina Faso, Canada, Croatia, Denmark, Estonia, Finland, Georgia, Germany, Ireland, Korean Republic, Latvia, Liechtenstein, Lithuania, Malta, Netherlands, New Zealand, Norway, Poland, Portugal, Samoa, Senegal, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago and the United Kingdom. In total, 68 states are commonly considered part of the Like-Minded Group. The full list is found in Parliament of the Commonwealth of Australia, *Statute of the ICC*, 110.
processes and norms,²³ I have suggested that the negotiation of the Statute was itself a constitutive moment in which state identities and interests were reconfigured in favour of an independent Court, and that this intersubjective process has facilitated subsequent compliance. Indeed, there is ample evidence that national implementation has contributed to broader societal transformations: “The passing of the ICC Act was momentous: prior to the ICC Act, South Africa had no municipal legislation on the subject of war crimes or crimes against humanity, and no domestic prosecutions of international crimes had taken place in South Africa.”²⁴ This is similarly the case for a number of states in Latin America, including Argentina.²⁵ In such cases, the Rome Statute—defined by its legalistic criteria of rules and procedures and association with prior international humanitarian and human rights law—is now taken as the embodiment of a new standard of appropriate behaviour, as explored further in the next chapter.

Interestingly, the presence of ongoing violence does not impede the incorporation of ICC features as much as might be expected. Overall, the 64 State Parties involved in some form of armed conflict since 1998 have considerably higher rates of adherence than treaty members in general, averaging 52% (6.25 points). This compares with an average incorporation rate of 32% (4.37) when accounting for the full 103 conflict-prone states during this same period. A good deal of this observed difference can be attributed to early supporters of the ICC—including Canada, the Netherlands and the United Kingdom—who participated in coalition military operations in Afghanistan and, to a lesser extent, Iraq. However, in some cases, the experience of internal armed conflict has led to greater engagement with the Court and an increased sensitivity

²³ Prominent expressions are found in Downs, Rocke and Barsoom, “Good News About Compliance;” and Hathaway, “Do Human Rights Treaties Make a Difference?”
to the legal standards contained in the Rome Statute. For example, Uganda’s implementation
score is a near-perfect 11.5, which is owing to the fact that the 2010 *International Criminal
Court Bill* is explicitly modelled on the Statute and incorporates many provisions directly from
the treaty text.  

Anecdotal evidence suggests that Ugandan officials modified the *ICC Bill* in
specific ways to conform to the Statute. Hence challenging circumstances do not necessarily
undermine state compliance, and may in fact provide the impetus for legal change. More
broadly, this brief account conforms to the theoretical expectation that State Parties will often
invoke the legal criteria of the treaty as the benchmark against which they measure their own
conformity with community expectations.

Unsurprisingly, the extent of implementation among non-parties is extremely low, with
these states averaging an approximately 8% rate of incorporation (0.9 points). This is principally
owing to the fact that national legislative change is typically stimulated by a decision to join the
Court, and thus immediately precedes or subsequently follows ratification of the Rome Statute.
For this reason it is somewhat surprising that compliance among signatories is slightly lower
than for non-parties, at a little under 7% (0.8 points out of 12). We would expect to see greater
internalization of Rome Statute norms among those states that, by their signature, have indicated
their intention to join the institution. This finding suggests that, in the case of the ICC, legislative
change and the incorporation of international norms rarely occurs in advance of membership.

The global overview demonstrates only limited progress in applying Rome Statute norms
at the national level. This serves to highlight the difficulties, noted by various authors, in

mps-trap-museveni-and-save-kony.
28 Lyons and Reed-Hurtado, “Colombia,” 2.
translating behavioural injunctions found in international treaties into domestic legal contexts. These general findings therefore suggest important limits on the extent to which current national laws will permit states to undertake investigations and trials and cooperate with ICC proceedings. A more fine-grained analysis reveals particular patterns within this general compliance picture, as detailed below.

**Complementarity**

As noted already, the Rome regime is predicated on a burden-sharing arrangement in which states take on the majority of responsibility for legal initiatives. It is therefore incumbent upon State Parties to incorporate all Rome Statute provisions concerning the content of ICC subject crimes, as well as jurisdiction and modalities of individual criminal responsibility (elimination of immunity and incorporation of principle of commander responsibility), into their domestic laws so as to enable this division of labour. As Figure 8 documents, however, a great deal of work remains in this regard. To this point, State Parties have a compliance rate of close to 44%, an average of 2.65 of the 6 complementarity indicators. The extension of Rome Statute norms outside of the formal treaty community remains extremely low: current signatories average a 12% rate of incorporation (0.73 out of 6), while non-parties again score slightly higher at 15% (0.90 out of 6). These patterns mirror the aggregate view presented above, and reaffirm the observation that early supporters are much more likely to incorporate ICC obligations, albeit incompletely.

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29 For example, “the implementation of the Rome Statute in Latin America continues to face structural gaps caused by a lack of comprehensive implementation of all the elements of the treaty.” Carrasco, “Implementation of War Crimes in Latin America,” 462. Similarly, “[w]hile African states have been at the forefront in ratifying the Rome Statute, the progress on domestic implementation of the Statute has been rather slow…. [D]raft implementing legislation exists in several African countries but only a few countries have passed domesticating statutes to date.” Mwiza Nkata, “Implementation of the Rome Statue in Malawi and Zambia: Progress, Challenges and Prospects,” in *Prosecuting International Crimes in Africa*, eds. Chacha Murungu and Japhet Biegon (Pretoria, South Africa: Pretoria University Press, 2011), 283-284.
There are thus important limits in the extent to which the constituent ICC norms and rules are gaining traction in domestic law, and how much of the observed incorporation can be attributed to new laws specifically implementing the Rome Statute. At the time of writing, 56 states have fully incorporated the dual (territorial and national) modes of jurisdiction envisioned in the Rome Statute\textsuperscript{30}, of which 42 have done so via specific ICC implementing legislation. A further 50 states have partially recognized the jurisdictional basis of the Court, either by including either the territorial or national modality, or by incorporating both in an incomplete fashion.\textsuperscript{31} In total, 106 states have met at least part of the jurisdictional precondition for

\textsuperscript{30}Rome Statute, Article 12(2). Bourgon, “Jurisdiction Ratione Loci.”

\textsuperscript{31}As explained in the Appendix, I code the “jurisdiction” indicator in relation to those for “genocide,” “crimes against humanity,” and “war crimes”: the former was only coded as “present” in my dataset if the state in question also had incorporated a significant number of ICC crimes. While every domestic criminal code has a provision for
addressing Rome Statute crimes in their domestic legal systems; this figure includes 26 states that are not presently members of the Court.\(^{32}\) This reflects the fact that the modes of jurisdiction were already recognized norms of international law before the advent of the Rome Statute, and were thus among the most likely to be present in the national laws of non-parties.

The assertion of the complete “irrelevance of official capacity”\(^{33}\) is at the heart of the Rome Statute’s commitment to universal justice. The extent of state endorsement of this new standard is an especially important indication of norm diffusion, since the elimination of immunities for senior political leaders reverses previous international practice and implicates the very people making these international commitments, and thus represents an especially significant form of state change. Yet the Rome Statute also maintains the long-established principle that states will respect the legal immunities of certain political and diplomatic actors in their international relations, and therefore enshrines two apparently contradictory standards for how to govern sensitive questions of legal culpability.\(^{34}\) Here the dataset reveals among the most limited degrees of progress: thus far, only 32 states have fully incorporated the immunity standard articulated in Article 27 of the Rome Statute, while a further four have modified their laws in partial adherence to this new rule.\(^{35}\) Significantly, the vast majority (27 instances) of these changes have come via specific implementing legislation by State Parties. This reflects the fact that, unlike some other metrics included in this dataset, the Rome Statute is a principal source for this emergent standard and would be a key driver of any future consolidation of an

\(^{32}\) 16 non-parties and 10 signatories.
\(^{33}\) Rome Statute, Article 27. See also Gaeta, “Official Capacity and Immunities.”
\(^{34}\) Rome Statute, Article 98. My thanks to Professor Byers for emphasizing this point.
\(^{35}\) Prominent ICC proponents including France have yet to incorporate the provisions of Article 27 into their domestic laws, while others like Colombia have retained the ability to provide amnesties and pardons. On the debate surrounding Uganda’s removal of immunities in line with Article 27, see Mufumba, “ICC Bill.”
anti-immunity norm.\(^{36}\) The evidence presented here thus also suggests that newer international norms are also likely to be incorporated more slowly and contested more heavily, a theme that the next chapter takes up at length.

Closely related is the principle of commander responsibility, which was already well established as a rule of customary international law.\(^ {37}\) Here again we find only limited evidence of incorporation in national law, with 39 states having fully domesticated the Rome Statute standard, and six having done so in an incomplete manner. And, as with the principle of immunity, the vast majority of this legal change is undertaken by State Parties (38 of 46 cases) via ICC-specific national legislation (30 of 46 cases). This provides yet another example of the limited domestic incorporation of international norms despite a substantial prior legacy.

Equally important to efficacy of the ICC regime is the widespread adoption of the crimes under the Rome Statute, since in their absence states are unable to meet their responsibility to address “the most serious crimes of concern to the international community as a whole.”\(^ {38}\) As above, the record is decidedly mixed. Genocide\(^ {39}\) is the most consistently incorporated crime, and features in the available laws of 105 states, including 26 states that are presently not members of the Court. However, this owes less to the Rome Statute itself than it does the widespread acceptance of the prior Genocide Convention, from which the Rome Statute derives.

\(^{36}\) Interestingly, three states—Armenia, Egypt, and Rwanda—have domestic laws that parallel the spirit of Article 27 even as all three remain non-parties to the Rome Statute.


\(^{38}\) Rome Statute, Article 5(1).

its definition in Article 6.\textsuperscript{40} Hence, while 79 ICC State Parties have incorporated the crime of genocide, only 55 of those have some form of implementing legislation relating to the Statute, which in a number of cases does not address subject crimes at all. And, while genocide is the most widely domesticated crime, it is still only present in 54\% states with national laws accessible for this study.\textsuperscript{41} This finding is especially relevant for two reasons. On the one hand, the modest incorporation of the Genocide Convention—a treaty that has been in existence for over 60 years and is widely ratified\textsuperscript{42}—gives some perspective on the comparative experience of ICC implementation. On the other hand, the fact that a foundational norm of contemporary international society—what international lawyers term a \textit{jus cogens} norm—has not received greater incorporation in national law provides an important qualification for the network theory of norm diffusion developed in Chapter 2.

The Rome Statute formulations of crimes against humanity and war crimes are even less prominent in domestic legislation.\textsuperscript{43} Fifty-four states have fully incorporated the definition of crimes against humanity found in Article 7 of the Rome Statute, while five have internalized some aspects while leaving others out. Unlike genocide, crimes against humanity are most often

\textsuperscript{40} In virtually every case, states have incorporated the operative language of the definition of genocide in its totality directly from either the Convention or Rome Statute. The only apparent exceptions are Guinea-Bissau, Saint Lucia and Uzbekistan.

\textsuperscript{41} “Despite a requirement under the Genocide Convention that States Parties ‘enact . . . the necessary legislation to give effect to the provisions of the present Convention…’ many States parties… had not done so, claiming that their domestic laws were adequate to address the crime. Many of these same states have now been prompted to finally do so when faced with ratifying the Rome Statute, therefore ensuring that they will be able to fulfill their undertakings under the Genocide Convention to prevent and punish acts of genocide.” Leanne McKay, “Characterising the System of the International Criminal Court: An Exploration of the Role of the Court Through the Elements of Crimes and the Crime of Genocide,” \textit{International Criminal Law Review} 6, no. 2 (2006): 270-271.

\textsuperscript{42} As of June 2012 there are 142 State Parties to the Convention on the Prevention and Punishment of the Crime of Genocide. \url{http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&lang=en}.

incorporated via new national implementing legislation (45 out of 59 cases); this makes sense since there is no stand-alone convention defining and regulating this category of international crimes and so the Rome Statute is the most obvious legal source on this subject.\textsuperscript{44} Many states already criminalize some or all of the constituent crimes encompassed in Article 7 (such as murder, torture, or rape) domestically, but not necessarily as part of a “widespread or systematic attack” “directed against a civilian population,” with the further caveats that it be composed of “multiple commissions” of the acts and be executed “pursuant to or in furtherance of a State or organizational policy.” These distinctions are important, as they collectively represent the principal difference between “ordinary” crimes and those of the normatively distinct “grave crimes” regime encapsulated by the ICC. The Like-Minded Group accounts for 65% (35 of the 54 cases) of the full incorporation of this standard, as would be expected given the earlier discussion. Most interesting are those states—including the Central African Republic, Congo, Democratic Republic of the Congo, Indonesia, the Philippines and Uganda—that have incorporated crimes against humanity in the midst of internal armed conflicts that have featured allegations of precisely these kinds of acts by rebel groups and/or state security forces. Other conflict-prone states like Azerbaijan, Burundi, Georgia and Rwanda have similarly implemented the crimes of Article 7 in their national law. These cases provide among the best examples of instances where states have endorsed legal rules under circumstances where legal exposure is most plausible, thus raising the prospective costs (and benefits) of compliance.

\textsuperscript{44} Lee, “States’ Responses,” 26; Leila Nadya Sadat, ed., \textit{Forging a Convention for Crimes Against Humanity} (Cambridge: Cambridge University Press, 2011). Regarding the customary development of crimes against humanity, see Cassese, “Crimes Against Humanity.” Crimes against humanity were first articulated at the Nuremburg Tribunal. Aspects of the Rome Statute definition were drawn from this experience as well as developments at the International Criminal Tribunals for Rwanda and Yugoslavia, though these prior legal initiatives were not previously codified. Daryl Robinson, “Defining ‘Crimes Against Humanity’ at the Rome Conference,” \textit{The American Journal of International Law} 93, no. 1 (1999): 53-54 and 56. The other 14 states—including six non-member states—that have adopted crimes against humanity in some form have done so presumably by referencing the widely-accepted definition under customary international law, which the Rome Statute essentially mimics.
There are clear patterns to instances of partial compliance as well. Most notably, certain categories of less established crimes are much less likely to feature in domestic legislation. This finding can be connected back to the negotiation of the Rome Statute, since a prominent view held that only those acts already recognized under customary international law at the time of the Statute’s creation—i.e., “crimes that constitute a common concern of the international community and are universally considered to be the most serious”—should be included in the final document. Of the five states that have incorporated only some aspects of Article 7, all have failed to include the sub-clauses relating to sexual crimes and the crime of apartheid, which are among these more recent and controversial innovations. Three of these—Albania, Estonia, and Niger—are State Parties with implementing legislation specifically addressing ICC crimes, which suggests that the exclusions are the result of deliberate policy.

Finally, the Rome Statute draws together a wide body of prior international humanitarian law in formulating a single omnibus definition of war crimes. Despite its legacy, the full scope of this article has not yet widely permeated national legal settings. To this point, 56 states have fully internalized Article 8 in their domestic laws, with 13 states reflecting a partial

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46 Rome Statute, Articles 7(g) and (j), respectively. During the Rome negotiations “a vocal minority of anti-abortion groups, supported by the Vatican and Arab states” sought “to prevent any language that might be interpreted as facilitating abortion from entering the Statute.” Glasius, International Criminal Court, 32. “The main aim of the proposal was to replace the crime of forced pregnancy with ‘forcible impregnation.’ Despite the similarities between these terms, the two crimes contained different elements or rules defining the parameters and penalties for the crime. For instance, whereas forcible impregnation referred to the single act forcing women into pregnancy, forced pregnancy was a ‘broader concept involving keeping women pregnant,’ even in the case of rape or incest.” Steven C. Roach, Politicizing The International Criminal Court: The Convergence of Politics, Ethics, and Law (New York: Rowman & Littlefield Publishers, Inc., 2006), 144. For full list of states, see Bedont and Hall Martinez, “Ending Impunity for Gender Crimes,” 75, n. 44; and Glasius, International Criminal Court, 88-89.

47 Rome Statute, Article 8.
incorporation. Here again national implementing legislation is one important vector for legal change: 43 states have incorporated some or all of Article 8 through ICC legislation, while others have evidently done so via other legal processes (for example, by ratifying and implementing the 1949 Geneva Conventions, 1977 Additional Protocols, and other legal instruments such as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict).\(^{48}\) Most ICC non-members thus have at least some Article 8 crimes in their domestic laws.

This general pattern is most pronounced in the context of crimes that are especially controversial or have been less clearly codified in previous international humanitarian law, and thus are in a greater state of flux. It is in these instances that the Rome Statute would most clearly be a force for the progressive consolidation of social expectations within the grave crimes regime. For example, only 54 states—out of the 121 ICC State Parties and 196 states recognized in this dataset—have incorporated the language of Article 8(2)(b)(xxii) rendering sexual offences as war crimes in international armed conflict.\(^{49}\) Similarly, 60 have implemented the rule prohibiting the recruitment of child soldiers in times of international war.\(^{50}\) There is remarkable parity in the adoption of these two crimes, with only one of the 54 states incorporating sexual crimes not also doing so for child soldiers.\(^{51}\) In both instances, 33 of these states were members of the Like-Minded Group. The consistency here suggests first that newer norms are particularly susceptible to slow domestication, and second that their incorporation is strongly associated with the emergence, and subsequent acceptance, of the Rome Statute as a new articulation of appropriate behaviour.

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\(^{48}\) In particular: Bulgaria, Denmark, France, Japan and Sweden.

\(^{49}\) A further 13 states have domestic legislation that partially incorporates the Rome Statute standard, but these provisions are typically drawn from Article 27(2) of the Fourth Geneva Convention of 1949 which includes only some of the sexual offences listed in Rome Statute Article 8(2)(b)(xxii).

\(^{50}\) Rome Statute, Article 8(2)(b)(xxvi). Interestingly, six of these states are not currently parties to the Rome Statute.

\(^{51}\) Bosnia and Herzegovina. 32 of these states were also members of the Liked-Minded Group.
This pattern is reflected in other aspects of the war crimes definition as well. The major innovation of Article 8 is to bring violations of the laws and customs of war in both international and non-international conflicts under one operative legal article. Here again we should anticipate relatively low incorporation, since a number of states have previously resisted legal innovations relating to non-international armed conflict. The dataset confirms this expectation. While 99 states—including 14 non-parties and six signatories—have fully incorporated the provisions of Article 8(2)(a) concerning grave breaches of the 1949 Geneva Conventions, only 56 have similarly done so for Article 8(2)(e) which addresses “serious violations of the laws and customs applicable in armed conflicts not of an international character.” Many of these crimes were previously codified (in whole or in part) in the more controversial Additional Protocol II to the Geneva Conventions. It is particularly notable that of this group of states, fully 52 are current State Parties to the Rome Statute, and 39 were part of the Like-Minded Group. 50 have also incorporated the provisions concerning sexual crimes and child soldiers in international armed conflicts, suggesting that the incorporation of these contested international standards is closely connected. Finally, eight states—Burundi, Central African Republic, Colombia, Congo, Democratic Republic of the Congo, Ethiopia, Philippines and Uganda—incorporated the


53 The latter agreement is less widely ratified than the original 1949 Conventions. As of June 2012, there were 194 State Parties to the 1949 Geneva Conventions, and 166 to Additional Protocol II. However, prominent states including Israel, Iran, Turkey and the United States have not joined APII. International Committee of the Red Cross, *Annual Report 2010* (Geneva, ICRC, 2010), 572-578. [http://www.icrc.org/eng/](http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp). See also La Haye, *War Crimes*, 173-174.

54 By way of comparison, 72 states—including six non-parties and three signatory states—have incorporated the language of Article 8(2)(c), which concerns “serious violations of article 3 common to the four Geneva Conventions” in instances of non-international armed conflict. However, the protections enumerated in sub-article (c) are derived from the widely accepted 1949 Geneva Conventions, and not the more deeply contested standards of Additional Protocol II. Hence the finding that considerably more states (and especially non-members of the ICC) have endorsed sub-article (c) without also incorporating those found in sub-clause (e) only serves to reinforce the point that the 1949 Conventions remain a more acceptable international standard and that the Rome Statute is an important vector for increasing state incorporation of war crimes law in non-international armed conflicts.
standards of Article 8(2)(c) during internal armed conflicts in which these crimes may have featured, again highlighting the significant costs associated with this kind of legal change.

These findings draw attention to two important theoretical points. First, many states are compliant with Article 8(2)(a) as a result of their prior internalization of the 1949 Geneva Conventions and antecedent laws of war stretching back into the 19th Century; this is especially true of non-party states. This provides further evidence of the network effects discussed above, and suggests one way in which the Rome Statute may gain legitimacy among non-members by virtue of its association with a long legal tradition that includes states like China, India, Russia and the United States. At the same time, however, the fact that so few non-parties have incorporated other features of the ICC war crimes regime limits the extent of this commonality. Second, ICC membership is strongly correlated with the incorporation of contested international rules most recently codified in the Rome Statute. In these cases, states have employed the legal criteria of the Statute in modifying their own domestic practice. The Statue has thus become a prominent instrument for consolidating international expectations concerning the scope of grave international crimes. As noted already, however, this process remains substantially incomplete; I consider the implications of this finding more fully below.

Cooperation

The challenges of domestic legal incapacity are further illustrated with reference to expectations concerning national cooperation with Court activities. State Parties have regularly

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acknowledged the vital importance of meeting their commitments to cooperate with and facilitate ICC operations. Moreover, these responsibilities, articulated in Part IX of the Rome Statute, are generally understood to impose specific legal obligations on treaty members. Yet thus far, the calls for greater cooperation have not been met. State Parties have an average compliance rate of only 35%, implementing 2.09 of the 6 cooperation indicators. Interestingly, the 68 members of the Like-Minded Group fare only slightly better, with an average score of 2.76, though 30 of these states have scores of 4 or higher. The extension of these norms to non-members is virtually non-existent: current signatories average a 1% rate of incorporation (0.06 out of 6), while non-parties are even lower (0.01 out of 6). This makes sense, since cooperation in most instances applies only to ICC member states, and these particular commitments are not found in prior legal agreements. The formal codification of obligations via legislative change is thus a process normally only contemplated by treaty members. Moreover, 40 states—all of whom are ICC members—have scores of 4 or above, further suggesting that the incorporation of cooperation provisions typically comes as a bundled legislative response to the legal demands of ratification.

56 Assembly of States Parties, Kampala Declaration, operative paragraph 7; Assembly of States Parties, Report of the Bureau on Cooperation; Rastan, “Responsibility to Enforce.”

A disaggregated view (Figure 9) reinforces the general pattern of limited legislative change among State Parties and especially non-members. Thus far, only 37 ICC parties have included a provision specifically acknowledging the obligation to cooperate with Court requests for assistance, as per Article 86 of the Rome Statute. Recognition of the special legal status of Court officials has received greater endorsement thus far, with 71 State Parties ratifying or acceding to the Agreement on the Privileges and Immunities of the Court (APIC), and a further 62 having signed the document. This greater degree of state compliance is likely owing to two principal factors. First, the APIC merely reflects established principles concerning the special

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59 A further five State Parties have made general reference to this commitment without reflecting the Rome Statute language.

status of diplomats and representatives of international organizations, and is thus largely uncontroversial on its face. Second, the APIC can be domesticated via ratification or accession and without the long process of developing detailed national legislation to implement other Rome Statute obligations.

On issues of particular concern to the proper functioning of the ICC as a legal and judicial institution, the data presented here is unimpressive. State progress in criminalizing the obstruction of Court activities—denoted as “AIDE” in the dataset and figure—has received limited uptake, with 33 State Parties including comprehensive language in their implementing legislation.\(^1\) The numbers are very similar with respect to the provision of documents for ICC investigations\(^2\): only 35 states have included this obligation in their implementing laws, with three others providing an incomplete rendering of the Rome Statute formulation. Hence a little less than a third of all State Parties currently have the domestic legal authority to contribute to vital Court needs.

Arguably the most pressing state contribution to ICC operations—the arrest of indicted individuals and their subsequent surrender to the Court—has also received only limited support in the national laws of State Parties. Forty-three states have included a specific reference to this obligation and provided procedures to facilitate the detention and transfer of suspects, while two others have partially addressed this issue in their national legislation. Various authors have noted that arrest and surrender remains a key gap in state commitment to the Court. For example, the failure to date of States Parties to ensure the execution of the majority of the arrest warrants issued by the Court has put the issue of international cooperation at the centre of deliberations. The judges are increasingly inquiring as to the fulfilment by States of their cooperation obligations, particularly in respect of the warrants of arrests issued by the Court. The President of

\(^1\) Rome Statute, Article 70. One state has also partially incorporated this commitment in their legislation.

\(^2\) Rome Statute, Article 93(d) and (i).
the Court and the Prosecutor, moreover, have made repeated calls on States to shoulder their responsibilities under the Statute.\textsuperscript{63}

The dataset findings presented here suggest that the absence of domestic legal capacity is an important reason why states have yet to meet these commitments. Finally, ICC members have been slow in implementing provisions for the enforcement of Court convictions. Since the Court does not have a permanent detention facility of its own, its sentences will have to be undertaken in a national penal system.\textsuperscript{64} In this light, the fact that only eight State Parties have explicitly included procedures to facilitate the acceptance of ICC criminals in their national laws—with a further 30 making a generalized commitment without outlining specific mechanisms—may complicate future efforts to place convicts.

With only two exceptions, the cooperation provisions discussed here have been incorporated via ICC-specific national implementing legislation. This observation reinforces the call from many quarters to make national implementing legislation a priority.\textsuperscript{65} In important respects, therefore, the Rome system currently features only a limited capacity among members to address vital aspects of the institution’s operations. The low rate of state incorporation on matters of cooperation is problematic both for the efficacy of the institution—by limiting the scope of actors that can positively contribute to its judicial mandate—and the prospective consolidation of Rome Statute norms – since only widespread adaptation and engagement would

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reinforce an expectation that the supranational judicial model embodied in the Statute is the appropriate response to the demands of international criminal justice.

Conclusion

A central contention of this chapter is that national legislation provides a window into the internalization of international norms that is not captured by reference to formal institutional membership or other forms of behavioural change and adherence. The development of a new dataset measuring national implementing legislation is thus an important empirical contribution to the growing literature on ICC effectiveness.

The evidence presented above reveals generally low levels of national legislative implementation, both in terms of the incorporation of core crimes and modes of liability, and cooperation with Court activities. Despite widespread membership, the Rome Statute has thus far been largely ineffective at changing state behaviour in this vital context. This means that states across the international system currently have only a limited ability—as provided in their national laws—to enforce ICC crimes within their domestic jurisdictions. There is a strong linkage here to the broader concern with behavioural change, since the absence of sufficient national legislation contributes to this non-compliance, by denying the legal and judicial conditions necessary to facilitate state engagement. At the present moment, therefore, domestic incorporation of the Rome Statute remains substantially incomplete. This impedes the effective operation of the ICC regime, as gaps in domestic legal systems weaken the network of international justice and place further burdens on the Court to enforce for itself grave violations of international criminal law. These gaps can be deployed by ambivalent states in an attempt to
excuse and avoid obligations under the Statute; in this respect, incapacity can suggest a lack of political will at the heart of state inaction.

The present analysis also bears on my theoretical account in a few distinct ways. First, the experience with State Parties is broadly in keeping with the expectations of Chapter 2, whereby treaties serve as focal points for clarifying new standards of appropriate behaviour—defined in terms of their legal criteria—for members of the formal treaty community. Since the advent of the ICC, states that have developed new legislation to address relevant international crimes have overwhelmingly been parties to the Rome Statute. In some cases, as with the category of crimes against humanity and certain war crimes, the Statute provides the most comprehensive legal articulation of the rule, and thus represents the most relevant standard for new social expectations concerning the scope of the grave crimes regime. The treaty has therefore served as the reference point for the transmission of international rules and norms to domestic institutions. There are important limits to this impact, however, both inside and outside the formal legal community: the expansion of ICC membership has only led to a modest diffusion of Rome Statute features into the national laws of treaty parties, and has had little influence on the domestic legal contexts of non-party states.

Second, the empirical evidence also suggests the importance (and limitations) of network effects in providing the conditions for the spread of non-great power norms. The Rome Statute clearly benefitted from its association with existing international legal structures, as the constitutive process of reaffirming and refining these norms generated widespread support for the creation of the Court, as detailed in Chapter 5. Yet these connections have not led to a similarly broad incorporation of constituent criminal features in domestic legislation, as already noted. It would appear that many antecedent norms and rules of international humanitarian and
human rights law were not widely incorporated in domestic law prior to the emergence of the Rome Statute. This fact can help explain the limited overlap with existing national laws in non-party states as well as some otherwise supportive ICC members. It has been suggested, for example, that the lag in incorporation may be owing to the relative unfamiliarity of international rules and norms in many national legal systems.\footnote{Regarding the Japanese experience, see Meierhenrich and Ko, “How Do States Join the ICC,” 254.} This provides an important qualification to the theoretical account of the role of network effects in creating the conditions for non-great power treaty success, while at the same time further reinforcing the significance of the Rome Statute—and its domestication—as a means of consolidating prior international law.

Despite these significant caveats, the incorporation of some Rome Statute crimes even among non-parties—principally genocide, and to a lesser extent the grave breaches articulated in Article 8(2)(a)—does provide a modest window of opportunity for expanding the reach of the ICC legal regime over time. The existence of these crimes in national law means that these states are capable of investigating and prosecuting cases on these grounds on their own territory, thereby alleviating the responsibility on the Court itself. At the same time, the promotion of international norms often occurs by analogy, as new social and legal standards are associated with prior principles and rules that hold wider sway.\footnote{Vaughan Lowe, “The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?” in The Role of Law in International Politics: Essays in International Relations and International Law, ed. Michael Byers (Oxford: Oxford University Press, 2000), 207-226.} Hence, it is at least conceivable that the endorsement of the crime of genocide and some war crimes can be leveraged to bring such states into closer alignment with the commitments of the Rome Statute.

When taken together with the previous chapter, present behaviour reveals significant gaps in the legal and normative web embodied in the Rome Statute. At the same time, however, there are important examples of state conformance with ICC obligations, even in instances where a
narrow reading of national interests might suggest an alternative outcome. The evidence for effectiveness is therefore more mixed than in the MBT case. Rendering judgements on the contemporary status of the Court and its norm of internationalized procedural justice thus demands some attention to the reasons or logics that drove decision-making, and particularly the degree to which these have factored in the public justifications for state policy. Attention to the discursive interventions of states—and especially the articulated conceptions of legal obligation and the existence (or absence) of international norms—provides more subtle evidence of treaty impact by qualifying and contextualizing these observed patterns of (non)compliance. This complex subject is the focus of the next chapter.
CHAPTER SEVEN:
STATE DISCOURSE AND THE NORMATIVE FORCE OF THE INTERNATIONAL CRIMINAL COURT

As noted already, the International Criminal Court seeks to engender substantial changes in domestic institutions in especially sensitive areas of national responsibility. Yet this particular model for enforcing violations of international humanitarian and human rights law sits uncomfortably with older consent- and sovereignty-based notions of international law and political practice. This raises the question of whether the International Criminal Court and its norm of internationalized procedural justice is being widely endorsed. The previous two chapters began to answer this question by tracing changes in state behaviour. Here I seek to determine the extent to which state behaviour evidences an acceptance of, and commitment to the obligations enshrined in the Rome Statute as indicated in the official discourse of state actors, and how these discursive engagements correspond to the behavioural patterns identified already. To do so, I focus first on general statements of endorsement, and subsequently on a series of crucial issues during the early life of the Court. These topics are selected for their salience to the broader question at hand; the latter episodes in particular constitute especially challenging disagreements over the scope and implications of the Rome Statute, and provide valuable data points for demonstrating the utility of discourse analysis in assessing treaty influence.

State Support for an International Criminal Court

As Chapter 5 demonstrated, the ICC is part of a larger trend toward the domestic and international punishment of atrocities. In keeping with this “justice cascade,” a survey of national
statements suggests that the goal of ending impunity for grave crimes has gained widespread acceptance in political discourse. This notion of applying individual criminal accountability for grave violations of human rights and the laws of war represents a genuinely transformative development in the way in which state responsibilities are conceptualized and articulated in international politics.\(^1\) The creation of a permanent International Criminal Court is part of this broader tradition, but the pursuit of international criminal justice via domestic judicial measures overseen by a supranational legal authority also represents a significant new dimension of the norm and an important new identity for states.

*State Parties*

As might be expected, the reference to the Court’s paramount role in the transformation of international legal affairs is broadly reflected in the contemporary statements of State Parties. Schiff has suggested that “converging international normative commitments against impunity” have formed the basis of state support for the ICC.\(^2\) Thus long-time proponents like Brazil have asserted that “[i]n order to win the fight against impunity and bring these crimes to an end, the ICC and its mandate are our best tools.”\(^3\) Similarly, for South Africa “[t]he creation of the International Criminal Court is evidence of an emerging norm in international law in favour of ensuring that those accused of the most serious crimes are either prosecuted by competent national authorities or handed over for prosecution by a duly instituted international court.”\(^4\)

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Importantly for the legitimacy of the institution, this endorsement has been extensively embraced by many of the states most deeply implicated in the crimes under ICC jurisdiction. Thus for Colombia, “[t]he adoption of the Statute of the Court… constitutes a milestone in the codification and progressive development of international law, and meets the aspiration of the international community to put an end to impunity for the gravest violations of human rights.”

Indeed, many new members have invoked their own experiences with armed conflict as justification for their support of the Court, as discussed further in a moment.

As with the Mine Ban Treaty, treating this outcome as the unproblematic result of pre-existing policy preferences would obscure the transformative processes through which states came first to regard individual criminal responsibility as an appropriate response to mass atrocity, and later to pursue this goal through a new internationalized legal structure. The Rome Statute emerges out of a much longer history of the progressive elaboration of international humanitarian, human rights and criminal law, while the negotiation of the Statute was itself a constitutional moment in which state identities and interests were further reconfigured in favour of a robust and independent Court as a particular institutional solution to the problem of enforcing accountability for grave crimes. Changing conceptions of how to address violations of international humanitarian and human rights law thus generated fidelity to the social expectations embodied in the Rome Statute. Network effects are also important here, as the ICC could be presented as an extension—rather than wholesale overthrow—of established international legal principles. This constitutive process is vital to the subsequent power of the Court, as even long-time supporters faced substantial impacts by virtue of their membership. The discourse of many

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Republic of Nigeria, Statement by Mr. Wali, at the United Nations Security Council, 59th year, 5052nd meeting, New York, October 6, 2004 S/PV.5052 (Resumption 1).

State Parties consequently reflects a careful consideration of the implications of the ICC in light of its obligations. Hence,

[i]t was not easy for Mexico to become a State party. It required a complex process of constitutional reform, which in turn entailed a very broad debate within our society…. The situation demonstrated that becoming a party to the Statute entailed, essentially, improving national justice systems. In short, we understand the International Criminal Court to be a deterrent to the commission of the most grave crimes, but it is also a motor for promoting the rule of law within our countries.6

In these instances, the affirmative choice of membership was largely predicated on an intersubjectively-derived sense of the Court as representing the socially appropriate means of addressing grave international crimes via supranational oversight of domestic institutions and policy. This reaffirms the point that treaties like the Rome Statute should not be regarded merely as low-cost agreements among already willing participants, but rather as a politically significant driver of change in international identities.

In many cases, endorsement of the international procedural justice norm embodied in the Rome Statute has been part of more holistic societal transformations as communities seek to address past violence. For the Democratic Republic of the Congo,

the ratification of the Rome Statute was the culmination of a major mobilization of domestic public opinion and involvement in the process of creation of the ICC…. The engine of this enthusiasm was unquestionably the serious injustices and damage caused by several years of war and grave breaches of human rights and international humanitarian law in the DRC and the conviction of the need to combat impunity as a close to dramatic cycles of violence and the desire to restore peace and reconciliation on the basis of sound justice.7

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In this way, the ICC has been seen by affected states including Afghanistan, Bangladesh, Bosnia and Herzegovina, Croatia and Serbia as an extension of prior efforts to ensure justice for grave crimes. This is mirrored by the experience of Latin American states involved in the early wave of domestic prosecutions. As Carrasco notes, “[c]onsidering that Latin America has an ongoing issue of ‘dealing with the past’, [support for the ICC] constitute[s] basic yet significant steps toward strengthening and ensuring not only the integrity of the Rome Statute but also the rule of law in general.”

In this light, it is significant that the adoption of the Rome Statute has also been presented in more recent political transitions as evidence of a renewed commitment to international norms. Thus for the post-revolutionary Tunisian government, accession to the Rome Statute was

[a] decision which reflects the irreversible commitment of the new Tunisia to join the effort by the international community to end impunity for perpetrators of genocide, war crimes and crimes against humanity and provide justice to victims of such violations. It is a significant step and especially important for my country that has experienced profound democratic changes following the popular revolution of January 14, 2011 which put an end to decades of injustice, abuse and despotism.

In this respect, and much like the Mine Ban Treaty discussed above, adherence to the Rome Statute has been deployed as a marker of responsible statehood in the international system. The


South African implementing legislation makes this connection plainly: “the Republic of South Africa, with its own history of atrocities, has, since 1994, become an integral and accepted member of the community of nations.”\(^{11}\) For other states including Cambodia\(^{12}\), the Democratic Republic of the Congo\(^{13}\), the Philippines\(^{14}\) and Serbia\(^{15}\), membership in the ICC system has similarly become a potent symbol of domestic transformation and inclusion within an international community of states.

For a majority of states in the contemporary international system, the International Criminal Court has therefore become a focal point for the elaboration of a new international role identity in which states undertake to punish violations of the grave crimes regime under the explicit oversight of a supranational body. Attention to the public logics by which states have articulated their membership choices provides additional depth to prominent rationalist accounts of legal influence in at least two respects. First, while many states may join international institutions like the ICC to “lock-in” new and more liberal political commitments to human rights and the rule of law in the wake of a political transition (as proposed by Moravcsik\(^{16}\) among

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\(^{12}\) “As a country whose people have experienced great tragedy in the past, Cambodia is committed to striving for the cause of justice, for the promotion of human rights and democracy, and for the strengthening of the rule of law. It is our sincere obligation to join the international community to help bring an end to impunity, and thus we will do our utmost to be a fully supportive member of the International Criminal Court.” Statement by H.E. Ambassador Sun Suon, Deputy Permanent Representative of Cambodia to the United Nations, as quoted in Coalition for the International Criminal Court, *ICC Monitor* 21 (June 2002), 5. [http://www.coalitionfortheicc.org/?mod=browsedoc&type=5](http://www.coalitionfortheicc.org/?mod=browsedoc&type=5).

\(^{13}\) Democratic Republic of the Congo, 7\(^{th}\) ASP.


\(^{16}\) Moravcsik, “Origins of Human Rights Regimes.”
others) these actions are themselves situated within a international social context in which individual criminal accountability via regularized judicial processes has become a preeminent means of addressing past atrocity. This helps to explain why transitional states would use ICC membership as a signalling device and marker of responsible statehood. Yet it is important not to lose sight of the fact that the decision to employ trials and penal sanction, as opposed to other potential responses including amnesties, asylum or summary execution, represents a dramatic sea change in how states conceive of their domestic and international responsibilities, as Chapter 5 demonstrated empirically.

Second and relatedly, the above brief discussion provides greater context for the dynamic reasoning underlying membership. In many cases, it may appear that treaties merely serve to “screen” supporters in that the content of the agreement reflects the existing preferences of a certain sub-set of states. This view, however, misses the often long-term processes through which norms develop that create new role identities transforming what states want and how they attempt to pursue these goals. As demonstrated above, enmeshment within diplomatic negotiations created the conditions through which many states could come to regard an independent Court with substantial jurisdictional scope as in their interests; this process, however, was also connected to prior legal developments concerning the criminalization of grave crimes. As suggested in Chapter 2, rather than merely coordinating among static preferences, it is this constitutive process that allows states to build an intersubjective community of obligation defined by the particular characteristics of law.

Non-Party States

The official discourse of non-party states also evidences clear support for the central goals of the ICC. For example, China has declared that

[although China is not a party to the Rome Statute, it always supports the purposes and objectives for which the ICC was established and is in favor of setting up an independent, impartial, effective and universal international criminal tribunal, as a supplement to national judicial systems to punish the gravest international crimes and to promote world peace and realize judicial justice.]

This view of the Court’s animating purpose has been endorsed by a great number of other current non-member states, including Angola, Cameroon, Cuba, Egypt, Guatemala, Indonesia, Iran, Israel, Kuwait, Laos, Malaysia, Pakistan, Qatar, Russia, Sudan, Syria, and...
Thailand, Turkey, Ukraine, the United States and Vietnam.

Thus no state argues that grave violations of international humanitarian and human rights law should go unpunished. Yet this represents nothing less than a fundamental reorientation of social expectations concerning the prerogatives and responsibilities of state actors. History is rife with examples of political military leaders reporting the systematic slaughter of non-combatants as a natural facet of war. For the vast majority of human history, moreover, violence in the service of political ends was unexceptional, and the notion that state agents would face individual punishment for their official acts was anathema. The fact that judicial responses to atrocity—including, potentially, the prosecution of sitting or past political leaders—is widely
acceptable in the contemporary international setting only serves to reinforce the extent of the transformative effect of norms in shaping the content of the society of states.

Just as significant, however, is the extent to which non-parties have already endorsed the idea that a permanent international court is the appropriate mechanism for addressing certain forms of grave criminality. More remarkable still is the fact that many have explicitly associated the present ICC with this cause. While pointedly refusing to sanction the Court in its current institutional configuration, prominent non-parties have nonetheless linked the body to the amelioration of grave human rights abuses via judicial punishment. For the Russian Federation,

[t]he strength of the Court consists not only in its ability to punish but also in the fact that its only existence can influence drastically both the world political climate and national legislation of States. It is a kind of a sword of Damocles for those who admit a possibility of achieving political goals by committing mass murders, extermination and violating international law. Therefore, already today at the initial stage of the ICC existence we can affirm that the Court has fulfilled itself and found its own place in the world.

Indeed, the fight against impunity has been explicitly invoked in a number of instances where non-parties have cooperated with Court activities, as discussed in the following section. And a number of these same states—including many of those most hostile to the Court—have made frequent reference to their long-term engagement with its negotiation and subsequent development. The effect of this social shift is such that even those actors most directly

41 It should be recalled, for example, that even the United States—the most vocal opponent of the ICC since 1998—has supported the creation of an international criminal court and was intimately involved in the negotiations that led to the Rome Statute.
42 This list includes: Algeria, Egypt, Guatemala, Indonesia, Iran, Kuwait, Lao People’s Democratic Republic, Pakistan, Russian Federation, Sudan, Syria, Thailand, Turkey, Vietnam. Statements from the likes of China and the United States have often been more indirect in praising the ICC as a legal institution, but have nevertheless sought to reaffirm their support for international criminal justice via a permanently constituted body. China, UNGA, October 15, 2002; and United States, Statement by President Clinton, December 31, 2000.
associated with on-going violations of the Rome Statute have felt compelled to voice their support for the institution:

Sudan has been actively involved in the negotiation process that led to the establishment of the International Criminal Court. This positive engagement stemmed from a strong conviction of the need to create an international legal body that responds to the realities of international relations and strictly follow[s] the established principles of international law, especially those pertaining to the rule of law and equality. The Court was perfectly designed to perform in accordance with the fundamental standards of due process and to pursue its entrusted duties with impartiality and effectiveness.\(^{45}\)

In this respect, at least, there is near-uniform acceptance of a general obligation to punish acts of atrocity, and a more particular recognition of the Court as a legitimate actor in this effort.

These developments have important theoretical implications for the account of non-great power treaty influence developed in this dissertation. First, this kind of generalized endorsement, while not yet constituting full recognition of the institution, can nevertheless provide a pathway for the extension of treaty norms to encompass ambivalent states within the social and, potentially, legal community defined by the Rome Statute. The connections between individual treaties and the broader corpus of international law and norms means even overtly hostile states rarely reject a new institution in its entirety. This is certainly true of the ICC, as the above discussion made clear: the now-established international consensus concerning international criminal accountability has led many non-parties to further endorse the idea of a permanent international court as the appropriate means of addressing grave violations of international law. This is a significant development in its own right, and opens up space for further accommodation in the future. In this light, it is noteworthy that many current non-parties participate in Assembly Conference; Russia, ICC Review Conference; and United States, ICC Review Conference.

\(^{45}\) Sudan, 5\(^{th}\) ASP.
of States Parties meetings, while some—including Indonesia, Kuwait, Laos and Turkey—have stated that they are actively considering ratification or accession.⁴⁶

Even below that threshold, however, the strength of the internationalized procedural justice norm is such that states must now concede the premise that the ICC has a legitimate role in the enforcement of individual criminal accountability as the minimally acceptable global discourse. These kinds of changes reflect a closing-off of certain rhetorical possibilities in response to the social expectations fostered by the treaty. Indeed, while many states previously supported the idea of international justice for grave crimes, these general ambitions were given a specific reference point with the advent of the Rome Statute. Future debates over the proper response to domestic and international violations of human rights and the laws of war must now engage with the Court as the central global institution for addressing atrocities. Expressing general—if equivocal—support for a legal development while continuing to resist the full weight of its obligations is therefore not without consequences. For example, the fact that so many non-parties have acknowledged the emergence of the ICC as a positive development can lead to charges of hypocrisy if these same states do not narrow the gap between their stated general support and actual policy toward the Court. Scholarship has established that such rhetorical entrapment can generate social pressures—from domestic actors, international bureaucracies and national and international civil society—to produce more substantial change.⁴⁷ Hence even insincere concessions can have political repercussions. A key issue, then, is determining whether these same states have remained consistent in their official engagements, and identifying the remaining points of dispute. I take up this topic in the section on contestation, below.

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⁴⁶ Indonesia, Review Conference; Laos, 7th ASP; Kuwait, ICC Review Conference; and Turkey, ICC Review Conference.
Strategic Politics and the Social Influence of the ICC

One particularly valuable contribution of the discourse analysis undertaken here is its ability to uncover how evolving conceptions of appropriate behaviour may shape the strategic pursuit of state interests. There are numerous examples of states employing the ICC’s legal procedures to achieve political goals; this has led some observers to suggest that the Court has become a tool for the enactment of power politics, rather than a genuine instrument of justice.48 Yet these accounts are incomplete absent a sensitivity to the social processes through which state identities and subsequent interests are transformed in favour of new roles and responsibilities that can in turn be pursued through instrumental means.49

This connection between ideas and utility is reflected, for example, in instances where states have voluntarily requested ICC intervention via so-called “self-referrals.” As noted in Chapter 5, these decisions are puzzling insofar as we might wonder why actors would willingly cede sovereign authority over such politically significant functions to an external body. While not encompassing the totality of motivations, official statements demonstrate the impact of the ICC in framing state policy. The Ugandan government has thus repeatedly referenced a commitment to ending impunity as the basis for their referral:

Indeed, the Government of Uganda (GoU) decided to refer the case to the ICC not because the Government was unable or unwilling to try the [Lord’s Resistance Army] itself but because the ICC was established specifically to deal with crimes of this magnitude and the GoU was unable to access the LRA who were operating outside its territory. We thought that the ICC would

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48 For example: Branch, “Uganda’s Civil War.” Generally see Goldsmith and Posner, Limits of International Law. 49 Finnemore and Sikkink, “International Norm Dynamics,” 888-889 and 909-915. “Such activities are essentially compatible with rational choice arguments about human beings as expected utility-maximizers. Actors... pursue exogenously defined and primarily instrumental or material interests and change their behavior in order to reach their goals. They adjust their behavior to the international human rights discourse without necessarily believing in the validity of the norms.” Risse, Ropp and Sikkink, Power of Human Rights, 12.
galvanize international cooperation and compel those countries harbouring the LRA to act appropriately.  

Darehshori and Evenson similarly report that the Central African Republic’s decision to refer alleged crimes committed in 2002-2003 to the ICC came about “after CAR’s Court of Appeal recognized the inability of domestic courts to investigate and prosecute war criminals effectively.” Two issues are notable here. First, these justifications substantively mirror the kinds of capacity-based arguments made by states with respect to the Mine Ban Treaty: rather than questioning the legitimacy of the institution or the underlying commitment to punish violations of the Rome Statute, both states sought to portray the referrals in the context of an inability to meet the conditions of their legal obligations. Ugandan officials, for example, have taken pains to use their referral as a means of pressuring other states to comply with the Court, and have frequently expressed their hope that the ICC arrest warrants for senior LRA leaders will generate greater state cooperation within the region and serve as a catalyst for peace.

Second, while much of this rhetoric evokes an instrumental view of the ICC legal process—in effect using international legal sanction as a means of generating coercive pressure for a settlement of the conflict on the government’s terms—it simultaneously reinforces dominant normative expectations concerning the rule of law and the necessity of individual


52 Hence “Uganda does not support impunity. We recognise that it is a cardinal objective of the Rome Statute to end impunity and to bring to justice the perpetrators of the most serious crimes. That is why Uganda was the first to make a referral to the Court in order to investigate the situation of the LRA.” Republic of Uganda, Statement by H.E. Ambassador Francis K. Butagira, Permanent Representative to the United Nations, at the United Nations General Assembly, 63rd Session, Agenda Item 69: Report of the International Criminal Court, New York, October 31, 2008 A/63/PV.35.

criminal punishment for acts of atrocity. Governments have sought to use ICC investigations and indictments as a means of delegitimizing enemy combatants as “enemies of mankind” and, by contrast, marking themselves out as responsible international actors. The Ugandan government thus redefined the conflict in northern Uganda in terms of international criminal law in order to use international criminal justice as another instrument to defeat its enemy. Following the Ugandan government’s previous attempts to brand the LRA as ‘irrational’, ‘religious fundamentalists’, or ‘terrorists’, the ICC could brand the LRA as internationally wanted ‘criminals’. The ICC could turn the LRA from enemies of the Ugandan government into enemies of the international community as a whole.

Yet such efforts only make sense in an international social setting in which the pursuit of individual accountability via an internationalized legal structure embodied in the ICC is already widely recognized as the proper response to grave acts of criminality. For the Government of Uganda (GoU), these public engagements have had lasting implications in narrowing the scope of policy options with respect to the domestic peace process. Subsequent efforts to revoke the ICC indictments in exchange for LRA demobilization have faced criticism precisely because of the GoU’s prior public support for the ICC process. It is particularly significant that the GoU has repeatedly found it necessary to defend Ugandan proposals against responses from the Court and other states that explicitly invoke the legal criteria of the Rome Statute as the basis of Uganda’s ongoing obligation. This form of rhetorical entrapment is anticipated in prior scholarship on the Court and in the IR literature more broadly, as discussed elsewhere. Consequently, the indictments have remained in force, and Ugandan statements regarding the withdrawal of ICC arrest warrants have notably receded in recent years.

New social expectations may also bear on the strategic calculus of states outside of the treaty. Though a non-party, Sudan still shows evidence of the influence of the ICC in shaping the development and presentation of domestic policy. Recall that Sudan established a special criminal court in response to the initiation of an ICC investigation over events in Darfur. The subsequent description of this initiative is germane to this discussion:

Needless to say, that the principle of complementarity constitutes the core premise of the Court which gives primacy to national jurisdictions. In this context the National Special Court for Darfur and the two sub-regional Courts in Genaina and Nyala which were established to investigate and try alleged cases of violations of international humanitarian law, is a clear manifestation of the will and ability of the Sudan to fight impunity.58

While critics might suggest that these efforts are designed to shield officials behind the veneer of a genuine legal process, it is nonetheless significant that Sudan has framed its actions in the context of ICC obligations. Even cynical piggy-backing on a norm reinforces its salience as a metric of good international standing.59 Without this widely recognized social expectation, there would be no instrumental value to the public recognition of compliant behaviours.

The effects of the ICC—and its association with prior international norms—in shaping policy horizons are also apparent in the justifications surrounding the use of United Nations Security Council authority to refer cases to the ICC. The justifications provided by prominent non-parties are particularly telling in this regard. Thus for the Russian Federation, Resolution 1593 authorizing an ICC investigation in Darfur “reaffirmed that the struggle against impunity is one of the most important elements of a long-term political settlement in Darfur and the Sudan as a whole…. We believe that the resolution adopted today by the Security Council will contribute to an effective solution in the fight against impunity in Darfur.”60 While more measured in its endorsement, the United States also plainly recognized the Court’s place as a consequential

58 Sudan 5th ASP.
59 See Chapter 2, pages 60-61 and 64-65.
60 Russia, UNSC March 31, 2005.
international institution for pursuing justice:

We strongly support bringing to justice those responsible for the crimes and atrocities that have occurred in Darfur and ending the climate of impunity there. Violators of international humanitarian law and human rights law must be held accountable. By adopting this resolution, the international community has established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur. While the United States believes that the better mechanism would have been a hybrid tribunal in Africa, it is important that the international community speak with one voice in order to help promote effective accountability. The United States continues to fundamentally object to the view that the ICC should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute. We decided not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan and because the resolution provides protection from investigation or prosecution for United States nationals and members of the armed forces of non-State parties.  

It is particularly significant that the Bush administration’s decision not to block the Darfur referral was conditioned by its interpretation of existing legal obligations under the Genocide Convention, and a determination that the conflict met the standards of genocide. This conditional support, which was shared by China, came with the important caveat of substantial objections to the structure and purpose of the Court, discussed at length below. Non-parties have thus sought to strike a delicate balance between on-going principled rejection of the ICC on the one hand, and recognition of its potentially valuable role in achieving politically desirable ends, on the other. This calculus was again apparent during the recent conflict in Libya, as frequent reference was made to the particularly desperate humanitarian conditions—and a belief that an ICC legal process “would have the effect of an immediate cessation of violence and the
restoration of calm and stability”\(^{65}\)—as the precipitating factor leading to unanimous support for an ICC referral.

Some civil society observers are sceptical of the depth of change entailed in the Security Council processes, and have suggested that the Darfur and Libya cases were instances where no prevailing geopolitical interests worked against the referrals—that great powers had no specific and overriding interest in protecting the regimes—and that the US and other prominent Court opponents did not regard the votes as precedent for increasing the legal legitimacy of the ICC.\(^{66}\) Despite these concerns, the actions remain significant for two principal reasons. First, the referrals provide specific evidence of the ways in which value-based considerations may inform the content of state interests. It is understood, for example, that widespread outrage within the US government and public concerning gross human rights abuses in Darfur was at the heart of the American decision not to oppose the Security Council referral. Concerns for the negative impact on international opinion and a utility-based assessment of the Court’s likely contribution in pressuring the Sudanese government to change its behaviour interacted with fundamental norms concerning humanitarian protection and the rule of law.\(^{67}\) The same factors were evident in the subsequent Libyan referral, and in the in the recent case of the United States deploying military forces to aide in the capture of senior LRA leaders in Uganda.\(^{68}\) It is particularly notable that President Obama described this latter initiative as implicating “the national security and foreign policy interests of the United States.”\(^{69}\) These brief examples demonstrate how a new

\(^{65}\) Republic of India, Statement by Mr. Hardeep Singh Puri, at the Security Council, 66\(^{th}\) year, 6491\(^{st}\) meeting, Agenda Item: Peace and Security in Africa, New York, February 26, 2011 S/PV.6491. Similar sentiments were expressed by the representatives of China, the Russian Federation, and the United States at the same meeting.

\(^{66}\) John Washburn (Convener, American Non-Governmental Organizations Coalition for the International Criminal Court), interview with the author, New York, December 20, 2011; and CICC MENA section interview.

\(^{67}\) Washburn interview. Also Schiff, Building the ICC, 226-242.

\(^{68}\) United States, 10\(^{th}\) ASP.

\(^{69}\) Office of the President of the United States of America, Notification that Approximately 100 U.S. Military Personnel Have Been Deployed.
international norm may influence strategic decision making on important matters of national policy by constituting a new role identity that invites or even explicitly requires internationalized responses to grave crimes. Prior to the shift in social expectations occasioned by the justice cascade, a framing of US strategic interests that encompassed the judicial punishment of foreign nationals for atrocities committed against their own citizens would have been inconceivable. The same is true for many other states. The more recent emergence of the ICC has extended this still further, as the mechanism for pursuing individual criminal accountability is an institution that the US and other great powers formally reject.

Second, despite non-party intentions to the contrary, the instrumental use of the ICC may have the effect of further legitimizing the institution over time, principally by associating the Court with the purposive actions of the international community. It has been suggested, for example, that increasing familiarity with the Court in the second term of President George W. Bush and currently under President Obama has removed some of the ideological opposition to the ICC and allowed the administrations to make decisions on the basis of utility considerations when those would have been foreclosed formerly. These internal changes, when manifested as public discourse, can have important effects in normalizing the ICC as an appropriate institutional response to atrocity crimes, thereby further locking non-parties into a rhetorical cycle whereby they must defend future deviations from this nascent behavioural pattern. The use of the ICC in particular circumstances thus leaves non-parties vulnerable to charges of hypocrisy – in effect, if the Court is good enough to deal with the leaders of Libya or Sudan, why should great powers not also subject themselves to its legal authority? These forms of social pressure carry potentially significant political costs in raising the threshold for future non-conformance and can have aggregative effects over time. This potential was recognized in the Darfur referral,

70 Washburn interview.
wherein both the Chinese and US delegates explicitly sought to disconnect their country’s abstention on Resolution 1593 from any change in the respective government’s positions vis-à-vis the Court. Yet for the same reason it is significant to note that subsequent statements concerning the Libyan referral excluded any reference to these objections. Scholarship on customary international law has made clear that the extension of international norms can occur through acquiescence to a given legal development. In this light, the more ambiguous diplomacy from the US and China appears relevant to the development of the ICC and its norm of internationalized procedural justice. This is especially the case if one adopts a long-term perspective in attempting to judge the efficacy of such a revolutionary institutional development which, given its sheer scale and transformative implications, we would expect to take numerous decades to take hold if indeed at all.

Though official statements give us little insight into the private views and incentives of state actors, they do offer valuable evidence of the ways in which international legal structures and norms bear on the articulation of rights and responsibilities in international politics. Norm-affirming discourse matters even if the justifications cannot be attributed to sincere belief since they reaffirm the dominant place of the ICC in defining, adjudicating and enforcing acts of international criminality in the international system of states. The very use of ICC processes for political gain demonstrates how the Rome Statute has become widely acknowledged as a standard of appropriate behaviour such that declared adherence to its precepts is de facto evidence of good international standing. The rationalist view of laws and norms as strictly regulative devices misses this vital constitutive function, which is best uncovered via the types of discursive evidence deployed here. For example, Simmons’ and Danner’s conception of the ICC as means of making credible commitments for restraint in war does not account for why the

71 China, UNSC, March 31, 2005; and United States, UNSC, March 31, 2005.
particular institutional structure and parallel norm embodied in the Rome Statute has come to be regarded by the majority of states as the socially appropriate means of punishing acts of atrocity.\textsuperscript{72} Deploying the Court as a signalling device thus presupposes its intersubjectively-agreed symbolic value. In this way, constructivist attention to social content of strategic decision making complements and extends rationalist insights regarding the preferred institutional means of fighting impunity.\textsuperscript{73}

**Contestation and the Contemporary Status of ICC Norms**

At one level, then, there would seem to be a broad consensus concerning the need to address, in a systematic and internationalized fashion, individual and collective acts of atrocity. Yet this endorsement includes within it more particular disagreements concerning how a general norm of individual criminal accountability should be operationalized – and, in particular, whether the International Criminal Court as currently constituted represents the proper institution to pursue this goal. This applies both to non-parties and members of the Court, though the intensity of these concerns is not distributed evenly. This may be explained in part as a consequence of the diplomatic strategy adopted at the Rome Conference, wherein states were forced to vote on the entire draft Statute as a single document, rather than in sections as some delegations wished, and without benefit of additional amendments. Moreover, as no reservations to the text are permitted, states cannot exempt themselves from portions of the institution they do not endorse.\textsuperscript{74} This is particularly significant since the negotiation of the Rome Statute revealed

\textsuperscript{72} Simmons and Danner, “Credible Commitments.”
\textsuperscript{73} Fehl, “Explaining the ICC.”
\textsuperscript{74} Benedetti and Washburn, “Drafting the ICC Treaty,” 29-30. Regarding U.S. objections on this point see Schabas, “United States Hostility,” 711.
vastly different preferences concerning “the powers, jurisdiction, and role of the new court.”

These debates ultimately revolved around the fundamental question of how autonomous ICC would be from other international bodies, most specifically the United Nations Security Council. Indeed, as Deitelhoff notes, two divergent frames emerged in response to the broadly agreed need for an “effective” court, “one emphasizing politics (and in particular security politics) [i.e., a Court acceptable to all— and especially the most powerful—states] and the other explicitly focusing on fundamental principles of law and morality [i.e., universal applicability without political biases or interference].” Negotiations were thus emblematic of Price’s concern with whether multilateral initiatives should prioritize breadth of membership or depth of obligations as the means of promoting strong international norms.

This raises the question of whether the diplomatic strategy that defined the “new diplomacy” initiatives has been successful in generating widely respected norms and legal commitments. The balance of this chapter takes up this issue through an exploration of prominent debates concerning the Rome Statute and the operation of the ICC; I return to this theme again in considering the totality of the experiences of the Mine Ban Treaty and International Criminal Court in the Conclusion to this dissertation. The attention to modes of contestation is important because it gets to the heart of the political challenge facing the Court: the fact that the practice of operating a supranational judicial body with global reach ensures that the ICC will be involved in matters of fundamental importance to all states. In the interests of clarity and analytical leverage I focus here on a limited selection of the most important debates,

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75 Struett, Politics of Constructing the ICC, 24-25.
76 Fehl, “Explaining the ICC,” 358; Schiff, Building the ICC, 85-89; 128-133; and 170. In this respect, the fact that the preferences of the major powers did not win out is a puzzle from the perspective of realist IR theory, as noted already.
78 Price, “Hegemony and Multilateralism.”
measured both in terms of the volume of discourse and the way in which these rhetorical engagements have impacted upon the contemporary status of the Court. As will be shown below, these issues—both the initial objections and subsequent responses—implicate foundational commitments of the Rome Statute as well as even more fundamental principles of the contemporary international order. This selectivity is also a pragmatic decision, as the sheer scale of tracing discourses across the entirety of the state system requires some assessment of those discourses that have proven most consequential to the development of the ICC as a global body.

**Immunity and the Political Prerogatives of State Actors**

Central to the normative structure of the International Criminal Court is the principle, expressed in Article 27(1) of the Rome Statute, that its legal authority “shall apply equally to all persons without any distinction based on official capacity.” However, despite this general intent, there remain important disagreements concerning how an anti-immunity norm should be operationalized as a matter of law and practice: how far should this jurisdiction over individuals extend, and what are the limits, if any? The Rome Statute does not definitively resolve this question. “The interplay of Articles 27 and 98(1)… creates a regime wherein States Parties agree to relinquish all immunities in relation to ICC requests concerning their own nationals, representatives or officials, while still respecting the existing… immunities of States which have not joined the ICC Statute system.” Given the complexity of this arrangement and its recent codification, it is not surprising that state discourse reveals considerable ambivalence concerning the scope of the non-immunity norm as constituted in the Rome Statute, and whether this feature

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79 Rome Statute, Article 27(1).  
fundamentally accords with prior constitutive principles of the international system. Here there are two principal modes of contestation, relating first to the collective immunity of nationals from non-party states, and second to the more specific issue of Head of State immunity under international law. I analyze these issues through a study of official statements in three significant policy debates, concerning UN operations, US bilateral diplomacy over so-called “Article 98” non-surrender agreements, and the indictment of Sudanese President Omar al-Bashir. These episodes represent the most overt and sustained battles over the application and meaning of the Rome Statute and therefore provide particularly telling illustrations how discourse can inform our assessment of treaty influence.

Security Council Politics

In 2002 and 2003 the United States sought resolutions in the UN Security Council that would provide immunity from prosecution for peacekeepers drawn from non-ICC member states. This effort was premised on the idea that as a non-party, the United States had no legal obligations under the Rome Statute, and US nationals should therefore not be subject to ICC jurisdiction through its participation in UN operations. As the then US Ambassador explained during debate on the extension of the UN mandate in Bosnia and Herzegovina,

[w]hile we fully expect our peacekeepers to act in accordance with established mandates and in a lawful manner, peacekeepers can and do find themselves in difficult, ambiguous situations. Peacekeepers from States that are not parties to the Rome Statute should not face, in addition to the dangers and hardship of deployment, additional, unnecessary legal jeopardy. If we want troop contributors to offer qualified military units to peacekeeping operations, it is in the interest of all

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81 This finding is reinforced in the empirical analysis. See Chapter 6, pages 227-228.
United Nations Member States to ensure that they are not exposed to unnecessary additional risks. The United States therefore threatened to withdraw its forces from the UN mission in Bosnia if its demand for a formalized exemption from ICC prosecution was not accepted. Yet the public discourses surrounding Security Council Resolutions 1422 and 1487 make clear that the disputes were not just about legal exposure in UN operations in Bosnia or elsewhere. Rather, these diplomatic engagements fundamentally revolved around questions of how to interpret international legal developments and the relationship between particular institutions and broader principles of international order. The debates are especially useful because they provide direct insights into concerns for international immunities and because an unusually large number of states participated in the discussions. Considerable data thus exists concerning the US view and international responses. As I demonstrate below, the US position—while initially gaining some support—was successfully confronted by ICC proponents through a rhetorical strategy that connected the particular features of the Rome Statute to prior international norms.

US negotiators invoked three types of arguments in justifying their position. First, American diplomats framed the immunities in terms of fundamental norms of international law relating to sovereign consent as the basis for legal obligation. Yet the US was at also pains to couch their efforts in terms of the Rome Statute, arguing that the plain language of the treaty explicitly permitted the resolutions:

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84 One month before Resolution 1422 was debated, U.S. officials had attempted to get a similar immunity provision included in a Security Council resolution authorizing the peacekeeping mission in East Timor. When this effort failed, the U.S. withdrew its three military observers and 75 civilian police from the operation. Thus the spectre of U.S. punishment hung over the diplomatic proceedings. See Ralph, Defending the Society of States, 164.
85 “That principle is respected by exempting from ICC jurisdiction personnel and forces of States that are not parties to the Rome Statute. It is worth noting that the resolution does not in any way affect parties to the Court, or the Rome Statute itself.” United States, UNSC, July 10, 2002.
Deferral of investigations and prosecutions—and I wish to stress this point—in keeping with the Rome Statute cannot undermine the role the ICC plays on the world stage…. Our latest proposal uses article 16 of the Rome Statute—as we were urged to do by other Council members—to address our concerns about the implications of the Rome Statute for nations that are not parties to it, but which want to continue to contribute peacekeepers to United Nations missions. We respectfully disagree with analyses that say that our approach is inconsistent with the Rome Statute…. We believe that it is consistent both with the terms of article 16 and with the primary responsibility of the Security Council for maintaining international peace and security.  

Finally, the justification also made reference to the United States’ unique role in upholding the international system via overseas military deployments including peacekeeping. From the US perspective, therefore, “[t]he demand… that no individual be above international humanitarian or human rights law and that states cooperate with the ICC on that basis, was deemed to be in conflict with the ‘smooth working’ of international society.”

The vast majority of states speaking at the meetings raised both practical and principled objections to the US initiative. This “pro-ICC” grouping consolidated around an initial statement by Canadian diplomat Paul Heinbecker, and included some non-ICC parties such as Malaysia and the Ukraine. Only three states—China, India and Russia—rhetorically supported the US position in the Council discussions before voting was held on the 2002 draft resolution. This is contrasted with 28 states—including two speaking on behalf of the European Union and Rio Group—that voiced explicit concerns over the US proposal. A similar pattern emerged in 2003, with only Pakistan explicitly endorsing the US view and Angola, Bulgaria, China and the Russian Federation making more ambiguous statements of understanding. These responses have important implications for the status of the ICC and its internationalized procedural justice norm; in particular, the diplomatic interventions reveal how resistance to the US initiative was framed

87 Ralph, Defending the Society of States, 166.
88 This episode is recounted in Michael Byers, Intent for a Nation: What is Canada For? (Vancouver: Douglas & McIntyre, 2007), 110-111.
89 Seven other states made interventions that could not be clearly identified as fundamentally supportive or resistant.
in terms of the legal criteria of the Rome Statute as well as broader principles of international law, as anticipated by my theoretical account. Court supporters first argued that the Rome Statute already contained sufficient procedural checks and balances to effectively eliminate US stated concerns for politically motivated prosecutions.90 More fundamentally, a number of states objected on the grounds that, quite to the contrary of American assertions, the proposal for granting immunity a priori expressly violated the terms of the Rome Statute:

the proposals now circulating would have the Council, Lewis-Carroll-like, stand article 16 of the Rome Statute on its head. The negotiating history makes clear that recourse to article 16 is on a case-by-case basis only, where a particular situation—for example the dynamic of a peace negotiation—warrants a 12-month deferral. The Council should not purport to alter that fundamental provision. Those States that have pledged to uphold the integrity of the Statute—especially the six States parties in the Council—have a special responsibility in that regard.91

These claims were widely supported in both the initial 2002 debate and the subsequent renewal of the resolution in 2003.92

ICC proponents thus responded to US arguments by invoking an alternative assemblage of legal interpretations and constitutive international principles. Especially relevant here were discourses of legal equality and fairness, and respect for norms regulating the modification of international legal instruments. Delegations thus voiced concern that a blanket immunization as envisioned in Resolutions 1422 and 1487 “attempted to elevate an entire category of people to a

90 See inter alia statements by Canada, France, Jordan, Ireland, Brazil and Switzerland to the United Nations Security Council. 57th year, 4568th meeting, Agenda Item: The Situation in Bosnia and Herzegovina, New York, July 10, 2002 S/PV.4568 and S/PV.4568 (Resumption 1). At the same meeting, Canada and France also argued that U.S. opposition in this specific case was largely irrelevant, since the International Criminal Tribunal for the Former Yugoslavia would have primary jurisdiction over any alleged crimes committed by UN peacekeepers. Moreover, the U.S. concerns in that respect should actually be more pronounced, since the ICTY Charter contained no complementarity provision, though the U.S. supported the creation of the tribunal and had not raised these concerns in the context of the Charter’s negotiation. See also Ralph, Defending the Society of States, 166-167.
92 See for example statements by Costa Rica, Brazil, Switzerland, Mexico, New Zealand and Liechtenstein at the 2002 meeting; and those by Canada, New Zealand, Jordan, Switzerland, the Netherlands and Liechtenstein to the United Nations Security Council, 58th year, 4772nd meeting, Agenda Item: United Nations Peacekeeping, New York, June 12, 2003 S/PV.4772. This objection was also reiterated by the UN Secretary General at the 2003 meeting. See Cryer, Prosecuting International Crimes, 227-8.
point above the law — a concern exacerbated still further when thought is given to the revolting nature of the crimes covered by the Court’s jurisdiction."  

"This was described by another delegate as “an unconscionable double standard.” Various speakers suggested that this would weaken the ICC as an institution and “reverse the positive gains and historic milestones of the Rome Diplomatic Conference.”

At the same time, numerous countries argued that the US demand would set a precedent for the Security Council to unilaterally re-interpret existing multilateral agreements without the approval of the treaty parties. The argument was that such an expansive mandate to immunize international actors would force State Parties to violate their own legal obligations under the Statute, and would more broadly undercut the sovereign right of states to undertake legal commitments. This was widely understood by the participating states to constitute an extra-legal interference in the treaty making process, and thus a violation of long-established principles and procedures of international law. As the Canadian delegate noted, “in the absence of a threat to international peace and security, the Council’s passing a Chapter VII draft resolution on the ICC… would… be *ultra vires,*” that is, outside of the Security Council’s proper scope of authority. As such, “[m]ember States would have to question the legitimacy and legality of this exercise of the role and responsibility entrusted to the Council were that to occur.” Even more fundamentally, this overreach of Security Council authority “that would destabilize and

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96 See for example statements by Canada, New Zealand, South Africa, Costa Rica, Iran, Mexico, and Colombia at the UN Security Council, July 10, 2002.
97 Canada, UNSC, July 10, 2002.
98 Canada, UNSC, July 10, 2002. See also similar statements by Jordan and Liechtenstein at the same meeting.
undermine the international legal regime”\textsuperscript{100} based on the principle of sovereign equality and the sanctity of legal agreements as embodied in the UN Charter.

In essence, what we are debating today is the validity of the Charter of the United Nations and the mandate it has conferred on the Security Council. Were the Council to endorse the gross violation of the Charter and international law that this attempt seeks to impose on it, it would imperil the founding principles of the United Nations as well as the very existence of the Organization as it is defined in the Charter.\textsuperscript{101}

This, in turn, could only serve to degrade the credibility of the Security Council by further politicizing its decisions.\textsuperscript{102}

The crux of the debates over Security Council immunities thus centred on conceptions of the appropriate role of international law as an ordering device of international affairs:

At stake today are entirely different issues that raise questions about whether all people are equal and accountable before the law; whether everyone in the territory of a sovereign State is subject to that State’s laws, including international laws binding on that State; and whether States may collectively exercise their sovereignty to prosecute perpetrators of grievous crimes. Those principles were affirmed at Nuremberg and have been affirmed since.\textsuperscript{103}

Despite ultimately approving Resolutions 1422 and 1487\textsuperscript{104}, the record of the Security Council debates demonstrates that this outcome went against the majority of publicly stated views. The furor over US brinkmanship drew attention to the question of “[w]hether the establishment of the ICC seriously threatened peacekeeping making it prudent for [Court supporters] to compromise on their commitment to the integrity of the Rome Statute” in order to sustain a commitment to

\textsuperscript{100} Syria, UNSC, July 10, 2002.


\textsuperscript{103} Canada, UNSC, July 10, 2002.

\textsuperscript{104} Resolution 1422 was approved unanimously; Resolution 1487 was approved with 12 votes in favour and three abstentions (France, Germany and Syria).
UN operations.105 The discursive record suggests that Security Council members reluctantly regarded Resolutions 1422 and 1487 as a necessary means of ensuring this larger goal.

When considered in the broader context, however, it is clear that the pro-ICC camp succeeded in limiting the potential damage from the US effort. The attempt to establish a blanket immunity for peacekeepers was resisted, as was the attempt to give the Security Council greater authority over an independent organization. In these respects, prominent features of the ICC legal regime—notably the elimination of immunities and the Court’s jurisdiction over non-party nationals—largely withstood the US attack. This can be demonstrated in a couple of ways. First, while Security Council members submitted to US demands in the short run, few states were willing to recognize the request as anything other than a temporary concession, as demonstrated by the initial Canadian diplomacy ensuring annual UNSC oversight via a renewal.106 Though partially endorsing the US view that the resolutions were not in contravention of the Rome Statute, the United Kingdom made clear that “[w]e regard Security Council resolution 1422 (2002) as an exceptional measure. It is not permanent; nor is it automatically renewable. It is subject to scrutiny in the Council, at least annually. We look forward to the day when it or its successor will no longer be required.”107 This view was echoed by other states including Canada, France, Guinea and Spain. The reference to exceptional circumstances is vital here, as it suggests that the immunity was not normalized even as the international system’s highest political body temporarily conceded to US pressure. The decision not to further extend the resolution in 2004 is

105 Ralph, Defending the Society of States, 170.
106 Byers, Intent for a Nation, 110-111.
also crucial since the repeated issuance of one-year extensions would have ultimately had the effect of substantiating the US position as a *fait accompli*.\(^\text{108}\)

Second, both the initial US effort and the subsequent rebuttals took place on legalistic grounds rather than via a reliance on spare *realpolitik* considerations. The American position sought to leverage principles of international law and Rome Statute rules to place limits on the operation of an independent institution. Yet this process cut both ways, as the strategy exposed US diplomats to countervailing arguments that equally relied on legal reasoning. Resistance to US efforts then specifically reaffirmed the legal validity of the Court on the basis of its internal criteria and proper connection to existing international law. This has precedent for future situations as well, as repeated reliance on a legalistic discourse can lock actors into similar modes of justification in future interactions, as we shall see below. Third, the diplomacy over peacekeeping did not exist in an isolated bubble, but was directly informed by other events that drew attention to US respect for international law. In particular, the release of photographs documenting serious abuses at Abu Ghraib Prison in Iraq drew widespread condemnation, and led many Security Council members to more actively challenge the US immunity effort.\(^\text{109}\) In this light, the United States decision not to seek a further renewal of Resolution 1487 “was not a consequence of America’s changing attitude towards the Court,” but was instead a response to growing international hostility to US unilateralism and perceived withdrawal from international legal restraints.\(^\text{110}\) This episode vividly demonstrates how international norms may place constraints on the most powerful actors, even when these states are able to partially limit the application of new international obligations. More specifically, the decision to end any further

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\(^{108}\) This worry is articulated in Stahn, “Ambiguities of Security Council Resolution 1422,” 104.

\(^{109}\) Byers, *Intent for a Nation*, 110-111.

\(^{110}\) Ralph, *Defending the Society of States*, 173.
extensions also conforms with my theoretical account in the sense that the ultimately dominant view of the pro-ICC camp was heavily buttressed by legal reasoning.

These achievements were incompletely consolidated, however, as parallel developments within the UN Security Council have led to a partial ratification of the US immunity policy. Successive resolutions creating a Multinational Force in Liberia and referring the situations in Darfur and Libya to the ICC Prosecutor have contained an operative clause that provides a permanent exemption for nationals of non-party states from ICC jurisdiction.111 This language was inserted on US insistence, and was regarded by the American delegation as legal affirmation of their position previously articulated in the Bosnia resolutions:

The language providing protection for the United States and other contributing States is precedent setting as it clearly acknowledges the concerns of States not party to the Rome Statute and recognises that persons from those States should not be vulnerable to investigation or prosecution by the ICC, absent consent by those States or a referral by the Security Council. We believe that, in the future, absent consent of the State involved, any investigations or prosecutions of nationals of non-party States should come only pursuant to a decision by the Security Council . . . Protection from the jurisdiction of the Court should not be viewed as unusual.112

The pattern and content of national statements would suggest that resistance to this US initiative has not been as widespread and consistent as with the Bosnian case. Only three states spoke against the inclusion of this immunity provision during the debate over Resolution 1497 regarding Liberia113 and, while the subject received far greater attention in the case of the Darfur resolution (1593) with seven explicit objections114, only one state (Brazil) reaffirmed this position in the more recent debate over Resolution 1970 and the Libyan referral.

111 “Decides that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force or United Nations stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.” UNSC Resolution 1497, operative paragraph 7. Parallel language can be found in the resolutions on Darfur and Libya. UNSC Resolution 1593; and UNSC Resolution 1970.
112 United States, UNSC, March 31, 2005.
113 France, Germany and Mexico.
114 Argentina, Benin, Brazil, Denmark, Greece, Philippines and Tanzania.
There are two specific findings to draw from this brief example. First, the debate in these three cases mirrored the legalistic discourse discussed at length in the context of Resolutions 1422 and 1487: the US delegation again framed its position as in accordance with international legal practice, while opponents argued that the immunity provision was inconsistent with established principles of law and further violated their own domestic legal commitments to the Rome Statute and other instruments.115 Second, many of these same states sought to limit the impact of their affirmative votes by disassociating their support for the purpose of the resolution from an endorsement of the immunity provision in particular. As the Greek delegate explained concerning Darfur:

The resolution creates certain exceptions for the specific case of the Sudan for countries not parties to the Statute of the International Criminal Court. That will create certain problems of interpretation regarding the application of the principle of exclusive international jurisdiction…. Despite that, we preferred to vote in favour [of the draft resolution] rather than to allow violations of humanitarian law to go unpunished.116

Importantly, therefore, for many states the existence of the immunity provision was an unfortunate development whose negative connotations was outweighed by the necessity of addressing ongoing violence in Liberia, Sudan and Libya. The notable absence of principled support for the US position is significant for the present analysis since it suggests an important qualification to the US claim for establishing precedent. The acquiescence by ICC supporters has, however, contributed to a partial if not fully solidified recognition of non-party immunities in Security Council practice. This is likely to become increasingly settled if the recent pattern continues without substantial challenge in future resolutions.117

115 On this see Cryer, “Sudan, Resolution 1593,” 215-218.
“Article 98” Bilateral Immunity Agreements

The fate of the anti-immunity norm can be further assessed in relation to another US initiative, since the motivations for the policy and subsequent responses substantially mirror the Security Council processes discussed above. In the wake of the failure to gain a permanent exemption for US forces, American diplomats initiated a global effort to convince foreign states to sign bilateral non-surrender agreements barring them from transferring American nationals to the ICC. This program—named after Article 98 of the Rome Statute—was driven by the same desire to place all US nationals beyond the reach of ICC jurisdiction:

It's an important principle for the United States that those who want to adhere to the Rome Treaty, who want to participate in the International Criminal Court, can do so. That's their sovereign decision to do so. But they cannot implicate others and pretend to carry out prosecutions against others who may not be participating, especially since we have our own legal system that deals with the same kind of crimes, and that we do deal with the same kind of crimes. We hold our military to the highest standards, and we don't think that we need to rely on prosecutors under this court to decide when that needs to be done.118

This episode provides valuable additional evidence concerning the health of the anti-immunity norm enshrined in the Rome Statute. As Kelley points out, the Bush administration’s global strategy with respect to Article 98 agreements meant that virtually all states were approached, while the sheer aggressiveness of the US effort could not have been fully anticipated by states prior to the Statute’s creation and entry into force.119 In this latter respect, many states were faced with a dilemma of whether to persist with their prior commitment to the ICC, or concede to American demands. The nature of the discourse thus allows us to directly evaluate alternative material and norm-based accounts of the motivations for state behaviour.

As with the Security Council above, the global debate surrounding Article 98 agreements relied extensively on a legalized discourse. The United States explicitly sought to frame its

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efforts both in terms of broader principles of international law, and the more particular standards of the Rome Statute: “we see it as a treaty-friendly approach. We’re using the exact Article and provisions as provided for by the Rome Statute. We’ve gone out to all states around the world, have been making our case that this is consistent with the treaty and we feel that it’s legally permissible so at the end of the day it’s a policy call.” In this respect the US approach again provides interesting insight into the impact the Statute has had in shaping global responses to evolving norms concerning the punishment of atrocity. After all, the Bush administration could have ignored the Court completely, and relied on raw power politics unadorned with legalistic justification to pursue its goals, as anticipated by realist accounts. Yet the administration instead sought legitimacy for its policy through reference to the Rome Statute. The Statute—and the broader institution and norm—therefore profoundly influenced the manner in which the world’s preeminent military power has articulated its interests in a key area of national security policy.

At the same time, discourse from states signing Article 98 agreements makes clear that in the majority of cases, these decisions were motivated by a desire “to avoid a sanction or to appease the United States” rather than an endorsement of the US position concerning the legal validity of the agreements. This is further demonstrated by the fact that a number of states signing bilateral immunity agreements—including East Timor, Egypt, Morocco and Pakistan—

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121 Goldsmith, “Self-Defeating ICC.”
sought to conceal their existence. Other states like Botswana faced substantial domestic opposition that also drew contrasts between legalistic interpretations of the agreements and the prevailing suspicion that more base material incentives drove the agreements. As with the UNSC resolutions, the effects of the US program on the anti-immunity norm—and, more generally, the ICC itself—are therefore limited by the absence in most instances of any endorsement of the content of the US position.

Principled arguments were also at the heart of resistance to Article 98 agreements. These rhetorical interventions are significant in large part because they came most often from US allies and aid recipients that faced punishment through a suspension of American military and other assistance if they refused to adopt the agreements. In that sense, these expressions of normative commitment were anything but “cheap talk” as some scholars might expect, but rather came with significant material consequences since all states were at least theoretically subject to punitive US action. Kelley has argued that principled resistance to US pressure came in two forms, and for some states was driven by genuine affinity with the ICC as an embodiment of international justice while for others was motivated by a more generalized belief that international commitments must be observed. This was particularly the case for those states that made up the Like-Minded Group. Thus for Canada

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126 See summarized and verbatim statements included in CICC, Quotes from High Officials; and American Non-Governmental Organizations Coalition for the ICC, Government References to So-called Article 98 Agreements September-October 2002. [http://www.amicc.org/usinfo/reaction.html#otherdocs](http://www.amicc.org/usinfo/reaction.html#otherdocs).
[t]he efforts to secure broad immunities from the potential jurisdiction of the Court are both unnecessary and unfortunate. The Rome Statute is a carefully balanced instrument which fully respects the sovereignty of law-abiding states willing and able to fulfill their existing legal obligations to investigate and, where necessary, prosecute those who commit the most heinous crimes. For Canada, we remain committed to a dialogue with any and all states on the International Criminal Court and we are willing to discuss any legitimate concerns these states may have. At the same time, Canada remains firmly committed to ensuring full respect for the Rome Statute.\footnote{Canada, Statement by Ms. Deborah Chatsis, at the 6th Committee of the United Nations General Assembly, 57th Session, New York: October 15, 2002. Cited in AMICC, Government References to Article 98 Agreements.}

A sense of fidelity to legal obligations is also widely apparent: “Australia views its obligations as a party to the ICC statute as paramount, and, although aware of US concerns, would not conclude any agreement that is inconsistent with Australia's ICC obligations.”\footnote{Comments attributed to a spokeswoman for the Canadian Department of Foreign Affairs. CICC, Quotes from High Officials.} Similarly, “[t]here is no way Kenya can sign such an agreement because Kenya recently ratified the Rome Statute and all countries must submit to its jurisdiction irrespective of their peculiar circumstances… The Kenya government has no intention of exempting anybody or any country under any circumstances.”\footnote{Comments attributed to Assistant Minister for Foreign Affairs Moses Wetangula. Fred Oluch, “Kenya on Collision Course with US on ICC Treaty” East African April 25, 2005. http://www.globalpolicy.org/intljustice/icc/2005/0425kenyaicc.htm.} Similar arguments were frequently invoked by the approximately 90 states that refused to endorse these bilateral non-surrender agreements.\footnote{CICC, Quotes from High Officials. According to the CICC, 100 states had signed bilateral immunity agreements as of December 2006. CICC, Factsheet. See also Kelley, “Who Keeps International Commitments,” 574.}

Norm-based concerns for upholding the ICC system have often interacted with strategic considerations in shaping the policy responses of many states. This is particularly notable with respect to the linkage between EU membership and endorsement of the EU’s common position in support of the Court.\footnote{Council of the European Union, Draft Council Conclusions on the International Criminal Court, Brussels: September 30, 2002. http://www.amicc.org/usinfo/reaction.html#nonsurrender.} Yet instrumental logics that associate rejection of a bilateral immunity agreement with economic of diplomatic benefits are incomplete in this case for two important reasons. First, in contrast to the US approach, “although the EU strongly discouraged states from
signing nonsurrender agreements, there was no direct economic pressure, nor has there been any record of the EU punishing a country for signing such an agreement." Second, even self-seeking behaviour that sought to weigh the relative benefits of cooperating with US versus EU demands still relies on a prior social agreement concerning the normative value of the Court. Despite various instrumental calculations,

[this diplomacy] thus provides rare empirical support that states do at times prioritize normative goals and care about the rule of law. This is not to say that traditional interests did not matter in this case. States clearly were more likely to sign nonsurrender agreements if they were poor and more United States dependent. It is interesting, however, that for some states the sanctions produced more consternation than cooperation. Hence there is strong evidence to suggest that commitment to international norms—whether concerning internal content of the Rome Statute or broader principles of international justice—was sufficient to outweigh direct material costs for many states, an outcome that runs contrary to realist and institutionalist expectations.

The Rome Statute has therefore come to be identified by many states as a constituent element of international society, such that non-conformance has implications even for powerful non-parties like the United States. The suspension of the Article 98 agreements program, and withdrawal of domestic legislation punishing states that refused to sign bilateral non-surrender agreements was itself a direct result of military and intelligence setbacks owing to the suspension of aid:

In testimony to a congressional panel in 2005, US Army General Bantz Craddock said enforcement of [the American Service Members’ Protection Act] had made it impossible for him to fulfill his duties as head of the Southern Command, in charge of US forces in Latin America. He stated that several countries in Latin America had refused to sign [Article 98 Agreements] and

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134 While existing Article 98 agreements remain in force, the legislation that penalized states that did not sign agreements was not renewed after 2006, and was officially repealed by the Obama administration in 2009. Moreover, it appears that no new Article 98 agreements have been sought since 2008. See Lucia Di Cicco, The Non-Renewal of the “Nethercutt Amendment and Its Impact on The Bilateral Immunity Agreement (BIA) Campaign, April 30, 2009. http://www.amicc.org/usinfo/administration_policy_BIAs.html.
as a result, certain foreign aid for these countries has been held up. These statements were ultimately reflected in Secretary of State Condoleezza Rice’s conclusion that the [Article 98 Agreements] policy had been ‘sort of the same as shooting ourselves in the foot.’

Thus even a dominant military power like the United States can face material consequences when its behaviour is widely judged to contradict community standards that the resistant state does not share. In this case, a combination of legalistic and normative argumentation generated sufficient resistance such that the US administration ultimately relented and reversed its previous policy. This outcome is particularly significant given the high importance that senior members of the Bush administration attached to the Article 98 agreements program.

In all of the above cases, therefore, ICC proponents have defended a particular vision of a legal community through resort to forms of discursive argumentation that invoke both the particular criteria of the Rome Statute and broader norms of international law. While the US often proved able to get states to acquiesce to its demands in the short term, it has had much less success in convincing them of the legitimacy or legal validity of its claim to the exemption of non-party nationals. In this respect, the norm against immunity has held up against substantial material challenge; this is particularly surprising from the realist perspective which has been highly sceptical of the potential impact the Court could have in the face of sustained US pressure.

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Immunities and Senior Political Actors: The Impact of the Bashir Indictment

Yet the considerable resistance to US diplomatic efforts has not resolved concerns over the non-immunity norm enshrined in Article 27, and its potentially contradictory relationship with existing diplomatic obligations contained in Article 98. Ambivalence over legal immunities is further evident with respect to the more specific question of whether Heads of State and other senior officials should face legal sanction. Here too the debate centres crucially on questions of sovereign equality and the permissible limits on external interference in the domestic affairs of the state. Official statements suggest, for example, that the necessity of removing Head of State immunity currently presents a barrier to ICC membership in a number of countries including Azerbaijan, Belarus, Malaysia, Monaco, Morocco, Sudan, Thailand and Uzbekistan.

The concern over the legal status and political legitimacy of Head of State immunity is brought into sharp relief by the extensive debate over the indictment of Sudanese President Omar al-Bashir.136 Opposition to the ICC legal process has taken two main forms. First, a number of states—principally from Africa and the Middle East—have challenged the indictment on the grounds that it constitutes an unacceptable interference in national affairs. Sudan has not surprisingly stated that “this request [of an arrest warrant for Mr. al-Bashir] targets the leadership of the state, the symbol of sovereignty and dignity… [a]nd in a state which is not a member of the Rome Statute.”137 This framing essentially relies on a view that Head of State immunity

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remains an active principle of customary and statutory international law that cannot be obviated by new legal institutions without the consent of the affected state(s). It is in this vein that the African Union has expressed its understanding that Article 98(1) was included in the Rome Statute establishing the ICC out of recognition that the Statute is not capable of removing an immunity which international law grants to the officials of States that are not parties to the Rome Statute, and by referring the situation in Darfur to the ICC, the UN Security Council intended that the Rome Statute would be applicable, including Article 98. 138

In addition to the first legal objection is a second political one, that the ICC process has had a negative effect on the prospects for resolving the conflict in Darfur. Hence the African Union has stated that “[w]e believe the indictment of Bashir will complicate deployment of [the African Union / United Nations Hybrid Operation in Darfur] and the management of the humanitarian crisis.”139 It is in light of this concern that the AU has repeatedly requested that the UN Security Council seek the deferral of the ICC investigation in Darfur, as permitted in Article 16 of the Rome Statute.140 Many African states thus question the legitimacy of Heads of State

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being subject to international law generally, and the *effects* in this particular case; this call has been endorsed some non-AU member states as well.\(^{141}\) Yet the AU has equally sought to reiterate that its policy does not imply an endorsement of impunity:

> We see the deferral as best strategy for now. Deferment should not in any way be perceived as condoning injustice. Justice is a matter of essence. Justice must be done and seen to be done. We are simply concerned with the best possible sequencing so that the most immediate matters of saving lives and easing the suffering of the people of Darfur are dealt with first. Getting the support and cooperation of the government of Sudan is a matter of essence.\(^{142}\)

Nevertheless, the Security Council has thus far refused to entertain the AU request. This policy clearly contributed to complaints among many African leaders to the effect that “the ICC is a hegemonic tool of western powers” and that “the ICC is an institution which is targeting or discriminating against Africa.”\(^{143}\) In response, the AU Heads of State—ironically at the initiative of Libyan leader Muammar Gaddafi—made it official policy that “AU Member States shall not cooperate pursuant to the provisions of Article 98 of the Rome Statute of the ICC relating to immunities, for the arrest and surrender of President Omar El Bashir of The Sudan”\(^{144}\)


On its face, therefore, the AU position poses a substantial challenge to the authority of the Court, since it creates a situation in which a regional organization demands that its members violate an international legal obligation they collectively share in order to prioritize an alternative commitment to a political body. Recall that all states are obliged to cooperate with the ICC in respect of the Darfur situation by virtue of its origins in a Security Council referral. This, of course, is in addition to the fact that many AU members are also State Parties to the Rome Statute and thus have legal obligations to the Court by virtue of their membership. The fact that the deferral request has been reiterated by a number of (primarily regional) states thus calls into question the scope and applicability one of the principal innovations of contemporary international law as embodied in the Rome Statute.

As in other instances of contestation, the response from other states is vital to the overall assessment of the status of the ICC and its norm of internationalized procedural justice. In this respect the extant statements reveal both principled and procedural defences of the Bashir indictment. A variety of states used the Security Council forum to explicitly link the legal efforts with the resolution of conflict in the region: for example, France declared its conviction “that there is no contradiction between justice and peace, and that combating impunity is one of the conditions of lasting peace.”¹⁴⁵ Importantly for the political legitimacy of the norm, this framing was also endorsed by State Parties currently in the midst of ICC legal processes.¹⁴⁶ At the same time, a host of states called on all members of the international community to meet their

¹⁴⁵ Republic of France, UNSC, December 4, 2009. See also inter alia statements by Austria, Japan, and the United States at the same meeting.
obligations to cooperate with Court activities relating to Darfur, thereby implicitly rejecting the African Union’s position discussed above.\textsuperscript{147}

A systematic study of official positions at the UN Security Council also suggests that support for the Bashir indictment is widespread. In the two most recent available discussions concerning the ICC’s work in Darfur,\textsuperscript{148} the majority of states endorsed the fight against impunity including the legal proceedings against President Bashir.\textsuperscript{149} There is good evidence here of the ways in which civil society may leverage norms and legal rules to pressure states into changing their behaviour:

some countries have had to dissociate themselves from the Sudanese President, often under pressure from NGOs and civil society: Al-Bashir refrained from going to the Organization of the Islamic Conference in Turkey in October 2009 after the Turkish Coalition for the ICC staged protests; the following month, he found his invitation to the AU Peace and Security Council in Nigeria revoked, after an outcry from NGOs, condemned the governments for inviting a ‘fugitive of justice.’ Moreover, France decided to relocate the France-Africa summit scheduled for May 2010 from Egypt to France in order to avoid the presence of Al-Bashir.\textsuperscript{150}

Similarly,

[b]ecause of its support for the [Sirte Declaration] South Africa was quickly singled out for severe criticism both at home and abroad…. Virtually all of South Africa’s leading human rights organisations, including the South African Human Rights Commission, united around the call for South Africa’s government to respect its own law and constitution and to disassociate itself from the AU decision to refuse cooperation with the ICC.\textsuperscript{151}

\textsuperscript{147} Statements by Belgium, Burkina Faso, France, Italy, South Africa, and Vietnam to the United Nations Security Council, 63\textsuperscript{rd} year, 6028\textsuperscript{th} meeting, Agenda Item: Reports of the Secretary-General on the Sudan, New York, December 3, 2008 S/PV.6028; and Statements by the United Kingdom, United States of America, Mexico, Japan, Costa Rica, Croatia and Uganda to the UNSC, December 4, 2009.

\textsuperscript{148} Since 2010, the Security Council has generally not held public, on-the-record discussions of the bi-annual reports from the ICC Office of the Prosecutor. The two relevant discussions since the issuance of the arrest warrant for President Bashir are from December 2009 and June 2012. See United Nations Security Council, 64\textsuperscript{th} year, 6230\textsuperscript{th} meeting, Agenda Item: Reports of the Secretary-General on the Sudan, New York, December 4, 2009. S/PV.6230; and United Nations Security Council, 67\textsuperscript{th} year, 6778\textsuperscript{th} meeting, Agenda Item: Reports of the Secretary-General on the Sudan, New York, June 5, 2012 S/PV.6778.

\textsuperscript{149} The United Kingdom, United States, Mexico, France, Japan, Costa Rica, Austria, Turkey and Croatia made positive statements in the December 2009 meeting. The United Kingdom, United States, France, Portugal, Colombia, Guatemala, Togo, Russia and Germany did so in the 2012 meeting. In each instance, only two states opposed the indictments (Libya and Burkina Faso, and Morocco and India, respectively) while four others made statements that did not assert a clear position.


\textsuperscript{151} du Plessis, International Criminal Court, 15.
The extent of the opprobrium was such that the South African government—an early and long-time supporter of the Court—subsequently issued an official statement in which it reiterated its commitment to the ICC in general and its obligations concerning the Bashir arrest warrant in particular.152 As with other examples cited in this dissertation, these instances conform with Checkel’s conception of societal mobilization in which “non-state actors and policy networks… mobilize and coerce decision-makers to change state policy” on the basis of normative understandings.153 Thus the legal criteria and network effects that define contemporary international treaties facilitate the types of agency typically identified in constructivist accounts that include naming-and-shaming,154 “boomerang” or leverage politics,155 and strategies of rhetorical entrapment.156

The norm against immunity of high-ranking officials has become established to such an extent that even Court opponents generally prefer to refrain from public opposition of the indictment.157 This has been the case with prominent non-parties like China and the Russian Federation. The US decision to support the initial Security Council referral and subsequent indictments is particularly illustrative of these significant compliance pulls, as the US defended the use of the Court on both moral and instrumental grounds:

Those responsible for these atrocities must be held accountable…. Although the United States is not party to the Rome Statute, it [is committed]… to engage with the international community on issues that affect our foreign policy interests. Ending impunity for crimes against humanity, including crimes on the staggering scale of those committed in Darfur, ranks high among our

152 See du Plessis, International Criminal Court, 16-17 for text of the statement.
155 Keck and Sikkink, Activists Beyond Borders.
157 See statements by Russia, China and Vietnam at UNSC, December 4, 2009; and statements by Pakistan, Azerbaijan and China at UNSC, June 5, 2012.
commitments. The United States will therefore continue to be supportive of the ICC’s prosecution of these cases to the extent consistent with United States domestic law.\textsuperscript{158}

US support in this case offers an intriguing example of how norms may stimulate a partial reconception of state interests. Here the US was willing to endorse a norm of legal sanction against the nationals of a non-party state \textit{under certain circumstances} even as it vehemently rejected the hypothetical application of the same legal standard to its own citizens.\textsuperscript{159} In particular, it appears that the US was content to accept the utility of the Court in this instance because the legal jurisdiction had come about via Security Council initiative, and was thus consistent with the US view of the appropriate relationship between the ICC and the existing UN system. This is best appreciated in a wider context of great power politics and the ICC’s presumed role in international affairs, discussed in the final section below. While incomplete, therefore, the US position—and the more muted responses from other non-parties—nonetheless contributes to the legitimacy of the Court by reinforcing the public perception that the ICC is the appropriate means of addressing acts of atrocity. State discourse again provides valuable evidence in weighing the political implications of the Court, as the attention to discursive justifications demonstrates greater uptake of ICC norms than formal treaty status alone would suggest.

To briefly summarize, the three historical examples presented here demonstrate enduring disagreements regarding the appropriate limits of immunity—relating to the scope of jurisdiction over non-parties generally and Heads of State in particular—as a matter of both politics and law.

\textsuperscript{158} United States of America, Statement by Ms. DiCarlo, at the United Nations Security Council, 64\textsuperscript{th} year, 6230\textsuperscript{th} meeting, Agenda Item: Reports of the Secretary-General on the Sudan, New York, December 4, 2009 S/PV.6230.

\textsuperscript{159} U.S. efforts here substantially mirror those with respect of Security Council Resolutions 1422 and 1487 as discussed above: “the legitimacy of the referral is impaired by the a-priori exclusion of non-party state nationals from the jurisdiction of the ICC…the point is not that the jurisdiction of the ICC will be significantly limited in a practical fashion, but that the exclusion of some states’ nationals fails to respect the Prosecutor’s independence and makes it difficult to reconcile the resolution with the principle of equality before the law. Some states’ nationals, it would appear, are more equal than others.” Cryer, “Sudan, Resolution 1593,” 217.
International responses suggest that the legal norm concerning immunity as embodied in the Rome Statute remains unsettled, as might be expected by the competing modalities of Articles 27 and 98. At the same time, there is a notable shift in the way that states articulate their rights and duties with respect to individual and collective responsibility for grave crimes. Contestation and responses therefore take place on the terms of the Rome Statute, and disputes engage with particular norms codified in the treaty text, as well as more generalized accounts of duties and obligation under international law. In this respect, a key impact of the internationalized procedural justice norm has been to frame the conception of state interests on a key matter of national sovereignty, and thereby inform responses to particular real-world scenarios.

Institutional Autonomy and the Place of the ICC in the System of States

Caroline Fehl has argued that political disputes with respect to the International Criminal Court ultimately “revolv[e] largely around questions of institutional design, [and especially] specific provisions in the Rome Statute governing the ICC’s operation.”160 There is certainly evidence to support this claim, as the above discussion demonstrates. Yet as I have attempted to show, contestation is not limited to narrow debates over legal rules, but has engaged questions of the jurisdictional scope and relative independence of the ICC, and by extension, its relationship to the broader international system. It is therefore worth briefly unpacking these issues, since disagreements over institutional content ultimately concern foundational norms of sovereignty and hierarchal authority in international affairs. This section probes the limits of the patterns of discursive change addressed in this chapter, to offer some final thoughts on the impact of the ICC and its internationalized procedural justice norm.

As the above analysis has made clear, “[t]he conflict between the universal nature of the Statute’s normative claims and the particularistic nature of national sovereignty is at the root of opposition to the Court.”\textsuperscript{161} This has played out frequently in the context of objections to the Court’s ability to exercise jurisdiction over the nationals of non-party states.\textsuperscript{162} In the view of powerful states including China, India, Russia and the United States, this arrangement violates the foundational tenet of international law that states cannot be bound by rules to which they do not consent:

fundamental principles of treaty law still matter and we are loath to ignore them with respect to any state’s obligations vis-à-vis a treaty regime. While certain conduct is prohibited under customary international law and might be the object of universal jurisdiction by a national court, the establishment of, and a state's participation in, an international criminal court are not derived from custom but, rather, from the requirements of treaty law.\textsuperscript{163}

For the Russian Federation, “the International Criminal Court has not yet become a universal instrument. Consequently, it is essential to bear in mind the legitimate interests of the States that are not yet States parties to the Rome Statute.”\textsuperscript{164} The United States, speaking at the same meeting, was even more blunt, declaring simply that “The ICC is not the law”\textsuperscript{165} and thus could not reasonably be held up as a universal standard of international authority.

Debates over the ICC ultimately return to the question of how the Court should operate with respect to other, prior institutions and thus, in effect, its proper place in the international system of states. These objections have tended to centre on the Prosecutor’s ability to launch an

\textsuperscript{161} Schiff, \textit{Building the ICC}, 166.
\textsuperscript{162} Rome Statute, Article 12.1(a).
\textsuperscript{164} Russian Federation, Statement by Mr. Lavrov, at the United Nations Security Council, 58\textsuperscript{th} year, 4772\textsuperscript{nd} meeting, Agenda Item: United Nations Peacekeeping, New York, June 12, 2003 S/PV.4772.
\textsuperscript{165} United States of America, Statement by Mr. Cunningham, at the United Nations Security Council, 58\textsuperscript{th} year, 4772\textsuperscript{nd} meeting, Agenda Item: United Nations Peacekeeping, New York, June 12, 2003 S/PV.4772.
investigation *proprio motu* – that is, on his or her own authority without prior agreement of the state(s) whose nationals are implicated or the approval of the UN Security Council.

At issue [during the Rome negotiations] was the willingness of the permanent members of the Security Council to surrender their capacity to determine when and where international justice could be done. By widening the process of referral beyond the Security Council, the Statute has in effect empowered voices beyond those that dominate the society of states. Indeed, by creating an Independent Prosecutor that can pursue cases based on evidence gathered by non-governmental organisations, the Statute has enabled individuals and groups who are not necessarily represented by states to have their claims heard in a court of law.\(^{166}\)

For China, Russia and the United States this legal structure is particularly problematic as it does not respect the Security Council’s pre-eminence as the permanent members of the Security Council. By widening the process of referral beyond the Security Council, the Statute has in effect empowered voices beyond those that dominate the society of states. Indeed, by creating an Independent Prosecutor that can pursue cases based on evidence gathered by non-governmental organisations, the Statute has enabled individuals and groups who are not necessarily represented by states to have their claims heard in a court of law.\(^{166}\)

For China, Russia and the United States this legal structure is particularly problematic as it does not respect the Security Council’s pre-eminence responsibility for maintaining international peace and security or the particular prerogatives given to its permanent members in the form of the veto. UNSC dominance of international policymaking is understood to be at the heart of the post-World War II international order and deviations from the UN Charter, in turn, represent violations of the constitutive norms of the international system. China has thus argued that “as a member of world peace and security system, the Court cannot operate without support of countries and relevant international organizations, and the Court's activities must be taken within the current international law framework with UN Charter as its foundation.”\(^{167}\)

This has echoes of the US position during the debates over UN peacekeeping discussed earlier. As such, these states regard the ICC as incompatible with established international principles and procedures that are both temporally prior and superior as sources of international obligation.

This emphasis on the constitutional power of the UN Charter also helps to resolve an apparent disjuncture in great power policy and discourse relating to ICC jurisdiction: the Court should not have legal authority over non-parties, unless the general legal norm of consent is overridden by another equally foundational principle of international order, manifest in the pre-

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167 China, Review Conference, June 1, 2010.
eminence of the UN Security Council. Hence the referrals of Darfur and Libya to the ICC, and the subsequent legal exposure of non-party nationals of these states, were acceptable precisely because—and only because—the initiative came from the Security Council. The Court’s relationship to the UN Charter can thus be understood as both a practical and principled issue in that it implicates the proper distribution of rights and duties in the international system. Prominent non-parties demand that the Court respect the current international structure and the special responsibilities bestowed upon materially powerful states by virtue of their position.

The United States has had an abiding interest in what kind of court the ICC would be in order to operate efficiently, effectively and appropriately within a global system that also requires our constant vigilance to protect international peace and security. Our refusal to support the final draft of the treaty in Rome… was grounded in law and in the reality of our international system.

David Whippman has argued that US objections do not primarily focus on the prospect of individual prosecutions of American personnel for grave crimes, since the US already accepts the legal validity of these crimes, and authorities would likely be willing to undertake similar judicial processes. Rather, if “the Court will pursue cases arising from the implementation of military doctrine…. the US fears that the Court will serve as a vehicle to constrain the exercise of US military power.” This privileging of great power politics seeks to subordinate the ICC to other international structures and is thus a fundamental challenge to its independent position in the international system.

Schiff, for example, has argued that “[t]he United States appeared willing to support the Court as long as it remained subordinated to the UN Security Council, as it was in the original [International Law Commission] proposal. Once it became clear that the ICC would be independent of the UNSC permanent members’ veto powers, however, the United States found increasing fault with the Court.” Schiff, Building the ICC, 170.

Scheffer, “Deterrence of War Crimes.”

Of course, the recent experience with torture under the administration of President George W. Bush, and the subsequent unwillingness to pursue criminal prosecutions of senior officials under the Obama administration, call this commitment into question. This, however, is a subject I do not engage with here. For recent treatments see McKeown, “Norm Regress;” and Brunnée and Toope, Legitimacy and Legality in International Law, 220-270.

These critiques betray limits in the extent to which the Rome Statute’s norm of internationalized procedural justice has permeated the great powers. While the association with prior international rules and norms has clearly been central to the broad acceptance the ICC has enjoyed, the more revolutionary features of the Statute—most especially relating to the elimination of legal immunities for State Parties and the autonomy enjoyed by the Court—have been regarded by prominent non-parties as contrary to the established international order based jointly on the political prerogatives of great powers and reinforced by norms of sovereignty and voluntary consent. There has been important adaptation, particularly in the form of shifts in the discursive acceptance of the Court as a legitimate tool for punishing some acts of international criminality; this transformation has yet to be fully realized, however, as the above discussion has repeatedly demonstrated.

This begs the question of whether the resistance by non-parties and especially the great powers of China, Russia and the United States has succeeded in inhibiting the development of the ICC as a legal body and norm. This is central to the present analysis, since the original purpose of the ICC founders was to create an institution that was protected from dominance by powerful states via the Security Council. The balance of evidence suggests that the great power view has not won out, as states across the international system have rejected the expectation that the ICC should be subordinate to these existing political and legal structures. Recall, for example, that ICC proponents like Canada, Jordan and New Zealand (among others) explicitly argued that blanket immunities in UNSC resolutions violated both the principle of legal equality under the UN Charter and the sanctity of legal agreements. These states effectively challenged the US position by arguing that, quite apart from the Rome Statue being a threat to sovereign rights, the US itself was seeking to limit the sovereignty of State Parties to the Rome Statute by
asserting that it was impermissible to delegate enforcement of core crimes committed on their territory to an outside institution.

The vast majority of states—including non-parties—have similarly rejected the idea that the Security Council should have exclusive authority in determining the jurisdiction of the ICC, particularly as this would give five states (three of which are not members of the Court) the power to protect themselves from ICC action with their veto. India, in a statement voicing its concerns over other aspects of the Rome Statute, made this objection plainly:

The power to bind non-States Parties to any international treaty is not a power given to the Council by the Charter. Under the Law of Treaties, no state can be forced to accede to a treaty or be bound by the provisions of a treaty it has not accepted. The Statute violates this fundamental principle of international law by conferring on the Council a power which it does not have under the Charter, and which it cannot and should not be given by any other instrument. This is even more unacceptable, because the Council will almost certainly have on it some non-States Parties to this Statute. The Statute will, therefore, give non-States Parties, working through the Council, the power to bind other non-States Parties.\(^\text{172}\)

In sum, then, while serious disagreements remain concerning the legitimate scope of ICC jurisdiction, efforts by the great powers to limit the practical application of the Rome Statute have not been accepted by State Parties and have often received limited support among ICC non-parties as well.

**Conclusion**

The central concern of this and the preceding two chapters is whether—and in what respects—the International Criminal Court has altered the behaviours and discourse of states in line with its central injunctions and broader normative commitments. There is now undoubtedly widespread acceptance of the notion that the most serious international crimes must be addressed via judicial processes in which individuals (as well as states) are the proper subjects of

\(^{172}\) India, Explanation of Vote, July 17, 1998.
punishment. A norm of individual criminal accountability for atrocities—described by Sikkink, Bass and others—has thus clearly taken hold, and can be understood as both a precipitating factor in the creation of the Court, and a chief source of its legitimacy. In this sense, the International Criminal Court and its norm of internationalized procedural justice can be regarded as a principal manifestation of the broader international shift towards individualized justice. As has been noted already, this represents a fundamental sea change in the way in which state rights and duties are conceptualized and articulated in the international system. Hafner-Burton and Ron have noted that “[w]hile it is clear that human rights talk has grown in a variety of venues, from the media to international treaties, it is harder to discern how, precisely, this discursive surge has influenced the actions of states and their leaders.” 173 Attention to official discourse, when combined with the behavioural metrics presented in Chapters 5 and 6, provides valuable evidence in beginning to assess this vital question.

For State Parties, support for the particular institutional solution enshrined in the Rome Statute has become a prominent marker of socially status. “Prior to the formation of the Court a good international citizen might be expected to maintain international order by respecting and where possible protecting” the traditional rights and responsibilities associated with a state system predicated on sovereign statehood. 174 While the creation of the Rome Statute has by no means done away with sovereignty as conventionally understood, it has generated a competing—and as yet incompletely solidified—international social expectation that conditions national obligations to punish grave crimes with significant international oversight. This constitutive function, in turn, has important implications for foundational principles of international relations: by establishing the Court as an element of the international system, states “are expected to

174 Ralph, Defending the Society of States, 170.
preserve the integrity of the Rome Statute” and its revised relationship between national and international authority.\textsuperscript{175} The discourse presented above suggests that State Parties have begun to build a community of law on the basis of these expectations. This task, however, is substantially incomplete, as evidenced by the fact that state cooperation with Court proceedings and changes in domestic laws have not been fully realized.

Discursive support for the fight against impunity is also widely apparent among states not party to the ICC, to the extent that many have identified the Court as a principal resource in this effort. This particular phenomenon is often missed in discussions of the ICC’s contemporary status. Yet close attention to official discourse is valuable in identifying rhetorical acceptance of the central validity claim of the ICC norm above and beyond the record of behavioural compliance. Indeed, following from the theoretical account presented in Chapter 2, the fact that many ICC non-parties already accept many of the (temporally prior) international norms and rules embodied in the Rome Statute should offer an important vector for bringing these states into closer accord with the particular legal innovation represented by the ICC. It would seem significant, therefore, that a number of current non-parties have expressed an active interest in the Court and kept open the prospect of their future membership. The instrumental use of the ICC by non-parties also reinforces social legitimacy of the Court, even if the discursive justifications do not suggest a wholesale socialization of these actors.

However, as the preceding analysis has also suggested, substantial disagreements remain concerning how a broad commitment to fight impunity should be operationalized in the form of a permanent international court. The lines of critique noted above converge for the US and other non-parties in an overall complaint that the Court is unrepresentative of, and thus conflicts with, foundational norms in international relations. It is in this light that one can also interpret the

\textsuperscript{175} Ralph, \textit{Defending the Society of States}, 170.
African Union position regarding the Bashir indictment. In isolation, these kinds of disputes do not necessarily prohibit the emergence of widely accepted norms. Treaties often face interpretive challenges as states and other actors seek to apply complex and frequently ambiguous legal standards to changing circumstances or, more instrumentally, to meet their particular needs. Discursive challenges are therefore more damaging to extent that they are widely endorsed and replicated. In the case of immunities, the available evidence suggests that the standard enshrined in the Rome Statute remains in flux, particularly when it comes into conflict with expectations concerning the special status of Heads of State and other senior political officials for states outside of the Rome regime. However, there has also been extensive push back against efforts to narrow the scope of ICC jurisdiction by entrenching a recognition of permanent immunities for all nationals of non-party states. ICC proponents have similarly withstood attempts by the US, China and Russia to constrain the Court within the parameters of Security Council politics. In these twin respects, the institutional structure and parallel norm of internationalized procedural justice embodied in the Statute has proven more resilient to efforts by the great powers to limit its influence than many would have anticipated. This, too, is a substantial change in the conduct of international politics.

When considered in this manner, the ICC is clearly shaping the means by which states—including prominent non-parties—frame their interests and subsequent policies. Most broadly, these debates play out in the context of normative and legalistic language that largely excludes crude reference to realpolitik considerations alone. This finding runs contrary to the expectations of realist IR and legal scholars, who would anticipate a far greater ability for powerful states to ignore or otherwise marginalize legal developments they do not formally endorse. The

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discursive record in fact reveals a considerable shift in the statements of powerful non-party states, particularly regarding the ICC as an acceptable tool for achieving other political goals. Modes of resistance are also important for precisely the same reason: even while denying its legal applicability, non-parties frequently engage with the norms and constituent obligations embedded in the Rome Statute, and thereby reinforce its relevance in adjudicating other actual and potential scenarios. This, as I argued extensively above, has implications for future behaviour, as non-parties can be challenged to further adapt their policies to accord with their conditional support for the Court. The ICC has therefore achieved substantial influence without the support of many of the most powerful states. The fact that this process is incomplete should not distract from its significance as a matter of international relations and law.
CHAPTER EIGHT: CONCLUSION

Summary

This dissertation was motivated by a striking development in world politics. The Antipersonnel Mine Ban Treaty and Rome Statute of the International Criminal Court came about through a diplomatic strategy that sought to create strong international institutions and norms by bypassing resistance from powerful states like China, Russia and the United States. While the US in particular was heavily involved in the negotiations that led to the MBT and ICC, it did not join the final agreements and remains, like the other two powers, outside of the respective legal communities. Hence the treaties contain in their genesis the prospect of limited influence, at least according to prominent accounts in the fields of international relations and law that assume that successful multilateral efforts tend to rely on the material, coercive and normative support of the great powers.

The animating concern of this dissertation, therefore, was to establish whether and why these treaties have proven effective—by substantiating new legal commitments and norms that shape state policy—in the face of such substantial political resistance that also includes other key regional powers like Egypt, India, Iran and Israel. Key here is an effort to determine the extent to which the MBT and ICC have led to a narrowing of the gap between prior and new shared understandings – whether, in effect, the obligations embodied in the treaties have become the reference point for assessments of appropriate behaviour even among sceptical states. My central contribution is to explore this subject in theoretical and empirical terms. This is an important topic, since the implications of middle-power and civil society leadership in creating international institutions—which has been well documented already—can only be fully
understood by evaluating the outcomes of these initiatives. This latter question has yet to be satisfactorily addressed, and so the present study aimed to fill an important gap in existing knowledge concerning the wisdom of the so-called “new diplomacy” approach to multilateralism.

The Mine Ban Treaty and International Criminal Court are particularly valuable cases through which to evaluate this phenomenon. Both are archetypal examples of non-great power treaty making and there is a considerable empirical record to consult in making assessments of their comparative efficacy. Yet such research has not previously been attempted in the methodological manner and scope undertaken here. And despite claims to the contrary, both treaties constitute hard cases for the principal issue under study. This is because the MBT and ICC substantiate a series of legal obligations and norms that represent dramatically different conceptions of acceptable behaviour as compared with prior practice, and do so by implicating core features of national security and sovereignty. Hence while focusing on successful instances of institutional creation to the exclusion of other failed attempts, I have sought to investigate the prospects of non-great power norm development under especially challenging circumstances.

To do so the dissertation first developed an account of how treaties may generate broadly respected international norms when they lack the support of the most materially powerful states. The starting point in this effort was to conceptualize treaties as normative structures that are composed of, and in turn consolidate, standards of appropriate behaviour. Treaties are thus one prominent way in which international norms may be generated and promoted. Particular treaties are also embedded within a much larger network of legal and non-legal norms and rules that structure international practice. Other studies have made this claim as well, and so my intention was to make the connection between norms and law more explicit, and then to demonstrate the
implications of this conceptual frame. In particular, I contend that that the social content of legal processes allows treaties to transcend the boundaries of their formal membership. In doing so, I identified two interconnected features of legal institutions—namely network effects and “the criteria of legality”\(^1\)—that are at the heart of their legitimacy and influence. The two core case studies largely confirm my theoretical expectations, as I summarize below.

**State Parties and the Development of Legal Communities**

There are strong grounds to assert that State Parties have successfully generated genuine communities of obligation based on the legal content of these respective treaties. The Mine Ban Treaty has in this respect become the focal point for the development of a prohibitionary norm banning antipersonnel mines. Violations of its core injunctions within the treaty community have, within a short period of time, become extremely rare, an impressive change especially in view of the fact that so many State Parties have been engaged in internal armed conflicts or participated in military operations since the advent of the treaty. And just as significantly, instances of non-compliance are typically justified in norm-confirming terms that do not seek to modify foundational institutional expectations. The response from other actors has also sought to stigmatize real or apparent violations. There has, therefore, been no normalization of contrary behaviour. MBT parties and their civil society partners have thus proven quite adept at constituting and inculcating a mine ban community with a social expectation of fidelity to treaty rules. This new status quo represents a fundamental reversal of past military practice and international opinion concerning the legitimate place of AP mines in the conduct of warfare.

In much the same way, support for the particular institutional solution enshrined in the Rome Statute has become a prominent marker of socially appropriate behaviour shaping national

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\(^1\) I borrow this phrase from Brunnee and Toope, *Legitimacy and Legality in International Law*. 
responses to grave crimes. While the Statute has by no means done away with prior norms of sovereignty and political prerogatives, it has generated a competing international expectation that conditions national judicial responses with significant international oversight. This has been reflected in the widespread membership and substantial compliance enjoyed by the Court, most notably among many of those states most directly implicated by its operations. While incomplete, this record is certainly more productive than the most dire predictions of the Court’s critics and the expectations of rationalist and (especially) realist schools of thought in international relations which privilege material interests and the unfettered pursuit of power, above all military power, as the primary motives for compliance with international norms:

An ICC without U.S. support—and indeed, with probable U.S. opposition—will not only fail to live up to its expectations. It may well do actual harm by discouraging the United States from engaging in various human rights-protecting activities. And this, in turn, may increase rather than decrease the impunity of those who violate human rights.²

The evidence presented in Chapters 5-7 suggests that this prediction was overblown. There are some remaining debates concerning the proper scope and limits of this new institutional mechanism for punishing atrocity and clear gaps in compliance (see below), but in political terms the ICC has improved the general global rejection of impunity. Jason Ralph has therefore suggested that ICC members have adopted a “post-Westphalian” conception of rights and responsibilities that is willing to cede greater authority to international bodies as part of an international society.³ This, too, represents a radical departure from previous practice in which the enforcement of international humanitarian and human rights law was left in the hands of states without the spectre of supranational intervention.

The Mine Ban Treaty and Rome Statute of the ICC have therefore constituted new role identities in the international system in which responsible statehood has come to be associated—

³ Ralph, Defending the Society of States, 170.
for the majority of states at least—with membership in the legal community defined by the respective treaties. The impact of these processes is most dramatically revealed in the many instances where states have voluntarily adopted, and subsequently adhered to, legal restraints in the midst of armed conflict, since these would be regarded as the least likely circumstances for binding rules to exert influence over state behaviour. Yet it is equally important not to lose sight of the fact that even early supporters underwent a substantial transformation in their views concerning the wisdom of a ban on antipersonnel mines or a permanent international criminal court independent of Security Council control. The MBT and ICC have therefore proven effective at substantiating new legal commitments among a wide array of state actors, though with some substantial differences in the depth of these outcomes, noted below.

This shift in social expectations was itself the product of a dynamic process in which state and civil society actors engaged in complex negotiations over the meaning of responsible behaviour in the international system. Hence the negotiation of the Mine Ban Treaty and Rome Statute created new social and legal obligations that went beyond previous accepted practice; this latter finding provides an important challenge to the sceptical view that “most treaties require states to make only modest departures from what they would have done in the absence of an agreement.”

Rather, the respective treaties substantiated new norms that have in turn influenced the construction of state identities and the consequent framing of interests. That these logics of action have come to be so taken for granted among many states such that their membership is unremarkable provides a potent demonstration of the power of norms in transforming the content of international politics. More broadly, the experience of this dissertation also validates the attention to both behavioural and discursive metrics in offering a more nuanced and comprehensive account of treaty impact.

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4 Downs, Rocke and Baroom, “Good News About Compliance,” 380.
In identifying the social bases of the MBT and ICC, I have demonstrated that two main processes enable the creation of legal communities in the absence of the great powers. First, the discrete treaties have clearly benefitted from their connection to prior norms and rules that constitute and regulate the international system. These include most importantly the corpus of international humanitarian and human rights law, rules of criminal procedure, and broader norms concerning the rule of law and the sanctity of legal agreements. The association with these more established international standards provide the MBT and ICC with a sense of inherited continuity—of shared legal heritage—even as the treaties in many respects represent a transformative shift in state obligations. These processes have also importantly drawn on legal criteria in validating and reinforcing the legitimacy of the treaties as the standards for assessing acceptable behaviour among a community of states defined in part by their shared legal obligations. Actors—including states, secretariats and civil society groups like the ICBL and CICC—have explicitly sought to frame discussions of compliance and non-compliance in terms of the legal text itself, and in so doing have reinforced the legal validity of the treaty and its constituent norms. Legal rules and broader social expectations thus serve as a reservoir of legitimacy that can be deployed in defence of the institution. These were key theoretical expectations that have been confirmed in the cases.

Yet there are important differences in the depth of these developments. To this point, the evidence suggests more extensive change with respect to the ban on AP mines. While both treaties exhibit high rates of membership, the MBT captures a substantially greater share of states within its formal legal ambit: 83% of states are full parties, versus 63% for the ICC. Moreover, nearly twice as many conflict-prone states have joined the MBT as the ICC, thus indicating the differential challenges of regulating one weapon versus a more constitutive change
in sovereignty in effect implied by norms governing legal jurisdiction and immunity. The central internationalized procedural justice norm of the ICC therefore remains in greater flux than its MBT counterpart. This is illustrated both with respect to the comparative records of compliance, and the discursive endorsement of central treaty commitments. Chapter 5 demonstrated that while generally observed, requests from the ICC for assistance in crucial matters like the collection of evidence, securing of witnesses, and (especially) arrest and surrender of suspects have featured important exceptions that challenge the efficacy of the organization. As I argued in Chapter 6, these procedural gaps may be traced back in important ways to the absence of sufficient implementing legislation in the majority of State Parties. ICC members thus currently possess only a limited capacity to enforce the full spectrum of core crimes in domestic jurisdictions, and an even more proscribed ability to cooperate with Court investigations and prosecutions. In sum, therefore, the Rome Statute has been less effective than the Mine Ban Treaty at changing behaviour across a range of empirical measures.

As I demonstrated in Chapter 7, the Rome Statute also faces a degree of contestation within the formal legal community that exceeds the experience of the Mine Ban Treaty. Most problematically, a number of State Parties have challenged the implications of ICC obligations when they have come into perceived conflict with other prior or parallel commitments. This is most clearly apparent in instances where ICC member states have endorsed the African Union’s position regarding the indictment of Sudanese President Omar Al-Bashir and, to a lesser extent, supported US efforts to secure immunities for its citizens. These differing experiences between the MBT and ICC are perhaps not surprising given that the latter represents a more comprehensive challenge to international expectations concerning the limits of state sovereignty – a subject I reflect upon more fully below. At the same time, however, I have suggested that the
discursive debates do not ultimately undermine the normative authority of the Rome Statute principally because the challenges have taken place in a legalized terrain in which the obligations of the Statute are assumed to be binding on at least a substantial portion of states. The majority of State Parties have pushed back against such claims in support of the Court, and these efforts have largely succeeded in limiting the damage of counter discourses. The institutional structure of the ICC has therefore remained resilient – and surprisingly so, when considered in the light of sceptical expectations. Despite the challenges, we should not lose sight of the substantial shift that has taken place thus far.

Non-Parties and the Impact of New International Norms

A second principal claim of this dissertation is that the networked quality of international treaties allows new legal norms to be associated with other, prior standards and thereby implicate states that remain outside of a given legal agreement. Both treaty cases provide strong support for this account. In the case of the Mine Ban Treaty, non-party states—including those great powers that have most forcefully resisted the legal obligations of the treaty—bear clear evidence of the influence of the prohibitionary norm. As detailed at length in Chapter 3, key non-parties like China and the United States are in compliance with core provisions concerning the use, production and transfer of AP landmines; in the case of the US especially, this has involved substantial policy change in conformance with the new mine ban norm. On the other hand, while mine use has declined dramatically since the initiation of the mine ban movement, there has recently been a modest resurgence whose significance—whether constituting an anomaly or reversal of the prior empirical trend—remains to be established. Remaining users regard antipersonnel mines as unexceptional weapons; states like Myanmar and Syria are thus largely
immune to the stigmatization of AP mines that appears to have been so successful elsewhere. Yet these states are also increasingly regarded as outliers, and the international response to their actions (which goes beyond just the case of landmines policy) has had the effect of reinforcing the general social taboo against the weapons.

I have further argued that this widespread adherence is the result of sensitivity to a rapidly altered social expectation concerning the appropriateness of AP mines that can only be satisfactorily explained in reference to the mine ban movement. This claim is evidenced by reference to the discourse of non-party states: even those states that continue to resist the legal obligations of the MBT on grounds of military utility accept the premise of treaty proponents that the prior widespread use of antipersonnel mines has generated a pervasive and unacceptable humanitarian crisis. By endorsing this particular framing—protecting civilian populations from indiscriminate military force as an obligation of members of international society—non-parties (perhaps inadvertently) connect the MBT to a broader array of international humanitarian law instruments and constitutive norms of international relations. The prior calculus of military utility has thus been replaced by a widely accepted reference to humanitarian impact as the basis for assessing the legal and social status of antipersonnel mines. Prominent military powers still envision situations under which the use of AP mines would be acceptable, but they do so under much more constrained parameters than in a previous era. This in turn has the effect of further entrenching the underlying premises upon which the legitimacy of the MBT is predicated, and narrowing future policy options such that a reversal—like the reconstitution of mine production or the systematic use of prohibited mines—would be widely recognize as aberrant behaviour even for states with no legal obligations under the MBT.
There are strong parallels in the ICC case though—as with the experience of State Parties above—the depth of contestation is more pronounced. Here again network politics are key, as the association of the International Criminal Court with a longer history of international responses to atrocity (including other international treaties like the Genocide and Torture Conventions, domestic trials and international tribunals like the ICTY and ICTR) has been central to its impact on non-party states. This connection is sufficiently well established that many prominent non-parties have identified the Court as a principal instrument in the effort to punish grave violations of international humanitarian and human rights law. Moreover, these same states have come to engage with the ICC as a genuine feature of the international system, even as they reject its universal legal application. Despite these important developments, the Court has faced principled resistance from a number of non-parties, most notably China, Russia, and (especially) the United States. These states—and other, lesser powers—have invoked constitutive norms like sovereignty and voluntary consent to challenge the legal authority of the ICC as presently constituted. In one sense, therefore, we might conclude that the inverse of the theoretical expectation developed in Chapter 2 is occurring, with great powers actually leveraging alternative legal principles to challenge the legitimate status of the new institution. This is most apparent with respect to US efforts to gain permanent immunities for their citizens involved in UN operations, and the parallel domestic program of seeking bilateral non-surrender agreements. These initiatives have had some success in temporarily undermining the consolidation of the ICC norm, particularly by drawing State Parties into confrontation with the Court.

Yet as I explained in Chapter 7, this picture is incomplete, for the simple reason that it misses the extent to which the expectations embodied in the Rome Statute have already served to influence the way that non-parties frame and pursue their interests in the international system.
These states have not disputed the legal effect of the Statute for treaty members, but have sought instead to carve-out exceptions for themselves that implicitly (and sometimes explicitly) recognize the Rome Statute as the *de facto* standard for judging responses to atrocity. Moreover, these same states have strategically employed the Court as a means of achieving other political goals, as was demonstrated with respect to the Security Council referrals regarding Darfur and Libya. This has had the effect of further reinforcing the ICC—as opposed to other potential mechanisms—as the appropriate institution for addressing grave international crimes. This phenomenon is often missed in discussions of the Court’s contemporary status.

Both the Mine Ban Treaty and Rome Statute of the ICC therefore provide ample evidence of the ways in which new institutions and norms may bear on the construction of identities and subsequent policy even among those states that formally reject the binding force of these developments. The general pattern has been for non-parties to express support for the broad objectives of the treaty, while refusing to accept any legal obligation. I have suggested that these efforts have not been fully successful, for reasons widely anticipated in the IR literature on norms. While these shifts have not led to a wholesale adoption of the treaties, it is difficult even for non-parties to entirely ignore alterations in their broader social environment, particularly as these relate to new understandings of their intersubjective relations.

*Social Resources as a Source of Power*

This dissertation has set out to answer the question of whether multilateral treaties are worth pursuing when leadership from materially powerful states is not forthcoming. Can treaties forge alternative means of ensuring compliance and obligation without these actors? And just as significantly, can the same agreements exert informal impacts on these ambivalent states? The
present study has answered in the affirmative in both respects. A key thrust of this dissertation is thus to suggest the value of a broader conception of power than the materialist one often favoured by realist and institutionalist IR schools in helping us understand a key innovation in contemporary international diplomacy. In particular, I have argued that an emphasis on coercive power does not capture the full range of ways that treaties may impact the conduct of international affairs. In so doing, I have sought to demonstrate that international institutions derive their legitimacy, and hence, influence, from their constitutive role in consolidating standards of appropriate behaviour and thereby informing the identities and interests (and subsequent behaviours) of international actors. It is this social function that generates obligation and suggests how treaties may transcend particular configurations of material power to shape international politics. This in turn speaks to a more holistic notion of power as “the production, in and through social relations, of effects that shape the capacities of actors to determine their circumstances and fate.”

A central contention, therefore, is that material sources of power are not determinative on their own, but exist only in the context of a broader web of intersubjective meaning that is structured in large part by international laws and norms. States typically pursue their interests through international institutions, and it is this system that directs and constrains the raw application of military and economic capacity. “Power,” in this sense, is properly understood as “qualified and transformed by the international legal system.” This is not to suggest that the

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5 Rationalist scholars may, of course, also apply instrumental insights to non-material subjects such as ideas and norms. For one example see Schimmelfennig, “Strategic Calculation.”

6 For a summary of these views see Hafner-Burton, Victor and Lupu, “Political Science Research on International Law,” 51-2.


international legal order is strictly egalitarian – far from it. Materially powerful actors still deploy their resources to shape legal structures to their own ends, and thus make a disproportionate impact on the composition of the international system. Nevertheless, the self-interested development of law necessarily relies on pre-existing rules and structures of shared knowledge to give such efforts meaning, and this imposes important limits on the extent to which materially powerful states may unilaterally re-shape the legal environment or ignore unwelcome developments. “Powerful states can often impose outcomes on other states, but that does not necessarily mean that they are at the same time modifying international norms or making new ones. The difference is that whereas specific actions are individual, rules are social.” This is a significant point overlooked by realist approaches, but animates the conception of power employed in this dissertation.

The preceding analysis demonstrates that an interest in the social influence of non-great power treaties is well placed. The theoretical account, in conjunction with the case studies, thus has important implications for how scholars and policymakers think about the application and limits of power in international politics. There has been a great deal of writing on this subject in recent years, largely in response to the United States’ position as the sole global hegemon, and by a sense that this unique historical moment may be entering a period of change. While not endeavouring to provide a fully conceived accounting of this important subject, the present dissertation does offer some valuable insights that speak to these concerns.

10 “Analysis of power in international relations, then, must include a consideration of how social structures and processes generate differential social capacities for actors to define and pursue their interests and ideals.” Barnett and Duvall, “Power in International Politics,” 42.
12 Sandholtz and Stiles, International Norms, 15.
First, the treaty cases examined here have demonstrated that the development of international rules and norms can occur without the leadership of the most powerful states. Legal authority and obligation are fundamentally social in that they originate from, and are maintained by, interactions among constituent units of the international system. Treaties may succeed in the absence of support from great powers precisely because they do not rely on coercive enforcement (military force and economic sanctions), but because they can draw on reservoirs of social leverage to induce behavioural change independent of any punitive measures. This is important because

[t]he paucity of sanctions upholding international law is notorious, and many international rules are negotiated that have no sanctions attached. Yet states and other actors constantly speak as though international law is obligating, and a large amount of international debate involves states justifying their actions with reference to legal rules, or accusing other states of acting outside of those rules.”

A focus on non-material sources of influence thus broadens the array of potential incentives that may bear on states to observe treaty commitments. To this end, Alastair Iain Johnston has argued that creating social rewards and punishments is a cost-effective way for institutions to generate adaptation and adherence. The social nature of these processes engages a range of actors typically ignored in power-based analyses – that is, emergent norms need not always reflect the views of dominant states. A combination of middle powers, smaller states, treaty bureaucracies and civil society actors have been able to develop internally obligating communities of law, as well as more broadly influential norms, without the support of dominant actors. This outcome contradicts the sceptical expectations of Goldsmith and others, who assumed that a ban on antipersonnel mines and a new global criminal law institution would be sharply limited without the full inclusion of the United States and, to a lesser extent, other major powers.

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14 Reus-Smit, “Politics and International Legal Obligation,” 598.
Second, because international diplomacy is not defined strictly by material capacity, the development of norms and legal rules does not move in lock step with the demands of materially powerful states, and can outstrip their efforts to control the diplomatic process.\textsuperscript{16} Hence the coercive efforts of powerful states to shape international law to their will do not always succeed:

In the entire history of human rights lawmaking, by far the most coercive moment occurred quite late in the game, when the United States first opposed many parts of the Rome Statute of the International Criminal Court; and it then later tried to undermine Rome.\textsuperscript{17} There is no other example that I am aware of in the history of human rights law where a powerful country expended such resources to secure a particular legal outcome.\textsuperscript{17} In this case, the most powerful state in the system tried to block the implementation of human rights law precisely because it had failed in its efforts to control the drafting process. Moreover, the U.S. campaign against the ICC was oddly ineffective, and the United States ended it after admitting it had been counterproductive to other U.S. interests.\textsuperscript{17}

The implications run still deeper, as great powers not only cannot fully control the outcomes of international diplomacy, but are themselves impacted by the very rules and norms they refuse to endorse. This dissertation has demonstrated that in a variety of ways, powerful non-party states have adapted their behaviour and discourse in line with the injunctions of the MBT and ICC – this (partial) socialization has occurred independent of any formal recognition of the respective treaties. In short, hegemons and great powers do not always get their way, and they equally cannot entirely avoid even those institutional developments they explicitly reject.

**Alternative Institutional Worlds: Counterfactuals and the Impact of the MBT and ICC**

An additional animating concern of the present study was whether the decision to proceed with a multilateral treaty in the face of great power resistance was “worth it” given the presumed costs of excluding key states from the legal community. Assessing the wisdom of the


\textsuperscript{17} Sikkink, *Justice Cascade*, 233.
“new diplomacy” that generated the MBT and ICC can only be accomplished by first detailing the actual performance of the treaties that did emerge—the substantive purpose of this dissertation—and contrasting these outcomes with the prospective consequences of other potential institutions. Here there are two chief alternatives to the strategy of non-great power cooperation. First, negotiators may concede to the demands of powerful opponents, modifying the agreement in favour of these preferences; in many cases, this approach would result in a weaker set of rules. Second, negotiators may abandon the legalization effort altogether, relying instead on informal arrangements and “mini-lateral” agreements among select states.

The effectiveness of the MBT and ICC is therefore judged partially in relation to these hypothetical alternatives: what would have been the extent of norm adoption with a different treaty, or the absence of a formal treaty altogether? This assessment, in turn, relies on the use of counterfactual analysis to adjudicate amongst an array of possibilities that cannot be observed directly. This is particularly essential in small-n studies with a limited pool of actual cases. In establishing these scenarios, however, attention must be paid to selecting theoretically and logically coherent possibilities: the more closely proposed counterfactuals follow the actual flow of events, the greater their analytical leverage. This can be achieved by identifying “critical branching points” from which alternative historical pathways could plausibly have emerged. In both cases, it is possible to identify a set of potential and existing institutions that would have

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22 Biersteker, “Constructing Historical Counterfactuals,” 331.
satisfied the demands of MBT and ICC non-parties. The negotiating histories of the respective treaties evidence a series of issues that, had they been incorporated, might have resulted in the US and others supporting the final treaties. In addition, it is possible to contrast the observed impact of the MBT and ICC against real-world institutional alternatives: Amended Protocol II to the Convention on Certain Conventional Weapons regulates the use of AP mines, while various combinations of ad hoc international tribunals, hybrid courts, and domestic jurisdictions have been proposed as opposing models of international criminal justice. I address each briefly in turn.

*The Mine Ban Treaty*

First, while the United States participated extensively in the negotiations that led to the Mine Ban Treaty, it did not join the final agreement. US opposition in this instance centred on two unmet demands: that negotiators include an exemption for US landmines deployed for the defence of the demilitarized zone on the Korean peninsula, and that the treaty be re-worded to exclude AP mines used as “anti-handling” devices attached to anti-vehicle mine systems. President Clinton later noted that had these red lines been achieved, the United States would have signed and sought to ratify the resulting treaty. It is thus conceivable that the modification of the draft Mine Ban Treaty to incorporate these demands would have resulted in the inclusion of the United States as a full treaty party.

What can be said about the likely consequences of this development in terms of the stigmatization of antipersonnel mines? It is important to recognize in the first place that the proposed US amendments would have resulted in a substantively weaker treaty and international

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norm by eliminating the absolute prohibition on the weapons. This is significant since the
animating view of the mine ban movement was that the humanitarian consequences of AP mines
could only be adequately addressed via a complete prohibition that gained its legal and moral
force from its absoluteness. This proposed trade-off gets to the essence of the breadth versus
depth dilemma identified by Price. Yet even if the US could be brought into the formal legal
community on these terms, it seems plausible that its inclusion—especially when weighed
against the costs—would not have contributed to the further development of an international
norm against the weapons. As recorded in Chapter 3, the United States has not been decisively
shown to have used AP mines since the advent of the Mine Ban Treaty, and has similarly ceased
their production and transfer; US policy thus appears to be heavily influenced by the mine ban
norm even as it remains outside the legal agreement. The potential for a “demonstration effect”
from early American membership is also questionable. It is not clear, for example, that China,
India, or the Russian Federation would have changed their position had US demands been met.
Nor is it at all certain that US ratification at the outset would have substantially impacted the
policies of remaining mine users like Myanmar and Syria. On the other hand, a US exemption
during negotiations would surely have led other states to seek additional concessions that, if
successful, would have further eroded the treaty text and prohibitionary norm, with predictable
consequences in terms of greater landmine use and higher casualty rates.

In light of this, an arguably more appropriate subject for counterfactual evaluation exists
in the form of Amended Protocol II to the Convention on Certain Conventional Weapons. APII
was negotiated in April and May 1996, and thus is the immediate precursor to the Mine Ban
Treaty. APII is especially relevant since the negotiations were conducted via consensus decision-

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25 The ICBL opposed the U.S. proposals on precisely these grounds. Williams and Goose, “International Campaign
to Ban Landmines.”
26 My thanks to Professor Richard Price for suggesting this additional important point.
making rules that allowed powerful states to limit the scope of the resulting agreement to terms they found acceptable. The key distinction here is that APII regulates—rather than bans altogether—the use, production, stockpiling, and transfer of antipersonnel mines. In particular, Article 5(2) of the treaty permits the use of AP mines that contain self-destruct or self-deactivation mechanisms, or in instances where the minefields are fenced and actively patrolled. It was this perceived failure to produce sufficiently restrictive obligations that stimulated the separate Ottawa Process and the full prohibition of antipersonnel mines in the Mine Ban Treaty. APII can thus be read as the primary institutional alternative to the MBT as it articulates a divergent view of the appropriate legal mechanism for addressing the humanitarian effects of AP mines.

Here again the available evidence suggests that APII would not generate a more effective stigma against antipersonnel mines—since that is not the aim of the treaty—or produce better humanitarian outcomes. A key question, then, is whether APII can reasonably be interpreted as providing at least a comparable level of restraint over the use (and associated practices) of antipersonnel mines such that unwanted victims are avoided. I do not think that this case can persuasively be made. Currently 98 states are parties to APII; this contrasts with the 160 MBT parties. Only ten states are members of APII but not the MBT. While this list does include the most prominent opponents of the mine ban prohibition, the vast majority of APII State Parties are subject to the more rigorous standards of the Mine Ban Treaty. Since the advent of these dual regimes, six of these same ten states—Georgia, India, Israel, Pakistan, Russia, Sri Lanka—have

27 Amended Protocol II also deals with anti-vehicle mines and booby-traps, but discussion here is limited to its implications for antipersonnel landmines.
30 China, Georgia, India, Israel, Korea, Morocco, Pakistan, the Russian Federation, Sri Lanka, and the United States of America.
used antipersonnel mines, at least in some instances under conditions that would violate Article 5(2) of APII. And while many now appear to be compliant with APII’s less stringent terms, it is important to point out that the likes of China and the United States have been informally following the higher standards of the MBT. Moreover, 28 non-parties to the MBT—nearly two-thirds of the total—have also failed to join the less ambitious APII, leaving them outside of both sets of legal restraints.\textsuperscript{31} This latter list includes a number of regional powers such as Egypt, Iran and Saudi Arabia, as well as recent mine users Libya, Myanmar, Nepal and Syria. These latter four states all appear to have deployed mines that would violate the terms of Amended Protocol II. Finally, APII also excludes states that might be most in need of future restraints on behaviour including Armenia, Azerbaijan, the Democratic People’s Republic of Korea and Lebanon. Hence it is unlikely that APII would have served as a more effective means of stigmatizing antipersonnel mines in the absence of the Mine Ban Treaty.\textsuperscript{32}

\textit{The International Criminal Court}

Assessing the alternatives to the International Criminal Court is more difficult, as there is no single existing institution that would credibly replace the Court. Nevertheless, it is possible to make some initial judgements regarding the likely outcomes of an alternative institutional arrangement versus current ICC operations. Various critiques of the ICC ultimately concern the independence of the Court from established modes of political power in the international

\textsuperscript{31} Armenia, Azerbaijan, Bahrain, Cuba, the Democratic People’s Republic of Korea, Egypt, Iran, Kazakhstan, Kyrgyzstan, Laos People’s Democratic Republic, Lebanon, Libya, Marshall Islands, Micronesia, Mongolia, Myanmar, Nepal, Oman, Poland, Saudi Arabia, Singapore, Somalia, Syria, Tonga, Tuvalu, United Arab Emirates, Uzbekistan and Vietnam.

It is therefore plausible that a Rome Statute that entrenched Security Council dominance—most centrally concerning an exclusive right to refer situations to the Court (with the possible addition of self-referrals) and defer active investigations—would have significantly increased the chances that one or more of the great powers would have joined the ICC. William Schabas has for example argued that had the final Rome Statute retained the structure of the 1994 International Law Commission draft that subordinated the new court to the Security Council, “it is likely that today the United States would be a keen supporter of the Court.”

What are the most likely implications of this alternative scenario for the influence of the Court and the extension of its norm of internationalized procedural justice?

To begin, the case selection of the Court would clearly have been affected by UNSC dominance: neither the Kenyan nor Ivorian situations would have been possible via the present circumstances of *proprio motu* authority, and five senior political leaders would not be facing trials in The Hague. The Security Council would still have retained the capacity to refer these cases itself; but in the years preceding the ICC Prosecutor’s initiation of proceedings, there was little indication of any particular interest in this possibility among the Council’s permanent members. Questions of organizational capacity and the specific justification of these cases aside,

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34 United States of America, Statement by US President Bill Clinton, Authorizing the US Signing of the Rome Statute of the International Criminal Court, Camp David, Maryland, December 31, 2000. Document on file with the author. The lead U.S. negotiator at the Rome Conference subsequently made this claim directly: “There is far more to lose in the effectiveness of the ICC if the United States is not a treaty partner than there is to gain from its current dubious regime of jurisdiction.” Scheffer, “Deterrence of War Crimes.”

it seems impractical to assume that such a situation would represent a net gain for the cause of international justice. An emphasis on UNSC referral is unlikely, however, to have impacted the present ICC activities in the other five situation countries. While the self-referrals by Uganda, the Democratic Republic of Congo and the Central African Republic fall outside of Security Council control, this modality was not explicitly rejected by the United States and others during the Rome negotiations, principally because it was not anticipated to prove especially relevant to early Court activities.36 At the same time, the Darfur and Libyan situations would have been unaffected since it was a Security Council referral that activated these investigations. And there is little reason to believe that the permanent Security Council members—three of whom are ICC non-parties—would have used their more exclusive authority to refer additional situations to the Court, since there is nothing stopping them from doing so now. Outside of the (significant) examples of Kenya and Cote d’Ivoire, therefore, the present caseload of an International Criminal Court under UNSC control may not have been substantially different.

There are, of course, other important potential consequences of increased great power participation, principally relating to the scope of the ICC legal and normative community, and practical considerations for cooperation with Court proceedings. The argument here is that the early endorsement by the United States as well as other prominent states would have further increased the legitimacy of the institution, while at the same time improving its capacity to collect evidence of crimes and locate and arrest suspects. Both claims are plausible but open to question. US support in particular would have undoubtedly strengthened the perception that the Court was an active feature of the international system, and could have generated additional ratifications and accessions through its example. Previous research in IR has suggested that leading powers can have an important influence on the adoption of international norms by

36 Kress, “‘Self-Referrals,’” 944.
smaller states.\textsuperscript{37} Formal US inclusion would also have removed the substantial challenge to the Court presented by Article 98 agreements and parallel domestic laws withdrawing funds from states that did not sign these bilateral non-surrender agreements.\textsuperscript{38} This would have had a perceptible effect in not bringing 100 states into overt conflict with the Court.

Yet this demonstration effect must be set against the fact that a large number of states—especially the members of the Like-Minded Group—and most civil society actors strongly opposed any effort to limit referral authority to the Security Council. Nicole Deitelhoff has demonstrated that the 1998 Rome negotiations generated a profound shift in state attitudes in which the overwhelming majority of states (some 80\% of those speaking) came to strongly support the Like-Minded Group’s demands for an independent Court including \textit{proprio motu} capacity and limits on the ability of the Security Council to defer ongoing investigations or cases.\textsuperscript{39} This empirical finding is reinforced by my own research on subsequent discourse. Thus the consequence of acceding to great power demands during negotiations would have at minimum substantially undercut the enthusiasm for the new institution among its most dedicated proponents, and could plausibly have unravelled the existing support for a Court at the Rome negotiations, leading to a weaker treaty or no treaty at all.

This is additionally significant since it is by no means certain that the concession on UNSC control would have translated into rapid ratifications by the likes of China, Russia and the United States. Schabas is persuasive in arguing that the issue of Security Council authority—and in effect the Court’s place in the prevailing international order—was and remains the central US objection to the ICC. However, I am not convinced that any amount of acquiescence to US

\textsuperscript{37} Ikenberry and Kupchan, “Socialization and Hegemonic Power;” Fordham and Asal, “Billiard Balls or Snowflakes?”
\textsuperscript{38} My thanks again to Professor Price for making this point.
demands would have led to American ratification by this point, principally because of the long time frames frequently required in receiving the “advice and consent” of the Senate. It is notable, for example, that it took 40 years for the US to ratify the Genocide Convention; the US also has yet to accede to the International Convention on the Suppression and Punishment of the Crime of Apartheid, nearly 30 years after its creation. Hence even legal efforts that have broad public and political support can fall short of formal US recognition. This is especially relevant since in the wake of the 2000 presidential election that brought George W. Bush to power, the United States entered a period of profound hostility towards a number of multilateral institutions. Members of the new administration, led most publicly by John Bolton, asserted a host of additional objections to the ICC involving judicial practice and Constitutional law that had not occupied US diplomats during the 1994-1998 negotiations. Under these circumstances, it seems unlikely that President Bush would have actively sought ratification of an international instrument that was portrayed by many conservative Republicans in the administration and Senate as infringing on traditional notions of sovereignty for reasons that went beyond Security Council control.

On the other hand, a Court that was more broadly deferential to US interests, even if still unacceptable when applied to American nationals, could conceivably have faced a more muted and neutral response from the Bush administration. This would most plausibly have entailed a strategy in which the US did not actively seek to undermine the Court—via Article 98 agreements and the withdrawal of foreign military funds—and sought to express its qualified support on the margins through a gradual but more systematic expansion of US assistance. This could have been achieved by providing access to satellite monitoring and other intelligence as evidence in ICC investigations, or through the training and capacity-building of local security

forces to enable more timely arrest and surrender of suspects (as was later approved by President Obama with respect to Uganda). However, nothing in the diplomatic record suggests that a less hostile United States would have actively contributed to the arrest of fugitives like Bosco Ntaganda, Omar al-Bashir, and others. The same goes for other prominent non-parties, all of whom possess considerably more limited capacity for overseas operations than the United States.

Finally, it is worth briefly considering whether the absence of an ICC altogether—certainly a possible outcome in the face of great power demands during the Rome negotiations—would have led to a more potent international response to grave crimes and a stronger norm of individual criminal accountability. Would an international criminal regime constituted solely by ad-hoc tribunals and domestic trials have fared better in promoting strong international norms? In short, I can see no reason to believe so. This is principally because it was the perceived limitations of the alternatives that spurred the creation of the ICC in the first place. Ad-hoc tribunals are costly to establish and maintain, and are circumscribed in their scope in both geographic and temporal terms, and there is hardly any guarantee they would be established in all relevant cases. There was, therefore, already a sense of “tribunal fatigue” in the early 1990s that generated calls to create a permanent body capable of addressing the needs of justice in a regularized fashion. These temporary institutions are also cumbersome by their nature, since they must be created in response to outbreaks of widespread and systematic violence: building sufficient political will in the international community takes time, as historical examples demonstrate. Griffen has therefore suggested that a permanent ICC would have produced better outcomes for the causes of justice in the Rwandan and Yugoslavian cases since it would have been able to commence and conclude trials more quickly than the ICTR and ICTY, which had to
be negotiated in the midst of the respective conflicts.\textsuperscript{41} And, while the rise criminal trials in the “justice cascade”\textsuperscript{42} were a precipitating factor in the creation of the ICC, domestic and international prosecutions of genocide, crimes against humanity and war crimes have clearly not met the scale of these acts. This is especially relevant given the long time it has taken for many domestic judicial processes in Latin America and elsewhere to commence after the end of authoritarian rule.\textsuperscript{43} A great hope for the International Criminal Court is therefore that it would stimulate necessary improvements in national responses to grave crimes.

Leaving aside a detailed discussion of deterrence here\textsuperscript{44}, I also see little support for the idea that any alternative international legal structure would have contributed more strongly to the larger goal of preventing atrocities. First, a court controlled by the Security Council would have a narrower jurisdictional scope, and would therefore be able to threaten judicial punishment under a more limited set of scenarios. Given the historical intransigence of Security Council politics, many combatants might quite reasonably assume that their crimes would escape the reach of the ICC. Second, ad-hoc tribunals are necessarily focused on particular conflicts, and thus have little bearing on prospective crimes in other places, unless combatants assume another tribunal will be established for their own conflict. In view of the challenges associated with this strategy of international accountability, the deterrent effects of existing tribunals for unrelated conflicts appear limited. Third, a substantively weaker ICC with diminished jurisdictional scope and enthusiasm among leading proponents would not, it seems to me, have fared any better as a

\textsuperscript{41} Griffen, “A Predictive Framework,” 446-447.
\textsuperscript{42} Sikkink, \textit{Justice Cascade}. See also Chapter 5, especially pages 172-179.
\textsuperscript{43} For example, in countries “such as Chile and Uruguay, no or few trials were held after the transition but began to be held later. In the case of Uruguay, for example, no trials were held for 20 years”. Sikkink and Booth Walling, “Impact of Human Rights Trials,” 433.
\textsuperscript{44} For a brief discussion see Griffen, “A Predictive Framework,” 449-453 and Chapter 5, pages 191-195.
model of internationalized justice. Such a legal structure is thus unlikely to have stimulated better incorporation of international criminal law norms in domestic law than the existing ICC.

Reservations and Treaty Influence

A final counterfactual returns us to the question of diplomatic strategy that was at the core of my interest in the Mine Ban Treaty and Rome Statute in the first place. Among the innovations that have defined the “new diplomacy” is the decision to prohibit all reservations to the treaties – a reversal of the common practice for most multilateral legal instruments.45 There are two competing perspectives regarding the utility of reservations. “It is often argued that a degree of tolerance of reservations encourages ratifications, by providing States with a mechanism by which small difficulties with a treaty text can be made inapplicable to them.”46 In this view, it is preferable to make concessions so as to bring a greater number of states within the formal confines of a legal treaty. Yet recent experience has suggested that reservations are often employed as a means of avoiding the most consequential aspects of a legal agreement, thus undermining the very benefits presumed to accrue from more states endorsing treaty norms as legal obligations. In the case of the ICC,


46 Schabas, International Criminal Court, 1166.
believed that problems created by reservations could be prevented by simply forbidding the practice.\textsuperscript{47}

This presents us with an interesting dichotomy. International politics has become increasingly legalized, as the IR literature has already well established.\textsuperscript{48} But the removal of reservations as a legal tool for accommodating state concerns—in the MBT and ICC cases, at least—has pushed objections to the content of treaties back into the realm of politics. By not permitting disagreements within the scope of a legal community, the strategic approach favoured in the new diplomacy has had the effect of de-legalizing particular commitments or matters of interpretation over which states might genuinely object, making treaty membership an all-or-nothing enterprise that does not allow for variation in the scope of obligation.\textsuperscript{49} The dilemma of this approach—as noted in the breadth versus depth discussion presented in Chapter 1—is that in seeking a treaty in which all members share the same full complement of legal commitments, the agreement may well exclude some (potentially highly consequential) states that would otherwise join were they allowed to moderate the scope of their obligations.\textsuperscript{50}

For the sake of argument, I assume two things for this counterfactual. First, the decision to permit reservations would have led to an increased number of ambivalent states joining the respective agreements, especially (and most importantly for our purposes) among the hostile great powers. This is plausible since the US in particular pushed for the inclusion of reservations in order to facilitate its own participation.\textsuperscript{51} Second, in doing so, these states would have

\textsuperscript{47} Schabas, \textit{International Criminal Court}, 1166.
\textsuperscript{48} See for example the special issue of \textit{International Organization} on “Legalization and World Politics” 54, no. 3 (2000). For a response, see Finnemore and Toope, “Comment on ‘Legalization and World Politics’.”
\textsuperscript{49} I thank Professor Richard Price for suggesting this framing.
\textsuperscript{50} This distinction is not absolute, as both the Mine Ban Treaty and Rome Statute permit states to lodge declarations that in some circumstances could amount to \textit{de facto} reservations. See Maslen, \textit{Commentaries}, 315 and 317-318; and Schabas, \textit{International Criminal Court}, 1166 and 1168-1173.
exempted themselves from significant aspects of the treaty, largely following the same core objections discussed already. What would have been the most likely outcome of this scenario?

The key question is how much more rule-following could be expected if current non-parties were full members of the respective treaties, and whether this would be likely to lead to better outcomes in terms of the basic treaty goals. Without rehashing the discussion of other scenarios above, I see many parallels with previous counterfactuals that suggest that the impact of reservations would have been limited. First, states making use of reservations are no more likely—at least initially—to comply with the full spectrum of treaty obligations, since the express purpose of reservations is to avoid these legal commitments that a given state finds objectionable. It is certainly possible that once established as members of the treaty community, additional socialization pressures would lead these states to observe the full range of treaty rules, either by withdrawing or ignoring their reservations. But this is at best a plausible long-term outcome that would depend heavily on the contingencies of particular experience in the meantime. Second, states that met a lesser standard defined by their reservations might not ultimately have behaved much differently, if one assumes (as I do) that the reservations would largely mirror the objections raised during treaty negotiations. Here the net effect of reservations can be hypothesized as broadly the same as non-participation. In any case, I have demonstrated already that despite their substantial objections, non-parties have largely followed key aspects of the MBT and ICC. Thus the difference between compliance under the current situation and that of a treaty with broad discretion for exceptions is likely to be marginal.

As with other hypothetical concessions discussed above, the prospective gains from including reservations must be set against the potential damage to the spirit and efficacy of the legal agreement both during negotiations and since. On the one hand, proposals to include
reservations were strongly resisted by the core groups of state supporters at both Ottawa and Rome.\(^52\) The prohibition on reservations was intimately associated with the broader non-great power diplomatic strategy, as the above quote makes clear. Thus the allowance for reservations might have threatened the cohesion and momentum of the “pro-treaty” groupings in much the same way that specific concessions to US demands were hypothesized to. Again, the net effect would have been basically the same as simply conceding to great power demands to alter the treaty text at the outset. For some actors, reservations may have been preferable to weaker treaty, since they would allow states to selectively recognize constituent rules and norms, rather than excluding these legal features entirely. But once the practice was rendered permissible, many additional states might have taken advantage of the opportunity to carve out exceptions for themselves as well. One of the great strengths of the Ottawa and Rome processes is the comprehensive way in which the final negotiations were handled. Breaching the commitment to the adage of “no exceptions, no reservations, no loopholes”\(^53\) would have undermined the legitimacy of the treaties in the eyes of their most ardent supporters, and could therefore have substantially weakened the socializing power of the treaties.

Rendering a fully comprehensive assessment of the impact of the no reservations strategy would require a comparative analysis of all—or at least a substantial sample of—contemporary treaties, measuring the relative rates of compliance experienced for treaties with and without reservations. Obviously this is well beyond the scope of the present study. But short of this, the brief thought experiment suggests that the decision to prohibit reservations was defensible both in light of the objectives of the Mine Ban Treaty and Rome Statute, and measured in terms of the empirical record and the hypothesized alternative. In short, the benefits of absolutism in my view


\(^{53}\) This phrase was coined by Mines Action Canada.
outweigh the presumed advantages of having additional partially committed states inside the formal treaty community.

Assessing the Wisdom of the New Diplomacy

These assessments are necessarily partial and tentative, given the purpose of the present study. The preceding section does however raise some interesting questions concerning the relative efficacy of the Mine Ban Treaty and International Criminal Court given the most likely alternatives. This is a vital concern, since many observers have argued that modesty may be the better virtue in seeking long-term and sustainable international change. Brunnee and Toope have therefore suggested that when social expectations widely diverge on a given issue of governance, “it may be preferable to settle for a less ambitious project, and to patiently build up the legality elements that may enable a community of practice gradually to expand its stock of shared understandings.” This caution was echoed in responses to the mine ban and international criminal court movements cited elsewhere.

Yet the findings presented in this dissertation strongly suggest that the decision to proceed without the great powers has not, on balance, been detrimental to the causes of eliminating antipersonnel mines or providing criminal accountability for grave violations of international law. Both the Mine Ban Treaty and Rome Statute have generated substantial change in state behaviour across the international system, though with important differences noted above and in previous chapters. More fundamentally, the treaties have served as touchstones for a re-conception of state identities in which the abolition of AP mines and the supranational oversight of judicial punishment for grave crimes have become appropriate means of restraining violence.

54 For one such early attempt, see Malanczuk, “The International Criminal Court and Landmines.”
55 Brunnee and Toope, Legitimacy and Legality in International Law, 76.
and ordering international affairs. While these new norms are as yet incompletely and unevenly adopted, they have nonetheless served to dramatically re-shape the articulation and subsequent pursuit of state interests in their image. While this is especially true of formal treaty members, it applies in important ways to non-party states as well.

Rendering a fully convincing judgement would naturally require further theoretical and empirical investigation. But with these provisos in mind, it is difficult to find persuasive evidence that the MBT and ICC have performed worse than any plausible alternatives, which is the appropriate perspective from which to evaluate these initiatives and the criticisms they have received. As Price has observed in a related context, “critics of just war norms importantly underscore that these norms suffer from inadequacies in restraining the character of contemporary large-scale violence – but, one must ask compared to what?”56 Sceptics of these non-great power initiatives should similarly be challenged to explain how their prospective or retrospective assessments square with empirical reality in a highly imperfect world: what reasonable alternative approaches would have produced better outcomes, and why?

The most fundamental finding of this dissertation, therefore, is that developing treaties without great power support can prove a successful approach to creating strong international norms, backed up (for treaty members) by binding legal rules. This can occur even in the most challenging context of national security and state sovereignty.57 The account presented here thus provides a rebuttal to the sceptical view of international institutions as mere tools that (usually preponderantly powerful) states use to pursue their prior interests.58 This claim also requires some attention to the question of whether the new diplomacy model embodied in the mine ban and ICC processes can or should be replicated in other issue areas. Sikkink has argued that

57 Price, “Transnational Civil Society,” 598.
scholars “who raise questions of progress and regress in world politics not only need to evaluate the progressive versus regressive outcomes of policies, but also try to specify more carefully the conditions under which a more progressive or less progressive outcome is likely.”59 The subject has received some initial attention already.60 I do not seek to resolve this issue here, but instead offer some brief comments derived from the previous empirical assessment and theoretical IR literature, as a way of suggesting some comparative lessons from the implementation of the two cases, and a path forward.

First, it is widely hypothesized that characteristics of the particular issue shape the prospects for generating new international legal initiatives.61 On the one hand, scholars like Keck and Sikkink have suggested that “issues involving bodily harm to vulnerable individuals, and legal equality of opportunity” are most likely to lead to successful development of new norms and (potentially) legal rules.62 On the other hand, “the development and implementation of new norms… are more likely to be successful to the extent they can be grafted on to previously accepted norms.”63

These assumptions can also be applied to the implementation of treaties that is the focus of this study. One potential, and quite compelling, explanation for the greater contestation surrounding the ICC stems from the fact that the Court represents a far more fundamental challenge to foundational tenets of statehood than the more limited intrusion of the antipersonnel mine ban. In this sense, the Rome Statute embodies a more through-going change

62 Keck and Sikkink, Activists Beyond Borders, 204. Similarly, see Price, “Transnational Civil Society,” 598.
to international expectations concerning the rights and responsibilities—and thus character—of states, especially in its extension of jurisdiction over non-party nationals (in some circumstances) and its elimination of legal immunities including for senior political actors. This account is anticipated by the notion of network politics advanced in Chapter 2: indeed, since treaties gain much of their legitimacy from their association with prior norms and rules, it is unsurprising that those elements that most sharply diverge from past experience should face the greatest challenge. The Mine Ban Treaty can by contrast be understood as a more straightforward application of prior norms of international humanitarian law to a particular weapon system.

This is not to suggest, however, that the mine ban was unproblematic by comparison, for reasons that I have enumerated elsewhere in this dissertation. The claim that states have adopted and adhered to the Mine Ban Treaty because they no longer “needed” AP mines only begs the question of how this rather substantial transformation came about, which is itself a vital part of the explanation for why the MBT has proven so effective. Yet it does seem plausible that the scope of the MBT—as a prohibition of a discrete weapon—was more readily comprehensible to prospective members and resistant states alike. An enforcement mechanism for the punishment of core crimes, in contrast, is potentially much broader in its range and impact and could well infringe on state interests in awkward and unpredictable ways.⁶⁴

Extending the insights above leads to a conclusion that future regulatory efforts are most likely to succeed when they can establish close connections to existing widely accepted international norms. Here the notion of what I have termed “network effects” is again vital, since further norm development is most probable when it occurs by analogy, as was the case with the recent Convention on Cluster Munitions building explicitly on the legal and normative precedent of the Mine Ban Treaty. Further scholarship could seek to clarify other such connections as, for

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⁶⁴ My thanks to Professor Byers for suggesting this interpretation.
example, with an emerging research agenda applying the concept of crimes against humanity to other types of environmental or economic activities that may have adverse consequences for present or future generations. I consider some additional prospective candidates for non-great power norm development in the final section of this chapter. The take-away, it seems, is that future efforts at generating effective rules and norms in the absence of great power support will not be determined on the basis of immutable features that render the prospective subject inherently susceptible or hostile to regulation. Rather, the framing of the norm building effort is crucial, and is most likely to succeed when motivated actors seek to connect proposed norms to existing international standards.

Finally, a number of studies have already demonstrated that the structure of diplomacy was vital to the genesis of non-great power treaties. Scholars have called attention to the crucial role of norm entrepreneurs in promoting new international norms that are often (though by no means always) codified in legal agreements. This was certainly the case with the Mine Ban Treaty and Rome Statute, as numerous studies have explored. Carpenter has argued that the distribution of decision-making authority within and among transnational advocacy networks has an important influence over what issues are adopted and promoted by these groups. One important finding from the previous analysis is that features most frequently identified in these accounts—principally the existence of a cohesive coalition of middle power states and civil

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66 For a brief summary see Brem, “Is There a Future,” 177-180.

67 Finnemore and Sikkink, “International Norm Dynamics.”

society actors ordered by a non-consensus based negotiating venue—have proven equally important in the succeeding efforts to ensure widespread adoption of the treaties’ rules and norms. Treaty proponents have used diplomatic fora as venues for the promotion of compliance and the stigmatization of non-conformance, principally by invoking the legal criteria of the treaties and drawing reference to associated external norms and rules. A lesson from this, therefore, is that the strategic choices that made non-great power treaties possible in the first place must be maintained in the subsequent implementation phase.

Limitations and Rejoinders

In this section I briefly address some principal challenges to the approach taken in this dissertation, which broadly relate to its scope and evidence. I then turn in the final section to key directions in my future research that build on the current project and seek to resolve some of its limitations. First, there are problems inherent in the case selection at the heart of this project. By selecting only those processes that resulted in formal treaties, I ignore a potentially large universe of cases that did not progress this far. This could include issues for which concerted efforts at norm-building or treaty development have been attempted without success—as with the regulation of small arms and light weapons or the proposed verification protocol to the Biological and Toxin Weapons Convention—and those which failed to get off the ground to any significant extent – a potentially unbounded set of possibilities. The latter in particular makes the attempt to arrive at some overall assessment of the ratio of “success” among the universe of possible cases necessarily elusive, and means any claims about the success of the strategy arising from the two case studies under consideration will be importantly qualified by that overall context. An alternative research design might have sought to identify all contemporary instances
of non-great power treaty making and design a large-$n$ quantitative study that assessed the relative degree of compliance against a set of great-power led initiatives. Or the researcher could have used an instance of failed non-great power initiative as a control case to see whether international norms could develop without the conclusion of a legal agreement.

While these are plausible approaches, in my view the costs in terms of breadth are borne out by the particular research question that motivated this dissertation, namely whether international treaties could generate broadly effective international norms when the legal developments were rejected by powerful states. The intention from the outset, therefore, was not to consider all possible outcomes at the stage of institutional creation, but rather to explore—in a detailed and systematic fashion—the extent of treaty impact under these conditions of great power resistance. This warranted different methodological choices, particularly in view of the need to explicate in considerable detail the nature and extent of norm influence across the entire system of states. In the quantitative research design proposed above, it would be impractical to attempt to assess behavioural and discursive measures to the same extent across such a large number of initiatives. Including instances where the failure to gain the support of major powers resulted in the abandonment of treaty-making efforts would have allowed me to more directly evaluate the most likely alternative to the diplomatic strategy employed in the MBT and ICC cases. However, specifically considering the alternative no-treaty scenario would have further expanded the scope of the present study and, more importantly, would have implied a shift in focus from the implementation of existing treaty norms to the prior question of why and how negotiations succeed (or not) in the first place. That said, the failure to achieve binding international obligations is obviously a part of my larger interest in non-great power norm development, and will be engaged in subsequent research as discussed below.
Second and relatedly, critics may charge that by selecting successful instances of treaty-making, I have necessarily chosen “easy” cases that did not pose significant challenges to the states engaging in the cooperative effort. This basic line of argument is that since “most treaties require states to make only modest departures from what they would have done in the absence of an agreement,”[^69] the treaty cases presented here are both unexceptional and lead the study as a whole to over-estimate the extent of state adaptation that is possible given the broader universe of cases. I believe that this charge is misplaced, particularly with regard to the cases analyzed here. On the one hand, I have argued that both the MBT and ICC represent substantial changes to the prevailing international policy solution that preceded their creation. The MBT bans a weapon that was in frequent use, while the ICC entrenches an institutional structure of internationalized oversight of domestic judicial processes that is revolutionary in its scope and potential invasiveness. Moreover, the respective treaties each impede on state policymaking on core national security prerogatives, and thus are properly regarded as inherently challenging subjects for regulatory success. For these reasons, the MBT and ICC were often derided as utopian fantasies before their creation, a fact that is often conveniently forgotten by those who now wish to regard these institutions as uncomplicated developments.

On the other hand, I have demonstrated that even those states most closely associated with the treaties were often sceptical of the wisdom and practicality of the initiatives at the outset. Prominent state supporters—often defined as the “Like-Minded Group”—underwent the same kind of identity transformation that would come to characterize the mine ban and ICC movements more generally. Rather than simply coordinating among exogenously derived and effectively static preferences, therefore, negotiations for the Mine Ban Treaty and Rome Statue were constitutive fora in which new conceptions of appropriate behaviour were promoted.

contested and (ultimately) adopted. Hence the connection between early acceptance of the treaties and subsequent ratification and compliance is ultimately a source of treaty strength and a key part of the norm-building story, rather than an indicator of the limitations of the enterprise.

Third, it can be correctly charged that a “global” study of this kind provides a broad overview of compliance and discursive endorsement across the entire international system, rather than detailed attention to a more discrete set of actors over time. States are thus necessarily (if imperfectly) treated as aggregates; this account therefore misses the international political and bureaucratic dynamics that are vital to a fully formed view of how international structures shape domestic policy. Equally, the agency of non-state armed groups and civil society actors is largely excluded from the narrative. This, in turn, can lead to an account of norm adoption that does not sufficiently attend to subtle shifts in meaning that can only be revealed by closely tracing the adoption of norms among human individuals and collectives. Finally, a sceptical reader might challenge the lack of hypothesis testing in this dissertation. Without theoretically informed mechanisms of state change, this critique goes, it is impossible to generate compelling causal claims and thereby attribute any observed outcomes to the treaty itself in lieu of other factors.

The present study is methodologically designed to better get at the range of ways that international norms can influence state dispositions and policies. Attention to the behavioural patterns of (non)compliance and, especially, the discursive logics underlying these actions, provides plausible evidence of the impact of norms. This effort could be further refined in reference to theoretically derived drivers of state change. Yet to properly situate a causal story requires that we first compile compelling data regarding the impacts of these purposive interventions. To that end, this dissertation is envisioned as the prelude to a more fine-grained assessment of the mechanisms by which the present treaties have been promoted and
internalized. Here again detailed, systematic empirical research is vital in providing the basis for judgements regarding the retrospective wisdom of non-great power diplomacy and the suitability of its application to other issue areas.

**Future Research**

This study is naturally limited in its ability to address all relevant facets of the broader subject area. With this in mind, I see a number of productive directions for future research.

**Socialization and Mechanisms of Actor Change**

First, the account of treaty influence developed in this dissertation would benefit from greater attention to the micro-processes that lead to the adoption of norms within states. Socialization—which Checkel defines as “a process of inducting actors into the norms and rules of a given community”70—provides the key frame of reference for conceptualizing this process.71 Future research will therefore use the MBT and ICC as case studies for assessing previously theorized mechanisms of socialization—notably persuasion72, social rewards and punishments73 and emulation74—as well as instrumental explanations that emphasize positive inducements (side payments) or coercive threats (material sanctions)75 to explain behavioural

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71 Checkel, “International Institutions and Socialization,” 804.
72 Johnston, “Treating International Institutions,” 496; Risse, “Let’s Argue!”
adaptation or the lack thereof. This research will pay particular attention to those actors identified in previous research as constituting theoretically interesting cases—because they should be either receptive or resistant to socialization effects—or as having crucial importance to the treaty’s implementation. Importantly, however, it is not “the state” as an abstract political entity but its representatives that must be socialized, such that “state practice ultimately reflects the socialization of relevant individuals.” For this reason, my research on socialization will focus at the level of individuals (diplomats, military officials, and other representatives) and their aggregation in policymaking groups. The extent of socialization is then measured in reference to the degree to which relevant actors have internalized core treaty norms. The conception is thus compatible with the approach to studying institutional impact employed in this dissertation.

In undertaking this research, I will especially seek to draw connections between institutional environments and the processes of norm adoption. Organizational fora are inherently social environments, and “can therefore be thought to catalyze the process of international norm diffusion by providing a site within which the ideas held by policymakers from one country can be effectively transmitted to the representatives of another.” Institutions direct these processes by means of their structural rules and decision-making procedures, and thus provide a venue for

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76 These explanations rarely act in isolation, as norms and legal obligations frequently constitute and define the “good” upon which instrumental choices are based and inversely, rational utility-regarding actors often promote new norms via deliberate entrepreneurship and “strategic social construction.” Johnston, “Conclusions and Extensions,” 1030; Finnemore and Sikkink, “International Norm Dynamics,” 910. Norms may condition the enactment of materially rational calculations; but norms may themselves be the currency that is instrumentally promoted. This suggests that capturing the full potential of socialization requires a synthesis of rationalist and constructivist insights. See Fearon and Wendt, “Rationalism v. Constructivism.”
persuasion and “the distribution of social rewards and punishments,” as well as a portal through which material inducements such as side payments and sanctions may be directed. Treaty fora also provide the space in which state representatives and civil society actors can engage in socialization efforts. And the very act of participation may help induct actors into certain modes of thinking and acting with respect to community rules regarding proper forms of diplomacy and basic understandings about the problem to be addressed and its resolution. In this sense, institutions act as “environments” facilitating diffuse forms of agency. At the same time, a properly-conceived study of socialization must be attentive to the possibility that actors may seek to challenge the content or meaning of treaty norms via the same processes. The research will therefore remain sensitive to the potential for reversals amounting to the degradation of norms.

Finally, a study of socialization should also seek to attribute agency to the processes of norm adoption. A vibrant literature has already detailed the roles and impact of transnational civil society in raising and promoting new norms in the MBT and ICC cases, but has thus far had less to say about their involvement after the conclusion of binding legal agreements. This emphasis was entirely appropriate to the goal of demonstrating the salience and impact of norms at one crucial stage, but necessarily leaves a gap in our understanding with respect to how socialization may continue, and potentially shift in focus, over time. My research will seek to extend these valuable insights to the question of how civil society can contribute to the implementation of international norms, inter alia by monitoring compliance, providing technical

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82 For example, see Greenhill, “Company You Keep.”
assistance and deploying social pressure to improve state adherence to legal obligations and treaty norms. This emphasis also speaks to a related question, addressed briefly in this dissertation, concerning the most appropriate strategies for dealing with non-compliance. Is it best to publicize violations in the hopes of compelling changes in behaviour, or keeping such transgressions quiet and working with the offending actors to ameliorate their policies, and under what circumstances should one approach be preferred?86 This research agenda would thus contribute additional empirical data to flesh-out and refine theoretical expectations concerning the place and impact of transnational civil society in world politics.

Non-Great Power Norms in Comparative Context: Expanding the Universe of Cases

The theoretical and conceptual work undertaken here also provides an opportunity to apply the same approach to related issue areas. The recently concluded Convention on Cluster Munitions (CCM) represents a further example of non-great power treaty making that substantially mirrors the diplomatic strategy that brought the MBT and ICC to life.87 To that end, I intend to replicate the methodology developed in this dissertation and incorporate the CCM as the third core case study for a subsequent book manuscript on the contemporary politics of non-great power norm development. This would, to my knowledge, constitute the first detailed assessment of global compliance with the new treaty, and I would be well placed to contribute to emerging scholarly and policy debates concerning the efficacy of this initiative. This is a rich subject for study, as there are already emerging concerns relating to the interpretation and implementation of treaty obligations among prominent middle powers like Australia and

Canada. These experiences further highlight the potential disjuncture between formal legal commitment and the internalization of norms that was a theme of the present study. Finally, writings on the CCM have begun to explore the crucial role again played by transnational civil society in promoting the new treaty, though the agency and impact of these groups—most notably the Cluster Munitions Coalition—could be articulated with greater theoretical and empirical rigour. Including this third case will also provide even more robust grounds for the conclusions drawn in the present dissertation.

Yet there has also been limited success thus far in generating similar regulatory outcomes on a number of nascent topics in international humanitarian law—including space weaponization, non-lethal military technologies, and small arms and light weapons, among others—which appear to be forestalled by resistance from the United States and other key powers. The same could be said for the environmental sphere, as witnessed by the challenges in developing globally binding regulations to replace the Kyoto Protocol, or on matters of evolving human rights norms, as in the case of the United Nations Declaration on the Rights of Indigenous Peoples. Attention to negative cases—instances where diplomatic negotiations did not generate new rules or norms in the face of great power resistance—would help to uncover comparative factors concerning (for example) issue type and coalition politics that may be hypothesized to improve or diminish the chances of achieving effective international treaties. Here there are important linkages with recent research on international “non-regimes” – that is, policy areas

with little or no institutional development and policy coordination. Radoslav Dimitrov and his colleagues have pointed out that the lack of international treaties is especially puzzling in policy areas where theories of IR would most expect cooperation to emerge – for example, because external conditions raise the need for coordination, and states stand to mutually benefit from their interactions.

Contrasting my research on successful instances of treaty-making with currently under-regulated subjects would add further empirical evidence to theoretical and policy arguments regarding the most promising strategies for pursuing international norms and rules during periods of inconsistent great power engagement. A comparative study of this kind would thus serve to further get at the potential limits of non-great power cooperation. What lessons can be systematically derived from successful campaigns, and how do these contrast with “no-treaty” instances? Inversely, under what circumstances might international norms be generated without the prior advent of an international legal instrument? This subject was briefly touched upon above, and is a subject rife for more systematic exploration in future scholarship.

*International Law and Non-Parties*

These concerns also speak more broadly to my interest in the political and social dimensions of international legal authority, and the role of law in contributing to the development of international norms. In this respect, a particularly interesting finding from the present dissertation concerns the extent of informal compliance and adaptation among non-

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91 Dimitrov et al., “International Nonregimes;” Carpenter, “Studying Issue (Non)-Adoption” and “Vetting the Advocacy Agenda.”
93 Price, “Hegemony and Multilateralism.”
parties. Subsequent research will further engage this counter-intuitive observation and contribute to emerging literatures in three distinct areas.

As the preeminent global power, the United States’ role in shaping (creating or impeding) international governance has been extensively studied. However, for all the attention given to US objections to recent treaties, much less has been said about the impact of new international norms on US policy, or the potential that US resistance has for the health of legal agreements. The present dissertation has begun this effort, but I will seek to explore the topic more systematically in subsequent research. The MBT and ICC are valuable cases for studying US responses to non-great power cooperation, as they provide good evidence of informal adaptation and demonstrate differing degrees of accommodation with international developments. Other cases in the fields of human rights, security and other issue areas can be added as well. The broader goal of this research agenda is thus to explore the potential for international cooperation independent of US power and the ability of international legal and normative structures to constrain the actions of the dominant state. This in turn may offer compelling indications of the functional limits of hegemony – a key debate in the contemporary literature.

Yet this dissertation made clear from the outset that the concern for non-great power norms encompassed more than just the United States in isolation, as a number of other current and emerging powers also have profound interest in the development of international institutions. Hence future research should build on existing studies to explore the effects of power disparities in shaping the prospects for global governance – to what extent have other key states like China, India and Russia been drawn toward treaties they officially reject, and has their principled resistance succeeded in influencing the composition or impact of legal rules and

94 Witness, for example, the sizeable literature charting U.S. objections to the ICC, discussed earlier.
norms? Alternatively, what role can emerging powers have in solidifying new social standards? This is particularly important since not all of these actors inherently reject legal developments of the kind studied in this dissertation: Brazil, Nigeria and South Africa, for example, are all prominent supporters of the MBT and the ICC.

I would also like to extend this focus to non-state armed groups. The impact of treaty processes on these latter actors—who are typically precluded from signing formal international legal agreements—has only recently emerged as a subject of scholarly concern. Yet work by non-governmental organizations like Geneva Call has demonstrated that NSAG are sensitive to international norms and may be motivated by concerns for status and legitimacy to adopt new standards of appropriate behaviour as markers of responsibility. Initial research will seek to develop a typology of factors leading to NSAG compliance with international norms, and will also focus on the key role played by civil society as intermediaries in the spread of these standards.

Hence much remains to be said about how the accumulation of material and social power (and its gradual realignment) will contribute to the development of international order, and my research agenda is well placed to contribute to these debates. It is my view, therefore, that the preceding dissertation has validated the initial interest in non-great power norm development and has provided good reasons for seeking to further extend these insights going forward.

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97 Here there are strong parallels with studies of the legal and normative restraints on mercenaries. See Percy, “Mercenaries.”
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APPENDIX: DATASET INDICATORS AND CODING RULES

General Coding Overview

The purpose of Chapters 3 and 6 is to provide a global overview of state compliance with the Mine Ban Treaty and Rome Statute of the ICC. For each treaty case I have developed a unique dataset that measures the behavioural status of every state—both formal parties and non-parties—in relation to a set of indicators reflecting the principal norms embodied in the treaties. These indicators, in turn, are drawn directly from the respective legal texts. Since the Mine Ban Treaty and Rome Statute require significant behavioural changes, it is possible to compare observed progress against the “optimum institutional consequence” defined by the treaties themselves.¹

In developing this aggregate account, I code each individual indicator as an ordinal measure of relative adherence. A score of 1 denotes compliance with the indicator, regardless of whether the state in question is a formal party to the treaty. Inversely, 0 indicates non-compliance with the relevant treaty provision. An intermediate score of 0.5 is used to indicate incomplete adherence, either in the form of the partial realization of an obligation or—less frequently—in instances where non-compliance is strongly suspected but not definitively proven. These individual measures are then compiled into a single composite compliance score for each state, reflecting overall adherence to treaty norms.²

States constitute the primary actor in this dataset. This is so because while other actors—primarily non-state armed groups and non-governmental organizations—are deeply implicated in the development of international norms, only states are permitted to formally adopt multilateral

¹ Hall, “Institutional Solutions,” 93.
² For a brief summary of this approach, see Greenhill, “Company You Keep,” 133.
treaties. The list of states in this study is based on the 193 members of the United Nations. In a few instances—e.g., Cook Islands, The Holy See and Niue—non-UN member states that have joined one or both of the treaties are included here. State names follow the UN form. States are also coded by geographic region: Africa (excluding North Africa) (AFRI), Americas and Caribbean (AMER), Asia (ASIA), Europe (EURO), Commonwealth of Independent States (including Georgia and Ukraine) (CIS), Middle East and North Africa (MENA), and Pacific (including Australia and New Zealand) (PAC). This division largely follows the World Bank classification, with some reorganization on the basis of a formulation provided by the Coalition for the International Criminal Court. Finally, each state’s membership status vis-à-vis the treaty is noted, with 2 representing full States Parties (those states that have ratified or acceded to the treaty), 1 for signatories, and 0 for non-parties. This provides a useful baseline from which to assess the relative impact formal membership may have on norm adherence. Note that this measure is deliberately calibrated differently than subsequent behavioural indicators, and is not included in the composite score for each state.

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5 The CICC classification is visible in Coalition for the ICC, Factsheet.
Mine Ban Treaty

Temporal Representation

This dataset captures state compliance with the Mine Ban Treaty from 1997 to 2009. This time period spans from the creation of the MBT, to the end of the treaty’s first decade in operation (marked by the second Review Conference). The basic coding procedure was replicated for three temporal periods: 1997-1999 (from negotiation to the first Meeting of the States Parties), 2000-2004, (up to the first Review Conference), and 2005-2009 (up to the second Review Conference). The information contained within each temporal dataset is based on the Landmine Monitor report for the end of that period – 1999, 2004, and 2009. Information should be considered accurate as of approximately the middle of each respective calendar year. The dataset was compiled by this author between April and August 2010. Please note that in some limited instances—principally with respect to treaty membership and the use of AP landmines—the dataset was subsequently expanded to take account of events up to June 2012.

Data Sources

Unless otherwise stated, the data for the coding below is derived from the Landmine Monitor (LM), published annually by the International Campaign to Ban Landmines, with editorial leadership from Human Rights Watch and Mines Action Canada. In rare cases where Landmine Monitor reports did not include relevant information, I have consulted the national transparency and implementation reports mandated under Article 7 of the Mine Ban Treaty.

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6 The Landmine Monitor reports in question were published in May 1999, October 2004, and May 2009. Consequently, the information contained within should be considered current up to two months prior to the date of publication. The reports are available online at http://www.the-monitor.org/index.php.
7 Article 7 reports are deposited with the United Nations Secretary General, and are available at www.unog.ch/80256EE600585943/%28httpPages%29/A5378B203CBE9B8CC12573E7006380FA?OpenDocument
Special Coding Considerations

As discussed at greater length in Chapter 3, the Mine Ban Treaty entrenches both negative and positive obligations:

States adhering to this treaty must never under any circumstances use, develop, produce, stockpile or transfer anti-personnel mines or help anyone else to do so. They must also destroy existing antipersonnel mines, whether in stockpiles or in the ground, within a fixed time period. A small number of these mines may be retained for the sole purpose of developing mine-clearance and destruction techniques and training people in the use of these techniques.\(^8\)

As a general rule, compliance with core treaty norms is held—in a qualified fashion—as the *de facto* position in the absence of clear evidence to the contrary. Following the editorial policy for the *Landmine Monitor*, violations are coded as such only on the basis of suitable evidence. This decision is justified by the fact that *Monitor* reports draw on extensive research and are recognized as the most comprehensive source of information on mine policy; hence, the lack of substantial evidence provides good grounds to assume compliance. On the other hand, in instances where adherence would require positive action—as with the implementation of national legislation or the creation of a national oversight body—the burden of proof is reversed, and states are only coded as being in compliance with definitive evidence to this effect. In cases where no information is available regarding, for example, the creation of a national mine policy entity or the ratification of new legislation, these actions are assumed not to have occurred. Please note that activities relating to a given indicator are only counted once during a temporal period, regardless of number of discrete incidents. Only one value is attributed to any particular cell in the dataset, with the lowest possible score utilized for any instances of contra-norm behaviour during a temporal period. This produces a deliberately conservative measure of norm

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adherence, since any instance of violation during a given temporal period would result in a score of 0 for that indicator, and thus cancel-out other, potentially substantial, patterns of compliance.

In order to introduce greater nuance to the empirical assessment, the coding scheme also includes a score of 0.5 in two distinct circumstances. Cases of suspected non-compliance—where strong evidence indicates that a violation has taken place, but definitive judgement is not possible—are coded in this fashion. Instances of partial compliance are also coded with 0.5, as detailed below. While this coding scheme risks confusing various types of incomplete adherence, it is a preferable solution so as to improve reporting efficiency and avoid artificial compliance hierarchies. Alleged violations—in which no substantive evidence is available—by definition remain unconfirmed and are excluded here. In cases where information is incomplete or potentially contradictory, consistent state comments and/or no evidence of the particular act in question is given preference.

Compliance Indicators

Use of Antipersonnel Landmines (USE)

This indicator captures the use or deployment of antipersonnel landmines, as defined by the MBT. The complete non-use of AP landmines during the reporting period is coded as 1. Conversely, a coding of 0 is used to denote confirmed use of AP landmines by state actors during that same time period. As elsewhere, a score of 0.5 indicates instances where Landmine Monitor strongly suspects a violation (or violations) to have taken place, but where

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9 According to Article 2.1 of the Mine Ban Treaty, “‘Anti-personnel mine’ means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.” As per Article 2.2, “‘Mine’ means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle.”
definitive evidence was not available. The dataset also accounts for the “passive use” of AP landmines. I define passive use as the continued reliance on already-established minefields by a state (or its agents) to gain perceived security benefits, typically in relation to hostile international frontiers or to deny access to non-state armed groups, drug traffickers, or illegal migrants. This relies on a subjective assessment by the researcher that the state in question regards the persistence of minefields as militarily valuable, as opposed to those situations in which the state has yet to fully complete the clearance of mined areas. As per the intention of the Mine Ban Treaty, the continued reliance on existing minefields—even if they were laid prior to the entry-into-force of the treaty—constitutes a de facto use of AP mines and is thus considered a violation of the treaty.\textsuperscript{10} However, to denote the different degree of intentionality, such cases are coded as 0.5.

**Production of AP Landmines (PROD)**

This indicator addresses the manufacture of AP mines for state purposes, typically but not necessarily as part of a large-scale industrial process.\textsuperscript{11} As with “use” above, 1 indicates a total absence of production, while 0 denotes any confirmed instance(s) of such production; 0.5 is here used to identify instances of strongly suspected violation.

**Transfer of AP Landmines (TRANS)**

As per Article 2.4 of the Mine Ban Treaty, “‘Transfer’ involves…the physical movement of anti-personnel mines into or from national territory, [and] the transfer of title to and control

\textsuperscript{10}Maslen, *Commentaries*, 80-85. The same goes for the maintenance of existing minefields. See Maslen, *Commentaries*, 85-86.

\textsuperscript{11}The Convention also prohibits the “development” of landmines but, as Maslen notes, the term is not defined in the treaty. For the sake of parsimony, emphasis is placed instead on the production of antipersonnel landmines and development is excluded as a stand-alone indicator. Maslen, *Commentaries*, 86-87.
over the mines…” For the purposes of this study, I restrict my analysis to the direct import or export of AP landmines, in which the act of transferring or receiving the weapons is done by a state entity. This would include the transfer of AP landmines by a state actor to a non-state group (or inversely, the purchase of these weapons by a government from a non-state actor); excluded here are instances concerning the transit or storage of foreign mines on the territory of another state. Following the above, 1 indicates a total absence of AP mine transfer, 0.5 represents strongly suspected violation, while 0 reflects an absence of such behaviour in the reporting period.

Destruction of AP Landmine Stockpiles (DEST)

This indicator captures the status of AP landmine destruction in each state. The MBT requires that all State Parties destroy their AP landmine stockpiles—excluding those mines permitted to be retained for training purposes—within four years of the Treaty’s entry into force for that state. For State Parties, 1 indicates completion of stockpile destruction; 0.5 indicates that the deadline lines in the future (and thus that full compliance is not yet required); 0 reflects a failure to meet this target – a serious violation of the treaty. By virtue of their relationship to the MBT, non-parties do not fall under the four-year deadline, and possess no legal obligations to destroy their mine stockpiles. For this reason, and the

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12 Maslen, Commentaries, 90-93.
13 Mine Ban Treaty, Article 4. For more detail, see Maslen, Commentaries, 149-164.
14 For parties with a future destruction deadline, a score of 0.5 is used to denote the contingent nature of compliance. Though imperfect, the decision to code future commitments in this fashion is justified by the fact that, though the deadline lies in the future (and states with future deadlines are by definition not in violation of their obligations), consistent progress toward full compliance is expected of all parties from their ratification or accession. The deadline is a last opportunity rather than the ideal completion point—as states are supposed to comply as soon as possible but not later than this date—and as such, evaluating progress towards this goal provides the fairest and most effective means of standardizing the assessment across all States Parties.
difficulty in ascertaining the composition of stockpiles, non-parties are scored in a binary fashion, with 1 only accorded to states that have confirmed an absence of mine stockpiles.

**Clearance of Mined Areas (CLEAR)**

This indicator captures the status of mine clearance efforts for each state. Article 5.1 of the Mine Ban Treaty states that “Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.”\(^{15}\) Coding for States Parties follows the pattern of stockpile destruction, above: 1 denotes the completion of mine clearance operations, and 0.5 reflects State Parties with ongoing obligations in this regard. However, Article 5 also permits parties to request an extension to their 10-year clearance deadline; to this point, all such requests have been approved, with varying lengths of extension. Thus, State Parties that have made and received extension requests continue to be coded as 0.5 until such time as their clearance obligations are completed. A score of 0 denotes a failure both to meet the initial 10-year deadline and negotiate an extension as permitted by treaty rules. In the current context, this latter outcome would be exceptionally rare. Again, non-parties are exempted from the mine clearance deadline, and possess no legal obligations in this regard. As above, non-parties are therefore scored in a binary fashion, with 1 only accorded to states which have confirmed the elimination of all known mined areas and absent contradictory evidence.

\(^{15}\) I employ the term “clearance” so as to distinguish between the obligation to destroy mine stockpiles contained in Article 4. See Maslen, *Commentaries*, 165-184.
It is important to note that adherence to treaty norms need not require behavioural change in all cases. Indeed, some states—both parties and non-parties—have reported the complete absence of anti-personnel landmines on their territory and under their control. In such instances, the state in question is coded as being in compliance with the relevant treaty provision(s), even if this compliance requires no modification of behaviour or policy.

National Legislation to Implement the Mine Ban Treaty (LEG)

This indicator accounts for state progress in implementing MBT obligations in national legislation. This dataset does not distinguish between stand-alone legislation and states that employ existing laws to cover implementation of the Mine Ban Treaty. However, this coding follows the ICRC view that penal sanctions criminalizing and specifying punishments for individual violations of the Convention are the “minimum requirement” for implementing legislation; nevertheless, wide discretion is left to states regarding the form and content of the national implementing law.\(^\text{16}\) The coding follows the standards developed above: 1 denotes domestic legislation with penal sanctions; 0.5 indicates partial legislation (and especially the absence of penal sanctions); finally, 0 indicates no reported legislation. This scoring is primarily based on the annual country reports from Landmine Monitor and is supplemented with reference to the Rule of Law in Armed Conflict Project maintained by the Geneva Academy of International Humanitarian Law and Human Rights\(^\text{17}\), and the ICRC Advisory Service on the National Implementation of International Humanitarian Law.\(^\text{18}\)


Creation of a National Authority to Supervise Mine Action (AUTH)

This measure addresses the perceived need for political oversight of the many responsibilities concerning compliance with the Mine Ban Treaty. States are given a score of 1 if they have created and maintained a body to coordinate national resources for meeting core treaty obligations and facilitating mine action. There are no specific expectations concerning the composition of this body, with the notable exception that it be independent of military control. As above, a score of 0 denotes the absence of a national body, while 0.5 is employed in a few instances to indicate the existence of an entity whose structure and functions are not clearly articulated.

Composite Score (COMPSCORE)

This aggregate measure reflects the combined score of the seven preceding indicators. This provides a “snapshot” of state compliance with core treaty norms across the entire state system, judged on a standardized set of measures. In addition to the composite score for each iteration of the dataset, a measure of change is included in the 2004 and 2009 versions; this accounts for any improvement or decline in state compliance over time.

The table below contains a brief overview of each indicator, and is arranged in five columns. The first provides the short title, followed by the dataset code in capital letters. Three further columns give a brief description, then provide the relevant reference(s) in the Mine Ban Treaty, and finally suggest how the indicator will be operationalized.
Table 3: MBT Dataset Indicators

<table>
<thead>
<tr>
<th>Indicator Name</th>
<th>Dataset Code</th>
<th>Description</th>
<th>Mine Ban Treaty</th>
<th>Operationalized</th>
</tr>
</thead>
<tbody>
<tr>
<td>Use</td>
<td>USE</td>
<td>Laying or otherwise deploying AP mines.</td>
<td>1.1(a); 2.1</td>
<td>Landmine Monitor</td>
</tr>
<tr>
<td>Production</td>
<td>PROD</td>
<td>The manufacture of AP mines for state purposes.</td>
<td>1.1(b)</td>
<td>Landmine Monitor</td>
</tr>
<tr>
<td>Transfer</td>
<td>TRANS</td>
<td>The import or export of AP mines done by a state entity.</td>
<td>1.1(b); 2.4</td>
<td>Landmine Monitor</td>
</tr>
<tr>
<td>Destruction</td>
<td>DEST</td>
<td>Status of AP mine destruction in each state.</td>
<td>1.2; 4</td>
<td>Landmine Monitor</td>
</tr>
<tr>
<td>Clearance</td>
<td>CLEAR</td>
<td>The status of mine clearance efforts for each state.</td>
<td>5</td>
<td>Landmine Monitor</td>
</tr>
<tr>
<td>National Legislation</td>
<td>NATLEG</td>
<td>Creation of national legislation implementing MBT obligations.</td>
<td>9</td>
<td>Landmine Monitor; RULAC; ICRC</td>
</tr>
<tr>
<td>National Authority</td>
<td>NATAUTH</td>
<td>Creation of a political body responsible for coordinating implementation of the Treaty.</td>
<td>---</td>
<td>Landmine Monitor</td>
</tr>
<tr>
<td>Composite Score</td>
<td>COMPSCORE</td>
<td>Aggregate measure incorporating scores for discrete indicators above.</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
The Rome Statute of the International Criminal Court

The dataset developed for the ICC case study addresses a more particular form of state compliance focused on national implementation of ICC norms. Since the Rome Statute anticipates legal parity at the national level, tracking the existence of ICC crimes and procedures in domestic legislation provides a good proxy for the spread of Rome Statute norms, and hence a partial account of ICC institutional effectiveness. The goal here is thus to determine whether, and to what extent, both State Parties and non-parties are adopting the principal features of the ICC, and what patterns may be developing within this process. As detailed elsewhere, the Rome Statute contains an extensive set of legal obligations structured around broad norms of cooperation and complementarity. When taken together, these assumptions constitute a particular configuration of responsibilities and rights at the heart of the ICC legal regime.

Temporal Representation

In contrast to the dataset developed for the Mine Ban Treaty, the analysis of the ICC is not divided into specific temporal periods but rather captures the entire timeframe from the conclusion of the Rome Statute in 1998 through to December 2011. This decision was necessitated by two considerations. On the one hand, the ICC regime lacks an annual monitoring report of the kind so usefully undertaken by the ICBL’s Landmine Monitor project. As such, it is extremely difficult to track changes in state compliance at the same level of detail and with the necessary degree of coding reliability and consistency. On the other hand, the type of behavioural change captured by this dataset is less suited to fine-grained temporal distinctions. National legislation—the primary subject of study in this analysis—tends to change infrequently and in “bursts” that encompass a number of relevant features at one time. It is therefore sufficient
to focus on the nature of national policy change. The lack of differentiation in terms of yearly state progress is thus offset by the extensive detail included in the constituent indicators.

Data Sources

This analysis is based on a comparison of the text of the Rome Statute with language of domestic laws – both specific implementing legislation and, where applicable, prior criminal codes. In lieu of an available annual reporting mechanism, this study utilizes a series of external databases of national legislation. The National Implementing Legislation Database (NILD)—developed jointly by the University of Nottingham’s Human Rights Law Centre and the International Criminal Court Legal Tools Project¹—was initially employed as the primary source. The database contains the most extensive repository of national legislation concerning the Rome Statute that can be searched by individual state or a collection of 800 keywords.

To compile the data, I first undertook a series of keyword searches for every available state within the NILD, as described in the table below. I then conducted a further qualitative analysis of the available documents for each state identified by the searches, in order to verify parity between the Rome Statute and the relevant legislation. Since the NILD only covers approximately 60 states at present, I subsequently consulted three additional databases—maintained by the International Committee of the Red Cross², the Geneva Academy of International Humanitarian Law and Human Rights³, and the UN Office on Drugs and Crime⁴—in order to assess the available national legislation for the 196 states in my dataset. An English version of the relevant legislation was sometimes not available; in these circumstances I utilized

³ http://www.adh-geneva.ch/RULAC/.
Google Translate in order to render the relevant passages for comparison. Finally, the above research was occasionally supplemented with reference to academic sources where external databases were inconclusive. Whenever possible, the coding sources (excluding the NILD) are indicated in comments appended to the relevant cells in the dataset. When taken together, these sources provide the empirical data for coding state adoption of ICC norms. Coding for the ICC dataset was conducted during October and early November 2011.

Specific Coding Considerations

This dataset assesses state progress in implementing core procedural and substantive norms enshrined in the Rome Statute of the International Criminal Court. This is a potentially controversial approach, as the Rome Statute wording and extant state practice make clear that implementing legislation is not legally obligatory. This assessment is further complicated by the fact that there is no agreed international standard delimiting the proper approach to the domestication of international crimes. There is thus great variety in the particular form domestic implementation will take, and this study does not privilege one approach—stand-alone legislation, amendment of existing laws, etc.—in assessing state adaptation. Nevertheless, there is widespread agreement that some form of legislative change is necessary so as to ensure that all

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5 In this respect I especially relied on La Haye, War Crimes, 150-176.
8 Terracino, “National Implementation of ICC Crimes,” 423. To achieve domestic parity, a state has two generic options. First, it may seek to transpose all ICC crimes into national law via “incorporation by reference, creation of a separate piece of legislation enacting ICC crimes or amendment of existing domestic legislation that already implements the Geneva Conventions, the Additional Protocols, the Genocide Convention or any other relevant treaty” (as with Kenya, New Zealand, South Africa, Uganda and the United Kingdom; and Canada, Ecuador and Uruguay, respectively). ICCLR, International Criminal Court, 82-83. Alternatively, a state may “use existing national laws that criminalize conduct that is similar in substance, if not in form or detail, to the crimes defined in the Rome Statute” (as per Denmark and Norway). ICCLR, International Criminal Court, 82-83. Hence, national legislation should either incorporate Rome Statute language directly, or reference other international treaties and customary law. For some examples of national implementation options, please see Human Rights Watch, Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute, September 2001. http://www.coalitionfortheicc.org/?mod=romeimplementation. Amnesty International, International Criminal Court.
relevant features of the Statute are addressed in national law as a prerequisite to facilitating state compliance.\textsuperscript{9} Moreover, as the International Centre for Criminal Law Reform has made clear, domestic legal reform offers an important demonstration of state commitment to the ICC and its norms.\textsuperscript{10} This dissertation is concerned first and foremost with assessing whether legal institutions generate changes in state policy and behaviour, and this approach requires a target by which such adaptation can be usefully compared across individual state cases. Considered as a political matter, therefore, domestic legal change is a vital, but by no means sufficient, demonstration of normative adaptation.

A focus on legislation implementing the Rome Statute obviously excludes those states that have not ratified or acceded to the treaty, as well as those who have yet to complete the national legislative process; in this respect, the dataset would capture only a relatively modest sub-set of state cases. In order to address the broader international status of constituent rules and norms, I replicate the coding protocols to include all states regardless of their status vis-à-vis the treaty or national legislation. This is useful as it allows the researcher to suggests ways in which aspects of the Rome Statute are anticipated in states that officially oppose the Court or have yet to make significant progress in transposing the Statute domestically.

Unless otherwise noted, coding reflects the degree of parity between domestic legislation and the legal (textual) content of the Rome Statute. Under this coding scheme, 1 represents the inclusion of specific language incorporating the particular treaty feature (i.e., language that matches, or is substantively equal to, the provision found in the Rome Statute); by contrast, 0 indicates that no such provision exists in the national legislation. Less frequently, a cell may be


\textsuperscript{10} Hence, “a State that has the political will needed to join the States Parties to the Rome Statute in their affirmation of the ICC’s mandate and purpose will typically have little difficulty in resolving the legal or constitutional questions that might arise during the implementation process.” ICCLR, \textit{International Criminal Court}, 12.
coded with 0.5 to indicate a partial incorporation of Rome Statute language, for example by excluding certain elements of the ICC rule. Language that expands the scope of crimes beyond all recognizable definitions—for example, by eliminating the “widespread and systematic” criteria of crimes against humanity—is similarly coded as 0.5 to reflect the substantial disjuncture entailed.\footnote{In some instances, states have chosen to incorporate a broader standard than the one enshrined in the Statute, for example by including additional subsidiary crimes that were not agreed at the Rome Conference. These cases would still be coded as fully compliant so long as they included all applicable Statute crimes. Terracino, “National Implementation of ICC Crimes,” 424-425.} For some indicators—especially the three core ICC crimes—the relevant article in the Rome Statute contains multiple subsidiary clauses. In these instances, the main dataset reflects the aggregate implementation of the omnibus crime: 0 denotes incorporation of less than 50\% of the distinct sub-clauses, while 0.5 is given for 50-75\%, and 1 for greater than 75\% incorporation. This measure is utilized in the main ICC compliance dataset, though a version of the more fine-grained dataset measuring each individual sub-clause is also available upon request.

\textit{Compliance Indicators}

The dataset seeks to operationalize the core ICC norms through a set of discrete indicators. Naturally these do not account for all features of the Rome Statute. Those selected do however closely accord with the core treaty norms, and have been identified for their legal and political significance – i.e., because they are vital to the proper functioning of the Court, or regarded as particularly controversial or challenging to implement.\footnote{For one example, see ICCLR, \textit{International Criminal Court}, 19-25.} The Rome Statute most broadly seeks to “put an end to impunity for the perpetrators”\footnote{Rome Statute, preamble, paragraph 5.} of grave crimes, and so the indicators included in this study have been chosen for their contribution to this goal. At the same
time, the Statute demands significant commitments from State Parties, and so the degree to which states willingly amend their laws to recognize these obligations is an important indicator of behavioural change. Conversely, the absence of provisions enabling cooperation and complementarity with the Court is a prominent way that states may seek to avoid realizing their commitments in practice. In this way, I seek to assess the implementation of ICC norms under the most difficult conditions.

In total, the dataset identifies 12 principal indicators: six concerning the principle of complementarity (territorial and national jurisdiction\textsuperscript{14}, the removal of immunity\textsuperscript{15}, commander responsibility\textsuperscript{16}, and the core crimes of genocide, crimes against humanity and war crimes\textsuperscript{17}) and six reflecting cooperation concerns (general obligation to cooperate with Court operations\textsuperscript{18}, the special legal status of the Court\textsuperscript{19}, and more specific obligations concerning the punishment of the obstruction of justice\textsuperscript{20}, arrest and surrender of ICC suspects\textsuperscript{21}, provision of documents and other evidence\textsuperscript{22}, and the enforcement of Court sentences\textsuperscript{23}). These were further informed by an extensive set of more specific sub-indicators.

\textbf{Jurisdiction (JURIS)}

This indicator measures whether the state in question has adopted the jurisdictional modality set out in the Rome Statute that applies to acts either committed on the territory of a State Party (even if committed by nationals from a non-party) or by the national of a State Party (in

\begin{itemize}
  \item \textsuperscript{14} Rome Statute, Article 12.2.
  \item \textsuperscript{15} Rome Statute, Article 27.
  \item \textsuperscript{16} Rome Statute, Article 28(a).
  \item \textsuperscript{17} Rome Statute, Articles 6-8.
  \item \textsuperscript{18} Rome Statute, Article 86.
  \item \textsuperscript{19} Rome Statute, Article 48.
  \item \textsuperscript{20} Rome Statute, Article 70.
  \item \textsuperscript{21} Rome Statute, Articles 59 and 89.
  \item \textsuperscript{22} Rome Statute, Article 93(d) and (i).
  \item \textsuperscript{23} Rome Statute, Articles 103 and 109.
\end{itemize}
Recognition in national law of the forms of ICC jurisdiction is necessary to ensure that the state in question can deal with any crimes under its purview. The main dataset indicator is composed of two sub-indicators that account respectively for the territorial and national modes of jurisdiction. This principal indicator is scored as 1 when both features are present in national law, and 0.5 when either one is present or (more rarely) when both are partially incorporated in domestic legislation. As elsewhere, a score of 0 indicates the absence of these features. Please note that since the jurisdictional modalities of Article 12 apply to the core crimes enumerated in the Rome Statute, the features are only coded as present in national legislation if the state also recognizes the majority of ICC crimes in national law. This reflects the fact that to be of practical use, the modes of jurisdiction must apply to actual or potential acts.

Elimination of Personal Immunities (IMMUN)

This indicator captures the principle—central to the ICC regime and articulated in Article 27 of the Rome Statute—that all persons are subject to international criminal law. Building on prior developments including at the Nuremberg and Tokyo Tribunals and more recent ad-hoc criminal tribunals, the Rome Statute explicitly aims to overturn the prior customary international legal norm whereby (in most cases) senior political leaders are exempt from these kinds of criminal culpability particularly when the proposed prosecutions are to take place in any territory.24 Recognition in national law of the forms of ICC jurisdiction is necessary to ensure that the state in question can deal with any crimes under its purview. The main dataset indicator is composed of two sub-indicators that account respectively for the territorial and national modes of jurisdiction. This principal indicator is scored as 1 when both features are present in national law, and 0.5 when either one is present or (more rarely) when both are partially incorporated in domestic legislation. As elsewhere, a score of 0 indicates the absence of these features. Please note that since the jurisdictional modalities of Article 12 apply to the core crimes enumerated in the Rome Statute, the features are only coded as present in national legislation if the state also recognizes the majority of ICC crimes in national law. This reflects the fact that to be of practical use, the modes of jurisdiction must apply to actual or potential acts.

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24 Rome Statute, Article 12.2. See also Bourgon, “Jurisdiction Ratione Loci.” This does not include more expansive assertions of authority over accused persons including “passive personality jurisdiction”, “jurisdiction of custodial State or State where present”, and “universal jurisdiction”. Due to the unsettled nature of the norm—and the fact that the Rome Statute does not impose a specific obligation for national jurisdictions—an age of criminal responsibility is not coded in this dataset. See Robinson, “Rome Statute and Its Impact on National Law,” 1863-1864 and Frulli, “Jurisdiction Ratione Personae,” 534.
place via a foreign entity.\textsuperscript{25} In order to ensure full compliance and complementarity with the Rome Statute, State Parties must adopt the same provision in their national law(s), in particular by eliminating existing immunities for Heads of State or Government, or other elected or appointed officials. As with jurisdiction above, the immunity provision was only coded as present in national legislation if the state also recognizes the majority of ICC crimes in national law.

\textbf{Command Responsibility (COMMAND)}

Article 28 reaffirms the principle of command responsibility in international criminal and humanitarian law: “A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control”\textsuperscript{26}. In order to be capable of addressing all potential cases—and thus avoiding the transfer of jurisdiction to the Court—State Parties must affirm this principle in their implementing legislation.\textsuperscript{27} This dataset does not include the various grounds for excluding criminal responsibility, as to do so would introduce too much complexity into an already expansive dataset.\textsuperscript{28} Most notably, the rule (and associated conditions) concerning “superior

\footnotesize
\begin{itemize}
\item Article 27 of the Rome Statute states that the treaty “shall apply equally to all persons without any distinction based on official capacity…. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.” As du Plessis notes, “[A]rticle 27(2) makes clear that the traditional doctrine of personal immunity for sitting state officials also does not apply. This latter provision is not found in the statutes of any of the earlier international criminal tribunals, and thus is unique to the ICC.” du Plessis, \textit{International Criminal Court}, 77. On the complex interplay of Article 27 and prior norms of international law, see Akande, “International Law Immunities,” esp. at 407.
\item Rome Statute, Article 28(a).
\item See ICCLR, \textit{International Criminal Court}, 72-73 and 86-89.
\item Regarding the grounds for excluding criminal responsibility, see Rome Statute, Articles 31 and 33; and ICCLR, \textit{International Criminal Court}, 89-91.
\end{itemize}
orders” is not addressed here. This decision is justified by the reasonable assumption that the most politically controversial instances of criminal punishment are likely to involve senior military officers and civilian officials, and it is here that non-compliance is most likely to occur. The formal incorporation of command responsibility is therefore the most consequential for the perspective of assessing ICC influence.

Beyond matters of the jurisdictional scope and subjects of legal authority, states should also fully incorporate the content of ICC crimes in their national law. While this is not an explicit legal obligation, the adoption of subject crimes is important for two reasons. First, failure to ensure national processes exist for investigating and prosecuting ICC crimes would leave states unable to fully meet the standards of complementarity set out in Article 17 and would result in gaps between national and international levels of criminal justice. Second, as discussed elsewhere, the crimes encapsulated in the Rome Statute are considered to be the most egregious in the international system. Therefore, it is important for the development of ICC norms that core crimes are treated as “special” crimes under domestic law, and distinguished from “regular” civil acts like murder, rape, kidnapping, and so forth.

A separate dataset details each sub-indicator for the three core crimes individually. There are five such indicators for the crime of genocide, 11 for crimes against humanity, and fully 50 for war crimes. This approach is useful as early experience has demonstrated that states may incorporate crimes in different ways (with broader or narrower definitions), or not at all. The

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29 Rome Statute, Article 33. See also Ambos, “Superior Responsibility.”
30 Lee, “States’ Responses,” 44.
coding for the sub-crimes follows the standard protocol for this project and measures the similarity between domestic legislation and the language of the relevant Rome Statute crime: 0 reflects an absence of the particular provision, 0.5 denotes partial incorporation, and 1 indicates its full inclusion in domestic law. In cases where the domestic law is broader than the Rome Statute wording—for example, including additional war crimes not contained in the Statute—^34^ the domestic provision is coded as 1 provided that it encompasses all features of the (lesser) ICC standard. These are then composed into a single score reflecting overall national implementation of each genus of crimes: 0 denotes incorporation of less than 50% of the individual indicators, while 0.5 is given for 50-75%, and 1 for greater than 75% incorporation. It is this latter aggregate measure that is included in the main ICC compliance dataset, though the subsidiary ICC Crimes dataset is also available upon request. Because the Court will not gain jurisdiction over the subject until at least 2017, the crime of aggression is excluded from this analysis.

Genocide (GENO)

This aggregate measure is composed of six sub-indicators—the chapeau clause laying-out the operative features of “acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group,” and the five constituent crimes—encompassing the crime of genocide as contained in Article 6 of the Rome Statute. Some states and commentators have argued that national jurisdictions may address the genocide crimes via existing “normal” statutory categories like murder, rape, and so on. However, this approach is problematic because it fails to capture the particular normative opprobrium attached to acts that by their nature are targeted against specific identifiable groups. It is this mental element

^34^ As with, for example, Argentina, Germany, and the Netherlands. See Terracino, “National Implementation of ICC Crimes,” 424-425.
of intent that is the key to the specific nature of genocide as a core crime, and what
distinguishes acts as especially heinous and serious.\(^\text{35}\) Therefore, in order to be fully
compliant states must incorporate the specific conception of genocide as defined in the Rome
Statute; reliance on existing domestic crimes is insufficient.\(^\text{36}\)

**Crimes Against Humanity (HUMAN)**

“HUMAN” is an aggregate indicator composed of 12 sub-indicators constituting the various
elements of crimes against humanity, as well as the conditioning criteria that the acts were
“committed as part of a widespread or systematic attack directed against any civilian
population, with knowledge of the attack,” as contained in Article 7 of the Rome Statute.\(^\text{37}\)
These latter features are what transform “ordinary” crimes into more particular crimes
against humanity. As above, a separate dataset details each sub-indicator, and the main
indicator is a composite of these. While the Rome Statute reflects existing statutory and
customary international law it also includes new categories, particularly with respect to
sexual crimes.\(^\text{38}\) Indeed, as Lee notes, the absence of a prior treaty codifying crimes against
humanity means that “Article 7 may… be regarded as creating an autonomous regime.”\(^\text{39}\) In
this respect, state compliance—via domestic incorporation—is a good indicator of the
normative status of these crimes and, by extension, the influence the Rome Statute is having
on the progressive extension of international humanitarian and criminal law.

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\(^{35}\) Lee, “States’ Responses,” 25.
\(^{36}\) Lee, “States’ Responses,” 25. Cassese notes that the Rome Statute incorporates word-for-word the language in
Article II of the Genocide Convention, but is less expansive than Article II of the Convention (for example, by not
including conspiracy to commit genocide as a crime). Cassese, “Crimes Against Humanity,” 347.
\(^{38}\) See Byron, *War Crimes and Crimes Against Humanity*, 224-225 and 258-260; Cassese, “Crimes Against
Humanity,” 373-377; Glasius, *International Criminal Court*, 77-90; and Bedont and Hall Martinez, “Ending
Impunity for Gender Crimes.”
War Crimes (WAR)

As with Genocide and Crimes Against Humanity above, “WAR” is an aggregate measure composed of 50 sub-indicators encompassing all elements as contained in Article 8 of the Rome Statute. In particular, war crimes are defined as those acts (a) occurring during a recognised armed conflict and that (b) constituted significant violations of established the laws governing warfare. The Statute identifies four primary forms these may take: “grave breaches of the Geneva Conventions of 12 August 1949;” “other serious violations of the laws and customs applicable in international armed conflict;” “serious violations of article 3 common to the four Geneva Conventions of 12 August 1949” (for non-international conflicts); and “other serious violations of the laws and customs applicable in armed conflicts not of an international character international armed conflict.” Note, however, that unlike for genocide and crimes against humanity, this dataset does not include the four chapeau paragraphs for Articles 8(a)-(c) and (e). The Statute by and large does not create new crimes but instead brings existing laws of war into a single (more comprehensive and precise) document. The incorporation of war crimes as detailed in the Rome Statute thus provides a useful means of assessing the influence of the ICC in consolidating these expectations.

41 Regarding the nexus with an armed conflict, see Byron, War Crimes and Crimes Against Humanity, 14-16. It is this “nexus between the acts of the perpetrator and the armed conflict… which raises the status of an act from an ordinary domestic crime to a war crime and so a breach of international law.” Byron, War Crimes and Crimes Against Humanity, 15. Concerning gravity, see Bothe, “War Crimes,” 380.
42 Rome Statute Articles 8.2(a-c) and (e). See also Byron, War Crimes and Crimes Against Humanity, 16-21; and Bothe, “War Crimes,” 382-423. For a detailed assessment of each constituent crime and its relationship to existing statutory and customary international law, see Byron, War Crimes and Crimes Against Humanity, 21-187.
43 With respect to non-international armed conflicts, the Rome Statute is more restrictive than the standard enshrined in Additional Protocol II to the Geneva Conventions, which has not achieved universal adherence. La Haye, War Crimes, esp. 112-115 and 138-144.
Obligation to Cooperate (COOP)

This is a generic measure of whether a state has incorporated a legal recognition of the obligation to cooperate with Court requests. Cooperation is enshrined as a legal obligation in the Rome Statute\textsuperscript{44}, but this does not require that the state adopt legislation or follow a standardized procedure.\textsuperscript{45} However, for my purposes, this is a useful indicator nonetheless, since indicates political support for the cooperation norm, and removes potential barriers that may be present in the absence of clear legal mechanisms.\textsuperscript{46} Unlike core crimes or modes of liability that frequently pre-date the Rome Statute, provisions relating to cooperation are specifically directed towards treaty members, and so almost entirely exclude non-party states.

Status of Court Officials (APIC)

Article 48 of the Rome Statute requires that all states provide adequate recognition, in their domestic law, of the special status of the Court and its officials on their own national territory.\textsuperscript{47} While this can often be accomplished via amendments to existing laws, a more complete protocol has been developed in the form of a stand-alone Agreement on the Privileges and Immunities of the International Criminal Court (APIC).\textsuperscript{48} State recognition of the special rights and duties of ICC officials is operationalized in this dataset via formal acceptance of the APIC: 1 denotes ratification, 0.5 for signature, and 0 for no action taken.

\textsuperscript{44} See generally Rome Statute, Article 88.
\textsuperscript{46} Indeed, as Bekou has pointed out, “a state cannot use the absence of national procedures as an excuse for non-cooperation…. As it is unlikely that a state would have legislation in place that would be completely in line with the Statute requirements, Article 88 serves as a gateway to all those provisions that need to be incorporated.” Bekou, “Case for Review of Article 88,” 470.
\textsuperscript{48} Assembly of States Parties, Agreement on the Privileges and Immunities.
Data is derived from the most recent CICC tally (current as of May 5, 2011). States that have not ratified the APIC but have included parallel language in their national implementing legislation are coded as compliant in the same manner as for other indicators derived from the NILD. These instances are noted in the dataset.

Facilitating Court Operations (AIDE)

This indicator measures state progress in criminalizing the obstruction of Court activities by individuals or groups with respect to investigations, collection of evidence (including access to witnesses), and the like. Failing to adopt and apply fully compliant procedural rules represents a likely way that State Parties may seek to avoid the full range of their obligations under the Rome Statute.

Arrest and Surrender (ARREST)

Articles 59 and 89 require that States Parties (and third party states subject to ICC jurisdiction) to comply with requests from the Court for the arrest and surrender of suspects. This duty has been described as “one of the cornerstones on which the Rome Statute rests.” To be fully compliant, states must include explicit provisions for facilitating such requests in their implementing legislation; the precise manner of these procedures is left to the discretion of the state. The obligation to turn over nationals to an international body is a particularly hard case for normative change since this provision is antithetical to the prior law in many states. At the same time, in most states existing procedures for inter-state extradition are too

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49 Coalition for the International Criminal Court, *Ratification/Accession and Signature of the Agreement on the Privileges and Immunities*.
50 Rome Statute, Article 70.
51 Bert Swart, “Arrest and Surrender,” at 1640.
cumbersome to deal adequately with the ICC surrender process and streamlined procedures need to be enacted to specifically address ICC requests.\textsuperscript{53} Importantly, therefore, the Statute explicitly regards surrender as distinct from the established practice of extradition (which governs the transfer of individuals between states), and provides no grounds for refusing an ICC surrender request.\textsuperscript{54} In the interest of maintaining a more efficient dataset, the obligation relating to provisional arrest found in Article 92 is not included in this indicator.

**Provision of Documents (DOCS)**

Articles 93(d) and (i) enumerate state responsibilities with respect to the provision of records and documents related to prospective and on-going Court investigations. For reasons of efficiency and parsimony, a variety of other important aspects of state cooperation—including the protection of victims and witnesses\textsuperscript{55} and the identification, tracing, freezing of assets from crimes\textsuperscript{56}—are not included here.

**Enforcement of Sentences (ENFORCE)**

This indicator assesses the legal capacity of a state, via formal procedures, to accept individuals convicted at an ICC trial and incarcerate these persons in their own national prison system. These processes are outlined in Articles 103 and 109 of the Rome Statute. As the Court does not possess its own permanent detention facility, the responsibility for enforcing sentences falls on states. Yet as Article 103 makes clear, this is a voluntary

\textsuperscript{53} Lee, “States’ Responses,” 2.
\textsuperscript{55} Rome Statute, Article 93.1(j).
\textsuperscript{56} Rome Statute, Article 93.1(k).
commitment⁵⁷, albeit one that speaks to the willingness to expend material resources in support of the Court. States may indicate their intention to receive prisoners through their domestic implementing legislation and/or the conclusion of an Enforcement of Sentences Agreement with the Court. The coding source is indicated in the dataset.⁵⁸

**Composite Score (COMPSCORE)**

This aggregate measure reflects the combined score of the preceding 12 indicators. As with the MBT dataset above, this provides a “snapshot” of state compliance with core treaty features across the entire state system, judged on a standardized set of measures.

The table below contains a brief overview of each indicator, and is arranged in six columns. The first provides the title of the main indicator, followed by the sub-indicators, and then the dataset code in capital letters. Three further columns give first a brief description, then provide the relevant reference(s) in the Rome Statute, and finally suggest how the indicator will be operationalized. “NILD” refers to the keywords drawn from the National Implementing Legislation Database. This refers to the first stage of research only, as discussed above. Some indicators are assessed via other external sources, like the ratification of associated legal texts, as indicated.

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⁵⁷ Kress and Sluiter, “Imprisonment,” 1787.
⁵⁸ In order to maintain consistency in the application of justice, State Parties should adopt implementing legislation which broadly follows the Rome Statute sentencing guidelines (Rome Statute, Article 77). However, the Statute does not impose a specific set of legally binding punishments for particular crimes, and so this dataset does not attempt to measure individual state policies concerning appropriate penal sanction.
### Table 4: ICC Dataset Indicators

<table>
<thead>
<tr>
<th>Main Indicator Name</th>
<th>Sub-Indicator Name</th>
<th>Dataset Code</th>
<th>Description</th>
<th>Rome Statute</th>
<th>Operationalized (NILD keywords)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jurisdiction</td>
<td>Territorial Jurisdiction</td>
<td>JURIS - T</td>
<td>Acceptance of territorial jurisdiction</td>
<td>12.2(a)</td>
<td>Territorial Jurisdiction; Territorial jurisdiction - ICC proceedings; Territorial jurisdiction - national proceedings</td>
</tr>
<tr>
<td></td>
<td>Nationality Jurisdiction</td>
<td>JURIS - N</td>
<td>Acceptance of nationality jurisdiction</td>
<td>12.2(b)</td>
<td>Nationality jurisdiction; Nationality jurisdiction – national proceedings; Nationality jurisdiction – ICC proceedings; Residence jurisdiction</td>
</tr>
<tr>
<td>Immunity</td>
<td></td>
<td>IMMUN</td>
<td>Removal of the legal basis for Head of State or other political/diplomatic immunities</td>
<td>27</td>
<td>Immunity – national proceedings; Immunity – ICC proceedings; State privileges and immunities</td>
</tr>
<tr>
<td>Command Responsibility</td>
<td></td>
<td>COMMAND</td>
<td>Principle of command responsibility for crimes committed by subordinates, given relevant conditioning criteria</td>
<td>28</td>
<td>Command responsibility; Command responsibility – national proceedings; Command responsibility – ICC proceedings</td>
</tr>
<tr>
<td>Genocide</td>
<td></td>
<td>GENO</td>
<td>Aggregate indicator: national law recognizes and internalizes the crime of genocide</td>
<td>5.1(a); 6</td>
<td>Genocide; Unique provision – genocide</td>
</tr>
<tr>
<td>Main Indicator Name</td>
<td>Sub-Indicator Name</td>
<td>Dataset Code</td>
<td>Description</td>
<td>Rome Statute</td>
<td>Operationalized (NILD keywords)</td>
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<tr>
<td>Genocide</td>
<td></td>
<td></td>
<td>“‘genocide’ means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:”</td>
<td>6(a)</td>
<td>Incitement to genocide; National penalties – genocide; Intent to destroy, in whole or in part, a national, ethnical, racial or religious group; Intent to destroy, in whole or in part, other groups</td>
</tr>
<tr>
<td></td>
<td>6(a)</td>
<td>6(a)</td>
<td>“Killing members of the group;”</td>
<td>6(a)</td>
<td>Killing members of the group</td>
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<tr>
<td></td>
<td>6(b)</td>
<td>6(b)</td>
<td>“Causing serious bodily or mental harm to members of the group;”</td>
<td>6(b)</td>
<td>Causing serious bodily or mental harm to members of the group</td>
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<tr>
<td></td>
<td>6(c)</td>
<td>6(c)</td>
<td>“Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;”</td>
<td>6(c)</td>
<td>Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part</td>
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<td></td>
<td>6(d)</td>
<td>6(d)</td>
<td>“Imposing measures intended to prevent births within the group;”</td>
<td>6(d)</td>
<td>Imposing measures intended to prevent births within the group</td>
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<tr>
<td></td>
<td>6(e)</td>
<td>6(e)</td>
<td>“Forcibly transferring children of the group to another group.”</td>
<td>6(e)</td>
<td>Forcibly transferring children of the group to another group</td>
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<td>Main Indicator Name</td>
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<tr>
<td>Crimes Against Humanity</td>
<td>Aggregate indicator</td>
<td>HUMAN</td>
<td>national law recognizes and internalizes crimes against humanity as a concept and form of criminality</td>
<td>7</td>
<td>Crimes against humanity; Unique provision - crimes against humanity; National penalties - crimes against humanity</td>
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<tr>
<td>Crimes Against Humanity</td>
<td>7.1(a)</td>
<td>7.1(a)</td>
<td>“Murder;”</td>
<td>7.1(a)</td>
<td>Murder - crimes against humanity</td>
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<tr>
<td>Crimes Against Humanity</td>
<td>7.1(b)</td>
<td>7.1(b)</td>
<td>“Extermination;”</td>
<td>7.1(b)</td>
<td>Extermination - crimes against humanity</td>
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<tr>
<td>Crimes Against Humanity</td>
<td>7.1(c)</td>
<td>7.1(c)</td>
<td>“Enslavement;”</td>
<td>7.1(c)</td>
<td>Enslavement - crimes against humanity</td>
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<tr>
<td>Crimes Against Humanity</td>
<td>7.1(d)</td>
<td>7.1(d)</td>
<td>“Deportation or forcible transfer of population;”</td>
<td>7.1(d)</td>
<td>Deportation of population - crimes against humanity; Forcible transfer of population - crimes against humanity</td>
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<td>Main Indicator Name</td>
<td>Sub-Indicator Name</td>
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<td>Description</td>
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<tr>
<td>Crimes Against Humanity</td>
<td>7.1(e)</td>
<td>7.1(e)</td>
<td>“Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;”</td>
<td>7.1(e)</td>
<td>Imprisonment - crimes against humanity; Severe deprivation of physical liberty - crimes against humanity</td>
</tr>
<tr>
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<td>7.1(f)</td>
<td>7.1(f)</td>
<td>“Torture;”</td>
<td>7.1(f)</td>
<td>Torture - crimes against humanity</td>
</tr>
<tr>
<td></td>
<td>7.1(g)</td>
<td>7.1(g)</td>
<td>“Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;”</td>
<td>7.1(g)</td>
<td>Any other form of sexual violence - crimes against humanity; Enforced prostitution - crimes against humanity; Enforced sterilisation - crimes against humanity; Forced pregnancy - crimes against humanity; Rape - crimes against humanity; Sexual slavery - crimes against humanity</td>
</tr>
<tr>
<td></td>
<td>7.1(h)</td>
<td>7.1(h)</td>
<td>“Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;”</td>
<td>7.1(h)</td>
<td>Persecution - crimes against humanity; Persecution against any identifiable collectivity on other grounds universally recognised as impermissible under international law - crimes against humanity; Persecution against any identifiable collectivity on political, racial, national, ethnic, cultural, religious, or gender grounds - crimes against humanity; Persecution against any</td>
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<tr>
<td>Crimes Against Humanity</td>
<td>7.1(i)</td>
<td>7.1(i)</td>
<td>“Enforced disappearance of persons;”</td>
<td>7.1(i)</td>
<td>Enforced disappearance - crimes against humanity</td>
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<tr>
<td></td>
<td>7.1(j)</td>
<td>7.1(j)</td>
<td>“The crime of apartheid;”</td>
<td>7.1(j)</td>
<td>Apartheid - crimes against humanity</td>
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<td>7.1(k)</td>
<td>7.1(k)</td>
<td>“Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.”</td>
<td>7.1(k)</td>
<td>Other inhumane acts - crimes against humanity</td>
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<tr>
<td>War Crimes</td>
<td>WAR</td>
<td>WAR</td>
<td><em>Aggregate indicator:</em> national law recognizes and internalizes war crimes as a concept and form of criminality</td>
<td>8</td>
<td>War Crimes; Unique provision - war crimes</td>
</tr>
<tr>
<td></td>
<td>8.2(a)(i)</td>
<td></td>
<td>“Wilful killing;”</td>
<td>8.2(a)(i)</td>
<td>Wilful killing - IAC</td>
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<td>Main Indicator Name</td>
<td>Sub-Indicator Name</td>
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<tr>
<td>War Crimes</td>
<td>8.2(a)(ii)</td>
<td></td>
<td>“Torture or inhuman treatment, including biological experiments;”</td>
<td>8.2(a)(ii)</td>
<td>Biological experiments – IAC; Inhuman treatment – IAC; Torture – IAC</td>
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<tr>
<td></td>
<td>8.2(a)(iii)</td>
<td></td>
<td>“Wilfully causing great suffering, or serious injury to body or health;”</td>
<td>8.2(a)(iii)</td>
<td>Wilfully causing great suffering – IAC; Wilfully causing serious injury to body – IAC; Wilfully causing serious injury to health – IAC</td>
</tr>
<tr>
<td></td>
<td>8.2(a)(iv)</td>
<td></td>
<td>“Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;”</td>
<td>8.2(a)(iv)</td>
<td>Extensive appropriation of property – IAC; Extensive destruction of property – IAC</td>
</tr>
<tr>
<td></td>
<td>8.2(a)(v)</td>
<td></td>
<td>“Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power;”</td>
<td>8.2(a)(v)</td>
<td>Compelling a prisoner of war to serve in the forces of a hostile power – IAC; Compelling a protected person to serve in the forces of a hostile power – IAC</td>
</tr>
<tr>
<td></td>
<td>8.2(a)(vi)</td>
<td></td>
<td>“Wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;”</td>
<td>8.2(a)(vi)</td>
<td>Wilfully depriving a prisoner of war of the rights of fair and regular trial – IAC; Wilfully depriving a protected person of the rights of fair and regular trial – IAC</td>
</tr>
<tr>
<td>Main Indicator Name</td>
<td>Sub-Indicator Name</td>
<td>Dataset Code</td>
<td>Description</td>
<td>Rome Statute</td>
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<tr>
<td>War Crimes</td>
<td>8.2(a)(vii)</td>
<td></td>
<td>“Unlawful deportation or transfer or unlawful confinement;”</td>
<td>8.2(a)(vii)</td>
<td>Unlawful confinement – IAC; Unlawful deportation – IAC; Unlawful transfer – IAC;</td>
</tr>
<tr>
<td></td>
<td>8.2(b)(i)</td>
<td></td>
<td>“Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;”</td>
<td>8.2(b)(i)</td>
<td>Intentionally directing attacks against individual civilians not taking part in hostilities – IAC; Intentionally directing attacks against the civilian population – IAC</td>
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<tr>
<td></td>
<td>8.2(b)(ii)</td>
<td></td>
<td>“Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;”</td>
<td>8.2(b)(ii)</td>
<td>Intentionally directing attacks against civilian objects - IAC</td>
</tr>
<tr>
<td></td>
<td>8.2(b)(iii)</td>
<td></td>
<td>“Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;”</td>
<td>8.2(b)(iii)</td>
<td>Intentionally directing attacks against installations, material, units or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations – IAC; Intentionally directing attacks against installations, material, units or vehicles involved in humanitarian assistance – IAC; Intentionally</td>
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<tr>
<td>War Crimes</td>
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<td>directing attacks against personnel involved in a peacekeeping mission in accordance with the Charter of the United Nations – IAC; Intentionally directing attacks against personnel involved in humanitarian assistance - IAC</td>
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<tr>
<td>8.2(b)(iv)</td>
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<td></td>
<td>“Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;”</td>
<td>8.2(b)(iv)</td>
<td>Intentionally launching attacks that will cause environmental damage – IAC; Intentionally launching attacks that will cause incidental damage to civilian objects – IAC; Intentionally launching attacks that will cause incidental loss of life or injury to civilians - IAC</td>
</tr>
<tr>
<td>8.2(b)(v)</td>
<td></td>
<td></td>
<td>“Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;”</td>
<td>8.2(b)(v)</td>
<td>Attacking or bombarding towns, villages, dwellings or buildings which are undefended and which are not military objectives - IAC</td>
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<td>War Crimes</td>
<td>8.2(b)(vi)</td>
<td></td>
<td>“Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion;”</td>
<td>8.2(b)(vi)</td>
<td>Killing or wounding a combatant who has laid down his arms and surrendered at discretion – IAC; Killing or wounding a combatant who no longer has means of defence and has surrendered at discretion – IAC</td>
</tr>
<tr>
<td></td>
<td>8.2(b)(vii)</td>
<td></td>
<td>“Making improper use of a flag of truce, of the flag or of the military insignia and uniform of the enemy or of the United Nations, as well as of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury;”</td>
<td>8.2(b)(vii)</td>
<td>Improper use of a flag of truce – IAC; Improper use of the flag of the enemy – IAC; Improper use of the emblems of the Geneva Conventions – IAC; Improper use of the flag of the United Nations – IAC; Improper use of the military insignia and uniform of the enemy – IAC; Improper use of the military insignia and uniform of the United Nations – IAC</td>
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<td></td>
<td>8.2(b)(viii)</td>
<td></td>
<td>“The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;”</td>
<td>8.2(b)(viii)</td>
<td>Transferring own civilians into occupied territory – IAC; Transferring population of an occupied territory - IAC</td>
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<tr>
<td>War Crimes</td>
<td>8.2(b)(ix)</td>
<td></td>
<td>“Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;”</td>
<td>8.2(b)(ix)</td>
<td>Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected - IAC</td>
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<td>8.2(b)(x)</td>
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<td>“Subjecting persons who are in the power of an adverse party to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;”</td>
<td>8.2(b)(x)</td>
<td>Medical experiments – IAC; Mutilation – IAC; Scientific experiments - IAC</td>
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<td></td>
<td>8.2(b)(xi)</td>
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<td>“Killing or wounding treacherously individuals belonging to the hostile nation or army;”</td>
<td>8.2(b)(xi)</td>
<td>Killing or wounding treacherously individuals belonging to the hostile nation or army - IAC</td>
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<td>8.2(b)(xii)</td>
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<td>“Declaring that no quarter will be given;”</td>
<td>8.2(b)(xii)</td>
<td>Denial of quarter - IAC</td>
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<td>War Crimes</td>
<td>8.2(b)(xiii)</td>
<td></td>
<td>“Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;”</td>
<td>8.2(b)(xiii)</td>
<td>Destroying or seizing the enemy's property unless imperative - IAC</td>
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<td></td>
<td>8.2(b)(xiv)</td>
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<td>“Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party;”</td>
<td>8.2(b)(xiv)</td>
<td>Declaring abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of a hostile party - IAC</td>
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<td></td>
<td>8.2(b)(xv)</td>
<td></td>
<td>“Compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war;”</td>
<td>8.2(b)(xv)</td>
<td>Compelling nationals of hostile party to take part in operations of war against their own country - IAC</td>
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<td></td>
<td>8.2(b)(xvi)</td>
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<td>“Pillaging a town or place, even when taken by assault;”</td>
<td>8.2(b)(xvi)</td>
<td>Pillaging - IAC</td>
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<td></td>
<td>8.2(b)(xvii)</td>
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<td>“Employing poison or poisoned weapons;”</td>
<td>8.2(b)(xvii)</td>
<td>Employing poison or poisoned weapons - IAC</td>
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<td></td>
<td>8.2(b)(xviii)</td>
<td></td>
<td>“Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;”</td>
<td>8.2(b)(xviii)</td>
<td>Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices - IAC</td>
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<td>War Crimes</td>
<td>8.2(b)(xix)</td>
<td></td>
<td>“Employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions;”</td>
<td>8.2(b)(xix)</td>
<td>Employing bullets which flatten or expand - IAC</td>
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<tr>
<td></td>
<td>8.2(b)(xx)</td>
<td></td>
<td>“Employing weapons, projectiles and materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and materials and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123;”</td>
<td>8.2(b)(xx)</td>
<td>Employing weapons, projectiles and materials and methods of warfare which are inherently indiscriminate – IAC; Employing weapons, projectiles and materials and methods of warfare which cause superfluous injury or unnecessary suffering - IAC</td>
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<td></td>
<td>8.2(b)(xxi)</td>
<td></td>
<td>“Committing outrages upon personal dignity, in particular humiliating and degrading treatment;”</td>
<td>8.2(b)(xxi)</td>
<td>Humiliating and degrading treatment – IAC; Outrages upon personal dignity - IAC</td>
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<td>War Crimes</td>
<td>8.2(b)(xxii)</td>
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<td>“Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions;”</td>
<td>8.2(b)(xxii)</td>
<td>Enforced prostitution – IAC; Enforced sterilisation – IAC; Forced pregnancy – IAC; Rape – IAC; Sexual slavery – IAC; Any other form of sexual violence - IAC</td>
</tr>
<tr>
<td></td>
<td>8.2(b)(xxiii)</td>
<td></td>
<td>“Utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations;”</td>
<td>8.2(b)(xxiii)</td>
<td>Utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations – IAC</td>
</tr>
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<td></td>
<td>8.2(b)(xxiv)</td>
<td></td>
<td>“Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;”</td>
<td>8.2(b)(xxiv)</td>
<td>Intentionally directing attacks against buildings, material, medical units and transport using the emblems of the Geneva Conventions – IAC; Intentionally directing attacks against personnel using the emblems of the Geneva Conventions – IAC</td>
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<td></td>
<td>8.2(b)(xxv)</td>
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<td>“Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief”</td>
<td>8.2(b)(xxv)</td>
<td>Intentionally starving as method of warfare - IAC</td>
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<td>Sub-Indicator Name</td>
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<td>War Crimes</td>
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<td>supplies as provided for under the Geneva Conventions;”</td>
<td>8.2(b)(xxvi)</td>
<td>Conscripting children under 15 into the national armed forces – IAC; Enlisting children under 15 into the national armed forces – IAC; Using children under 15 to participate actively in hostilities – IAC</td>
</tr>
<tr>
<td></td>
<td>8.2(b)(xxvi)</td>
<td></td>
<td>“Conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”</td>
<td>8.2(b)(xxvi)</td>
<td>Cruel treatment – NIAC; Murder – NIAC; Mutilation - serious violation of Common Article 3 – NIAC; Torture - IAC</td>
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<td></td>
<td>8.2(c)(i)</td>
<td></td>
<td>“Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;”</td>
<td>8.2(c)(i)</td>
<td>Humiliating and degrading treatment – NIAC; Outrages upon personal dignity - NIAC</td>
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<tr>
<td></td>
<td>8.2(c)(ii)</td>
<td></td>
<td>“Committing outrages upon personal dignity, in particular humiliating and degrading treatment;”</td>
<td>8.2(c)(ii)</td>
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<td>8.2(c)(iii)</td>
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<td>“Taking of hostages;”</td>
<td>8.2(c)(iii)</td>
<td>Taking of hostages - NIAC</td>
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<td></td>
<td>8.2(c)(iv)</td>
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<td>“The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as”</td>
<td>8.2(c)(iv)</td>
<td>Not affording judicial guarantees to the passing of sentences and the carrying out of executions - NIAC</td>
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<td>8.2(e)(i)</td>
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<td>“Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;”</td>
<td>8.2(e)(i)</td>
<td>Intentionally directing attacks against individual civilians not taking part in hostilities – NIAC; Intentionally directing attacks against the civilian population – NIAC</td>
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<td>8.2(e)(ii)</td>
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<td>“Intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law;”</td>
<td>8.2(e)(ii)</td>
<td>Intentionally directing attacks against buildings, material, medical units and transport using the emblems of the Geneva Conventions – NIAC; Intentionally directing attacks against personnel using the emblems of the Geneva Conventions – NIAC</td>
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<td>8.2(e)(iii)</td>
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<td>“Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict;”</td>
<td>8.2(e)(iii)</td>
<td>Intentionally directing attacks against installations, material, units or vehicles involved in a peacekeeping mission in accordance with the Charter of the United Nations – NIAC; Intentionally directing attacks against installations, material, medical units or vehicles involved in humanitarian assistance – NIAC; Intentionally directing attacks</td>
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<td>“Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;”</td>
<td>8.2(e)(iv)</td>
<td>Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected - NIAC</td>
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<td>“Pillaging a town or place, even when taken by assault;”</td>
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<td>Pillaging - NIAC</td>
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<td>8.2(e)(vi)</td>
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<td>“Committing rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions;”</td>
<td>8.2(e)(vi)</td>
<td>Enforced prostitution – NIAC; Enforced sterilisation – NIAC; Forced pregnancy – NIAC; Rape – NIAC; Sexual slavery – NIAC; Any other form of sexual violence - NIAC</td>
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<td>War Crimes</td>
<td>8.2(e)(vii)</td>
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<td>“Conscripting or enlisting children under the age of fifteen years into armed forces or groups or using them to participate actively in hostilities;”</td>
<td>8.2(e)(vii)</td>
<td>Conscripting children under 15 into armed forces or groups – NIAC; Enlisting children under 15 into armed forces or groups – NIAC; Using children under 15 to participate actively in hostilities – NIAC</td>
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<td>8.2(e)(viii)</td>
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<td>“Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand;”</td>
<td>8.2(e)(viii)</td>
<td>Ordering displacement of the civilian population - NIAC</td>
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<td>“Killing or wounding treacherously a combatant adversary;”</td>
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<td>Killing or wounding treacherously a combatant adversary - NIAC</td>
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<td>8.2(e)(x)</td>
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<td>“Declaring that no quarter will be given;”</td>
<td>8.2(e)(x)</td>
<td>Denial of quarter - NIAC</td>
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<td>8.2(e)(xi)</td>
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<td>“Subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried</td>
<td>8.2(e)(xi)</td>
<td>Medical experiments – NIAC; Mutilation - other serious violations of laws and customs of war – NIAC; Scientific experiments - NIAC</td>
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<td>out in his or her interest, and which cause death to or seriously endanger the health of such person or persons;”</td>
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<td>Destroying or seizing the enemy's property unless imperative - NIAC</td>
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<td>8.2(e)(xii)</td>
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<td>“Destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict;”</td>
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<td>COOP</td>
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<td>APIC</td>
<td>Recognition in national law of the special diplomatic status (rights and responsibilities) of Court officials</td>
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<td>Ratification of the Agreement on the Privileges and Immunities of the Court or relevant language in national legislation</td>
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<td>AIDE</td>
<td>Criminalizing the obstruction of Court activities</td>
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<td>Arrest and Surrender</td>
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<td>ARREST</td>
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<td>59; 89</td>
<td>Request for arrest and surrender; Arrest for ICC proceedings - national procedures; Arrest for ICC proceedings – obligation; Arrest for national proceedings</td>
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<td>DOCS</td>
<td>Domestic law to allows national authorities to collect and transfer documents pertaining to ICC cases to the Court</td>
<td>93(i) and (j)</td>
<td>Provision of records or documents; Provision of records and documents - authority - ICC proceedings; Provision of records and documents - national procedures for ICC proceedings; Provision of records and documents - national proceedings; Service of documents; Service of documents - national procedures for ICC proceedings; Service of documents - authority - ICC proceedings; Service of documents - national proceedings</td>
</tr>
<tr>
<td>Enforcement of Sentences</td>
<td></td>
<td>ENFORCE</td>
<td>Willingness of state to accept convicted individuals and incarcerate these persons in their own national prison system</td>
<td>Part X (103-110)</td>
<td>Conclusion of an Enforcement of Sentences Agreement with the ICC</td>
</tr>
</tbody>
</table>