THE POLITICS OF INTERNATIONAL JUDICIALISATION

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This paper takes a fresh look at the two dominant approaches to international judicialisation - liberal institutionalism and constructivism - in the light of three cases studies from the periphery of the current research agenda. The empirical foundation for these two theories is often (but not always) drawn from research on the WTO Appellate Body and the European Court of Human Rights (ECHR). It tends to assume that key actors routinely distinguish between law and politics in these areas.

In this paper, we firstly describe liberal institutionalist and constructivist theories of international legalisation. We then propose a conceptualisation of international legalisation in three stages: the creation of a treaty or legal regime, states’ commitment to it and finally their compliance with it. We draw here on H.L.A. Hart’s Concept of Law (1961) and, in particular, his distinction between the internal and external aspects of rules. Lastly, we move the gaze to Sub-Saharan Africa, where key actors’ distinctions between law and politics have proved less rigid, and where solutions to domestic political problems are often sought in the international arena. Our conceptualization is applied to cases involving Zimbabwe and the Southern African Development Community (SADC) Tribunal, and Uganda and Kenya’s involvement with the International Criminal Court.
We argue that constructivist and liberal institutionalist theories describe particular rather than general phenomena. They fail to explain why countries such as Zimbabwe, Kenya and Uganda become involved with international judicial processes.

**Judicialisation**

‘Judicialisation’, like many of its associated terms, is often used loosely, and to denote a wide range of phenomena (Blichner and Molander 2008). In this paper, following standard usage, domestic and international politics are deemed *legalised* when laws and legal bureaucracies come to govern hitherto political interactions, actions and decisions. They are deemed judicialised when judges and courts become key decision-makers in legalised issue areas (see e.g. Brake and Katzenstein 2013). The transnationalisation or internationalisation of domestic politics, and the domestication of international politics often accompanies these two interlinked processes.

**The liberal institutionalist study of judicialisation**

Liberal institutionalists study international legalization and the judicialization of politics with methods from comparative politics, IR and international law. Their approach makes two central assumptions. International law, firstly, is primarily, but not exclusively, constraining on states. As stated by Goldstein et al. (2000, 387) ‘Fully legalized institutions bind states through law: their behavior is subject to scrutiny under the general rules, procedures, and discourse of international law and, often, domestic law.’ The second assumption holds that states are rational utility-maximising entities which therefore seek to ensure that their legal commitments correspond to their national interests.

From these two assumptions follow a number of key puzzles. Given that judicialization entails a transfer of control and sovereignty from governments to courts, why do states increasingly judicialize? Moreover, why do states comply with or ratify international law when there is little or no enforcement of the law, or where there are strong interest-based incentives to defect? These puzzles lead to a focus on institutional design (Abbott et al. 2000; Goldstein et al. 2000), and the theoretical development of rationalist mechanisms that explain the dynamics of judicialisation. International law is used to solve cooperation or coordination problems (Bradley and Kelley 2008),
to bind future governments by ‘locking-in’ policies and/or institutions (Moravcsik 2000), or as a means to communicate credible commitments to domestic groups (Simmons and Danner 2010).

With regard to the first stage of judicialisation, the creation of law, one strand of liberal institutionalism tends to deploy the term legalisation in a narrow and specific sense. They define it in terms of its ‘key characteristics of rules and procedures, not in terms of effects’ (Abbott et al. 2000, 402). These characteristics are the ‘obligation’ to be bound by the rules of the institution, the ‘precision’ of these rules, and the ‘delegation’ of authority to courts or other judicial bodies (Abbott et al. 2000, 402). Another strand of scholarship seeks to explain why states legalise or judicialise their affairs. As Simmons (2013, 54) argues, ‘[t]reaties… don’t have arms, legs, brains or iPhones. They can’t do anything. They must be used by purposive agents that have the motivation to leverage them to achieve their goals.’ According to this strand, states want to constrain their own and other governments. The new kind of relationships enabled by legalised politics offer a number of functions which they desire: The coordination of trade, the legitimate monitoring of compliance, the reduction of transaction costs, the adjudication of disputes, and the expansion of the grounds for compromise; in sum, the subjection of their relationships to rules which reflect their shared problems and interests.

Liberal institutionalists often conceptualise the second stage of judicialisation, the commitment to law, as the ratification of a treaty or the delegation of authority to an international judicial body. Since the creation of new regimes is determined by state interest, the ratification of international agreements is largely seen as unproblematic or as resulting from domestic pressures. In analyzing commitments to international law, these scholars interpret their data with an analytical lens that weighs expected or realized benefits against expected or realized costs. As Simmons put it, ‘states make commitments in order to realize joint future gains’ (2008, 198). According to this approach, states only invest time and resources in those international agreements which they have at least some interest in complying with (Chapman and Chaudoin 2013; Von Stein 2005, 611).

The last stage of judicialisation is compliance with the new legal regime. To account for compliance, liberal institutionalists focus on the role of reputation and reciprocity, including the use of domestic political mechanisms by domestic audiences (Simmons 2008, 201). Simmons for instance, argues that in terms of monetary affairs ‘governments make commitments to further their
interests and comply with them to preserve their reputation for predictable behaviour in the protection of property rights’ (Simmons 2000, 820; but see Von Stein 2005). Because of their rationalist methodology, liberal institutionalists generally infer compliance patterns from the presence or absence of a co-variant relationship between a commitment to a particular law and indicators of the desired or proscribed behaviour.

**Constructivist study of judicialisation**

Both of these usages, however, are narrower than those preferred by constructivists. Their studies of similar phenomena deal not only with the design of new institutions and instruments, but also with their ratification, and eventually their elicitation of compliance (cf. Finnemore and Sikkink 1998; Risse, Ropp and Sikkink 2013). Whilst institutionalists have sought to explain why states choose to ‘legalise’ existing areas of co-operation, or to ‘judicialise’ existing forms of domestic political competition, constructivists have focused on the creation of new issue areas - most especially those inexplicable by reference to states’ interests. These issues areas, typically, are ‘literally created’ or ‘framed’ by ‘norm entrepreneurs’ in civil society (Sikkink 2002, 44). (This framing work is constrained by the ‘material world’ and the ‘imagination’, but not in any sense easily amenable to theoretical generalisation (Sikkink 2002, 39).) After being framed, these new issue areas then form the basis for civil society’s lobbying of liberal states and international organisations (e.g. Sikkink 2004). Persuasion re-configures interests and these bodies are subsequently instrumental in the design and creation of appropriate legal regimes.

In the second stage of judicialisation - commitment - these liberal states typically ratify new regimes at an early stage. Authoritarian states by contrast, initially ‘deny the validity of universal norms’ and refuse to do so (Risse and Sikkink 1999, 27). Then, later, to avoid ‘international isolation’, they make ‘tactical concessions’ or ‘cosmetic’ changes - including the ratification of international treaties and conventions. Such moves are made for ‘instrumental or strategic’ reasons (Risse and Sikkink 1999, 22-25). They subsequently impose reputational costs on other authoritarian (and particularly regional) states that refuse to follow suit (also Sikkink 2011, ch.4). Ratification is now mimicked and diffuses rapidly; a ‘norm cascade ensues’ (Finnemore and Sikkink 1998, 902).
These decisions, however, much to the annoyance of authoritarian states, provide domestic activists with standards to criticize their behaviour with: a phenomenon constructivists describe as ‘self-entrapment’ (Risse and Sikkink 1999, 28). It is this routine kind of activism, finally - highlighting the gap between proclaimed ideals and actual behaviour - that eventually leads to the third stage of judicialisation: compliance. Courts and bureaucracies now become important in making deference to new legal institutions a matter of habit (Finnemore and Sikkink 1998, 905). Constructivists claim not to be interested here in the ‘true beliefs of actors’, but rather in observing ways in which states’ behaviour gradually becomes ‘rule-consistent’ - conforming, that is, with the original intentions of activists, not the literal content of law (Risse and Sikkink 1999, 29). From this they infer, crucially, that states have ‘internalised’ the constructions of activists.

**Conceptualising creation, commitment and compliance**

This paper takes over constructivists’ tripartite structure, but argues that the third stage - compliance - demands distinct analytical treatment from the first two. Blichner and Molander (2008) make a relevant distinction here between ‘constitutive’ judicialisation - ‘where norms constitutive for a political order are established or changed to the effect of adding to the competencies of the legal system’ - and judicialisation ‘as legal framing’ - which refers to ‘the process by which people increasingly tend to think of themselves and others as legal subjects’ (Blichner and Molander 2008, 38-9). The design and ratification of new judicialised legal regimes are therefore ‘constitutive’ phenomena, whilst compliance falls under the umbrella of ‘legal framing’. On the latter issue, this paper argues, constructivists and institutionalists are wrong to study compliance simply via the lens of observable behaviour. *Pace* Risse and Sikkink, we must in fact turn our attention to the ‘true beliefs’ of actors.

This argument is made via reference to H.L.A. Hart’s 1961 classic *The Concept of Law*. Liberal institutionalists acknowledge a ‘particular debt’ to this work, and constructivists have criticised them for doing so (Abbot et al. 2000, 403). They urge institutionalists to move beyond the ‘bureaucratic formalism’ they believe characterises Hart’s theory, and invite them instead to attend to the ‘richer’ ways in which law is ‘deeply embedded in the practices, beliefs and traditions of societies’ (Finnemore and Toope 2001, pp. 743, 745). Both of these approaches, however - like many legal theorists - mis-understand Hart (2012 [1961]). As *The Concept of Law* latest editor insists, ‘Hart’s message’ is indeed that law is a broad social phenomenon. It is ‘a social
construction’ and ‘an historically contingent feature of certain societies’, with both costs and benefits (Green 2012, xv).

Institutionalists, however, focus simply of Hart’s distinction between ‘primary’ and ‘secondary’ rules. The former, as they point out, ‘regulate behaviour’, whilst the latter are ‘rules about rules’. Secondary rules do not impose obligations but confer powers to ‘create, extinguish, modify and apply primary rules’ (Abbot et al. 2000, p.19) With this distinction institutionalists hope to distinguish themselves from classical legal positivists and international relations realists, who understood law crudely as simply sovereign command (Abbot et al. 2000, 18-19). Their analysis, however, ignores Hart’s crucial further distinction between the ‘internal’ and ‘external’ aspects of rules.

‘External’ aspects involve the ‘regular uniform behaviour’ that institutionalists hope law can help impose on international affairs. ‘Internal’ aspects, by contrast, involve something which Hart labels as ‘acceptance’. The presence of this varies according to the ‘practices, beliefs and traditions of societies’, but does not involve simple normative appropriation for rules. Law, on a Hartian view, does not derive its validity from moral argument (cf. Raz 2009). Acceptance involves, rather, a ‘critical reflective attitude to certain patterns of behaviour as a common standard’, displaying itself in ‘criticism (including self-criticism), demands for conformity, and in acknowledgements that such criticism and demands are justified’ (Hart 2012 [1961], 57). These attitudes distinguish legal norms from other norms and group habits. But they need not be shared by society as a whole. In ‘deplorably sheep-like’ societies perhaps ‘only officials might accept and use the system’s criteria of legal validity … but there is little reason for thinking that it could not exist or for denying it the title of a legal system’, since society harbours the ‘presence of both these points of view’ ([1961] 2012, 117 [91 1994 version]).

Genuine compliance, involving the prior acceptance of law as authoritative, can thus be distinguished from ‘accidental or purely habitual patterns in behaviour’ (Green 2012, xxi). Institutionalists and constructivists each fall into one of these traps. By measuring the co-variation between observable behaviour and the ‘external’ aspects of rules, firstly, institutionalists will often identify accidental compliance. Jo and Bryant (2013), for instance, operationalise a commitment to and compliance with humanitarian law by rebel groups in terms of the number of civilian deaths.
and rebel-granted visits to the civilian population by the International Committee of the Red Cross. To the authors, a commitment to human rights entails the granting of visits and killing of more than 25 civilians in a year, while ‘[g]roups that grant full visits and kill fewer than twenty-five civilians’ comply with human rights law (Jo and Bryant 2013, 248). Jo and Bryant, then, do find that some rebel groups comply with humanitarian norms, but it is difficult to know if rebels killed less than 25 civilians because of an ‘internal’ acceptance of human rights or, conversely, because of the protection of civilians by government forces.

Constructivists, secondly, identify not acceptance but either ‘purely habitual’ compliance, or that motivated by ‘feelings’; ‘psychological experiences analogous to those of restriction or compulsion’ (Hart 2012 [1961], 57). According to constructivists, compliance is first produced by ‘shaming’, ‘denunciations’ and ‘embarrassing the target’. These feelings are then internalised and ‘habitualization processes’ take over (Risse and Sikkink 1999, 14, 17). The critical and reflective dimensions of acceptance are totally absent from this analysis. On a Hartian view an important quality of specifically legal authority is that it may enjoin agents to behave even in ways that run counter to their everyday inclinations and habits.

Such authority, of course, is not universal. Hart and others have associated it with modern states (Lacey 2007; Hart 2012 [1961], 95). Max Weber, likewise - whom Hart explicitly identified as having anticipated his idea of ‘acceptance’ - distinguished ‘rational-legal authority’, accruing to individuals simply in virtue of their office, from charismatic, traditional, and patrimonial alternatives (Weber 1958). Despite popular misconceptions, neither Hart nor Weber believed rational-legal legitimacy to be better or ‘more advanced’ than any other form (see D’Avray 2010, Hart 2012 [1961], 202; Green 2012, xlix-l) It is central, nevertheless, to our interpretive understanding of compliance. Our case studies seek to distinguish instances of compliance which reflect the ‘acceptance’ of legal authority from instances when ‘legal framing’ competes with other ‘background cultures’ (e.g. neo-patrimonialism). In such cases it is more likely that compliance is in fact accidental, purely habitual, or simply a matter of ‘feelings’. Such facts cannot be established by observing behaviour, but only by interpreting actors’ attitudes towards law.

Judicialisation at the periphery: Zimbabwe, Kenya and Uganda
The study of international judicialisation often focuses on Europe or North America, where countries are political elites are assumed to draw clear distinctions between law and politics, and where foreign-policy is thought to reflect states’ pursuit of their interests (but see Alter 2012). This holds true even when such interests are also, in turn, shaped by domestic constituencies’ interests (as per liberal accounts) or by NGO socialisation (as per constructivist accounts). The paper moves the gaze to Sub-Saharan Africa, where (international) rational-legal legitimacy is frequently eclipsed by neo-patrimonial alternatives (Engel and Erdmann 2007; Pitcher, Moran and Johnston 2009) and where elites’ working distinctions between law and politics are less prevalent. The cases therefore represent ‘hard tests’ for the two dominant theories of judicialization.

Foreign policy-making, more specifically, is more frequently governed by what one leading Africanist, Jean-Francois Bayart (2000, 254-55), has termed a ‘grammar of extraversion’. African states, on Bayart’s view, have not sought to assertively defend their interests in a hostile international system. They have, instead, a long history of actively pursuing dependence and self-subjectification. For elites, in particular, the external environment has formed less a structural constraint than ‘a major resource in the process of political centralisation and economic accumulation’ (Bayart 2000, 219).

Our case studies use Bayart’s ideas to provide an interpretive explanation for why African states appear not to pursue their interests during the first two stages of judicialisation: design and commitment. Subsequently they turn to Hart and Weber to identify the low levels of rational-legal legitimacy and ‘legal framing’ which explain the lack of compliance. The two cases are the involvement by the SADC Tribunal in Zimbabwe and involvement by the ICC involvement in Uganda [Kenya]. In each case, we are identifying and analysing the three stages of judicialization, while also looking for ‘fingerprints’ that would signify the empirical relevance of the two main theories of judicialization.

Zimbabwe and the Southern African Development Community (SADC) Tribunal

Constitutive judicialization: Design
The most familiar institutionalist approaches to international legal regimes are ‘neo-functionalist’ explanations for the European Union (e.g. Haas 1968; Sandholtz and Stone Sweet 1998). States, as in liberal institutionalist accounts more generally, constantly seek to influence design choices so that integration processes reflect their preferences (see above). The history of regionalism in southern Africa, however, reflects no such dynamic. Despite significant regional inequalities in state power, there have only been two isolated periods of significant institutional engineering. The first was in the late 1970s, and led to the founding of the Southern African Development Coordination Conference (SADCC). Although rhetorically committed to ‘economic liberation’, the organisation in fact functioned primarily to divert trade from areas affected by South African ‘destabilisation’ during apartheid (see Gleave 1992). With the end of the Cold War, however, and with political transition in South Africa underway, the SADCC had lost its *raison d’être*. In the early 1990s it was replaced by the Southern African Development Community (SADC). In a sign of the times, the 1992 Windhoek Treaty committed it, *inter alia*, to ‘human rights, democracy and the rule of law’, the ‘free movement of capital and labour’, and the establishment of a supranational tribunal with compulsory jurisdiction (with specific competences to be established via a separate protocol). Crucially these debates were marked by an almost total absence of the controversy and manoeuvre for political advantage that neo-functionalism would lead us to anticipate.

In an attempt to account for such difficulties, Lenz’s (2012) study of the SADC Tribunal blends the neo-functionalist account with diffusion perspectives. He proposes that states’ pursuit of their interests is bounded, firstly, by a form of path dependence. This sustains (relatively) dysfunctional arrangements and entrenches states’ preferences until ‘changes in external structural conditions … combine with a major political or economic crisis’ to throw ‘previous established practices into discredit’ (Lenz 2012, 157). In the moments of ‘high uncertainty’ that follow ‘functional pressures are generally compatible with different viable institutional arrangements; hence, policy-makers face the question of institutional choice’ (Lenz 2012, 156). At such times, and when ‘spurred’ by ‘EU-oriented domestic actors and the EU’s active material support’, policy-makers are likely to ‘emulate’ EU ‘templates’.

For understanding the genesis of the SADC Tribunal this represents a considerable advance on pure neo-functionalism. EU ‘templates’ and changes in ‘external structural conditions’, and not simply state preferences, were certainly significant. Lenz notes the importance of international-
systemic changes after 1989. Southern African states could now no longer position themselves as superpower clients. They became acutely aware of ‘the keen competition for aid and investment from the other parts of the world, notably Eastern Europe’. (SADCC Summit, 26 August 1991: 7). The SADC became increasingly dependent ‘on both aid and investment from the EU and other regions’ (Lenz 2012, 165). So when ‘EU-oriented actors’ conveyed their views about ‘what an effective and credible dispute settlement mechanism ought to entail’, it was perhaps unsurprising that the Tribunal’s protocol, when eventually adopted in 2000, reflected EU preferences (Lenz 2012, 166). The region established a supranational court with individual access provisions, and not a mere intergovernmental organ.

Lenz’s own evidence in this direction is so striking, nevertheless, that it appears radically incompatible with the functionalist components of his account. ‘Spurred emulation’, on his view, is supposed to have intervened at critical junctures on integration processes that ultimately, nevertheless, reflect functional pressures. He provides no evidence, however, that politicians sincerely intended regional organisations to help regional economies adjust to new imperatives, or to signal sincere commitments to integration (for indications to the contrary Pallotti 520, 527). As he explains, moreover, the decision to establish the SADC Tribunal was made in 1992 before significant pressure from ‘EU-oriented domestic actors and the EU’s active material support’. As in West Africa, therefore, but unlike during the ratification of the ICC (see below), coercion by Western states was relatively insignificant. Most importantly, however, it was evident that ‘no real discussion on the costs and benefits of different options had taken place at the regional level’ (Lenz 2012, 165). (This judgement has been repeated by a legal official of the Economic Community Of West African States (ECOWAS) Secretariat in relation to their own regional court (Alter 2012, 149)). This does not appear to reflect states pursuing their vital interests in new structural conditions of dependence. Nor, as the next section illustrates in graphic detail, is there much evidence that states ‘carefully’ planned ‘sovereignty-preserving’ deviations from the EU template, as Lenz (2012, 167) claims. His findings, rather, would appear to support Bayart’s theory of African states’ dependence as a ‘form of action’; geared towards extracting rents from the international system, and not simply equivalent to ‘external structural conditions’ (cf. Bayart 2000, 218).

**Constitutive judicialization: Commitment**
Constructivist and liberal institutionalist analyses of ratification also struggle to account for such phenomena (Risse and Sikkink 1999, 28; Simmons 2009, 79;). One possibility both approaches consider is that ratification expresses states’ genuine preferences. Simmons (2009) reflects this with her distinction between ‘insincere’ and ‘sincere’ ratifiers. Risse and Sikkink (1999; 2013) meanwhile, analyse how persuasion and socialisation shift state preferences towards the values embodied in institutions, and then trigger ratification. Such hypotheses, however, are clearly inapplicable to our case study. As one observer of the institution notes, somewhat delicately, ‘the history of the Tribunal suggests a distinct lack of enthusiasm for the institution by members of the Summit [regional Heads of State]’ (Matyszak 2011, 20). Eight years elapsed between the Tribunal’s creation and the signing of the protocol prescribing its powers. Another five years passed before judges were sworn in and the Tribunal inaugurated. It was only two years later, finally, in 2007, that the first dispute was lodged - against the SADC’s own secretariat (Matyszak 2011, pp 1-2).

Both these approaches, however, were designed to account for when authoritarian regimes begin to engage in ‘controlled liberalisation’. Such processes are clearly shot-through with insincerity, continuing in some cases into the ‘commitment’ phase of judicialisation. Some constructivists wrestle particularly with the question of why states appear to consistently underestimate the risk that new legal regimes will be used against them in the future (e.g. Risse and Sikkink 1999 and Simmons 2009). They conclude that, between two and three decades ago, human rights NGOs were relatively new in terms of ‘world time’. It was rational, therefore, for authoritarian regimes to believe that ‘tactical concessions’ to new norms - and more specifically the ‘insincere’ ratification of new treaties and conventions - would have minimal effects. Such hypotheses, however, retain the assumption that insincere ratification forms part of a process whereby authoritarian states seek jealously to maintain their sovereignty under increasingly hostile international conditions. As the case of Zimbabwe illustrates, however, there is no reason to assume that ratification - like institutional design - is in fact guided by any such ‘tactical’ logic. The Zimbabwean government apparently gave no thought whatsoever to the issue of ratification until the new regime threatened its sovereignty. Following Bayart (2000, 224), this paper suggests this most likely reflects the ‘radicalisation of strategies of extraversion’ commonplace in the early 1990s, and triggered by the collapse of international rents which accompanied the end of the Cold War and structural adjustment. At this time ‘various anciens régimes’ - including, notably,

Article 22(4) of the 1992 SADC Treaty provided that all subsequent protocols ‘shall enter into force thirty (30) days after the deposit of the instruments of ratification by two thirds of the Member States’. To date, however, only five of fifteen member states, excluding Zimbabwe, have done so (e.g. Honduras 2010 p.21). Later, in 2001, an SADC Amendment Treaty declared that the recent Tribunal protocol ‘shall, notwithstanding the provisions of Article 22 of this Treaty, form an integral part of this Treaty’. Recent years have seen intense and complex debate over these technicalities. Discussion centres around whether the 2001 Treaty has in fact legally entered into force, and whether the Tribunal was therefore legally constituted (for a summary Matyszak 2011, 2-3). But these technical considerations appear to have exerted no influence in the ‘commitment’ stage, contrary to normal expectations for ‘tactical concessions’. Many recent debates revolve around drafting so vague that it reflects neither efforts to ‘bind’ future behaviour, nor ‘careful’ efforts to preserve sovereignty (see above). ‘Poor drafting’, indeed, ‘appears throughout the Treaty and it is remarkable that disputes, such as that around the Tribunal, did not arise earlier’ (Matyszak 2011, pp …..).

Most remarkably, however, in 2005 the government of Zimbabwe (GOZ) sent a judge (Antonina Guvava) to a Tribunal that it now believes to have been illegally constituted (Chinamasa). In 2008 it even defended itself in the same court! To put it mildly, these facts do not suggest a ‘tactical’ approach to ratification and commitment to new legal regimes. They can be explained, manifestly, by the simple fact the GOZ lost the first case it chose to defend; *Mike Campbell (Pvt) Ltd et al. v. Republic of Zimbabwe* (2008). This has been one of the best publicised cases in the region’s recent history, striking at the heart of sovereign privilege. It is only *after* refusing to comply with the Tribunal’s judgement that the government of Zimbabwe, and some of its regional allies, have begun to ‘tactically’ assess their earlier approach to ratification. As described in the next section, their efforts to prevent encroachments on their sovereignty from the Tribunal continue until the present time.

**Legal framing and compliance**
As Kingsbury (1998, 348) argues, the concept of compliance is a function of ‘competing concepts of law’. Both institutionalist and constructivist accounts approach it via conformity with observable behaviour. The former generally embed positivist theories of law, and seek to measure behavioural conformity with the ‘external’ aspects of rules (see above). The latter, meanwhile, embed more sociological theories of law, and seek to assess the socialisation of states into behaviours characteristic of ‘international society’ (cf. Goodman and Jinks 2004, 638-655). The interpretive analysis that follows thus identifies the different sorts of ‘compliance’ sought by (quasi-)legal actors. It concludes that whilst NGOs have sought to elicit compliance via socialisation (an implicitly sociological stance), legal officials have demanded conformity with the values underpinning rules-systems (an implicitly naturalist, not positivist stance). In the event, the GOZ has not been socialised into new habits and behaviours, and has not ‘accepted’ the legitimacy of new legal regimes (Blichner and Molander 2008, 38-9). Compliance has been lacking, therefore, whether or not one accepts the Hartian alternative to constructivist and institutionalist accounts proposed here.

Zimbabwe’s independence constitution (1980) entrenched property rights for 10 years. The decade that followed saw a series of administrative orders gazetting land defeated in the courts on procedural grounds. These cases were usually paid for from a Commercial Farmers Union (CFU) legal defense fund established for the purpose. Some influential ruling-party technocrats, who believed in the legitimacy of legal routes to land redistribution, complained, controversially, that the higher courts imposed overly-restrictive conditions policy-making in this period (Alexander 2006). By the late 1990s, however, as is well-known, ZANU-PF (the ruling party) faced economic crisis and its first serious electoral threat, from the Movement for Democratic Change (MDC). It temporarily abandoned its self-presentation as a modernising regime committed to rational-legal norms. In its place it adopted a (not wholly unsuccessful) nationalist legitimisation strategy rooted in ‘patriotic history’ (Tendi 2010). It ceased to view land as a national economic asset, and sought to justify its authority in rural areas on nationalist and (in places) neo-patrimonial terms (cf. Moore 2005; Alexander 2006). In 2001 President Mugabe declared that ‘the courts can do what they want. They are not courts for our people and we should not even be defending ourselves in these courts’ (Chan 2003, 167). Generally speaking, however, the government continued to insist on the legality of its actions, going to considerable lengths to retrospectively rationalise land seizures via legislation (e.g. Kibble 2013, 93-4)
It was the most significant of these legislative rationalisations - the Constitutional Amendment Act No.17 (2005) - that finally divided the CFU from an important commercial farming constituency. Return to expropriated farms was now explicitly forbidden, and the CFU was no longer willing to mount legal challenges in the Zimbabwean courts (see Pilossof 2012). A splinter group, led by English-born Ben Freeth sought to challenge the expropriation of their farms, and land reform as a whole, on the international stage. They attracted support from a range of internationally-famous lawyers working pro bono (author interviews Harare, April 2012). Their initial tactics involved using local counsel to exhaust domestic remedies. They challenged the constitutionality of Constitutional Amendment Act No.17 in the Zimbabwean Courts, fully expecting to lose. Their goal was to bring the case before the soon-to-be-opened SADC Tribunal. In a surprise to some observers, the court granted itself jurisdiction over the case, pointing to the Windhoek’s Treaty’s insistence that states ‘shall act in accordance with the principles…[of] human rights, democracy, and the rule of law’ (Matyszak 2011, pp…).

(The Tribunal’s judges have often stressed SADC ‘values’ they believe should guide interpretation of legal rules. Their decision on the justiciability of Campbell has proved somewhat controversial. At least one Tribunal publication has conceded that is unlikely to have pleased ‘conservative positivists’ (SADC 2010, 11). The majority’s decision also, famously, emphasised their determination ‘to build a house of justice in the region’ (e.g. Gauntlett 2012). They appeared to share legal ‘naturalists’ opinion that states, especially in the early days of legal regimes, should seek to comply not only with legal rules, but with the values that undergird them (e.g. Dworkin 2011, ch. 15). After this determination had been made, however, specific international property law rules began to acquire independent force, in line with institutionalist expectations)

As described above, the GOZ did not challenge the constitution of the court, but sent its legal representatives to the Tribunal in Windhoek. They sought to delay proceedings repeatedly. One month’s breathing space was gained, for example, by reporting a broken fax machine in the President's office (Freeth 2012, 164). But these ‘weapons of the weak’ had their limits (Scott 1985). The Tribunal’s decision, moreover, when it came, was not in their favour. They were ordered to prevent further occupations of land and to compensate those which had already taken place. This was reportedly much to their surprise. The GOZ had anticipated that the Tribunal’s southern
African judges would share their view that expropriation, even if discriminatory, constituted a legally-legitimate public purpose in a post-colonial state. This view contrasted with that of some NGOs in the region mobilised around regional institutions (author interviews Johannesburg and Pretoria, May 2012). Their view had been that the commercial farmers’ case was likely to be fatal for the SADC Tribunal. Like constructivists, they believed compliance should be pursued by socialising GOZ officials into new behaviours. Land in Zimbabwe was identified as an issue too controversial for the court to take on. Such NGOs anticipated, correctly, that the Tribunal would not share this view. The southern African judges accepted the legitimacy of the new supranational legal regime. They believed its authority should not be disregarded in the long-term interests of socialization and regional integration. This explains why NGOs mobilised around regional institutions sought, unsuccessfully, to persuade the Campbell litigants to abandon their case before it began (Ibid.)

The aftermath of Campbell illustrated the failure of the new SADC legal regime to establish any distinctively legal authority amongst regional elites (for Zimbabwean domestic aspects see above). Rational-legal legitimacy had not, in Blichner and Molander’s (2008) terms, ‘extended beyond … background cultures’ - most specifically those associated with neo-patrimonialism, newly salient in Zimbabwean politics under the cover of ‘patriotic history’. Despite its consistent external presentation as a legalistic regime, this holds particularly true for ZANU-PF in the 2000s (e.g. Kimble 2013, 93-94). Signs of this could already be glimpsed prior to Campbell. Michelo Hansungele (2013, 138) of the International Commission of Jurists, for instance, has reported that a senior GOZ official declared at an earlier workshop that its nominated judge (Antonina Guvava) was ‘too junior to 'overrule' the Supreme Court of Zimbabwe while sitting at the SADC Tribunal’. This remark refers not to rational-legal hierarchies, of course, but to those ‘familial’ - and perhaps more commonly ‘paternal’ - metaphors that scholars believe express neo-patrimonial political legitimacy in Africa (Schatzberg 2001; Bayart 2009 [1989], 174; Chabal 2009, 40).

Such ‘familial’ language is common amongst former liberation movements in southern Africa, who continue to regard each other as ‘brothers in war’ and now ‘fathers of the nation’. (e.g. Alao 1994; Saunders 2007; Melber 2009, 456-8). At SADC Summits, for example, such as that

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1 In southern Africa especially, however, these should not be understood as cultural constants. They rather represent common features of African politics more generally which have recently acquired increased salience in some areas of Zimbabwean politics (see Lodge 1998).
which suspended the Tribunal, ‘Heads of State accord President Robert Mugabe with elevated status first as an elder statesman and second as the most educated among them’. Some ‘are said to queue for advice’ from the Zimbabwean leader (Hansungele 2013, 145). For Chabal (2009, 40) the simple reporting of this treatment of Mugabe ‘speaks to the attributes of the politics of age’ in the region. Outside South Africa, only Botswanan leaders have openly criticised the Zimbabwean President (Hansungele 2013, 145; for ‘hybrid’ legitimacy in Botswanan politics Pitcher, Moran and Johnston 2009). South Africa, meanwhile, particularly under Jacob Zuma, has also begun to pressure its northern neighbour to comply with SADC rules (Phimister and Raftapolous 2004). In doing so it has carefully sought to avoid being seen as ‘Big Brother trying to impose its will on others’ (Netsilתןe 2004). At the 2012 SADC Summit which eventually decided to suspend the Tribunal, nevertheless, the GOZ was apparently able to bide its time until South African officials were absent. They then persuaded other regional governments to embrace their point of view, reportedly raising the spectre of gay rights litigation at some point in the future (author interviews Johannesburg and Pretoria, April 2012). ‘We have created a monster that will devour us all’, Tanzania’s President Jakaya Kikwete is reported to have pronounced (The Economist 2012).

The ICC and Uganda and Kenya

Constitutive Judicialization: Design of the Rome Statute

The Rome Statute was negotiated and drafted at the five-week Rome Conference in June-July 1998. This was a political process, where states took various positions, engaged in arm twisting, facilitation and destructive behaviour, and negotiated the various principles and provisions of the Rome Statute. Various formal or informal groupings developed, such as the Non-Aligned Movement, the Like-Minded States, and the P5: the five permanent members of the UN Security Council.

NGOs in the areas of human rights, law and justice were very active and worked particularly with the group of Like-Minded States, a grouping of more than 60 states that were largely supportive of the establishment of an ICC. The Like-Minded States were committed to a number of ideas about the design of the ICC, such as court jurisdiction over genocide, crimes against humanity and war crimes, the elimination of a Security Council veto on prosecutions; an independent
prosecutor with *proprio motu* authority, and the prohibition of reservations to the ICC statute (Schabas 2001, 15-16). It is a testimony to their success that these four features were incorporated into the Rome Statute. The Like-Minded Group ‘quickly dominated the structure of the Conference’, taking key positions including the chairs of most of the working groups, membership in the Bureau of the conference (an ‘executive body that directed the day-to-day affairs of the Conference’) and the presidency of the Committee of the Whole of the Diplomatic Conference of Plenipotentiaries (Schabas 2001, 16).

The Rome Conference had an in-built inequality: only the richest countries in the world were able to send enough highly-skilled international lawyers to participate most effectively. Furthermore, effective participation in Rome depended to some extent on prior participation in the many preparatory PrepCom meetings in New York. Bassiouni, the chair of the Drafting Committee, observed that ‘developed countries generally fielded the larger, better delegations’, with heads of delegations that ‘usually wielded broad discretionary authority, which allowed them to conduct more efficient negotiations’ (2008, 141). Developing country delegations ‘were typically smaller and had limited instructions. As a result, these delegations could not undertake broad negotiations’ (Bassiouni 2008, 141). Furthermore, only delegations with at least 11 members could participate in all the concurrent committees and working groups that deliberated, negotiated, and prepared various parts of the product that eventually became the Rome Statute.

Kenya and Uganda were not part of the powerful group of Like-Minded States at the Rome Conference and there appears to be no evidence that the two countries played an important role at the Conference. The Kenyan delegation was against the draft provisions for a prosecutor with *proprio motu* authority, pursued by the Like-Minded group, but was unsuccessful in shaping the drafting process in this regard as these prosecutorial powers made their way to the Rome Statute. (Ironically, the Kenyan post-election violence in 2008 later became subject to a *proprio motu* investigation.) To no avail, the Kenyan delegation argued that it saw ‘no reason why the Prosecutor would require ex officio powers to trigger Court action’ because the ‘twin triggers of States and the Security Council, subject to appropriate controls, were sufficient to cover all cases which would need to go before the Court’ (United Nations 1998, 199-200).

The Kenyan and Ugandan experiences with the design of the Rome Statute are not inconsistent with both liberal institutionalist and constructivist theories in the sense that these two
countries simply lacked the capacity of the Like-Minded Group; their resources, commitment and determination. Both theories of judicialisation account, in fact, for the influence and success of this latter group, rather than for the lack of influence of delegations such as those of Uganda and Kenya. According to liberal institutionalists, states created the ICC in order to solve or minimise various coordination problems: the diplomatic and material costs of universal jurisdiction trials by individual countries (Fehl 2004), the material costs of the ad hoc tribunals to some states (ibid.), or some states’ role as a criminal ‘accountability police’ (Katzenstein 2009). On this view, the creation of the ICC represents strategic delegation to a judicial third-party. Constructivists, on the other hand, focus on the influential role of civil society organisations who acted as ‘norm entrepreneurs’ prior to and at the Rome Conference, as well as that epistemic community of lawyers representing governments that had already ‘internalized the international justice ethic’ (Sikkink 2011, 115, 119). Sikkink’s account, however, is not blind to the idea that supportive states (which initially included the US) might also see functional advantages for having an ICC, such as the international delegation of prosecutorial tasks (2011, 116).

**Commitment to the Rome Statute: Ratification**

Having participated in the Rome Conference in 1998, the governments of Kenya and Uganda signed the Rome Statute in 1999. Importantly, both governments ratified the Statute in a closed, executive process without the involvement of parliament. In Uganda, two MPs sought involvement in the matter prior to ratification, while MPs in Kenya only became interested in the issue of ratification more than four years after the event, when the ICC had begun to take an interest in holding to account those ‘most responsible’ for Kenya’s political violence.

Uganda ratified the Statute in mid-June 2002, in a decision that was taken solely by the government and in spite of parliamentary calls for debate. Prior to ratification, the issue was raised in parliament on two separate occasions, by two opposition MPs who worried that the government was stalling the process. On the prospect for parliamentary deliberation, however, the Attorney General was very clear: According to the relevant laws, he explained, ‘it is only Cabinet which is

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required to ratify it.³ He promised to inform parliament after the fact of ratification, in effect ensuring that it would have no opportunity to influence the decision to join the ICC.

In the face of a couple of persistent opposition MPs, the government was again forced to address the issues of executive ratification. The prime minister at this point responded that such criticism was divisive and unpatriotic, thus seeking to close the debate once again.⁴ Moreover, he referred any discontent over the matter to the committee on foreign affairs, a body that does not disclose its deliberation to the public.

Kenya ratified the Rome Statute on 15 March 2005, almost three years after its neighbour. Like in Uganda, the ratification of the Rome Statute in Kenya was an executive matter, decided by the NARC cabinet in an ‘unanimous decision’.⁵ In the ⁹th parliament, from February 2003 to October 2007, Rome Statute ratification was a non-issue. The Rome Statute was only mentioned twice on the floors of parliament during this period, both fleetingly and in relation to the deliberation on the Sexual Offences Bill.

Once the ICC took an interest in Kenya, however, the question of ratification became a controversial matter. MPs began to question the practice of executive decision-making in relation to international treaties and demanded a list of all the treaties the government had entered into. As MP John Olago Aluoch has stated:

The fundamental issue is that some of these international instruments have such serious ramifications for our country. However, before the Cabinet approves them, they should be brought to the House for debate before we commit our country. Recently, the Cabinet approved the Rome Statute without bringing it to the attention of the House. Later on, the House ratified it by the domestication of the International Crimes Act. However, we are now seeing how serious that matter was, that the Cabinet entered into that [Statute] without consulting Parliament.⁶

In the debate following a ministerial statement about the issue, MPs grilled the Minister of Foreign Affairs, suggesting that treaty ratifications were illegitimate if they had not been subject to

⁵ Parliament of Kenya Hansard 11 Nov. 2009 pm.
parliamentary deliberation. The Minister argued that the practice was legitimate because ‘That is the standard procedure under the international law and has been the practice in this country since Independence’.  

Where the executive in Uganda has the power to ratify international law without parliamentary consultation as per the constitution of Uganda, the Kenyan constitution (1969) was silent on the issue of treaty ratification. The Kenyan Minister therefore grounded the ratification in ‘the practice and precedence in this country’ and representative democracy. This debate about the procedure of ratification, curiously, took place after the International Crimes Act had been created by parliament. This meant that MPs took issue with the procedures surrounding ratification rather than substance of the Rome Statute.

Both liberal institutionalist and constructivist scholars have tried to account for Rome Statute ratification by countries such as Uganda and Kenya – countries with a relatively high probability of being subject to ICC investigation. To the liberal institutionalists, these ratifications presents a puzzle, given that it does not appear to be in the interest of the two governments to commit to the ICC (Chapman and Chaudoin 2013; Simmons and Danner 2010). Analysing large-N data, two explanations have been proposed. According to Simmons and Danner (2010, 240), ratification patterns ‘provide strong support for the credible commitments theory’ since ‘the least credible but most violence-prone governments have joined the principled but nonvulnerable governments in ratifying the ICC treaty most readily’ (ibid.). Contrary to these findings but consistent with the approach, Chapman and Chaudoin (Chapman and Chaudoin 2013, 10) find that ratification patterns are largely explained by ‘the potential costs facing governments.’ To the authors, ‘[c]ountries with little to fear from future ICC actions tend to ratify and countries with higher potential costs remain outside the regime’ (ibid.). Chapman and Chaudoin (2010), however, find they cannot explain a formal commitment to the Rome Statute by most Sub-Saharan African states. For these authors these countries constitute an exception to their rules.

As the decisions to ratify were kept out of the public gaze in Kenya and Uganda, it is difficult to find support for the idea that the driving mechanism was one of credible commitment to domestic audiences. Furthermore, at the time of ratification, both countries had recent histories of

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7 Parliament of Kenya Hansard 11 Nov. 2009 pm.
impunity, state-sanctioned violence, insurgency and counter-insurgency. Chapman and Chaudoin (2010) cannot explain, therefore, why Kenya and Uganda did not imitate other countries with a recent history of non-state or state violence, and stay outside the legal regime.

Constructivists see the Rome Statute ratifications as indicative of a normative change among a sufficient number of actors; similar to a ‘justice cascade’ (Sikkink 2011). According to Sikkink (2011, 239), however, any norm cascade includes ‘a significant handful of countries that ratify treaties because they believe in them’ as well as a ‘second set of countries that ratify because they think they will not be costly and find later to their dismay that they were mistaken.’ For her, a number of African countries thus found themselves self-entrapped (Sikkink 2011, 240). There seems to be little indication that the two East African countries had internalized the international justice ethic, given Uganda’s actions in the DRC and given the subsequent organization of the post-election violence in 2007-8 by members of the Kenyan elite and security forces. It is possible, therefore, that they belong to Sikkink’s ‘second set’ of countries. Some lawyers close to the Ugandan government do, indeed admit that the latter did not appreciate what ICC involvement entailed when they referred the northern Uganda to the ICC. But constructivist accounts still fail to explain why countries in the ‘second set’ ratify in the first place.

As an alternative to both the liberal institutionalist and constructivist accounts, it is possible that soft forms of coercion played a role. Goodliffe et al. (2012) argue that states decided whether or not to ratify the Rome Statute according to the ratifications and positions of states on which they depended for trade relations, security alliances and memberships in international organisations. As such, if a country has a ‘dependency network’ of states that are committed to the ICC, it will decide to ratify the Rome Statute, and vice versa.

The focus on dependency networks could explain why 72 per cent of ICC states parties are either EU members or beneficiaries of EU aid and trade. Such an explanation suggests that the EU used its leverage over its African, Caribbean and Pacific (ACP) partner countries and beneficiaries of the EU Neighbourhood policy to push for ratification of the Rome Statute. As the Head of the Delegation of the European Commission to the UN, Fernando Valenzuela, described in 2009 (Assembly of States Parties 2009, 45),
The ICC has been on the agenda of almost all major summits and Ministerial [meeting]s with third countries. The ICC was raised in 31 separate demarches in the period from July 2007 to December 2008.

The EU systematically pursues the inclusion of an ICC clause in negotiating mandates with third States. On the initiative of the Commission, the Cotonou Agreement with ACP countries (2005) includes a binding ICC clause. Under the European Neighborhood Policy, the Commission has also negotiated the insertion of ICC clauses into many related Action Plans.

28 per cent of ICC member states, or 34 countries, are neither EU or EU-candidate countries or beneficiaries of EU-ACP or Neighbourhood partnerships. These 34 countries are either rich Western states such as Andorra, Canada, Australia and Japan, middle-income non-Western countries such as Argentina, Brazil, Mexico and the Maldives, or poor countries such as Bangladesh or Mongolia. According to Goodliffe et al. (2012) the ICC memberships of these countries is likely to be determined by the composition and nature of each country’s portfolio of dependencies in the fields of trade, security and membership of international organisations.

The EU has put its economic and political leverage at the service of international justice before. It assisted the ICTY in dealing with the Serbian and Croatian governments’ reluctance to provide evidence or arrest suspects. Cooper (2009, 95) claims that this involved ‘economic pressure from the United States and the European Union and the promise of future EU membership conditioned on cooperation’ from the governments of Serbia and Croatia (2009, 95). She quotes the former ICTY prosecutor, Carla del Ponte, who maintained in 2007 that ‘90 percent of all accused currently on trial or awaiting their trial are in The Hague as a direct result of EU conditionality’ (Cooper 2009, 95).

**Compliance: An ‘internal view’ of the Rome Statute?**

As discussed above, it is possible to distinguish between the external and internal aspects of legal rules. According to Hart (2012 [1961]), as we saw, it is possible to be an observer of a social rule who does not accept the rule (the external view), or to be a member of the group which accepts and uses it as a guides to conduct (the internal view). Compliance with law, to be a meaningful category
that is distinct from a commitment to law, requires attention to these internal aspects. Compliance with the Rome Statute in Kenya and Uganda therefore involves the ‘acceptance’ of the ICC regime and states’ willingness to view themselves and others as legal subjects under the Rome Statute.

In Kenya and Uganda, compliance with the Rome Statute has been coexistent and sometimes in conflict with the authority of African Union rules, more neo-patrimonial forms of authority, and the political instrumentalisation of the ICC. As such, it is difficult to argue that the internal view of the Rome Statute, as opposed to the external view, is present in the two cases.

One of the rules of the ICC is that member countries need to cooperate in the arrest of a wanted person. Both countries, however, invited the indicted Sudanese President, Omar al Bashir, to their countries after the ICC had issued a warrant for his arrest. In Uganda, the government sent mixed messages about their likely response to al Bashir’s prospective presence, highlighting variously that they would arrest or not arrest him; as a consequence, the Sudanese leader stayed away. In Kenya, however, Bashir attended the inauguration of the 2010 constitution, an event that prompted criticism of Kenya from the ICC, the EU and human rights organisations. According to the Kenyan government, al Bashir’s visit sent the message that ‘Kenya is at peace with its neighbours’ (BBC 2010) and was also in conformity with the July 2009 AU resolution that ‘AU Member States shall not cooperate … for the arrest and surrender of President Omar El Bashir of The Sudan’ (African Union 2009).

While the arrest and surrender of any person who is wanted by the ICC is an obligation by all state parties, the ICC has become considerably more involved in Kenya and Uganda as it has charged persons from both countries with crimes against humanity and, in the case of Uganda, also war crimes. In their own situations before the ICC, it can be argued that Uganda and Kenya have complied with the prescriptions of the Rome Statute: Uganda referred the situation of northern Uganda to the ICC as per Article 14, and the government argues that it has been unable to arrest the indictees, the leaders of the rebel group, the Lord’s Resistance Army (LRA). The Kenyan government did not, despite promises, refer the situation of the post-election violence to the ICC, prompting the ICC prosecutor to initiate an investigation under his proprio motu authority. Kenya has, however, been cooperating with the ICC, in the sense that it has granted access to
investigators. Furthermore, those charged with ICC crimes have appeared in court whenever they have been so requested.

On the other hand, it can be argued that even this kind of compliance must be examined in the light of other developments. Uganda appears to have referred the situation to the ICC in an effort to delegitimise the rebels as international criminals, obtain international support for capturing the rebels, and to be seen to be doing something. In the referral letter, the GOU explains that it ‘has referred this situation to the ICC primarily because without international co-operation and assistance, it cannot succeed in arresting those members of the LRA leadership and others most responsible for the above mentioned crimes’. As the LRA rebels would only be captured in a military operation, the ICC referral was consistent with, rather than a departure from, the government’s military approach to the conflict. In fact, the government has articulated a consistent narrative when explaining the executive decision to obtain ICC involvement. It wanted international support to defeat the LRA by putting moral and diplomatic pressure on the LRA’s Sudanese donors and by obtaining military assistance to capture the rebels. As the Minister of Defence explained to parliament in February 2004,

The implications [of the ICC referral] are that if they find evidence, as I know they will, that Kony has engaged in acts, which amount to commission of crime against humanity, they will issue an international warrant of arrest. … This will particularly impose the duty on Sudan, where he is, to actually do what you are asking [i.e., stop the LRA]. It will now be by (sic) the international community and not Uganda appealing to Sudan or things of that kind, or even Sudan in that case will have no say in the matter.9

As such, GOU delegated the task of capturing the rebels to the international community, in an act of ‘extraversion’ (Bayart 2000). The president articulated the same narrative of international delegation:

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8 Referral letter, quoted in Hansard 23 March 2005.
The International Criminal Court is a good ally because it makes Kony untouchable as long as it has got indictment; anybody who touches him will have problems with the International Criminal Court, therefore, that is the advantage.¹⁰

Around the time of the referral the Ugandan government remained in its public statements rather unspecific about what kind of international military support it envisaged. But less than two months after submitting the referral, the UPDF announced that it would re-enter Sudan ‘to hunt down the LRA leadership’ (Branch 2007, 184). Later on, the president voiced disappointment at what he saw as the lack of international military support following the referral and subsequent indictments of the LRA leaders.

It seems that Uganda’s ICC referral was less an act of compliance than the strategic use of ICC involvement; at no point was the referral legitimate explicitly by reference to Sikkink’s ‘international justice ethics’.

In Kenya, the prosecutor has charged individuals at the heart of the political establishment with crimes against humanity, including the current President and Vice President. The fact that these two persons were elected by a slim majority of voters, in spite of being indicted by the ICC, could be an indicator of the absence of the ‘acceptance’ of the Rome Statute. Furthermore, the disappearance of witnesses for the prosecution of the Kenyan indictees also suggest that international criminal law is far from accepted in the sense of constituting an internal acceptance.

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¹⁰ Hansard, 7 June 2005.
References


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