Chapter 4

**Power, Principle, and Pragmatism in Prosecutorial Strategy**

Geopolitical implications of the location of a situation . . . are not relevant criteria for the selection of situations under the Statute.

—ICC Office of the Prosecutor

It was an unprecedented event in the relatively short history of the International Criminal Court (ICC). On September 5, 2013, members of the Kenyan parliament approved a motion to withdraw from membership in the ICC. At issue were ICC charges of crimes against humanity against President Uhuru Kenyatta and Deputy President William Ruto. The charges stemmed from mass violence in the 2007 election that brought the two men into power. During the widespread violence over one thousand people were killed and more than a half million people were forced from their homes. Both Kenyatta and Ruto have repeatedly demanded that the charges against them be dropped and have characterized the ICC action as a politically motivated assault on Kenyan sovereignty by foreign interests.

Though the Kenyan move was uniquely provocative, the sentiments expressed during the meeting reflected a broader and growing skepticism of the ICC evident across Africa. Critics point out that among the nineteen situations currently under ICC review, formal investigations and subsequent legal proceedings have been established in only eight—all in African countries.
The results of the court's reviews have generated considerable skepticism in the region. For example, Rwandan president Paul Kagame suggested that the ICC “was made for Africans and poor countries.” Similarly, Jean Ping, president of the African Union (AU) Commission, declared that “the ICC seems to exist solely for judging Africans.”

This emerging narrative of an institutional bias against African nations has found a receptive ear, both in African civil society as well as in wider academic and policy circles. Choices made by the ICC’s Office of the Prosecutor (OTP) fuel the fire of this rhetoric, as observers point out apparent inconsistencies in the application of justice at the ICC. Why did the OTP utilize its *proprio motu* power authorized under Article 15 of the Rome Statute to seek permission to open a formal investigation into the election violence in Kenya in 2007, yet decline to move forward with investigations into situations characterized by a significantly larger number of civilian casualties, including Afghanistan and Iraq? One critic remarked, “When the Prosecutor quickly decides to open an investigation—as in the Kenya situation—without making a decision about long-term preliminary examinations—in places like Colombia and Afghanistan—it can taint perceptions of the Prosecutor’s impartiality and give rise to the impression that the Prosecutor has been influenced by non-legal factors.”

These case-specific criticisms beg the broader question regarding the determinants of situation selection. In other words, why does the court pursue some cases but not others? Moreover, why does it seem to move more aggressively in some cases and more cautiously on others?

Presumably, the OTP makes prosecutorial choices solely in accordance with accepted norms of jurisprudence. Not surprisingly, the OTP consistently forwards this position in all court statements and documents. However, as pointed out earlier, a strictly legal perspective has difficulty in accounting for some of the inconsistencies evident on the court’s docket. In response, some have argued that prosecutorial strategy is the product of politics—of institutional capture by external influence or bias. Such arguments appear quite extreme and face a formidable burden to prove their claims. In addition to providing concrete evidence of external efforts to influence the decisions of the OTP, scholars would need to provide evidence that its decisions were predicated in response to coercion or bias. The OTP is unlikely to concede any such admission and has vigorously denied such accusations. The court’s first chief prosecutor, Luis Moreno Ocampo, main-
tained that “the Statute provides that the Office of the Prosecutor shall act independently on instructions from any external source. Independence goes beyond not seeking or acting on instructions; it means that the Office decisions shall not be altered by the presumed or known wishes of any party or by the cooperation seeking process.”

Moreno Ocampo’s successor, Fatou Bensouda, has also emphatically defended the autonomy of the OTP: “We are a new tool, a judicial tool, not a tool in the hands of politicians who think they can decide when to plug or unplug us.”

This chapter forwards a theoretical explanation of prosecutorial strategy at the ICC that explores the intersection of these two extremes—one based solely on legal idealism, the other based primarily on political influence. The chapter develops a theory of prosecutorial strategy that explains why egoistic institutional interests may internalize the preferences of external actors. In particular, the theoretical framework provides a rationale for why the strategic interests of three of the most powerful nonmember states may be internalized by the OTP. These states who are not parties to the Rome Statute include the United States, Russia, and China. Using this theoretical framework, the chapter argues that prosecutorial strategy emerges from the intersection of principle, power, and pragmatism. Although international legal principles press the OTP to place greater emphasis on situations deemed to be the most grave, institutional pragmatism prompts the court to move much more cautiously in cases involving the strategic interests of these three nonmember states.

**Developing a Theory of Prosecutorial Strategy**

Given that the ICC is such a new institution on the international landscape, it is not surprising that little theoretical research has been done to explain the behavior of the court. It is only now that enough time has passed that we have a large enough sample to begin to identify possible patterns of ICC behavior. Because there is not a developed theoretical literature focused on the behavior of the ICC, it may be useful to seek inspiration and guidance from research aimed at explaining the behavior of other international courts (ICs) with longer track records, such as the International Court of Justice (ICJ), the European Court of Justice (ECJ), and the European Court of Human Rights (ECHR).
A number of scholars have turned to principal-agent (PA) theory to address questions regarding the behavior of international courts and other international institutions and organizations. PA theorists examine the relationship between principals and agents and the mechanisms through which principals attempt to get agents to pursue their preferred course of action. Unfortunately, the models do not provide a clear picture of whether international courts are autonomous. Some posit that being a principal provides specific tools of leverage that can shape outcomes; that is, control over the terms of the delegation contract that confers a hierarchical control of the principal over the agent. For example, applying this framework to the study of international courts, Geoffrey Garrett and Barry Weingast suggest that the ECJ has little autonomy and generally selects outcomes that the court’s most powerful principals prefer. Additional studies also provide support for the notion that IC behavior is influenced by politics. Geoffrey Garrett, R. Daniel Kelemen, and Heiner Schulz suggest that, although legal precedent is taken into account in court rulings at the ECJ, judges do take into account the likely reactions of member state governments. This would seem to suggest that political factors may have a significant influence on outcomes and challenge those who argue that the ECJ is largely independent of such considerations. Similarly, in their study of the ICJ, Eric Posner and Miguel F. P. de Figueiredo found that judges tend to favor the states that appoint them and those whose wealth level is commensurate with their home country. Moreover, Clifford J. Carrubba, Matthew Gabel, and Charles Hankla argue that preferences of member–state governments “have a systematic and substantively important impact on ECJ decisions” through the use of threats of noncompliance and override.

Other scholars counter that international courts are more independent than PA models would generally anticipate. For example, in his analysis of rulings at the ECHR, Erik Voeten found that judges displayed a high degree of independence from political influence. A similar argument is made by Karen Alter, whose work on the European Court of Justice supports the notion that rulings have become increasingly independent of the interests of member governments, suggesting again that international courts have the capacity to remain independent of political pressure. Subsequent research by Mark Pollack and Jonas Tallberg offers similar findings of judicial autonomy. More recently, Alec Stone Sweet and Matthew Brunell argue that threats of override against ECJ decisions are not credible, and member states
were largely unsuccessful in the small number of cases where they sought to curb the court and constrain future developments.\textsuperscript{17}

Though sharp disagreement remains among scholars regarding the issue of the autonomy of international courts, the PA framework is useful in that it prompts us to think carefully about the relationship between the ICC and the states that established it. Of particular utility is the consideration of the egoistic interests of the parties who make up the ICC and the delegation contract (Rome Statute) that defines the terms of the arrangement. However, though these factors are not sufficient to capture the process leading toward the creation of a prosecutorial strategy, they do serve as a good starting point in the process of additional theory building.

This chapter begins by considering the interests of the states that created the ICC—the states parties to the Rome Statute. Though states may have had different reasons for wanting to create and then join the court, the largest was represented by the Like-Minded Group (LMG), a coalition of some sixty countries whose primary stated interests centered on notions of the court as an instrument of principled justice.\textsuperscript{18} We can consider the LMG as representative of the principal in this case because the group’s interests were for the most part reflected in the final design of the Rome Statute and its membership constituted most of those whose prompt ratification brought the Statute into force on July 1, 2002.\textsuperscript{19} Among the most prominent of these principles of justice was the notion of equality under the law. From the standpoint of the principals that created the court, the mandate of the ICC was clear—to pursue justice independent of considerations of the political power and interests of the actors involved. This mandate is reflected in the process of design during the Rome Conference, where the idealist LMG sought to secure the institutional independence of the court by freeing it from UN Security Council (UNSC) control. Thus, the OTP is charged with facilitating this pursuit of justice under this premise. For the principals, among the most significant achievements possible would be for the court to finally hold the leadership of a powerful country accountable for their actions.

At first glance, the interests of the principals would seem to be perfectly congruent with the institutional interests of the court itself and could explain the extremely high degree of delegation afforded to the ICC. As with other international courts, high levels of delegation are intended to promote judicial independence and insulate the courts from political influence.\textsuperscript{20} Moreover, this delegation was accompanied by an unusually high level of discretion
afforded to the OTP. As pointed out by Moreno Ocampo, “States established two key provisions in order to enhance the impartiality and independence of the new Court: they made it a permanent body, and they decided that the selection of situations would be a judicial decision.” Presumably, this means that decisions regarding the selection of situations would be soundly rooted in definitive legal thresholds to be met, including jurisdictional limitations as articulated in the statute and whether the principle of complementarity applies in a given instance. Yet, the ICC statute provides tremendous discretion to the OTP in the selection of cases, a point not lost on the court’s first chief prosecutor: “Few commentators on the Statute have noted that the most distinctive feature of the Court, as compared to the other international tribunals, is the power given to the Court to independently select the situations to investigate.” Presumably, such discretion would simply provide the court the independence it needs to remain insulated from political factors that might influence these crucial decisions. Applied to the question of prosecutorial strategy, this autonomy manifest in the Rome Statute would lead us to predict that the OTP would pursue a strategy based solely on issues of jurisprudence and international legal principles.

Ironically, the discretion afforded to the OTP that was intended to increase the independence and legitimacy of the court may also open the door to political considerations and strategic behavior on the part of the prosecutor. It consolidates the power of the prosecutor to define both the institutional interests of the court and plot the course to achieve these objectives. But would these interests remain congruent with the principled goals laid out in the Rome Statute by its member states? Over the long-term—absolutely. The ICC’s most ardent and principled supporters have long envisioned a court that would serve two functions: (1) to provide justice for victims of war crimes, crimes against humanity, and genocide necessary to facilitate postconflict peace and reconciliation; and (2) to serve as a deterrent against the commission of future atrocities by holding those most responsible to account for their crimes. If successful on both counts, the ICC stands to make a significant and lasting impact on global peace. In the short term, however, stand formidable obstacles. Two elements figure prominently for the OTP: (1) the ICC is a new institution that must overcome considerable inertia on the road to becoming a well-functioning and powerful force in international society, and (2) the ICC is a weak institution that depends on cooperation of states. Achieving success in the long term depends on suc-
cessfully navigating these challenges. As outlined in the following, these challenges create an institutional dependence on the UN Security Council that influences the manner in which the OTP pursues its mission to promote international justice.

To gain support and build legitimacy, new (and thus, relatively weak) institutions face considerable pressure to produce positive results quickly and achieve some measurable evidence of progress in the short run. For the ICC, this meant that becoming a functioning court involved more than gaining the requisite number of states to ratify the Rome Statute—it meant having defendants to prosecute. Thus, the choices regarding initial investigations and prosecutions would likely sacrifice some degree of principle in the name of pragmatism. This pressure toward pragmatism was evident in the ad hoc criminal tribunals that preceded the ICC, both of which depended on securing the cooperation of the states involved. Even though the International Criminal Tribunal for the Former Yugoslavia (ICTY) was based on a principle of decollectivization of guilt that pressed for prosecution of those most accountable for atrocities (i.e., leadership), it began by prosecuting the case of Dusko Tadic, a low-level official at the Omarska prison camp. This choice was restricted because hostilities were still ongoing at the time the court began operation and apprehending political or military leadership was simply not feasible. The ICC faced similar choices at the time it became operational. Given that prosecution is limited by the court’s *jurisdiction ratione temporis*, the OTP had to face the fact that defendants would likely come from ongoing situations where stability and order have not yet been achieved. In such situations, the OTP will likely only be able to try rebels apprehended by government forces (most likely, not the top leadership), or would need states to provide the military intervention necessary to stabilize the situation, apprehend political and military leadership, and turn these defendants over to The Hague for trial. For the latter, the court depends on the support of the UN Security Council.

Because the Rome Statute itself does not confer authority on the ICC to take coercive action, the OTP is dependent particularly on the UN Security Council. Under the UN Charter, the Security Council has the authority to legitimize coercive action to stabilize a situation through its Chapter VII powers. One example of the need for coercive action sanctioned by the UNSC to forward war crimes trials was the application of NATO airstrikes in the Bosnian conflict. Operation Deliberate Force played a decisive role in
equalizing the balance of power among warring parties, brought the political leadership to the negotiating table, and ultimately paved the way to the stability needed for the ICTY to conduct investigations, apprehend accused war criminals, and forward the process of adjudication. The situation in Libya is another prime example. The ICC was granted jurisdiction over the situation in Libya on February 26, 2011, to investigate crimes committed by Muammar Gaddafi against civilian protesters during the ongoing civil war. It is unlikely that the ICC’s arrest warrant for Colonel Gaddafi would bring him into the court’s custody absent international military support of the rebel forces. On March 17, 2011, the UN Security Council issued Resolution 1973, which provided the legal basis for international military intervention. The council’s action was instrumental to the fall of the Libyan regime and to the apprehension of Gaddafi. Unfortunately for the ICC, Gaddafi was executed by the mob that discovered him before he could be brought into custody to stand trial. The situation in Sudan serves as another example, though in the reverse. Though the OTP issued an arrest warrant for Sudanese president Omar al-Bashir, lack of international military intervention enabled the regime to maintain its hold on power. As a result, al-Bashir remains a free man.

As major world powers, the UNSC’s five permanent members (P5) can also help to gain cooperation that the court needs from states involved through the use of political pressure and suasion. For example, the United States used the threat of withholding a $50 million aid package to Serbia if they did not cooperate with the ICTY by arresting Slobodan Milosevic and turning him over to The Hague for prosecution.\footnote{27} Similarly, the European Union (EU) linked Serbia’s bid for accession to cooperation in securing the arrest of indicted war criminal Ratko Mladic. Following the apprehension and surrender of Mladic, French president Nicholas Sarkozy declared that the arrest represented “one more step towards Serbia’s integration one day in the European Union.”\footnote{28} Although the permanent members of the UNSC are not the only powerful states that can be called on to apply such political pressure, they are among the most important. Moreover, if P5 members seek to actively block ICC action in a given situation, it is highly unlikely that the court could successfully promote its mission. For example, U.S. opposition to the court under the George W. Bush administration produced a number of measures aimed at weakening the ICC. These included threatening to veto UN peacekeeping missions unless the UNSC provided a resolution
granting immunity for military personnel from non-ICC member countries, including the United States.\textsuperscript{29} It also included a massive diplomatic campaign to secure bilateral nonsurrender agreements from nations around the globe.\textsuperscript{30} Although the former chief prosecutor maintains that the court “managed” to operate in the face of this opposition, such obstacles clearly did not make the OTP’s job easier nor facilitate the pursuit of justice.\textsuperscript{31} In another example, both Russia and China vetoed a UN Security Council resolution to refer the situation in Syria to the ICC, denying the court jurisdiction to act where human rights organizations have documented massive human rights violations and atrocities.\textsuperscript{32}

Cooperation from the Security Council is also essential for the court to expand its jurisdictional reach. The Rome Statute limits the court’s jurisdiction to the territory and nationals of member states. Yet, jurisdictional limitations do little to quell the calls for justice for situations arising in states that are not party to the statute. Sudan (Darfur) and Libya are two significant examples. To answer the calls for justice, the court required referral by the UNSC under the authority afforded to it under the Rome Statute. The capacity for expanding its reach through UNSC referrals must be considered essential to addressing human rights violations even when they fall outside the ICC’s statutory jurisdiction. Though the former chief prosecutor maintains that the OTP has never lobbied the council for referrals, having a council willing to refer situations to the ICC is essential to its global mission to end impunity.\textsuperscript{33} Had it not secured a Security Council referral in the case of Sudan, the ICC would have remained a witness to a situation characterized by many as genocide.

In short, it is clear that the ability of the ICC to achieve its mandate for justice is greatly facilitated when it enjoys the support of the Security Council and can be greatly hampered if these states actively oppose it. Indeed, Moreno Ocampo remarked that at the time he took office he considered obtaining the cooperation of the Security Council to be “crucial” to the success of the court.\textsuperscript{34} The ICC already has the support of two of the five permanent members of the Security Council—Britain and France. Indeed, their high level of support for the court was on display when they served as key players in securing a Security Council referral for the situation in Sudan.\textsuperscript{35} Thus, it is rational for the OTP to pursue an institutional course aimed partially at forging better relations with the three remaining permanent members of the Security Council that are not members of the court: the United States,
Russia, and China (hereafter referred to as the P3). This is not to suggest that the OTP would be optimistic about all three joining the court. However, U.S. opposition to the court has softened under the Obama administration, suggesting that future membership is not beyond the realm of the possible. It is difficult to envision Russian or Chinese membership in the court in the foreseeable future; however, should the United States join the ICC, it would place some pressure on them to follow suit. At this point, it is highly unlikely that the OTP would seriously consider such an outcome. That does not mean that the OTP does not have a strong interest in bettering relations with these states, even if their eventual membership in the court is extremely unlikely. As outlined earlier, the P3’s role on the Security Council can either facilitate the court’s mission or create formidable obstructions in its path. Indeed, from its standpoint, the OTP does not necessarily need support—simply actions that do not obstruct the ability of the court to investigate and prosecute alleged crimes. In the case of UNSC Resolution 1593, the ICC was able to gain jurisdiction over the situation in Sudan by virtue of the Chinese and American decisions to abstain during the vote rather than to exercise their individual veto power. It stands to reason that, realistically, the OTP would seek to facilitate eventual U.S. membership in the court and to assuage Russian and Chinese opposition to the point that they do not actively obstruct its mission. Put differently, it is in the egoistic institutional interests of the ICC to carefully consider the interests and potential reaction of the P3 in charting a course of action for the court. Thus, it is rational to expect that these interests may be internalized in the process of defining the institutional interests of the ICC.

From this perspective, we now have reason to believe that there is a divergence of interests between the principals (states parties) and the court—at least in the short- to medium-time frame as the institution establishes itself, broadens its support base, and cultivates its legitimacy in international society. This theory of internalization suggests that the egoistic interests of the court take into account the preferences of powerful nonmember states whose cooperation it seeks to secure. In this sense, it goes beyond the scope of PA theory that suggests political dynamics are largely endogenous to the principal-agent dyad. This internalization theory does not propose that the prosecutorial strategy of the OTP is driven primarily by strategic interests and deference to the preferences of the P3. Instead, such internalized interests may serve as a significant intervening variable in the process of ad-
judication. Given this view, we would expect prosecutorial strategy to be first and foremost driven by an interest to respond to the situations characterized by the gravest violations of international law. However, we would also expect the court to act much more cautiously when situations involve the strategic interests of the P3. Specifically, this means that the OTP would be less likely to move forward in cases involving high strategic value to any members of the P3. Moreover, we would also expect the process of investigation to move more slowly where P3 interests are vested. These hypotheses are tested using both qualitative and quantitative methods of analysis, and this research develops and draws on an original data set that includes both legal and political variables.

Research Design

Creating an appropriate research design to test these hypotheses is challenging. The first involves deciding on the unit of analysis. The unit of analysis used in this chapter is the “situation”—generally defined in terms of the geographic location where events took place, but also including a temporal context. Although the ICC prosecutes individuals rather than states and charges are specific to particular instances of atrocities committed, the OTP has made it clear that initial decisions to act are done in consideration of situations, not specific events within them. Thus decisions are also not predicated on the actions of individuals who could eventually face prosecution by the court. A second challenge involves deciding which aspect of the process of adjudication to focus on. Adjudicating possible crimes committed in a given situation involves numerous steps. Key among these is the decision to launch a formal investigation after completing a preliminary investigation of a situation. From the standpoint of responding to calls for justice, little political capital is lost by the OTP on the decision to open a preliminary investigation. Information obtained during this process remains confidential, and unless a formal investigation is launched, no arrest warrants will be issued. More importantly, the OTP exercises little discretion with regard to preliminary investigations. As a matter of policy and practice, the OTP will open “a preliminary investigation of all situations that are not manifestly outside the jurisdiction of the court.” In contrast, the decision to open a formal investigation involves much more discretion on the part of the OTP. Moreover,
the decision to launch a formal investigation performs two significant signaling functions: (1) it suggests that sufficient evidence exists to warrant further action by the court, and (2) it establishes a firm commitment by the OTP to move the process of adjudication further. Though doing so does not bind the OTP into seeking arrest warrants, closing down the adjudication process at this point would signal that the OTP misread the initial findings and that the expense incurred through the formal investigation was squandered. In short, it would have a significantly negative effect on the legitimacy of the court. Therefore, the dependent variable used here is the decision by the OTP to establish (or the failure to establish) a formal investigation. The universe of cases comprises all situations where the court has opened a preliminary investigation, the necessary precursor to the establishment of a formal investigation. During the process of a preliminary investigation, the OTP determines whether the court has jurisdiction over a given situation.

Although the choice to focus on the decision to open a formal investigation makes much more sense than focusing on preliminary investigations, it presents formidable challenges in terms of research design. Among the most vexing is the size of the universe of cases—in this case nineteen situations under review by the court. Researchers who seek to explain general patterns of ICC behavior face a “Goldilocks problem”—the universe of cases appears too small to rely solely on multivariate regression analysis, but too large for an intensive qualitative analysis encompassing all cases. Moreover, qualitative analysis likely would rely largely on the statements of key individuals involved in the decision-making process. It is extremely unlikely that anyone in the OTP would acknowledge that political considerations influence their decisions. This chapter attempts to address the Goldilocks problem by carefully employing elements of both quantitative and qualitative methods of analysis. Two key independent variables figure prominently: gravity and P3 strategic interests. Because neither is concrete, substantial qualitative analysis is employed to operationalize each. To address the question of what factors shape the decision to begin a formal investigation (or not), the analysis begins with a qualitative inspection of the relationship between gravity and outcomes regarding formal investigation, as well as the relationship between strategic interests and outcomes. Basic probability analysis is highly suggestive, but does not allow for possible interaction with other potentially significant variables. Thus, this qualitative evidence is supplemented with probit regression analysis. To address the second question—which factors
determine the speed in which the court moves from preliminary to formal investigation—a similar mixed-methods approach is used. Survival analysis is supplemented with a qualitative examination of outcomes when different modes of referral are employed. For the quantitative analysis, this chapter utilizes an original data set that includes both constant and time-varying variables with situation-month observations. Observations begin for the month in which a preliminary investigation is established and run until the month that either a formal investigation is begun or June 2013. The following sections describe the legal and political variables employed in the analysis.

**Legal Factors**

One common theme in the literature suggests that support for international criminal courts is a function of a state’s commitment to liberal principles of human rights and democracy. From this perspective, we might expect that democracies would be more inclined to prosecute crimes covered by the Rome Statute within the domestic court system. The level of democracy can thus serve as a proxy for complementarity—the principle that the ICC should not be the primary venue for prosecution, but rather a court of last resort. Thus, one might expect that the OTP would be less likely to move aggressively in more democratic countries. I operationalize “democracy” using the Freedom House Index.

Another likely legal factor involves a judgment on whether events that occurred in a given situation are severe enough to warrant ICC involvement. Indeed, the Rome Statute charges the ICC to prosecute the most serious international crimes. Of course, determining a suitable measure for such a variable is challenging. Given that many of the crimes the ICC is charged with adjudicating involve atrocities committed against noncombatants, using civilian deaths as a proxy for conflict intensity is initially appealing. However, this variable is problematic for several reasons. First, many of the contemporary conflicts marked by atrocities and followed by calls for international justice have been intrastate rather than interstate—either civil wars or ethnic conflicts. Are rebels and their supporters to be defined as “military” or “civilian”? Second, estimates of civilian casualties are often biased to support political agendas, or what Taylor Seybolt, Jay Aaronson, and Baruch Fischhoff refer to as “efforts to produce official ignorance.” They
add, counting civilian casualties “is an area where politics is often involved in the most pernicious way.” Researchers are left with a combination of cases that lack data on civilian casualties and cases characterized by substantial differences in estimates. Though not an ideal measure, I instead employ aggregated battle-related deaths as an alternative measure to gauge the severity of a conflict, drawing primarily on the Uppsala Conflict Data Program data set. This measure captures both military and civilian casualties recorded in a given situation.

Some readers, particularly legal scholars, may object to using the scale of violence alone as a measure of the significance of a given situation. The criteria put forward by the OTP suggest that the gravity of a situation goes beyond consideration of scale and includes consideration of more subjective factors such as “nature, manner, and impact of the alleged crimes committed in the situation.” Yet, the statute provides little precise guidance regarding how the “gravity threshold” is to be applied. Margaret de Guzman points out that “in light of the serious repercussions of labeling an international crime ‘grave,’ one might expect the concept of gravity to have reasonably well-defined and accepted content in international law. In fact, the opposite is true. Individuals who craft, apply, and write about international criminal law invariably reference the seriousness of the crimes at issue but rarely specify what they mean.” This lack of specificity had led to some glaring inconsistencies. For example, the chief prosecutor argued that he was hesitant to open a formal investigation into possible crimes committed in Iraq because they involved a small number of victims, yet he was willing to open a preliminary investigation into the situation in Korea that involved a similarly low volume of casualties. In rationalizing his decision on Iraq, the chief prosecutor writes, “The alleged crimes committed by those nationals of States Party in Iraq appeared isolated and did not meet the required gravity threshold.” Because the statute does not offer a precise means of determining the level of gravity, finding an appropriate measure to be used in this analysis is problematic. Consideration of factors such as the nature, manner, and impact of crimes is inherently subjective. Utilizing the stated assessments of the chief prosecutor is inappropriate because, as a variable, such remarks would suffer from endogeneity.

One solution was offered by Allison Danner, who argues that gravity could be reflected in a hierarchy of crimes. Noting that a “hierarchy of crimes seems to emerge from the case-law of the ICTY,” she suggests that genocide
is the most grave and points out that the International Criminal Tribunal for Rwanda (ICTR) frequently referred to it as the “crime of crimes.”

Citing similar references in the case law drawn from the ad hoc tribunals, she further suggests that war crimes can be considered “lesser crimes” (i.e., less grave) than crimes against humanity. Thus, gravity could be measured on a 1–3 scale. The problem with operationalizing gravity in this manner is that it applies to individual acts, not necessarily to situations as a whole. Most of the situations brought to the attention of the court show evidence of crimes across the hierarchy of crimes; thus we are left with little to differentiate level of gravity between situations. In other words, garnering a subjective assessment measure from the OTP suffers from endogeneity, while utilizing a categorical hierarchy loses precision at the level of the situation.

This chapter addresses these limitations by using original survey data drawn from sources with backgrounds and experience commensurate with those of the chief prosecutor. Twenty of the world’s most noted international legal scholars/practitioners drawn from five continents were surveyed, selected because of their extensive expertise in the area of international criminal justice. Survey participants were asked to gauge the gravity of situations under investigation by the court on a scale of 1–10 (10 being the most grave), using only the ICC’s published criteria as guidance in their determination. The mean score for each situation, as reflected in the surveys received, was used in the analysis.

**Political Factors**

The high degree of discretion given to the OTP under the statute raises questions regarding whether external political factors influence the judgment and action of the prosecutor. The broader literature on the court prompts us to consider several likely factors.

One possible political factor could involve public pressure. This argument is in line with those who cite the influence of global civil society on the creation of the court in the first place. From this perspective, one might predict that increased levels of public attention on a given situation will increase the probability that the court will establish a formal investigation. This chapter utilizes original data compiled from content analysis of news stories on situations considered by the court that were published in major world publications from
July 2002 through June 2013. Stories on situations under review by the ICC were analyzed to confirm that they involved aspects germane to the court (i.e., war, casualties, deaths, etc.) as opposed to other news from the country (e.g., the economy). The data set included 190,462 news stories published in major world publications, and observations were made on a country-month basis.

Nongovernmental organizations may also serve to create political pressure to act. Numerous scholars have documented the role that NGOs played in the process leading up to the signing of the Rome Statute, and the number of such organizations has grown substantially over time. Many NGOs acknowledge that they actively press for ICC action by providing information to the OTP via communiques. Moreover, the OTP has made clear that it pays close attention to the reports that groups such as Amnesty International and Human Rights Watch generate. In describing the preliminary investigation on the situation in Iraq, the chief prosecutor noted that “we conducted an exhaustive search of all readily-available open source information, including media, governmental, and non-governmental reports. Significant additional material collected from open sources includes, among others, the findings of Amnesty International, Human Rights Watch, Iraq Body Count, and Spanish Brigades against the War in Iraq.”

To measure the level of pressure human rights NGOs direct toward the OTP, the number of published press releases and reports produced regarding a specific situation were counted. These data are drawn from the archive established by the Coalition for the International Criminal Court (CICC), an NGO that serves to bring together a wide array of organizations that support an active role for the ICC in dealing with human rights issues. For the period 2002–13, I reviewed 2,399 press releases and reports that appear in the CICC archive and recorded the number that applied to each situation where a preliminary investigation was opened by the OTP.

Lastly, the internalization theory posed here generates the final political variable tested in this analysis: the strategic interests of the P3 vested in a given situation. What constitutes “strategic interests” in the sense used here? Defining this term is an inherently subjective enterprise and is challenging to operationalize because no single measure can capture it adequately. For this reason, this chapter employs qualitative analysis of bilateral relationships between individual members of the P3 and countries where primary investigations have been established by the ICC. The chapter attempts to utilize
the most parsimonious measure possible in making strategic interests operational. Thus “strategic interests” in this setting is defined in terms of the combination of three primary components: (1) the level of involvement in a situation, (2) the strategic military value, and (3) the significance of economic ties.

Level of involvement reflects the degree to which a member of the P3’s actions contributed to the commission of atrocities—either directly or indirectly. An example of direct involvement would be Russia’s actions in Georgia in summer 2008. On August 6, 2008, Georgian military forces launched an assault in South Ossetia. The following day, Russian forces responded in kind, opening a week-long military clash before a cease fire was established on August 15. Human Rights Watch noted that “the week of open conflict, and the many subsequent weeks of rampant violence and insecurity in the affected districts, took a terrible toll on civilians, killing hundreds, displacing tens of thousands, and causing extensive damage to civilian property.”

Although Russia was not a member of the ICC, the court could try Russian defendants because the alleged crimes were committed on the territory of a member state, putting the Russian military and its political leadership at risk. In general, where the level of P3 involvement is high, the possibility of OTP prosecution presents a risk to leadership in those countries should the ICC proceed to a formal investigation. In addition to direct involvement in the commission of prosecutable crimes, indirect linkages may also increase the strategic importance of a given situation.

Indirect actions might be financial or military support for those who perpetrated atrocities in a given situation. One example is U.S. support for Colombia. The contemporary centerpiece of U.S. policy on Colombia is manifest in Plan Colombia, an antinarcotics program supported by U.S. aid to Colombian military and police operations. The latter included government efforts to combat the insurgency of the Fuerzas Armadas Revolucionarias de Colombia (FARC). The levels of aid afforded through Plan Colombia made it the third-largest recipient of U.S. foreign aid and the largest in the Western Hemisphere. In 2006, U.S. assistance to Colombia amounted to an estimated $728 million, approximately 80% of which was military and police assistance. In addition to monetary support, the United States provided military personnel to train local military and police forces. Amnesty International has documented that the Colombian government’s struggle with the FARC insurgency and the narcotics industry has been marked by torture,
massacres, “disappearances,” and killings of noncombatants. Moreover, “widespread collusion between the armed forces and paramilitary groups continues to this day.” Critics have argued that “as a consequence of United States anti-narcotics policy and the War on Drugs in general, the U.S. government is both directly and indirectly implicated in the growing human rights crisis in Colombia.” Amnesty International adds, “The US has continued a policy of throwing “fuel on the fire” of already widespread human rights violations, collusion with illegal paramilitary groups and near total impunity.” Judging by U.S. actions, policymakers are aware of how U.S. support may be indirectly contributing to atrocities in Colombia. In July 2003, the Bush administration froze military aid to Colombia unless it signed a bilateral immunity agreement with the United States. As a supporter of the ICC, Colombia initially refused to do so. However, as U.S. pressure mounted, it relented and signed an accord on September 17, 2003. Sensitivity to potential prosecution of U.S. personnel is certainly exacerbated in the Colombian case because U.S. policies could be directly or indirectly linked to crimes prosecutable by the ICC. Other examples of indirect support include Russian support for Venezuela and Chinese support for North Korea. Although cases involving indirect involvement are a much lower risk in terms of vulnerability to prosecution, information made public during the investigation and possible trials could pose a substantial threat to a P3 member’s soft power. Among the three components of strategic interests employed here, level of involvement is likely the most sensitive. For this reason, it is weighted double relative to the other two measures included in the composite strategic-interests variable.

The second component used to gauge the level of strategic interests vested in a given situation involves its military value. Strategic military value considers multiple factors, including alliance relationships and the regional military importance of the relationship. In addition to whether an alliance relationship exists for a given dyad, the qualitative nature of the relationship was carefully considered when determining the overall strategic value. These include the so-called special relationships that countries may have. A prime example of where both elements figure prominently is the U.S. alliance relationship with Israel. Its strategic military importance is related to both its position in the region as well as to the qualitative nature of the relationship. Israel is the primary ally of the United States in the Middle East. As noted
by the U.S. State Department, “Commitment to Israel’s security has been a cornerstone of U.S. policy in the Middle East since Israel’s creation.” In support of this key ally, the United States provides over $3 billion in security assistance annually. Since World War II, Israel has received more aid from the United States—primarily military aid—than any other country. The value of the American alliance with Israel is sometimes likened to the special relationship between the United States and Great Britain. Because U.S. presidents played a key role in founding the Jewish state after World War II, they have frequently pointed to the U.S. relationship with Israel as exceptional among its allies. Bill Clinton remarked, “America and Israel share a special bond. Our relations are unique among all nations.” This sentiment was echoed by his successor, George W. Bush, who declared, “The alliance between our governments is unbreakable, yet the source of our friendship runs deeper than any treaty.” Most recently, President Obama reaffirmed the American position: “A strong and secure Israel is in the national security interest of the United States not simply because we share strategic interests . . . America’s commitment to Israel’s security flows from a deeper place—and that’s the values we share.” Another example of a particularly vital strategic alliance is the one between China and North Korea. China has what could be considered a special relationship with North Korea. China has been North Korea’s closest ally ever since Chinese troops entered the Korean War in 1950. An alliance relationship was formalized in 1961 with the signing of the Sino-North Korean Treaty of Friendship, Cooperation, and Mutual Assistance that articulated a Chinese commitment to defend North Korea in case of military attack. It has steadfastly provided military and economic support for the autocratic North Korean leadership across several regimes, including Kim-II Sung, Kim Jong-II, and Kim Jong-Un. For the Chinese, the Democratic People’s Republic of Korea (DPRK) provides a buffer between its borders and democratic South Korea.

The regional importance of a bilateral relationship need not entail a special relationship, but also may elevate the relative significance of the alliance. One example is Russia’s alliance with Venezuela. Since 2001, Russia has sought to increase its influence in the Western Hemisphere by strengthening its ties with Venezuela. Venezuela has been one of the largest importers of Russian-made weapons, the two countries have carried out joint military exercises, and Russian military forces have utilized Venezuelan bases. A
bilateral commission meets regularly to explore ways to deepen the relationship. In mid-2013, a major Russian oil company and Venezuela’s state-owned oil firm announced plans for a joint venture designed to exploit a new field.

In all, the Russia government calculates that it has invested more than $20 billion in Venezuela. The significance of the relationship is increased because of Russia’s relative lack of political influence in the hemisphere.

Economic ties are the third component considered when assessing the strategic value of a given situation. The significance of economic ties reflects the relative importance of the relationship and considers the country’s position among the bilateral trading relationships of P3 countries. The level of exports from the P3 member country is given priority over level of imports, except in cases involving strategic resources, especially oil. In several instances, military and economic interests vested in a given relationship overlap considerably. A prime example includes the People’s Republic of China’s (PRC’s) relationship with Nigeria. China’s interest in close relations with Nigeria is a function of its oil resources as well as an important step in the PRC’s grand strategy to increase economic and political influence on the continent. In 2006, Chinese firms signed a multibillion dollar deal to revitalize Nigeria’s railway.

Chinese state-owned oil companies have received major concessions and have invested significantly in the country’s oil sector. In 2012, the volume of bilateral trade between China and Nigeria reached $10.5 billion, making Nigeria China’s third-largest trading partner.

Table 4.1 lists the strategic interest values for each component as well as the combined value used in the analysis. Along each component, situation-countries are coded on a 1 (low) to 3 (high) scale, with values doubled for the level of involvement component. The total strategic value of a relationship is determined by a sum of these scores, which are then converted back to a 1–3 scale to correspond with low, medium, and high strategic value. Several of the situations as identified by the ICC actually involve other states of strategic interest to one of the P3 members. Because Israel is the object of the complaints stemming from situations identified as “Palestine” and “Comoros,” strategic interests are considered involving Israel. Similarly, the situation in Korea involves the potential prosecution of defendants from North Korea (a non-ICC member state). When determining the strategic interests involved, the object of prosecution was used rather than the situation as identified by the ICC for these cases. The relevant state in terms of strategic interest is noted parenthetically.
Gravity and Strategic Interests

The empirical evidence provides strong support that the gravity of a situation and the level of P3 strategic interests vested in a given situation have a strong influence on the choices made by the OTP, both the choice to pursue a formal investigation and the swiftness with which they do so. A simple summary of court actions when considering these two variables provides initial support for the hypotheses offered here. As shown in table 4.2, formal investigations have been established in 75% of the cases deemed to reflect the gravest violations of crimes covered under the Rome Statute. Consistent with the hypotheses, both of the situations where formal investigations have not been established involve cases with high or medium levels of strategic importance to a member of the P3. Though striking, this cursory analysis is a
rather blunt instrument on which to make substantive judgments regarding causal inference. Thus, additional quantitative tools of analysis were utilized to provide additional support and clarity.

A series of probit regressions were performed to check their effect on whether the court established a formal investigation across cases.\textsuperscript{75} Probit regression tests the probability that an observation with certain characteristics (i.e., defined by the covariates included) will fall into either of the two outcome categories. The results of the probit regression can then be transformed to establish their marginal effect on outcomes. Marginal effects show the effect that a one-unit change in the covariate will have on the probability that a formal investigation will not be established for a given situation. Regressions were run with only two covariates at a time because of the small number of observations available for analysis. The probit results provide further evidence that the decision regarding whether to open a formal investigation is strongly influenced by the level of gravity witnessed in a given situation ($p = .015$). Moreover, the evidence suggests that strategic interests also play an important role in outcomes. Strategic interest is statistically significant ($p = .016$), whereas most other variables have little statistical significance on outcomes. The results of the probit regression become more meaningful when converted into their marginal effects, as shown in Table 4.3. In the case of gravity, a one-unit change in the level of gravity increases the probability that a formal investigation will be established by roughly 30\% ($\text{d}y/\text{d}x = 0.317$). Conversely, for each unit increase in the strategic value of a given situation, the probability that a formal investigation will be established \textit{decreases} by over 50\% ($\text{d}y/\text{d}x = 0.509$). As reflected in figures 4.1 and 4.2, the more grave the

<table>
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<tr>
<th>Situation</th>
<th>Gravity</th>
<th>Formal Investigation</th>
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<tbody>
<tr>
<td>Democratic Republic of Congo</td>
<td>8.5</td>
<td>Yes</td>
</tr>
<tr>
<td>Sudan</td>
<td>8.5</td>
<td>Yes</td>
</tr>
<tr>
<td>Uganda</td>
<td>7.3</td>
<td>Yes</td>
</tr>
<tr>
<td>Nigeria</td>
<td>5.8</td>
<td>No</td>
</tr>
<tr>
<td>Central African Republic</td>
<td>5.5</td>
<td>Yes</td>
</tr>
<tr>
<td>Afghanistan</td>
<td>5.3</td>
<td>No</td>
</tr>
<tr>
<td>Cote d’Ivoire</td>
<td>5.3</td>
<td>Yes</td>
</tr>
<tr>
<td>Libya</td>
<td>5.3</td>
<td>Yes</td>
</tr>
</tbody>
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situation, the more likely a formal investigation will be established, whereas
the more strategic importance P3 countries place on a given situation, the
less likely a formal investigation will be established.

The probit analysis provides further support for the qualitative empirics
that P3 strategic interests shape institutional choices regarding the selection
of situations to investigate. It does not suggest that the court is beholden to
or captured by the P3. Rather, it suggests that the court is more likely to es-

tablish formal investigations for those situations deemed most grave, but also
takes into account the perceived interests of powerful states whose support it
would like to gain. This would be consistent with a principled, yet pragmatic
prosecutorial strategy. However, a closer look at the data gives reason for
cautions with regards to the application of the gravity threshold. Figure 4.3
shows patterns drawn from the results of the survey conducted regarding
situational gravity. The graph plots the range of gravity levels assigned to
a situation across the universe of survey respondents as well as the mean score
used in the quantitative analyses. Although the gravity variable was statisti-
cally significant in the probit model, figure 4.3 shows the degree of variation
in respondents’ assessment of the gravity of a given situation. For many of the
situations there was a significant degree of disagreement among respondents

<table>
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<tr>
<th>Formal Investigation</th>
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<tbody>
<tr>
<td>P3 Strategic Interest</td>
</tr>
<tr>
<td>−0.510**</td>
</tr>
<tr>
<td>(0.172)</td>
</tr>
<tr>
<td>NGO</td>
</tr>
<tr>
<td>−0.00484</td>
</tr>
<tr>
<td>(0.0170)</td>
</tr>
<tr>
<td>Gravity</td>
</tr>
<tr>
<td>0.317</td>
</tr>
<tr>
<td>(0.266)</td>
</tr>
<tr>
<td>Battle Deaths</td>
</tr>
<tr>
<td>−0.0000701</td>
</tr>
<tr>
<td>(0.0000473)</td>
</tr>
<tr>
<td>Media Coverage</td>
</tr>
<tr>
<td>0.000212</td>
</tr>
<tr>
<td>(0.000171)</td>
</tr>
<tr>
<td>HR Reputation</td>
</tr>
<tr>
<td>0.0782</td>
</tr>
<tr>
<td>(0.0713)</td>
</tr>
</tbody>
</table>

Note: Marginal effects; standard errors in parentheses (d) for
discrete change of dummy variable from 0 to 1: * p < 0.05,
** p < 0.01, *** p < 0.001.
Figure 4.1. Effect of increases in gravity on probability of formal investigation

Figure 4.2. Effect of increases in strategic interests on probability of formal investigation
regarding the level of gravity. In particular, variation was particularly high for the cases of the Central African Republic, Colombia, Iraq, Kenya, and Nigeria, each having a range of at least 5 scale points between the low and high values. However, the mean in many cases clearly deviates from the median, suggesting that the size of the range across situations is a function of outliers in the survey pool. On the one hand, that should give some confidence that the correlation between assessments of gravity and the choices made by the OTP with regard to investigations is indeed robust. However, the presence of such significant outliers, combined with the institutional discretion afforded to the OTP, also suggests that there is the potential for significant deviation regarding the assignment of situational gravity, depending on the perspective of a given individual holding the office of chief prosecutor.

Do these factors also affect the speed of the adjudication process? To answer this question, survival analysis was used to examine likely legal and political variables that may affect outcomes. The analysis begins with a simple test of how strategic interests affect the process of adjudication. Figure 4.4 presents the Kaplan-Meier (K-M) “survival function” for situations involving low, medium, and high levels of strategic interest to one or more of the P3.76
Each line represents the probability that an inquiry open for a given number of months “survives” to the next month (i.e., that the ICC does not open a formal investigation at that time). The graph reinforces the qualitative results regarding the decision by the OTP to open a formal investigation: situations that have high (level 3) strategic value to the P3 have a 100% probability that a formal investigation will not be established. Of course, this could change because most still have open primary investigations underway. However, even if the OTP eventually decides to open formal investigations for some of these situations, the difference in duration between those with high strategic value and those with lower strategic value is striking. Figure 4.4 illustrates the declining rate of survival as the strategic value of a situation decreases. Put simply, as the strategic value of a situation declines, the probability that the OTP will open an investigation rises sharply, and the time between the preliminary investigation and start of a formal investigation is reduced. To test whether the differences in survival rate reflected in the K-M curve is statistically significant, I ran a nonparametric log-rank test. The results of the log-rank test reveal that the results shown in figure 4.4 are statistically significant ($p = 0.019$).
To gauge the significance of the strategic-interests variable when other covariates are included in the analysis, I utilized Cox proportional hazard regression analysis. The Cox proportional hazard model is a type of event history analysis that in this case tests the extent to which the covariates influence the rate that a formal investigation will not be established. The Cox regression produces a hazard ratio, which is the relative probability of failure due to a one-unit increase in the value of the independent variable. To gauge how sensitive the effect of strategic interest is to the other covariates, I ran a series of bivariate Cox regressions, pairing strategic interest with each of the other covariates. The p-values from these regressions ranged from 0.04 to roughly 0.09, providing a measure of confidence that the effect of strategic interest is not sensitive to model specification. Next, a full model Cox P-H estimate was run that included NGO activity, gravity of the situation, number of battle deaths, amount of media coverage, and human rights reputation. The results listed in table 4.4 show that the only statistically significant variable is strategic interest (p = .05). The finding that gravity was not a

<table>
<thead>
<tr>
<th></th>
<th>Formal Investigation</th>
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<tbody>
<tr>
<td>P3 Strategic Interest</td>
<td>0.0251*</td>
</tr>
<tr>
<td></td>
<td>(0.0471)</td>
</tr>
<tr>
<td>NGO</td>
<td>1.034</td>
</tr>
<tr>
<td></td>
<td>(0.0596)</td>
</tr>
<tr>
<td>Gravity</td>
<td>1.950</td>
</tr>
<tr>
<td></td>
<td>(0.796)</td>
</tr>
<tr>
<td>Battle Deaths</td>
<td>1.000</td>
</tr>
<tr>
<td></td>
<td>(0.000126)</td>
</tr>
<tr>
<td>Media Coverage</td>
<td>1.002</td>
</tr>
<tr>
<td></td>
<td>(0.000929)</td>
</tr>
<tr>
<td>HR Reputation</td>
<td>1.904</td>
</tr>
<tr>
<td></td>
<td>(0.864)</td>
</tr>
<tr>
<td>N</td>
<td>19</td>
</tr>
</tbody>
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Note: Exponentiated coefficients; standard errors in parentheses: * p < 0.05, ** p < 0.01, *** p < 0.001.
statistically significant predictor stands in stark contrast with the results drawn from the probit regressions. This suggests that while gravity may be strongly correlated with the probability that a formal investigation will be established, it may not be highly correlated with the duration of preliminary investigations. However, given the small-\(n\) available for the full-model analysis, these results should be considered more suggestive than definitive. As such, additional empirical evidence is necessary to supplement these findings.

Another indicator that strategic interest exerts influence on the duration of the process of investigation can be seen when we consider the role of power in the reverse utilizing a qualitative approach. How does the court behave when it receives support from great powers, particularly members of the Security Council? Most of the current situations under review by the ICC were initiated either by member state referrals or by the OTP (\textit{proprio motu}) with authorization by a pretrial chamber. However, two situations, Sudan and Libya, were referred by the UNSC. The first situation referred by the Security Council was in Sudan, which granted jurisdiction to the ICC after passage of Resolution 1593 on March 31, 2005. Passage of the resolution was unanimous, although four Security Council members abstained, including two members of the P3—China and the United States. In this case, a willingness not to block the referral was sufficient support for the ICC to gain jurisdiction over the situation. The OTP opened a formal investigation only nine weeks later on June 6. The second situation was in Libya, which was referred to the ICC by the UNSC through Resolution 1970 on February 26, 2011. Resolution 1970 enjoyed stronger support of the P3, passing unanimously with no abstentions. The OTP opened a formal investigation just five days later on March 3. When comparing the assertiveness of the OTP’s response to situations across the different sources of referrals, we see clear patterns of behavior. Figure 4.5 shows the average time between the start of a preliminary investigation and the start of a formal investigation for the three sources of referrals. The average time between preliminary and formal investigations is roughly forty-five weeks for situations referred by states parties to the ICC, whereas those referred by the Security Council average only five weeks.

Although many factors may affect the speed of an investigation, the evidence suggests that the OTP may feel more confident in moving the process forward and making a stronger institutional commitment for situations where the UNSC has offered its support. This is also consistent with the strategic-interests hypothesis, but in the reverse. Where investigations may
clash with P3 strategic interests, the OTP has an interest to proceed cautiously. Where the court has the backing of the Security Council, the OTP is more inclined to pursue the case aggressively.

Many are loathe sacrificing principal at the altar of pragmatism, or worse, realpolitik: “In order for the International Criminal Court to build legitimacy over time, it must both act and be seen to act in a neutral way that transcends political pressures.”79 Similarly, Cherif Bassiouni argues, “The legitimacy of the ICC will not be sustained on the basis of occasional referrals based on political expediency but will depend on the consistency of its work.”80 This would certainly include political pressures that might underlie any sort of regional or racial bias. Some critics of the court have argued that its prosecutorial strategy is an extension of great-power bias against weak African countries.81 Similarly, others have suggested that powerful states have sought to coerce the court to comply with their interests, using direct influence through regular dialogue to pressure the OTP.82 If the legitimacy of the court is tarnished by questions regarding the OTP’s choices regarding which situations it investigates, not only will this potentially hamper its efforts to expand the number of states parties, but risks losing the hard-won support the ICC already has.

Although highly provocative arguments, the “regional bias” and “institutional capture” explanations of ICC behavior are extreme and do not take
into account the many non-African situations under preliminary investigation by the OTP or the fact that the current Chief Prosecutor is Gambian. Moreover, they face a formidable burden of proof unlikely to be met by the available evidence. The evidence presented here strongly suggests that great-power interests shape the behavior of the court, but there is no direct evidence that the OTP is beholden to the interests of powerful Western states as some critics have claimed. Rather, a more nuanced explanation of court behavior is gained by examining how the egoistic institutional interests of the OTP are influenced—not determined—by the strategic interests of some important external actors. This is not a case of institutional capture, but rather, reflects the internalization of external preferences. It is a reflection of the challenges facing a new, relatively weak institution that depends considerably on receiving cooperation from states, particularly powerful ones. The theoretical framework forwarded here reveals how the interests of powerful nonmember states (and thus, not principles under the more limited PA framework) can be taken into account by the OTP in defining institutional interests and consequently shaping prosecutorial strategy.

The underlying theory and resultant findings are significant to our understanding of the ICC and may also be of interest to those studying other international courts or international institutions more generally. First, they provide a theoretical explanation for the behavior of the ICC and the decisions made by the OTP regarding situation selection in accordance with its prosecutorial strategy. The theory of prosecutorial strategy forwarded here is strongly supported by the available empirical evidence—both quantitative and qualitative. Although there was no attempt to account for initial actions into a situation (i.e., opening a primary investigation), the internalization hypothesis does illuminate a powerful intervening variable in the process of investigation and adjudication by the court. The law may be clear on a principle, but how it is pursued in practice by the court offers considerable latitude to the OTP that can strongly shape the legal process. The evidence presented here illuminates factors that may press the OTP to proceed more cautiously in some cases (those where P3 interests are involved) and more aggressively in others (where referral came from the authority of the UNSC). More broadly, the theoretical framework and the evidence drawn from the ICC reveal how behavior can be affected by institutional dependence on external actors, and how the preferences of these actors may be internalized into the decision calculus—even in legal institutions where procedure is
clearly articulated in law. For this reason, these findings may be of interest to those interested in the functioning of international legal institutions more broadly, not just on the ICC.

These findings should also be of interest to those seeking to understand international institutions more broadly. It unpacks the ways that new or weak institutions may be more vulnerable to the influence of great-power realpolitik. This influence need not be the product of direct suasion by these powerful states, but rather as a function of the dependence such institutions have on them and their institutional interests to garner their support. Such insights would seem applicable to institution building across issue areas, including international trade, finance, and environmental protection. Moreover, understanding these processes may facilitate the creation of more successful international institutions charged with addressing crucial global challenges.

Lastly, normative implications can be drawn as well. Idealists critical of the court’s apparent consideration of great-power interest—particularly among those who are not even members of the court—consider such actions as anathema to the pursuit of justice. Others argue for a more pragmatic course: “The Prosecutor should therefore establish and adhere to a long-term policy which is widely perceived as acceptable, while carefully balancing the need for political support with the need to be perceived as independent and credible.”83 The evidence presented in this chapter suggests that the OTP has done just that and has navigated a very difficult course between principle and pragmatism. The significance of gravity in the series of analyses performed here suggests that the OTP has indeed remained true to the court’s mission to prosecute the most serious international crimes. Thus it would seem that the OTP acts in accordance with the wishes of the states parties.84 On the other hand, the consistently high significance of strategic importance reflects institutional awareness of the very practical dependence the court has on powerful states to successfully prosecute cases and bring the architects of mass atrocities to justice. Moreover, the ability of the court to expand its jurisdictional reach and global influence is dependent on gaining the support of three of its most powerful nonmember states—the United States, Russia, and China. The road to achieving its institutional mandate for international justice requires that the OTP be pragmatic as well as idealistic.