TRIGGER MECHANISMS OF THE INTERNATIONAL CRIMINAL COURT: STATE SIZE AND BARGAINING TACTICS

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After years of negotiations, the Rome Statute was signed on July 17, 1998, creating the International Criminal Court (ICC)—the first permanent world court designed to address war crimes, crimes against humanity, and genocide. The General Assembly's first attempt to negotiate a treaty establishing an international criminal court had come short in 1954, and it was not revisited until the end of the Cold War (Lee 2). In 1992, spurred by the International Law Commission, the General Assembly decided to re-examine this area of international criminal law. Six years later, the ICC was a reality.

The Rome Statute grants the Court considerable power and independence, and many point to its "trigger mechanisms"—the processes within the restructured Court framework that skew the adjudication on all international criminal disputes (Ralph 36). As a result of the prosecutor's capacity to initiate investigations without state approval and his exclusive ability to bring cases for trial, the trigger mechanisms within the structural framework of the Court appear to leave states with little control over the Court's primary functions of investigating and prosecuting war criminals. At the outset of negotiations, many powerful states, including all five members of the Security Council, were expressly opposed—and still are—to trigger mechanisms that grant referral powers to an independent actor with such a limited role for states. Along with the diminished voices of signatories in influencing the Court's adjudication process, the trigger mechanisms will likely increase the number of investigations at the ICC. Not only will the number of these investigations be in the exclusive domain of the independent

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prosecutor, the increasing number of investigations will consequently constrain state behavior in new ways to voice opposition to the Court's decisions, particularly among larger and more powerful states.

Given the low benefits and high costs signatories of the Rome Statue face in bringing cases to the Court—primarily as a result of the powers granted to the independent prosecutor—this paper seeks to understand the context in which states decide to use the embryonic "trigger mechanisms" of the ICC and the pronouncement's effect on the rapidly evolving norms of international criminal law. This paper first asks what interest states had in supporting these trigger mechanisms, particularly in light of the independent prosecutor's unchecked, powerful mandate of authority in the legal process. Second, it inquires how those states articulated and realized their preferences over those of other states.

OVERVIEW

No party can refer an individual case to the ICC, but only a "situation in which one or more of such crimes [within the jurisdiction of the court] appear to have been committed" (Rome Statute Article 13). Currently, a situation is a general "series of events" in which war crimes, crimes against humanity, or genocide were committed.[1] There are three ways in which a situation may be brought before the ICC. First, any state party to the Rome Statute, or a non-state party that has decided to submit temporarily to ICC jurisdiction, can refer a situation to the prosecutor. Second, the Security Council can pass a resolution to refer a situation, even one that occurred on a territory of a non-signatory. Third, the prosecutor can independently petition the Pre-Trial Chamber (PTC) for permission to initiate an investigation into a situation without state or Security Council approval. This capacity is unprecedented

1Article 5.2 of the Rome Statute also provides for the eventual inclusion of aggression. Note that Article 17(1)(d) also requires that the crimes be of "sufficient gravity" to fall within its jurisdiction: war crimes, for instance, must be "widespread and systematic," and crimes against humanity must be "part of a plan or policy, or part of a large-scale commission."

in international courts and is often cited as the most revolutionary aspect of the Rome Statute (Olásolo 39; e.g. Ralph 36).

The prosecutor must inform any interested state of an investigation he commences, unless it was initiated by the Security Council (Rome Statute Article 18.1). An "interested state" is any state that might normally have a claim to prosecute the crimes in question (Hall 1998a 131). If any such state wishes to take over the investigation, "the prosecutor shall defer to the state's investigation" (Rome Statute Article 18.2). This principle, known as "complementarity," essentially preserves states' rights to investigate and prosecute crimes domestically if they wish. The prosecutor may appeal a state's request to take over an investigation to the PTC. If the PTC determines the state is "unwilling or unable genuinely" to take over the investigation, the state must return its investigation to the prosecutor. Crucially, it is the ICC that makes this determination, not the interested state (Rome Statute Article 17).

It is also important to note that the constraints on the prosecutor's power are all negative constraints. The Security Council may defer an investigation already begun by the prosecutor under Article 16, or an interested state may defer an investigation under Article 18, but the prosecutor does not need either actor's positive consent in order to commence an investigation. However, having conducted an investigation into a situation, the prosecutor has the exclusive power to bring individual cases to trial at the Trial Chamber, although states or the Security Council may request the PTC to review the prosecutor's decisions.

Secondary Functions of the Trigger Mechanisms

The trigger mechanisms as formulated are likely to have two important consequences. First, as a result of having an independent prosecutor, there are likely to be more war crimes trials. The rules allowing the prosecutor to initiate an investigation without the prior approval of states or the Security Council suggest the number of investigations will increase; other international courts that allow non-state actors to refer cases, such as the European Court of Hu-

man Rights (ECHR), have seen similarly high incidences of trials (Keohane, Moravcsik, and Slaughter 475).

Second, even if those investigations are taken over by states under the complementarity principle, there is the possibility under Article 17 that the ICC may determine a state to be "unable or unwilling genuinely" to investigate or prosecute war crimes, making complementarity conditional. Conditional complementarity will likely put pressure on states to conduct trials at certain standards of transparency, efficiency, and fairness. This will occur primarily through legal precedents in determining inability and unwillingness to bring the accused to justice. As Dempsey argues, "that constitutes an unprecedented challenge in the sources of national lawmaking, one that diminishes the traditional notion of state sovereignty" (Dempsey 52).

WHY DID STATES VOTE FOR THE TRIGGER MECHANISMS?

Primary Proponents: the Like-Minded Group

The first countries to propose an independent prosecutor were Denmark, Finland, Iceland, Hungary, New Zealand, Norway, Sweden, and Switzerland in early 1994 (Report of the International Law Commission 24, 46). By August 1995, several others states, such as Greece, Austria, and the Netherlands, advocated for an Independent prosecutor as well (Glasius 2002 153). Australia, Canada, Egypt, Germany, Ghana, and Italy joined shortly thereafter.

These states formed the Like-Minded Group (LMG), which was to grow substantially in later years. Throughout its existence, the LMG was an informal coalition. No full-scale historical study of the LMG has been conducted, so its precise origins and membership are hard to trace. By the end of 1996, however, many states had actively declared their membership in the LMG, and it grew to include over 40 states. By the time of the Rome Conference in 1998, this number had increased to over 75, including the United Kingdom and many smaller states, such as Benin and the Solomon

Islands (Schabas 16, Bassiouni 1999a 31). Throughout negotiations, it was this group that advocated most forcefully for the independent prosecutor and a reduced role for the Security Council. Therefore, one must look to the LMG in order to understand the origins of state interest in the ICC's trigger mechanisms.

The Trigger Mechanisms as a Result of Power and Coercion

Under a realist interpretation, one would expect that powerful states dictated to smaller states which trigger mechanisms to include in the Rome Statute (Goldstein et al. 385-399). Rudolph argues that war crimes tribunals, and the rules governing them, are controlled by powerful states (Rudolph 2001). Realists hold international law to be epiphenomenal, which means that it will not encroach significantly on the interest of states, especially powerful states (Abbott 365). Despite this, the preferences of the Great Powers—the permanent five of the Security Council—are not reflected in the trigger mechanisms as formulated in the Rome Statute.

From the outset of the negotiations, these states argued that only the Security Council should have referral rights.[2] This argument failed to hold sway. They also proposed that individual members of the Security Council should have the right to veto any investigation, but this was overturned with the so-called "Singapore Compromise."[3] Most importantly, these states were firmly

2 Members argued that "the primary purpose in establishing a permanent international criminal court was to avoid the necessity of the Security Council establishing ad hoc tribunals to deal with crimes under international humanitarian law." Under this system, as with the Ad Hoc Tribunals in Rwanda and Yugsolavia, the Security Council alone could control which investigations were started and which were not. However the ICC would obviate the need to establish a new tribunal each time a situation arose (Summary Record of the 27th Meeting).

3During the preparatory meetings prior to the Rome Conference, there was a strong divide between those states that argued the Security Council must pre-authorize any investigation by the ICC, and those that felt it should have no referral powers at all. Singapore made a proposal, subsequently known as the 'Singapore Compromise,' whereby the Security Council would have the right to defer an investigation. Any trial commenced would go ahead unless the Security Council's members collectively agree that an investigation should be stopped, and passed a resolution to that effect. This subtle difference in effect retains the Security Council's collective right to control investigations at the ICC, but it does not give

opposed to the prosecutor's power to initiate investigations independently (Glasius 2006, 52). On a similar note, the great powers also believed the ICC should have no rights to determine if a state is unable or unwilling to investigate and prosecute war crimes.

Though the wishes of powerful states were not fully realized in the Rome Statue, power-based theories are not completely at a loss to explain the ICC's trigger mechanisms. For instance, the preferences of middle powers were accepted over the preferences of smaller states. It is certainly possible that this may be a result of aid-based coercion: 19 out of 22 of the world's largest aid donors were middle powers that supported the independent prosecutor and the reduced role of the Security Council at the time of the Rome Statute's passing (OECD Fact Sheet).[4] Nonetheless, this does not explain why Great Powers, with the most influence and money, lost the support of many small states to the middle powers.

Trigger Mechanisms Reflecting State Interest

If great power preference does not account for the trigger mechanisms in the Rome Statute, can they then be explained by state interest? After all, 83 percent of states at Rome supported the independent prosecutor by the end of the Rome Conference, and 86 percent of states voted for the Rome Statute overall on July 17, 1998 (Glasius 2006, 59). One possible explanation is institutionalist, which sees state interest as exogenously constructed. In such a framework, the ICC would have been created to fulfill a particular function.[5] Here, interest is analyzed purely at the international level without consideration of domestic politics, individual leaders, interest groups, or norms. Under an institutionalist framework, it is not immediately evident why states, especially the primary pro-

any individual Security Council member the right to veto an investigation.

4An important caveat is that while nineteen out of twenty-two seems an impressive number, the three states unaccounted for are the first, second, and third highest aid donors respectively (the US, Japan, and France), all of whom opposed the independent prosecutor at Rome. Their collective aid outweighs the combined aid of the remaining nineteen.

5See Abbott & Snidal, 421-456; Keohane et al., 457-488; and Koremenos et al., 1-40.

ponents of the ICC and its independent prosecutor, would have an exogenous interest in the trigger mechanisms. In thinking through this issue, a cost-benefit analysis proves a useful analytical method to see what advantages or disadvantages might come as a result of the ICC's trigger mechanisms.

Costs

For many states, it is unlikely that the independent prosecutor will come as a sovereignty cost. As it is typically defined, a sovereignty cost can best be understood as "the symbolic and material costs of diminished national autonomy," including "the potential for inferior outcomes, loss of authority, and diminution of sovereignty" (Abbott 375; Abbott and Snidal 437). These costs are "at their highest when international arrangements impinge on the relations between a state and its citizens or territory" (Abbott and Snidal 437). Complementarity, which allows states to take over investigations that the prosecutor may initiate, will reduce sovereignty costs substantially, since a state will retain its authority to regulate its citizens' behavior through its own judicial system. In 1951 and 1953, the International Law Commission's draft statues for an international court did not include the principle of complementarity, and each of these drafts were roundly rejected (Bassiouni 1997, 14). Such an example helps to illustrate states' chief concern with maintaining a level of sovereignty through complementarity.

However, complementarity is conditional, and not all states will be as well-protected by it as others. Many developing states might incur higher sovereignty costs than established powers. Developing states that are either engaged in or emerging from conflict should reasonably be expected to face a greater incidence of "situations" than developed, stable states. The more situations that occur, the more likely the state is to be investigated by the ICC. On top of this, the ICC's ability to determine that a state is "unable or unwilling genuinely" to investigate or prosecute war criminals will further increase the sovereignty costs. As William Schabas argues, many developing states do not have established and recognized ju-

dicial systems that the ICC would necessarily deem "able and willing genuinely" to bring defendants to justice (Schabas 2004 86). For small, developing states, then, an independent prosecutor presents unique sovereignty costs.

Great powers also incur sovereignty costs as a result of the ICC's independent prosecutor. More often than their smaller peers, their foreign policies may entail military presence overseas; indeed, many of the Security Council members have recently conducted or are conducting military operations on foreign territory—most obviously, the wars in Iraq and Afghanistan by the United States, United Kingdom, and other NATO powers. Consequently, their potential for involvement in war crimes situations is higher, and an independent prosecutor invites the possibility of sovereignty costs. Nonetheless, complementarity would likely lower such costs for these powers. The ICC is not likely to determine that they are unable or unwilling to prosecute war crimes: "the difficulties involved in challenging a State with a sophisticated and functioning justice system would be virtually insurmountable," according to Louise Arbour, the prosecutor for the International Criminal Tribunal for the former Yugoslavia (ICTY) (qtd. in Schabas 2004, 86).

In contrast to the small and large states, middle powers seem to face few of these sovereignty costs. These very middle powers—states such as Canada, Australia, Germany, the Netherlands, Norway, Finland and Argentina—came together first to form the LMG and to vocalize support for the ICC's independent prosecutor. For such states, uncertainty about potential war crimes violations is comparatively slight given their limited involvement in foreign military operations. As with the great powers, though, it is difficult to imagine the ICC considering their judicial system as ineffective. Thus, they have little reason to fear a challenge to their judicial system by the independent prosecutor or the ICC. In a cost-benefit calculation, their costs are lowest of all states.

Benefits

From the outset, state benefits from the ICC trigger mecha-

nisms are not immediately clear; however, the secondary effects of an independent prosecutor help to elucidate these state interests. One rational choice motivation for state interest may be that an independent prosecutor would reduce future threats to global peace and security. Though there is very little evidence either that prosecution regularly deters future war criminals or that prosecution is correlated with an end to violence in war crimes situations, states may nonetheless have perceived that the ICC's independent prosecutor would contribute towards global peace and stability (Dietelhoff 10). In fact, the Rome Statute's negotiating records suggest states believed the ICC would achieve this goal. Nevertheless, whether this actually constitutes a "benefit" that would be in the self-interest of states depends on the state. For small states, global peace and security might be a means of ensuring their own survival, reducing internal instability, or aiding economic growth. On the other hand, the core proponents of the ICC, the already stable and prosperous middle powers, were considerably less likely to benefit from global peace and security than small states; achieving such ideals will not likely increase the chances of their survival or, for instance, increase economic productivity.

Another potential gain from signing and ratifying the Rome Statute may be what Abbott and Snidal identify as the "reputational benefits" of international law (427). The authors argue that states have an interest in "hard" law because it creates useful credibility and reputational benefits for compliant states. First, commitments to one area of international law lend credibility to a state's commitments in all areas of international law, and such commitments may be beneficial to smaller states' chances of receiving foreign aid. However, neither of these potential benefits would apply to the core proponents of the ICC, who were primarily aid donors, not aid recipients, and whose commitments to international law were already credible at the time of ICC negotiations. It is not incorrect to say supporting the ICC and the independent prosecutor had useful reputational benefits, but it is important to realize that these benefits extended mostly to the small states—states that were secondary supporters of the ICC.

Finally, if we assume that the core supporters of the ICC (i.e., the LMG) hoped to reduce war crimes and to establish global peace, then, an institutionalist argument could be made that having an independent prosecutor would concretely "lock in" or cement that interest. In other words, the LMG sought to create an independent prosecutor as a means to an end—reductions in war crimes and global peace. Indeed, the negotiating records of the Rome Statute indicate that the LMG aggressively advocated for an independent prosecutor for precisely this reason. In as much as this is an institutionalist argument, it is a weak one. While it is true that having an independent prosecutor would lock in middle power preference, it is unclear how these preferences—reductions in war crimes and global peace—would constitute a "benefit" or be in the rational self-interest to these particular states. There is a further caveat to the "locking in" argument. As already noted, 83 percent of states eventually supported the independent prosecutor, with 86 percent supporting the ICC generally. If the LMG had strong-armed consensus on the independent prosecutor against the will of other states, then we might expect a larger discrepancy between these two figures. Thus it seems the primary proponents of the independent prosecutor—that is, middle powers—had both little to gain and little to lose from the trigger mechanisms of the ICC. At the same time, the low costs clearly are important to understanding why these states supported them.

Cost-benefit Analysis of the ICC's Trigger Mechanisms.

	Costs	*Benefits*
Developing States	Very high: more likely to be investigated, complementarity is conditional and less likely to apply	High: reputational benefits, possible benefits from peace and stability
Middle Powers	Low: not likely to be investigated, complementarity applies	Low: no reputational benefits, benefits from peace and stability already in place
Great Powers	High: more likely to be investigated.	Low: no reputational benefits

Liberal Theories

So far, state interest has been assumed as exogenously given, and it has not been analyzed at the domestic and decision-maker level, as liberal theories do. Although liberal theories remain a rational choice analysis, they are applied to states as well as non-state actors, such as domestic political parties, special interest groups and NGOs, or individual leaders.

Andrew Moravcsik, in his widely-cited article, "The Origins of Human Rights Regimes," argues that human rights regimes can only be explained by looking at "the domestic self-interest of national governments" (Moravcsik 220). Using the ECHR as a model, Moravcsik contends, "the primary proponents of binding international human rights commitments in postwar Europe were neither great powers, as realist theory would have it, nor governments and transnational groups based in long-established democracies, as the ideational account would have it." (Moravcsik, 219).[6] Rather, Moravcsik argues that the historical record indicates new governments in recently emerging democracies were the states most active in advocating for the ECHR.

Liberal republicanism, which contends that newly-formed democratic governments attempt to "lock-in" domestic commitments to the rule of law, democracy, and human rights through international law, may offer a compelling explanation for the origins of the ECHR and its trigger mechanisms, but evidence for this theory in the case of the ICC's trigger mechanisms is not overwhelming, despite the same surprising conclusion that powerful states did not support high levels of access to the ICC, let alone coerce other states into supporting them.

The "primary proponents" of the ICC were the LMG, of which some states—about fifteen in total—were indeed emerging democracies at the time of the Rome Conference.[7] States that

6 Ideational theory, according to Moravcsik, argues that "Governments accept binding international human rights norms because they are swayed by the overpowering ideological and nonnative appeal of the values that underlie them." (Moravcsik 223).

7 This number was derived from the Freedom House country rankings. Freedom House,

were either "Not Free" or "Partly Free" but that had become "Free" within ten years prior to 1998 included nine Central and Eastern European countries,[8] as well as countries such as South Africa, Chile, and Venezuela. Though many supporters of the ICC were emerging democracies, Moravcsik's theory does not apply for two reasons. The first is that all of these emerging democracies only joined the group later and were thus all secondary proponents of the independent prosecutor. The second is that they did not necessarily vote for the Rome Statute to lock in domestic policy goals as Moravcsik would predict. In the case of the ECHR, Moravcsik's evidence for his conclusions—that emerging democracies were the primary proponents of the ECHR, and that they were motivated by domestic policy preferences—is primarily derived from speeches, negotiation records, and European Parliamentary records (Moravcsik 237). But in the case of the ICC, the analogous evidence[9] offers surprisingly little to suggest that emerging democracies were notably active in the LMG, or that they were vocal in their support out of domestic political interest.

Normative Values

At this point, it becomes clear that the preferences of the core proponents of the ICC and its high-access trigger mechanisms (i.e. the LMG) did not find their origin in power or self-interest. Neither institutionalist nor liberal arguments can account for the fundamental origin of state interest in the ICC's trigger mechanisms, although they may reveal the rational choice strategies by which that interest was locked in. While some states may have supported the independent prosecutor as a means to cement their preferences, these preferences constitute values, or norms, more than they rep-

Freedom in the World Country Ratings, 1972-2006.

8Bulgaria, Croatia, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, and Romania.

9The records of the ICC's development, including the records of the International Law Commission, the Sixth Committee (the committee in the General Assembly that discusses international law), the Ad Hoc Committee, PrepCom meetings, and the Rome Conference itself.

resent self-interest.

I argue, then, that to understand why the primary proponents of the ICC's trigger mechanisms supported high levels of access to the Court, one must look to norms, values and principles. The LMG was initially a coalition of middle powers who shared a set of norms and preferences about the Court, including the independence of the prosecutor. Indeed the independent prosecutor was one of four key "cornerstones" of the LMG's policy preferences (Glasius, 2006, 23). Though the LMG is defined principally by the states that it comprises, it is important to note that the LMG initially formed around a group of individual delegates to the Sixth Committee—the committee in the General Assembly that deals with international law (Glasius, 2006, 22). It may seem obvious, but the LMG's preferences were articulated by individual decision-makers, not states. For the most part lawyers by profession rather than practicing diplomats, these delegates may have been more concerned with the legal functionality of the Court than with representing "state interest" as defined in any of the rational choice theories discussed above. In some cases, these lawyers came from states that did not favor the establishment of the ICC and have yet to sign or ratify the Statute.[10] That the LMG formed around such delegates explains more clearly why state interest is highly obfuscated in the trigger mechanisms.

Moreover, in their speeches and debates at the Sixth Committee, delegates consistently underscored normative values in explaining their support for the ICC as well as their advocacy for the independent prosecutor, the reduced role of the Security Council, and the situation/case distinction. They argued that without these three elements incorporated into the statute, the ICC would be beholden to state control and political interference and would have no capacity to act where it was most needed. Indeed the likelihood of more trials as a result of the independent prosecutor and of trials conducted at certain standards of impartiality, transparency, and efficiency, as determined by the ICC, strongly informed

10 For instance, M. Cherif Bassiouni of Egypt, S. Rama Rao of India, and Lionel Yee of Singapore.

and influenced the LMG's preferences. LMG states stressed the importance of values such as legitimacy, global justice, the rule of law, non-politicized and impartial trials, global peace and security, assisting war crimes victims, avoiding "victors' justice" or violations of the principle nulla crimen sine lege, and the moral obligation to end human suffering.[11]

DEVELOPMENT OF NORMS

While it seems clear that those states who advocated most forcefully for the independent prosecutor did so primarily as a result of normative preferences, we still do not know why their preferences were realized in the Rome Statute while those of other states were not. Although 83 percent of states ultimately supported the independent prosecutor, not all states shared this preference to begin with. Indeed, those who did in December of 1996 amounted to only 23 percent (Dietelhoff 17).

The mass atrocities witnessed in both Yugoslavia and Rwanda were one of the most important factors underlying why states adopted such a position. Prior to 1993, the main reasons behind state efforts to create the ICC had been instrumental (e.g., to prevent and try drugs crimes). While the International Law Commission had expanded the Court's mandate to include war crimes, it was not a state-led effort. It was only after the creation of the ICTY that many states came to see the importance of such a mandate. The International Criminal Tribunal for Rwanda (ICTR) lent the process further urgency. Those in favor of the independent prosecutor repeatedly and energetically invoked these incidences of ethnic cleansing and genocide as evidence of the necessity of this trigger mechanism. They argued in meetings that the brutal nature of the conflicts and the scale of deaths were unconscionable; states had a moral obligation to prevent further conflict, and one way to realize this objective was to have an independent prosecutor

11 For examples of states espousing these values, the meeting records of the Rome Conference are particularly helpful. See Summary Records of the Committee as a Whole, contained in UN Doc. A/CONF/13 (Vol. II).

(Kirsch and Oosterveld 1141-60). From a legal perspective, the two tribunals also constituted evidence of a "growing consensus or international norm concerning the institutionalization of humanitarian law" (Leonard 36).

One must also look to the role of domestic politics to understand how these norms developed. First, the change in administration in 1993 in the United States had a clear impact on the United States' statements and policy preferences. An examination of the General Assembly's Sixth Committee meeting records clearly shows a shift in attitude between 1992 and 1993. Under the Bush administration in 1992, the United States' Sixth Committee members consistently argued for a total moratorium on the International Law Commission's work on the ICC. Under the Clinton administration in 1993, they viewed the work as "excellent, thoughtful, serious and deserving of attention by member states" (Morris and Bourloyannis 350).

More direct evidence of domestic politics impacting norms comes from the United Kingdom. The change from a Conservative to Labour government is cited by numerous sources to have been highly influential on negotiations (e.g. Hall 1998a, 132). This occurred in mid-1997, just over a year before the Rome Conference. In that time, the United Kingdom changed positions dramatically, withdrawing its previous opposition to the independent prosecutor (Hall 1998a, 132). It also accepted a reduced role for the Security Council under the Singapore Compromise and did not oppose the judicial review powers granted to the ICC in its trigger mechanisms. Because this massive change came from a member of the Permanent Five, it crucially undercut the unity of the Security Council in its opposition to the independent prosecutor. U.K. support for the independent prosecutor lent increased momentum to the LMG and the NGO coalition. While the United States and the United Kingdom were far from the core proponents of the ICC or its trigger mechanisms, changes in their governments did create the conditions under which the LMG could succeed in advancing its normative preferences.

The "New Diplomacy"

A new body of scholarship argues that one must look at a process known as the "New Diplomacy,"[12] a method of negotiating international treaties that is a "bold break from traditional processes [by using] innovative methodology and…amazing speed" (Davenport 18). It consists of coalition building with non-state actors, agenda control, accelerating negotiations to force results, wide-ranging lobbying efforts, occasional policy-making for small states, a break from consensus politics, and a tendency for its proponents to implement "take it or leave it" package deals.

Coalition Building

One of the principle factors in the success of the LMG was its tactic of coalition building. Both Glasius and Leonard study this coalition extensively (Glasius, 2006; Leonard). They assert that one must look to the role of persuasion and discourse to grasp why small states accepted LMG proposals for the ICC trigger mechanisms. In this endeavor, the LMG was supported and goaded by a vast array of NGOs—over eight hundred in total—under the umbrella of the Coalition for the International Criminal Court (CICC). Almost all accounts of the ICC's history stress the importance of NGOs to negotiations (e.g., Kirsch and Holmes, Bassiouni 1999a, Bassiouni 1999b, Glasius, Benedetti and Washburn, and Arsanjani).

With regard to the prosecutor, NGOs performed two major functions. Firstly, they persuaded wavering states that the position was both desirable and achievable (Glasius 2002, 60). NGOs pressured unsure states to support high access levels on normative as well as functional grounds. They argued that having an independent prosecutor and curtailed Security Council powers, in both referral and deferral, were essential to the successful administration of justice. Indeed, the likelihood of more trials and fairer trials, discussed above, factored strongly into their support for the trig-

12See Davenport, Dietelhoff, and Cooper, English & Ramesh.

ger mechanisms as formulated (see, for instance, Report of the Ad-Hoc Committee, par. 113). In making these normative arguments, NGOs used governments' own statements against them to push them into compliance:

> Governments had made a lot of statements of the Yugoslavian and Rwanda Tribunals about international justice. Those governments really made very strong statements but of course in a different context. And it was very easy to use those statements against them to push them further (C.K Hall qtd. in Dietelhoff 26).

The coalition was further strengthened by the support of the prosecutors for the ICTY and ICTR. The former made important appeals for an independent prosecutor at the fifth meeting of the Preparatory Committee in December 1997 (Hall 1998b, 339). There it was stressed that the prosecutor needed the power to initiate investigations propio motu in order to avoid politically motivated trials. Additionally, both prosecutors attended the Rome Conference as independent experts. There, they made an important impact on delegations, arguing that the independence of the prosecutor would be necessary for the effective functioning of the court (Glasius 2006, 11).

Secondly, the CICC also played an important function in convincing states of the feasibility of an independent prosecutor. Glasius argues that many small states did not support the independent prosecutor simply because they believed such a position would never be realized in the face of U.S. opposition (Glasius 2006, 56-60). To that end, the CICC circulated a daily newsletter at Rome that demonstrated where each state stood on controversial matters. By showing in hard numbers that many states were not opposed to an independent prosecutor, even if they had not directly supported it, they were able to demonstrate that the United States, while vocal in its opposition, was not necessarily in the majority (Glasius 2006, 59). The focus shifted from powerful states to the number of states, as each had only had one vote. Phillip Kirsch, the chairman of the conference, concluded that the independence of the prosecutor was one of "the features that might not have appeared without

the concerted NGO insistence" (qtd. in Glasius 2006, 57).

Leadership and Agenda Control

A further reason the LMG-led coalition was successful lay in its ability to gain and hold key leadership positions throughout the negotiation process. First, this meant that it could control the "rules of the game" as the Statute developed, and, second, that it could directly influence critical decisions at key moments.

The Ad Hoc Committee, the first committee in which states were to debate directly the draft statute, was chaired by Adriaan Bos, the Netherlands' delegate to the Sixth Committee. He also chaired the Preparatory Committee (PrepCom) meetings—six meetings of state representatives, and in some cases NGOs, convened to prepare a draft statute in advance of the Rome Conference. Bos made several tactical decisions that strongly changed the rules of the game in the LMG's favor. He divided the agenda up into working groups that were chaired by delegates from LMG countries (Glasius 2002, 44). The working groups on trigger mechanisms in both the Ad Hoc and Preparatory Committees were chaired by Silvia Fernández de Gurmendi, a founding LMG member from Argentina. Another crucial victory was the attendance of NGOs at all of these meetings and at the Rome Conference itself (Benedetti & Washburn 23).

Bos also scheduled several informal meetings outside of the Ad Hoc and PrepCom meetings. In some cases, critical aspects of the draft statute were negotiated at these meetings—a prime example being the power of the ICC to take over investigations if it determines a state is unable or unwilling to do so ("Decisions Taken By The Preparatory Committee" 10). Likewise, non-substantive but nonetheless necessary administrative work was conducted at these informal meetings.[13] Not all states were invited to these

13 For instance, after the fifth PrepCom there was no single, consolidated draft statute. Many substantive changes had been made to the ILC draft statute, but they had yet been merged into a unified, coherent document. Bos organized an informal meeting of states and NGOs at Zutphen in January 1998, where he drafted a consolidated text, known as the "Zutphen Draft."

meetings, yet NGOs were (Benedetti and Washburn 11). Indeed, when one such meeting, the Courmayeur Meeting, lacked the necessary funding to go ahead, an NGO covered the costs (Bassiouni 1999b, 447).

Perhaps Bos's most important contribution was to argue that the ICC should be established by multilateral treaty. As Chairman of the Ad Hoc Committee and PrepCom Committee, he presented this view to the Sixth Committee multiple times as if it were a given that all states agreed with him (see, for instance, Summary Record of the 25th Meeting, par. 26). In fact, many did not. The LMG preferred a multilateral treaty because it gave equal voting power to all states. Against this view, the great powers had argued the ICC should be established by Security Council resolution, as had been the case with the ICTY and ICTR.

Bos's ability to dictate the rules of the game, so to speak, was further enhanced by his nomination to chair the Rome Conference as well. However, he fell ill a few weeks before it started and was subsequently unable to fulfill this role. In his place, he recommended the Canadian lawyer Philip Kirsch. At this point, Canada was the chair of the LMG, and Kirsch, together with the rest of the leadership of the conference (again, all from LMG states) still maintained substantial influence over the outcome by drawing up the agenda for the conference in advance at a meeting funded by NGOs (Bassiouni 1999b, 446-447). Kirsch scheduled trigger mechanisms and the independent prosecutor to be discussed amongst the last items on the agenda. He also ensured that trigger mechanisms were debated not in a working group, but in the Committee as a whole, which he chaired himself.

Kirsch also made other crucial decisions that prevented states who did not share his preferences on trigger mechanisms and other matters from wielding too much influence. He limited the time for speechmaking, worrying that powerful states opposing the Court might obfuscate and delay the progress of the statute if given the chance (Benedetti and Washburn 28). More crucially, about three weeks into the Rome Conference, when it became clear that states were locked into entrenched positions on trigger mechanisms, ju-

risdiction, and other controversial aspects of the Statute, Kirsch organized a meeting at the Canadian Embassy, inviting only LMG states and the CICC. At this meeting, he drafted a "Bureau Paper" that purportedly represented an aggregate of state views on the Statute's most controversial matters, including its trigger mechanisms. This draft included an independent prosecutor, despite a large number of states who opposed such a move at that stage in the conference. U.S. delegates expressed outrage at Kirsch's actions and claimed that he had inserted LMG preferences throughout the draft that was produced as a result of this meeting—an accurate criticism.

Despite vocal opposition to his leadership, Kirsch continued his aggressive approach in ensuring the high-access trigger mechanisms were included in the final draft. He and the leadership of the Committee as a whole kept the drafting process in their own hands as the deadline approached for the end of the conference. Negotiations had become "increasingly informal and untransparent" such that no delegate "knew what was going on that last week except John Holmes, the Canadian Ambassador, Kirsch, and some key leaders of the Like Minded Group," according to William Pace (qtd. in Glasius 55).

Kirsch, and those working with him, wrote up a final draft of the Rome Statute that included an independent prosecutor and presented it to the delegations on the last day of the Rome Conference. With no time left, states were left unable to negotiate this or indeed any other provisions at all. States were presented with a "take it or leave it package" that left them with no choice but to take it.

Although 83 percent of states ultimately supported the independence of the prosecutor, Kirsch's unilateral actions are an important variable in explaining why powerful states, such as the members of the Security Council, were unsuccessful in their opposition. More importantly, Kirsch's aggressive leadership strongly influenced wavering states to vote for the Independent prosecutor.

"Conditions of Uncertainty" and Incomplete Information

A final factor to consider is that the coalition's success was facilitated by small states' lack of information throughout the negotiation of the Statute. Many small states did not send delegations to the Ad Hoc and PrepCom meetings (Hall 1997, 186). Further, due to translation delays, there was very little time between when the final draft of the Statute was sent out and the start of the Rome Conference (Bassioun 1999b, 445).The Statute had not received significant media attention in many smaller countries, and many delegates were unaware of its key provisions (Bassiouni 1999b, 445). This was partly because the draft was extremely long—173 pages, with 1300 different square bracketed proposals—such that it was hard to analyze coherently (Bassiouni 1999b, 445). As a result of these factors, when they arrived at Rome, it took these delegations two weeks just to learn what the key issues of the Statute actually were, let alone to determine where they stood on them (Bassiouni 1999b, 449).

Once at Rome, small states faced new practical problems. Many delegations were unable to communicate regularly with their home capitals as a result of technical inadequacies at Rome, including a dearth of fax machines (Bassiouni 1999b, 450-452). The building's layout was, "to say the least, confusing," and often delegates arrived late or not at all for meetings (Bassiouni 1999b, 450). Moreover, many of the meetings at Rome lacked translators and were conducted only in English (Bassiouni 1998a, 29, fn. 148). Consequently, non-English speaking nations were unable to participate fully in debates or understand what progress was made.

The greatest problem small states faced at Rome, however, was the sheer number of meetings that were held. In order to ensure each state had a representative at every meeting of the Rome Conference, each government would have had to send at least ten delegates (Bassiouni 1999b, 450, fn 27). This number would be even higher if one factored in the informal consultations ("informals" and "informal informals"), of which there were up to 12 a day (Bassiouni 1999b, 449). One-hundred and twelve states out of 163

had fewer than 10 delegates. Of these states, at most 22 ultimately rejected the Statute or abstained in the final vote, constituting no more than 20 percent of states.[14] Over four-fifths of the states who could not attend all meetings ultimately voted for the statute. In contrast to these states, LMG delegations had sufficient staff to attend most meetings. LMG states had more than 10 delegates on average and not only participated in every meeting but were able to actively and aggressively pursue their preferences in the absence of opposition.

According to Kofi Annan, for those 112 delegations who could not attend all meetings or who were otherwise unable to comprehend the progress made on the Statute, NGOs played an "unprecedented role" in informing delegations of key issues and ultimately persuading them to adopt LMG stances (Annan ix-xi). For many delegations, the briefings provided by NGOs were their only sources of information on meetings. In some cases where states were short of delegates, NGOs even provided states with their own personnel to attend meetings as acting delegates (Pace and Thieroff 394). This presented NGOs with a clear opportunity to influence policy—an opportunity they did not pass up (Glasisus 2006, 43).

CONCLUSION

I have sought to address two questions in this paper: why states supported the trigger mechanisms as they are formulated, and how they were able to incorporate their preferences.

In a cost-benefit analysis, the primary proponents of the trigger mechanisms, middle powers, had no compelling interest in an independent prosecutor or the reduced role of the Security Coun-

14It was probably even less than this number, but since the vote was not disclosed to the public, we do not know. We do know that in total 27 states either rejected or abstained from the vote, including China, Iraq, Israel, Libya, Mexico, Singapore, Sri Lanka, Trinidad, Qatar, the USA, and Yemen, who voluntarily made their votes public. This leaves 22 states unaccounted for. I am assuming that these states had less than 10 delegates; if they did not, the argument would be even stronger in favor of the hypothesis that having less than 10 delegates led to a positive vote.

cil. Nonetheless, while they stood to gain little from the ICC's trigger mechanisms, they would accrue the lowest costs from the independent prosecutor, as compared to other states. If these costs had been higher, their support for the independent prosecutor may not have been as substantial as it was.

The evidence indicates that the middle powers' preferences in trigger mechanisms were largely shaped by normative values. The negotiation records clearly demonstrate that delegations from these states argued repeatedly and vigorously that the independence of the prosecutor and the reduced role for the Security Council were essential to effectively bring war criminals to justice, to end human suffering, and to foster global peace and security. It seems probable they preferred these trigger mechanisms precisely because they challenged state authority, not in spite of their doing so.

The middle powers built influential coalitions with other states and NGOs in the form of the LMG and the CICC, respectively; its aggressive bargaining tactics, sometimes referred to as "the New Diplomacy," were highly successful in marginalizing the influence of great powers and aligning the preferences of small states with their own.

As a result, the Rome Statute includes Article 13(c), granting the prosecutor the power to take independent action if and when states do not. Although the current prosecutor has yet to investigate a situation of his own will, early indications are that he is not afraid to challenge state authority in the face of strong opposition, as evidenced by the recent indictment of Hassan Omar Al-Bashir in an investigation initiated by the Security Council.

However, Article 13(c) on its own would not be a major step forward to realizing the aims expressed by the middle powers and their allies during negotiations without the added authority of Article 17.2, which makes complementarity conditional. Even if states take over investigations initiated by the prosecutor, he may appeal such action if states do not conduct investigations and prosecutions at certain standards of impartiality and fairness determined by the ICC.

Amnesty International expressed the perceptual impact of

the Rome Statute as follows:

> The true significance of the adoption of the Statute may well lie, not in the actual institution itself… but in the revolution of legal and moral attitudes towards the worst crimes in the world. No longer will these crimes be simply political events to be addressed by diplomacy at the international level, but crimes which all states have a duty to punish themselves or, if they fail to fulfill this duty, by the international community in accordance with the rule of law. (qtd. in William Pace and Mark Thieroff 396)

The combination of the independent prosecutor and conditional complementarity makes this secondary impact of the ICC a significant one.

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