Explaining State Cooperation with the International Criminal Courts and Tribunals

A thesis submitted by

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Declaration

This thesis is the result of the author's original research. It has been composed by the author and has not been previously submitted for examination which has led to the award of a degree.

Signed:

Date:

Abstract

The dissertation applies an innovative interdisciplinary design to explain which conditions or combinations of conditions are causally relevant for effective state cooperation with international criminal courts and tribunals. I answered the research question by conducting two empirical analyses.

The first study places states at the centre of the analysis. The literature review identified six conditions: court independence; court outreach; international interests (such as the threat of sanctions or the promise of membership of an international organisation); the proximity of suspects to the state's political or military elite; the state's institutionalisation of relevant law; and government stability. These conditions were divided into two groups, according to their proximity to the state. It was then possible to analyse how different constellations of court outreach and international interests interact with state level conditions (government stability, institutionalisation and proximity of suspects to elites).

The qualitative comparative analysis (QCA) relies on an original dataset of 34 cases related to the cooperation of Kenya, Uganda, Serbia and Croatia cooperation with the International Criminal Court and the Yugoslav Tribunal was created. By using two-step QCA to account for the interactions of conditions, the dissertation answers the question of which tools might be used to promote cooperation. Two pathways sufficient for cooperation were identified. The results indicate that even when proximity of suspects to elites is significant, cooperation can be achieved when international pressure combines with outreach and a high level of ICL institutionalisation. The second pathway suggests that cooperation follows when suspects do not hold high-level leadership positions. Even in this situation, international pressure and outreach play a role.

The second analysis, a small-n QCA of five human rights and international criminal courts, assessed whether court independence has an influence on cooperation. The results suggest that independence positively affects cooperation only in presence of a contextual factor, high degree of norm socialisation among state parties.

To Štefan Marušík and all those whose lives were taken from us.

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List of Acronyms

ASP	Assembly of State Parties of the International Criminal Court
AU	African Union
ECJ	European Court of Justice
ECHR	European Court of Human Rights
EU	European Union
IACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICRG	International Country Risk Guide
ICT	International Criminal Tribunal or Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Former Yugoslavia
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
LRA	Lord's Resistance Army
NATO	North Atlantic Treaty Organization
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNHRC	United Nations Human Rights Committee
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council
USD	United States Dollar
QCA	Qualitative Comparative Analysis

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1. Introduction

What motivates states to cooperate with international criminal courts and thus limit their sovereign decision-making powers in the area of national security? International criminal courts and tribunals (hereinafter ICTs, or courts) are a unique type of international institution prosecuting perpetrators of war crimes, crimes against humanity and genocide; these atrocities are closely associated with armed conflict. As such, ICTs scrutinise the decisions of political leaders at times when national sovereignty is already under threat.

Croatia in the 1990s is a case in point. Following the constitutional crisis in Yugoslavia and first Croatian multi-party elections in 1990, Croatia declared independence in 1991. Very soon it found itself in a complex war on its own territory as well as in neighbouring countries (BBC 2012). Only a few months after the start of the war, Croatia "called on [the] international community to create a tribunal" (Peskin 2008, 95). In 1993, the United Nations Security Council (UNSC Res 827) as a response to "widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia" established the International Criminal Tribunal for Former Yugoslavia (hereinafter ICTY, or tribunal). Over the next two decades the ICTY delivered on its mandate and prosecuted in total 161 persons. The accused included generals Gotovina, Ademi and Norac, as well as army chief of staff Bobetko, who were in charge of the armed forces during the Croatian war for independence (ICTY n.d.). Although the generals were popularly seen as national heroes, Croatia was obliged to cooperate with the ICTY arrest warrants (Lamont 2008, 216; Peskin 2008, 129). The clash between the legal obligation, EU pressure for cooperation and popular sentiment put

Croatia's first post-Tudjman coalition government in a difficult position. In this complex situation, one of the accused, General Gotovina, was allowed to escape arrest (ICTY 2002, para 226). Nevertheless, it was with the vital support of the Croat government that Gotovina was arrested four years later, in Spain (ICTY 2006, para 77).

Why was Croatia, even though its very survival was at stake, willing to limit its room for manoeuvre through international criminal law (ICL)? Once its military leaders were accused of breaking the law, what drove Croatia's final decision to cooperate with the ICTY arrest warrants? This dissertation aims to shed light on the main determinants of successful cooperation between states and courts prosecuting violations of ICL. Cooperation is understood here as average yearly state compliance with "undue delay with any request[s] for assistance or an order[s] issued" by the court (ICTY statute, art 29 para 2).

1.1. Theoretical puzzle of cooperation

Theory suggests that two fundamental forces drive state behaviour: norms and interests. The discussion between the interest-focused "logic of consequences" scholarship and the norm-oriented "logic of appropriateness" theories is central to the discipline of international relations (see March and Olsen 1998). Its relevance to the questions asked above has been pointed out by Lamont's study (2008, 2010) on state compliance with the ICTY that reviews the main theories within both logics.

On the one hand, "logic of consequences" theories argue that states always behave as rational actors aiming to maximise their interests (March and Olsen 1998, 949–50; Zaelke, Kaniaru, and Kružíková 2006, 55–56). According to

rationalist approaches such as realism and neoliberalism, states cooperate with international organisations and comply with international law only to increase their gains. By prosecuting the individual perpetrators of what frequently are state-sponsored crimes, the ICTs can easily find themselves in direct conflict with states' interests. The courts examine the conduct of national leaders during armed conflicts, when the very survival of the state is threatened. For illustration, the ICTY's investigations of crimes committed by the Yugoslav National Army eroded the international standing of the Federal Republic of Yugoslavia and at the same time improved the position of its adversaries, notably the Croat and Bosnian forces (see Peskin 2008, 14-16 on state interests and victim status). As the example shows, the independent criminal prosecutions often bear highly political consequences for the states involved, including weakening of their national sovereignty. Therefore, when looking through the lens of "logic of the consequences" theories, cooperation with ICTs is frequently viewed as contrary to national interests.

On the other hand, the "logic of appropriateness" theories point out the role of norms and national identities (March and Olsen 1998, 952; Wendt 1999, 25). How states define interests depends on the norms and identities they internalise (Wendt 1992, 423–24). Thus, from the "appropriateness" point of view, cooperation with the ICTs "should" follow. After all, laws proscribing the infliction of unnecessary suffering during armed conflicts are based on the oldest norms with almost universal acceptance (Bassiouni 2003, 25–26).

The cases of Slobodan Milosevic and Uhuru Kenyatta, who both faced international criminal proceedings while serving as president (of Serbia and Kenya, respectively) illustrate the relevance of both approaches. By violating national sovereignty, an arrest warrant against a sitting head of state repre-

sents a "condensed" version of the conflict between national self-interest and humanitarian norms.

The ICTY indicted President Milosevic in 1999 for crimes against humanity allegedly committed in Kosovo (ICTY 1999). The timing of the indictment coincided with Kosovo air campaign conducted by the North Atlantic Treaty Organization (NATO) against the Federal Republic of Yugoslavia. Compliance with the ICTY's arrest warrant would, in effect, weaken Yugoslavia' sovereignty since President Milosevic would not be able to exercise his powers as the supreme commander of the Yugoslav Army. From the "appropriateness" point of view, it needs to be pointed out that the Federal Republic of Yugoslavia recognised the legitimacy of the norms protected by the ICTY. As argued by its foreign affairs minister in 1993, Yugoslav national laws were harmonised with relevant international law and the country supported the establishment of a permanent international tribunal (Djokic 1993, 2). However, Yugoslavia strongly opposed the establishment of the ICTY, citing fears of bias (Djokic 1993), and refused to recognise its jurisdiction (ICTY 2002, paras 158, 165).

The case of President Kenyatta seems to be an antidote to that of President Milosevic. Unlike Serbia, Kenya voluntarily joined the International Criminal Court (ICC) in 2005. Five years later, the prosecutor requested issuance of summons to appear for Uhuru Muigai Kenyatta, Kenyan Deputy Prime Minister and Minister for Finance and five other prominent Kenyans (ICC 2015). The prosecution alleged that the suspects orchestrated crimes against humanity during post-election violence across the country between December 2007 and February 2008 (ICC 2011). At the time, Uhuru Kenyatta and William Ruto, another ICC suspect, were prospective presidential candidates for the upcoming 2012 election (Gaitho 2010). Initial signs suggested that the Kenyan

government planned to deliver on its cooperation obligations. When given the opportunity to enact law enabling domestic prosecutions of those involved in the post-election violence, Kenyan parliamentarians opted instead for the ICC process, citing the catch phrase "Don't be vague, let's go to The Hague" (Ollinga and Kibor 2015). The acceptance of the international criminal prosecutions thus appeared stronger than in the case of the Federal Republic of Yugoslavia. Furthermore, cooperation seemed to have the necessary political support. Despite heated domestic political discussions after the name of the suspects became public, the Prime Minister Raila Odinga, also a prospective presidential candidate, reconfirmed his support for the ICC process (Reuters 2010).[1]

As the two cases illustrate, the friction between norms and interests underlies the relationship between states and ICTs. However, they also show how difficult it is to foresee which of the forces will prevail in the long term. The final cooperation outcomes in these two cases are indeed opposite to the initial expectations. In 1999, the Federal Republic of Yugoslavia did not only refuse to execute the arrest warrant against President Milosevic but then prevented ICTY officials from entering its territory (ICTY 2002, paras 158, 165). As argued above, compliance with the ICTY arrest warrant was inconsistent with Yugoslavia's interests and the normative pull of international criminal justice was limited. Nevertheless, only two years after issuance of the arrest warrant, Milosevic lost power and Yugoslavia's successor state of Serbia and

[1] Nonetheless, after the prosecutor's announcement in December 2010, Kenyan parliamentarians criticised the ICC's involvement and quickly passed a motion requesting the government to withdraw from the ICC (National Assembly of Kenya 2010). Despite repeated discussions of withdrawal, in March 2016 Kenya remains a state party to the ICC.

Montenegro actually ensured the warrant was executed. In 2001, Milosevic became the first former head of state to appear before an ICT (BBC 2001).

In contrast, in April 2013, Kenyatta and Ruto were respectively elected President and Vice-President (Elbagir 2013). Although both voluntarily appeared at the proceedings in The Hague (BBC 2014), the prosecutor complained about lack of cooperation by Kenyan authorities (ICC Prosecutor 2013a). Alarmingly, the prosecutor argued that bribery and killing of witnesses prevented her proceeding with the trial in the case of President Kenyatta and another suspect (ICC Prosecutor 2013b para 11, 2014). In 2014, the prosecutor had to withdraw the case against President Kenyatta, citing lack of evidence (ICC Prosecutor 2014), while the case against Vice-President Ruto was still ongoing in January 2016. The initial political support for the ICC process and acceptance of the ICL norm did not tally with the long-term outcome.

What exactly drove Serbia and Kenya to change their level of cooperation? As the literature shows, dynamics of state cooperation are influenced by developments at two different levels. Peskin (2008, 12) in his case study of state cooperation with the ICTY and the ICT for Rwanda (ICTR) argues that the so-called virtual "trials of cooperation" take place at both domestic and international level. In a similar case study of the ICTY, Lamont (2008, 51–81) also points out the importance of domestic and international "politics of compliance". Indeed, when looking at definitions of interests more precisely through the lens of individual "logic of consequences" theories, the differences become apparent at the systemic and at the state level. That is, different conclusions about the possibility of cooperation may be drawn depending whether the focus is on the state or the system, even where the same "logic" is applied. In particular, realism, as the most sceptical of the "logic of conse-

quences" theories, illustrates how by looking through the lens of the system or the state, the perception of cooperation can change.

Systemic neorealist theory argues that survival, the ultimate goal of each state, can be achieved by securing the best possible relative power position in the international arena (Waltz 1979, 92, 118). From a neorealist perspective, preoccupation with relative power position significantly constrains cooperation. When deciding whether to cooperate, an individual state has to weigh not only whether its absolute cooperation gains will be positive or negative, but also whether everyone else's gains will not change the power distribution at its expense (Grieco 1988, 499). If cooperation takes place, it is mostly exploitative in nature, since states are assumed to cooperate only when it strengthens their power position (Mearsheimer 1994, 11–13). Under such constraints international institutions facilitating cooperation are assumed to be a mere reflection of the "distribution of power" among their members. The courts and other international organisations are assumed to have little independent agency and to be unable to attract state cooperation if their mandates interfere with the interests of their member states (Mearsheimer 1994, 13).

However, when applying the same theoretical reasoning at the state level, cooperation is viewed differently. In an attempt to develop Waltz's systemic theory, neoclassical realists dismantle the state and look at constellations of interests at both international and domestic level (Rose 1998, 151–52). Neoclassical realism accepts the argument that states' behaviour is primarily shaped by systemic forces and, therefore, states adjust their foreign policies in response to changes in their relative power position (Rose, 1998, 152). However, it also introduces an argument about the secondary influence of domestic politics. Neoclassical realists argue that systemic constraints under-

go a process of translation into foreign policy at domestic level, during which domestic politics may also influence states' behaviour (Rose, 1998, 152). Not only relative power position in the international system, but also internal factors such as domestic public opinion or power struggles between coalition partners influence state behaviour (Rose 1998, 154). Thus, for neoclassical realism, cooperation becomes possible if domestic actors strongly favour such an option. For instance, from a neorealist point of view, Rwanda had little incentive to cooperate with the ICTR, as it would violate its sovereignty. However, calls of the Tutsi-led government for the establishment of an international criminal tribunal designed to prosecute primarily Hutu-led atrocities are consistent with the neoclassical understanding of interests. In other words, neoclassical realists argue that states cooperate only if they expect the outcome to be consistent with their interests, but they define interests not only in terms of enhanced relative material capabilities – as neorealists (Mearsheimer 1994, 11) do – but also include the interests of domestic actors.

Next to the level of analysis, the definition of relative and absolute gains dissects "interests" into smaller pieces. As argued by Grieco (1988, 487) neorealists define interests in terms of relative gains, whereas neoliberalism's systemic explanations of cooperation focus on absolute gains. If a state is concerned only with whether cooperation increases its absolute gains and disregards comparisons with the gains of other players, cooperation is easier to achieve (Grieco 1988, 487).

The puzzle of cooperation is relatively complex within the rationalist "logic of consequences" theories. All "logic of consequences" theories agree that material interests matter, such as economic sanctions, development aid, military capabilities and national security threats (see March and Olsen 1998,

651). However, they disagree when it comes to the precise definition of interests and they identify different pieces of the puzzle as relevant. For Waltz (1979, 88–101), only relative power capabilities matter when it comes to survival in the international system. When survival is understood as equal to the preservation of sovereignty and territorial integrity, cooperation with an international court overriding the jurisdiction of national courts is by default inconsistent with national interests. For neoclassical realists, cooperation is still difficult to achieve, but if the interests of domestic actors align favourably it does become possible (see Lobell 2009; Rose 1998, 152). Neoliberals are much more positive about the possibility of successful cooperation, thanks to their focus on absolute rather than negative gains. For liberal authors such as Moravcsik (2010, 1) the reasons for cooperation may lie at domestic level, where national preferences are defined.

"Logic of appropriateness" theories are generally more open to the possibility of effective cooperation as long as the relevant norm enjoys acceptance, whether at the systemic level (Finnemore and Sikkink 1998) or within a particular state (Risse and Sikkink 1999). In essence, the theories agree that norms determine state behaviour as long as they are internalised by the state. However, the "appropriateness" theories disagree on the fundamental questions of whether and how the influence of norms can be measured. On the one hand, social constructivists such as Wendt (1999) or Finnemore (1996a) accept the basic epistemological premises of neorealism and neoinstutionalism (Smith 2000, 390). In other words norms can be defined and their influence can be measured. At the other end of the "logic of appropriateness" spectrum are reflectivist approaches, which oppose the basic positivist premises (Smith 2000, 390). As categorised by Keohane (Keohane 1988, 382) "reflective" authors such as Kratochwil or Ruggie "emphasize the im-

portance of human reflection for the nature of institutions" and question whether social science can be objective.

In sum, the existing scholarship offers a relatively complex explanation of cooperation with ICTs. The literature on cooperation can be categorised based on the underlying logic and the level of analysis, as Table 1-1 illustrates.

Table 1-1: Positioning international relations theories

	System	State
Consequences	Neorealism (Waltz) Neoliberalism (Keohane)	Neoclassical realism (Rose, Schweller) Liberalism (Moravcsik, Slaughter)
Norms	Systemic constructivism (Wendt, Finnemore)	Domestic constructivist approaches (Risse and Sikkink)

Source: Author's own compilation

Furthermore, within each logic further divisions exist. The main division within the logic of consequences is between the theories oriented to relative and absolute gains. If interests are understood as maximisation of absolute gains, the theory is more cooperation-friendly than is the scholarship oriented to relative gains (Grieco 1988, 487). The main divisions within the logic of appropriateness focus on the underlying assumptions about nature and the limits of scientific enquiry.

1.2. Literature gap

The empirical research on cooperation with ICTs is spread across the different corners of the theoretical landscape. Three authoritative books focus on cooperation with ICTs specifically (see Lamont 2008, 2010; Peskin 2008; Rajkovic 2011), but only the ICTY and ICTR are the subject of analysis, due to their prominence at the time. The most influential ICT today, the ICC, had until recently a small workload as a newly established court and little has

been written about its cooperation struggles (see Wartanian 2004). Most of the ICC literature on state cooperation is written from a legal perspective. As such, it provides an interpretation of national and international law, but less is said about compliance with that law (see Ardebili 2007; Cryer and Bekou n.d.; Kaul and Kress 1999; Sluiter 2004, 2010).

Among the three books on cooperation with ICTs, Lamont's theoretical approach is the closest to that of this dissertation. He reviews compliance with the ICTY through the lenses of realism, liberalism, neoliberal institutionalism and constructivism, while also incorporating insights from the legal studies. The individual theories are then tested in the cases of Croatia, Serbia, Bosnia and Herzegovina, Macedonia and Kosovo. Methodologically, Lamont's approach is best described as a comparative case study. By relying on primary sources stemming from interviews, EU and UN archives complemented through secondary media, academic and NGO sources, Lamont develops a compliance narrative for each of the five states under examination. For Croatia and Serbia, Lamont (2008, 212) argues, it was primarily "third state coercion and inducements […] which brought about compliance".

Methodologically, Peskin's approach is very similar to Lamont's. He conducts comparative case studies of Serbia and Croatia's cooperation with the ICTY and Rwanda's cooperation with the ICTR. The value of Peskin's book lies in the depth of his background research, spreading over eight years, and his ability to secure interviews with more than 300 informants, including key actors at the highest level, such as Serbian Prime Minister Zivkovic and ICTY prosecutors Del Ponte and Goldstone (2008, kindle 71). Peskin does not align himself clearly with any theoretical paradigm. He (2008, 8, 237) criticises the realist overemphasis on power politics and highlights the importance of argumentative processes and soft power. Shaming and negotiation were at

times crucial tools in the hands of the ICTs for securing cooperation, Peskin (2008, 237) argues. As such, his arguments are close to those of constructivist scholarship. However, elements of rationalist reasoning are present as well, for instance where he points out the role of external incentives and coercion in cooperation (2008, 236).

Lastly, Rajkovic's (2011, 3) study of Serbia and Croatia's compliance with the ICTY relies on "in-depth and cross-comparative analysis". By strongly opposing model-focused theorising, Rajkovic (2011, 129) aligns himself with reflectivist approaches. In his view, "the problem of influence has been misconstrued as a search for relevant logic of mode of action" (Rajkovic 2011, 128). Instead, Rajkovic (2011, 11) deconstructs the very meaning of compliance rather than assuming that cooperation is an objectively measurable concept.

A common element emerging from the ICT literature is the relevance of causal complexity, as well as a focus on both domestic and international cooperation dynamics. Lamont (2008, 51–81) and Peskin (2008, 9–12) point out the distinct nature of domestic and international cooperation dynamics. As argued by Peskin (2008, 236), "decisive international community intervention on behalf of" ICTs is necessary for successful cooperation. Lamont (2008, 215) also argues that purely rationalist explanations focusing on interest-driven cooperation fail to account for the varying degrees of cooperation in Serbia and Croatia, even though both states received a comparable level of material incentives from the international community. According to Peskin, international support does not guarantee cooperation and "domestic politics is critical in shaping a state's decision" (Peskin 2008, 236). Lamont (2008, 215) points out the role of the ideational structures adopted by the two states. In other words, international incentives and coercion are seen as necessary but

not sufficient for cooperation. Only when international incentives combine with the right constellation of domestic politics and/or ideational structures does cooperation follow.

Next to these three books, a number of journal articles have dealt with the subject (see Bailliet 2013; Cohen 1997; Fehl 2004; Griffin 2001; Helfer and Slaughter 1997; Keohane, Moravcsik, and Slaughter 2000; McClendon 2009; Posner and Yoo 2005). Scholarship focused on international courts' institutional design has generated intensive discussion about impact of court independence on effectiveness. A striking feature of the research on this topic is the contradiction in conclusions about the role of independence and other variables. On the one hand, some authors argue that the highest levels of effectiveness are most likely to be achieved by independent courts resembling domestic judicial bodies (Helfer & Slaughter, 1997; Keohane et al., 2000). On the other hand, Posner and Yoo (2005) come to very different conclusions. When examining the relation between a court's independence and its effectiveness, they argue that these two variables "are, at best uncorrelated and may be negatively" correlated (2005, 28).

In my opinion the contradictory views on independence have been caused by flawed case selection on one side of the theoretical camp, and by non-consideration of causal complexity by Posner and Yoo. Helfer and Slaughter (1997) analyse in detail the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) and conclude that their main design features, including independence, should be transferred to other courts. However, by selecting cases on the dependent variable, their case selection is flawed, as pointed out by Posner and Yoo (2005). By focusing only on effective courts, Helfer and Slaughter fail to establish a clear causal link between effectiveness and the court features identified (Posner and Yoo 2005). How-

ever, when Posner and Yoo (2005) tested Helfer and Slaughter's theory using more cases to prove that court independence is not causally relevant for state support, they made the mistake of not considering the conjunctural influence of norm institutionalisation.

To address both problems, I propose a research design that allows for the inclusion of more cases and which is at the same time sensitive to causal complexity. So far, no study has been conducted where cooperation was analysed in a systematic manner on a comparatively large number of cases while paying strong attention to causally complex explanations. With the exception of McClendon's (2009, 349) quantitative analysis examining how, "through the selection of individuals to indict, demonstrated leniency on some suspects and outreach", the ICTY and ICTR influenced the degree of cooperation they achieved with various states, previous studies of ICTs have been small "n" comparative studies (see Cohen 1997; Fehl 2004; Griffin 2001; Helfer and Slaughter 1997; Lamont 2008, 2010; Peskin 2008). This dissertation builds on existing knowledge and scholarship (as reviewed above). However, methodologically I choose a more rigorous approach and deliver the first systematic study of state cooperation conducted on a middle-sized dataset. Certainly, cooperation with the ICC has been understudied in the political sciences. By comparing the ICTY and the ICC, the dissertation further develops existing knowledge of cooperation dynamics with the creation of a new original dataset.

1.3. Research design

To deliver a comprehensive picture of cooperation, this dissertation relies on a broad spectrum of theoretical insights rather than trying to fit the research into a particular paradigm. The dissertation presents an interdisciplinary ap-

proach in order to overcome the traditional divide between international relations and international law (see Irish, Ku, and Diehl 2013). Symptomatic of that divide is limited attention paid by international relations scholars to international law topics and issues, and, on the other hand, the scarce application of social science research methods in legal scholarship (Irish, Ku, and Diehl 2013, 360). This dissertation examines the performance of international law institutions and relies on social science research methods to do so. It draws on theoretical insights from different paradigms. In such a cross-disciplinary endeavour, it is crucial to clearly state my own epistemological and ontological position.

In writing this dissertation, I align myself ontologically with Wendt's (1999) social constructivism. I assume that norms and ideas matter and can shape state behaviour (see Katzenstein 1996, 498; Wendt 1999, 35–37). This has significant implications for how the international system is viewed. I assume that, unlike in neorealism, where the international system is static and "reducible to preexisting agents" (Wendt 1999, 37), international society continuously evolves. So do states, which, for instance, gradually develop norms governing their coexistence (Arend 1999, 129; Finnemore 1996b, 5–7). From my perspective, not only do material incentives influence the level of cooperation with international courts but so do internalised norms.

Epistemologically, I share common ground with neorealism and neoinstitutionalism, but also social constructivism. Just like Wendt (1999, 38), I "do not think an idealist ontology implies a post-positivist epistemology". The influence of both norms and the material world is quantifiable and can be tested in order to develop a deeper understanding of state cooperation.

To capture the complex causal relations between courts and states, I use Qualitative Comparative Analysis (QCA) to determine which conditions or combinations of conditions are necessary or sufficient for state cooperation. QCA as an explanatory strategy is a unique combination of quantitative and qualitative methods which allows an examination of combinatorial relationships between several conditions on a comparatively small number of cases (Clement 2005, 6; Rihoux and Ragin 2009, xix). By applying analytical reduction, QCA delivers a final parsimonious formula identifying the combinations of conditions leading to the desired outcome, in this case state cooperation (Stokke 2007, 2). The final formula not only allows the strength of the examined theories to be evaluated but it may also uncover new combinatorial relationships between the identified conditions. By way of example, it is possible that court independence causes different levels of cooperation, depending on the changing state context.

To capture differences in reasoning at the systemic and state levels, I use a twofold approach. First, the core of the analysis is located at the state level. The unit of analysis is the behaviour of a specific state over a period of one year. I created an original dataset comprising 34 cases. Specifically, the states under examination are Croatia (1997-2006), Serbia (1996-2011), Kenya (2010-2014) and Uganda (2005-2008). These four states offered varying degrees of cooperation with the institutions seeking to enforce ICL. By limiting the timeframe for each case to one year, different levels of cooperation could be captured. Furthermore, the inclusion of Kenya and Uganda allows me to compare new ICC cases with well-studied ICTY cases.

Locating the analysis at the level of the state does not mean that systemic factors are omitted. For instance, I look both at "domestic interests" and "international interests". However, the impact of "international interests" is

measured from the position of an individual state. For instance, I assess whether the international community has adopted measures capable of strengthening or weakening the position of a particular state. More specifically, I look at whether membership of a regional organisation or access to development aid for a particular state is directly conditional on cooperation with the ICT.

I apply two-step QCA, which is well suited to designs with two distinct groups of conditions (see Mannewitz 2011; Schneider and Wagemann 2006). The literature review identified six conditions: court independence; court outreach; international interests (such as the threat of sanctions or the promise of membership of an international organisation); the proximity of suspects to the state's political or military elite; the state's institutionalisation of relevant law; and government stability. These conditions were divided into two groups, according to their proximity to the state. It was then possible to analyse how different constellations of court outreach and international interests interact with state level conditions (government stability, institutionalisation and proximity of suspects to elites). Serving as a bridge between traditional qualitative and quantitative approaches, this QCA design applied to an original dataset offers a fresh perspective on state cooperation with international criminal courts and tribunals. By using two-step QCA, the dissertation approaches each case in a holistic manner (Berg-Schlosser et al. 2008, 6) and takes account of the potentially complex interactions between the conditions identified.

The state-focused analysis is followed in chapter 7 by a look at cooperation from a perspective of the court. The unit of analysis here is no longer a state during a specific time period but the courts themselves throughout their lifespan. This allows for analysis of a broader spectrum of courts, namely the

ECHR, the Inter-American Court of Human Rights (IACHR), the ICC, the ICTY and the International Military Tribunal (IMT). Some of the same conditions are included in the analysis, but they are redefined to measure their impact at the systemic level. For instance, when it comes to norm institutionalisation, instead of looking at the degree of socialisation of an individual state, I work with an average among all ICC member states.

The aim of this two-level approach is to deliver two types of answers. The analysis of causality of cooperation in chapter 7 offers insights for the future design of international courts, and enriches the existing theoretical debate on the independence of international courts and its impact on their effectiveness (see Helfer and Slaughter 1997, 2005; Keohane, Moravcsik, and Slaughter 2000; Posner and Yoo 2005). The state-focused analysis of cooperation causality conducted in chapters 4 to 6 aims to deliver practical policy suggestions for the existing courts and international policy makers on how to improve the cooperation of individual states.

1.4. Structure of the dissertation

The analysis starts with description of the ICL regime in chapter 2. Although the dissertation focuses on the performance of ICTs, they need to be seen in the context of the broader ICL regime. This is because the normative pull of the ICTs is directly linked to the strength of that regime. Chapter 2 defines the core norms the regime aims to protect, outlines their evolution and also describes the institutions used to enforce these norms in order to justify the selection of the ICC and the ICTY for the state-focused QCA element of the present research.

Chapter 3 reviews the major theories in order to identify the conditions which may influence state cooperation with requests for cooperation made by the ICTs. It then defines six conditions: court independence; court outreach; international interests (such as the threat of sanctions or the promise of membership of an international organisation); the proximity of suspects to the state's political or military elite; the state's institutionalisation of relevant law; and government stability. Some theories assume that more than one causal pathway may lead to cooperation and that the behaviour of some of the causal conditions may be context dependent.

The expectation of complex causality led to the identification of QCA as the most suitable research method. Chapter 4 summarises the reasons for using QCA to capture the complex dynamics of cooperation. By being able to account for complex interactions among the conditions identified, QCA is a method well suited to providing a comprehensive picture of the processes driving state cooperation.

Chapter 5 operationalises the identified conditions and introduces the dataset and chapter 6 analyses the collected data by using two-step QCA and provides an interpretation of the results.

Chapter 7 tests the influence of court independence on state cooperation. The dataset used in previous chapters offers limited variation of court independence. As a consequence, the results suggesting that independence is a necessary condition for cooperation have to be interpreted with great caution. To compensate for this deficiency, chapter 7 looks at the effectiveness of a broader range of international courts by shifting the level of analysis away from the state and towards the courts.

1.5. Conclusion

Laws proscribing the infliction of unnecessary suffering during armed conflicts have existed in national legislation since ancient times (Bassiouni 2003, 25–26). ICTs are merely the most recent institutional product of the belief that violations of the most elementary "laws of humanity" should be prosecuted (Broomhall 2003, 46–48). However, despite stemming from this well-established norm, the effectiveness of ICTs has been limited. State cooperation is a necessary condition for these courts to function effectively. As an ICTY President once explained, an ICT is like

> "a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the State authorities; without their help the Tribunal cannot operate. […] Unlike domestic criminal courts, the Tribunal has no enforcement agencies at its disposal: without the intermediary of national authorities, it cannot execute arrest warrants, it cannot seize evidence, it cannot compel witness to give testimony, it cannot search the scene where crimes have been allegedly committed. For all these purposes, it must turn to state authorities and request them to take action."(Cassese 1995 as cited in Frowein and Philipp 2001)

So far, the ICTs have experienced varying and often unstable levels of cooperation. In its initial years, the ICTY was plagued by limited cooperation (or even its absence) not only from the states of the former Yugoslavia, but also from NATO and some of the states which stood behind the establishment of the tribunal. Nevertheless, with time, the tribunal managed to secure the cooperation of most of the above-mentioned actors and by 2013 all of the ICTY fugitives had been apprehended. Low levels of cooperation have affected other ICTs as well. During its short existence, the ICC has, for instance, experienced excellent, even though short-lived, cooperation from Kenya, non-cooperation from Sudan and mixed levels in the case of the Democratic Republic of Congo (DRC).

In order to provide a better understanding of the dynamics of cooperation, this dissertation applies an innovative design to explain which conditions or combinations of conditions are causally relevant for state cooperation with ICTs. The contribution of the design is, first, expected to be theoretical, by assessing the strength of various legal and political theories and by uncovering so far unanalysed interactions between variables derived from these different theoretical backgrounds. The dissertation for the first time examines state cooperation with ICTs in a systematic manner on a comparatively large number of cases whilst paying strong attention to the causal complexity of cooperation. So far, single case studies or small-"n" approaches have been the method of choice when explaining state cooperation with ICTs (see Peskin 2008; Lamont 2008; Helfer and Slaughter 1997; Griffin 2001; Cohen 1997; Fehl 2004). The dissertation thereby makes a theoretical contribution to the international relations literature by evaluating the strength of existing legal and political theories and by uncovering so far unanalysed interactions among conditions stemming from different disciplines. As in comparative case studies, the QCA design applied in this dissertation captures the complex causality inherent to state cooperation with ICTs. The novelty of the design applied here lies in the ability to include more cases than do conventional comparative case studies.

The dissertation also delivers practical answers for policy-makers. Strong attention is paid to the ICC as a permanent court likely to be at the centre of ICL regime in the future. The design aims to give a thorough account of the interaction between states and courts by differentiating between two groups of conditions: state-proximate conditions, such as norm institutionalisation; and state-distant conditions, such as the ICT's external communication or the degree of international pressure on a state to cooperate. By analysing the in-

teraction between these two groups of conditions, the dissertation uncovers strategies that might stimulate state cooperation.

2. International Criminal Law Regime

The main research question posed by this dissertation is which conditions or combinations of conditions are causally relevant for state cooperation with ICTs. However, state cooperation with a particular court has to be seen in the context of the wider ICL regime, because the normative pull for cooperation with a particular court is likely to be related to the strength of the underlying norms, as argued by constructivists (see Finnemore and Sikkink 1998). In this chapter, I demonstrate that the norms underpinning international criminal law enjoy almost universal acceptance and that a well-defined regime exists around them. Furthermore, the chapter serves to justify selection of the cases within the jurisdiction of the ICC and the ICTY by describing the central role they play in the ICL regime, both historically and structurally.

The chapter is structured as follows. Sections 2.2 and 2.3 briefly outline the historical evolution of the ICL regime since the norms were first codified. I argue that despite the long history of these norms, an ICL regime could not exist until the norms achieved such a high degree of acceptance that states developed an international enforcement regime for prosecuting perpetrators of international crimes (Cryer 2005, 149). Such a historical turning point came after World War II (WWII), when the International Military Tribunal in Nuremberg (IMT) and the International Military Tribunal for the Far East (IMTFE) were established to prosecute individuals responsible for international crimes committed by German and Japanese forces. The tribunals established the notions of individual criminal responsibility and international crimes, which are central features of the ICL regime (Bantekas and Nash 2003, 8).

Section 2.4 describes different modes of ICL enforcement. Two types of system for the prosecution of perpetrators of international crimes exist, and these complement each other (Bantekas and Nash 2003, 23–29). First, there is a direct enforcement system, consisting of international courts and tribunals (Bassiouni 2003, 23). Second, international crimes can be prosecuted by a national judiciary under an indirect enforcement system (Bassiouni 2003, 29). Section 2.4 highlights the central position of the ICTs within the regime. I argue that the ICC exemplifies the state of the art within ICL, with regard to both the content of the enforced norms as well as institutional structure.

Section 2.5 describes the core crimes and the content of the norms underlying the regime. Identifying the core crimes is crucial, as the dissertation focuses only on the courts prosecuting offences indisputably recognised by international society as international crimes. Applying a behavioural approach, I look at both types of enforcement system to determine which crimes have repeatedly been prosecuted and thus are seen to enjoy the highest degree of acceptance. A list of core crimes is developed and the values the regime aims to protect are defined.

In section 2.6 I summarise the main features of the ICL regime and argue that state cooperation with ICTs is an important factor in the performance of the ICL regime.

2.1. Defining a regime

Although within the legal literature, ICL is sometimes referred to as a regime (see Cryer 2005; Schaack and Slye 2008), there is ambiguity about its defining elements. For instance, various authors may disagree which offences can be characterised as international crimes (see discussion in section 2.5). Further-

more, "crimes under international law" do not all enjoy the same hierarchical status, and consequently the modes and frequency of their punishment vary (Werle 2005, 29). Thus, before trying to identify variables that drive cooperation within the field of ICL, the ICL regime needs to be defined.

In international relations theory a tendency exists to use different definitions of "regime", depending on the underlying theoretical approach (Hasenclever et al, 2002: 21). This tendency reflects ontological and epistemological differences between leading theories (Hasenclever et al, 2002: 21). Since in the following realism, liberalism, neoliberalism and constructivism will be applied to explain the effects of ICL on states' behaviour, the task of defining ICL regime becomes difficult. While trying to find a compromise, this dissertation relies on Krasner's (1983, 2) widely accepted "consensus" definition (Hasenclever et al, 2002: 8. This states that regimes are:

> "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations. Principles are beliefs of fact, causation, and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice."

This definition is often criticised for ambiguity with regard to the "question of when we may say that a rule (or any other regime component) *exists* in a given issue area" (Hasenclever, Mayer, and Rittbeger 1997, 11). To mitigate this shortcoming, I apply a "behavioural approach" in order to limit the analysis only to those "norms, rules, and decision-making procedures" where the "actual behaviour of states" indicates their acceptance (Zacher, 1987: 174 as cited in Hasenclever et al, 1997,p. 15). This approach is chosen to limit the scope of analysis to "core" aspects of the ICL regime – those that en-

joy high acceptance within the international community of states. In the next section, the norm at the core of the ICL regime is defined.

2.2. The ICL prior to WWII

Laws proscribing the infliction of unnecessary suffering upon civilian populations and other protected groups during armed conflicts have appeared in national codes for more than a thousand years (Bassiouni 2003, 25–26). Bassiouni (2003, 25–26) argues that this points towards the existence of the so-called "ICL norm" and demonstrates its existence with several examples of national rules developed by different societies independent of each other. He mentions instances from the fifth century B.C.E. in China and third century B.C.E. in India, where writings were found "recommending the humane treatment of the sick, the wounded, prisoners, and civilians in the occupied territories" (Bassiouni 2003, 25). In a similar vein, Greppi offers examples from medieval Europe (1999, 532) and points out that already "in 1386 King Richard II of England" enacted rules regulating behaviour during armed conflicts. Similar codes were "issued by Ferdinand of Hungary in 1526, by Emperor Maximillian II in 1570 … and by King Gustavus II Adolphus of Sweden in 1621" (Greppi 1999, 532). These rules prohibited "unnecessary" suffering of civilian populations, in particular attacks against hospitals, churches and women (Ögren 1996).

However, despite the existence the norm prohibiting war-related crimes, the mechanisms to prosecute its violations were only rudimentary. For hundreds of years, until WWII, prosecutions were possible only under national legal systems. Traditionally, states prosecuted war crimes on the basis of territoriality and nationality principles. The principle of territoriality means that "a crime committed in a State's territory is justiciable in that State" (Cassese

2003, 277). The nationality principle differentiates between active and passive nationality – active nationality means that the perpetrator is brought to justice by his/her national state (Cassese 2003, 6–7). Passive nationality developed subsequently and gives the right to prosecute to that "State of which the victims have the nationality" (Cassese 2003, 6). Being entirely dependent on states' willingness to punish the perpetrators of atrocities, the "prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor's army" (Schabas 2009, 1). Most war crimes trials were not, then, conducted by the perpetrators' national states, but by the adversary state, on the basis of passive nationality (Cassese 2003, 39). To illustrate the shortcomings of purely national war crimes prosecutions, Cassese (2003, 39–40) mentions a British definition of war crimes from 1912 according to which war crimes were exclusively "[acts] of *enemy* soldiers and *enemy* civilians" (emphasis added).

Thus, although there was a norm protecting similar values to those endorsed in modern ICL, one cannot speak about the existence of an ICL regime. At this stage, actors shared expectations that certain inhumane conduct should not occur, but the norm was not sufficiently accepted to provide for an effective enforcement mechanism (Cryer 2005, 149). As argued by Cryer (2005, 149), "we can speak of a regime of international criminal law enforcement" when it "not only provides a set of norms and expected behaviours but also sets up a system designed to identify and rectify instances of cheating". At this stage, a system for the prosecution of war-related crimes did not exist.

Although there were international treaties setting limits to admissible war conduct, they did not provide mechanisms to be applied in cases of non-compliance (Kwakwa 1992, 14; Schabas 2004, 3). For instance, the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in

Armies in the Field proscribes inappropriate war conduct and urges for protection of medical personnel, the civilian population and "wounded or sick combatants", but it does not provide any kind of mechanism to punish individual violators of the Convention, neither under national nor international law (1864 Geneva Convention, art 8; Kwakwa 1992, 14; Schabas 2004, 3). Nor did the "Hague Conventions of 1899 and 1907, which further specified the rights of prisoners of war and unlawful combatants, and included new provisions about the protection of civilian populations" (Jakusova 2008, 7), provide a mechanism to punish perpetrators under international law. It was the task of states to ensure the compliance of their citizens (Kwakwa 1992, 14; Schabas 2004, 3).

2.3. Emergence of the ICL regime

For the ICL regime to emerge, it was necessary that the prosecution of war-related crimes was enabled outside national judicial systems. A system had to be developed under which impunity would not be a norm and perpetrators would face a threat of prosecution in cases where national authorities failed to act (Cryer 2005, 149).

A first indication of a change came after World War I (WWI), when states started to look for international judicial mechanisms to punish the architects of the war. Public opinion in the Entente powers, "particularly in England, was increasingly keen on criminal prosecution" (Schabas 2004, 3) and at the Paris Peace Conference it was agreed to establish a special tribunal to prosecute Kaiser Wilhelm II for crimes "against international morality" committed during the war (Treaty of Versailles, 1919: art 27 as cited in Schabas 2004, 3). However, the international trial of the German Emperor never took place, since he found refuge in Holland, which refused to extradite him, using the

argument that retroactivity in criminal law is prohibited (Schabas 2004, 3). Therefore, it took another 26 years for the emerging idea of ICL enforcement regime to find its "embodiment" through the International Military Tribunal (IMT) in Nuremberg (Sadat 2002, 21), which was the first "international forum" prosecuting "on the basis of international law" (Bantekas and Nash 2003, 8).

This was previously impossible because international law before WWII addressed exclusively states and did not recognise individuals as bearers of rights and duties (Armstrong, Farrell, and Lambert 2007, 180). It was only in the face of the widespread and inhuman crimes committed during WWII that a transformation of international law started, in order to recognise individuals as subjects of international law (Bianchi 2009, 16). This not only led to numerous codifications of human rights, but also allowed for criminalisation of the acts of individuals under international law. Thanks to this reinterpretation of the role of individuals, war-related crimes were no longer punishable only under national law, but gained the character of international crimes and as such gave rise to individual criminal responsibility under international law (Kittichaisaree 2001, 9). Thus, not only states but also individuals could be held accountable for their acts by international institutions such as the IMT (Werle 2005, 6). The IMT Charter established individual criminal liability for three categories of international crimes: war crimes, crimes against humanity and crimes against peace (ICRC n.d.; Werle 2005, 7). These crimes were punishable irrespective of: the existence of these offences under national law (Principle II), the official capacity of the perpetrator (Principle III) and the existence of superior orders to commit the crime (Principle IV)(ICRC n.d.; Werle 2005, 7).

Similarly to pre-existing national legislation criminalising inhuman war conduct, the new international legislation prohibited the infliction of unnecessary suffering on civilian populations, wounded combatants and other protected groups. However, unlike the earlier national legislation, the international rules were more exact and their scope of protection was broader.

When assessing the contribution of the IMT to the development of the ICL regime, next to its positive impact, its main weaknesses need to be mentioned as well, namely its vulnerability to the political interests of the US, USSR, UK and France, the powers that stood behind its establishment (Jakusova 2008, 18–19; Sands 2003, 7, 23).

Illustrative of the tribunal's lack of independence is the fact that its jurisdiction was limited to nationals of the Axis countries (Jakusova 2008, 18–19; Sands 2003, 7, 23) and the fact that the Soviet Prosecutor was able to bring a case against German officers for the massacre of "some 15,000 Polish officers and soldiers in the Katyn forest", even though the participation of the Soviet forces has been alleged by some sources (Bassiouni 2009, 135).

Given this strong impact of political interests on the IMT, the ICL regime is to be considered rudimentary at this stage. The norm according to which actors expected prosecution of international crimes had been only weakly socialised, as indicated by the selectivity of the IMT prosecutions and the sporadic punishment of international crimes in subsequent years. For this reason, Cryer (2005, 149) does not speak about the existence of ICL regime until 2002, when the first permanent International Criminal Court was established. However, in my opinion, developments in customary and treaty law indicate that states were under an obligation to prosecute international crimes soon

after the end of WWII, although the effectiveness of the obligation was low. For instance, the 1949 Geneva Conventions and the 1948 Genocide Convention put their signatories under the duty to prosecute certain categories of international crimes domestically (Akande 2009, 42). Similarly, a norm obliging states to prosecute international crimes developed under customary law (Werle 2005, 62). These developments can be seen as proof of the existing expectations for prosecution of international crimes. Therefore, I argue that the ICL regime emerged with the establishment of the IMT.

2.4. ICL enforcement institutions

In the following, I describe the main ICL enforcement institutions. The literature differentiates between a direct enforcement system, operated by international courts, and an indirect enforcement system, under which individual states prosecute international crimes (Bantekas and Nash 2003, 8; Bassiouni 2003, 29; Werle 2005, 69). These two systems are presented as subsystems of a broader ICL regime developed to prosecute international crimes (Bassiouni 2003, 25–41).

2.4.1. Direct enforcement system

After the establishment of the IMT and IMTFE, the ICL regime continued to evolve. At the end of the 1940s the idea of the international prosecution of war-related crimes enjoyed widespread support within the international community. In 1948 the UN General Assembly adopted the Genocide Convention, which entered into force on 12 January 1951 (ICRC on Genocide Convention n.d.). Apart from declaring genocide "a crime under international law" (Genocide Convention, art 1), the convention also foresaw the establishment of an "international penal tribunal" (Genocide Convention, art 6; Schabas 2009, 8). In the early 1950s the International Law Commission and

a special commission established by the General Assembly produced two draft statutes for such a court (Schabas 2009, 9). However, due to the rise of Cold War tensions, international cooperation in the area of ICL stagnated until the end of the 1990s (Bantekas and Nash 2003, 9). As fittingly put by Bassiouni (2003, 422), "justice was the Cold War's casualty". Soon after the fall of the Berlin Wall the General Assembly mandated the International Law Commission to resume work on the draft statute (Schabas 2009, 10). A long negotiation process had started which led to the adoption of the Rome Statute in 1998 and its entry into force in 2002, when the first permanent ICC came into existence.

The subsequent section is structured as follows. Before describing the ICC, attention needs to be given to other international judicial bodies that emerged after the end of the Cold War and influenced the institutional structure of the ICC (Schabas 2009, 13). First, the *ad hoc* ICTY and ICTR are described. Next, an alternative mechanism of hybrid courts combining aspects of national and international adjudication is presented. Lastly, the ICC is introduced and it is argued that the court represents the current development stage of the ICL regime.

2.4.1.1. *Ad hoc* international criminal tribunals

In 1993, as a response to "widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia", the Security Council established the ICTY, the first international tribunal since the end of WWII (UNSC Res 827). As an *ad hoc* body, the ICTY's jurisdiction was limited to the crimes "committed in the territory of the former Yugoslavia since 1991" (ICTY Statute, art 1). Subject matter jurisdiction was to be restricted to those crimes that are "beyond any doubt part of the cus-

tomary law" (Report of the Secretary General, 1993 UN Doc S/25704 in Schabas, 2009, p. 11). Those were crimes against humanity, genocide and war crimes as defined in the "grave breaches of the Geneva Conventions of 1949" and "violations of the laws or customs of war" (ICTY Statute, art 2-5; Schabas 2009, 114).

The inactivity during the Cold War in the area of ICL was suddenly superseded by an opposite approach and within 18 months the Security Council (UNSC) established a second tribunal, the International Criminal Tribunal for Rwanda (ICTR) (UNSC Res 955). The ICTR had limited temporal and territorial jurisdiction, which "[extended] over the territory of Rwanda" for "a period beginning on 1 January 1994 and ending on 31 December 1994" (ICTR Statute, art 7). The subject matter jurisdiction was similar to that of the ICTY, but with consideration for the non-international nature of the conflict (Schabas 2009, 12). The court prosecuted genocide and crimes against humanity, and war crimes were limited to "serious violations of international humanitarian law" (Shraga 2004, 21–22). The ICTR could not exercise jurisdiction over grave breaches of the Geneva Convention since the Rwandan conflict was internal (Schabas 2009, 12). The ICTR's jurisdiction over war crimes was restricted to the "violations of Article 3 common to Geneva Conventions and of Additional Protocol II" (ICTR Statute, art 4), because these offences are punishable also when committed during an internal armed conflict.

When assessing the contribution of the ICTY and ICTR to the evolution of the ICL regime, three main functions can be pointed out: first, they served as experimental bodies in the process of development of a modern international penal tribunal (Schabas 2004, 12–13); second, their case law helped to specify definitions of international crimes, as will be shown in the section on international crimes (Schabas 2004, 12–13); third, these tribunals can be seen as a

next step on the way to a more independent ICL enforcement regime. Unlike the IMT, neither the ICTY nor the ICTR was "limited to the prosecution of some offenders", as both were designed to prosecute perpetrators irrespective of their membership of a particular warring group (Bassiouni 2003, 427).

However, the establishment of the tribunals has often been criticised as being driven more by political necessity rather than by the idea of justice. In particular, the ICTY was claimed to be "set up to make up for the impotence of diplomacy and politics" to effectively address the spread of violence (Cassese 2002, 13). The claim that political interests played an important role in the UNSC's decision-making is also supported by the fact that in similar conflicts the UNSC was reluctant to provide resources for the establishment of international tribunals and some authors speak of the "selective approach of the [UN]SC" (Cassese 2002, 15; Jakusova 2008, 19).

2.4.1.2. Hybrid courts

One of the reasons for the "selective approach of the [UN]SC" may have been that the ICTY and ICTR proved to be a big burden for the UN (Bassiouni 2003, 429–434; Cassese 2002, 15). The tribunals were costly and the UNSC had to face many administrative and logistical problems, partly because the new judicial bodies were being established in countries that lacked the necessary infrastructure and domestic support (Bassiouni 2003, 429–434). As a consequence the UNSC reached the point of "Tribunal Fatigue" and other forms of post-conflict justice enforcement had to be looked for (Bassiouni 2003, 434). While the work on the project of permanent court continued, the UNSC was also experimenting with the concept of "hybrid courts". "Hybrid" courts (also referred to as "internationalised" or "mixed" courts) are, in their nature, mixtures of national and international courts. As described by Dick-

inson, hybrid courts usually apply a "blend" of national and international law. Furthermore, they rely on domestic infrastructure, but also count on the support of international actors (Dickinson 2003, 295). As a result, both national and international judges and prosecutors cooperate to deliver post-conflict justice. The following courts are often referred to as examples of hybrid bodies: the Special Court for Sierra Leone, established in 2000,; the Extraordinary Chambers in the courts of Cambodia (2006); the Crimes Panels of the District Court of Dili in East Timor (2000); and the UNMIK court system in Kosovo (2000) (Dickinson 2003; Romano, Nollkaemper, and Kleffner 2004).

Similarly to the ICTY and ICTR, hybrid courts are not permanent and have limited temporal jurisdiction. Their subject matter jurisdiction is broader than that of purely international tribunals since the courts also apply national law. In general, international crimes prosecuted by the ICTY and ICTR – namely genocide, crimes against humanity, and war crimes – were also present in the statutes of most of the hybrid courts (Shraga 2004, 21–22).

In theory, hybrid courts should offer a number of advantages. Due to their reliance on domestic infrastructure they should be cheaper than their international counterparts (Jessberger 2009, 211). Furthermore, in theory they provide adjudication sensitive to the demands of domestic society "without compromising respect for international standards" (Cassese 2003, 345). However, in practice the problem of underfunding undermined the ability of some of the courts to function effectively, in particular in Sierra Leone and East Timor (Cassese 2003, 346, 215).

2.4.1.3. The permanent International Criminal Court (ICC)

Alongside hybrid courts, the UN was also working on the project of a permanent International Criminal Court (ICC). After a long negotiation process, which had been triggered already in the 1950s and renewed in 1989, delegates of over 160 states met in Rome in 1998 to establish the first permanent international penal court in human history (Coalition for the International Criminal Court, 2008). The project enjoyed broad support within international community. The Rome Statute was adopted on 17 July 1998 with 120 votes in favour; "only 7 nations voted against the treaty (including the United States, Israel, China, Iraq, Qatar), while 21 countries abstained" (Coalition for the International Criminal Court, 2008). The Court came into existence after the first 60 ratifications, on 1 July 2002, and, as of 19 July 2015, 123 countries had joined the court (ICC, n.d.).

The ICC has jurisdiction over crimes committed after 2002 on the territory of a state party or by a national of a state party (ICC Statute, art 11-12). Unlike the previous *ad hoc* tribunals, the ICC does not have primary jurisdiction, but it is complementary to national systems (Bassiouni 2003, 500 – 501). In first instance, the states are responsible for the prosecution of international crimes (Bassiouni 2003, 500 – 501), but if a state fails or refuses to do so, the ICC may claim jurisdiction (ICC Statute, art 17). The ICC can also exercise jurisdiction with regard to situations referred to it by the UNSC under Chapter VII, regardless of territorial limitations (ICC Statute, art 13). The subject matter jurisdiction follows the pattern of previous tribunals. Currently, the ICC may prosecute genocide, crimes against humanity and war crimes. Additionally, "the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted" which defines the crime (ICC Statute, art 5 para 2).

When assessing the contribution of the ICC to the development of the ICL regime, the most important factor that needs to be mentioned is the permanent nature of the court. A permanent ICC moved the ICL enforcement further away from direct state influence (Bassiouni 2003, 28 – 30). As shown above, states' interests played a role in the considerations about the establishment of all previous *ad hoc* international bodies (Bassiouni 2003, 28 – 30). While the IMT and IMTFE are often described as embodying "victor's justice" (Cryer 2005, 40), the ICTY and ICTR prosecutions enjoyed a much higher degree of fairness. Nevertheless, the very establishment of the post-Cold-War *ad hoc* tribunals would not have been possible without the support of the UNSC members (Bassiouni 2003, 28 – 30). In large part, the ICC eliminated the influence of political interests when deciding whether to apply international justice to a particular conflict or not, since this may be decided by an independent prosecutor (Bassiouni 2003, 28 – 30). The prosecution of the ICC can be triggered by three mechanisms: referral by the UNSC (ICC Statute, art 13 b), referral by a state party (ICC Statute, art 14) and initiation by the prosecutor (ICC Statute, art 15). While the first two mechanisms are likely to be applied only when ICL prosecutions do not interfere with state interests, the existence of an independent prosecutor gives the ICC independence to decide whether or not to trigger jurisdiction, without consideration of political interests (Kirsch and Robinson 2002, 663).

It needs to be mentioned that the UNSC has the right to defer the ICC's investigation and prosecution for a period of 12 months if acting under Chapter VII (ICC Statute, art 16; Schabas 2009, 166 – 167). Although this may interfere with the court's independence, this particular mechanism can still be considered a relative success compared with the original proposals prohibiting the ICC to exercise jurisdiction over any cases which are "being dealt

with by the Security Council" under Chapter VII (Draft Statute, art 23 para 3 in Schabas 2009, 167).

Thus, the ICC enjoys a relative, although not absolute, independence with regard to the decision whether its jurisdiction over a particular situation should be triggered. This degree of independence points towards the existence of a relatively strong ICL enforcement regime.

However, next to triggering of the jurisdiction, consideration needs to be given to whether the court can investigate and prosecute effectively (Jakusova 2008). According to the ICC Statute, during the investigation phase the prosecutor has only a restricted right to conduct "on site investigations" (Schabas 2009, 249). As pointed out by Schabas (2009, 249), although the prosecutor "is allowed … to undertake specific investigative steps in a territory of a State without having previously obtained its consent", he/she needs the approval of the Pre-Trial Chamber. Schabas argues that the high standard which needs to be satisfied to obtain that approval prevents the power being "effectively utilized" (Guariglia, 1999, 227-38 in Schabas 2009, 249). With limited access to the crime site, the court relies on states' cooperation. However, apart from the possibility of referring a case to the UNSC, which is a political body and its actions are likely to be constrained by the interests of its permanent members, the ICC is not given any effective means to enforce cooperation (Sovereignty, n.d.).

Similar problems may arise in connection with the "arrest and surrender" of indicted persons (ICC Statute, art 89). Therefore, the court enjoys independence with regard to the decision over whether its jurisdiction should be triggered, but during the investigations and prosecutions phase its perfor-

mance can be strongly influenced by states' unwillingness to cooperate (Jakusova 2008).

The ICC marks the most recent development in the direct ICL enforcement system. However, the definition of an ICL regime is incomplete if the indirect enforcement system prosecuting the very same crimes as the ICC is not included. In the next part, the development of the national prosecution of international crimes will be outlined.

2.4.2. Indirect enforcement

National prosecutions were an important part of the early ICL development (Werle 2005, 69). In order for national judiciaries to function as indirect ICL enforcers, two major changes needed to occur.

First, as argued by Bassiouni (2001, 333), the ICL had to become "domesticated". In other words, the newly established definitions of international crimes had to find their expression in national legislation (Bassiouni 2003, 333). States have modelled their national laws with respect to the principles of customary international law or in accordance with international treaty obligations (Akande 2009, 42). For instance, the 1948 Genocide Convention obliges the 140 State Parties to enact legislation necessary for the punishment of genocide (Akande 2009, 42; Genocide Convention 1948, art 5). Similar obligations arise in connection with the universally ratified Geneva Conventions of 1949 or the 1984 Torture Convention as well as the 1998 Rome Statute (Akande 2009, 42).[2]

[2] Extensive information about the national implementation of international criminal and humanitarian law is available at the ICRC's national implementation database. See http://www.icrc.org/ihl-nat

Second, states needed to obtain broader rights in the area of enforcement. Prior to WWII, states prosecuted war-related crimes on the basis of territoriality and nationality principles, as explained above. A novelty related to the emergence of ICL is a broader applicability of the universality principle, according to which "any state is empowered to bring to trial persons accused of international crimes, regardless of the place of commission of the crime, or the nationality of the author or the victim" (Cassese 2003, 284).

Universal jurisdiction is based on the assumption that the prosecution of certain crimes is in the interest of international society (Armstrong, Farrell, and Lambert 2007, 181 – 182). Already in the 17th century, international society acknowledged that prosecution of piracy was a "joint concern of all states" and, accordingly, universal jurisdiction was established for the crime of piracy (Cassese 2003, 284). However, only after WWII did states accept universal jurisdiction for the core international crimes, no longer exclusively on the basis of a "joint interest" but also to safeguard fundamental "universal values" (Cassese 2003, 285). This redefinition of universal jurisdiction coincided with the rise of international crimes to the "constitutional" status of *jus cogens* and *obligatio erga omnes* (Broomhall 2003, 42; Inazumi 2005, 126). *Jus cogens* status of international crimes means that these "[norms hold] the highest hierarchical position" and as such are "non-derogable" (Bassiouni 1996, 67). *Erga omnes* "[arises] out of a certain crime's characterizations as jus cogens" (Bassiouni 1996, 63) and creates an "[obligation] of a state towards [the] international community as a whole" (1970 ICJ Report: 32 in Inazumi 2005, 126). This high hierarchical status is an expression of the view that the prosecution of international crimes is in the interests of all states (Bantekas and Nash 2003, 9).

As a first international treaty, the 1949 Geneva Conventions obliged their 194 State Parties to prosecute "grave breaches", irrespective of territorial or nationality links (ICRC, 3-09-2009; Inazumi 2005, 66; Kittichaisaree 2001, 39). The first significant trial applying universality principle which gained a lot of international attention took place in 1962 in Israel against Adolf Eichmann (Cassese 2003, 285). The District Court in Jerusalem, without having clear territoriality or nationality links to the crimes committed during the WWII, convicted Eichmann, a German national, among others, for crimes against humanity and "crimes against the Jewish people", which were modelled after, but not identical with, the 1948 Genocide Convention (Ben-Naftali 2009, 653). Similar prosecutions followed, among others trials against Klaus Barbie, Paul Touvier, Maurice Papona in France, and Imme Finta in Canada (Inazumi 2005, 82 Footnote 110); the United Kingdom arrested Augusto Pinochet on the basis of an international arrest warrant issued by Spain (Inazumi 2005, 83). Later international treaties on torture and terrorism also obliged their signatories to prosecute these two crimes on the basis of the universality principle (Cassese 2003, 284).

After describing the modes under which national prosecutions can be triggered the question follows of whether the ICL regime gives states a right or imposes on them a duty to prosecute international crimes (Werle 2005, 63). A relatively clear answer can be given with regard to states which have territorial jurisdiction over the crimes. As argued by Werle (2005, 62), under customary law "the state of commission" has at all times "a duty to prosecute" (Werle 2005, 62).

More difficult is the question whether states without territorial or national links have a *right* or a *duty* to prosecute international crimes (Werle 2005, 63). Bassiouni (1996, 65) argues that there is a "duty to prosecute", but at the

same time he points out that the duty is derived from "implications of *jus cogens*" and the question

> "of whether obligatio erga omnes carries with it the full implications of the Latin word obligatio, or whether it is denatured in international law to signify only the existence of a right rather than a binding legal obligation, has neither been resolved in international law nor addressed by ICL doctrine." (Bassiouni 1996, 65)

Thus, although the high hierarchical position of international crimes indicates that there is a *duty* to prosecute, the acceptance of the norm remains unclear. Broomhall (2003, 110) argues that under customary law there is a "permissive universal jurisdiction" implying the *right* to prosecute core international crimes (Werle 2005, 63). Under treaty law, thanks to the universal ratification of the 1949 Geneva Conventions, all states are under the duty to prosecute "grave breaches", regardless of territorial or nationality links to these war crimes (ICRC, 3-09-2009; Werle 2005, 62).

2.4.3. Central role of the ICTs

Although two different enforcement regimes exist, they do not operate in isolation. The ICTs stand at the centre of the ICL regime and play a unique role from a structural point of view. They are the measure of last resort, used to step in or sometimes even "replace … ineffective domestic legal systems" (Heikkilä 2009, 27). Despite their small numbers, the performance of these international courts is crucial for the success of the ICL regime.

The ICC best exemplifies this central role played by ICTs. As argued by former ICC President Song (2014), with the adoption of the Rome Statute, a "structural relationship of the ICC and national jurisdictions" was established. The primary duty to prosecute perpetrators of international crimes lies with states and the jurisdiction of the ICC is complementary to that of its

State Parties. However, if states are either unwilling or unable to investigate and prosecute, the ICC steps in as a court of last resort (Song, 2014). Acting as a sort of "highest instance" court, the ICC is not only in the spotlight of public attention, but is crucial for the overall effectiveness of the regime. Prior to the establishment of the ICC, a similar role was implicitly played by the *ad hoc* tribunals, even though differences existed in terms of their limited temporal and territorial jurisdiction.

The ICT statutes reflect the "state of the art" in international criminal law. Not only do these statutes reflect the evolving definitions of international crimes, but they also show how the quality of the direct enforcement changes over time. The International Military Tribunals in Nürnberg and the Far East marked the emergence of the new discipline of ICL as we know it today. However, the structural design of these tribunals would be deemed obsolete according to today's standards. The IMT and IMTFE did not have jurisdiction to prosecute crimes committed by all parties to the conflict, and this gave rise to the suspicion of "victor's justice". Although this was not an issue in the case of the ICTY and ICTR, their *ad hoc* nature implied strong territorial and temporal limitations. Symptomatic of the post-Cold-War period was the "selectiveness" of international criminal justice, as the majority of conflicts remained unaddressed and only a select few were followed by post-conflict prosecutions (Bassiouni 2010a, 37; Cassese 2002, 15). Thus, although the ICTY and ICTR enjoyed a relatively high degree of independence, the very establishment of these courts was dependent on the constellation of political interests within the UNSC. Compared with these predecessors, the ICC enjoys an even higher degree of independence. Being a permanent body with an independent prosecutor, the ICC can exercise its jurisdiction with respect

to crimes occurring on the territory of any of its 123 State Parties or committed by its nationals (ICC Statute, art 12).[3]

It is the reflection of the "state of the art" in ICL combined with its central structural role which makes the ICC and the newer *ad hoc* tribunals empirically relevant. The case selection described in chapter 4 will specify the reasons for giving preference to the ICTY among other *ad hoc* tribunals as well as reasons for selecting individual cases within ICTY and ICC jurisdiction.

2.5. Crimes at the core of the ICL regime

As argued in the beginning of this chapter, common to national war crimes laws existing prior to WWII was the protection of basic humanitarian values. Although the various national laws differed with regard to the scope of protection or the definition of protected groups, their common goal was the prohibition of unnecessary suffering during armed conflicts. In its essence,

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[3] This broad jurisdiction, however, caused tension and during the negotiations over the ICC statute, when attempts were made to give the UNSC significant powers to limit ICC investigations and prosecutions. Article 23(3) of the 1994 draft statute stated:

> "No prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council as a threat to or breach of the peace or an act of aggression under Chapter VII of the Charter, unless the Security Council otherwise decides."

In other words, any situation examined by the UNSC would lie outside ICC jurisdiction unless the UNSC decided otherwise (Schabas 20014: 82). The ICC would not be able to prosecute crimes occurring in these situations for an unspecified period of time and regardless of whether the UNSC managed to find consensus among the P5 about how to effectively address the situation. Following strong criticism and extensive negotiations, the final statute allows the UNSC to defer ICC prosecutions and investigations for a limited period of 12 months following adoption of a resolution under Chapter VII (ICC Statute, art 16; Schabas 2001, 421; Bassiouni 2003, 457). The threshold for allowing the UNSC to interfere with ICC investigations and prosecutions has thus been raised significantly, by being dependent on the ability to find consensus among the P5 (UN Charter, art 27).

the modern ICL has the same goal, although the definitions of international crimes are more complex and their scope of protection is broader (Bassiouni 2003, 25). To better understand what behaviour the regime aims to proscribe, I look at the notion of international crimes in this section. First, the crimes that are indisputably recognised as international and lie at the core of the regime will be listed. Second, I describe the general characteristics of international crimes.

Because they appear in the jurisdiction of two or more ICTs, four "core crimes" are usually considered to lie at the centre of the ICL regime: "genocide, crimes against humanity, war crimes and the crime of aggression" (Bassiouni 1999, 255; Broomhall 2003, 20; Werle 2005, 26). In the following, I introduce these four types of crime with attention to definitional changes since 1945.

Genocide criminalises "acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such" (Genocide Convention 1948, art 2). The definition adopted in 1948 has since has remained unchanged. The same wording was incorporated in the statutes of both the post-Cold-War *ad hoc* tribunals and the ICC.

Crimes against humanity criminalise attacks against civilian populations. The crimes have undergone a process of redefinition that has resulted in a broader scope of protection. Under the IMT Charter, crimes against humanity were punishable only if they were "perpetrated … 'in connection with' war crimes or crimes against peace" and "before or during the war" (Cassese 2003, 69; Prosecutor v Tadic Judgment, IT-94-1, 7 May 1997, paras 627, 646). This so-called "war nexus" was introduced to prevent the punishment of such crimes if they were committed in times of peace (Schabas 2009, 13). The

aim was to prevent intervention in the internal matters of a state at any time when the state was not involved in an international armed conflict. As fittingly put by Cassese, "this association meant that only those criminal activities were punished which 'directly affected interests of other States'" (Schwelb, 1946: 207 in Cassese, 2003, 69). However, with time, the "war nexus" for crimes against humanity has gradually been replaced by a "widespread or systematic attack" element (Bassiouni, 1999: 243; Broomhall, 2003: 49; *Prosecutor v Tadic* (ICTY Judgment), IT-94-1, (7 May 1997) para. 627, 646). Today, crimes against humanity can be prosecuted "regardless of whether they are committed in an armed conflict, international or internal in character" (*Prosecutor v Tadic* (ICTY Judgment), IT-94-1, (7 May 1997) para. 627, 646).

Similarly, under the IMT Charter war crimes were directly linked to international armed conflicts (Broomhall 2003, 48). Thus, "murder, ill-treatment or deportation to slave labour … of civilian population[s] … or of prisoners of war" was deemed illegal under international law only when committed in the context of international conflict (IMT Charter, art 6 in Schabas 2009, 113). However, this definition also changed, as with crimes against humanity, to broaden the scope of protection. Although different "classes" of war crimes are recognised, depending whether the context is international and national, it is no longer the case that war crimes apply exclusively to international armed conflict (ICC Statute, art 8; Schabas 2009, 13).

The crime of aggression has a special standing. Its historical predecessor – crimes against peace – were defined by the IMT as

> "planning, preparation, initiation or waging of a war of aggression…, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing." (IMT Charter, art 6 (a))

In 1942 the IMT declared crimes against peace to be the "supreme international crime" (Broomhall 2003, 46). This is in stark contrast to developments over the following decades. Despite several attempts in the aftermath of the Nuremberg trials to redefine the crime of aggression, international society was unable to reach a consensus for several decades; indeed, today a definition has still not entered into force (Cassese 2003, 112). When establishing the ICC in 1998, the states agreed that it should exercise jurisdiction over aggression, but again failed to define the crime (ICC Statute, art 5 para 2). At the Rome Statute Review Conference in 2010, states managed to reach a consensus and adopted a definition of a crime of aggression. However, the ICC will be able to exercise jurisdiction over the crime of aggression only "one year after the ratification or acceptance of the amendments by thirty States Parties" (ICC Statute, art 15bis paras 2-3) and following "a decision to be taken after 1 January 2017" by a two-thirds majority of states parties (ICC Statute, art 15bis paras 2 -3). As of 9 July 2015, only 23 states had ratified the amendments on the crime of aggression (UNTC, Amendments on the crime of aggression to the Rome Statute of the International Criminal Court, n.d.).

Although all four types of crime are considered to be international, this dissertation restricts its analysis only to those norms which enjoy indisputably high acceptance within international society. Therefore, an approach is applied to limit the list of international crimes to those where the "actual behaviour of states" indicates strong acceptance of the prosecution of such crimes under international law (Zacher 1987, 174 as cited in Hasenclever, Mayer, and Rittbeger 1997, 15). Thus, the analysis shall be restricted to those crimes which repeatedly fall within the jurisdiction of a majority of ICTs and which have been prosecuted by national courts on the basis of universal jurisdiction.

Genocide, crimes against humanity and war crimes in various forms appear in the jurisdiction of all the ICTs. With regard to the crime of aggression, less coherence can be observed. The crime of aggression can be found in the statutes of the IMT and IMTFE. However, "aggression" was not included in the statutes of the ICTY and ICTR. The ICC, due to the problems with definition described above, is currently not exercising jurisdiction over the crime of aggression. Furthermore, none of the so-called hybrid courts (the borderline cases between direct and indirect enforcement described above) exercises jurisdiction over the crime of aggression.

There is little dispute that a number of states accept universal jurisdiction for genocide, war crimes and crimes against humanity (Broomhall 2003, 110; Macedo 2004, 30); however, less clarity can be observed with regard to "aggression". As argued by Ohlin (2009, 238), some states "have enacted aggression as a domestic crime, but none have ever prosecuted it". Thus, the general trend is non-prosecution of the crime of aggression under the indirect enforcement system. When the state parties to the ICC agree on the definition of a crime of aggression, its prosecution may become more common internationally. However, at the time under investigation, acceptance of aggression as an international crime under both the direct and the indirect enforcement systems is not well established, and there "have been no national or international trials for alleged crimes of aggression" since 1946 (Cassese 2003, 112). My goal is to focus only on those norms and rules of the ICL regime that enjoy the highest degree of acceptance within international society. Therefore, when I refer to crimes lying at the core of the ICL regime, the crime of aggression is not included.

This definition of ICL is strict and other authors may argue that the ICL regime proscribes a number of other crimes. Depending on the definition

applied, it is arguable that there are up to 28 categories of international crime (Bassiouni 2003, 116 – 117). Such a high number is achieved because Bassiouni does not define international crimes according to the degree of acceptance of the rules in international society, but by looking at the values and interests the law aims to protect (Wouters n.d., 2). However, ICL is a complex body of law that has developed largely in an *ad hoc* manner. This complexity causes a wide variation with regard to the acceptance of many ICL provisions. Therefore, my definition of the ICL regime allows inclusion of only those elements which enjoy the highest degree of acceptance, exemplified through their prosecution under both the direct and the indirect enforcement systems. As a result, this dissertation examines cooperation with ICTs only in cases where the perpetrators are accused of committing war crimes, crimes against humanity or genocide.

2.5.1. Common characteristics of international crimes

After defining the core types of international crime, the common characteristics of these crimes are defined below in order to extract the norm characterising the ICL regime.

When the ICL regime was first emerging after WWII, the IMT defined an international crime as an

> "act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances…" (Hostages Trail, IMT, 19 Feb. 1948 (1953) 15. *Ann. Dig.* 632 at 636 in Kittichaisaree 2002, 3)

In other words, the IMT recognised that the serious nature of certain crimes threatens the international community to such an extent that the crimes may be punished by the international community if the responsible state fails to prosecute (Broomhall 2003, 19 – 20). This belief later found its expression not

only in the *jus cogens* and *erga omnes* statuses of international crimes, which raise the prohibition and prosecution of international crimes to a "constitutional level", but also in the Preamble of the Rome Statute, which recognises that "grave crimes threaten the peace, security and well-being of the world" (Broomhall 2003, 42, 46 – 51).

But what criteria does a crime need to fulfil to be granted such a superior status? Why is the killing of a person in one case considered to be genocide while in another case it is a murder under national law? Certain common characteristics can be identified from the definitions of the core types of crime. Namely, they occur in the context of a "widespread or systematic" attack and are related to an "action or policy" of states or of non-state actors with "control over territory" (Bassiouni 1999, 243; Werle 2009, 55). Thus, only crimes which are committed in the context of "large scale violence" organised by an "entity" effectively controlling certain territory are considered "international" (Bassiouni 1999, 243; Werle 2009, 55).

The role of this "international element" can be illustrated through a consideration of the difference between murder and genocide (Bassiouni 1999, 243; Werle 2009, 55). Both crimes occur when a person intentionally kills another person. The difference between the two crimes is in the overall context. While murder is a crime committed by one individual against another individual, genocide, as defined in the 1948 Genocide Convention, occurs when a person is killed as part of a larger plan to destroy "in whole or in part, a national, ethnical, racial or religious group, as such" (art 2).

2.6. The ICL regime

As the chapter has shown, the rationale for the existence of the ICL regime is linked to the belief that the suffering caused by international crimes may threaten international society as a whole (Cassese 2003, 284–285). Existence of this belief is indicated by the *jus cogens* and *erga omnes* statuses of international crimes, and acceptance of universal jurisdiction, which is based on the claim that international crimes may "affect all states" and therefore shall be prosecuted (Cassese 2003, 284). The threat to the society of states has two aspects – the crimes may threaten the material interests of international society and/or its fundamental values (Broomhall 2003, 44–46; Cassese 2003, 284). While piracy (discussed above) was early made the subject of international criminal law, this was primarily to protect states' interests, the core international crimes defined above incorporate both aspects (Broomhall 2003, 44–46; Cassese 2003, 284). Protection of interests is manifest in the aim of regulating the aggressive use of force (Broomhall 2003, 44–46). Protection of fundamental values is connected to what has been called the "conscience of humanity"(Broomhall 2003, 45).

The ICL regime, just like its main institutions, is marked by a struggle between normative commitments and national interests. On the one hand, when looking at the main ICL institutions and the definitions of international crimes, it appears that the normative commitments keep expanding, even at the cost of national self-interest. For illustration, the early definitions of war crimes, crimes against humanity and crimes against peace in the IMT Charter and the jurisprudence of the IMT focused on the criminalisation of offences related to the aggressive use of force against other states (Broomhall 2003, 44–55). This can be exemplified by several facts. First, the IMT declared

crimes against peace (today known as the crime of aggression) to be the "supreme international crime" (Broomhall 2003, 46). Furthermore, under the IMT statute, war crimes and crimes against humanity were linked to international armed conflicts (Broomhall 2003, 48). The ICL was preoccupied with limiting the consequences of external aggression, and so the very same atrocities committed in the context of non-international conflicts were not deemed illegal under international law (Schabas 2009, 113).

However, as fittingly put by Broomhall (2003, 46), with time, the "conscience of humanity" gained more "autonomy". When looking today at the ICC Statute, crimes which are currently within its jurisdiction concern "widespread or systematic" attacks against civilian populations irrespective of the nature of the conflict (ICC Statute, art 6-8). This indicates that the protection of humanitarian values has gained in importance relative to the protection of common (state) interests (Broomhall 2003, 46).

Today, at their core, all three international crimes serve to prohibit unnecessary "widespread or systematic" suffering sponsored by a state or other "entities" occurring during internal or international armed conflicts (Bassiouni 1999, 243; Werle 2009, 55). The principle underlying this norm is the belief that international crimes threaten the international community as a whole, by threatening either its material interests or its fundamental values (Broomhall 2003, 46–48; Cassese 2003, 284).

However, this growing normative commitment is not matched by increased efficiency of the regime as such. When looking at the empirical data, it can be said without any exaggeration that the ICL regime has so far had only very limited effectiveness. According to a study by Bassiouni et al (2010c, xiii), between 1945 and 2008 "some 313 conflicts have taken place resulting in an

estimated 92 to 101 million people killed". As pointed out by Bassiouni (2010c), that is "twice as many people killed in World Wars I and II put together", which occurred before the existence of the modern ICL regime (Council on Foreign Relations, 2010). Not only have the ICL norms had limited impact but also its institutions designed to prosecute those violating these norms have been strongly constrained by political considerations and therefore have had limited effectiveness. In 2010, of the 313 conflicts analysed by Bassiouni et al, only 32 were subject to the jurisdiction of any of the 11 *ad hoc* international or hybrid criminal judicial bodies or the ICC (Mullins, 2010: 80). The indirect enforcement system did not perform much better either. According to Mullins (2010, 80), of the 313 conflicts, only 33 were followed by national prosecutions; in 142 conflicts other accountability mechanisms such as truth commissions, memoralisation and lustration were used and 125 conflicts resulted in amnesties (Mullins 2010, 80). Based on these numbers it can be assumed that the vast majority of those responsible for killing millions of people will never face a trial (Bassiouni 2010b). This has significant implications for the deterrence effect of the international criminal regime and reflects on the effectiveness of that regime.

Despite significant expansion of the ICL regime, its normative pull is not yet strong enough to constrain national self-interest and ensure compliance. Why do states keep expanding the ICL regime at significant financial and often political cost, if its effectiveness is lacking? A better understanding of state cooperation with ICTs may uncover the reasons behind this paradoxical behaviour.

The tension between norms and interests is common to both the performance of the overall ICL regime as well as to cooperation between the ICT and individual states. A better understanding of state cooperation with ICTs is

expected to shed light on the future evolution of the ICL regime as well. Variables predicting the success of cooperation between states and ICTs may play a role also when it comes to better understanding cooperation with the ICL regime. In addition, ICTs as the "highest instance" courts stand at the centre of the ICL regime. As such, their performance has a significant impact on the overall efficiency of the regime and deserves further study.

2.7. Conclusion

In this chapter, I argued that the ICL norms enjoy almost universal acceptance and that a well-defined regime exists around these core norms. As the chapter showed, the norm prohibiting unnecessary war-related suffering has existed in national legislation over an extended period (Bassiouni 2003, 25 – 26). However, one can only talk about the existence of a "regime" after the international community developed mechanisms to prosecute violations of this norm. As put by Cryer (2005, 149), in order for the regime to emerge, the international community needed to design a system "to identify and rectify instances of cheating". I argued that such a system emerged with the establishment of the IMT and the IMTFE. For the first time, international crimes could be prosecuted directly under international law, irrespective of the existence or non-existence of the offence in national law (Bantekas and Nash 2003, 8). Individual criminal liability moved responsibility away from states to individuals, since, as fittingly put by the IMT,

> "crimes against international law are committed by men, not by abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced." (IMT judgement of 1 October 1946 in (Werle 2005, 7)

Next, I argued that two complementary systems exist to ensure compliance with ICL. The indirect enforcement system relies on states' willingness and

ability to prosecute international crimes. Under the direct enforcement system, perpetrators of international crimes are prosecuted by international or hybrid courts. The ICL regime thus encompasses thousands of national courts complemented by a handful of international and hybrid courts at its centre.

Third, I argued that three crimes lie at the core of the regime: genocide, war crimes and crimes against humanity. All three serve to prohibit unnecessary suffering occurring during internal or international armed conflicts (Bassiouni 1999, 243; Werle 2009, 55). The section served to identify offences that indisputably enjoy within international society the status of international crimes. Only cases where the perpetrators are accused of committing war crimes, crimes against humanity or genocide are included in the analysis of state cooperation with ICTs.

Last, I summarised the main elements of the ICL regime to argue that ICTs as well as the broader ICL regime are both affected by the conflict between norm compliance and interest pursuit. Better understanding of cooperation between the ICTs and states is relevant for understanding the performance of the ICL regime. Furthermore, the central role of the ICTs, as courts of last instance in the ICL regime, makes them an attractive research subject from the policy implication perspective.

3. Theoretical review: searching for conditions for cooperation

To identify which factors are causally relevant for cooperation, realist, liberal, constructivist as well as legal theories of state cooperation are reviewed in this chapter. By focusing at the most prominent theories, the structure of the chapter inevitably resembles Lamont's theoretical framework who (2008, 22–36) also reviewed realist, liberal, neoliberal institutionalist, and the "logic of appropriateness" theories. To organise the vast literature on cooperation, a separate section (3.1.–3.4.) is dedicated to each leading school of thought. The focus is on the role of international law and courts, as well as the main pre-conditions for successful cooperation. Once the general hypotheses of this study have been proposed, in terms of the conditions identified in the literature as potentially being of relevance to state cooperation with the ICL regime, section 3.5 proceeds with the operationalisation of those conditions.

3.1. Realism

Within the "logic of consequences", realism was the prominent theoretical approach to international relations during the 20th century. Realist authors address international law only indirectly, as a particular form of international institution (Arend 1999, 115–116; Mearsheimer 1994, 8). When looking through the neorealist lens, institutions play only a limited role in international politics. They do not act independently and their decisions merely reflect the interests of their strongest members (Finnemore 1996a, 14; Mearsheimer 1994, 7; Waltz 1979, 121). Furthermore, realists argue that this insignificant role of international institutions cannot change (Arend 1999, 117). This view is based on the assumption that the structure of international

system is essentially anarchical, occupied by "functionally" equal states with different power capabilities (Waltz 1979, 88–101). States are assumed to be rational actors whose behaviour is primarily motivated by the will to survive (Waltz 1979, 121). Securing survival in an anarchical system is particularly challenging because no authority protects states from acts of aggression and states "have little reason to trust each other" (Mearsheimer 1994, 9). Therefore, the only effective means is self-help (Waltz 1979, 74–79). In other words, the structure of the international system constrains states to behave as self-interested power-seekers wishing at minimum to preserve their current power position, or at maximum to improve it. If they fail to behave this way, the international structure will eliminate them (Waltz 1979, 92). As a result, international law and international organisations exert little or no influence on state behaviour.

However, the system-focused neorealist theory provides little guidance about how national decision-makers identify state interests in specific situations. Neoclassical realism as a state-focused theory recognises the influence of domestic political processes on interest calculations and provides more fine-tuned information about how policy-makers determine what constitutes the national interest. As argued in chapter 1, it accepts of many Waltz's assumptions when arguing that state behaviour is primarily shaped by systemic forces and, therefore, states adjust their foreign policies in response to changes of their relative power position (Rose 1998, 152). However, neoclassical realism also argues that systemic constraints undergo a process of translation into foreign policy at state level, during which domestic politics influences states' behaviour as well (Rose 1998, 152).

As argued by Rathbun (2008, 304), international structure influences foreign policy patterns, but it does not directly determine the strategies of individual

states. Realism is a theory "of constraints and incentives and therefore does not offer determinate expectations of state behaviour" (Rathbun 1998, 304). States enjoy the freedom to ignore the logic of the anarchical system, but, as a consequence, have to bear its punitive effects (Taliaferro, Lobell, and Ripsman 2009, 28). In order to survive, states need to adopt strategies respecting the logic of a self-help system, but in many cases they fail to do so because states' representatives struggle to identify suitable strategies or simply decide not to use them (Taliaferro, Lobell, and Ripsman 2009, 28). Unlike neorealist assumptions about "absolute domestic agential power'", which allowed the theory to capture states as unitary actors, neoclassical realism relativises the power of governments. It admits that domestic institutions limit the absolute freedom of governments when it comes to foreign-policy decision-making (Hobson 2000, 25–26). Foreign policy decision makers lie at the "intersection of domestic and international" pressures (Lobell 2009, 56). In order to secure their survival in the international system and the domestic environment, they have to find equilibrium between international security interests and the pressure from the unit level (Lobell 2009, 56).

The differentiation between rational understanding of systemic constraints and domestic pressures is central to the neoclassical realist literature. For instance, Lobell (2009, 56–57) stresses the difference between the "foreign policy executive", comprising rational security maximisers, and "societal elites", who, in an attempt to maximise their welfare, may compromise the state's rational foreign policy goals. In a similar vein, Sterling-Folker argues that "irrational national collective identity" can "coexist with rational self-interest" (Sterling-Folkner 2009, 104).

Thus, according to neoclassical realism, the behaviour of states is influenced not only by anticipation of systemic constraints driving states to behave as

rational egoists, but also by pressures from the domestic level. Even if it is assumed that foreign-policy decision-makers behave rationally, rational behaviour at the domestic level may seem irrational at the level of the international system. When the level of analysis is the international system, as in neorealism, states' interests are perceived in terms of securing the best possible relative power position (Taliaferro, Lobell, and Ripsman 2009, 5). However, when the unit of analysis is an individual state, as in neoclassical realism, self-interest is defined as an equilibrium between international power politics and domestic pressures.

The incorporation of domestic variables partially changes the conditions under which states are willing to cooperate. From a neorealist point of view, power competition severely hinders cooperation. According to Grieco (1988, 601), when it comes to cooperation, a state has to take into consideration not only its absolute gains, but also the fact whether the gains of other states could affect its relative power position. In other words, states look not only at their own profits, but also at their relative gains (Grieco, 1990: 47 as cited in Hasenclever et al 2002, 120). Thus, a state cooperates only if it assumes that the outcome will be an enhancement of its absolute gains and at minimum preservation of its relative power position (Grieco 1988, 601).

In a similar vein, neoclassical realism has a rather negative attitude towards the possibility of cooperation. However, when looking through a neoclassical realist lens, state behaviour is driven not only by the prospect of enhanced relative material capabilities. Consideration must also be given to the interests of domestic actors, who may be in favour of cooperative behaviour for a number of reasons. In other words, neoclassical realists argue that states cooperate only if they expect the outcome to be consistent with their interests. Interests, however, are not only defined in terms of enhanced relative materi-

al capabilities (Mearsheimer 1994, 11), but also incorporate the preferences of domestic actors. In sum, from a neoclassical realist perspective, the main inducement for state cooperation is in the form of material incentives and one has to take into consideration a constellation of interests at both the systemic and the domestic level.

Hypothesis 1 resulting from realism can be summarised as follows: states will cooperate with ICTs only when it furthers their interests at the domestic and/or international level as interpreted by the incumbent government. The conditions identified as being of relevance for state cooperation are international interests (international pressure for cooperation), domestic interests, government stability.

3.2. Liberalism and neoliberalism

While, from a realist perspective, state behaviour is driven exclusively by material incentives, other theories challenge this "static" understanding of interests (Moravcsik 2010, 3, 11). Rationalist theories bring in a concept of preferences, encompassing both material and ideational elements. Preferences reflecting the demands of domestic society or of "some subset of domestic society" are the "fundamental cause of state behaviour in world politics" (Moravcsik 2010, 1, 3). Although the argument that state behaviour is primarily driven by preferences strongly resembles realist argumentation about interest-driven behaviour, the dynamic character of preferences (Moravcsik 2010, 3, 11) enables the liberalist theories to analyse how international institutions can redefine domestic preferences. According to Moravcsik, if the preferences of various states "overlap", effective international cooperation can occur. In contrast, differences between states' preferences enhance the probability of conflict (Moravcsik 1997, 520–521).

The strategies to enhance cooperation can go beyond external coercion, as argued by realism, and should focus on a redefinition of preferences (Slaughter 2000, 242). Based on the assumption that preferences are a reflection of societal demands, liberalism argues that international institutions using "direct links to individuals" are more likely to attract cooperation (Slaughter 2000, 242). The links function in two directions: first, the they influence the preferences of domestic actors by imposing obligations directly on individuals rather than on states; and second, they may entitle individuals to enforce their claims by provision of direct access to international enforcement institutions (Keohane, Moravcsik, and Slaughter 2000, 477–478; Slaughter 2000, 242, 248). In this way the international law can bypass the political obstacles stemming from national governments.

Within the liberalism framework the focus of scholars is on the quality of international institutions. One of the relevant qualitative aspects of international law is the independence of courts, and surprisingly, liberal accounts offer contradictory conclusions about the influence of independence and other formal variables on court effectiveness. On one side of the argument is Keohane, Moravcsik and Slaughter's (2000) comparison of interstate and transnational mechanisms of dispute resolution. The authors examine how different designs of court influence the performance of dispute resolution mechanisms. Their "explanatory variables are independence, access and embeddedness" of the courts (Keohane, Moravcsik, and Slaughter 2000, 458–459). The three variables are defined as follows:

> "independence specifies the extent to which formal legal arrangements ensure that adjudication can be rendered impartially with respect to concrete state interests. Access refers to the ease with which parties other than states can influence the tribunal's agenda. Embeddedness denotes the extent to which dispute resolution decisions can be implemented without governments having to take actions to do so. We define low independence, access,

> and embeddedness as the ideal type of interstate dispute resolution and high independence, access, and embeddedness as the ideal type of transnational dispute resolution." (Keohane, Moravcsik, and Slaughter 2000, 459)

Each of the explanatory variables is associated with a different dependent variable. Independence affects the ability of the tribunal to "challenge national policies" (Keohane, Moravcsik, and Slaughter 2000, 472). Mode of access is relevant to the number of the cases referred to a court, as well as "the likelihood that such cases will challenge national governments" (Keohane, Moravcsik, and Slaughter 2000, 472). And the most relevant criterion for this dissertation is embeddedness, as it is expected to impact on compliance (Keohane, Moravcsik, and Slaughter 2000, 476).

The three variables are used to differentiate between transnational and interstate courts. The ideal type of transnational court is, thanks to the access for individuals, expected to attract a large number of cases. Second, as an independent institution, the court decides the disputes impartially, without giving consideration to political interests. And finally, by activating domestic enforcement it can expect high levels of compliance (Keohane, Moravcsik, and Slaughter 2000, 470–479). In contrast, interstate courts, which give access only to state actors, can expect fewer cases, their decisions are less likely to challenge the interests of state parties and compliance is strongly dependent on the willingness of states to "back" the court "with threats of reciprocal denial and punishment" (Keohane, Moravcsik, and Slaughter 2000, 470–476).

In a similar vein, Helfer and Slaughter (1997) differentiate between international and supranational courts. The definition of supranational courts resembles to a certain extent the above-mentioned concept of transnational courts, and the international courts resemble the interstate courts. Helfer and Slaughter apply in essence the same approach as Keohane et al (2000) and

argue that the international courts dealing with interstate disputes can expect relatively few cases and significant problems at the enforcement stage (Helfer and Slaughter 1997, 285–286). This conclusion is delivered from the assumption that courts can be effective only if they can rely on a set of institutions designed to enforce their judgements (Helfer and Slaughter 1997, 284). Where there are no global enforcement mechanisms, the only option is to activate national enforcement systems (Helfer and Slaughter 1997, 284). In Helfer and Slaughter's (1997, 288–290) view, supranational courts by "[penetrating] the surface of the state" and "[establishing] a direct link between supranational tribunals and private parties" can "harness the power" of national enforcement systems. As consequence, supranational courts can be expected to achieve higher levels of compliance than international courts.

The difference between Keohane et al's (2000) and Helfer and Slaughter's (1997) approach is in their scope of analysis. While Keohane et al (2000) provide a theoretical argument about different causal mechanisms operating in connection with interstate and transnational tribunals, Helfer and Slaughter (1997) take the argument about the effectiveness of supranational courts as their starting point and focus on analysis of two existing effective supranational tribunals, namely the European Court of Justice (ECJ) and the European Court of Human Rights (ECHR), in order to provide a list of criteria which can be applied to all supranational judicial bodies. After identifying a list of 13 features of the ECJ and ECHR, the authors argue that their application to other judicial bodies, such as the United Nations Human Rights Committee (UNHRC), could enhance their effectiveness (Helfer and Slaughter 1997, 337). However, by simply observing a correlation between a long list of features common to the ECJ and ECHR and high levels of compliance, the authors fail to establish a clear causal link (Posner and Yoo 2005, 3).

Despite this difference, when theorising about state compliance, the underlying argument of both groups of authors is the same. Both Keohane et al (2000) and Helfer and Slaughter (1997, 288–290) stress importance of the "ability to penetrate the surface of the state" or "embeddedness" when generating state cooperation.

Hypothesis 2 resulting from Keohane et al's (2000) and Helfer and Slaughter's (1997) reasoning can be summarised as follows: the highest levels of cooperation can be expected between states which have embedded cooperation modalities with ICT into their national legislation and ICTs which have structural features and communication strategies that allow them to develop good connections with national authorities. The conditions identified as being of relevance for state cooperation are "norm institutionalisation" and court "outreach".

Keohane et al's and Helfer and Slaughter's approach has been challenged by Posner and Yoo (2005), who come to very different conclusions about the relation between a court's independence and its effectiveness. According to them, independent tribunals are unlikely to be effective, because independence and effectiveness are not positively correlated. They define independent tribunals as those which are

> "composed of senior, respected jurists with substantial terms; […] have an independent fact-finding capacity; their decisions are binding as international law; […] make decisions on the basis of "principle rather than power"; and […] engage in high-quality legal reasoning." (Posner and Yoo 2005, 5)

Posner and Yoo (2005, 3) argue that Helfer and Slaughter's case selection is flawed since they study only supranational tribunals. The transfer of the variables identified by Helfer and Slaughter to other international courts would not lead to enhanced compliance because those courts cooperate with states

which do not enjoy such a "high level of political and economic unification" as the European states in which the ECJ and ECHR operate (Posner and Yoo 2005, 3). Therefore, state behaviour in situations where states are not assumed to have incorporated the norm into their preferences is driven by a different causal logic. They assume that international courts operate in a non-hierarchical system, where they do not have the mechanisms necessary for enforcement of their decisions; therefore they have to rely on the cooperation of the state parties, which are less likely to support an independent court that might violate their interests (Posner and Yoo 2005, 66–67).

Although Posner and Yoo share with liberals the assumption that states coexist in an anarchical environment in which international institutions can nonetheless effectively facilitate cooperation, the theories differ in their level of analysis (Keohane 1982, 332; Slaughter 2004, 29). While Posner and Yoo's institutionalist approach examines states as unitary actors, new liberal theory dismantles the state and analyses the role of individuals and domestic groups in international cooperation (Slaughter 2004, 26, 29). This difference in the approach leads the two schools to conflicting hypotheses about the causal mechanisms of cooperation. As stated above, in new liberalism state behaviour is driven primarily by the preferences of domestic actors. Therefore, to enhance state cooperation with international tribunals one should aim to develop connections with domestic actors and gain their support (Slaughter 2000, 242). This is most likely to be achieved through independent impartial tribunals granting access to individuals and having close ties with domestic institutions (Helfer and Slaughter 1997; Keohane, Moravcsik, and Slaughter 2000).

On the other hand, by approaching states as unitary actors, institutionalists are driven to different conclusions. From an institutionalist perspective,

states pursue a goal of gain maximisation; this is "stable" (Posner and Yoo 2005, 6–7) and cannot be changed by developing links with domestic actors. States establish international courts in order to overcome international or transboundary problems and thus enhance their absolute gains (Posner and Yoo 2005, 14–19). This approach leads neoliberals to less optimistic conclusions about the effectiveness of international courts than the conclusions of new liberalism. According to Posner and Yoo (2005, 28), if states perceive that an international court violates their interests they are unlikely to comply with its decisions and the court has no means to enforce compliance. Since independent courts and tribunals are more likely to violate state interests, in Posner and Yoo's (2005, 25) view, higher levels of compliance should negatively correlate with court independence.[4]

Hypothesis 3 resulting from Posner and Yoo's (2005, 25) reasoning can be summarised as follows: independence and cooperation are not positively correlated. The condition identified as being of relevance for state cooperation is court "independence".

The different theoretical approaches identify not only different causal logics of state behaviour, they also drive case selection. Helfer and Slaughter and Keohane et al pay attention only to supranational tribunals (ECHR, ECJ).

[4] However, it is important to note that Posner and Yoo (2005, 25) differentiate between *ex ante* and *ex post* interests. They (2005, 25) assume that the judicial activism of independent tribunals may lead to violation of states' *ex ante* interests, but they also point out that even dependent tribunals cannot let the *ex post* interests of the disputing parties influence their decision-making and the tribunals have to remain neutral (2005, 22). Thus, while Helfer and Slaughter (1997, 313) and Keohane et al (2000, 460) assume that independence is necessary to secure procedural justice, Posner and Yoo assume that dependence will not negatively impact on procedural justice and at the same time force the court to respect states' *ex ante* interests.

Posner and Yoo (2005, 3) criticise this narrow case selection and argue that "the high level of political and economic unification among European states" is the reason behind the effectiveness of the ECHR and the ECJ. Instead, they conduct their study on a dataset containing 12 courts, some of which have interstate and some supranational designs. Despite the fact that liberal and institutionalist approaches to judicial independence contradict each other, both groups of authors may be right if their hypotheses are reformulated to reflect the conjunctural influence of the European unification. By adding condition norm institutionalisation to the analysis, this research examines whether impact of independence on cooperation changes depending on presence or absence of norm institutionalisation and outreach.

3.3. Constructivism

Constructivist theories can be divided between state- and system-oriented approaches, according to their level of analysis. Similarly to neorealism, Wendt's systemic constructivism recognises the influence of the international structure on states' behaviour (1999, 25). However, Wendt does not describe the structure as static. In his view, the international system is a changing construct shaped by identities and norms which develop through extensive socialisation. Norms, as argued by Finnemore and Sikkink (1998, 893), exist as long as a "critical mass" of actors shares the belief that certain behavioural patterns should be followed. The presence of norms can be determined from the existence of institutionalised rules such as laws, behavioural patterns and justifications in case of non-compliance (Finnemore and Sikkink 1998, 893).

The likelihood of cooperation is related to the degree to which a set of norms has been "socialised" by a state. Constructivist authors offer both systemic and state-centric accounts of this norm socialisation process. Finnemore and

Sikkink (1998) describe it as a process through which an individual norm gains in importance from a systemic point of view. They argue that the "life cycle" of a norm consists of three main phases (Finnemore and Sikkink 1998, 895). During the "emergence phase", norm entrepreneurs try to persuade a wide range of actors of the "appropriateness" of the new norm (1998, 895). In the second "norm cascade" stage, a large number of actors have already accepted the norm and other states "imitate" their behaviour. Finally, after the norm has been internalised, it enjoys "a taken-for-granted quality and [is] no longer a matter of public vote" (1998, 895). At this stage, "conformance with the norm [is] almost automatic" (Finnemore and Sikkink 1998, 904) and high levels of compliance can be expected.

Turning to the state level, Risse and Sikkink's (1999, 22–35) produce a "spiral model of human rights change" in examining the influence of norms on individual states. Risse and Sikkink differentiate between "three types of socialisation processes which are necessary for enduring change in the human rights area" in any given state. The first type refers to the "processes of instrumental adaptation and strategic bargaining" that may lead states to norm compliance for tactical reasons, for example in response to external coercion. Operating both at domestic and international level, the processes are in essence consistent with the realist definition of interest-driven behaviour (Risse and Sikkink 1999, 5, 12).

The second type, the "processes of moral consciousness-raising, argumentation, dialogue and persuasion" may lead states to "accept the validity and significance of norms in their discursive practices" (Risse and Sikkink 1999, 5, 13). Norm-supporting discourse adopted by a state may indicate a degree of norm acceptance and simultaneously create the possibility for norm promoters to "catch government on its own rhetoric". Shaming may be used by

norm promoters to stimulate socialisation by a particular state as well as to trigger coercion by other states (Risse and Sikkink 1999, 14–15). The third type, "processes of institutionalization and habitualization" may lead to "incorporation" of the norm into the "'standard operating procedures' of domestic institutions" and habitual compliance (Risse and Sikkink 1999, 5, 16–17).

Although these mechanisms operate simultaneously throughout all stages of norm socialisation, their importance changes as the norm socialisation processes progress throughout five phases described by Risse and Sikkink. The socialisation spiral starts with an initial "repression phase", which is characterised by a state's lack of respect for the relevant norm, and where neither instrumental nor argumentative socialisation shapes state behaviour (Risse and Sikkink 1999, 22–35). The domestic society is too weak to challenge the government and transnational networks are inactive.

In the second phase, transnational networks engage in shaming in order to raise international attention, but the state itself denies the validity of the norm and may even start a counter-shaming campaign at both domestic and international level. Domestic and international pressure remains insufficient to change the state's behaviour (Risse and Sikkink 1999, 23).

During the third phase a temporary compliance may occur in response to international pressure. To secure enduring norm compliance, the transnational networks should pay attention to mobilisation of domestic groups. If mobilisation is successful, the government is more likely to succumb to simultaneous pressure at the international and domestic levels. The socialisation processes involve both instrumental and argumentative behaviour. States may comply with the norm for instrumental reasons when exposed to

international pressure. At the same time, if a state accepts the validity of the norm in its discourse, the mobilised civil society can put pressure on the government by pointing out its inconsistent behaviour (Risse and Sikkink 1999, 25–28).

During the fourth "prescriptive status" phase, "argumentative rationality and institutionalisation" gain in importance at the expense of instrumental rationality (Risse and Ropp 1999, 249–251; Risse and Sikkink 1999, 32). This change indicates that domestic actors accept the norm and, therefore, are more likely to follow it at times voluntarily, irrespective of external pressures. Institutionalisation processes find expression through

1. "ratification" of relevant international instruments
2. "institutionalisation" in domestic law
3. accessibility of domestic enforcement mechanisms (Risse and Sikkink 1999, 28–29)

Argumentative socialisation manifests itself through the "discursive practices of the government", which, "irrespective of the (domestic or international) audience", no longer challenges the validity of the norm and instead "engages in a dialogue" (Risse and Sikkink 1999, 28–29).

The fifth phase is rule-consistent behaviour, during which the norm, next to formal institutionalisation in domestic legal structures, enjoys habitual compliance (Risse and Sikkink 1999, 31). It can be said that the norm has been internalised.

The constructivist reasoning has similarities with that of legal theories. For this reason next section turns to legal scholarship and contains a hypothesis for both theoretical frameworks.

3.4. Legal scholarship

While constructivist theories examine the process of norm socialisation, most of the international law theories start with the assumption that compliance with international law lies in the interest of states. For instance, Chayes and Chayes (1993, 179) assume that "states cannot be legally bound except with their own consent" (1993, 179), and therefore become parties only to those treaties which are consistent with their interests. By assuming that compliance is an automatic consequence of treaty ratification, Chayes and Chayes (1993, 176) rephrase the question "Why do states comply with international law?" and ask instead "What are the reasons for states obstructing compliance?" They identify three main causes. The first concerns the quality of the law; namely, ambiguous treaty texts provide confusing information about states' obligations and as a result non-compliance may follow (Chayes and Chayes 1993, 188). Second, there is a state capacity variable. And third, states need some time to adjust or in some cases to establish the new regulatory mechanisms necessary to ensure compliance (Chayes and Chayes 1993, 188). It is therefore possible that lower levels of compliance may occur at earlier stages of regime existence (Chayes and Chayes 1993, 175).

In a similar vein, Franck (1988, 705–706) derives his analysis from the assumption that states are motivated to comply with international law and stresses the influence of norm quality on compliance. According to Franck, if states want to be recognised as members of a specific community, they comply with the rules governing relations between its members (Franck 1988, 711). Thus, no enforcement is necessary, since compliance is voluntary (Franck 1988, 745). The main factor determining whether states obey the rules is the quality of the norm. According to Franck, only such a rule which

came into being "in accordance with the right process" and is perceived "as legitimate by those to whom it is addressed" is likely to be internalised and followed (Franck 1988, 706, 711). In connection with ICL regime, Franck's observation (1988, 711) that not only the rule itself but also the institution applying the rule has to be legitimate is of particular relevance.

Legitimate rules are characterised, first, by level of "textual determinacy", which relates to the ability of a rule to transparently communicate its content (Franck 1988, 713, 725). Second, they can be characterised by the various forms of "symbolic validation" communicating the authority of the rule (Franck 1988, 725). "Symbolic validation" may include signs such as ratification of a treaty or a decision by an international institution such as the ICJ or United Nations General Assembly (UNGA) confirming the validity of the rule (Franck 1988, 726). Third, "coherence" means that the validation procedures and the rule itself have to be applied in a coherent manner and also that the norm has to be coherent with the principles of the underlying regime (1988, 741, 750–751). Last, "adherence" requires legitimate rules to be made "within the procedural and institutional framework of an organised community", or, put in Hart's terminology, the "primary rule of obligation" has to adhere "to a system of secondary rules of process" (Franck 1988, 752).

Finally here, Koh's transnational legal process theory needs to be mentioned. Unlike Franck, Koh (1998, 628) does not see the quality of the norm as crucial for compliance, but argues similarly with constructivist and to some extent also liberal authors that states are most likely to obey international law when the laws have been internalised (i.e. incorporated within domestic structures). Internalisation takes place in form of the domestic institutionalisation and has social, political and legal dimensions (Koh 1998, 642).

Hypothesis 4 resulting from constructivist and legal scholarship can be summarised as follows: states will cooperate if the underlying norm is legitimate and has been institutionalised by the state. The conditions identified as being of relevance for state cooperation is norm institutionalisation.

3.5. Defining causal conditions

Political and legal theories have been reviewed in this chapter in order to identify a number of sufficient and necessary conditions for cooperation. From the realist perspective, it has been argued that states are expected to cooperate with ICTs only when it furthers their interests at the domestic and/or international level. From the liberal point of view, cooperation can be expected when states have embedded cooperation modalities with ICT into their national legislation and ICTs are independent and conduct an outreach campaign to engage with the state (Keohane et al, 2000; Helfer and Slaughter, 1998). The last statement has been challenged by Posner and Yoo (2005: 3), who claim that the independence of the court and state cooperation are not positively correlated. Finally, when looking constructivist and normative legal theories, compliance can be expected when the court is perceived as legitimate and the norm it is trying to enforce has been institutionalisation by the state (Franck 1988; Finnemore and Sikkink 1998, 904; Risse and Sikkink 1999, 31).

In the following, the conditions identified in the literature as causally relevant for state cooperation with an ICT are defined by relying, where possible, on existing operationalisations of the hypotheses. Furthermore, consideration is given to ICT scholarship, notably Peskin's (2008) and Lamont's (2008) accounts of state cooperation with the ICTY and ICTR, when operationalising the theoretically derived conditions.

3.5.1. Arguing for different types of (domestic and international) interests

A number of realist authors have examined issues of state cooperation with international courts. However, the analysis is mostly at the systemic level and I could identify no neoclassical realist account.

To identify a set of criteria predicting the effectiveness of the ICC, Griffin's (2001) Predictive Framework for the Effectiveness of International Criminal Tribunals examines the performance of the IMT, the IMTFE, the ICTY and the ICTR from a perspective consistent with systemic realist thought. According to Griffin (2001, 437), the effectiveness of the ICC will be primarily dependent on three factors:

> "(1) the degree of physical control exercised by the enforcing powers; (2) the degree of cooperation among the enforcing allies, neighbouring countries, and interested parties; and (3) the perceived integrity of the tribunal's procedures."

Because Griffin's (2001, 437) analysis includes non-sovereign states occupied by other states or organisations, the first criterion is irrelevant from the perspective of this dissertation, which focuses on sovereign states. No explicit definition or operationalisation is offered for the second and the third criteria.

Cohen (1997, 4), in an attempt "to predict the possibility of successful adjudication of Bosnian war criminals" by the ICTY, identifies two realist variables: interests and state capacity. State capacity as a trivial necessary condition for cooperation is not of theoretical importance for this dissertation and therefore has been accounted for in the definition of the outcome: the absence of arrests will not be assessed as non-cooperative behaviour in cases where the state lacks the capacity to comply. When defining interests, Cohen (1997,

117), similarly to Griffin (2001), assumes that coercion plays a major role and assumes that interests are "demonstrated through security interests, economic motivations, and the desires to maintain or promote political stability and peace".

In another analysis of cooperation with the ICTY, Lamont (2008, 25) identifies two main variables falling within the realm of the definition of state interests: "coercion and inducements deployed by third party states". Lamont's (2008, 25, 223–224) examples of coercion and inducement are, on the one hand, of purely economic character, such as conditionality of foreign aid by third states and, on the other hand, are of a mixed nature and related to membership of international institutions crucial for economic development, post-conflict reconstruction and political stability, such as "the US threat to block Serbian access to international financial institutions" (2008, 223) or the conditionality of EU accession (2008, 224).

Although Lamont (2008, 51–81) does not associate himself with neoclassical realism, consistent with its logic he looks at both the domestic and the international politics of compliance. A difference between domestic and international cooperation dynamics has also been observed in Peskin's (2008) study on state cooperation with the ICTY and the ICTR. At one level, Peskin (2008, 9) looks at the interactions between the ICT, the international community and the state as a unitary actor, and at another level he analyses the dynamics of the domestic political scene (Peskin 2008, 9–12).

In order to account for the differences in the modalities of interest calculations at the systemic and the domestic level, I treat the constellations of international and domestic interests as two separate conditions. The differentiation is designed to deliver insight into the decision-making process of

foreign-policy decision-makers faced with conflicting domestic and international pressures. More specifically, it is expected to shed light on the threshold after which the decision-makers prefer cooperation even in situations where it would be deemed irrational from neorealist perspective.

Domestic interests - defining proximity (condition 1)

The absence of neoclassical realist accounts of state cooperation with international courts makes operationalisation of domestic interests difficult. While neoclassical realists agree on the primary influence of systemic constraints on state behaviour, the individual authors identify a broad range of intervening variables stemming from the domestic level, such as elite consensus, government/regime vulnerability, social cohesion and elite cohesion (Schweller 2004), the state's ability to extract resources extraction (Taliaferro 2006) and even national identity (Sterling-Folkner 2009).

In an attempt to identify relevant domestic intervening conditions in the specific context of state cooperation with ICTs, I take into consideration Lamont's (2008) and Peskin's (2008) case studies of the ICTY and ICTR. Although the authors do not apply neoclassical realism, their empirical analysis pays strong attention to domestic dynamics. The overlaps between their conclusions and neoclassical realist logic were used to identify the factors operationalising "domestic interests".

A variable recognised by a majority of neoclassical realist theories (Rose 1998, 157–158) which also plays a role in Peskin's (2008, 13) and Lamont's (2008, 93) analysis is elite perceptions of external threats. In the context of state cooperation with ICTs, a factor expected to influence attitudes of the societal elite towards cooperation is the likelihood of the ICT targeting its members. Similarly to the logic at the international level, cooperation with an

ICT is expected to be consistent with the interests of those exercising control over foreign policy (i.e. government) – and those interests will be met when the ICT targets primarily the elite's domestic opponents, such as opposition parties or armed rebel groups. At the other end of the spectrum there are criminal investigations and proceedings targeting high-ranking state representatives and military members.

Domestic interests - defining government stability (condition 2)

Another element present both in empirical studies on state cooperation and in neorealist theories is government vulnerability (Schweller 2008). As defined by Schweller (2008, 49)

> "the concept of government vulnerability 'asks what is the likelihood that the current leadership will be removed from political life'".

Schweller (2008, 49–50) mentions threats to government stability, which can be divided into two groups: those stemming from elites such as coups by the military leadership and those stemming from society. Peskin (2008, 236) also postulates an impact of government vulnerability and argues that

> "notwithstanding international pressure and incentives, a targeted state will often withhold cooperation when domestic anti-tribunal actors threaten state authority and stability."

Defining international interests (condition 3)

In the absence of large-N realist studies on cooperation with ICTs, I have defined the condition "international interests" based on my interpretation of realist premises and their application to the issues at hand. Neoclassical realist thought accepts most of the neorealist assumptions when explaining "systemic level pressures", as described by Waltz (1979). According to neorealism, the primary interest of each state is "at minimum, [to] seek [its] own preservation and, at a maximum, drive for universal domination" (Waltz

1979, 92, 118). In a self-help system, states can achieve their survival by securing the best possible relative power position. When survival is understood as preserving sovereignty and territorial integrity, cooperation with an international court that can override the jurisdiction of national courts is by default inconsistent with national interests. However, in some specific scenarios cooperation may help to improve or preserve state's power position and thus be deemed as rational, even from a realist perspective.

More precisely, cooperation can be seen as meeting the national interest when coercion and inducements stemming from other states or international institutions render the costs of non-cooperation too high. External coercion stemming from other states can have different forms, ranging from economic pressure to direct occupation of the territory. Conditionality of US aid is mentioned as one of the main drivers of Serbian cooperation with the ICTY (Peskin 2008, 62). The attitude and conditionality of membership in regional organisations such as the European Union and the African Union are another source of international interests (see Kim 2008; Lamont 2008; Peskin 2008)

3.5.2. Defining norm institutionalisation (condition 4)

Institutionalisation of ICL plays a significant role in liberal, constructivist and international law accounts of cooperation. From a constructivist perspective, the prescriptive status of a norm is characterised by different forms of norm institutionalisation and rhetorical support of the government. To recall, Risse and Sikkink propose following factors:

1) "'ratification' of relevant international instruments
2) 'institutionalisation' in domestic law
3) accessibility of domestic enforcement mechanisms" (Risse and Sikkink 1999, 28–29)

Within legal scholarship Chayes and Chayes (1993, 188) stress the quality of the law, more precisely the unambiguity of treaty texts. Frank also stresses "textual determinacy", together with "symbolic validation" communicating the authority of the rule (Franck 1988, 713, 725), "coherence" validating that the norm has to be coherent with the principles of the underlying regime (1988, 741, 750–751) and "adherence" requiring legitimate rules to be made "within the procedural and institutional framework of an organised community" (Franck 1988, 752).

According to liberalism, institutions serve as a transmission belt, translating the preferences of societal actors into policies shaping state behaviour (Moravcsik 1997, 518). Institutional arrangements regarding the enforcement of ICL and cooperation with ICTs are, on the one hand, an important indicator of prevailing national preferences which drive state behaviour and, on the other hand, by "embeddeding" cooperation modalities with ICT into national law, institutionalisation can give leverage to domestic actors trying to enforce cooperation from "below" (Helfer and Slaughter 1997, 389; Keohane, Moravcsik, and Slaughter 2000, 477–478; Slaughter and Alvarez 2000, 242, 248).

To utilise these theoretical insights for the definition of institutionalisation, I use an index consisting of three factors:

1) The extent of ratification of human rights, ICL and humanitarian law treaties (percentage)
2) Implementing legislation allowing cooperation with the tribunals (dichotomous)
3) Presence of core crimes in domestic law (dichotomous)

The first factor proposed by Risse and Sikkink can be easily adapted to the context of international criminal justice by looking at the percentage of ratified human rights, international criminal law and humanitarian law treaties.

Second, by looking at the existence of implementing legislation, account is given to the constructivist arguments about the accessibility of domestic enforcement mechanisms (Risse and Sikkink 1999, 28–29), as well as to the liberal concept of "embeddedness" of ICTs (Helfer and Slaughter 1997, 389; Keohane, Moravcsik, and Slaughter 2000, 477–478; Slaughter and Alvarez 2000, 242, 248). Keohane et al (2000, 467) define embeddedness as "the extent to which dispute resolution decisions can be implemented without governments having to take actions to do so". Keohane et al (2000, 467) divide the "embeddedness continuum" into three main stages. When embeddedness is low, "the governments can veto implementation of legal judgment"; when it is moderate, the decision is binding but there is "no domestic legal enforcement"; and when it is high, "international norms [are] enforced by domestic courts" (Keohane, Moravcsik, and Slaughter 2000, 467). Although termed differently the assumption that the ability to "[penetrate] the surface of the state" and "[establish] a direct link between supranational tribunals and private parties" lies also at the centre of Helfer and Slaughter's (1997, 288–290) argument. Thus, the dissertation looks at the presence of implementing legislation enabling domestic actors to cooperate with the ICT.

Third, by answering the questions about whether genocide, crimes against humanity and war crimes have been criminalised under national law, the level of "institutionalisation as proposed by Risse and Sikkink (1999, 29) is accounted for.

3.5.3. Defining independence (condition 5)

Independence played central role in liberal and neoliberal accounts of cooperation with ICTs. Posner and Yoo define independence as follows:

> "One point is assigned to each tribunal for each of the following attributes: state can be bound to ruling without its consent to adjudication; possible that no national on panel that hears dispute; judges form permanent body; judges' terms extend beyond a given dispute; third parties may intervene. Maximum score is five points." (Posner and Yoo 2005, 52)

As the criteria were proposed for a broad group of international courts, some of them become redundant due to the unique nature of the ICTs and simultaneously inclusion of additional criteria is necessary. Posner and Yoo (2005) argue that dependent courts are more likely to respect states' interests than independent courts. The way jurisdiction of ICTs is triggered is closely related to the probability that states' interests may be violated. The jurisdiction of an ICT can be imposed upon a state by an external actor such as by the UNSC in the case of the ICTY and the ICTR, as well as the ICC under the article 16 of the Rome Statute (UNSC Res 827 1993, UNSC Res 955 1994). The state can also voluntarily consent to the jurisdiction, as in the case of the Special Tribunal for Lebanon (STL) and ICC state parties. The STL was established through an agreement between the United Nations and Lebanon (Report of the Secretary-General on the establishment of a special tribunal for Lebanon, 2006: 2). ICC state parties consented to ICC jurisdiction by ratification or accession to the Rome Statute. Once a state becomes an ICC member the jurisdiction can be triggered through a self-referral, referral by another state or by a *proprio motu* investigation requested by the prosecutor (Rome Statute, art 14 – 15). States' interests are most likely to be violated in situations where a state lands within a tribunal's jurisdiction without its prior consent. At one end of the spectrum are ICC self-referrals, where states una-

ble to deal with atrocity crimes by themselves request the assistance of the court.

Another feature which needs to be considered and which may have an impact on the probability that a state's interest will be violated is the nature of the jurisdiction. At one end of the spectrum are ICTs enjoying primary jurisdiction over international crimes. In such cases an ICT "may formally request national courts to defer" a case to its competence, without giving the state an ability to appeal (ICTY Statute, art 9 para 2). At the other end of the spectrum is a system where ICT jurisdiction is complementary to national systems. The ICT may step in only when national courts are unable or unwilling to prosecute and the state may formally challenge the admissibility of the case.

Scope of jurisdiction also plays a role; that is, ICTs can claim jurisdiction over alleged perpetrators of international crimes under the universal, passive and active nationality and territoriality principles. The pool of potential suspects is smallest under the passive nationality principle and the broadest under universal jurisdiction, but that is connected with the highest political costs (Risse and Sikkink 1999, 29).

At last, the calibration thresholds as used by Posner and Yoo (2005, 52) were adapted to reflect more accurately the differences between the ICTs. First, the measure of "permanent body of judges" as used by Posner and Yoo does not reflect the difference between *ad hoc* and permanent ICTs. To reflect the temporarily limited lifespan of the *ad hoc* ICTs, a negative value is assigned to *ad h*oc courts even if their judges form a permanent body. Second, the measure "no national hears the dispute" is also defined here in a more sensitive manner to reflect allegations of victor's justice in case of the IMT and IMTFE. No

national implies here, no national from either side involved in the armed conflict can hear the dispute.

Table 3-1 summarises the factors looked at when measuring ICT independence as proposed by Posner and Yoo (2005, 51) and partially adapted for the purposes of this research.

Table 3-1: Factors measuring court independence

Court structure	Dependent	Independent
Triggering mechanism of the jurisdiction	Consent	Imposed
Nature of jurisdiction	Complementary	Primary
"possible that no national on panel that hears dispute"	No	Yes
"judges form permanent body"	No (ad hoc courts)	Yes (permanent courts)
"judges' terms extend beyond a given dispute"	No	Yes
"third parties may intervene"	No	Yes
Scope of jurisdiction	Passive nationality, temporal	Universal, permanent

Source: Author's own compilation incorporating relying on and adapting the definition by Posner and Yoo (2005, 51)

3.5.4. Defining outreach (condition 6)

Importance of outreach has been highlighted by Helfer and Slaughter (1997) as well as Keohane et al (2000). The term "outreach" or "external communication" is used here to encompass a broad range of argumentative instruments as applied by the ICTs. An ICT can engage in a dialogue with states through external communication tools such as outreach targeting affected populations, public information and external relations facilitating "dialogue between the Court, State Parties … and other key partners" (ICC 2005, 3).

Within a particular state, the ICT's communication strategies are more likely to have an enduring effect on a state's willingness to cooperate if they

attempt to drive an argumentative dialogue at two levels. Firstly, the communication strategies should be capable of reaching the broad public through extensive public information campaigns. Although outreach is often seen as a primary tool of reconciliation, it has also been argued by liberal authors that, "by manipulating information" in the public domain, international actors can reshape the "domestic balance of power" in favour of, or against, certain policy decisions (Moravcsik 1995, 168). The power of information in the public domain has also been confirmed in the praxis of international criminal justice. As pointed out by Boas and Oosthuizen (2010, 11), most of the ICTs "have faced serious challenges stemming from active and deliberate misinformation in various fora by especially the powerful about their work". In fact, the ICTY established outreach programmes several years into its existence in order to combat the propaganda and misinformation about its work at the national level.

Secondly, Helfer and Slaughter (1997, 302) observed that campaigns targeting legal professionals impact on state willingness to cooperate (see also McClendon 2009, 356). Helfer and Slaughter make this argument in relation to the ECJ, which, in order to win

> "'co-operation and goodwill of the state courts' […] engaged in an extensive education campaign aimed at national judges, including seminars, dinners, regular invitations to Luxembourg, and visits around the Community."(Rasmussen, supra note 60 at 247 in Helfer and Slaughter 1997, 302)

Furthermore, they argue that

> "the growth of the [ECJ's] reputation among litigants over time depended in part on the ready availability of its decisions in multiple languages and the efforts of its research staff in making information available to lawyers, litigants, and scholars on demand." (Brown and Kennedy in Helfer and Slaughter 1997, 302)

The view that campaigns targeting legal professionals can improve state co-operation was also expressed by McClendon (2009, 349, 356) when analysing how the strategies of ICTs can "impact on compliance with arrest warrants".

McClendon (2009, 357) tests the hypothesis according to which "the more effort the tribunal puts into outreach … the faster arrest warrants will be executed". Her variable outreach:

> "is taken from the budget reports provided by the tribunals and gives the amount of US dollars spent each year by the tribunal on educational outreach activities in the state where the crimes were committed, per thousand inhabitants of that state." (McClendon 2009, 361–362)

In this dissertation the condition outreach will assess outreach spending and whether the outreach team was allowed to operate on the territory of the state.

To conclude, this chapter has revealed the main theoretical frameworks and empirical analyses associated with state cooperation with ICTs. It has defined and argued for conditions for cooperation. In the next chapter, the research design used to test influence of the six conditions on cooperation is introduced.

4. Research Design

This chapter justifies the choice of Qualitative Comparative Analysis (QCA) as the main analytical method suited to account for complex interactions among the identified conditions. The chapter proceeds as follows: in the section 4.1, QCA is introduced by juxtaposing it with comparative case-study design and highlighting its main components. In section 4.2, the set-theoretic logic of QCA is contrasted with regression analysis in order to highlight the reasons for choosing QCA as the most effective means of analysis, as well as to elaborate on the mechanisms used in the approach. Section 4.3 looks at different QCA designs and identifies two-step fuzzy-set Qualitative Comparative Analysis (two-step fs-QCA) as the best fit. Section 4.4 justifies case selection.

4.1. QCA vs. comparative case study

Comparative case studies are well-suited for capturing cooperation dynamics with ICTs and have been used in previous studies (see Lamont 2008; Peskin 2008). To expand on the existing case studies, I propose a research design able to account for complex causation and, at the same time, able to process a larger number of cases in a more structured and transparent manner than previous research on state cooperation with international courts.

The research design applies QCA, a relatively new approach straddling qualitative and quantitative methods. On the qualitative side, it approaches each case in a "holistic" manner, weighs all cases equally and assumes that interactions among conditions and the outcome are causally complex rather than linear (Berg-Schlosser et al. 2008, 13). Each case is captured as a combination of causal conditions and examined for its membership of the outcome. On

the quantitative side, QCA "standardises" information through the use of truth tables and Boolean algebra in order to apply analytical reduction techniques on a larger number of cases than is typically done using traditional comparative methods (Clement 2005, 6).

The key concepts central to any QCA analysis are ideas of necessity and sufficiency (Goertz and Mahoney 2012, 11; Schneider 2009, 57). A necessary condition is a superset of the outcome. In other words,

> "a condition is necessary for an outcome if it is always present when the outcome occurs. [...T]he outcome cannot occur in the absence of the condition." (Rihoux and Ragin 2009, XIX)

For instance, involvement of the police is a necessary condition for the execution of arrest warrants. Every time an arrest warrant is executed, a police officer has to be present. However, the presence of a police officer does not automatically imply that an arrest warrant is being executed.

A sufficient condition is a subset of the outcome. In other words,

> "a condition is *sufficient* for an outcome if the outcome always occurs when the condition is present. However, the outcome could also result from other conditions." (Rihoux and Ragin 2009, XIX)

For illustration, issuance of a sentencing decision is a sufficient condition for detention. Every time a sentencing judgement is issued, detention follows. However, alternative conditions sufficient for detention exist. For instance, an individual can be detained during the pre-trial period following issuance of an arrest warrant.

Although necessity and sufficiency are not explicitly referred to in previous case studies of state cooperation with ICTs, they are often implicitly part of the research design. As argued by Thiem (2011, 15), "most social science theory is based on set relations". As such, state cooperation theory is no

exception. For instance, Lamont's conclusions about the dynamics of state compliance with the ICTY can be easily translated into set-theoretic language. Lamont's five case studies examine compliance with the ICTY in Serbia, Croatia, Macedonia, Bosnia and Kosovo by weighing the contribution of interests-based calculations and normative pull at both domestic and international level (Lamont 2008, 46). In the case of Croatia, he points out the norm-affirming rhetoric of Croat elites, which alone was not sufficient for compliance and had to combine with conditionality of international support in order to generate cooperation (Lamont 2008, 79 – 80). The case of Serbia illustrated that conditionality of international support alone was not sufficient for compliance either, since, in the absence of ICL norm acceptance and institutionalisation, cooperation with the ICTY was at best sporadic. In contrast with Croatia, the ICL norm acceptance in Belgrade was low, as was the level of institutionalisation (Lamont 2008, 113 –114). In Macedonia, the last fully sovereign state under study, ICTY involvement was of a much smaller scale and the compliance was seamless. Cooperation was prompt and appeared even prior to the international community offering any incentives. Instead, the main force driving for compliance, as pointed out by Lamont (2008, 142 – 143), was low domestic cost combined with strong international embeddedness. Unlike Croatia or Serbia, where societal elites were prosecuted, the ICTY in Macedonia issued only one indictment. Even though Lamont himself does not use the language of necessity and sufficiency, given that his account is more descriptive, his claims are clearly of a set-theoretic nature. Three simple Boolean formulae[5] can display Lamont's descriptive accounts:

[5] Boolean algebra uses the following symbols: * stands for "logical and", + stands for "logical or", ~ denotes "negation of a condition", → reads as "is sufficient for", ← reads as "is neces-

Croatia: Norm acceptance * International Incentives → Cooperation

Serbia: ~Norm acceptance * International Incentives → ~Cooperation

Macedonia: ~Proximity * ~ International Incentives → Cooperation

It is the use of set theory in combination with Boolean algebra which allows a QCA model to offer an innovative perspective on state cooperation with ICTs (Ragin 2013, 171; Rihoux 2006b, 682). By formalising both qualitative and quantitative information as well as logic implicit to comparative approaches, QCA is more efficient in identifying and handling case-relevant information.

Synthesising qualitative information through the concepts of necessary and sufficient conditions, as well as their various combinations (INUS[6] and SUIN[7]), allows QCA to capture conjuncturality, equifinality as well as asymmetry. Conjuncturality implies that a given outcome occurs only when a particular combination of factors is present (Ragin 1987, 25). For, instance Lamont's observation that international coercion in Serbia alone did not suffice to generate consistent compliance will not be lost in a QCA solution formula. In addition, QCA operates with equifinal solutions in which more than one "causal pathway" leads to the outcome (Berg-Schlosser et al. 2008, 8; Ragin 1987, 25). Thus, all causal mechanisms identified in Macedonia, as compared with Serbia and Croatia, will be accounted for. In QCA, each case is analysed in a holistic manner and has an equal weight (Rihoux 2006b, 682).

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sary for".

[6] "Insufficient but necessary part of a condition which is itself unnecessary but sufficient for the result" (Mackie 1974:62; Goertz 2003b:68; Mahoney 2008 as cited in (Schneider 2009, 61).

[7] "Sufficient, but unnecessary part of a factor that is insufficient, but necessary for the results" (Mahoney et al. 2009: 126 as cited in (Schneider and Wagemann 2012a, kindle 1855).

In other words, comparative case-study designs and QCA are based on the same set-theoretic assumptions.

As the formulae illustrate, formalisation of information takes place when each case is synthesised as a set of conditions and outcome. Instead of looking at the full wealth of information associated with each case, QCA design focuses only on a limited number of pre-identified and clearly defined conditions. Combined with the requirement to report as well as justify the choice of calibration thresholds, QCA can deliver transparent and replicable results (Rihoux, Lobe, and others 2009, 8). Furthermore, this formalised procedure allows for more efficient use of logical minimisation, derived from Mill's methods of agreement and difference, as well as higher efficiency in data collection. Compared to comparative case-study designs, which generally suffer from the "many variables, small number of cases" problem (Lijphart 1971, 685), the QCA design proposed here is based on 34 observations and is therefore expected to deliver more reliable and generalisable results (Rihoux 2006b, 680).

However, the main strength of QCA can also turn into its main weakness. The ability to capture larger numbers of cases can lead to partial loss of in-depth knowledge of the examined data. Although researchers' intimacy with the cases remains relatively high compared with quantitative approaches, standardising qualitative information decreases the sensitivity of the analysis. Even though the cases are captured in a "holistic manner" at a meso level, in certain situations the risk of losing causally relevant micro-level information persists (Berg-Schlosser et al. 2008, 7). To mitigate this, the researcher needs to maintain in depth familiarity with all cases and QCA can be used in combination with narrative sections linking the cases to specific causal mechanisms, as done by Adhikari and Samford (2013).

4.2. QCA vs. regression analysis

Empirical studies of state cooperation with ICTs have so far relied on qualitative designs – only one regression study was identified in the review of the literature (McClendon 2009). However, in recent decades, a general trend in the discipline of International Relations (IR) has been to assign more value to empirical papers applying statistical designs, as demonstrated through higher publication rates in leading journals (Cohen 2010, 887 as cited in Mearsheimer and Walt 2013, 429). Even though regression and other statistical methods are viewed by some as the "best tools for making scientific interferences" (see Mahoney and Goertz 2006, 228), their application can be ineffective or lead to incorrect results when used to test causally complex hypotheses (Mearsheimer and Walt 2013, 440). By assessing the average influence of independent variables, regression is best suited to compare their relative strength but it has limited potential to explain their complex interactions (Fiss, Sharapov, and Cronqvist 2013, 192; Ragin 2006a, 14). In this context, Walt and Mearsheimer (2013, 427) warn of the dangers of "simplistic hypothesis testing" where the focus on the application of rigorous quantitative designs is privileged over the creation of new theoretical knowledge.

With its strong focus on underlying theory, QCA fits well in the niche identified by Walt and Mearhsheimer (2013) and has been applied in a number of IR publications. Its emphasis on causal complexity and its potential for theory refinement are among the most frequently mentioned reasons for choosing QCA. For instance, Thiem (2011, 1), in his analysis of defence cooperation in the EU, combines variables stemming from three different schools of thought. He argues that use of QCA not only reduces the risk of "confirmation bias through intra-paradigmatic reasoning" (2011, 1) but also offers a

refined application of existing theory by highlighting combinational relations among six identified theoretical models (2011, 4).

While some authors such Thiem or Pinfari (2011) rely on QCA as the main analytical method, a number of authors choose a multi-method approach, either juxtaposing regression and QCA (Bara 2014), or applying them in a complementary manner (Kiser, Drass, and Brustein 1995; Koenig-Archibugi 2004). For instance, Bara (2014), in her analysis of violent ethnic conflict, identifies theoretical debate where two types of variables (deeply felt grievances vs. opportunity structure) are juxtaposed against each other as potential causes of violent conflict. In an attempt to refine existing theory, she argues that understanding of the interactions among these two types of variables can better reveal the causes of violent ethnic conflict. She identifies QCA as a suitable method, even though she also uses logit models. According to her conclusions, the predictive capacities of QCA and logit models do not significantly differ. In her view, the main advantage of QCA over regression is its ability to account for equifinality. As she argues,

> "even if conventional statistical models can incorporate more complex relationships using interaction terms, they do not help us identify these relationships in the first place, and certainly they do not easily lend themselves to the identification of substitutable (equifinal) paths to conflict." (Bara 2014, 12)

Another empirical paper combining QCA and regression models is Koenig-Archibugi's (2004) analysis of factors determining states' preferences for supranational EU policies. Koenig-Archibugi (2004, 138) combines variables from different theoretical backgrounds in order to test the explanatory strength of different theories. This would imply the choice of regression model but, by asking which variables will increase the probability of the outcome, as well as whether some are necessary or sufficient, Koenig-Archibugi

opens the door for the application of both methods. When interpreting the results, Koenig-Archibugi combines the inputs obtained through both types of analyses and treats them as complementary.

Similar to the studies mentioned here, and as argued in chapter 3, there is a "theoretically informed expectation" that the pathways leading to cooperation are causally complex (Schneider 2009, 59). Conjuncturality plays a role in both liberal and constructivist accounts of state cooperation. For instance, liberals claim that cooperation takes place when institutionalisation combines with outreach.

Equifinality also plays a role in theoretical explanations of cooperation. For illustration, the argument about the number of causal pathways leading to cooperation lies at the centre of the dispute between constructivist and realist accounts of cooperation. For realists, only interests determine the level of cooperation, whereas constructivism describes both interest and norm-driven cooperation. While regression would have difficulties in effectively testing for all possible interactions among six variables, QCA was designed to test causally complex hypotheses.

An additional issue preventing use of regression in the current analysis is the size of the dataset. A simple rule of thumb, mentioned by Alisson (1999, 9), discourages multiple linear regression "with less than five cases per variable" (1999, 9). With 34 cases and six variables, the current dataset would be only one observation below the minimum recommended size. However, the hypothesised interactions among the variables put an additional stress on the sample size. As argued by Joseph (n.d.),

> "a general practical problem with all interactions is that they can be hard to detect in small or moderately sized data sets, i.e., the confidence intervals

> for the interaction term β coefficients will be very wide, and thus inconclusive."

With several interactions among six variables, the current dataset, with 34 cases, is not large enough to deliver reliable and robust results. This problem is heightened through the use of time-series cross-sectional data. While regression is sensitive to multicollinearity and its treatment is only possible on large datasets, QCA has been previously used to analyse time-series cross-sectional data (see Clement 2004; Rihoux 2006a; Schneider and Makszin 2014).

The main disadvantage of QCA compared with regression models is its higher susceptibility to errors (Maggetti and Levi-Faur 2013, 198). While correlation-based approaches offer tools for correcting errors, in QCA, as in any qualitative approach, an error in an individual observation has the potential to alter the final result (Maggetti and Levi-Faur 2013, 199; Mahoney and Goertz 2006, 229). As pointed out by Maggetti and Levi-Faur (2013, 199), the risk is much lower when fuzzy-set QCA is used as compared with crisp-set QCA, which is able to operate only with dichotomised conditions. Errors are most likely to occur during the calibration of set membership values. To assign a set-membership value to the raw data, the researcher has to use his/her theoretical *and* case knowledge to set thresholds for full set membership, non-membership and the cross over-point (Ragin 2009, 85). Similarly to cs-QCA, alteration of calibration thresholds can alter the final results, although to a lesser extent. It is therefore good standard practice always to specify the calibration thresholds and to provide explicit reasons for their selection (Schneider and Wagemann 2010, 7).

Finally, as with other methods, the reliability of QCA results can be weakened through inadequate case selection (Maggetti and Levi-Faur 2013, 199).

The case selection methods have to reflect the underlying causal model (Goertz and Mahoney 2012, 177). In regression models, cases are selected on independent variables while selection on dependent variables is seen as erroneous (Goertz and Mahoney 2012, 177). However, the inverse of this approach applies for set-theoretic approaches, such as QCA. Since necessary conditions are a superset of the outcome, identifying necessary conditions is possible only if cases are selected on the dependent variable (the outcome) (Goertz and Mahoney 2012, 179). In contrast, sufficiency implies that a condition is a subset of the outcome and, in order to test for such relations, the cases have to vary on both the dependent variable (outcome) and the independent variables (conditions). In QCA, skewed condition or outcome membership can lead to false positives (Schneider and Wagemann 2012b, kindle 4735-4935). For instance, when testing for sufficiency in situations where the dataset contains only cases with low set-membership values on the causal condition, a perfectly consistent sufficient relationship will be observed (Schneider and Wagemann 2012b, kindle 4735-4935). Similarly, if all cases have very high outcome membership values, it becomes unlikely that an causal condition violates the subset relationship (Schneider and Wagemann 2012b, kindle 4735-4935). Thus, to effectively test for sufficiency and necessity, variation on both the outcome and causal conditions is important.

4.3. Advantages of the two-step fs-QCA research design

This section clarifies the reasons for the selection of the two-step fs-QCA variant. Firstly, as a mixed method, QCA is able to handle both qualitative and quantitative information (Schneider and Wagemann 2012a, kindle 802). Although the initial QCA variant – the crisp-set QCA (cs-QCA) – operates only with dichotomised conditions, such as whether a country recently experi-

enced an armed conflict or not, newer fuzzy-set QCA (fs-QCA) can capture partial membership scores ranging anywhere between 0 and 1 (Schneider and Wagemann 2012a, kindle 749). This is a logical implication of set-theoretic thinking, where subset and superset relationships exist both between dichotomised and fuzzy-set conditions (Schneider and Wagemann 2012a, kindle 374). For illustration, to determine whether government stability is sufficient for cooperation, one has to observe that the set-membership value for cooperation is higher than for government stability across all cases. In cs-QCA, sufficiency is established if all cases with a positive stability score have a positive cooperation score as well. In fs-QCA, sufficiency is established if, across all of the examined cases, the value for government stability is consistently lower than the value for cooperation. Being based on the same logic, cs-QCA can be seen as analysing a special type of set-relations, whereas fs-QCA is less selective by allowing partial set membership (Schneider and Wagemann 2012a, kindle 611). Fs-QCA is more universal and, as such, more suitable for the research design, evolving around continuous conditions.

Secondly, in order to test for sufficiency, the two-step QCA developed by Schneider and Wagemann (2006) has been selected for this research. In two-step QCA, causal conditions are divided into distant and proximate groups, depending on their distance to the outcome. Here, "proximate" is a methodological term used by the authors proposing the two-step method and does not refer to the condition *proximity*. To avoid confusion, all tested conditions are distinguished through the use of *italics* in this section. Two-step QCA is particularly suited for research questions where a natural difference exists between remote and proximate conditions. Schneider and Wagemann (2006, 760) propose a number of criteria for the differentiation between remote and

proximate conditions, such as stability over time and agency. Simultaneously they also point out that

> "the precise conceptualisation of remote and proximate conditions depends on various factors, such as the research question, the research design, or the way the dependent variable is framed." (Schneider and Wagemann 2006, 760)

In this dissertation, the framing of the research question is essential for the differentiation between proximate and distant conditions. Given that the aim of this research is not only to answer which conditions or combination of conditions influence state cooperation, but also to identify the most effective strategies available to international society for enhancing the cooperation of different states, the conceptualisation of remote and proximate conditions is based on distance from the state. In the first step QCA, domestic conditions: *government stability, proximity* and *institutionalisation* will be used in the analysis to identify outcome-enabling domestic contexts. In the second step QCA, it will assess how the international conditions – *outreach, independence* and *international interests* – operate when faced with different domestic contexts. This conceptualisation of domestic and international conditions reflects their different levels of origin, as well as the normative goal of this dissertation, which is to improve knowledge about strategies that could be employed by international society (in particular, the courts themselves) to generate cooperation. From the viewpoint of an international policy-maker, domestic conditions are more distant and difficult to influence than international conditions. As such, domestic conditions need to be examined in the first step and international conditions are entered in the analysis only in the second step.

Second, the major advantage of two-step QCA is its efficiency in tackling the problem of limited diversity (Schneider and Wagemann, 2003). By dividing

the conditions into domestic and international, and analysing their interactions in two steps, the method "[rules] out […] causally irrelevant [but] logically possible combinations between [context and strategy] conditions". Put in a formula, in one-step QCA the number of logically possible combinations of conditions equals 2^k (where k is the number of conditions). Applied to the present theoretical design, with six conditions, 64 logically possible combinations exist. In contrast, the conditions in two-step QCA are divided into groups. As a consequence, the number of logically possible combinations becomes smaller. Mannewitz (2011, 7) uses the following formula to calculate the number of logically possible truth-table rows:

$$n=2^{k1} + 2^{k2+1} * c$$

n – number of condition combinations
k – "the number of conditions in the respective step"
c – number of identified contexts in the first step
Source: Mannewitz (2011, 7)

As the formula shows, the exact number of logically possible combinations will depend on the number of conditions identified in the first step. If, for instance, in the current theoretical design, two conditions pass the first step and one is eliminated, the number of logically possible combinations decreases to 40. As the example illustrates, the differentiation between contextual and proximate conditions offers a transparent and effective approach for tackling the problem of limited diversity.

4.4. Case selection

As argued by Berg-Schlosser and De Meur (2008, 20), a QCA case-selection process starts with the definition of an "area of homogeneity" delineating the population of admissible cases. To ensure the comparability of the cases, the

following four criteria were used. Firstly, from the pool of existing courts and tribunals, only those of purely an international nature will be taken into consideration. The core international criminal law offences have found their way into national legislation and, as such, can be prosecuted by national or hybrid courts. However, the mechanics of cooperation in national and semi-national contexts differ from those in purely international settings. This difference has been famously captured by the ICTY President Cassese in his address to the UNGA in 1995:

> "Unlike domestic criminal courts, the Tribunal has no enforcement agencies at its disposal: without the intermediary of national authorities, it cannot execute arrest warrants, it cannot seize evidence, it cannot compel witness to give testimony, it cannot search the scene where crimes have been allegedly committed. For all the purposes, it must turn to state authorities and request them to take action. Our Tribunal is like a giant who has no arms and no legs. To walk and work, he needs artificial limbs. These artificial limbs are the State authorities; without their help the Tribunal cannot operate." (Cassese 1995)

National and hybrid courts' stronger ties to national authorities imply different cooperation mechanics compared with ICTs. In order to preserve a degree of homogeneity among the examined cases, this dissertation will be limited to ICTs.

Secondly, the criterion used to define the "area of homogeneity", sometimes called "investigation domain" (Berg-Schlosser and De Meur 2008, 20), is the practical relevance of the cases. The ICL regime has undergone a long evolution and it is not relevant here to develop an understanding of cooperation modalities between states and tribunals with obsolete designs which, according to current standards, fall within the realm of "victor's justice". From the five institutions (ICC, ICTY, ICTR, IMT and IMTFE), the two post-WWII military tribunals (IMT and IMTFE) stand out structurally due to their limited personal jurisdiction. As stated in Article 6 of the IMT Charter, the tribunal

had power only to "try and punish persons who [were] acting in interests of the European Axis countries" and crimes allegedly committed by Allied powers could not be prosecuted by the tribunal. Furthermore, individual criminal responsibility under international law had not been clearly established prior to the establishment of the IMT and questions about *ex post facto* legislation has been raised in this connection (Bassiouni 1999, 172). Since the jurisdiction of the IMTFE was limited in a similar manner, only the ICC, ICTY and ICTR can be considered as potential cases.

Thirdly, the criterion defining the "area of homogeneity" is the frequency of interaction between the ICTs and the state. It is reasonable to consider only those states receiving requests to cooperate with a frequency surpassing a certain threshold. Therefore, the dissertation focuses on "situation" countries, in other words, states which had jurisdiction over a situation in which one or more international crimes occurred and which were stripped of it or voluntarily referred it to an ICT.

The fourth criterion defining the "area of homogeneity" derives from the aim of this research – to understand interactions between ICTs and fully sovereign states. Cooperation between states or entities administered by bodies such as the UN and EU (for example, Bosnia and Herzegovina or Kosovo) encompass complex interactions between the national authorities, the external administrator and the ICT. Due to this difference, only fully-sovereign states are considered as comparable in the context of this dissertation.

After delimiting the case population (Berg-Schlosser and De Meur 2008, 20) to fully-sovereign "situation" countries within the jurisdiction of the ICTY, the ICTR and the ICC, the overall population of admissible cases comprises: Croatia, Serbia, Macedonia, Rwanda, Uganda, Democratic Republic of Con-

go, Sudan, Central African Republic, Kenya, Uganda, Libya, Côte d'Ivoire, and Mali. To further narrow down the number of cases, I rely on a combination of the "most different" and "most similar" systems designs as used by Clement (Clement 2004, 2005).

By selecting cases with similar outcomes that are otherwise as different as possible within the defined population, the most different systems design attempts to "[eliminate] all factors across the observed range that are not linked to an identical outcome" (Berg-Schlosser and De Meur 2008, 22). As such it seeks "maximal heterogeneity in the selection of cases" (Rihoux 2006b, 688). By enabling variation of the causal conditions the design is suited for testing necessity (Clement 2005; Schneider and Wagemann 2012a, kindle 1770).

The most similar systems design, on the other hand, looks for cases with different outcome that are similar "as much as possible" with regard to causal conditions (Rihoux 2006, 688). By enabling variation of the outcome, the most similar systems design is suited for sufficiency tests (Clement 2005; Schneider and Wagemann, 2012, kindle 1614).

Since, in the tested hypotheses, both necessity and sufficiency play a role, a combined approach is most suitable for this project. In an attempt to find a balance in the search for the most similar cases, and simultaneously the most different cases, this research relies on a combination of the two designs suggested by Clement (2004) in "State Collapse: A Common Causal Pattern?". Firstly, by relying on the most different systems design, Clement selects three states which all experienced the same outcome: state collapse. Then she moves to the most similar systems design in order to uncover the processes leading to state collapse. She divides the dependent variable into three se-

quences: state collapse, state crisis and state strength. By selecting the same states at different points of time experiencing each of the three outcomes, Clement obtains a population of similar cases associated with different outcomes.

Applying Clement's approach allows for testing of both the necessity and the sufficiency of the identified conditions. The pool of cases is limited to the fully sovereign situation countries of the ICTY (Croatia, Serbia, Macedonia), the ICTR (Rwanda) and the ICC (Uganda, Democratic Republic of Congo, Sudan, Central African Republic, Kenya, Uganda, Libya, Côte d'Ivoire, and Mali). The scope of this dissertation allows for the inclusion of a maximum of four states. Following the "most different systems similar outcome design" cases different with regard to the identified causal conditions need to be selected (Berg-Schlosser and De Meur 2008, 22). The largest possible variation of ICT-related variables is achieved by including both ICC and ICTY "situation" countries. Inclusion of an ICTR situation country would not add an additional variation, as the tribunal's outreach strategies, as well as institutional design, strongly resemble those of the ICTY. Since both tribunals were established by the UNSC within a period of 18 months, they were not only designed in a similar manner but their institutional structure also partly overlaps. The tribunals share a common Prosecutor and an Appeals Chamber. Due to better access to the data, preference was given to the ICTY situation countries.

From the three sovereign states within the jurisdiction of the ICTY, the frequency of interaction was the lowest in case of Macedonia, making Serbia and Croatia stronger candidates for inclusion. Both states experienced all occurrences of the outcome and are, as such, suitable case candidates. Among the ICC situation countries, a certain degree of variation on dependent varia-

bles occurs according to preliminary assessments in the cases of Uganda, Kenya, DRC and Sudan. Kenya and Uganda were selected for inclusion in the dataset as the outcome variation is broadest in these two states.

Given the use of fs-QCA, Clement's design had to be partly amended. Similarly to Clement, the selected states are approached diachronically with the aim of finding states experiencing different levels of cooperation. However, instead of dividing the outcome into three categories, full variation is captured through use of partial fuzzy-membership values. Naturally, not all partial fuzzy-values can be observed, even though the variation is expected to be more than sufficient.

4.5. Conclusion

Chapters 3 and 4 serve to define and justify the analytical model used to determine which conditions are causal in order for state cooperation with international criminal courts and tribunals. These two chapters had three main goals: to identify conditions causally relevant for state cooperation, to choose an adequate analytical method, and to define the investigation domain.

Chapter 3 reviewed realist, liberal, constructivist and legal approaches to state cooperation and articulated four hypotheses describing pathways expected to lead to cooperation. Depending on their closeness to the state or international society, the conditions are divided into two groups. Domestic conditions describe the state and include government stability, institutionalisation of ICL, and the proximity of suspects to societal elites. International conditions are located at a different level and are not subject to the influence

of national governments. Again, three conditions were identified: court independence, court outreach, and international pressure for cooperation.

By differentiating between state and international conditions, the dissertation aims to give a thorough account of the interaction between states and ICTs. Two-step fs-QCA will be used to analyse which of these conditions or their combinations are sufficient and necessary for state cooperation. Based on the results, the dissertation aims to uncover strategies suitable to stimulate state cooperation with ICTs.

The current model is to be tested on sovereign states within the jurisdiction of ICTs. A combination of "most similar" and "most different" systems designs was used to select Kenya and Uganda within the ICC's jurisdiction, as well as Serbia and Croatia under the ICTY's jurisdiction. The chosen unit of analysis is "year-state", in order to capture changes in cooperation levels experienced by all four states over time.

5. Presenting the dataset

After delineating the analytical model and justifying the choices for the inclusion of individual conditions, cases and analytical methods in the previous chapter, this chapter populates the model with data. More specifically, the identified conditions are described and operationalised as well as the collected data are illustrated.

The chapter presents an original dataset built on extensive collection of primary sources. Specifically, a wide range of primary sources stemming from the courts was analysed to collect data on cooperation. For some of the causal conditions original data have been collected, while for other conditions the information has been obtained from pre-existing datasets or published research. This chapter will describe the operationalisation of each condition and the sources of data. First, though, the outcome is operationalised.

5.1. Outcome: State cooperation

To operationalise cooperation, I rely on the definition enshrined in the statutes of the ICC and ICTY. As put by the drafters of the ICTY statute, state cooperation means compliance with "undue delay with any request for assistance or an order issued" by the court (ICTY statute, art 29 para 2). The ICC and ICTY differ in the technical modalities of cooperation but, in general, requests for cooperation from both courts can be divided into two main thematic areas: surrender of persons, and assistance "in relation to investigations and prosecutions" (Rome Statute, art 93; ICTY Statute, art 29 para 2).

In an ideal case, a dataset comprising the percentage of fulfilled requests for cooperation in each respective area would be created. However, the issue of

confidentiality limits the availability of data. The ICC statute, Article 87 para 3, puts states under obligation to keep all requests confidential:

> "the requested State shall keep confidential a request for cooperation and any documents supporting the request, except to the extent that the disclosure is necessary for execution of the request."

The ICTY statute adopts a more open approach; its article 29, pertaining to "Co-operation and judicial assistance", does not declare per se that requests must be kept confidential. Nevertheless, a judge or Trial Chamber can make a decision with regard to the non-disclosure "of an indictment, or part thereof, or of all or any part of any particular document or information" (ICTY Rules of Procedure and Evidence, Rule 53, 28 August 2012). In light of these regulations, I rely only on publicly available information on cooperation.

By relying on courts' assessments of cooperation, the dataset can be criticised as subjective. An alternative measure is the rate of execution of arrest warrants (McClendon 2009). Information about issuance of arrest warrants is mostly public, even though warrants can initially be issued under seal and later declassified. However, this measure is inherently imprecise as, in some instances, the state may be providing excellent cooperation, but apprehension of the suspect may not be possible due to lack of capacity. Uganda in 2005 serves as an apt example. Even though Uganda's cooperation was assessed by the ICC as excellent, government forces were not able to arrest any of the indicted Lord Resistance Army fighters, many of whom were thought to have flown to neighbouring South Sudan. To assess when an arrest warrant was not executed due to lack of willingness to cooperate or due to lack of state capacity is beyond scope of an academic researcher without access to relevant information from national executive agencies. Therefore, I rely on courts' assessments of state cooperation, as the courts have better access to

information access and more manpower to make the assessment. For instance, the Croat authorities claimed that they were unable to arrest Ante Gotovina because he had fled the country. The office of the prosecutor regularly assessed whether Croatia had fully cooperated in terms of locating, arresting and surrendering the fugitive. When Gotovina was finally arrested in Spain, the success of the operation was "credited to the efforts of the Government of Croatia" (ICTY 2006, para 77).

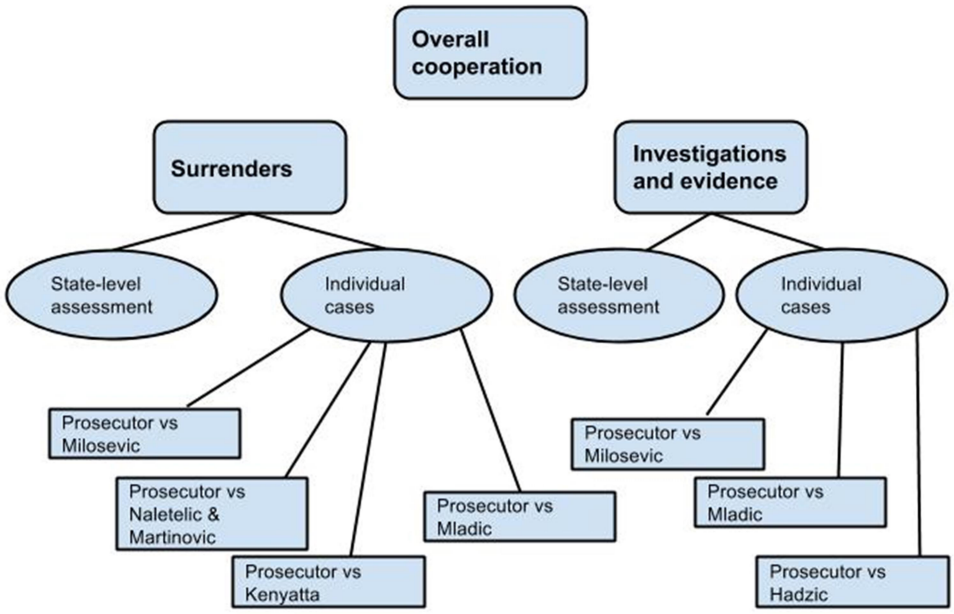
In order to create the dataset, I first reviewed a range of regular publications of the ICC and ICTY in order to establish how the courts assess cooperation and how comparable the data are. The following primary sources were used: Annual Reports of the ICC to the UN (2005–2014), ICC Press Releases (2005–2014), Reports from Diplomatic Briefings (2005–2014), and Annual Reports of the ICTY to the UN (1994–2011). Furthermore, once the ICC Chambers had discussed the level of cooperation offered by a state in a particular case, a wealth of information was obtained from submissions of the Office of the Prosecutor, Registry and the Chambers' decision itself.

For most of its existence, the ICTY has issued annual assessments of cooperation for all states within its jurisdiction. These reports also give *ad hoc* comments about individual cases. The ICC does not provide regular assessments of cooperation and all of its comments on cooperation have been of an *ad hoc* character.

To create a systematic dataset, the publications containing comments on cooperation were coded according to a scheme that captured two types of information: level of cooperation and area of cooperation. The area of cooperation captured whether the comments assessed overall cooperation, cooperation with regard to surrenders and summons to appear, or coopera-

tion with regard to investigation and access to evidence. In the latter two groups, I also coded whether the comment was related to an individual case, or whether it was a state-level assessment of cooperation. Figure 5-1 shows the different areas of cooperation. The figure shows only a small sample of individual cases for illustrative purposes. To clarify, the individual cases were only used in the construction of data on cooperation when yearly state assessment by the court was not available as explained two pages below when describing Table 5-1.

Figure 5-1: Areas of cooperation



Source: Author's own illustration

To capture the level of cooperation in any of the areas, including the individual cases, I assigned a value according to the following scheme.

0.9 – 1: Full cooperation
0.7 – 0.8: Good cooperation
0.5 – 0.6: Mixed record of cooperation, with scope for improvement
0.3 – 0.4: Mixed record of cooperation
0.1 – 0.2: Poor cooperation
0: Non-cooperation

Overall, surrenders were a highly publicised area and many of the public statements reported on cooperation in this field. Next to surrenders, compliance with summons to appear was coded as cooperation as well. It is necessary to note that compliance with summons to appear depends to a large extent on individuals' willingness to cooperate. Similarly, voluntary surrenders are actions of individuals in response to a state-issued arrest warrant. Nonetheless, compliance with summons to appear or voluntary surrenders is strongly influenced by a state's willingness to cooperate. As the practice in Serbia illustrates, the sudden rise in voluntary surrenders was motivated by state policies. As reported by multiple sources during 2004 and 2005, it had been the policy of the Serbian authorities to negotiate voluntary surrenders rather than to pursue an unpopular enforcement of the court's arrest warrants (Kim 2008, 3). For this reason, voluntary surrenders and compliance with summons to appear are not automatically excluded from the analysis and are coded as well.

Cooperation in relation to investigations and access to evidence is a broad field. It includes:

> "(a) The identification and whereabouts of persons or the location of items;
>
> (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
>
> (c) The questioning of any person being investigated or prosecuted;
>
> (d) The service of documents, including judicial documents;
>
> (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
>
> (f) The temporary transfer of persons as provided in paragraph 7;
>
> (g) The examination of places or sites, including the exhumation and examination of grave sites;

(h) The execution of searches and seizures;

(i) The provision of records and documents, including official records and documents;

(j) The protection of victims and witnesses and the preservation of evidence;

(k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

(l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court." (Rome Statute, art 93 (1))

In general, public statements produced by the courts (press releases, speeches, annual reports etc.) were less specific than individual confidential requests made by the court. The courts mostly commented publicly only on overall ability to access evidence in relation to certain cases.

My initial QCA analysis used the wealth of collected data on the individual cases. However, when the unit of analysis was defined as state cooperation with regard to an individual court case in any given year, the results suggested that the theoretical model could not explain state cooperation. Different models were tested, and this showed that the problem lay in the conceptualisation of the outcome. State cooperation with regard to individual cases placed the outcome at an individual level, whereas the reviewed theories identified causal conditions located at both state and systemic level. For this reason, the outcome was reconceptualised to shift it to the state level. The data displayed in Table 5-1 summarise the court's assessment of cooperation as well as the aggregated level of cooperation through individual cases on a yearly basis.

In Table 5-1, the column "cooperation" gives a yearly assessment of all coded areas of cooperation. The number reflects the overall assessment of coopera-

tion made by the court, where available. In cases where a court's overall assessment of cooperation was not available or too vague, I made an assessment of average yearly cooperation by first considering state-level information in the areas of surrenders and investigations. Information on individual cases was considered only where state-level assessment by the court was ambiguous or absent.

Table 5-1: Outcome condition: state cooperation with the ICC and ICTY

Case ID	Case	Cooperation
S96	Serbia 30/07/1995 – 31/07/1996	0
S97	Serbia 30/07/1996 – 31/07/1997	0
S98	Serbia 30/07/1997 – 31/07/1998	0
S99	Serbia 30/07/1998 – 31/07/1999	0
S00	Serbia 30/07/1999 – 31/07/2000	0
S01	Serbia 30/07/2000 – 31/07/2001	0.4
S02	Serbia 30/07/2001 – 31/07/2002	0.4
S03	Serbia 30/07/2002 – 31/07/2003	0.4
S04	Serbia 30/07/2003 – 31/07/2004	0.2
S05	Serbia 30/07/2004 – 31/07/2005	0.55
S06	Serbia 30/07/2005 – 31/07/2006	0.55
S07	Serbia 30/07/2006 – 31/07/2007	0.6
S08	Serbia 30/07/2007 – 31/07/2008	0.6
S09	Serbia 30/07/2008 – 31/07/2009	0.8
S10	Serbia 30/07/2009 – 31/07/2010	0.8
S11	Serbia 30/07/2010 – 31/07/2011	1
C96	Croatia 30/07/1995 – 31/07/1996	ambiguous information
C97	Croatia 30/07/1996 – 31/07/1997	0.8
C98	Croatia 30/07/1997 – 31/07/1998	0.8
C99	Croatia 30/07/1998 – 31/07/1999	0.3
C00	Croatia 30/07/1999 – 31/07/2000	0.8
C01	Croatia 30/07/2000 – 31/07/2001	0.7
C02	Croatia 30/07/2001 – 31/07/2002	0.6
C03	Croatia 30/07/2002 – 31/07/2003	0.6
C04	Croatia 30/07/2003 – 31/07/2004	0.9
C05	Croatia 30/07/2004 – 31/07/2005	0.9
C06	Croatia 30/07/2005 – 31/07/2006	1
C07	Croatia 30/07/2006 – 31/07/2007	no outstanding arrest warrants
C08	Croatia 30/07/2007 – 31/07/2008	no outstanding arrest warrants
C09	Croatia 30/07/2008 – 31/07/2009	no outstanding arrest warrants
C10	Croatia 30/07/2009 – 31/07/2010	no outstanding arrest warrants
U05	Uganda 01/01/2005 – 31/12/2005	1
U06	Uganda 01/01/2006 – 31/12/2006	1
U07	Uganda 01/01/2007 – 31/12/2007	no information available
U08	Uganda 01/01/2008 – 31/12/2008	0.4
K10	Kenya 01/01/2010 – 31/12/2010	0.6
K11	Kenya 01/01/2011 – 31/12/2011	0.8
K12	Kenya 01/01/2012 – 31/12/2012	0.4
K13	Kenya 01/01/2013 – 31/12/2013	0.4
K14	Kenya 01/01/2014 – 31/12/2014	0.4

Source: Author's own compilation

For the ICTY, Table 5-1 shows the level of overall cooperation coded in Annual Reports to the UN. Annual reports for 1994–2011 were reviewed. However, since the Tribunal either did not issue cooperation requests in its initial years to Croatia and Federal Republic of Yugoslavia or simply did not comment on the matter, Table 5-1 reflects only those years where clear information on cooperation was provided. Furthermore, the assessment of Croat cooperation in 1996 was ambiguous and it was difficult to determine whether Croatia should be placed in the set of cooperative or non-cooperative states. The case was therefore excluded from further analysis. The last Croat suspect was arrested in December 2005. As such, the last coded period for Croatia is 30/07/2005 – 31/07/2006. Because the ICTY reports were issued around the end of July and beginning of August, the measured time periods for Croatia and Serbia do not reflect a calendar year, but start at 30/07 in any given year and end at 31/07 of the subsequent year.

The ICC's comments on cooperation are of an *ad hoc* character and none of its publications regularly assessed the degree of cooperation it received from Kenya and Uganda. The information displayed in Table 5-1 is based on an assessment of cooperation in all coded areas. Annual Reports of the ICC to the UN (2005–2014), ICC Press Releases (2005–2014), Reports from Diplomatic Briefings (2005–2014), and ICC jurisprudence were reviewed to create a comprehensive pool of texts mentioning the cooperation offered by Kenya and Uganda. The court did not provide an assessment of Ugandan cooperation in 2007. The case was therefore excluded from further analysis. Accordingly the dataset contains 34 observations out of the 40 possible cases.

57 documents were identified as containing information on cooperation and were coded. The length of the documents ranged from 1 to 70 pages. The

Nvivo dataset and excel summary of the most relevant information are on file with the author.

5.2. Condition 1: Proximity

Proximity of the suspects to the societal elites was operationalised as the number of arrest warrants or summons to appear issued for high-ranking state and military officials of a particular state. For illustration, between 30/07/2003 and 31/07/2004 there were in total eleven open arrest warrants against high-ranking Serbian suspects. Six arrest warrants were newly issued that year. Five arrest warrants were outstanding from previous years. Three of the eleven suspects were arrested during the year under observation.

In relation to the ICTY, for information on dates of indictment, apprehension, appearance and issuance of a judgement, I rely on the International Criminal Defendant Dataset (Meernik and King n.d.). Corresponding information about ICC suspects was obtained from the ICC website.

Primary sources were used to establish the societal status of the suspects, as well as their national and ethnic identity. In most cases, "case information sheets" published by the ICTY and ICC contained information about a suspect's professional occupation, nature of the crimes committed, as well as place of birth. In some instances, a suspect's personal information was not provided by the court and was obtained instead from other sources, such as newspaper articles or NGO reports.

To determine a suspect's societal status, professional occupation was coded. In total, information about 174 suspects had to be collected and coded based on the data in the case information sheets and other sources. Out of the 174 suspects, 53 were determined to be proximate to social elites. Individuals

holding, during or before the examined period, a high-level position in the civil administration, army or government were assigned a value of 1. Examples of high-level positions include president, prime minister, minister general, president of an autonomous region, and chief of police. Furthermore, where evidence existed that individuals in other professions were able to exert significant pressure on government, a value of 1 was also assigned.

It was possible for the assigned value to change. A case in point concerns Uganda, where, initially, members of the Lord Resistance Army were assigned a value of 0, as they were not connected to elite, and had no influence on the Ugandan government. However, after the start of peace negotiations in July 2006, the Lord Resistance Army gained significant leverage through its inclusion in the talks, and its members were then assigned a value of 1.

Information on suspects' nationality and ethnicity was also gathered. This information is highly relevant to the operationalisation of "proximity", as ethnic identity and nationality can be an important indicator of a state's willingness to extradite (Peskin 2008, 48). However, national and ethnic identities in multi-ethnic societies are often blurred and difficult to determine. The following techniques were used to determine the nationality and ethnicity of the 53 high-level suspects identified.

Firstly, I relied on information about nationality where it was available. However, in most of the ICTY cases, information about nationality was not readily available and had to be deduced. In these cases, suspects were assigned a particular nationality if they: 1) fought with its armed forces or with

the forces of an allied entity;[8] 2) were members of its government or of an allied government; and 3) were employed by the national civil administration or by an ally.

Table 5-2 summarises the number of arrest warrants or summons to appear made for suspects proximate to the societal elites for each state-year.[9] To account for years when any of the suspects was an incumbent prime minister or president, the number of suspects in Table 5-2 has been adjusted to the highest observed number within the dataset and is denoted by "- Max". This procedure allows for the assumption that, when an incumbent head of a state is under the threat of extradition, "proximity" is at its maximum, even if there is only one outstanding arrest warrant.

The full dataset containing detailed information on professional status, level, nationality as well as a table summarising which cases are relevant in each state-year are on file with the author.

[8] For illustration the case of allied governments applies to the former Yugoslavia, where ethnic Serb authorities, army and militias in Bosnia and Croatia are considered as allies of Serbia (the Federal Republic of Yugoslavia). An example is Radovan Karadzic, who was President of Republika Srpska (part of the Federation Bosnia and Herzegovina). Non-cooperation with his arrest was attributed to the authorities both Republika Srpka and Serbia, although the suspect was finally arrested by Serbian authorities (BBC 2008).

[9] Summons to appear is considered outstanding until: 1) it has been turned into arrest warrant; or 2) the case is closed; or 3) sentencing judgement is issued; or 4) the suspect is deceased.

Table 5-2: Proximity of suspects to societal elites

Case ID	State and time period	Number of outstanding arrest warrants/summons to appear
S96	Serbia 30/07/1995 – 31/07/1996	4
S97	Serbia 30/07/1996 – 31/07/1997	4
S98	Serbia 30/07/1997 – 31/07/1998	5
S99	Serbia 30/07/1998 – 31/07/1999	13
S00	Serbia 30/07/1999 – 31/07/2000	14 – Max
S01	Serbia 30/07/2000 – 31/07/2001	14
S02	Serbia 30/07/2001 – 31/07/2002	13
S03	Serbia 30/07/2002 – 31/07/2003	7
S04	Serbia 30/07/2003 – 31/07/2004	11
S05	Serbia 30/07/2004 – 31/07/2005	11
S06	Serbia 30/07/2005 – 31/07/2006	4
S07	Serbia 30/07/2006 – 31/07/2007	4
S08	Serbia 30/07/2007 – 31/07/2008	3
S09	Serbia 30/07/2008 – 31/07/2009	3
S10	Serbia 30/07/2009 – 31/07/2010	2
S11	Serbia 30/07/2010 – 31/07/2011	2
C96	Croatia 30/07/1995 – 31/07/1996	4
C97	Croatia 30/07/1996 – 31/07/1997	3
C98	Croatia 30/07/1997 – 31/07/1998	2
C99	Croatia 30/07/1998 – 31/07/1999	1
C00	Croatia 30/07/1999 – 31/07/2000	1
C01	Croatia 30/07/2000 – 31/07/2001	3
C02	Croatia 30/07/2001 – 31/07/2002	3
C03	Croatia 30/07/2002 – 31/07/2003	3
C04	Croatia 30/07/2003 – 31/07/2004	9
C05	Croatia 30/07/2004 – 31/07/2005	2
C06	Croatia 30/07/2005 – 31/07/2006	1
C07	Croatia 30/07/2006 – 31/07/2007	0
C08	Croatia 30/07/2007 – 31/07/2008	0
C09	Croatia 30/07/2008 – 31/07/2009	0
C10	Croatia 30/07/2009 – 31/07/2010	0
U05	Uganda 01/01/2005 – 31/12/2005	0
U06	Uganda 01/01/2006 – 31/12/2006	4
U07	Uganda 01/01/2007 – 31/12/2007	4
U08	Uganda 01/01/2008 – 31/12/2008	4
K10	Kenya 01/01/2010 – 31/12/2010	0
K11	Kenya 01/01/2011 – 31/12/2011	5
K12	Kenya 01/01/2012 – 31/12/2012	5
K13	Kenya 01/01/2013 – 31/12/2013	14 – Max
K14	Kenya 01/01/2014 – 31/12/2014	14 – Max

Source: Author's own compilation

5.3. Condition 2: Government stability

The data on government stability are taken from the International Country Risk Guide (ICRG) dataset created by the Political Risk Services Group (PRS Group n.d.). Among other measures, the ICRG provides monthly assessments of "government stability". A yearly average was calculated for each of the cases. As stated by the publisher, government stability is a composite of government unity, legislative strength and popular support. Overall, it is

> "an assessment both of the government's ability to carry out its declared program(s), and its ability to stay in office. The risk rating assigned is the sum of three subcomponents, each with a maximum score of four points and a minimum score of 0 points. A score of 4 points equates to Very Low Risk and a score of 0 points to Very High Risk." (PRS Group n.d.)

Table summarising the distribution of yearly average values for all cases is on file with the author.

Information for Croatia in 1996, 1997 and 1998 was not available. Since the cabinet of Zlatko Matesa, formed by the Croatian Democratic Union (Hrvatska demokratska zajednica), was in power from 7 November 1995 until 27 January 2000 (Government of Croatia/Vlada Republike Hrvatske n.d.), I inferred that the level of government stability in 1996, 1997 and 1998 was similar that in 1999 and imputed the data accordingly. In subsequent analyses, a stability value 10.57 is therefore used for Croat cases in the years 1995/96 (C96), 1996/97 (C97) and 1997/98 (C98).

5.4. Condition 3: International interests

The condition "international interests" looks at evidence of external pressure or incentives that would encourage a state's cooperation with an ICT. Two main regional actors are the European Union (EU) for Serbia and Croatia and the African Union (AU) for Kenya and Uganda. Furthermore, conditionality

of US aid is mentioned as one of the main drivers of Serbian cooperation with the ICTY (Peskin 2008, 62).

To assess the presence of international interests, primary sources such as Presidency Conclusions of the European Council, European Commission Progress Reports (Croatia), European Council Decisions, African Union decisions, declarations and resolutions, US Congress laws and resolutions as well as secondary sources such as the academic literature (see Kim 2008; Lamont 2008; Peskin 2008) were reviewed in search of evidence revealing direct pressure or incentives.

For cases where evidence of direct pressure or incentives was not found, a content analysis of the EU and AU documents was conducted to assess the attitudes of these regional organisations towards cooperation with the ICT and coded as positive, negative or absent. Table 5-3 summarises the information collected. "Aid or Membership conditionality", as a dichotomised indicator, indicates whether the reviewed sources indicated that cooperation with the ICT had been declared a condition for the provision of aid or potential membership of the EU or AU.

For cases where direct pressure or incentives was not observed, information about the attitudes of the regional organisation towards cooperation with the ICT is displayed in the column "AU/EU Rhetorical approach". The descriptor "negative" for the Kenyan cases indicates that the AU encouraged its members *not* to cooperate with the ICC. The descriptor "positive" for the Croatian and Serbian cases denotes that the EU, in its conclusions and decisions, supported cooperation with the ICTY. However, the support was not backed up by EU membership conditionality in the first years under examination. The descriptor "absent" suggests that the AU did not make any statements in its

resolutions with regard to the cooperation of Uganda with the ICC. Kenya 2013 was coded as negative despite the absence of any statements by the AU that year. Nevertheless, the negative position of the AU can be deduced from the strong wording in its resolutions stemming from the previous and subsequent year.

Table 5-3: International Interests

Case ID		Aid or Membership Conditionality	AU/EU Rhetorical approach
S96	Serbia 30/07/1995 – 31/07/1996	No	positive
S97	Serbia 30/07/1996 – 31/07/1997	No	positive
S98	Serbia 30/07/1997 – 31/07/1998	No	positive
S99	Serbia 30/07/1998 – 31/07/1999	No	positive
S00	Serbia 30/07/1999 – 31/07/2000	No	positive
S01	Serbia 30/07/2000 – 31/07/2001	Yes	
S02	Serbia 30/07/2001 – 31/07/2002	Yes	
S03	Serbia 30/07/2002 – 31/07/2003	Yes	
S04	Serbia 30/07/2003 – 31/07/2004	Yes	
S05	Serbia 30/07/2004 – 31/07/2005	Yes	
S06	Serbia 30/07/2005 – 31/07/2006	Yes	
S07	Serbia 30/07/2006 – 31/07/2007	Yes	
S08	Serbia 30/07/2007 – 31/07/2008	Yes	
S09	Serbia 30/07/2008 – 31/07/2009	Yes	
S10	Serbia 30/07/2009 – 31/07/2010	Yes	
S11	Serbia 30/07/2010 – 31/07/2011	Yes	
C96	Croatia 30/07/1995 – 31/07/1996	No	positive
C97	Croatia 30/07/1996 – 31/07/1997	No	positive
C98	Croatia 30/07/1997 – 31/07/1998	No	positive
C99	Croatia 30/07/1998 – 31/07/1999	No	positive
C00	Croatia 30/07/1999 – 31/07/2000	No	positive
C01	Croatia 30/07/2000 – 31/07/2001	Yes	
C02	Croatia 30/07/2001 – 31/07/2002	Yes	
C03	Croatia 30/07/2002 – 31/07/2003	Yes	
C04	Croatia 30/07/2003 – 31/07/2004	Yes	
C05	Croatia 30/07/2004 – 31/07/2005	Yes	
C06	Croatia 30/07/2005 – 31/07/2006	Yes	
C07	Croatia 30/07/2006 – 31/07/2007	Yes	
C08	Croatia 30/07/2007 – 31/07/2008	Yes	
C09	Croatia 30/07/2008 – 31/07/2009	Yes	
C10	Croatia 30/07/2009 – 31/07/2010	Yes	
U05	Uganda 01/01/2005 – 31/12/2005	No	absent
U06	Uganda 01/01/2006 – 31/12/2006	No	absent
U07	Uganda 01/01/2007 – 31/12/2007	No	absent
U08	Uganda 01/01/2008 – 31/12/2008	No	absent
K10	Kenya 01/01/2010 – 31/12/2010	No	negative
K11	Kenya 01/01/2011 – 31/12/2011	No	negative
K12	Kenya 01/01/2012 – 31/12/2012	No	negative
K13	Kenya 01/01/2013 – 31/12/2013	No	negative
K14	Kenya 01/01/2014 – 31/12/2014	No	negative

Source: Author's own compilation

The Nvivo dataset and an excel summary of the evidence analysed are on file with the author.

5.5. Condition 4: Institutionalisation

To operationalise the institutionalisation of ICL as provided by liberal, constructivist and international law scholars, I rely on the following three factors. The first factor looks at the extent of ratification of human rights, international criminal law and humanitarian law treaties. Information on ratification up to 2009 is taken from the Nominal Commitment to Human Rights Survey (NCHR Survey) conducted by Çali, Wyss, and Anton (2009). The survey examines states' nominal commitment towards "16 core human rights, international humanitarian, refugee law and international criminal law treaties" (Çali, Wyss, and Anton 2009, 1). The survey data extend only until 1 August 2009 and the information for the subsequent years until 2014 has been obtained from the United Nations Treaty Collection (United Nations 2015). The column "Ratification" in Table 5-4 shows the percentage of adopted relevant international ICL and human rights treaties by the state during the period examined.

The second factor looks at implementing legislation allowing cooperation with the ICTs. Implementing legislation is a dichotomised factor indicating whether or not the state had enacted legislation enabling its national institutions to cooperate with the ICT. The factor accounts merely for the presence or absence of implementing legislation: it does not assess its quality or different modes of cooperation unless the ICT raised an objection, as in the case of Serbia in 2002, when a law regulating cooperation with the ICTY was adopted, but at the same time contained a provision "[prohibiting] extradition to

the Tribunal of any accused indicted after the law came into force" (ICTY AR 2002 para 227). Due to this substantial limitation of cooperation, the implementing legislation was coded as absent until the relevant provision was removed in 2003 and the disputed article 39 in the "Law on Organization and Competence of Government Authorities in War Crimes Proceedings" deleted. Table 5-4 uses "yes" to denote the presence of implementing legislation and "no" to denote its absence.

The third factor looks at presence of the three core crimes under domestic law. This is a dichotomised factor assessing whether genocide, crimes against humanity and war crimes had been criminalised under national law (Risse and Sikkink 1999, 29). Only if all three crimes were defined under national law was the factor given a positive score, denoted by "yes" in Table 5-4. Absence of definition for one, two, or all three crimes were always coded as absent and denoted by a "no" in Table 5-4.

Table 5-4: Institutionalisation of international criminal law

Case ID	State-Period	Ratification	Implementing legislation	Core crimes presence
S96	Serbia 30/07/1995 – 31/07/1996	61%	No	No
S97	Serbia 30/07/1996 – 31/07/1997	65%	No	No
S98	Serbia 30/07/1997 – 31/07/1998	65%	No	No
S99	Serbia 30/07/1998 – 31/07/1999	58%	No	No
S00	Serbia 30/07/1999 – 31/07/2000	55%	No	No
S01	Serbia 30/07/2000 – 31/07/2001	52%	No	No
S02	Serbia 30/07/2001 – 31/07/2002	57%	no	No
S03	Serbia 30/07/2002 – 31/07/2003	67%	Yes	No
S04	Serbia 30/07/2003 – 31/07/2004	81%	Yes	No
S05	Serbia 30/07/2004 – 31/07/2005	89%	Yes	No
S06	Serbia 30/07/2005 – 31/07/2006	89%	Yes	Yes
S07	Serbia 30/07/2006 – 31/07/2007	86%	Yes	Yes
S08	Serbia 30/07/2007 – 31/07/2008	86%	Yes	Yes
S09	Serbia 30/07/2008 – 31/07/2009	81%	Yes	Yes
S10	Serbia 30/07/2009 – 31/07/2010	91%	Yes	Yes
S11	Serbia 30/07/2010 – 31/07/2011	91%	Yes	Yes
C96	Croatia 30/07/1995 – 31/07/1996	72%	Yes	No
C97	Croatia 30/07/1996 – 31/07/1997	72%	Yes	No
C98	Croatia 30/07/1997 – 31/07/1998	100%	Yes	No
C99	Croatia 30/07/1998 – 31/07/1999	95%	Yes	No
C00	Croatia 30/07/1999 – 31/07/2000	90%	Yes	No
C01	Croatia 30/07/2000 – 31/07/2001	90%	Yes	No
C02	Croatia 30/07/2001 – 31/07/2002	87%	Yes	No
C03	Croatia 30/07/2002 – 31/07/2003	96%	Yes	Yes
C04	Croatia 30/07/2003 – 31/07/2004	92%	Yes	Yes
C05	Croatia 30/07/2004 – 31/07/2005	93%	Yes	Yes
C06	Croatia 30/07/2005 – 31/07/2006	93%	Yes	Yes
C07	Croatia 30/07/2006 – 31/07/2007	90%	Yes	Yes
C08	Croatia 30/07/2007 – 31/07/2008	94%	Yes	Yes
C09	Croatia 30/07/2008 – 31/07/2009	94%	Yes	Yes
C10	Croatia 30/07/2009 – 31/07/2010	94%	Yes	Yes
U05	Uganda 01/01/2005 – 31/12/2005	91%	No	No
U06	Uganda 01/01/2006 – 31/12/2006	83%	No	No
U07	Uganda 01/01/2007 – 31/12/2007	80%	No	No
U08	Uganda 01/01/2008 – 31/12/2008	81%	No	No
K10	Kenya 01/01/2010 – 31/12/2010	63%	Yes	Yes
K11	Kenya 01/01/2011 – 31/12/2011	63%	Yes	Yes
K12	Kenya 01/01/2012 – 31/12/2012	63%	Yes	Yes
K13	Kenya 01/01/2013 – 31/12/2013	63%	Yes	Yes
K14	Kenya 01/01/2014 – 31/12/2014	63%	Yes	Yes

Source: Author's own compilation

A detailed table summarising the relevant national laws for all cases can be found in annex 1. An excel table summarising the relevant treaties in force for individual states in any given year is on the file with the author.

5.6. Condition 5: Court independence

The operationalisation of independence broadly relies on Posner and Yoo's (2005) definition and is adapted to the circumstances of criminal courts. The adaptation implies that my definition differs from that of Posner and Yoo. A summary of the main features of independent courts can be found in Table 3-1 in chapter 3, together with justification for inclusion and adaptation of individual factors.

To measure court independence, I relied on information published by Posner and Yoo (2005, 52), and PICT Research Matrix (n.d), as well as statutes of the court and tribunals. A summary of the measured factors for all existing international criminal courts and tribunals is presented in Table 5-6. Although only the ICC and the ICTY are part of the dataset, information about the independence scores for the IMF, IMTFE and ICTR is relevant for calibration of the raw data and will be used in section 6.2.

Table 5-5: Court Independence

	1	2	3	4	5	6	7	8
Cases	**Triggering mechanism**	**Nature of jurisdiction**	**no national hears the dispute**	**Permanent body of judges**	**length of term beyond dispute**	**third parties**	**Scope of jurisdiction**	**Score**
ICTY	Imposed (1)	Primary (1)	(1)	No (0)	Yes (1)	Yes (1)	Territorial: limited to the territory of the former Socialist Federal Republic of Yugoslavia (0)	5
ICTR	Imposed (1)	Primary (1)	(1)	No (0)	Yes (1)	Yes (1)	Territorial: limited to territory of Rwanda and active nationality for Rwandan citizens(0)	5
ICC Uganda	Consent (0)	Complementary (0)	(1)	Yes (1)	Yes (1)	Yes (1)	Territorial for all state parties, active nationality for all state parties (1)	5
ICC Kenya	Imposed (1)	Complementary (0)	(1)	Yes (1)	Yes (1)	Yes (1)	Territorial for all state parties, active nationality for all state parties (1)	6
IMT	Imposed (1)	Complementary with regard to signatories, primary for all other states (0)	Only signatories nationals can hear disputes against European Axis supporters (0)	No (0)	No (0)	No information in charter(0)	Passive nationality limited to crimes committed by European Axis supporters (0)	1
IMTFE	Imposed (1)	No info in charter (0)	Only Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines can hear disputes against Far Eastern war criminals (0)	No (0)	No (0)	No information in charter (0)	Territorial for Far East (0)	1

Source: Author's own compilation relying on Posner and Yoo (2005, 52)

Similar to Posner and Yoo (2005, 52), independence is an aggregated scale where one point is assigned for each of the factors characterising independent tribunals. The first column in Table 5-5 looks at the mechanism triggering jurisdiction. Courts, which jurisdiction was imposed on the states by the UNSC or other bodies, score 1. Courts, which jurisdiction was triggered following the consent or invitation of the state, score 0. The second column looks at the nature of jurisdiction and assigns a value of 1 to courts with primary jurisdiction. The third column summarises whether a national can be on the panel hearing the dispute and assigns a value of 1 if they cannot serve. In the fourth column, permanent courts are assigned 1 and *ad hoc* institutions 0. Column 5 assesses judges' length of contract and a value of 1 is assigned if it extends beyond the given dispute. If third parties can intervene, a value of 1 is assigned in column 6. Finally, the seventh column assesses the scope of jurisdiction and assigns a value of 0 to courts with their jurisdiction limited to a small number of states. The eighth column then shows how many of the attributes scored positively.

5.7. Condition 6: Outreach

Outreach or "external communication" encompasses a broad range of argumentative instruments applied by the ICTs. Consistent with McClendon's operationalisation, this dissertation measures the "outreach" condition by taking into account the amount spent annually on outreach activities per 1000 inhabitants (McClendon 2009, 361–362). Additionally, information about the presence of an outreach team on the territory of the state was collected. When the outreach team was not able to enter the state and conduct its activities on-site, the value for "outreach spending" is set to zero. This is

to account for the fact that despite allocated outreach budget, the outreach activities had strongly limited potential of reaching the local population.

An excel file summarising the information on the ICC budget and the presence of an outreach team on the territory of the state concerned for both the ICC and ICTY is on file with the author. Information on ICTY outreach spending was provided upon request by Prof. Gwyneth McClendon (McClendon 2009).

After the data collection process had been completed, all preparatory steps for starting the QCA were undertaken. As argued by Berg-Schlosser et al (2008, 13), when conducting QCA each case is "broken down into a series of features: a certain number of [causal conditions] and an outcome [condition]". This was done in chapter 3, where, the theory was used to identify the sufficient or necessary conditions for state cooperation. Section 4.4 describes case selection. This chapter has operationalised the conditions and presented the collected data. In the next chapter, the raw data will be calibrated into fs-membership scores, before proceeding to the fs-QCA.

6. QCA analysis

Fuzzy-set (fs) QCA operates differently from traditional qualitative and quantitative approaches. To facilitate the understanding of the method, key QCA concepts are introduced in a step-by-step manner on the following pages. Section 6.1 introduces calibration, which translates raw information into fuzzy-set membership values and describes the calibration process for each of the conditions as well as the outcome. Section 6.2 tests for conditions necessary for cooperation. Section 6.3 first discusses the methodological issues specific to two-step QCA and then presents the analysis of sufficiency. In section 6.4, the two-step QCA is replicated to identify combinations of conditions necessary and sufficient for non-cooperation. The results are interpreted in section 6.5. The software used was fs-QCA 2.5 (Ragin, Drass, and Davey 2006) and Kirq (Rubinson and Reichert 2011).

6.1. Calibration

Before they can be analysed, the raw data need to be calibrated into fuzzy sets. The purpose of calibration is to transform the collected data for each condition into a numerical scale, ranging in value between 0 (full set non-membership) and 1 (full set membership).

To explain the purpose of calibration of raw data into sets, Ragin (2009, 72) uses the example of water temperature. Water changes its physical qualities at freezing point (32°F) and boiling point (212°F). 32°F captures the qualitative change of water turning into ice, whereas 212°F captures the qualitative change of water boiling. To reflect these qualitative changes (Ragin 2009, 82), the calibration thresholds for the condition "liquid water" should be set at 32°F for full set non-membership and 212°F for full set-membership. Without

adequate calibration thresholds the physical difference between ice at 20°F and liquid water at 33°F would not be captured. While qualitative differences can be accounted for through cs-QCA, fs-QCA can also capture quantitative differences within a defined set. For instance, applied to the water example, 68°F corresponds to an fs-value of 0.2 and 176°F corresponds to 0.8. The fs values representing partial membership not only capture the qualitative state of water (liquid, not frozen, not boiling), but also indicate the difference in temperature between these two cases (Ragin 2009, 71 – 74). A value of 0.8 suggests that the temperature is relatively close to the boiling point and thus significantly warmer than the case with an fs value of 0.2.

Ragin (2009, 85) describes two methods of calibration: direct and indirect.

> "Using the first, direct, method, the researcher specifies the values of an interval scale that correspond to the three qualitative breakpoints that structure a fuzzy set: full membership, full nonmembership, and the crossover point. These three benchmarks are then used to transform the original interval-scale values to fuzzy membership scores. Using the second, indirect, method the external standard used is the researcher's qualitative assessment of the degree to which cases with given scores on an interval scale are members of the target set." (Ragin 2009, 85)

In other words, both methods rely on the researcher's own judgement when setting thresholds for set membership and non-membership. The difference lies in the way the quantitative differences between cases falling within the set are translated into partial set-membership values.

The indirect method relies on the researcher's assessment and is used for ordinal scale conditions where the degree of difference between the cases cannot be captured. For instance, in the present study the level of cooperation is ranked according to following order: full, good, mixed with tendency for improvement, mixed, poor, absent. In this case the researcher has to use

his/her knowledge to assign these verbal labels corresponding fs-membership.

The direct method of calibration relies on an automated procedure to assign partial set-membership values. As such it can be applied only to interval-scale variables, where the degree of difference is captured in the raw data. The researcher merely determines which raw values correspond with full membership, non-membership and where the crossover-point lies corresponding to 0.5 fs-membership.

I use the direct calibration method to calibrate interval-scale conditions "proximity of suspects", "government stability", "ratification" (as sub-factor of "institutionalisation"), "independence" and "outreach". The indirect method was used for ordinal-scale conditions, "cooperation" and "international interests". The coding procedure for each of the six conditions as well is the outcome is described in the remainder of this section.

Condition 1: Proximity (prox) of suspects to societal elites is measured by looking at the number of outstanding arrest warrants and surrenders against high-ranking state and military officials. The direct calibration method is used. While in the natural sciences calibration thresholds can often be easily derived by observing changes in physical qualities (as in case of water changing physical qualities at 32°F and 212°F), their determination in the social sciences is generally dependent on both the context and the theory. Unfortunately, in the case of "proximity", theory does not provide any guidance on calibration thresholds. In the absence of theoretical reasons for setting minimum and maximum values, the calibration thresholds reflect minimum and maximum values observed within the overall case universe in order to capture the full extent of quantitative variation (Koenig-Archibugi 2004, 157).

The calibration thresholds for full set membership and full set non-membership were set at maximum = 14 and minimum = 0 of the observed values. The crossover point was set just below the median score of 4, at 3.9, to avoid a situation where median cases are assigned a fuzzy-set value 0.5, which would effectively exclude such cases from the Boolean minimisation process. Accordingly, a robustness check was conducted with an alternative crossover point, set at 4.1, and no significant deviation in results was observed.[10]

Even though setting calibration thresholds at the maximum and minimum observed values "retains all the variation to be found in the raw data" (Koenig-Archibugi 2004, 157), the risk exists that the dataset is not representative of variation within the overall case universe. Turning to the example of the influence of water temperature on its physical state, if a researcher works with a dataset where all samples have temperature between 50°F and 100°F and sets the membership thresholds accordingly, the fs-values will not correctly reflect the position of the cases within the set "liquid water". Thus, wherever data are available, the location of the observed case within the overall case universe should be taken into consideration. In the case of *proximity*, comparative worldwide data are not available. However, due to the small number of ICTs, the assumption is made that the selected ICTY and ICC cases capture the maximum and minimum values for proximity within the case universe.

Condition 2: Government Stability (govstab) is an index created by the PRS Group that accounts for government unity, legislative strength and popular

[10] The two-step QCA identified the same causal pathways as sufficient for cooperation even though the consistency of the solution was lower by one decimal point.

support (PRS Group n.d.). The direct calibration method is used. The calibration thresholds were set at maximum = 11, median = 7 and minimum = 5 of the values observed across the world in 2012 and 2014, two years for which worldwide data samples are freely accessible.

Condition 3: Institutionalisation (institutionalisation) is a composite index of three factors connected through a logical AND. The three composite subfactors (high ratification rate of ICL and human rights treaties, presence of implementing legislation, presence of legislation defining core crimes) were calibrated according to the criteria listed below.

The first factor, ratification, is the percentage of ratified treaties in the field of human rights and ICL. The indicator is calibrated by use of the direct method. The calibration thresholds were set at maximum = 1, median = 0.82 and minimum = 0.53 of the observed values.

The second factor, implementing legislation, is a dichotomised indicator assessing whether the state had enacted legislation on cooperation with the ICT. A value of 1 is assigned for cases where the state had enacted legislation. In the absence of legislation, cases are assigned a value of 0.

The third factor of the institutionalisation condition is "presence of core crimes" in domestic criminal codes. This is a dichotomised indicator assessing whether genocide, crimes against humanity and war crimes had been criminalised under national law. A value of 1 is assigned for cases where all three crimes are included in the national criminal code and a value of 0 for cases where definition of one or more crimes is missing.

First, fs-membership for each these factors was calibrated, and then fs-membership for the "intersection" of all three factors was calculated. As de-

fined by Ragin (2009, 37), an intersection or "logical *and* is accomplished by taking the minimum membership score of each case in the sets that are combined". For instance, if a water sample has 0.3 fs-membership in relation to "sweet" and 0.8 in relation to "warm" and 0.5 in relation to "blue", its membership in "sweet and warm and blue" water is 0.3.

Condition 4: Outreach (outreach) is a composite of two factors – "outreach spending" and "outreach presence" (of an ICT outreach team on the state's territory) – connected through a logical AND.

The first factor of the outreach condition, outreach spending, is the sum of US dollars (USD) spent by the ICT on outreach activities per 1000 inhabitants. The indicator is calibrated by use of the direct method. The calibration thresholds are set at maximum = 86.3, median = 34.7 and minimum = 0 of the observed values.

The second factor is "outreach presence". This dichotomised indicator assesses whether an ICT outreach team was able to communicate with the population directly. If no outreach team was present in the territory of the state I assigned a value of 0. For cases where outreach teams were present a value of 1 was assigned.

Condition 5: International Interests (intl) rely on qualitative information collected from official documentation of the EU, the AU and the US as well as a number of secondary sources. The indirect method of calibration method was used. As argued in chapters 3 and 5, "conditionality" (the offer of membership or aid, conditional on state cooperation with the ICTY or ICC) is seen as the most important element of international pressure for cooperation with the ICT. Cases where evidence of conditionality was found are assigned a full set-membership value of 1. For cases where evidence of conditionality is

not present, the set membership value cannot exceed 0.5. To differentiate between different degrees of partial non-membership for the condition "international interests", I assessed whether a regional organisation, namely the EU for Croatia and Serbia and the AU for Kenya and Uganda, supported (positive), did not support (negative) or did not comment on (absent) the state's obligation to cooperate with the ICT in question. The absence of conditionality, combined with a negative attitude of the regional organisation towards the ICT, or the absence of a statement from the regional organisation is given a full set non-membership value of 0. The absence of conditionality combined with positive comments from the regional organisation is assigned a value of 0.3 that reflects a non-marginal argumentative influence stemming from regional organisations.

Condition 6: Independence (independence) is a seven-point scale, where, similarly to Posner and Yoo's operationalisation (2005, 51), one point is assigned "for each of the [seven] characteristics that distinguish an independent tribunal from a dependent tribunal". The direct calibration method is used. Calibration thresholds for full set membership and set non-membership were set at maximum = 6 and minimum = 1 of the observed values across the whole population of ICTs. The crossover over-point was set at 4 in order to include the ICC in the set of independent courts. This reflects Posner and Yoo's (2005, 70) assessment of the ICC as independent.

Outcome: State cooperation (coop) is of a qualitative nature and the coding procedure described in section 5.1 directly calibrated the results according to the following scale:

0.9–1	Full cooperation
0.7–0.8	Good cooperation

0.5–0.6	Mixed record of cooperation, with tendency for improvement
0.3–0.4	Mixed record of cooperation
0.1–0.2	Poor cooperation
0	Non-cooperation

The results of the calibration procedure are shown in Table 6-1, which gives the fs-membership scores for all 34 cases. As mentioned in section 5.3, the information on the outcome was missing for Uganda 2007 and this case is therefore not included in the analysis.

Table 6-1: Fuzzy-set membership scores

Row	id	coop	prox	govstab	institution	outreach	intl	independence
1	S96	0	0.51	0.59	0	0.05	0.3	0.82
2	S97	0	0.51	0.78	0	0.05	0.3	0.82
3	S98	0	0.58	0.82	0	0.05	0.3	0.82
4	S99	0	0.94	0.85	0	0.05	0.3	0.82
5	S00	0	0.95	0.78	0	0.48	0.3	0.82
6	S01	0.4	0.95	0.84	0	0.52	1	0.82
7	S02	0.4	0.94	0.07	0	0.82	1	0.82
8	S03	0.4	0.72	0.12	0	0.91	1	0.82
9	S04	0.2	0.89	0.59	0	0.74	1	0.82
10	S05	0.55	0.89	0.55	0	0.91	1	0.82
11	S06	0.55	0.51	0.55	0.76	0.95	1	0.82
12	S07	0.6	0.51	0.47	0.66	0.83	1	0.82
13	S08	0.6	0.33	0.52	0.66	0.72	1	0.82
14	S09	0.8	0.33	0.72	0.47	0.67	1	0.82
15	S10	0.8	0.19	0.68	0.82	0.65	1	0.82
16	S11	1	0.19	0.84	0.82	0.59	1	0.82
17	C97	0.8	0.33	0.94	0	0.05	0.3	0.82
18	C98	0.8	0.19	0.94	0	0.05	0.3	0.82
19	C99	0.3	0.1	0.94	0	0.05	0.3	0.82
20	C00	0.8	0.1	0.86	0	0.48	0.3	0.82
21	C01	0.7	0.33	0.87	0	0.52	1	0.82
22	C02	0.6	0.33	0.83	0	0.82	1	0.82
23	C03	0.6	0.33	0.67	0.91	0.91	1	0.82
24	C04	0.9	0.82	0.6	0.84	0.74	1	0.82
25	C05	0.9	0.19	0.74	0.86	0.91	1	0.82
26	C06	1	0.1	0.75	0.86	0.95	1	0.82
27	U05	1	0.05	0.82	0	0.16	0	0.82
28	U06	1	0.51	0.89	0	0.14	0	0.82
29	U08	0.4	0.51	0.9	0	0.32	0	0.82
30	K10	0.6	0.05	0.36	0.12	0.31	0	0.95
31	K11	0.8	0.58	0.36	0.12	0.25	0	0.95
32	K12	0.4	0.58	0.27	0.12	0.21	0	0.95
33	K13	0.4	0.95	0.51	0.12	0.21	0	0.95
34	K14	0.4	0.95	0.59	0.12	0.25	0	0.95

Source: Author`s own calculation using fs-QCA 2.5 software

As the table shows (first column), out of 34 cases, 14 are more in the set of non-cooperation. For the remaining 20 cases, the fuzzy value higher than 0.5 indicates that the government was, overall, more cooperative than not. This is the variance that this research aims to explain.

When looking at the domestic conditions (proximity, institutionalisation, government stability), a relatively even distribution occurs with regard to "proximity" of suspects to societal elites. Fifteen cases are more outside than inside of the proximate set and nineteen cases exhibit proximity set membership (a value over 0.5). "Government stability" and "institutionalisation" are less evenly distributed. Most of the governments are relatively stable with set membership over 0.5. Six cases – Serbia in 2002, 2003 and 2007 as well as Kenya in 2010, 2011 and 2012 – are relatively unstable and exhibit fuzzy membership values under 0.5 in the set.

The criteria for "institutionalisation" were set relatively high and only those states that ratified the majority of human rights and ICL treaties, enacted implementing legislation and included genocide, war crimes and crimes against humanity in their criminal codes were assigned scores over 0.5 in the set of countries with institutionalised ICL norms. Twenty-five cases have a low "institutionalisation" score and nine cases score a fuzzy set-membership a value over 0.5.

In the two-step QCA procedure, the analysis of international conditions, i.e. "outreach", "international interests" and "independence", will occur only after the outcome-enabling domestic conditions have been identified. The distribution of set membership in "outreach" is even, with seventeen cases scoring below 0.5 and seventeen above. "International interests" scored above 0.5 in seventeen cases.

However, "independence" scores are relatively high, with little variation. None of the cases is more outside the set of independent courts than in. A skewed membership is associated with a risk of "drawing wrong inferences about sufficient and necessary conditions" (Schneider and Wagemann 2012a,

kindle 4757). I address the problem in the next section, analysing conditions necessary for cooperation and non-cooperation as well as in chapter 7, by including more courts in the analysis.

6.2. Identifying necessary conditions

Following a standard of good practice, I conduct a test for necessary conditions as the first analytical step, that is, before the analysis of sufficiency (Schneider and Wagemann 2010, 8). As previously mentioned, a necessary condition is a superset of the outcome and as such "is always present when the outcome occurs" (Rihoux and Ragin 2009, XIX). When identifying necessary conditions, tests for cooperation and non-cooperation ("negation") need to be conducted separately, due to the asymmetric nature of set theory (Ragin 2009, 17). The negation of any condition is calculated by subtracting a condition's membership value from 1 (Ragin 2009, 36). For instance, if a case has a membership threshold set at 0.7 for the set of cooperative states, its membership in the set of non-cooperative states is 1–0.7, which equals 0.3. In the following, the symbol "~" or the prefix "non" are used to denote negation (the reverse) of a condition.

Table 6-2 displays the results of the necessity tests for cooperation. The second column, consistency, indicates "how closely a perfect subset [or in the case of necessity the superset] relation is approximated" (Ragin 2009, 44). A perfect superset relation is denoted with a value of 1. The higher the proportion of inconsistent cases is and the wider the margin by which the non-consistent cases violate the superset relation is, the closer the consistency value is to 0 (Ragin 2006b, 296). Only one of the tested conditions approaches perfect consistency: with a value of 0.95, "independence" deviates only marginally from being a perfect superset of the outcome. The coverage value of

0.62 for independence suggests that independence covers 62% of the total membership in the outcome cooperation (Ragin 2006b, 305).

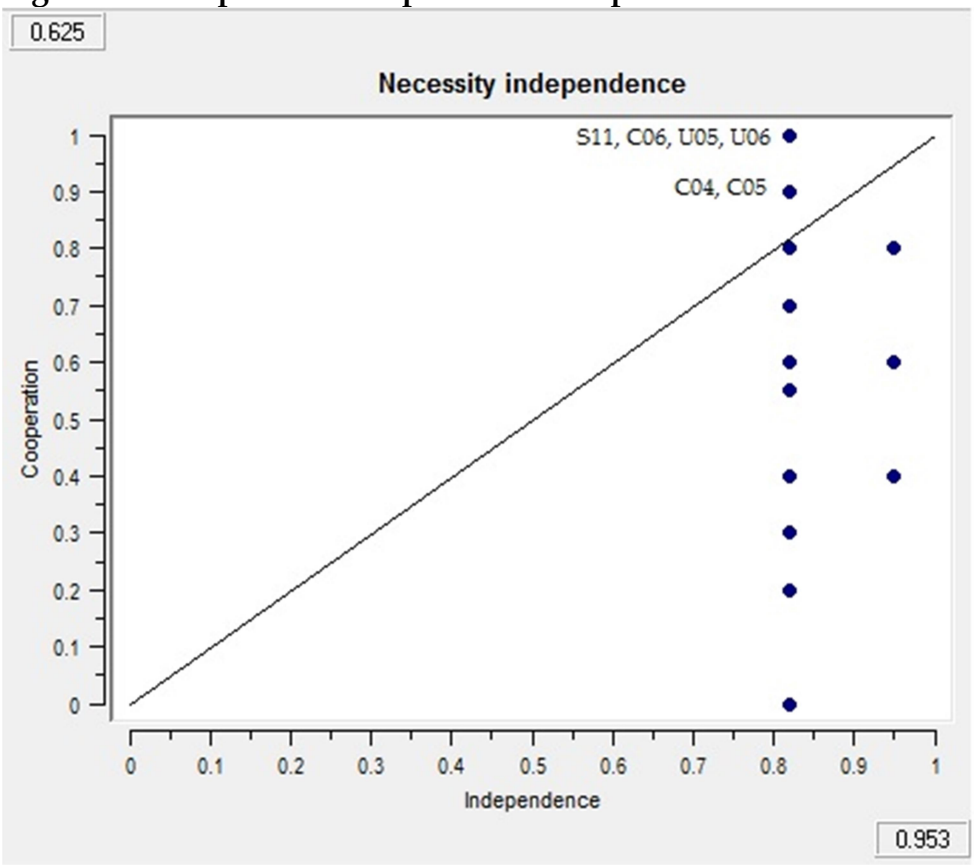
Table 6-2: Consistency and coverage of necessary conditions for cooperation

Outcome: Cooperation		
Condition	**Consistency**	**Coverage**
proximity	0.51	0.57
~proximity	0.76	0.83
government stability	0.84	0.69
~government stability	0.46	0.75
institutionalisation	0.41	0.92
~institutionalisation	0.71	0.52
outreach	0.66	0.76
~outreach	0.58	0.61
international interests	0.65	0.62
~international interests	0.40	0.52
independence	0.95	0.62
~independence	0.24	0.84

Source: Author's own calculation using software fs-QCA 2.5

As the XY-plot for Independence/Cooperation in Figure 6-1 illustrates, six cases – Serbia 2011, Croatia 2004, 2005, 2006, Uganda 2005 and 2006 violate the superset relationship. The remaining 28 cases are located below the X/Y axis. One point may represent several cases as the two points above the X/Y axis illustrate.

Figure 6-1: XY-plot for Independence/Cooperation



Source: Author's own calculation using software fs-QCA 2.5

However, Figure 6-1 also shows that independence membership is skewed, as all cases have scores in the range 0.8–1. If almost all cases are given values close to 1, as is evident for court independence scores, the risk exists that the analysis leads to conclusions of necessity based on a flawed case selection. This relates to the fact that to test for necessity of a condition it is essential to include cases with values below 0.5 (Schneider and Wagemann 2012b, kindle 1684). Otherwise, the condition may falsely test as necessary.

The problem becomes even more apparent when testing for conditions necessary for non-cooperation. As shown in Table 6-3, two conditions have consistency values above 0.9 and are thus almost perfect supersets of the outcome. A value of 0.96 strongly supports the statement that non-institutionalisation is necessary for non-cooperation. However, with a con-

sistency value of 0.94, independence also proves necessary for non-cooperation, which suggests that skewed membership may be distorting the results for this particular condition.

Table 6-3: Consistency and coverage of necessary conditions for non-cooperation

Outcome: ~Cooperation		
Condition	**Consistency**	**Coverage**
proximity	0.81	0.73
~ proximity	0.52	0.47
government stability	0.81	0.55
~ government stability	0.55	0.74
institutionalisation	0.19	0.35
~institutionalisation	0.96	0.57
outreach	0.55	0.51
~outreach	0.74	0.64
international pressure	0.55	0.43
~international pressure	0.51	0.55
independence	0.94	0.50
~independence	0.30	0.84

Source: Author's own calculation using software fs-QCA 2.5

As a consequence, the results suggesting that independence is a necessary condition for both cooperation and non-cooperation cannot be seen as valid. Furthermore, also when testing for sufficiency, the condition independence does not offer any analytical added value. The presence of independence would automatically appear in every causal combination identified as sufficient for cooperation or non-cooperation. Because the membership is strongly skewed towards full membership, all truth table rows with absence of independence will not be populated and not included in the Boolean minimisation.

The problem can be addressed by expansion of the dataset and inclusion of cases with lower independence scores. However, the existing case universe

(as defined in section 4.4) does not offer more variation on court independence. Only the ICTR can potentially be added into the analysis. However, it has an almost identical structure to that of the ICTY. To mitigate for this deficiency, analysis of sufficiency and necessity in this chapter will exclude "independence" and further analysis will be conducted in chapter 7. To secure more variation with regard to the "independence" condition, chapter 7 brings historical ICTs and human rights courts into the pool of analysed cases. Inclusion of a broader spectrum of courts (namely the ECHR, IACHR, ICC, ICTY and IMT) is made possible by shifting the level of analysis from states to courts. In chapter 7 the unit of analysis is thus not a state during a specific time period (as here) but an individual court. The theoretical framework has to be amended accordingly and conditions located at national level are not included in the analysis.

6.2.1. Combinations of necessary conditions

Testing for combinations of necessary conditions is not a standard practice, but it can be used if "strong and plausible theoretical arguments" support it (Schneider and Wagemann 2012b, kindle 1753). There are two main reasons for this hesitance to test for combinations of necessary conditions. First, testing for the intersection of necessary conditions connected through a logical AND is logically redundant in situations where no single necessary condition was identified (Schneider and Wagemann 2012b, kindle 1728). Since logical AND operations "are accomplished by taking minimum membership scores" of combined conditions (Ragin 2009, 37), the intersection of two or more unnecessary conditions cannot by definition be necessary either (Schneider and Wagemann 2012b, kindle 1720). In other words, if single conditions are not supersets of the outcome, neither will be their intersection (or "conjunction" as termed by Schneider and Wagemann (2012b, kindle 1720).

In this dissertation, after the exclusion of the independence condition only non-institutionalisation was identified as necessary for non-cooperation. The same argument can be applied in this scenario. The intersection of a necessary and unnecessary condition(s) has to take the minimum membership score of the unnecessary condition(s). Therefore, no intersection of non-institutionalisation AND other tested condition(s) can be necessary for non-cooperation.

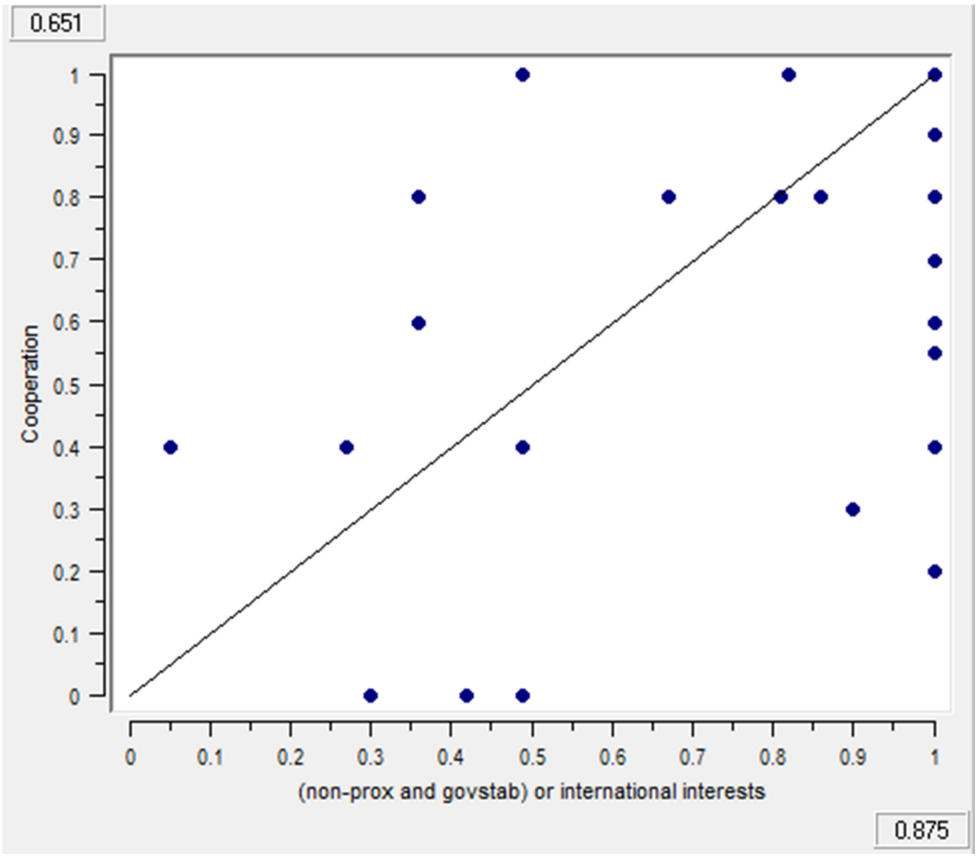
In contrast, testing for a union of conditions connected through a logical OR is likely to create a necessary combination of conditions (Schneider and Wagemann 2012b, kindle 1746). Because logical OR operations take a maximum membership score of the combined conditions (Ragin 2009, 37), the creation of necessary supersets is "very easy" (Schneider and Wagemann 2012b, kindle 1746). To put it differently, the more conditions are combined by taking the maximum value, the easier it becomes to create a superset of the outcome. According to Schneider and Wagemann (2012b, kindle 1764), caution is therefore required and necessity tests for unions of conditions are justified only if the conditions are "functionally equivalent". Two conditions are functional equivalents if there is "a common concept that manifests itself empirically" through either of the conditions or both (Schneider and Wagemann 2012b, kindle 1754).

In this dissertation, realism delivered a hypothesis involving two functionally equivalent conditions. The realist hypothesis stated that states will cooperate with ICTs only when it furthers their interests on the domestic or international level. The common concept is "interests". Translated in set-theoretic language, the hypothesis argues that every time cooperation occurs, domestic or international interests have to be in place as well. In other words, according to realism, the union of domestic OR international interests is nec-

essary for cooperation. Since the realist hypothesis assumes functional equivalency, a necessity test for union of domestic OR international interests is justified on theoretical grounds.

Domestic interests are a composite of two factors: ~proximity and government stability. Both factors are relevant for governments when making cost–benefit calculations on cooperation, even though their contribution is different in kind. Proximity measures whether societal elites are targeted by the court. Once the proximity has been determined, government stability plays a role in indicating whether cooperation or non-cooperation threatens the very survival of the government. Due to the different roles played by these two conditions, two separate analyses of necessity were conducted, one in which an intersection of proximity and government stability was used to represent domestic interests, and one in which domestic interests were represented exclusively by the absence of proximity.

Figure 6-2: Analysis of necessary conditions for [(~proximity and government stability) or international interests]

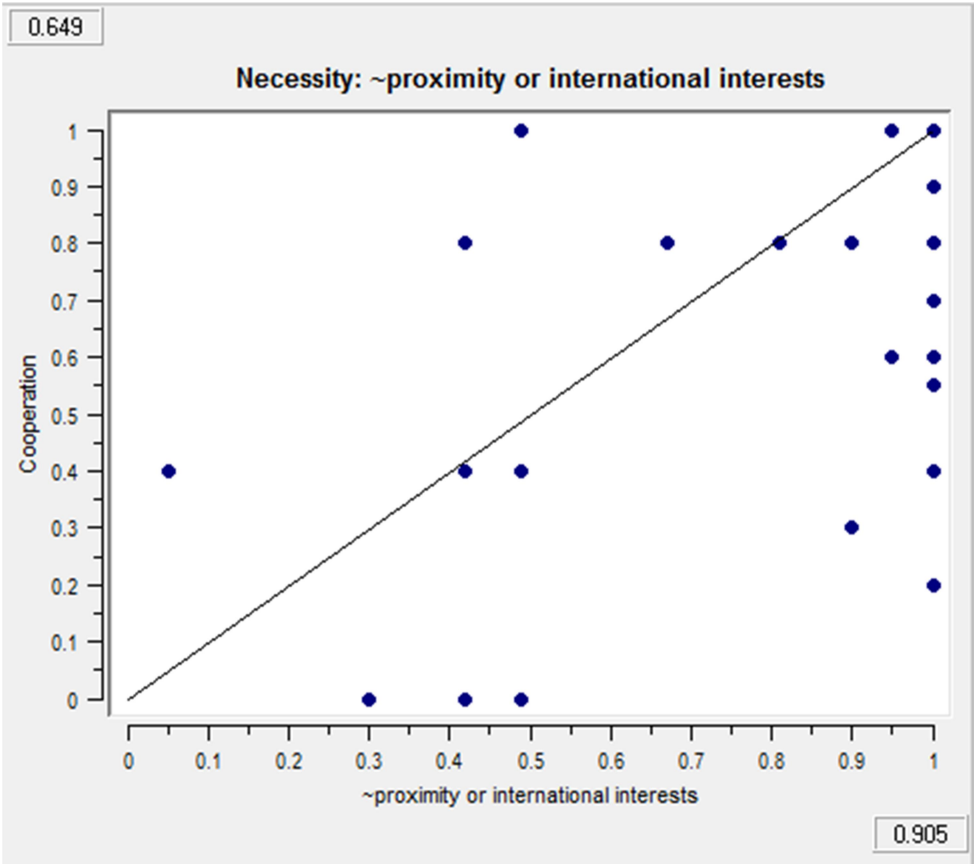


Source: Author's own calculation using software fs-QCA 2.5

The test that included government stability does not support the statement that a combination of [(~proximity and government stability) or international interests] is necessary for state cooperation. The consistency value 0.875 indicates that the combination is not a consistent superset of the outcome. Too many cases violate the superset relationship, as illustrated in Figure 6-2.

However, the union of [~proximity OR international interests] is indeed necessary for cooperation. The superset relationship is not ideal but is significant, with a consistency value of 0.91 and a coverage value of 0.65. Figure 6-3 shows the distribution of the cases on an XY plot. The results support the realist hypothesis that state cooperation occurs only when it does not violate government interests at the domestic level or when there is international pressure for cooperation.

Figure 6-3: Analysis of necessary conditions for ~proximity or international interests



Source: Author's own calculation using software fs-QCA 2.5

6.3. Testing for sufficient conditions: two-step QCA

To identify causal combinations sufficient for cooperation, I construct a truth table capturing all logically possible constellations of the examined condi-

tions (Varone, Rihoux, and Marx 2006, 217–218). By constructing each case as a configuration of calibrated conditions, the truth table captures a wealth of qualitative and quantitative information (Ragin 2009, 37; Rihoux and De Meur 2009, 44). With the help of fs-QCA 2.5 software, the information captured in the truth table is then analytically reduced and converted into a formula which describes combinations of conditions sufficient for cooperation (Brown and Boswell 1995, 1497).

6.3.1. First step: domestic conditions sufficient for cooperation

In two-step QCA not all conditions are examined at once as the method divides them into two groups. To recall section 4.3, the conceptualisation of domestic and international conditions in this dissertation is based on distance from the state. In the first step, domestic conditions (government stability, proximity and institutionalisation) are entered into the analysis to identify outcome-enabling domestic contexts. The second step then assesses how the international conditions operate in combination with the identified outcome-enabling domestic contexts.

Table 6-4 shows the distribution of cases within all logically possible combinations of domestic conditions: proximity of suspects to societal elites (prox), government stability (govstab) and institutionalisation of ICL (institutionalisation). Although in the truth table the conditions appear to be dichotimised, the quantitative differences captured through fuzzy sets are in fact contained in the table as well (Schneider and Wagemann 2012b, kindle 3964). As described by Schneider and Wagemann (2012b, kindle 2239), the dichotomised conditions can be seen as the corners of a three-dimensional cube (Side A – prox, Side B – govstab, Side C – institutionalisation). Cases can lie anywhere within the cube and for each case the most proximate edge can be identified.

The truth table then indicates how many of the cases, if any, are close to any of the corners. The consistency value informs which proportion of cases associated with each corner supports the statement that given causal combination is sufficient for (subset of) the outcome.[11]

Table 6-4: Truth table for domestic conditions

row	prox	govstab	Institutionalisation	Nr. of cases	Coop	raw consistency	Contradictions
1	1	0	1	1	1	1	
2	1	1	1	2	1	1	
3	0	1	1	6	1	0.99	
4	0	0	0	1	1	0.84	
5	0	1	0	8	1	0.80	C99[12]
6	1	0	0	4	0	0.71	K11[13]
7	1	1	0	12	0	0.62	S05, U06[14]
8	0	0	1	0	-	-	-

Source: Author's own calculation using software fs-QCA 2.5

Table 6-4 shows that observations exist for seven out of eight logically possible combinations of the three domestic conditions. Only row 8 is not populated by cases and is as such a logical remainder. Following Schneider and Wagemann's (2006, 770) suggestion, the consistency threshold for determining the outcome-enabling conditions is set at a relatively low level: 0.75. Row 6, with a consistency value of 0.71, could be in practice included in the analysis as well, since Schneider and Wagemann (2006, 769) in their methodological demonstration use a threshold as low as 0.70. However, a

[11] As well as the proportion of cases violating the subset relations, consistency also accounts for the margin by which the non-consistent cases violate the subset relation (Ragin 2006b, 296).

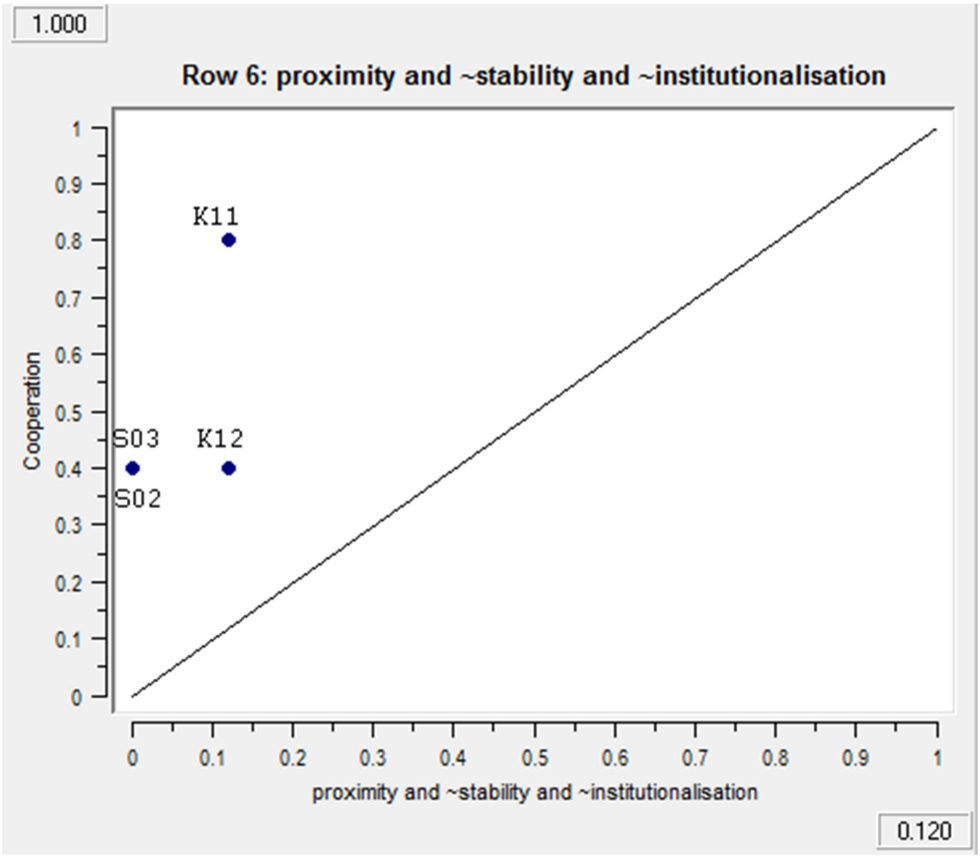
[12] Contradictory with the statement that the causal combination in row 5 is sufficient for cooperation.

[13] Contradictory with the statement that the causal combination in row 6 is insufficient for cooperation.

[14] Contradictory with the statement that the causal combination in row 7 is insufficient for cooperation.

look at the distribution of cases in row 6 reveals that there is only weak empirical evidence suggesting that the intersection of [proximity and ~government stability and ~institutionalisation] are sufficient for cooperation. As Figure 6-4 shows, only one case out of four, namely Kenya 2011, serves as evidence that "low" membership in the row 6 combination of conditions [proximity and ~government stability and ~institutionalisation] is sufficient for cooperation. The remaining three cases have a membership value of 0.4 in the outcome, as well as a low membership value in the combination [proximity and ~government stability and ~institutionalisation]. Thus, although all the cases are above the x=y line, there is only weak empirical evidence suggesting that combination of conditions captured through row 6 is sufficient for cooperation and row 6 is coded 0 to exclude it from logical minimisation.

Figure 6-4: Distribution of cases in row 6 of Table 6-4



Source: Author's own calculation using software fs-QCA 2.5

Consistency values for row seven is even lower, at 0.62, as Table 6-4 shows, and the majority of the cases do not support the statement that the combination of high proximity, high government stability and a low level of institutionalisation is sufficient for cooperation. Rows 6 and 7 in Table 6-4 show that three cases (Kenya 2011, Serbia 2005 and Uganda 2006) contradict the statement that the causal combinations captured in these two rows are insufficient for cooperation.

In cs-QCA, contradictions occur when some cases in a particular row of a truth table show the outcome while other cases do not (Ragin 2009, 27). In other words, the empirical evidence suggests that the same causal combination is both associated and not associated with the outcome. Within fs-QCA,

contradictory cases can occur as well, but are more difficult to identify. A low consistency value can imply that a particular condition is not a subset of the outcome (in other words, it is an insufficient condition). However, a low consistency value can also imply that that row of the truth table contains contradictory cases (Rubinson 2013, 2858). According to Rubinson (2013, 2858), in fs-QCA contradictions occur when some of the cases associated with a particular row of a truth table are consistent subsets of the outcome, whereas some are not. However, this definition is very strict and additionally identifies as contradictory cases with little empirical value or those violating the subset relation only marginally. To relax this definition, Rubinson (2013, 2848) uses a "consistency proportion threshold" which "operationalizes contradictions as a ratio of consistent to inconsistent observations".

An alternative definition of contradictory cases was proposed by Schneider and Wagemann (2012a, kindle 2780, 8305). Their definition of "true logical contradictions" is an extension of the Ragin's definition of contradictions in cs-QCA. To recall, in cs-QCA contradictions occur when some cases in the same causal combination experience the outcome and some not (Ragin 2009, 27). By extension in fs-QCA, contradictions are present when cases in the same row of a truth table show outcome membership both above and below 0.5 (as in Figure 6-4). As put by Schneider and Wagemann (2012a, kindle 4894), for sufficiency, true logically contradictory cases are "inconsistent cases (i.e. X >Y) that have membership in X >0.5 and in Y<0.5". By logical deduction, for insufficiency, true logically contradictory cases are consistent cases (i.e. X < Y) that have membership in X <0.5 and in Y>0.5.

Contradictions in cs-QCA are an important indicator of an unspecified theoretical model and always need to be addressed by the researcher (Rubinson 2013, 2850). A similar role can be played by the concept in fs-QCA as well.

However, depending on the definition, the number of identified contradictions may vary. Although both above-described definitions are logically correct, Rubinson's definition is at times misleading, as it is not able to differentiate between empirically important true logical contradictions, and contradictions of little empirical relevance, where the subset relation may be violated only marginally. Due to this deficiency, I adopt Schneider and Wagemann's definition (2012a, kindle 4894) when reporting contradictions in Table 6-4 as well as in the remainder of this chapter. In instances where standard techniques do not help to resolve contradictory cases as defined by Schneider and Wagemann, Rubinson's (2013, 2848) "consistency proportion threshold" is used when deciding whether to include a contradictory row of the truth table in the minimisation process.

In the first QCA step, the problem with contradictory cases can be related to the methodological procedure of two-step QCA, rather than an unspecified theoretical model. From a theoretical perspective, an analysis that accounts only for domestic conditions is not able to fully explain state behaviour since the theory review identifies a mix of domestic and international conditions as causally relevant. It is therefore not surprising that a QCA that relies on only some of the causally relevant conditions produces a truth table with contradictory rows. The dilemma in this case is whether to include these rows in the analysis or not. If the rows are not included, the risk exists that a relevant causal combination will be excluded, whereas including the contradictory rows could mean that the results are based on observations not supported by empirical evidence.

In row 6 of Table 6-4, only one case out of four supports the statement that the causal combination is sufficient for cooperation. In row 7, only two cases out of 12 have outcome membership above 0.5, whereas the majority of the

cases suggest that the causal combination is not sufficient for cooperation. Turning to Rubinson's (2013) "consistency proportion threshold", the analysis suggests that 75% of the cases in row 6 are not sufficient for cooperation.[15] In row 7, 70% of the cases are not sufficient for cooperation.[16] Since the majority of the cases suggest that the causal combinations in rows 6 and 7 are not sufficient for cooperation, these truth table rows are coded 0 (Table 6-4).

Next, the information contained in rows 1–5 in Table 6-4 is logically minimised with help of Booelan logic to deliver a solution formula describing causal pathways leading to the outcome. When conducting the analysis, in the first step, the consistency threshold is set at 0.75 and logical remainders are included in the Boolean minimisation process in order to deliver the most parsimonious solution (Schneider and Wagemann 2006, 770). This is consistent with Schneider and Wagemann's (2006, 770) proposal:

> "In the first step of the two-step fs/QCA approach our model is deliberately under-specified and is therefore not expected to show a (close to) perfect fit to the data. This is why we speak of … enhancing contexts at this point. Only when proximate factors are added to the analysis in the second step should the solution terms be found that combine remote and proximate factors and that lead to an (almost always) consistently sufficient result.

By choosing relaxed measures, "outcome-enabling conditions" with imperfect consistency scores are identified in the first step of the fs-QCA (Schneider and Wagemann 2006, 770).

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[15] Both the "consistency threshold" and the "consistency proportion threshold" were set at 0.75. Kirq software (Rubinson and Reichert 2011) was used for the calculation.

[16] The consistency threshold was set at 0.75 and the consistency proportion threshold at 0.7. Kirq software (Rubinson and Reichert 2011) was used for the calculation.

The analysis delivered following parsimonious solution:

~proximity OR institutionalisation → cooperation

In other words, the absence of proximity or the presence of institutionalisation is sufficient for cooperation.

As Table 6-5 shows, the raw coverage for the outcome-enabling context non-proximity is 0.76. The solution has a strong consistency score of 0.83. Typical cases (Schneider and Makszin 2014, 451) are displayed in the fifth column. Cases in bold are uniquely covered typical cases.[17] The solution covers one contradictory case, Croatia 1999. Croatia's cooperation in 1999 was assessed as mixed (0.3), despite the low proximity of ICTY suspects to societal elites.

Institutionalisation is an even more consistent subset of the outcome, with a consistency value of 0.92. However, the raw coverage is much lower, with a value of 0.41. Low unique coverage (0.06) suggests that, to a large extent, cases covered by the outcome-enabling context institutionalisation are captured by the context ~proximity as well. Indeed, the solution displays only three uniquely typical cases, denoted in bold type; Serbia 2006 and 2007 and Croatia 2004.

Both solutions cover 82% of the observations where cooperation occurred and their combined consistency is relatively high, at 0.82.

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[17] Schneider and Makszin's (2014, 451) definition and system of notation for typical and uniquely typical cases is used:

> "Typical cases are (a) good empirical instances of the welfare regime type (X) and the outcome (Y) and (b) in line with the statement of sufficiency, i.e. cases with X > 0.5 and Y > 0.5 and X <= Y (Schneider and Rohlfing 2013). Uniquely covered typical cases are those which fulfil these requirements only with respect to one of the [pathways]."

Table 6-5: First step results

	Raw coverage	Unique coverage	Consistency	Typical cases	Contradictions
~proximity	0.76	0.41	0.83	S08, **S09**, S10, S11, **C97**, **C98**, **C00**, **C01**, **C02**, C03, C05, C06, **U05**, **K10**	C99
institutionalisation	0.41	0.06	0.92	**S06**, **S07**, S08, S10, S11, C03, **C04**, C05, C06	
solution coverage: 0.82					
solution consistency: 0.82					

Source: Author's own calculation using software fs-QCA 2.5

6.3.2. Second step: Inserting international conditions in the analysis

In the second step, the interaction of international conditions with the identified domestic contexts is analysed. As described by Schneider and Wagemann (2003, 28), a context is a particular pathway leading to an outcome as identified in the first step. Applied to this dissertation, two single-condition contexts separated through a logical OR were identified:

Context A: ~proximity

Context B: institutionalisation

The two-step QCA is a new approach and, as such, it has evolved with regard to the conduct of the second step. Accordingly, there are three ways of combining the international conditions (outreach, international pressure, independence) and the outcome-enabling contexts surviving the first step (non-proximity, institutionalisation). In the literature, all three options have been applied, but the authors have offered little justification for their choices.

In the following, the different options as well as their weaknesses and strengths will be discussed.

6.3.2.1. Methodological discussion

The first methodological option (option 1) was introduced by Schneider and Wagemann (2003) and later applied by Korhonen-Kurki et al (2014). In the second step, these authors perform separate QCA analyses for each of the contexts and only those cases with membership higher than 0.5 in the relevant context condition are included in the analysis (Korhonen-Kurki et al. 2014, 170; Schneider and Wagemann 2003, 30).[18] This means that the dataset is split into as many smaller datasets as there are outcome-enabling contexts identified in the first step. When applied to this dissertation, two QCAs need to be performed:

1) Sub-analysis A to test sufficiency for "non-proximity" together with "outreach" and "international interests". Only cases with a proximity membership value lower than 0.5 are included in the analysis.
2) Sub-analysis B to test sufficiency for "institutionalisation" together with "outreach" and "international interests". Only cases with an institutionalisation membership value higher than 0.5 are included in the analysis.

The second methodological option (option 2) follows the same procedure with regard to combinations of conditions, but the analyses are run on the whole dataset. The method was used by Hanley and Sikk (2012, 15) and

[18] Although Schneider and Wagemann's 2003 article does not report the truth table, the comments in footnotes 50 and 53 about the small number of cases within each of the contexts indicates that the second-step analysis includes only cases with membership higher than 0.5 in the context condition.

Schneider and Wagemann (2006).[19] Even though Schneider and Wagemann (2006, 771) do not point out the change in method in the text, a quick look at the second-step results reveals that this time all cases were included, irrespective of whether they have membership values higher than 0.5 in the relevant context.

Even though the procedures in options 1 and 2 are similar, which cases are included in the analysis has twofold implications. If option 1 is used and only those cases having membership values higher than 0.5 in the domestic context are included in the dataset, the problem of limited diversity becomes more prominent. None of the truth table rows containing negation of a context condition will be populated. Table 6-6 and Table 6-7 illustrate the results for the two contexts, run according to option 1 (i.e. with divided datasets).

Table 6-6: The second-step truth table for the context "institutionalisation" (option 1, with divided dataset)

Institut.	Outreach	Intl. Interests	Nr. Of cases	Cooperation	Consistency	Contradictions
1	1	1	9	1	0.90	-
1	1	0	0			
1	0	1	0			
1	0	0	0			
0	1	1	0			
0	1	0	0			
0	0	1	0			
0	0	0	0			

Source: Author's own calculation using software fs-QCA 2.5

The following solution formula summarises the information in Table 6-6:

institutionalisation and outreach and intl. interest → cooperation

[19] Reported in Table 4 on page 772.

Table 6-7: The second-step truth table for the context "~proximity" (option 1, with divided dataset)

Prox	Intl.	Outreach	Nr. Of cases	Coop	Consistency	Contradictions
0	1	1	9	1	0.96	-
0	0	0	6	1	0.88	-
0	1	0	0			
0	0	1	0			
1	1	1	0			
1	0	0	0			
1	1	0	0			
1	0	1	0			

Source: Author's own calculation using software fs-QCA 2.5

The complex solution describes the following two pathways leading to the outcome, as identified in Table 6-7.

~proximity and ~intl. interests and ~outreach → cooperation

~proximity and intl. interests and outreach → cooperation

Through its strong restriction of included cases, option 1 leads to the population of just a single truth table row in the case of non-proximity and only two rows in the case of institutionalisation. The problem of limited diversity becomes so prominent that application of the Boolean minimisation algorithm is not possible. The complex solution merely describes the observed truth table rows and is difficult to interpret.

Turning to option 2, which includes all cases, the probability that the final truth table will contain contradictory rows increases, especially for those contexts with low unique coverage. Contradictory cases are used in the QCA to identify problems with the underlying theoretical model. These contradictions, however, may not mean that the theoretical model as such is imprecise, but that the methodological procedure is inaccurate. Namely, the contradictory rows may contain cases which are explained by the other context. For

example, Table 6-8 shows the truth table for the context "institutionalisation" run according to this methodological option.

Table 6-8: The second-step truth table for the context "institutionalisation" (option 2, with the complete dataset)

Row	institut.	outreach	intl.	Nr. Of cases	coop	raw consist.	Contradictions
1	1	1	1	9	1	0.910614	-
2	0	0	0	17	0	0.568238	C97, C98, C00, U05, U06, K10, K11[20]
3	0	1	1	8	0	0.686987	S09, C01[21]
4	1	1	0	0			
5	1	0	1	0			
6	1	0	0	0			
7	0	1	0	0			
8	0	0	1	0			

Source: Author's own calculation using fs-QCA 2.5 software

When trying to resolve this procedural problem and looking at current applications of two-step QCA, I found a third option for running the second step (option 3). Used by Schneider (2009) and described by Magetti (2015), this solution does not conduct sub-step analysis for each of the contexts. Instead, it includes in the second step all domestic conditions which passed the first step and analyses them together with the international conditions. Accordingly, the second step analyses all conditions with the exception of "government stability", which did not pass the first step. This approach decreases the risk of contradictory rows and as a result delivers more reliable results. Furthermore, by relying on the whole dataset, option 3 does not unnecessarily exclude relevant cases from the analysis. Since only two

[20] Contradictory with the statement that the causal combination in row 2 is insufficient for cooperation.

[21] Contradictory with the statement that the causal combination in row 3 is insufficient for cooperation.

conditions survived the first step, in the second step a total of four conditions is analysed. As Table 6-9 illustrates, out of 16 logically possible combinations, six rows are populated by cases. Even though the issue of limited diversity creates a problem, it is less of a problem than in option 1, where only 3 out of 18 truth table rows were populated by cases. However, in datasets where a large number of contexts survive the first step QCA, option 1 may be the more appropriate strategy.

Table 6-9: Second-step truth table (option 3, using all cases and all contexts)

Row	Prox.	Insti-tut.	outreach	Intl	Nr of cases	coop	Con-sistency	Contradictions
1	1	1	1	1	3	1	1	
2	0	1	1	1	6	1	0.98	
3	0	0	1	1	3	1	0.93	
4	0	0	0	0	6	1	0.72	C99
5	1	0	1	1	5	0	0.69	S05
6	1	0	0	0	11	0	0.48	U06, K11
7	0	0	0	1	0			
8	0	0	1	0	0			
9	0	1	0	0	0			
10	0	1	0	1	0			
11	0	1	1	0	0			
12	1	0	0	1	0			
13	1	0	1	0	0			
14	1	1	0	0	0			
15	1	1	0	1	0			
16	1	1	1	0	0			

Source: Author's own calculation using fs-QCA 2.5 software

In conclusion, the review of three methodological options for conducting the second step of QCA showed that option 2 (sub-step QCA for each context, all cases included) is logically inferior to options 1 and 3, since contradictory truth table rows may occur despite the identification of all relevant theoretical conditions. The usefulness of option 1 (sub-step QCA for each context, inclusion of cases associated with the relevant context) or option 3 (all con-

text conditions examined at once together with proximate conditions, all cases included) depends on the properties of the specific dataset. With datasets where only one or two conditions survive the first step, such as in Magetti (2009), option 3 is the most efficient choice, since it does not aggravate the problem of limited diversity by shrinking the dataset. Option 1 appears to be more suitable for datasets with more than two contexts surviving the first step, as in the case of Korhonen-Kurki et al. (2014)'s analysis. Although option 3 results may be easier to interpret since the outcome-enabling contexts are analysed separately, they remain highly descriptive without use of logical minimisation, due to the aggravated problem of limited diversity. For this reason, in the remainder of this chapter, I used option 3 and Table 6-9 is the truth table of reference.

6.3.2.2. Second-step results for cooperation

For logical minimisation, the consistency threshold is set at 0.71 and logical remainders are excluded from the analysis to deliver a complex solution. Despite Schneider and Wagemann's (2012b, kindle 5164) recommendation to use a higher consistency threshold in the second step, the value 0.71 has been chosen as the consistency threshold in order to include row 4 in the logical minimisation (see Table 6-9). Although the inclusion of that row may appear to go against standard QCA recommendations, theoretical reasons justify the inclusion of this causal combination in the Boolean minimisation.

Five out of six cases populating row 4 have set-membership 0 or close to 0 in the causal combination and higher than 0.5 in the outcome. Ragin (2009, 130) argues that "if most cases have very low or zero membership in a combination" the causal combinations are empirically trivial. However, since proximity is expected to contribute to cooperation only when the fuzzy

membership value is 0 or close to 0, an observation confirming this expectation is not seen as trivial. On the contrary, the presence of cooperation in the absence of proximity as well as the absence of institutionalisation, the absence of outreach and the absence of international pressure offer relevant insights which will be highlighted in section 6.5 by providing links to specific cases.

Next to the issue of triviality, rows with low membership in the causal combination can create analytical problems since they can be consistent sub-sets of both outcome and its negation (Schneider and Wagemann 2012b, kindle 3191, 4852). However, to avoid this problem the present analysis looks both at consistency values as well as at whether the outcome membership value for a majority of cases lies above or below the qualitative 0.5 anchor. In row 4, four out of five cases have low membership values in the causal combination and an outcome membership value above 0.5. As a result, when conducting QCA for non-cooperation, the outcome for all cases will be lying below the 0.5 anchor and assigned a value of 0. In other words, when the analysis considers both consistency values as well as whether the outcome for a majority of cases lies above or below the qualitative 0.5 anchor, the logical problem of using the same row for explaining the outcome as well as its absence does not occur.

Setting consistency threshold at 0.71 and opting for a complex solution delivers the results presented in Table 6-10.

Table 6-10: Second-step results for cooperation according to option 3

	raw cover-age	unique cover-age	con-sistency	Typical cases	Contra-dictions
~prox*outreach*intl	0.44	0.11	0.95	**S09**, S10, S11, C01, C05, C06	
institut*outreach*intl	0.35	0.04	0.91	S10, S11, **C04**, C05, C06	
~prox*~institut*~outreach*~intl	0.29	0.27	0.72	**C97, C98, C00, U05, K10**	C99
solution coverage: 0.74					
solution consistency: 0.83					

Source: Author's own calculation using fs-QCA 2.5 software

Second-step analysis identified three sufficient paths cooperation with ICTs. The three causal combinations explain 74% (solution coverage) of the cases where cooperation occurs and have a total consistency of 0.83. There is one outlier (Croatia 1999) which is not consistent with the identified solution (2012a, kindle 8305).[22]

6.3.4. Second-step results for non-cooperation

Due to the asymmetric nature of set theory (Ragin 2009, 17), cooperation and non-cooperation need to be analysed separately. As in the previous section, two-step QCA option 3 is used, according to which in step 2 all cases are included and all outcome-enabling contexts are analysed simultaneously.

Table 6-11 displays the truth table for step 1. The consistency threshold is set at 0.82 and only rows with higher levels are coded 1 in the column cooperation. Row 3 is excluded from the Boolean minimisation process even though

[22] According to Schneider and Wagemann (2012a, kindle 4894), true logically contradictory cases are "inconsistent cases (i.e. X >Y) that have membership in X >0.5 and in Y<0.5." Croatia 1999 (x = 0, y = 0.3) does not fulfil these conditions.

its constituency value is relatively high, at 0.8. As explained in the previous section, cases with low membership in the causal combination can be consistent subsets of both the outcome and its negation, which creates a logical problem. The only case populating row 3 is Kenya 2010, with a membership value in the causal combination of 0.05 and outcome membership value of 0.4. By being more outside than inside of the set non-cooperation, it offers weak empirical evidence. The causal combination is classified as insufficient and coded 0 in the column non-cooperation. Rows 1 and 2 contain three contradictory cases, but since the majority of the cases populating these two rows suggest that the causal combinations are sufficient for cooperation, the truth table rows are coded 1.

Table 6-11: First-step truth table for outcome non-cooperation

Row	prox	govstab	institut	number	~coop	raw consist.	Contradictions
1	1	1	0	12	1	0.85	S05, U06
2	1	0	0	4	1	0.84	K11
3	0	0	0	1	0	0.80	
4	1	0	1	1	0	0.76	
5	1	1	1	2	0	0.70	-
6	0	1	0	8	0	0.59	C99
7	0	1	1	6	0	0.43	
8	0	0	1	0			

Source: Author's own calculation using fs-QCA 2.5 software

In the first step, truth table rows scoring 1 as well as the only logical remainder row are included in the Boolean minimisation process. As displayed in Table 6-12, the parsimonious solution identified proximity and non-institutionalisation as sufficient for non-cooperation.

Table 6-12: First-step results for non-cooperation

	raw coverage	unique coverage	consistency	Contradictions
Proximity and ~institutionalisation	0.78	0.78	0.77	K11, U06, S05

Source: Author's own calculation using fs-QCA 2.5 software

The combination of proximity and absence of institutionalisation explains 78% of the cases where cooperation does not occur. The consistency of the causal combination lies at 0.77 and is expected to increase after the second-step QCA is employed. Both conditions are included in the second-step QCA together with outreach and international pressure for cooperation. Table 6-13 displays the set-membership representation for all four conditions, as well as the outcome. The consistency threshold for inclusion in the Boolean minimisation process is set at 0.8 and causal combinations with lower consistency are coded 0.

Table 6-13: Second-step truth table for non-cooperation

Row	prox	institut	outreach	intl	number	~coop	Consistency	Contradictions
1	1	0	1	1	5	1	0.82	S05
2	1	0	0	0	11	1	0.81	U06, K11
3	0	0	1	1	3	0	0.72	
4	1	1	1	1	3	0	0.61	
5	0	0	0	0	6	0	0.59	C99
6	0	1	1	1	6	0	0.38	
7	0	0	0	1	0			
8	0	0	1	0	0			
9	0	1	0	0	0			
10	0	1	0	1	0			
11	0	1	1	0	0			
12	1	0	0	1	0			
13	1	0	1	0	0			
14	1	1	0	0	0			
15	1	1	0	1	0			
16	1	1	1	0	0			

Source: Author's own calculation using fs-QCA 2.5 software

To deliver a complex solution in step 2, only rows coded 1 are included in the logical minimisation process and logical remainders are excluded. Two causal combinations sufficient for non-cooperation are identified, as shown in Table 6-14.

Table 6-14: Second-step results for non-cooperation

	raw coverage	unique coverage	consistency	Typical cases	Contradiction
prox*~institut*~outreach*~intl	0.39	0.34	0.81	**S96, S97, S98, S99, S00**	U06, K11
prox*~institut*outreach*intl	0.38	0.33	0.82	**S01, S02, S03, S04**	S05

Source: Author's own calculation using fs-QCA 2.5 software

Proximity and absence of institutionalisation are shared by both pathways and the rule of distributivity allows them to be factored out (Schneider and Wagemann 2012a, loc 1261) . The simplified solution term is then:

proximity and ~institutionalisation (~intl. interests and ~outreach OR intl. interests and outreach) → ~cooperation

Although the intersection "~intl. pressure and ~outreach" may convey the impression that it is a complement of "intl. pressure and outreach", they are not and their union does not create a universal set.[23] As a result, the formula cannot be further simplified and reads as follows: when the number of high-level suspects from a given state is higher than four and the relevant domestic legislation has not been adopted, cooperation does not occur when international pressure for cooperation is present and outreach takes place, or

[23] The complement of "~intl. pressure * ~outreach" is "intl. pressure + outreach" and the complement of "intl. pressure * outreach" is "~intl. pressure + ~outreach".

when international pressure and outreach are absent or the activities are relatively limited. The solution coverage lies at 0.72 and consistency at 0.80.

6.4. Contradictory cases

The dataset contains four contradictory cases (Croatia 1999, Kenya 2011, Serbia 2005, Uganda 2006). In order to resolve the problem with the contradictory rows, standard procedures were followed (Schneider and Wagemann 2010, 9). First, outcome definition and calibration were reviewed for inaccuracies. Second, two additional conditions were added to the analysis in an attempt to increase precision of the model. The condition "polity" (Marshall, Gurr, and Jaggers 2015), measured the degree of democracy and autocracy; and the condition "rule of law" measured confidence in law enforcement (World Justice Project 2012). However, neither of the strategies resolved the problem and in the latter case the complexity of the results increased significantly.

A detailed look at the cases reveals why these strategies could not address the problem. Croatia's sudden change in level of cooperation may be explained by rumours about Tudjman's imminent indictment. Peskin (2008, 105) argues that "by 1999, the Croatian president was reportedly convinced that he would face indictment." It is not surprising that the model is not sensitive enough to capture the fact that the government was acting in response to confidential information not yet in the public domain.

Kenya in 2011 was adapting to the political shock caused by the publication of the names of the ICC suspects. Uganda in 2006 started negotiations with the Lords Resistance Army (LRA) during which the LRA put immunity from ICC prosecutions as precondition to success of the peace negotiations. In

these initial phases following major political shocks any model would struggle to capture the fluid dynamics of the situation.

At last, Serbia 2005 is empirically only marginally contradictory. For four cases in row 1 in Table 6-14 (prox*~institut*outreach*intl) cooperation level remains below 0.5. In 2005, Serbia's cooperation increased to 0.55 and the case becomes contradictory only by the 0.05. This marginal difference may be due to my subjective measurement.

To ensure that the results are robust, I conducted tests for both the outcome "cooperation" and the outcome "non-cooperation" on a dataset excluding all contradictory cases. The identified causal pathways were the same as those reported in sections 6.4. and 6.3.2.2. The consistency of the results slightly increased as could be expected. In other words, the results reported in this chapter are robust. The results of the robustness test can be found in the annex 2 that presents the test without the inclusion of contradictory cases.

6.5. Interpretation of the results

To interpret the results, the pathways identified will be analysed and linked to the observed cases, with the aim of providing practical examples of causal mechanisms driving or obstructing cooperation. Next, the hypotheses formulated in Chapter 3 will be juxtaposed with the results in order to assess their accuracy.

6.5.1. Explaining cooperation

The two-step QCA identified three alternative pathways sufficient for cooperation:

(Pathway 1)

~proximity and outreach and international interests

OR

(Pathway 2)

institutionalisation and outreach and international interests

OR

(Pathway 3)

~proximity and ~institutionalisation and ~outreach ~international interests

→ Cooperation

With the exception of the court independence, which was excluded from the analysis, none of the conditions was identified as necessary for cooperation. In the first step, two alternative domestic contexts enabling cooperation were identified: first, absence of proximity; and second, the presence of institutionalisation. To put it another way, for cooperation to occur the government has to view cooperation as being in its interest or domestic legislation supporting cooperation as well as enforcement of ICL has to be in place. Interestingly, the results do not indicate that both conditions have to be always simultaneously present. These results are in line with the theories reviewed. At the core of realist thought is the statement that cooperation can occur only when it is recognised as beneficial by the incumbent government. This is hardly surprising and from a practitioner's point of view the question immediately arises of whether cooperation occurs also in situations where the court aims to prosecute suspected perpetrators who are part the of political or military leadership.

When domestic legislation is in place and is reinforced through international pressure for cooperation and combines with well-funded outreach of an international court, cooperation occurs in all of the observed cases. However, it needs to be pointed out that the low unique coverage value of 0.04 of the sec-

ond causal pathway suggests that six out of the nine cases characterised by this context exhibit absence of proximity as well. In three cases, cooperation occurred despite close proximity of the suspects to the elites: in Serbia 2006 and 2007 as well as in Croatia 2004. The overall tendency in Serbia during the relevant period was a decline in the numbers of high-level suspects. While in 2005 eleven high-level suspects were being sought by the ICTY, in 2006 and 2007 the number decreased to four, which is given a value just above the 0.5 fs-threshold. In 2008, the number further decreased and, with three open arrest warrants and an fs-value of 0.32, Serbia moved out of the set of states with high proximity of suspects to societal elites. It may be this declining tendency combined with significant international pressure which can explain Serbia's cooperation in 2006 and 2007. However, Croatia 2004 offers empirically strong support for the claim that institutionalisation is sufficient for cooperation, irrespective of the domestic interests constellation. The number of high-level outstanding indictments suddenly rose between 2003 and 2004, from three to nine, and cooperation not only remained the same but improved, to reach a nearly full set-membership value, of 0.9. The case thus provides much stronger empirical support for the statement that cooperation can occur despite a high political cost of the indictments for the incumbent government. As pointed out by Peskin (2008, 137) important role in this case was also played by favourable international interest constellation, namely upcoming EU decision "on whether to designate Croatia an official applicant to join the EU in 2007".

If the first-step results already suggest that these two contexts are sufficient for cooperation, is there are any role for international society and the court in increasing the levels of cooperation? The results show that there is some room for influence, even though it may be limited. The simultaneous pres-

ence of outreach and international pressure increase the consistency for the non-proximity context from 0.83 in step 1 to 0.95 in step 2.

Once relevant legislation is in place, the consistency value no longer increases when international pressure and outreach are added to the analysis in the second step. In fact, a 0.01 decrease occurs in the second step. The difference is too small to be interpreted as a reduction. This result appears to provide support to constructivist claims that once a state internalises certain norms it will cooperate, regardless of external incentives. However, a precise look at the cases shows that in the current dataset, all cases where relevant legislation had been adopted had simultaneously experienced outreach and international pressure for cooperation. Cases, where institutionalisation was present and the other two conditions were absent, are not observed in the current dataset. To convincingly confirm this constructivist hypothesis, further research would be needed.

The last causal combination may appear puzzling, since cooperation takes place despite the absence of outreach, the absence of institutionalisation and the absence of international pressure for cooperation. From a theoretical perspective, only low proximity is expected to be a force driving cooperation while the absence of the other three conditions is expected to prevent cooperative behaviour. Nevertheless, Croatia in 1997, 1998, and 2000, Uganda in 2005, Kenya in 2010 all cooperated. The condition "proximity" is calibrated in a way to be particularly sensitive to instances where it prevents cooperation rather than stimulates it. The 0.5 threshold for proximity is set at 3.9. As a result, even if one or two high-level suspects are indicted by the ICT the case will be assigned to the set of countries with low proximity. The measure is thus sensitive when capturing instances expected to obstruct cooperation, but is not sensitive to instances where proximity can be a driver of coopera-

tion. Such instances occur where the ICT's indictments not only do not harm a state's interests, but the indictments in fact directly further the interests of the incumbent government. All three states were at the beginning of their involvement with the ICTs. During this initial period, cooperation was deemed to be highly beneficial. The ICC initiated investigations in Uganda after self-referral of the Ugandan government, which had for years been struggling to control the situation in Northern Uganda and to prevent the crimes committed by the Lord Resistance Army directly weakening Ugandan sovereignty (see Nouwen and Werner 2010, 948).

In Kenya, the ICC investigation was initiated in *proprio motu* by the Prosecutor following an agreement with the Kenyan government. Kenyan parliamentarians were choosing from two options when deciding about the mode of prosecution for the orchestrators of the 2008 post-election violence. Initially, a domestic tribunal was to be established, but following a vote which failed to pass the necessary legislation Kenyan parliamentarians, with the catch phrase "Don't be vague, let's go to the Hague", effectively set in motion an ICC investigation (Ollinga and Kibor 2015). However, Kenyan cooperation was only short-lived and as soon as the ICC indictment was issued against several members of the government, the first hints of a change in attitude became apparent as discussed in the introduction.

Similar dynamics can be observed in Croatia, which in the hope of delegitimising Serbia, was among the states calling for the establishment of the Yugoslav tribunal (Peskin 2008, 98). It is probably this initial alignment of national interests and the ICT's objectives which drove cooperation in these cases. However, in Uganda and Kenya the alignment appeared to be only short-lived and in the absence of external pressure for cooperation and of domestic legislation, the levels of cooperation soon decreased. In contrast,

Croatia, which experienced external pressure for cooperation and adopted relevant legislation, maintained its cooperation, despite the ICTY's politically sensitive investigations into Operations Flash and Storm and a subsequent increase in the number of indictments (see Peskin 2008, 104).

6.5.2. Explaining non-cooperation

One condition – absence of institutionalisation – passed the necessity test for non-occurrence of cooperation. Two causal alternative pathways sufficient for non-cooperation were identified.

proximity and ~institutionalisation (~intl. interets and ~outreach OR * intl. interets and outreach) → ~cooperation

Common to both pathways are close links of suspects to the societal elites, simultaneously combined with lack of relevant legislation. When this combination of domestic conditions was present, non-cooperation followed both in cases where international pressure and outreach were absent as well as in cases where both were present.

Within this specific domestic context (proximity and non-institutionalisation), a typical example of a state resisting international interests and outreach (i.e. illustrating the causal mechanism) is Serbia between 2001 and 2004. However, the efforts of international society and the ICTY were not entirely fruitless. Even though cooperation was far from full (it was scored between 0.2 and 0.4), it was an improvement compared with the previous five years of absolute non-cooperation, during which an outreach team did not operate on Serbian territory and international pressure (interests) was weak (scoring 0.3). Even though overall cooperation remained low, there were some spectacular instances of cooperative behaviour, most significantly when former President Milosevic was surrendered to the ICTY on

01/04/2001. The literature links these sudden and temporary spikes in Serbian cooperation to US Congress deadlines for approval of foreign aid (Lamont 2008, 25; Peskin 2008, 69). The evidence suggests than even though the influence of international pressure and outreach is not sufficient to generate full cooperation, if neither domestic interests nor norm institutionalisation favour cooperation, at least partial improvements can be achieved.

6.5.3. Policy implications

The confirmed influence of "institutionalisation" and "outreach" and "international interests" on cooperation could have important policy implications. Institutionalisation was measured by looking at three factors: the extent of ratification of human rights, ICL and humanitarian law treaties (percentage), presence of implementing legislation allowing cooperation with the tribunals (dichotomous), presence of core crimes in domestic law (dichotomous). The definition of implementing legislation for cooperation was relatively lenient. Any sort of implementing legislation would meet the criteria as long as it did not apply temporal restrictions. The results show that even when implementing legislation does not impose an automatic obligation of national authorities to cooperate and requests have to be granted by the government, as in the case of Croatia, cooperation followed as long as the domestic law criminalised the core international crimes and most of the relevant international treaties were ratified.[24]

[24] "Constitutional Act On The Cooperation of Republic of Croatia With The International Criminal Tribunal" – Translation published by the ICTY. Available at http://www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/implementation_legislation_republic_of_croatia_1996_en.pdf

As a result, next to external pressure for cooperation and court outreach, the actors need to invest in creation of model laws and exercise pressure for the adoption of implementing legislation as well as ratification of international human rights and ICL treaties. The case of Croatia also shows that where sovereignty remains a concern, less than ideal implementing legislation (i.e. leaving certain discretionary powers to the government) can still promote effective cooperation.

7. A comparative analysis of the impact of independence on co-operation with international courts

The empirical results presented in the previous chapter suggest that independence of the court (the ICC or the ICTY) is a necessary condition for cooperation. Because the dataset used in chapter 6 offers limited variation in independence, the results are not reliable. To compensate for this deficiency, this chapter tests the impact of court independence on state cooperation, a core element of the effectiveness of international courts. Specifically, it looks at cooperation with a broader range of international courts by shifting the level of analysis away from the state and towards the system level. Thus the unit of analysis is no longer a given state's cooperation, as assessed by the international courts themselves during a specific time period, but the overall extent of compliance achieved by a given court throughout its lifespan. To broaden the spectrum of courts, I look at ICL and human rights (HR) courts, namely the ECHR, IACHR, ICC, ICTY and IMT.[25] By shifting the level of analysis, the theoretical model needs to be adapted and the conditions, even those used in the previous empirical analysis, need to be redefined.

To recall chapter 3, some theories assert that court independence is negatively correlated with effectiveness, and implicitly therefore with state

[25] To recall previously introduced acronyms: European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR) and the International Criminal Court (ICC), the International Criminal Tribunal for Former Yugoslavia (ICTY), the International Military Tribunal in Nuremberg (IMT).

cooperation (Posner and Yoo, 2005). However, several IR scholars make the opposite claim about the effectiveness of independent tribunals (Helfer and Slaughter 1997; Keohane, Moravcsik, and Slaughter 2000, 458). In an attempt to resolve this difference in a comparative setting of five case studies, these two alternative predictions regarding cooperation with international courts are tested, together with two additional conditions stemming from constructivism and realism.

Since it is possible that more than one of the theoretically pertinent conditions or combinations of conditions will lead to cooperation, the most appropriate methodology for this small-n analysis is QCA, which allows me to take "causal complexity" seriously (Ragin 1987, 25). Although a comparative study would also be feasible, a cs-QCA design was more suitable thanks to its ability to capture conjuncturality and multiplicity in a transparent and efficient manner. Although it is possible to use fs-QCA to work with continuous conditions, I choose cs-QCA in this chapter as it is less complex than fs-QCA and provides methodological transparency. On a small dataset of five cases, the cs-QCA illustrates better the logical minimisation procedures and allows the reader to follow all steps of the analytical process.

The remainder of this chapter is structured as follows. Section 7.1 briefly summarises the main theoretical arguments about the role of court independence on cooperation. Section 7.2 introduces the comparative setting and justifies the choice of research design. The operationalisation of the conditions takes place in section 7.3. The analytical core, section 7.4, documents the individual QCA steps and presents the results. The main findings are presented in section 7.5, and this is followed in section 7.6 by a conclusion.

7.1. Theoretical arguments on cooperation and courts' independence

As outlined in chapter 3, a striking feature of the research on the effectiveness of international courts is the contradictory conclusion about the role of their independence. On the one hand, some authors argue that the highest levels of effectiveness are most likely to be achieved by independent tribunals resembling domestic judicial bodies (Helfer and Slaughter 1997; Keohane, Moravcsik, and Slaughter 2000).

On the other hand, Posner and Yoo (2005) argue that a court's independence and effectiveness "are, at best uncorrelated and may be negatively" correlated (2005, 28). Their hypothesis is based on the assumption that international courts operate in a non-hierarchical system in which they do not have at their disposal the mechanisms necessary for the enforcement of their decisions; therefore they have to rely on the cooperation of the state parties, which are less likely to support an independent court, as it will be deemed more likely to violate their interests (Posner and Yoo 2005, 66–67).

The source of these fundamentally different conclusions about the influence of courts' formal qualities, in particular independence, on their performance can be uncovered by incorporating insights from the IR theory. While the above-mentioned authors are primarily concerned with technical aspects of international institutions, realism and constructivism look at the underlying motivation of states to cooperate with such institutions. From the constructivist perspective, states' cooperation can be normatively driven when states coexist in a community governed by a set of internalised norms (Finnemore and Sikkink 1998). In contrast, from the realist perspective, cooperation is driven exclusively by the pursuit of material interests (Mearsheimer 1994).

As opposed to those courts studied by Helfer and Slaughter (ECJ, ECHR), the courts analysed by Posner and Yoo (total of 12 international courts) differ not only in levels of independence, but also with regard to the degree of norm socialisation evident among their member states. Posner and Yoo (2005, 3) consider "the high level of political and economic unification among European states" as the reason behind the effectiveness of the ECHR and the ECJ and argue these courts are "not a good model for international tribunals". In contrast, Helfer and Slaughter (1997) as well as Keohane, Moravcsik and Slaughter (2000) use as examples of effective courts the ECJ and the ECHR.

From my perspective, the influence of independence has to be seen in connection with the degree of norm socialisation among the member states and "material incentives" for cooperation (Lamont 2008, 1). International courts are more likely to be effective if states' "preferences" for a particular norm align (Moravcsik 1995, 178), or if the state parties face strong "material incentives"(interests) for cooperation (Lamont 2008, 1).

This hypothesis combines assumptions drawn from two leading IR theories. Firstly, constructivism focuses on the role of norm socialisation. Constructivists argue that norms have, in addition to a constraining effect, a constitutive effect on states and therefore can redefine their identities (Barnett 2005, 254–255; Finnemore 1996a, 14; Wendt 1999, 36). If a particular norm is internalised by a state, then the following of that norm becomes part of that state's interest and high levels of cooperation can be expected (Finnemore and Sikkink 1998, 904–905). The second assumption is derived from realism, which argues that states comply with international norms out of self-interest. Self-interest is understood as an enhancement of the state's relative power position through an increase in its material capabilities (Grieco 1988, 499; Mearsheimer 1994, 11; Waltz 1979, 126). Therefore, international courts are

expected to be effective only if cooperation is in the interest of the member states. In the cases addressed in this dissertation, cooperation is in the state's interest in two scenarios. First, a state may be coerced to comply through the threat of sanctions or a violation of its sovereignty imposed by stronger actors. Second, a state may consider cooperation beneficial because incentives are offered to it, such as international aid or an invitation to join a regional organisation.

In the context of this dissertation, the following question emerges. Which of the three conditions – material interests, norm socialisation, and court independence – or what combinations of them are associated with cooperation? From the realist perspective, only material interests will be associated with cooperation. From the constructivist perspective, norm internalisation and/or material interests will be associated with cooperation. Although most constructivist authors focus on processes of socialisation, the influence of material interests is also consistent with constructivist reasoning. Lastly, according to Posner and Yoo (2005, 28), lack of court independence is associated with effectiveness and effectiveness implies cooperation. Given Posner and Yoo's (2005, 3) argument that the ECJ and ECHR (which are characterised by high degrees of norm socialisation among their state parties) should not be used as "model for international tribunals", their hypothesis can be refined as follows: in situations where the respective norms have not achieved a high degree of norm socialisation, independence will have negative impact on cooperation.

7.2. The comparative setting

A QCA setting of necessary and sufficient conditions can capture multiplicity and conjuncturality (Ragin 1987). In order to confirm the realist hypothesis

the analysis would have to show that material incentives (interests) are a necessary and sufficient condition for effectiveness. The constructivist hypothesis would be confirmed if norm socialisation was a sufficient condition.

7.2.1. Case selection

To recall, the first step of the QCA is the selection of cases to analyse. The cases should be, on the one hand, "alike enough to permit comparisons" and, on the other hand, provide variation with regard to the specified variables (Berg-Schlosser and De Meur 2008, 20–21). In this comparative setting of international courts, the selected "area of homogeneity", as termed by Berg-Schlosser and De Meur (2008), will be HR and ICL courts. This type of courts has been chosen because ICL and HR regimes allow the extent of norm socialisation to be measured more easily than would be the case with, say, courts with general and trade-related jurisdictions. In an ideal comparative setting, only one type of court would be the focus of the analysis, but because the number of HR and ICL courts is small these two groups will be examined together: they share the goal of protecting humanitarian values. The courts included in this analysis are: the ECHR, the IACHR, the ICC, the ICTY, and the IMT.

Despite the still small number of cases, these courts vary with regard to the outcome condition, as well as all three causal conditions. The selected cases represent a large proportion of the universe of cases: five out of the seven existing ICL and HR courts are included in the analysis. An analysis of the entire universe of ICL and HR courts is inappropriate because of the lack of comparability. In the case of the International Criminal Tribunal for Rwanda (ICTR), the unique constellation of domestic interests in Rwanda prevents

comparability with other courts.[26] The overall cooperation levels are high since it was in the interest of Rwandan government to prosecute the orchestrators of the primarily Hutu-led genocide. These unique political circumstances at domestic level are not replicated to such extent in any of the other examined courts and could bias the results. Furthermore, ICTR structure is almost identical with that of the ICTY. For this reason, ICTR is not included in the analysis. Another possible candidate would have been the African Court of Human Rights, but due to its short existence, empirical data on its performance were not available at the time of writing this chapter.

7.3. Operationalising the conditions

After selecting the cases and outlining the theoretical framework, the four conditions (cooperation, norm socialisation, court independence, and interests) need to be defined, operationalised and measured.

7.3.1. Cooperation

Effectiveness is here treated exclusively in terms of cooperation. Ideally, it would be defined in terms of additional criteria, such as "frequency of use", the contribution made to the "overall success of the treaty regime" or reputation and "awareness of audience", but this would be beyond the scope of this dissertation (Helfer and Slaughter 1997; Posner and Yoo 2005, 29). With re-

[26] Rwanda's cooperation was primarily driven by the political interests of the Tutsi-led government, which was willing to prosecute the Hutu orchestrators of the 1994 genocide (Peskin 2008, 21). This conditionality of Rwanda's cooperation became clear as soon as the ICTR indicted Tutsi perpetrators. The government blocked the trials by imposing travel restrictions on witnesses testifying at the ICTR and obstructed the investigation of crimes committed by Tutsi individuals (Peskin 2008, 1, 153). After the ICTR reported Rwandan non-compliance to the United Nations Security Council and "the US exerted pressure on the Rwandan government" to end the travel restrictions, cooperation with the tribunal was renewed (Peskin 2008, 217), but the ICTR's record in prosecuting Tutsi crimes remained weak (Peskin 2008, 225).

gard to cooperation, it needs to be taken into consideration that none of the international criminal courts and tribunals allows for trials *in absentia*. Further, once the accused is arrested and the trial has begun, 100% compliance with the judgements can be expected. Therefore, to measure the effectiveness of criminal judicial bodies and similarly to the previous analysis in chapter 6, cooperation with the arrest and surrender orders will be analysed. The crisp-set threshold value for cooperation is set at 50%. Courts with overall cooperation rates between 51% and 100% are coded 1, and courts with rates under 50% are coded 0.

Information about cooperation with arrest and surrender orders issued by the ICTY and ICC is compiled from their respective websites up to 1 March 2010. The data on cooperation with the IMT are taken from the information provided by the United States Holocaust Memorial Museum (USHMM: n.d.).

The information on cooperation for the IACHR and ECHR is based on the data provided by Hawkins and Jacoby (2010), who differentiate between full, partial and non-compliance. Due to different compliance regimes of the courts, the authors designed two separate measurement mechanisms.

For the ECHR, they look at a composite of several indicators to determine levels of compliance. Of particular importance for this dissertation is the indicator looking at the length of time before a case was closed by the Committee of Ministers. Compliance with ECHR judgements is monitored by the Committee of Ministers and a case remains open before the Committee until it is satisfied "that just satisfaction has been paid and that appropriate individual and general measures put in place" (Hawkins and Jacoby 2010, 10). According to Hawkins and Jacoby (2010, 60), as of 31 December 2009, 54% of leading cases were closed within two years, 35% of

leading cases had been pending for two to five years and 11% for more than years. In other words, the Committee found full compliance within two years in 54% of the leading cases. Since the data for the criminal courts look at compliance with arrest warrants only in absolute terms and do not account for the time during which the warrant was outstanding, for the ECHR a similar lenience has to be adopted for the purposes of comparison. No exact prediction can be made with regard to how many of the cases open after two years will reach full compliance over time, but a review of the ECHR's database of pending cases can provide an informed estimate. When reviewing pending cases the authors use following coding criteria:

> "We count as non-compliance only those (very few) narratives that contain no evidence of compliance. Partial compliance can be attributed to the bulk of the cases, where there is clear evidence that states have taken some constructive steps but where the Committee asks for evidence of further action. Full compliance is coded for those older pending cases where the case narrative strongly suggests that adequate steps have occurred. Finally, some very new pending cases contain too little information for coding. We note these and then drop them from further consideration." (2010, 55)

After coding a sample of 123 pending cases originating from four states, the authors find "clear evidence of partial compliance in 85 of the 90 leading cases that contain adequate information" (2010, 75). In over 50% of the ECHR cases full cooperation is reached within two years. And in the remaining leading cases indication exists that partial cooperation is present in most of the cases. Accordingly, the crisp-set value for compliance in this case is set at 1.

In the case of the IACHR, Hawkins and Jacoby rely on the compliance records issued by the court. Hawkins and Jacoby (2010, 48) reported that they had

> "compliance reports for 81 cases as of June 23, 2010, the cutoff date for our data. The Court issued 703 compliance orders for those 81 cases. Most of

these cases have more than one compliance report. Some, such as the *Loayza-Tamayo v. Peru* case, have as many as seven compliance reports."

The authors present the data in a number of different ways but for the sake of this analysis I rely on the "graphing [of] the distribution of the percent of compliance orders with which a state complies in any given case" (2010, 57). Table 7-1 reports the percentage of cases where more than 51% of compliance orders were complied with by the state concerned (2010, 57). According to Hawkins and Jacoby (2010, 57), in 47% of the cases the relevant state had complied with 51% or more of the compliance orders in those cases. As pointed out by the authors, their reported compliance rate is much higher than the 4% indicated by Posner and Yoo (2005). The authors attribute the difference to the fact that Posner and Yoo most likely reported only full compliance, i.e "only reported the cases in which states had complied with every aspect of the Court's rulings" (2010, 56). In fact, Hawkins and Jacoby (2010, 57) report a 91% to 100% compliance rate with the court's orders in only 10% of the cases. Given that partial compliance is under 50% and full compliance is very low, the compliance crisp-set value for the IACHR is set at 0.

Table 7-1: Cooperation rates and dichotomy values

ID	Court	Cooperation rate	Crisp-set value
1	ECHR	54% full compliance only	1
2	IACHR	47% full and partial compliance joined	0
3	ICC[27]	38.5%	0
4	ICTY[28]	98.8%	1
5	IMT[29]	95.4%	1

Source: Author's own compilation incorporating ECHR and IACHR data published by Hawkins and Jacoby (2010)

[27] Source: ICC, n.d.
[28] Source: ICTY, n.d.
[29] Source: USHMM, n.d.

7.3.2. Norm socialisation

Norm socialisation is understood here as a process leading to "[internalisation of] new roles or group–community norms" (Checkel 2005, 802). As argued by Finnemore and Sikkink (1998, 894), norm internalisation is the last stage of a long-term process which can be divided into three phases. During the norm emergence and norm cascade phases, when the norm spreads within international society, a mixed record of cooperation can be expected (Finnemore and Sikkink 1998, 895–905). Only when norm has been internalised by the states and enjoys a "taken-for-granted" quality within the given community can high levels of cooperation be expected (Finnemore and Sikkink 1998, 905). To operationalise norm socialisation, I look at the nominal commitment towards international human rights treaties. Nominal commitment is chosen as the most relevant indicator as it is assumed to be an external sign of norm internalisation. The information on nominal commitment is taken from the Nominal Commitment to Human Rights Survey (NCHR Survey) conducted at University College London in 2009 (Çali, Wyss, and Anton 2009). The data are up to date to 1 August 2009.

The survey examines states' nominal commitment to "16 core human rights, international humanitarian, refugee law and international criminal law treaties" (Çali, Wyss, and Anton 2009, 1). Based on the number of treaties ratified (with consideration given to individual petition mechanisms and treaty reservation), the NHCR Survey ranks states into three groups: low (0.000 to 0.359), medium (0.360 to 0.667) and high commitment (0.668 to 1.000) (NCHR Index, 2009).

To distinguish states where norm socialisation is considered high enough to have an impact on cooperation, the threshold value is set at 0.745, which is

the average value among the ECHR member states. As argued by Ragin (2008, 82), in qualitative research

> "the external criteria that are used to calibrate measures and translate them into set membership scores may reflect standards based on social knowledge (e.g. the fact that twelve years of education constitutes an important educational threshold), collective scientific knowledge (e.g. about variation in economic development and what it takes to be considered to be fully in the set of developed countries), or the researcher's own accumulated knowledge, derived from the study of specific cases."

The criterion for setting the threshold is based on the apparent consensus between Posner and Yoo (2005) and Helfer and Slaughter (1997) that norm socialisation among European states impacts on cooperation and the overall effectiveness of the ECHR. As argued by Posner and Yoo's (2005, 3), "the high level of political and economic unification among European states" may have an intervening influence on effectiveness. In a similar manner, Helfer and Slaughter (1997) argue that core features of the ECHR, including "Relative Cultural and Political Homogeneity of States Subject to a Supranational Tribunal", are predictors of greater effectiveness. Therefore, I set norm socialisation among the ECHR member states as the threshold for dichotomisation.

Courts whose state parties' average nominal commitment index is 0.765 and higher will be ascribed a value of 1, whereas courts whose members have an average nominal commitment of 0.764 or lower will be ascribed a value of 0. Table 7-2 summarises the nominal commitment for the selected cases.

Table 7-2: Operationalisation and dichotomy value attributed to socialisation

Case ID	Court	Member states/states within jurisdiction	Average nominal commitment	Crisp-set value
1	ECHR	Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, FYRO, Malta, Moldova, Republic of Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom	0.745	1
2	IACHR	Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, Venezuela	0.625	0
3	ICC	Afghanistan, Albania, Andorra, Antigua & Barbuda, Argentina, Australia, Austria, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Canada, Central African Republic, Chad, Chile, Colombia, Comoros, Congo, Democratic Republic of, Cook Islands, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guinea, Guyana, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Kenya, Korea, Republic of Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, FYRO, Madagascar, Malawi, Mali, Malta, Marshall Islands, Mauritius, Mexico, Mongolia, Montenegro, Namibia, Nauru, Netherlands, New Zealand, Niger, Nigeria, Norway, Panama, Paraguay, Peru, Poland, Portugal, Romania, Saint Kitts and Nevis, Saint Vincent & Grenadines, Samoa, San Marino, Senegal, Serbia, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Suriname, Sweden, Switzerland, Tajikistan, Tanzania, Timor-Leste, Trinidad and Tobago, Uganda, United Kingdom, Uruguay, Vanuatu, Venezuela, Zambia	0.594	0
4	ICTY	UN Member states	0.479	0
5	IMT	US, USSR; France, UK, Germany	0[30]	0

Source: Author's own compilation incorporating data from NCHR Survey

[30] Although the historic IMT member states are not captured by the NCHR Survey, the assessment of norm socialisation is relatively straightforward. The IMT has often been accused of retrospective criminal justice, since one of the three crimes within the jurisdiction of the tribunal was not codified at the time the atrocities occurred, namely the crimes against humanity (Schabas 2004, 6). Furthermore, most of the treaties covered by the NCHR Survey came into force only after the tribunal ceased to exist. Therefore the IMT will is ascribed socialisation value of 0.

7.3.3. Court independence

The operationalisation of independence relies on a definition used by Posner and Yoo (2005). The authors define independence as follows:

> "One point is assigned to each tribunal for each of the following attributes: state can be bound to ruling without its consent to adjudication; possible that no national on panel that hears dispute; judges form permanent body; judges' terms extend beyond a given dispute; third parties may intervene. Maximum score is five points." (Posner and Yoo 2005, 52)

Information about independence with regard to the ECHR, IACHR and ICC is taken from data published by Posner and Yoo (2005, 52), and PICT Research Matrix (n.d.). The independence of the ICTY and IMT is assessed according to the criteria specified by Posner and Yoo. The definition of independence in state-focused analysis in chapters 3 to 6 was broadly based on Posner and Yoo's criteria (2005, 52). I adapted the definition in order to reflect more sensitively the specific nature of the international criminal courts and tribunals. Section 3.5.3 justifies the amendments. In this chapter, the Posner and Yoo' definition is used without any changes in order to be able engage in a discussion with the authors. Table 7-3 summarises the data on independence. Courts meeting up to three of the criteria are ascribed a value of 0, while courts achieving a score between 4 and 5 are ascribed a value of 1.

Table 7-3: Operationalisation and dichotomy value attributed to independence

ID	Court	Jurisdiction	Compl. juris	No right to national	Permanent body of judges	Term of judges	3rd Party Interv	Score	Crisp-set value
1	ECHR	HR	yes	no	yes	6	yes	4[31]	1
2	IACHR	HR	yes	no	yes	6	no	3[32]	0
3	ICC	Intl crimes	yes	no	yes	9	yes	4[33]	1
4	ICTY	Intl crimes	yes	no	yes	4	yes	4	1
5	IMT	Intl Crimes	yes	no	yes	1	no	3	0

Source: Author's own compilation incorporating data published by Posner and Yoo (2005, 52) for the ECHR, IACHR, ICC. The data for ICTY and IMT is compiled from the above listed sources (PICT Research Matrix n.d.).

7.3.4. Interests (material incentives)

Before operationalising material interests for cooperation, the difference between the realist and neoliberal institutionalist understandings of international institutions needs to be recalled. From the neoliberal perspective, states establish international institutions with the goal of achieving higher absolute gains (Grieco 1988, 502). That is, international institutions, by decreasing the probability of cheating, enable cooperation among their member states, which secures them higher absolute gains (Grieco 1988, 495). In pursuit of higher gains, states are willing to undergo short-term loss for future profit (Grieco 1988, 495). In contrast, from the realist perspective, states are motivated to cooperate with international institutions only when they can enhance their relative power position or if they are coerced into cooperation by a stronger state or group of states (Grieco 1988, 499, 502). In the following, the realist understanding of material interests will be applied. Hence, positive values will be ascribed only those courts for which there is

[31] Source: Posner and Yoo (2005, 52)
[32] Source: Posner and Yoo (2005, 52)
[33] Source: Posner and Yoo (2005, 52)

clear evidence that there are instrumental reasons for cooperation (i.e. cooperation with the court leads to enhancement or preservation of the relative power position of the member state concerned). More specifically, cooperation with international courts is most likely to occur when a formal or infor-informal mechanism exists which sanctions non-cooperation and/or provides incentives for cooperation, such as conditionality of development aid or membership in a regional organisation.

This type of mechanism was present for two of the five courts examined: the ICTY and the IMT. In case of the ICTY, international actors, in particular the Security Council, the EU, the US and NATO, played a major role by putting pressure on states for the execution of the arrest warrants (Peskin 2008, 10). In the case of Croatia, the most effective political leverage proved to be the conditionality of EU succession, which enjoyed nearly universal support among Croatian voters (Lamont 2008, 78). In Serbia, the threat of "financial sanctions for non-cooperation with the ICTY" on the part of the US led to enhanced, but still limited, cooperation (Lamont 2008, 75–76, 109–100). As fittingly put by Peskin (2008, 90) in connection with Serbia:

> "when it came to handover of war crimes suspects, state compliance predictably increased shortly before and after the imposition of conditionality deadlines and then decreased during the other parts of the year."

In the case of Bosnia and Herzegovina, external coercion was even more direct, since state sovereignty had been limited by the imposition of an international administration and a military presence. In this context, arrests conducted by NATO forces significantly contributed to cooperation levels of Bosnia (Lamont 2008, 167). The other states within the ICTY's jurisdiction were Slovenia and Macedonia. However, because conflict over their territories, the involvement of the ICTY was minimal.

In case of the IMT, the external coercion was even stronger than in case of the Former Yugoslav Republics, since Germany was under occupation by the Allied powers, which also stood behind the establishment of the Tribunal. For these reasons, the ICTY and IMT are ascribed a value of 1 for the condition "state interests".

The ICC, ECHR and IACHR have enjoyed weaker support than the other courts in terms of external coercion, aid conditionality or sanctions. As pointed out by Bassiouni (2003, 501) the ICC relies on the cooperation of state parties for the "arrest and surrender" of indicted persons (ICC Statute, art 89), for the "execution of searches and seizures" (ICC Statute, art 93 para 1 section h), for the "protection of victims and witnesses and the preservation of evidence" (ICC Statute, art 93 para 1 section j), and for the "freezing or seizure of proceeds, property and assets" (ICC Statute, art 93 para 1 section k), as well as many others. According to Article 86, all state parties are obliged to fully cooperate with the Court, but the statute does not offer strong guidance how the decisions of the Court are to be enforced where cooperation is not forthcoming (Sovereignty, n.d.). Article 87 para 7 allows the Court to "refer the matter to the Assembly of State Parties or, where the Security Council referred the matter to the Court, to the Security Council". Out of the four "situations" before the Court in 2010, only situation in Darfur (Sudan) was referred to it by the Security Council and backed by a sanctions regime (UN Sanctions Committee, n.d). The remaining three cases were initiated by state parties and therefore the Assembly of State Parties (ASP) was responsible for dealing with non-cooperation. The statute does not propose how, in concrete terms, the ASP should ensure cooperation (Sovereignty, n.d.). During the period under examination (up to 1 March 2010), the ASP did not establish any formal procedures for dealing with non-cooperation. Subsequently, in De-

cember 2011 the Assembly adopted a formal set of procedures relating to non-cooperation which have so far resulted in an official statement of the President stressing the importance of cooperation, addressed to the transgressing states (ICC ASP, 2013). Since the ASP is a managerial organ of the Court and has no authority over state parties (ICC ASP, n.d.), in the majority of the cases the Court is weak in securing incentives for cooperation. With the exception of Sudan, no evidence of sanctions or aid conditional on cooperation with the ICC could be found in relation to the remaining situations before the ICC in 2010 (Central African Republic, Uganda and Democratic Republic of Congo).

Similarly to the ICC, the IACHR reports on a yearly basis to the General Assembly of the Organization of American States. However, as summarised by Bailliet (2013, 479 –480)

> "there is little discussion because states are reluctant to have their own human rights situation brought to light. In short, there are no real international sanctions for failure to comply with the Court."

According to Article 46 para 1 of the European Convention of Human Rights the ECHR's judgements are binding upon member states. The execution of judgements is supervised by the Committee of Ministers, which deals with cases of non-cooperation. The Convention specifies in Article 46 paras 4 and 5 that

> "4. If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.
>
> 5. If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the

> Court finds no violation of paragraph 1, it shall refer the case to the Committee of Ministers, which shall close its examination of the case."

The Convention remains silent when it comes to specific measures dealing with non-cooperation once the ECHR has declared that the state was in violation of Article 46 para 1. A brief review of the annual "Supervision of the Execution of Judgements" reports prepared by the Committee of Ministers did not find any indication of a sanctions mechanism consistent with the realist understanding of material incentives.

As a result, the ICC, IACHR and ECHR are ascribed a value of 0 for the condition "state interests".

7.4. Truth table and Boolean minimisation

After introducing the cases and dichotomising the conditions, the data are entered into a truth table. The result is shown in Table 7-4. In the following, Tosmana 1.3.0.0 software was used to analyse the data (Cronqvist 2007).

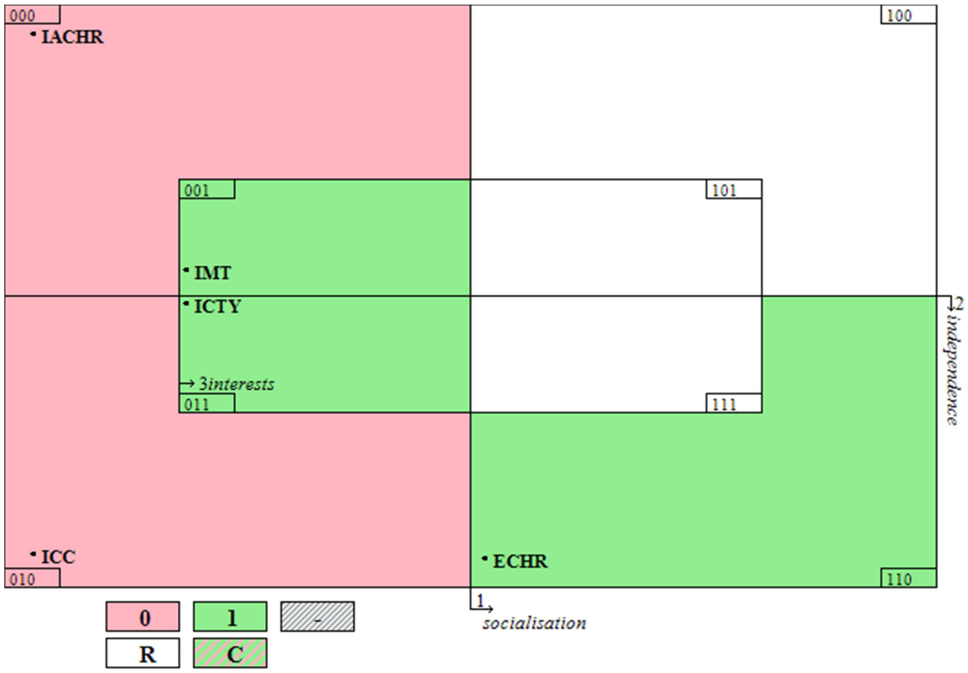
Table 7-4: Truth table

C1:	Norm socialisation	C2:	Court independence	
C3:	State interests			
O:	cooperation	id:	Court	
C1	C2	C3	O	id
1	1	0	1	ECHR
0	0	0	0	IACHR
0	1	0	0	ICC
0	1	1	1	ICTY
0	0	1	1	IMT

Source: Author's own compilation using Tosmana software

The data presented in the truth table can alternatively be presented in the form of a Venn diagram, as in Figure 7-1, which visually demonstrates location of the cases.

Figure 7-1: Venn Diagram



Source: Author's own output using Tosmana software

The Venn diagram (Figure 7-1) shows that five combinations out of eight have been addressed by the selected cases. There are no overlaps among the cases and no contradictions occur.

The combinations expressed in the truth table and the Venn diagram can be transformed into Boolean algebra. The Boolean formula summarising the data in the truth table for the presence of the outcome looks as follows:

socialisation* independence * INTERESTS + socialisation * INDEPENDENCE * INTERESTS + SOCIALISATION * INDEPENDENCE * interests → COOPERATION[34]

[34] Boolean algebra applies following basic conventions: "Uppercase letter represents the [1] value for a given binary variable…. A lowercase letter represents the [0] values for a given binary variable…. Logical 'AND' is represented by the [*] (multiplication) symbol…. Logical 'OR' is represented by the [+] (addition) symbol" (Rihoux and De Meur 2009, 34).

No minimisation has been applied here and therefore the formula remains relatively complex. Nevertheless, it can be observed that none of the conditions is necessary.

The first two possible combinations "differ in only one causal condition, yet produce the same outcome", which, as argued by Ragin (1987, 93), indicates that the differing condition "can be removed to create a simpler… expression":

socialisation * INTERESTS + SOCIALISATION * INDEPENDENCE * interests → COOPERATION

(ICTY+IMT) (ECHR)

The formula indicates that cooperation can be achieved by two separate causal pathways. First, the ICTY and IMT are characterised by a low level of nominal commitment to human rights and strong material incentives for cooperation. Second, the ECHR is characterised by a high level of nominal commitment to human rights combined with a high independence score for the court and absence of material incentives for cooperation.

Thus, the argument that cooperation has multiple causes, namely it can be driven by material interests or norm socialisation in connection with courts independence, is consistent with the formula.

The Boolean formula of truth table for the 0 outcome value states that:

socialisation * interests * INDEPENDENCE + socialisation* interests * independence → cooperation

When minimised following the same rule as above, the final formula looks as follows:

socialisation * interests → cooperation

(IACHR+ICC)

The minimising operations can be done manually, as showed above, or software such as Tosmana can be used. As pointed out by Rihoux and De Meur (2009, 56–64), the minimisation proceeds in four steps. Positive and negative outcomes are separately minimised without inclusion of logical remainders. Then the same is done with inclusion of logical remainders (De Meur, Berg-Schlosser, and Yamasaki 2009, 56–64). However, because the results above are understandable prior to the inclusion of logical remainders, I chose a more conservative approach and omitted their inclusion. Even though a more parsimonious solution could be computed, by excluding logical remainders from the analysis the risk is avoided that simplifying assumptions inconsistent with the underlying model are entered into the computation (Clement 2005, 17; Stokke 2007, 14).

7.5. Interpretation of the findings

The minimised formula for 0 cooperation indicates that a court will be ineffective if the state parties do not achieve a high degree of norm socialisation, or if material incentives for cooperation with the court are not provided. Whether the court is independent does not appear to influence non-cooperation. Thus, Posner and Yoo's argument about a causal connection between dependence and effectiveness could not be confirmed. On the other hand, the formula for 1 cooperation shows that when a court encounters a state with a high degree of norm socialisation, which at the same time is not facing any external coercion/incentives for cooperation, its own independence may have positive influence on cooperation.

Neither could the realist hypothesis be confirmed, since, next to material interests, norm socialisation was associated with cooperation. This contradicts

the realist assumptions that states cooperate with international institutions only if its suits their interests.

Although constructivists in their research focus on the processes of norm socialisation, they admit that actors behave rationally in pursuing their interests. As argued by Finnemore and Sikkink, states can be "extremely rational and, indeed, very sophisticated in their means–end calculations about how to achieve their goals" (Finnemore and Sikkink 1998, 910). Thus, from the constructivist perspective, the behaviour of states can be driven both by internalised norms and by rational interest. This assumption is confirmed by the final result stating that effective courts will be associated with a high degree of norm socialisation or the presence of material incentives for cooperation.

7.6. Limitations on the reliability and validity of the results

One of the main weaknesses of cs-QCA is the need to dichotomise "continuous" variables (De Meur, Berg-Schlosser, and Yamasaki 2009, 150). Since all four conditions used in this chapter are in theory "continuous", the risk exists that the thresholds were not set correctly, which would compromise the validity of the final formula. However, since the cases with regard to each of the variables were distributed in two "distinctive" groups, this type of error is less likely (De Meur, Berg-Schlosser, and Yamasaki 2009, 150).

Second, the population of cases was extremely low. In fact, the small number of cases is the main weakness of the analysis in this chapter. However, there are no other comparable courts that would permit the inclusion of more cases.

Further, there is a risk related to the chosen research design that not all variables with an influence on cooperation were identified and tested (De Meur, Berg-Schlosser, and Yamasaki 2009, 158). It is possible that other formal characteristics of the courts can have an impact on cooperation (Keohane, Moravcsik, and Slaughter 2000). However, with the current number of cases, the inclusion of more variables was not possible.

7.7. Conclusion

The aim is this chapter was to uncover the conditions that influence the effectiveness of international courts. The influence of three theoretically-driven conditions (court independence, norm socialisation and state interests) was measured by application of cs-QCA. The purpose was not only to test (in a comparative analysis) the theories from which these variables were derived, but also to uncover possible conjunctural and multiple relations between independence and the two IR variables. The results indicate that independence can play a role in cases where the court's member states enjoy a high nominal commitment to human rights and lack material incentives for cooperation.

8. Conclusion

The dissertation addressed the question under what conditions do states cooperate with international criminal courts and tribunals. To do so the main theoretical approaches towards cooperation were reviewed. State cooperation with ICTs is a theoretically puzzling subject. A constant tension between normative commitments and national interests may not only the ICTs but also the broader ICL regime. When looking at the ICL regime through the lens of international relations, the "logic of consequences" theories, such as realism (March and Olsen 1998, 949 – 950), focus on the pursuit of interest: states cooperate with ICTs only if actions of the court are compatible with their interests.

In contrast, "logic of appropriateness" theories argue that rules and norms not only have an impact on the way states behave, but also shape the interests states aim to achieve (March and Olsen 1998, 952; Wendt 1999, 25). While "logic of consequences" theories primarily focus on processes of competition (Waltz 1979, 76) and mostly underplay the role of socialisation, constructivist theories pay strong attention to the latter and explain how socialisation influences the identities of states and consequently their behaviour (Wendt 1999, 246). According to constructivists, states develop, over time, a set of norms guiding their coexistence in international society. Consequently, behavioural outcomes are not exclusively determined by the rules of a competitive system as argued by realists (Waltz 1979, 76–77), but also by socialised understandings about appropriate behaviour. Thus, actors' sets of rational (interest-maximising) actions in competing against other states is limited through socialisation (Finnemore and Sikkink 1998, 910). That is, the scope of possible behavioural outcomes is influenced by self-perceived identity and

internalised norms. States pursue only those strategies which are in accordance with their identities and internalised norms (Reus-Smit 1999 as cited in Burchill 2005, 203; Finnemore and Sikkink 1998, 910).

As chapter 2 showed, the evolution of the ICL reflects the constant struggle between these two logics. Since the emergence of the ICL, its provisions have gradually expanded the scope of humanitarian protection, at the expense of state sovereignty. This normative evolution has occurred simultaneously with the expansion of direct and indirect enforcement systems. Today, the ICL regime is characterised by a well-articulated prohibition of international crimes, enshrined in widely ratified international treaties. The law is complemented by a worldwide net of domestic and international courts with jurisdiction to prosecute the perpetrators of war crimes, genocide and crimes against humanity. Realism, with its interest-based reasoning, has difficulty accounting for the gradual strengthening of the ICL regime. As the chapter 2 showed, not only have the definitions of international crimes gradually expanded to cover non-international armed conflicts, but also the institutional make-up of ICTs points towards greater willingness to establish independent courts able to operate free of political considerations. However, normative approaches are weak in explaining why compliance at the ICL regime level remains unsatisfactory by any standard. As argued by Mullins (2010, 80) and Bassiouni (2010c, xiii), out of the 313 conflicts that took place since WWII (and which killed around 100 million people), only 65 were followed by national or international prosecutions.

In this dissertation, I focused on the institutions with the most influence on the overall performance of the ICL regime, the international criminal courts and tribunals. ICTs stand at the centre of the regime, acting as the courts of last instance when national courts fail to prosecute. When ICTs get involved

with a particular state they face a complicated struggle to obtain that state's cooperation. An arrest warrant from an international court violates national sovereignty, especially if high-level state representatives are targeted. Simultaneously, states have a strong normative obligation to cooperate, since the courts investigate and prosecute only in situations where international crimes with the "constitutional" *jus cogens* status occurred. It is therefore not surprising that support for the ICTs fluctuated. A telling example is the ICTY, which, after its initial years, which were plagued by fluctuating cooperation from Serbia and Croatia, managed to generate political support and as a result in 2013 all of the ICTY fugitives were apprehended. In this dissertation, I strived to identify the causes of these fluctuating levels of cooperation. More specifically, I used QCA to uncover which logic prevails at any given time. This research was driven by the normative goal of suggesting how such courts may be best designed and what strategies to apply in order to increase cooperation with ICTs.

I approached the research objective from two angles. From a systemic perspective, I conducted a small-n comparative analysis of the courts to test whether and when court independence has a positive influence on cooperation (see chapter 7). Placing states at the centre of the analysis, I created an original medium-sized dataset (see chapter 6). The aim was to identify strategies that can stimulate cooperation when the court and international society have to deal with a particular state. I turn now to summarising each of these analyses.

8.1. Court independence and its impact on cooperation

The court-focused study in chapter 7 solves the puzzle concerning the influence court independence has on state cooperation. From the perspective of

"logic of consequences", court independence is hypothesised to negatively impact cooperation because independent tribunals are expected to violate state interests (Posner and Yoo 2005, 28). In contrast, when looking through the lens of "appropriateness", only independent courts can ensure effective enforcement of the norms in question (see Helfer and Slaughter 1997; Keohane, Moravcsik, and Slaughter 2000). The analysis shows that which of the causal logics prevails depends on the context in which the court operates.

The results confirm that independent courts can expect cooperation only when their member states on average enjoy high norm acceptance. The ECHR is a good example of an institution that enjoys both a high level of independence and a high degree of cooperation on the part of its member states that have institutionalised human rights law to a high degree. However, when an international court is operating in normatively adverse environment, such as the IACHR and the ICTY, it needs either a mechanism to punish non-compliance or an external actor willing to do so on its behalf. In short, in the absence of norm socialisation, independence does not play a role. Instead, cooperation can be driven by material incentives. Thus, Helfer and Slaughter's (1997, 390) recommendation to improve other human rights institutions according to the ECHR precedent can be effective only in certain contexts. Posner and Yoo's (2005, 3) critique of Helfer and Slaughter's (1997) case selection – they study only courts that enjoy high norm socialisation among their member states – has merit, as the results show.

However, Posner and Yoo's hypothesis that independence and cooperation are negatively correlated could not be confirmed. Their argument about independent tribunals violating national interest and thus court independence discouraging cooperation does not apply where the ICL and HR are well-institutionalised (institutionalisation was used as an indicator of the sociali-

sation degree). Furthermore, the present results show that when there is a lack of norm socialisation among state parties, court independence does not have an impact on the level of cooperation. Thus, Posner and Yoo were correct only when highlighting that court independence cannot be expected to lead to cooperation in all situations.

In short, the set-theoretic thinking – in particular, the assumption that causality in such cases is going to be complex – helps to explain previous disagreements over the role of court independence. By working with rather than ignoring causal complexity, the present research was able to identify the problem and confirm that the impact of court independence depends on a contextual factor, namely norm socialisation.

These results have implications for the design of future international courts. The drafters of statutes should always consider in which kind of environment the court is expected to operate. When acceptance of the norm protected by the court is expected to be low, the statute should provide for a mechanism allowing the court to put material pressure on the state. One example is the World Trade Organization's Dispute Settlement Body, which allows for the imposition of reciprocal sanctions through withdrawal of "substantially equivalent concessions"(Bagwell and Staiger 2009, 19). Among the HR and ICL courts, the ICTY managed to link the conditionality of EU membership to Serbia's and Croatia's cooperation with the ICTY. Another option is a conditional offer of financial aid, as in the case of US financial support for Serbia.

8.2. Increasing the cooperation of individual states

The court-focused analysis served to explain the different levels of cooperation enjoyed by individual courts. As such, the results have only limited relevance when looking at the cooperation of individual states. For instance, the court-focused analysis could not explain why, in the absence of international pressure for cooperation, combined with low norm acceptance, there were differences in the levels of cooperation offered by Kenya and Uganda with the ICC.

To answer this and similar questions, the core of the dissertation is located at the state level, analysing the degree of cooperation of Kenya, Uganda, Serbia and Croatia with the ICC and the ICTY. To measure cooperation, I reviewed and coded official court publications to determine each state's yearly average cooperation level, coded on a scale between 0 and 1. The unit of analysis is the cooperation of an individual state over a period of one year. The review of rationalist theories identified "non-proximity of suspects to societal elites", "government stability" (both domestic interests) and "international interests" as causally relevant for state cooperation with ICTs. "Logic of appropriateness" theories consider norm institutionalisation and outreach as causally relevant for cooperation. Norm institutionalisation indicates the level of norm socialisation. Outreach is central for an argumentative process driving socialisation.

The results show that the combination of domestic or international interests is necessary for cooperation. In other words, in almost all cases when cooperation took place, material incentives in the form of domestic or international interests were present. A good example of the presence of domestic interests is Uganda, where the government invited the ICC to

investigate crimes committed by the Lord Resistance Army, a rebel group operating at the time on Ugandan territory. On the other hand, international interests for cooperation can for instance take the form of the conditionality of an offer of EU membership in the case of Croatia.

However, the results also showed that interests alone are not sufficient for cooperation. The results confirm that both norms and interests play a causal role, which is consistent with the conclusions in chapter 7. However, the conditions alone are not sufficient and occur in combination with other conditions. The analysis identified three combinations of conditions sufficient for cooperation.

The first pathway leading to cooperation is characterised by norm institutionalisation within the individual state occurring concurrently with outreach and a favourable constellation of interests at the international level. A typical case is Croatia in 2004. The country had in place the necessary implementing legislation to allow it to cooperate with the ICTY and to prosecute core international crimes. Furthermore, it had ratified most of the relevant human rights, international humanitarian, refugee law and ICL treaties. This combined with EU membership conditionality and ICTY outreach keeping the public and media informed about ongoing trials and investigations.

The second pathway shows that when low proximity of suspects to societal elites occurred concurrently with outreach and international pressure, cooperation followed. In these situations, institutionalisation proved not to be causally relevant for cooperation. A typical case is Serbia in 2009. At that time, most of the high-level suspects had already been arrested, outreach teams had been informing the local population about the ongoing trials for

several years and Serbia had just signed a Stabilisation and Association Agreement with the EU, part of which related to cooperation with the ICTY.

The third pathway is populated by states that welcomed ICT investigations and prosecutions for political reasons: Croatia 1997–2000, Uganda 2005, Kenya 2010. Surprisingly, even in the absence of international interests, outreach as well as norm institutionalisation, the states cooperated with the relevant court. In all observed cases, the courts were at the investigation/prosecution stage, when the names of the suspects were not known or the prosecutions were not yet significantly affecting societal elites. Simultaneously, all three governments initially welcomed international investigations, as they had reasons to assume that the courts would act in their interest. For instance, the ICTY's investigations of crimes committed by Serbian forces could help Croatia to portray itself as a victim of Serbian aggression (see Peskin 2008, 14). Uganda invited the ICC to investigate crimes committed by the Lord Resistance Army. Kenyan parliamentarians also voted for the ICC process rather than for domestic investigations.

Although, over time, in all three cases the constellation of interests turned in the opposite direction, the pathway shows that this early period may be critical for ICTs in utilising an initial willingness to cooperate. This in particular applies to cooperation during investigations and access to evidence. As the Kenyan case shows, once the prosecutor made the names of the suspects public, the state's interest calculations significantly changed. Following an election in which two of the suspects were elected President and Vice President, Kenya's willingness to cooperate significantly decreased.

When looking at the results from a theoretical perspective, the broader "logic of consequences" assumption about the importance of interests is confirmed

thanks to the observation that a combination of domestic and international interests is necessary for cooperation. However, realist arguments that cooperation is exclusively interest driven are disproved. The results show that interests alone are not sufficient to explain variation in the levels of cooperation. Without incorporation of the "logic of appropriateness" conditions, the picture is not complete. In particular, identification of norm institutionalisation as an outcome-enabling state-context supports constructivist arguments about the importance of socialisation processes. In a similar vein, liberal arguments about the influence of domestic institutions stimulating cooperation were confirmed as well.

From the perspective of policy implications, the most important finding is that norm institutionalisation combined with outreach and international pressure is sufficient for cooperation. Pressure for norm institutionalisation should be high on the agenda, next to pressure for other forms of cooperation. Especially in the initial period of its operations, the court and international society have a unique opportunity to put pressure on the government to adopt the necessary legislation. In particular, where states have voluntarily initiated cooperation with an ICT, the domestic political cost of adopting new legislation is relatively low at this stage.

8.3. Methodological discussion

Methodologically, the dissertation addressed two main issues: how to define contradictory cases in fs-QCA, and how to conduct two-step QCA.

In cs-QCA a contradictory case is an indication of an underspecified model. However, in fs-QCA contradictory cases are often not tested for. In fs-QCA, if a truth table row contains a contradictory case, the consequence is that the

consistency level is negatively affected. As a result, the row is less likely to be included in the logical minimisation. In this dissertation I addressed that problem of contradictory cases in order to decide what the most reliable procedure for conducting two-step QCA is. After comparing two definitions of contradictory cases in fs-QCA, I adopted Schneider and Wagemann's (2012a, kindle 2780, 8305) definition, which is a logical extension of Ragin's cs-QCA definition. In other words, contradictions are present when cases in the same truth table row display outcome membership both above and below 0.5.

The second, methodological issue relates to the conduct of two-step QCA, an extension of standard fs-QCA proposed by Schneider and Wagemann (2006) for research where the conditions analysed can be divided into two distinct groups. In this dissertation the distance from the state was used to differentiate between domestic conditions (government stability, proximity of suspects to societal elites, ICL institutionalisation) and international conditions (court independence, outreach and international interests).

An overview of previous two-step QCA applications found large disparities in how the second QCA step was conducted. In fact, chapter 6 describes three different ways of conducting the second QCA step. To recall, in option 1 the second QCA step is conducted separately for each of the contexts that survived the first step. The dataset is split and only cases associated with a particular context are included in the analysis (see Korhonen-Kurki et al. 2014; Schneider and Wagemann 2003). For illustration, if the first step identified high norm institutionalisation as an outcome-enabling context, in the second step only cases with high institutionalisation are included in the analysis. The scenario delivers consistent results, but by splitting the dataset aggravates the problem of limited diversity.

In option 2, the second step is conducted for each of the contexts on the complete dataset (see Hanley and Sikk 2012; Schneider and Wagemann 2006). The scenario generates a truth table with a large number of contradictory cases.

In option 3, in the second step the complete dataset is used and all conditions that survived the first step are entered in the analysis at the same time (see Maggetti 2009; Schneider 2009).

Authors who have used two-step QCA have not clearly justified the changes in the application of the method. My tests of all three options showed that option 2, when the second step is separately conducted for each outcome-enabling context on the complete dataset, is inferior to options 1 and 3. By conducting the analysis on the complete dataset while at the same time deliberately excluding relevant state conditions from the analysis, the approach is logically wrong. In effect, the researcher first identifies a condition as relevant and then excludes it from the analysis. Consequently, the tests for individual outcome-enabling contexts are underspecified and likely to lead to contradictory rows in the truth table.

Both options 1 and 3 have analytical merits, depending on the type of dataset. Option 1 is particularly suitable for large-n datasets, where, even after splitting of the dataset, enough observations are present to populate the truth table rows. On the other hand, option 3 is more suitable for smaller datasets, where the first step is to exclude causally irrelevant conditions from the analysis and thus decrease the number of examined conditions. Given the size of the current dataset and low number of conditions passing the first step, option 3 was identified as the most suitable for the current research.

8.4. Acknowledging limitations and future research

QCA research designs are excellent for capturing causal complexity, but also have a number of weaknesses. First, QCA designs are sensitive to measurement errors. In both cs-QCA and fs-QCA, the raw data need to be calibrated into set values. Wrongly set calibration thresholds can have a negative impact on the validity of the results. To minimise the risk of mistakes, the dissertation transparently lists calibration thresholds and justifies their selection.

Second, in both designs the problem of limited diversity plays a role. In the state-focused analysis, six (out of the possible 16) truth table rows are populated by the 34 cases. Limited diversity is a problem that occurs because the cases often exhibit identical combinations of conditions. As a result, the full potential of logical minimisation cannot be utilised. A more fully populated truth table would deliver more reliable results.

In the court-focused analysis the number of cases is extremely low. Nevertheless, since each of the five cases is unique with regard to the combination of conditions, five out of eight truth table rows are populated. Although a comparative study would also be feasible on a population of five cases, a cs-QCA design was more suitable for this dissertation thanks to its ability to capture conjuncturality and multiplicity in a transparent and efficient manner.

Third, there is a risk that not all variables with an influence on cooperation were identified and tested (De Meur, Berg-Schlosser, and Yamasaki 2009, 158). Underspecified models can exhibit contradictory cases. The state-focused model contains four contradictory cases (Croatia 1999, Serbia 2005,

Kenya 2011, Uganda 2006). As argued in chapter 6, in two of the contradictory cases sudden changes in the constellation of the causal conditions occurred in the year under observation. It is possible that the state was not fast enough in adapting its level of cooperation within the time frame under examination. This assumption is supported by the fact that the level of cooperation decreased in both Kenya and Uganda in the subsequent years. In Croatia 1999, the sudden change in willingness to cooperate is likely to have been caused by confidential information and rumours that the ICTY planned to issue an indictment against President Tudjman, as argued by Peskin (2008, 105). Serbia 2005 is empirically only marginally contradictory. Given the specific circumstances in these cases, it is unlikely that any additional condition or different calibration could prevent the occurrence of contradictory truth table rows. To ensure that the four cases do not affect the final solution formulas a robustness test was conducted on a dataset excluding the contradictory cases.

A fourth weakness relates to the fact that QCA does not assess the relative strength of the conditions connected through a logical AND. As a set-theoretic theory, QCA does not quantify the causal contribution of individual conditions. For instance, the results show that both outreach and international interests need to combine with norm institutionalisation for cooperation to occur. In the current design it is not possible to measure which of the three conditions – institutionalisation, outreach or international interests – has the stronger impact.

To increase the validity of the results, future research could expand the current dataset to include full population of the ICC cases by including for instance the cases Mali, Sudan and Ivory Coast. When starting this dissertation project, the ICC was active in only a handful of situations and there was

limited information on cooperation. The number of situations under ICC jurisdiction later rose to 10. As such, the extended dataset could offer more reliable insights about cooperation with the first permanent International Criminal Court.

Annex

Annex 1: National legislation overview

Sources:

Croatia:

Implementing Legislation
Constitutional Act on the cooperation of the Republic of Croatia with the International Criminal Tribunal April 19, 1996
http://www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/implementation_legislation_republic_of_croatia_1996_en.pdf
Art 13-24 Aws decided by judge
National criminal code
1997 https://www.icrc.org/applic/ihl/ihl-nat.nsf/0/ce67fea60a8e402fc1257163002a6ea9/$FILE/Criminal%20Code%20Croatia%20ENG.pdf
Art 156 Genocide, Art 158-160 War Crimes
Art 14 (4)(5) - Universal Jurisdiction
Art 13-14 - Active, Passive , Territorial
2003 http://www.legislationline.org/documents/section/criminal-codes
Art 157a CAH, Art 156 Genocide, Art 158-160 War Crimes

Serbia:

Implementing Legislation
"The Socialist Federal Republic of Yugoslavia's Constitution (1992), as amended in 2000, provides that a Yugoslav citizen "may not be ... deported from the country , or extradited to another state" Art 17 (3)" https://www.icrc.org/customary-ihl/eng/docs/v2_cou_asug-6e9dal_rule161
"Parliament passed a law on cooperation with the Tribunal on 11 April 2002. Under the law, a national council for cooperation has been created which will have the responsibility for coordinating all Tribunal requests. The law has one substantial fault (art 39), however, in that it prohibits the extradition to the Tribunal of any accused indicted after the law came into force." ICTY Annual Report 2002 para 227
"Law on Organization and Competence of Government Authorities in War Crimes Proceedings (2003)" //243. "On the positive side, the Law on Cooperation with the Tribunal was amended in accordance with the Statute of the Tribunal. Article 39, prohibiting the surrender of any accused indicted persons by the Tribunal after the passage of the Law, was deleted."
//https://www.icrc.org/customary-ihl/eng/docs/v2_cou_rs_rule161 ICTY AR 2003
National Criminal Code
Criminal Code of the Socialist Federal Republic of Yugoslavia 1997
2005 Criminal Code entered into force 1 January 2006

Kenya:

Implementing Legislation
International Crimes Act 2008
National Criminal Code
International Crimes Act 2008

Uganda:

Implementing legislation
International Criminal Court Act 2010
National Criminal Code
Geneva Conventions Act 1964

Table 0-1: National legislation overview

	Id	Ratificat.	Implem. leg.	Details	Source	War crimes def.	CAH def.	Genocide def.	Source	All crimes def.
Serbia 30/07/1995 - 31/07/1996	S0796	0.6111111	n			y	n	y	Criminal Code of the Socialist Federal Republic of Yugoslavia 1997	n
Serbia 30/07/1996 - 31/07/1997	S0797	0.6470588	n			y	n	y		n
Serbia 30/07/1997 - 31/07/1998	S0798	0.6470588	n			y	n	y		n
Serbia 30/07/1998 - 31/07/1999	S0799	0.5789474	n			y	n	y		n
Serbia 30/07/1999 - 31/07/2000	S0700	0.55	n	The Socialist Federal Republic of Yugoslavia's Constitution (1992), as amended in 2000, provides that a Yugoslav citizen "may not be ... deported from the country , or extradited to another state" Art 17 (3)	www.icrc.org	y	n	y		n
Serbia 30/07/2000 - 31/07/2001	S0701	0.5238095	n			y	n	y		n
Serbia 30/07/2001 - 31/07/2002	S0702	0.5652174	n	Parliament passed a law on cooperation with the Tribunal on 11 April 2002. Under the law, a national council for cooperation has been created which will have the responsibility for coordinating all Tribunal requests. The law has one substantial fault (art 39), however, in that it prohibits the extradition to the Tribunal of any accused indicted after the law came into force.	ICTY AR 2002 para 227	y	n	y		n
Serbia 30/07/2002 - 31/07/2003	S0703	0.6666667	y	Law on Organization and Competence of Government Authorities in War Crimes Proceedings (2003) //243. On the positive side, the Law on Cooperation with the Tribunal was amended in accordance with the Statute of the Tribunal. Article 39, prohibiting the	www.icrc.org/	y	n	y		n

				surrender of any accused indicted persons by the Tribunal after the passage of the Law, was deleted.						
Serbia 30/07/2003 - 31/07/2004	S0704	0.8076923	→y			y	n	y		n
Serbia 30/07/2004 - 31/07/2005	S0705	0.8888889	→y			y	n	y		n
Serbia 30/07/2005 - 31/07/2006	S0706	0.8888889	→y			y	y	y	2005 Criminal Code entered into force 1 January 2006	y
Serbia 30/07/2006 - 31/07/2007	S0707	0.862069	→y			y	y	y		y
Serbia 30/07/2007 - 31/07/2008	S0708	0.862069	→y			y	y	y		y
Serbia 30/07/2008 - 31/07/2009	S0709	0.8064516	→y			y	y	y		y
Serbia 30/07/2009 - 31/07/2010	S0710	0.90625	→y			y	y	y		y
Serbia 30/07/2010 - 31/07/2011	S0711	0.90625	→y			y	y	y		y
Croatia 30/07/1995 - 31/07/1996	C0796	0.7222222	y	Constitutional Act on the cooperation of the Republic of Croatia with the International Criminal Tribunal April 19, 1996	www.icty.org/	y	n	y	Criminal Code 1993	n
Croatia 30/07/1996 - 31/07/1997	C0797	0.7222222	→y		www.digured.hr/	y	n	y		n
Croatia 30/07/1997 - 31/07/1998	C0798	1	→y			y	n	y	Criminal Code entered into force 01/01/1998	n
Croatia 30/07/1998 - 31/07/1999	C0799	0.9473684	→y			y	n	y		n

Croatia 30/07/1999 - 31/07/2000	C0700	0.9	→y		y	n	y		n
Croatia 30/07/2000 - 31/07/2001	C0701	0.9047619	→y		y	n	y		n
Croatia 30/07/2001 - 31/07/2002	C0702	0.8695652	→y		y	n	y		n
Croatia 30/07/2002 - 31/07/2003	C0703	0.9583333	→y		y	y	y	Criminal Code amended 15 July 2003	y
Croatia 30/07/2003 - 31/07/2004	C0704	0.9230769	→y		y	y	y		y
Croatia 30/07/2004 - 31/07/2005	C0705	0.9259259	→y		y	y	y		y
Croatia 30/07/2005 - 31/07/2006	C0706	0.9259259	→y		y	y	y		y
Croatia 30/07/2006 - 31/07/2007	C0707	0.8965517	→y		y	y	y		y
Croatia 30/07/2007 - 31/07/2008	C0708	0.9354839	→y		y	y	y		y
Croatia 30/07/2008 - 31/07/2009	C0709	0.9354839	→y		y	y	y		y
Croatia 30/07/2009 - 31/07/2010	C0719	0.9375	→y		y	y	y		y
Uganda 01/01/2005 - 31/12/2005	U1205	0.9090909	n	International Criminal Court Act 2010	y	n	n	Geneva Conventions Act 1964	n
Uganda 01/01/2006 - 31/12/2006	U1206	0.8333333	n		y	n	n		n

Uganda 01/01/2007 - 31/12/2007	U1207	0.8	n		y	n	n		n
Uganda 01/01/2008 - 31/12/2008	U1208	0.8148148	n		y	n	n		n
Kenya 01/01/2010 - 31/12/2010	K1210	0.6296296	y	International Crimes Act 2008	y	y	y	International Crimes Act 2008	y
Kenya 01/01/2011 - 31/12/2011	K1211	0.6296296	y		y	y	y		y
Kenya 01/01/2012 - 31/12/2012	K1212	0.6296296	y		y	y	y		y
Kenya 01/01/2013 - 31/12/2013	K1213	0.6296296	y		y	y	y		y
Kenya 01/01/2014 - 31/12/2014	K1214	0.6296296	y		y	y	y		y

Annex 2: Robustness test with dataset not containing any contradictory cases

Cooperation
--- COMPLEX SOLUTION ---
frequency cutoff: 3.000000
consistency cutoff: 0.750365

	raw coverage	unique coverage	consistency
~prox*outreach*intl	0.440761	0.107065	0.946324
institutionalis*outreach*intl	0.354348	0.042391	0.910614
~prox*~institutionalis*~outreach*~intl	0.279348	0.257609	0.750365
solution coverage: 0.740761			
solution consistency: 0.848692			

Non-cooperation
--- COMPLEX SOLUTION ---
frequency cutoff: 3.000000
consistency cutoff: 0.805785

	raw coverage	unique coverage	consistency
prox*~institutionalis*~outreach*~intl	0.400685	0.352740	0.805785
prox*~institutionalis*outreach*intl	0.398630	0.350685	0.815126
solution coverage: 0.751370			
solution consistency: 0.800730			

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