

FROM LAW *VERSUS* POLITICS TO LAW *IN* POLITICS: A PRAGMATIST ASSESSMENT OF THE ICC'S IMPACT

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I. INTRODUCTION

If the International Criminal Court (ICC or “Court”) does not transform political and social realities on the ground, then why bother? This question, repeatedly offered by those disenchanted by the Court’s work,¹ is part of a pedigreed critique of international law, harking back to legal realist broadsides against natural law and positivist approaches a century ago.² It is not enough that law is moral, the argument goes, it must also perform in a way that is measurably good or positively transformative. The outlook that international law should be judged based on its impact is almost hegemonic today, at least in the United States.³ One variant of this outlook, the political realist critique, is particularly resonant. In this article, we begin by tracing how this critique is applied to the ICC. Political realists toggle seamlessly between arguing that the Court is unnecessarily political, and arguing that the ICC should be *more* politically engaged.

We then spend the bulk of the article constructing a pragmatist response to this challenge. Accepting that the ICC is inevitably political, we move toward a measured assessment of its impact. We extensively analyze both qualitative and quantitative data on the relationship between the ICC and two outcomes: the prevention of

1. See, e.g., David Davenport, *International Criminal Court: 12 Years, \$1 Billion, 2 Convictions*, FORBES (Mar. 12, 2014), <http://www.forbes.com/sites/daviddavenport/2014/03/12/international-criminal-court-12-years-1-billion-2-convictions-2/> (asking if the less-than-intended results of the ICC are worth the millions of dollars spent annually); see also Elizabeth Peet, *Why is the International Criminal Court So Bad at Prosecuting War Criminals?* WILSON Q. (June 15, 2015), <http://wilsonquarterly.com/stories/why-is-the-international-criminal-court-so-bad-at-prosecuting-war-criminals/> (stating that the international judicial process may actually hinder the healing process for war-torn nations).

2. *Contra* OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 1 (2009) (suggesting that law cannot be unwavering like the law of mathematics, but evolves throughout history); see Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 262 (1940) (listing four reasons how a positivist school of jurisprudence was historically important).

3. See Guglielmo Verdirame, *“The Divided West:” International Lawyers in Europe and America*, 18 EUR. J. INT'L L. 553, 560-61 (2007) (stating that while American scholars are perpetuating the use of empirical models to quantify the effectiveness of international law by referring to work by other American scholars, the larger international community is skeptical on the reliance of such methodology).

conflict and domestic legal change. Ultimately, we determine that the ICC is almost undoubtedly associated with improved conditions in the world, but this is not yet due to its general capacity to successfully intervene in states. Instead, the ICC has an impact because it performs beneficial social and legal functions in international politics.

II. THE POLITICAL REALIST CRITIQUE

Tensions between law and politics lie at the heart of the ICC mission. The principle of complementarity and the referral system resulted from political compromise among state delegations. This is no secret.⁴ What remains open for debate is whether the Court *behaves* politically. Because the Office of the Prosecutor (OTP) is independent and exercises discretion, it must necessarily balance uniform standards of international criminal law with the “interests of justice” in particular countries.⁵ Rooted in this fact, political realist critiques of the ICC make three different moves. The first is to argue that the ICC is caught in a law-versus-politics paradox. If the Court makes decisions solely on legal standards, it risks doing harm in situations ill-suited for judicial intervention. Yet, if the Court makes decisions infused with political judgment, it becomes “too pragmatic,” loses objectivity, or becomes a tool of selective justice.⁶

4. See BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* 68-72 (2008) (explaining that while the ICC has broad potential jurisdiction, its actual jurisdiction is severely limited because of the need to respect state sovereignty); see also DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* 163-65 (2012) (reflecting upon the difficult negotiations to decide whether the United States would sign the Rome Statute).

5. The Prosecutor does not have unlimited discretion. It is very difficult, for example, for OTP to suspend or ignore a case referred by a state parties or the Security Council. See M. CHERIF BASSIOUNI, *THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT, VOL. 1: INTRODUCTION, ANALYSIS, AND INTEGRATED TEXT OF THE STATUTE, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE* 168-70 (2005) (stating that the Prosecutor has many institutional limitations that may risk the feasibility of an investigation); see also Kenneth A. Rodman, *Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court*, 22 *LEIDEN J. INT'L L.* 99, 120 (2009) (explaining that the Prosecutor does not have unlimited discretion because it is very difficult, for example, for OTP to suspend or ignore a case referred by state parties or the United Nations Security Council).

6. See Phil Clark, *Law, Politics and Pragmatism: The ICC and Case*

The law-versus-politics paradox is a familiar refrain in work on the ICC:⁷ How could the Court sit in neutral judgment of political behavior if it behaves politically?

Some critical theorists are satisfied simply to conclude their work after identifying this problem. Others follow with a second move, which is to demonstrate that, faced with the law-versus-politics paradox, the Court favors consequentialist over normative reasoning. Investigative researchers argue that the ICC's first prosecutor, Luis Moreno Ocampo "chased" the Court's early cases in Uganda and the Democratic Republic of Congo, making secret deals to prosecute only rebels in exchange for government self-referrals.⁸ Moreover, the Prosecutor made this decision because it would gain the ICC access without damaging any vital interests of United Nations Security

Selection in Uganda and the Democratic Republic of the Congo, in COURTING CONFLICT? JUSTICE, PEACE, AND THE ICC IN AFRICA 37, 44 (Nicholas Waddell & Phil Clark eds., 2008) (exemplifying the precarious balance of prosecuting through ICC jurisdiction over domestic jurisdiction in the Democratic Republic of Congo and Northern Uganda); see also Celestine Nchekwube Ezennia, *The Modus Operandi of the International Criminal Court System: An Impartial or a Selective Justice Regime?* 16 INT'L CRIM. L. REV. 448, 450 (2016) (arguing that the ICC does not meet the requirement for impartiality and needs reform because it can be manipulated by powerful countries). For interests of justice, see generally Rome Statute of the International Criminal Court, art. 53, July 17, 1998, 2187 U.N.T.S. 90.

7. See Matthew R. Brubacher, *Prosecutorial Discretion Within the International Criminal Court*, 2 J. INT'L CRIM. JUST. 71, 80-81 (2004); see also Michael Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 507-08 (1999); see also Leslie Vinjamuri, *The International Criminal Court and the Paradox of Authority*, 79 LAW & CONTEMP. PROBS. 275, 277 (2016); see also Edward M. Wise, *The International Criminal Court: A Budget of Paradoxes*, 8 TULANE J. INT'L COMP. L. 261, 265 (2000) (introducing that the ICC faces paradoxes including trying to enforce "universal law" which would diminish state sovereignty); see generally Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, 171 WORLD AFF. 23 (2009) (explaining the foundational origins of the ICC).

8. Phil Clark, *Chasing Cases: The ICC and the Politics of State Referral in the Democratic Republic of Congo and Uganda*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE 1180 (Carsten Stahn ed., 2010); DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 101 (2014); Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18 INT'L J. HUM. RTS. 444, 452 (2014) (describing that the selective cooperation of countries like Uganda and the Democratic Republic of Congo with the ICC as "politicized justice").

Council (“Security Council”) members.⁹ These early Court-building measures coincided with numerous United Nations (UN) official statements linking justice to the prevention of conflict and deterrence of atrocity crimes.¹⁰ For many lawyers, showing concern for impact taints the purity of the Court; for political realists, this is proof that ICC supporters cannot be pure normative standard-bearers. Instead, Court legalists are awash in politics, and they are very much concerned about the consequences of law.¹¹

A third and opposite move is made by a different group of political realists. Instead of arguing that it is guided by outcomes, this group attacks the ICC and its supporters for being *too legalistic*. They contend that the Court ought to be more concerned about consequences because the Court’s actions are counterproductive. A large body of social science and journalism is predicated on identifying the short-term negative unintended consequences, potential or real, of the ICC’s judicial interventions.¹² According to

9. BOSCO, *supra* note 8, at 101 (clarifying that ICC deputy prosecutor Serge Brammertz left American officials of the US embassy in Congo convinced that the ICC would promote the unity government by only targeting militia leaders who remained outside the peace process).

10. See *Justice and the Rule of Law: The Role of the United Nations*, AMNESTY INT’L 2-3 (Sept. 29, 2004), <https://www.amnesty.org/en/documents/ior40/014/2004/en/> (stating that the Council stressed the importance of keeping individuals accountable for committing crimes against the international community to facilitate international peace); see also Press Release, General Assembly, General Assembly President Says Permanent International Criminal Court Will Provide Much Stronger Deterrence Than Ad Hoc Tribunals, GA/SM/282-L/T/4367 (April 11, 2002) (emphasizing that a permanent international criminal court would promote international peace by giving potential criminals a clear warning that there was no place to hide).

11. See also STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* 6-8 (2013) (advocating for the idea that in order to examine how human rights are a basic norm, scholars must look to politics); see generally Adam Branch, *Uganda’s Civil War and the Politics of ICC Intervention*, 21 ETHICS INT’L AFF. 179, 179-80 (2007) (considering the political effects the ICC has as it becomes politicized, as an agent of global law enforcement).

12. See Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?* 84 WASH. U. L. REV. 777, 816-17 (2006) (arguing that international criminal tribunals in weak states with ongoing military tribunals would be counterproductive); see also Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SECURITY 5, 40-41 (2003) (describing the positive effects of international criminal trials in transitional states that are often not felt until the subsequent generations support global norms); see also Branch, *supra* note 11, at 190-91

one such account by Goldsmith and Krasner, the ICC and other international institutions are “discouraged from engaging in assessments of costs and benefits that are often so important for the prevention of human suffering. As a result, such institutions may worsen rather than alleviate human rights catastrophes.”¹³ They follow that the ICC inspires counter-mobilization by political actors or armed combatants who do not want to be prosecuted for atrocity crimes. The ICC would ignore the risk of “backlash” at its own peril. Political realists began warning about backlash before the Court officially formed on July 1, 2002,¹⁴ and they have continued since.¹⁵

Reactions to the political realist critique and its consequentialist challenges to the ICC differ. The deontologist response is to argue that the ICC should retreat to strict norm enforcement, and insulate

(exposing issues with ICC intervention through the example of the conflict in northern Uganda with the Lord’s Resistance Army); *see also* Kenneth Anderson, *The Rise of International Criminal Law: Intended and Unintended Consequences*, 20 EUR. J. INT’L L. 331, 332 (2009) (pointing out that international criminal law has brought both anticipated and unanticipated consequences); *see generally* Jack Goldsmith & Stephen Krasner, *The Limits of Idealism* 123 DEADELUS 47, 48 (2003) (listing four fundamental flaws of the new theory of idealism in international relations).

13. *See* Goldsmith & Krasner, *supra* note 12, at 62-63 (underlining that the severance of the link between norm enforcement and political accountability can discourage institutions from “engaging in the assessments of costs and benefits that are often so important for the prevention of human suffering”).

14. *See* David Rieff, *Court of Dreams*, THE NEW REPUBLIC 16, 16-17 (Sept. 7, 1998) (suggesting that despite the ICC’s good intentions, there is now less respect for international law); *see also* Stephen Krasner, *A World Court that Could Backfire*, N.Y. TIMES (Jan. 15, 2001), http://www.nytimes.com/2001/01/15/opinion/a-world-court-that-could-backfire.html?_r=0; *see also* Robert Tucker, *The International Criminal Court Controversy*, 18 WORLD POL’Y J. 71, 79 (2001) (reasoning a primary complaint of the ICC is the erosion of sovereignty and speculating politics should precede the law because law is dependent on political order).

15. *See* ‘Dark Day for Justice,’ says ICC Prosecutor, Dropping Charges Against Kenyan President, U.N. NEWS CTR. (Dec. 2014), <http://www.un.org/apps/news/story.asp?NewsID=49529> (validating concerns in part by the African Union’s recent challenge to ICC authority, premised on the fact that the “neocolonial” Court had opened investigations only in African situations in its first decade of existence”); *see also* ICC Prosecutor Shelves Darfur War Crimes Inquiries, BBC (Dec. 12, 2014), <http://www.bbc.com/news/world-africa-30458347> (quoting Chief Prosecutor Fatou Bensouda that the Security Council’s stalemate on Darfur “can only embolden perpetrators” and that the Security Council needs to change its approach for arresting Darfuri suspects).

itself from political concerns over impact.¹⁶ In this sense, it accepts that law and politics should remain separate spheres. In this article, we pursue an alternative, pragmatist response. First, we embrace the law-versus-politics paradox. That the ICC works at the intersection of legal and political spheres is not a novel discovery, nor is it unique to the ICC.¹⁷ Martii Koskenniemi reminds us that international law lurks in a liminal space between apology and utopia, or between the concrete realities of state practice and aspiration for normative change.¹⁸ All courts must negotiate this space between legal and political spheres, as is evident from the very open and cynical maneuvering by political parties to seat judges on the Supreme Court of the United States. But the ICC is particularly prone to criticism on this front compared to national courts because it is a newer institution, and because it must appeal to a much wider and more diverse audience consisting of 124 state parties; influential non-ratifiers of the Rome Statute like the United States and China; and countless lawyers and political scientists that analyze the Court's every move.¹⁹ It seems unreasonable to reject the ICC wholesale

16. See Tomer Broude, *The Court Should Avoid all Considerations of Deterrence and Instead Focus on Creating a Credible and Legitimate Normative Environment in Which Serious Crimes Are Not Tolerated*, in CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT 194, 200 (Richard H. Steinberg ed., 2016) (advocating that crime prevention is much broader than deterrence and is beyond the mandate of the ICC).

17. Those who have worked closely with international tribunals are fairly open about the political compromises they must make. See SCHEFFER, *supra* note 4, at 164-65 (conceding those who have worked closely with international tribunals are fairly open about the political compromises they must make).

18. See Martti Koskenniemi, *The Politics of International Law*, 4 EUR. J. INT'L L. 6, 7 (1990) (asserting that international law is only independent from politics if it can distance itself from theories of natural justice and if it can distance itself between theoretical and actual state behavior); see also MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 23 (2006) (reiterating that states believe there can be a separation between how things are and how they should be).

19. Yonatan Lupu, *International Judicial Legitimacy: Lessons from National Courts*, 14 THEORETICAL INQUIRIES IN L. 437, 454 (2013); see Robert Sloane, *The Expressive Capacity of International Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 STAN. J. INT'L L. 39, 94 (2007) ("International criminal tribunals must develop coherent, fair, and principled sentencing practices, for their long-term success depends in part on the extent to which the social institution of punishment can be shaped to reflect, pursue, and in time, one hopes, justify their substantial costs").

because it is caught between all of these actors in a divided world.

Second, we do not take the political realist critique as entirely objective or predictively accurate. Political realists often claim scientific neutrality when passing judgment on international law, while in actuality they are promoting ambiguous normative alternatives.²⁰ For example, the same scholar might challenge legalists for being inattentive to consequences, only to later claim that the Court advocacy is based too much on consequentialist thinking.²¹ This creates a moving target for judgments of the ICC without supplying an alternative advocacy. Political realists also make predictions that are far off the mark, or that do not bear empirical fruit. For instance, it hardly seems the case that the ICC has directly caused any particular human catastrophe, as Jack Goldsmith and Stephen Krasner predicted in 2003.²² It is also hard to divorce this “prediction” from the alarmist outlook of its authors, American *sovereigntistes* writing in the early 2000s.²³ Finally, political analysts tend to make errors in their handling of critical legal and procedural details related to Court operation. Political scientists have argued that the ICC exercises universal jurisdiction, and others have written that African leaders voted themselves immune from the ICC in 2014.²⁴ Neither fact is true.²⁵

20. Geoff Dancy & Christopher J. Fariss, *Rescuing Human Rights law from Legalism and its Critics*, HUM. RTS. Q. 8-9 (forthcoming 2017); see Leslie Vinjamuri & Jack Snyder, *Law and Politics in Transitional Justice*, 18 ANN. REV. POL. SCI. 303, 305 (2015) (“Seemingly legalistic proponents of strict criminal accountability are often astutely pragmatic in their attempts to increase the autonomous scope or law in the politics of transition.”).

21. Cf. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY 5, 7 (2003) (finding that policies based on the logic of consequences are most likely to prevent war crimes and crimes against humanity); but see Leslie Vinjamuri, *Deterrence, Democracy, and the Pursuit of International Justice*, 24 ETHICS INT'L AFF. 191, 193 (2010).

22. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 89 (2003) (speculating that the ICC will discourage the United States from engaging in activities that protect human rights, thereby increasing the impunity of those who violate human rights).

23. For an explanation of “sovereigntistes,” see Seyla Benhabib, *Claiming Rights Across Borders: International Human Rights and Democratic Sovereignty*, 103 AM. POL. SCI. REV. 691, 692 (2009).

24. Nicola Perugini & Neve Gordon, *The Threat of Human Rights*, OPEN DEMOCRACY (2016), <https://www.opendemocracy.net/openglobalrights/nicola>

Biases and inaccuracies drive home the point that legal analyses almost always will involve political judgment, or will enter the realm of politics.²⁶ Therefore, with respect to the ICC, the question should not be whether the Court is political, but how it is political. What are its political impacts? We review a wealth of new empirical research, and conduct additional analyses of quantitative and qualitative data, to assess the ICC's work to date. While there is good new evidence on individual attitudes about the ICC—indicating that victims are often frustrated by procedure and lack of feedback, but also that roughly 60% of respondents from 56 countries continue to support the Court—perceptions are not our primary focus.²⁷ Instead, we orient our analysis toward the issues of violence prevention and domestic legal change.

We make two contributions. The first is to show that the ICC is associated with modest declines in repression, civil war, and mass violence, but these relationships are not necessarily attributable to the actual involvement of the ICC in particular situations. They are attributable to standard-setting functions that the Court plays in international political society. Second, we examine whether the Court is laying the foundations for future change at the domestic

perugini-and-neve-gordon/threat-of-human-rights; see Vinjamuri, *supra* note 7, at 276 (clarifying after the African Union discussed the possibility of withdrawal from the ICC, it voted to allow immunity of the Court's jurisdiction for current heads of state over genocide, crimes against humanity, and war crimes).

25. The ICC exercises a combination of national (active personality) and territorial jurisdiction, and African leaders voted themselves immunity to the African Court of Justice and Human Rights, not the ICC. See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 74-75 (2d ed. 2004); see also Monica Mark, *African Leaders Vote Themselves Immunity from New Human Rights Court*, THE GUARDIAN (July 3, 2014), <http://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court> (observing that African leaders voted to give themselves immunity in front of the African Court of Justice and Human Rights, not the ICC).

26. See JUDITH SHKLAR, LEGALISM: LAW, MORALS AND POLITICAL TRIALS 142-43 (1986) (opining that law is a form of political action).

27. See *The Victims' Court? A Study of 622 Victim Participants at the International Criminal Court*, HUM. RTS. CTR. 3-4 (2015), https://www.law.berkeley.edu/wp-content/uploads/2015/04/VP_report_2015_final_full2.pdf (advocating that victims' support of the ICC depends on where they are located, and that victims tend to value more convictions, including in lower-level cases); see also JAMES MEERNIK, INTERNATIONAL TRIBUNALS AND HUMAN SECURITY ch. 5 (2016).

political level, and find that the ICC produces unexpected and influential changes in domestic legal systems. The Court also encourages legal activism in measurable ways. In our discussion of conflict prevention and legal change, we pay close attention to the impact of the ICC across different stages of countries' involvement with the Court, including ratification, preliminary examination, and investigation. With this, we bridge legal research with newer political science research on ICC impact.

III. PREVENTION OF VIOLENCE

Our first task is to examine whether the ICC prevents violence. The preamble to the Rome Statute specifies that agreeing state parties are "determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."²⁸ This utilitarian justification for trials is found in all international tribunals' statutes.²⁹ As shorthand, the idea of *punitur, ne peccetur* (punishment so there will be no crime) is often referred to as deterrence.³⁰ Rooted in a rationalist approach to national criminal law, deterrence theory assumes that would-be criminals conduct a cost-benefit calculation to assess the utility of each criminal act. The more certain, severe, and swift the punishment, the less likely an actor will commit a crime.³¹ In national contexts, criminologists find little concrete evidence in support of deterrence theory. What evidence they do find suggests that the most important deterrent factor is the perceived certainty of punishment.³²

28. Rome Statute, art. 53.

29. See James Meernik, *Justice, Power and Peace: Conflicting Interests and the Apprehension of ICC Suspects*, 13 INT'L CRIM. L. REV. 169, 175-76 (2013) [hereinafter Meernik, *Justice, Power and Peace*] (including in the charters of the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda, in addition to the ICC).

30. The other justification for prosecution is *punitur, quia peccatum est* (punishment because there has been a crime). See Martin Mennecke, *Punishing Genocidaires: A Deterrent Effect or Not?* 8 HUM. RTS. REV. 319, 339 n.2 (2007).

31. Tom Buitelaar, *The ICC and the Prevention of Atrocities: Criminological Perspectives*, 17 HUM. RTS. REV. 285, 289 (2016).

32. See Raymond Paternoster, *How Much Do We Really Know About Criminal Deterrence?* 100 J. CRIM. LAW. CRIMINOLOGY 765, 818-19 (2010) (concluding that the perceived certainty of punishment is more important than the perceived severity, in almost every deterrence study to date).

When applying deterrence logic to the ICC, theorists are mostly skeptical.³³ They come away making one of two arguments: the futility thesis or the perversity thesis.³⁴ The futility thesis simply posits that the ICC will have no impact on actors' calculations. One reason is that individuals considering atrocity crimes are exceptional. They are already risk-acceptant or highly influenced by ideological motives, and they are unlikely to be swayed by the possibility of future punishment at an international court.³⁵ Another reason is that punishment by ICC is highly improbable, not particularly severe, and dreadfully slow.³⁶ It thus violates the conditions necessary for deterrence conceived in rational-choice terms.

The perversity thesis is grounded in a tension between justice and

33. Accord David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 *FORDHAM INT'L L.J.* 473, 476-77 (1999). For a review of the literature, see Mennecke, *supra* note 30, at 323-24 (confirming there is no empirical evidence to prove that potential criminals are deterred by the threat of prosecution); see also Buitelaar, *supra* note 31, at 293 (finding that the expectations of the ICC to promote peace and prevent humanitarian crimes appear to be largely unmet); see also Theodor Meron, *From Nuremberg to The Hague*, 149 *MIL. L. REV.* 107, 112 (1995) (reasoning that the effect of deterrence is lessened by factors including religious hatred, xenophobia, and fanatic patriotism). Accord MARK DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 52 (2007); see Sloane, *supra* note 19, at 75; see also Christopher W. Mullins & Dawn L. Rothe, *The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment*, 10 *INT'L CRIM. L. REV.* 771, 781 (2010); see also Victoria E. Collins & Dawn L. Rothe, *The International Criminal Court: A Pipe Dream to End Impunity?* 13 *INT'L CRIM. L. REV.* 191, 200 (2013); see also Meernik, *Justice, Power and Peace*, *supra* note 29, at 176-77; cf. MARTHA MINOW, *BREAKING THE CYCLES OF HATRED: MEMORY, LAW, AND REPAIR* 22 (2002) (offering that while it is too much to expect international criminal prosecutions to effect deterrence, the prosecutions can serve as means to force accountability and defy forced forgetting); see generally Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 *HARV. HUM. RTS. J.* 39, 43 (2002) (challenging the assumption that prosecution is the best method to redress criminal actions).

34. See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* 7 (1991) (introducing the perversity and futility theses).

35. See Ku & Nzelibe, *supra* note 12, at 807 (using coup participants in Africa as an example as other high-risk individuals who commit humanitarian crimes who will not likely be deterred by prosecution by international criminal tribunals).

36. See Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 *INT'L J. TRANSITIONAL JUST.* 1, 21 (2013) (considering that there may not be a deterring effect from prosecution because of the Court's particular selection of prosecutions, and the comparative lack of certainty and sanctions).

peace. The ICC aims to deter atrocities because such crimes “threaten the peace, security and well-being of the world,” and it often pursues investigations in situations of ongoing conflict.³⁷ As a result, analysts commonly blend the terminology of deterrence with rationalist arguments about the peace-making potential of international tribunals. Chief prosecutor of the Nuremberg Tribunal Robert Jackson spoke on the connection, or lack thereof, between tribunals and prevention of war: “Wars are started only on the theory and in the confidence that they can be won. Personal punishment, to be suffered only in the event that the war is lost, will probably . . . not be a sufficient deterrent to prevent a war where the war-makers feel the chances of defeat are negligible.”³⁸ The decision to engage with or refrain from war-fighting is made prior to any decision about punishment.

This logic is often extended to the ICC. Proponents of the perversity thesis argue that following ICC involvement, hardened war criminals, will have two choices: (1) negotiate an end to conflict and subsequently being punished for atrocities committed during the war, or (2) digging in to fight to the bitter end. Following this rational-choice train of thought, critics contend that the ICC might actually *encourage* leaders to choose option two and continue fighting.³⁹ Thus, a perverse and unintended consequence of ICC involvement is longer wars.

The futility and perversity theses contradict one another. Where the first assumes that ICC action is non-costly for actors considering atrocity crimes, the second assumes that ICC threats are costly enough to inspire combatants to fight harder.⁴⁰ How might one resolve this tension? The first step is to realize that the highly rationalist deterrence theory fueling the futility thesis is just an intellectual model, and its concept of “cost” might have little basis in reality. Research on mass violence suggests that leaders choose lethal options because they are politically strategic⁴¹; however, their

37. Rome Statute, pmbi.

38. INTERNATIONAL MILITARY TRIBUNAL, TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 153-54 (1947).

39. See Hyeran Jo & Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?* 70 INT'L ORG. 443, 446 (2016).

40. We are not the first to notice this. See *id.*

41. See Steven C. Poe, *The Decision to Repress: An Integrative Theoretical*

strategic decisions are not necessarily rooted in a meticulous calculation of material costs and benefits. Dictators and violent rebels are at times surprisingly sensitive to social and normative pressure, even when it is not backed by a high probability of sanction.⁴² These leaders have short time horizons, they remain preoccupied with their status in international society, and they fret over their historical legacies.⁴³

Being targeted by the ICC brings with it a kind of international opprobrium that is virtually unparalleled. As such, the Court could serve an expressive role as “shamer-in-chief” in world politics, multiplying the impact of media reports or transnational activism.⁴⁴

Approach to the Research on Human Rights and Repression, in UNDERSTANDING HUMAN RIGHTS VIOLATIONS: NEW SYSTEMATIC STUDIES 23, 23 (Sabine C. Carey & Steven C. Poe eds., 2004) (arguing that leaders chose repression techniques based on perceptions of strength). *See also* BENJAMIN VALENTINO, *FINAL SOLUTIONS: MASS KILLING AND GENOCIDE IN THE 20TH CENTURY* 2 (2004) (suggesting that mass killings begin with specific goals and strategies of high political and military leaders, not with broad social or political factors).

42. ALASTAIR IAIN JOHNSTON, *SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS, 1980-2000* 78-79 (2008) (exploring China’s seemingly non-rational engagement with security institutions starting in the 1980s); *see* Matthew Krain, *J'accuse! Does Naming and Shaming Perpetrators Reduce the Severity of Genocides or Politicides?* 56 *INT’L STUD. Q.* 574, 576 (2012) (explaining the decline in violence following naming and shaming the perpetrators of the genocide during genocidal episodes); *see also* HYERAN JO, *COMPLIANT REBELS: REBEL GROUPS AND INTERNATIONAL LAW IN WORLD POLITICS* 13-14 (2015) (advocating that compliant rebels emerge when they seek the legitimacy of their movement and their movement recognizes the importance of international law).

43. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 110 (2009); Jo & Simmons, *supra* note 39, at 13-14; RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 150-51 (2013).

44. *See* Sloane, *supra* note 19, at 70-71 (explaining that “punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted”); *see also* Amanda M. Murdie & David R. Davis, *Shaming and Blaming: Using Events Data to Assess the Impact of Human Rights INGOs*, 56 *INT’L STUD. Q.* 1, 13-14 (2012) (adding shaming Human Rights Organizations can have a “powerful impact on basic physical integrity rights” when the shaming is combined with domestic Human Rights Organizations and/or intergovernmental organizations, third-party states or individuals outside of the regime); *see also* Martti Koskenniemi, *Between Impunity and Show Trials*, in 6 *MAX PLANCK UNYB* 1, 9-10 (Jochen A. Frowein & Rüdiger Wolfrum eds., 2002) (explaining the role of the ICC in creating a “moral community.”).

This idea could go some way toward explaining why leaders, faced with only a low probability of actual trial punishment, alter their behavior: they care about how they are perceived. Leaders agonize over being indicted by the ICC, despite the fact that 39 indictments have produced only eight convictions in the first 14 years of the Court's operation.⁴⁵ In Uganda, being sent to The Hague “weigh[s] heavily on Kony's mind,” and reports suggest that he is an expert on ICC procedure.⁴⁶ In Kenya, Uhuru Kenyatta and William Ruto were concerned enough after their arrest warrants to launch an all-out propaganda offensive against the Court.⁴⁷ Even in non-signatory states, leaders fear the ICC. Sri Lanka's Mahinda Rajapaksa, former president and leader during the bloody and crime-ridden last offensive against the Tamil Tigers, publicly rails against the possibility of ICC indictment—perhaps not even realizing that his crimes are technically outside the jurisdiction of the Court.⁴⁸ And in bizarre diatribes in 2014, President Kim Jong-un of North Korea, another non-ratifier of the Rome Statute, called for “merciless sledge-hammer blows” against those who perpetuate the “political fraud” of criminal trials at the ICC.⁴⁹

While the ICC has not fared well in these political showdowns, the examples go some way toward answering the repeated question, “Who's afraid of the International Criminal Court?”⁵⁰ Apparently, a

45. *Situations Under Investigation*, INT'L CRIM. COURT, <https://www.icc-cpi.int/pages/situations.aspx?ln=en#> (last visited June 17, 2016).

46. BOSCO, *supra* note 8, at 129.

47. See Chandra Lekha Sriram & Stephen Brown, *Kenya in the Shadow of the ICC: Complementarity, Gravity and Impact*, 12 INT'L CRIM. LAW REV. 219, 226-27 (2012); see also Owen Bowcott, *ICC drops murder and rape charges against Kenyan president*, THE GUARDIAN (Dec. 5, 2014), <http://www.theguardian.com/world/2014/dec/05/crimes-humanity-charges-kenya-president-dropped-uhuru-kenyatta>; see also Susanne D. Mueller, *Kenya and the International Criminal Court (ICC): politics, the election and the law*, 8 J. E. AFR. STUD. 25, 26 (2014).

48. See Abdul Ruff, *Sri Lanka's Rajapaksa Headed for War Crimes Tribunal?* ASIA SENTINEL (Oct. 26, 2015), <http://www.asiasentinel.com/politics/sri-lanka-rajapaksa-war-crimes-tribunal/>.

49. Anna Fifield, *North Korea response to 'plot-breeding' U.N. report gets even weirder*, WASH. POST (Nov. 28, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/11/28/north-korea-response-to-plot-breeding-u-n-report-gets-even-weirder/>.

50. See generally David Kaye, *Who's Afraid of the International Criminal Court?* FOREIGN AFF. (May 2011), <https://www.foreignaffairs.com/articles/2011->

lot of leaders are. Fear of the ICC from camps with only the remotest possibility of punishment is not strictly rational from the perspective of deterrence theory, but this represents a deficiency in deterrence theory, not in the operation of the ICC. The futility thesis likely underestimates the social costs that the ICC creates.⁵¹

The second step in resolving the tension in arguments over deterrence is to realize that the perversity thesis is focused on specific deterrence, not general deterrence. Specific deterrence is “[t]he possibility that prosecutions can deter leaders who have already committed war crimes or crimes against humanity from committing them in the future.”⁵² However, proponents of the perversity thesis contend that, if the ICC creates humiliating social costs, ostracized leaders could lash out with violence in response to Court attention. Indeed, the fact remains that ICC intervention has failed to deter repeated violations by actors who have already labeled war criminals. Examples abound in situation countries like Sudan, DRC, Uganda, and Kenya. Stopping actors already complicit in atrocity crimes is extremely difficult, even when interveners are endowed with substantial coercive power.

Judging the ICC strictly on whether it can end ongoing violence is perhaps an unfair standard, though one still worth considering.⁵³ However, this should not be the only measure of the Court’s effects. In focusing on specific deterrence, the perversity thesis shows a blind spot. It does not consider whether the ICC exerts a general deterrent effect, preventing violent acts committed by *new* actors.⁵⁴ Analyzing

04-18/whos-afraid-international-criminal-court (discussing the ICC’s reputation and its impact on the international community, arguing that the ICC is struggling to find its international footing. The article generally discusses the successes and failures of the ICC).

51. See Jo & Simmons, *supra* note 39, at 450-51.

52. Nick Grono, *The Deterrent Effect of the ICC on the Commission of International Crimes by Government Leaders*, INT’L CRISIS GROUP (Oct. 5, 2012), <http://old.crisisgroup.org/en/publication-type/speeches/2012/grono-the-deterrent-effect-of-the-icc.html>.

53. Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RTS. Q. 624, 625 (Aug. 2009) [hereinafter Akhayan, *Are International Criminal Tribunals a Disincentive to Peace?*]; Payam Akhavan, *The Rise, and Fall, and Rise, of International Criminal Justice*, 11 J. INT’L CRIM. JUST. 527, 529-30 (2013) [hereinafter Akhavan, *Rise, and Fall, and Rise*].

54. See DRUMBL, *supra* note 33, at 61-62 (providing instances of specific and

such an effect is very difficult because it requires that one “measur[e] success by what does not happen.”⁵⁵ For this reason, most empirical scholars have shied away from a critical examination of general deterrence.

This brings us to the third and final step in addressing the debate on the ICC and deterrence. One of the only ways to draw inferences about conflict prevention is to compare a wide range of data. Cross-national analysis can help us see what is not apparent in specific case studies. Performing large-scale comparative analysis requires careful attention to the different kinds of claims linking the ICC to the prevention or promotion of violence. This means distinguishing between two distinct phenomena that are often lumped together. The first is the ability of the ICC to end ongoing wars. Terminating wars requires not deterrence, “[w]hich is aimed at dissuading someone from initiating proscribed behavior, but rather compellence, the act of preventing someone from continuing actions on which he has already embarked.”⁵⁶ The second is the ability of the ICC to stop new violence from erupting. The latter does require deterrence. In the remainder of this section, we examine whether ratification of the Rome Statute or active involvement of the Court in a situation might reasonably alter prospects for either compellence or deterrence.

A. COMPELLING AN END TO VIOLENT CONFLICT

Ending conflicts, specifically long-lasting ones, requires acts of compellence, wherein one side is convinced to cease armed combat. This can occur in one of two ways. Either one side gains a fighting advantage overwhelming enough to force surrender, or both sides decide to bargain rather than continue to fight. Ending war means removing fighting capabilities or making accommodation more

general deterrence).

55. Payam Akhavan, *Preventing Genocide: Measuring Success by What Does Not Happen*, 22 CRIM. L. FORUM 1, 23 (2011) [hereinafter Akhavan, *Preventing Genocide*].

56. Kenneth Rodman, *Darfur and the Limits of Legal Deterrence*, 30 HUM. RTS. Q. 529, 531 (2008) (opining the threat of prosecution is unlikely to deter because, “by the time a tribunal asserts jurisdiction, large-scale crimes have already taken place and in most cases . . . responsibility lies with top political and military leaders,” and “. . . attaching legal liability does not create an incentive to refrain from criminal activity.”).

attractive than fighting. How might the ICC assist in either of these processes?

1. Ratification

State commitment to the Rome Statute cannot itself make a fighting side stronger or marginalize an armed opponent. Therefore, we should not expect a relationship between ratification and compellence through coercion. That said, ratification might still affect compellence. State commitment to the Rome Statute can assist governments in making credible commitments to highly suspicious rebel opponents that want to bargain but do not trust the government. This “hand-tying” logic is explained by Beth Simmons and Allison Danner: “The willingness of a government to subject itself to the risk of prosecution sends an important signal to a government’s adversaries as well as the broader public that there are boundaries in quelling future threats beyond which the government will not go.”⁵⁷ The need for outside sources of hand-tying like commitment to the ICC is especially necessary in countries with little domestic rule of law. If no one trusts the rules of the game, governments seek to establish trust by outsourcing norm enforcement to the international community.

Simmons and Danner find evidence of this pattern in the fact that non-democratic and low rule-of-law countries with recent experiences of civil war ratify the Rome Statute at a higher rate than other countries.⁵⁸ As a member of the Sierra Leonean delegation expressed to the ICC’s Assembly of State Parties, “. . .we can attest first-hand to the crucial role of international criminal justice in ending conflict and restoring public confidence in the country and its future.”⁵⁹ The authors also discover that low-credibility ratifiers are more likely to experience a termination in civil war, defined as at least a one-year cessation of hostilities.⁶⁰

57. Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT’L ORG. 225, 234 (Spring 2010).

58. See SCHABAS, *supra* note 25, at 75 (noting how “astonishing” it was in 2000 and 2001 that the “very States expected to steer clear of the Court because of their obvious vulnerability to prosecution started to produce instruments of ratification.”).

59. Simmons & Danner, *supra* note 57, at 237.

60. *Id.* at 253.

a. Negotiated Settlements

The most comprehensive evidence on civil war is collected by the Uppsala Conflict Data Program (“UCDP”), which registers every episode of violent conflict between a state and a rebel group that results in at least 25 battle deaths.⁶¹ Using the UCDP data set, we find a correlation between ICC ratification and the prospects for a negotiated settlement in civil war states. Of all “dyadic” conflict episodes, involving state forces and a single rebel group, 69 were fought in states that ratified the Rome Statute.⁶² Out of those, 15 ended in either a ceasefire or negotiated settlement (22%). This may seem low, but when statistically compared to the 214 conflict episodes that occurred in non-ratifying states since 1998, we find that conflicts in Rome-ratifying states are 8% more likely to end in a negotiated settlement.⁶³ This is certainly a small effect, but one that is statistically significant.

b. Amnesties

Ratification may slightly improve the chances for negotiation, but it could also make final peace settlements more difficult to reach. One reason for this is that state governments and mediators may interpret state commitments to the Rome Statute as removing the option of amnesties to opposition groups. Amnesties are often thought to be a useful carrot for luring rebels to the negotiating table because they provide legal protection against prosecution in exchange for the promise to demobilize.⁶⁴ Although no systematic

61. UPPSALA CONFLICT DATA PROGRAM, <http://ucdp.uu.se/> (providing an interactive map of armed conflicts).

62. See Lotta Harbom et al., *Dyadic Dimensions of Armed Conflict, 1946-2007*, 45 J. PEACE RESEARCH 697, 706-09 (Sept. 2008) (providing dyadic conflict data). We code data on Rome Statute ratifications ourselves using the United Nations Treaty Collection, <https://treaties.un.org> (last visited Jun 15, 2016).

63. To calculate this probability, we run a bivariate logit model predicting a negotiated termination with a binary measure indicating whether the conflict takes place in a country party to the Rome Statute. The model employs robust standard errors clustered by country. We then calculate the change in the predicted probability of a negotiated settlement for conflicts in Rome-ratifying states versus non-ratifying states.

64. See Andrea Armstrong & Gloria Ntegeye, *The Devil is in the Details: The Challenges of Transitional Justice in Recent African Peace Agreements*, 6 AFRICAN HUM. RTS. L.J. 1, 7 (2006).

research demonstrates a concrete relationship between amnesties and the achievement of peace—the most optimistic places the “success rate” of amnesties at 34%⁶⁵—conflict management experts avidly defend the utility of amnesty offers.⁶⁶

The emerging duty to prosecute under international human rights law and international criminal law is in clear tension with the sovereign right to amnesty armed combatants.⁶⁷ For this reason, amnesties became a hot-button issue in the former Yugoslavia, where negotiations to end the conflict coincided with the operations of the fledgling ad hoc tribunal.⁶⁸ Similarly, at the negotiations for the Lomé Peace Accord to end the war Sierra Leone in 1999, UN mediators hurriedly appended a note clarifying the UN’s opposition to blanket amnesty after the agreement was already signed.⁶⁹ Though the UN position is to resist the issuance of blanket amnesties, international law technically does not ban them, and whether the ICC can recognize national amnesties is an open legal question.⁷⁰ Still,

65. RENÉE JEFFERY, AMNESTIES, ACCOUNTABILITY, AND HUMAN RIGHTS 109-10 (2014).

66. Stephan Sonnenberg & James L. Cavallaro, *Name, Shame, and Then Build Consensus? Bringing Conflict Resolution Skills to Human Rights*, 39 WASH. UNIV. J.L. & POL’Y 257, 265 (2012) (sharing models for conflict resolution in international conflicts and sharing that those involved in conflict resolution should encourage communities to make their own decisions for conflict resolution, including providing amnesty).

67. Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2552-53 (1990) (citing that although “international law generally establishes rights and duties between and among states, international criminal law imposes obligations on individuals making them liable to criminal punishment,” thus putting duties on states to follow international law where local law may grant amnesty); see Lisa Laplante, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, 49 VA. J. INT’L L. 915, 931 (2009) (highlighting how the tensions between international human rights treaties and national amnesties allow for ambiguities over what international law definitively states about amnesty).

68. Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249, 250 (1996); Felice D. Gaer, *UN-Anonymous: Reflections on Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 1, 6-7 (1997).

69. See *infra* Part IV.

70. See MARK FREEMAN, NECESSARY EVILS AMNESTIES AND THE SEARCH FOR JUSTICE 75 (2009) (asserting that neither the Rome Statute nor its Rules of Procedure and Evidence make reference to amnesties); see also Kieran McEvoy & Louise Mallinder, *Amnesties in Transition: Punishment, Restoration, and the Governance of Mercy*, 39 J.L. & SOC’Y 410, 415 (2012) (highlighting the growing scrutiny and legal challenges faced by blanket amnesties); see also Scharf, *supra*

purveyors of the perversity thesis argue that the involvement of the ICC and other legalists into situations of ongoing conflict will remove the amnesty option and make it more difficult to induce rebels to negotiate.⁷¹

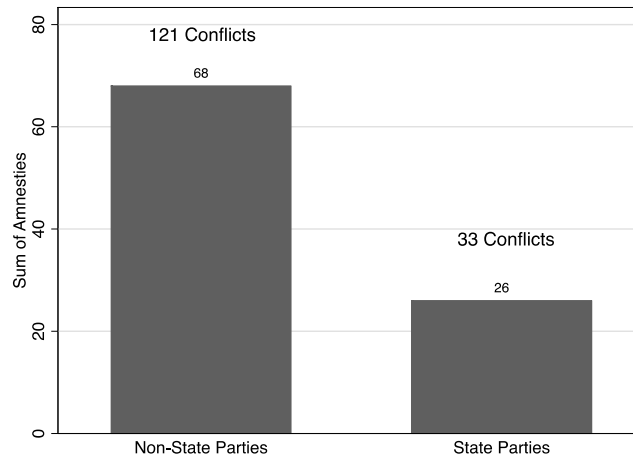
The suspicion that Rome ratification makes amnesties less likely is an unproven one. No research has examined the correlation between Rome Statute commitments and the propensity for governments to pass amnesty laws. In Figure 1, we depict the number of amnesties that have been offered to rebels in 154 different conflict dyads since 1998. To do so, we use the same dyadic civil war data from UCDP, but we also add information on amnesties available from the Transitional Justice Research Collaborative (“TJRC”).⁷² For this chart, we count the number of amnesties extended to each rebel opponent in a country (some countries have more than one group to fight against), and sum together all of those amnesties passed in Rome-ratifying and non-ratifying states. Figure 1 shows that among the 121 different violent conflicts that took place in 40 non-ratifying states, 68 amnesties were passed. Among the 33 conflicts that occurred in 15 Rome-ratifying countries, 26 total amnesties were passed. The percentage of conflicts with amnesties in Rome-ratifying countries (79%) is higher than the percentage in non-state parties (56%). On the basis of this data, it cannot be reasonably concluded that being a party to the ICC prevents governments from offering amnesties.

note 7, at 521 (asserting that there are frequently no international legal constraints on the negotiation of amnesties); *see also* Dwight G. Newman, *The Rome Statute, Some Reservations Concerning Amnesties, and a Distributive Problem*, 20 AM. U. INT'L L. REV. 293, 297 (2004) (positing that an ongoing challenge for the ICC and interpreters of the Rome Statute will be whether national amnesties immunize their recipients from prosecution).

71. Snyder & Vinjamuri, *supra* note 12, at 20 (affirming that criminal tribunals did not deter subsequent atrocities and did not contribute to bringing peace in Yugoslavia and Rwanda); Vinjamuri, *supra* note 7, at 196 (arguing that while international tribunals may complicate negotiations, they ultimately complement the attempts to reconcile warring parties and promote peace); Vinjamuri & Snyder, *supra* note 20, at 304 (declaring that some proponents of amnesties think amnesties are necessary inducements for rights-abusing parties).

72. Harbom, *supra* note 62, at 700-04 (presenting dyadic conflict data from across the world between 1964 to 2014); *see* Geoff Dancy et al., *The Transitional Justice Research Collaborative: Bridging the Qualitative-Quantitative Divide with New Data*, (2014), www.transitionaljusticedata.com (last visited Sept. 17, 2016).

Figure 1. Total Amnesties Passed During Conflict Between 1998 and 2010⁷³



The evidence presented in Figure 1 is probably not welcome news for norm entrepreneurs who want to live in a world where fewer war combatants are legally protected from prosecution. Nonetheless, the fact is that amnesties continue to be a mainstay of the conflict environment, and the higher percentage of amnesties among state parties to the ICC may be a response to heightened concerns about the possibility of prosecution.⁷⁴ However, in terms of the debate over the ICC's ability to end conflict, this is important evidence to take into account. Rome-ratifying states are slightly more likely to compel the termination of armed opposition through inducements to negotiate.

2. ICC Involvement

The discussion over state commitment through ratification only

73. Dancy et al., *supra* note 72.

74. Louise Mallinder, *Amnesties' Challenge to the Accountability Norm?*, in *AMNESTY IN THE AGE OF HUMAN RIGHTS AND ACCOUNTABILITY: COMPARATIVE AND INTERNATIONAL PERSPECTIVES* 69, 81 (Francesca Lessa & Leigh A. Payne eds., 2012) (finding that amnesties remain in common use despite the creation of the ICC; further asserting that the number of amnesties in 2003, the year after the creation of the ICC, was almost double the average number of annual amnesty enactments and was the largest annual total enacted in any year).

covers one possible link between the ICC and compellence. The other link involves the triggering of ICC jurisdiction, starting with preliminary examinations and following with full investigations. These two steps, which together we call "ICC involvement," create interesting possibilities for compellence because they introduce the risk of prosecution. ICC involvement brings the threat of coercion, and even if this threat is minimal due to the considerable difficulties the ICC has in apprehending suspects, it might alter the strategic calculations of various conflict actors. Protective of their claims to legitimacy, those targeted by ICC indictments want to avoid the material cost of being summoned or arrested by the Court, but they also want to avoid the tarnish of being labeled a war criminal by the international community.⁷⁵

There are two ways in which ICC involvement could change the strategic conflict environment. The first is that it inspires actors under threat of future prosecution to seek a bargained solution to the conflict. After the Court begins a preliminary examination of a situation, armed combatants will find themselves operating in the "shadow of the Court."⁷⁶ Thus, their strategy must change to incorporate the chance that potentially abusive battlefield actions will attract international legal scrutiny. Rather than taking this risk, combatants could demobilize. Colombia is a fitting example of this possibility. According to a report by the Human Rights Consortium in 2011,

[t]he prospect of prosecutions before the ICC has played directly into the dynamics of the armed confrontation, including the recent demobilisations of right-wing paramilitary groups. Various high-level initiatives are being undertaken by the government to avoid Colombian military officials and their civilian counterparts being brought before the ICC, and the left-wing guerrilla groups equally appear to be engaged in damage-limitation

75. See JO, *supra* note 42, at 13-14 (noting that rebel groups may comply with international norms in order to enhance their own legitimacy in the eyes of the international audience).

76. See Éadaoin O'Brien, Par Engstrom & David James, *In the Shadow of the ICC: Columbia and International Criminal Justice*, HUM. RTS. CONSORTIUM 1, 9 (2011) (summarizing that the preliminary examination has raised the specter of prosecution before the ICC and provoked intense debate among armed groups).

measures.⁷⁷

If this demobilizing potential is generalizable, we should observe a relationship between preliminary examination and the end of violent conflict.

Less attentive combatants may not pay heed to ICC involvement until they are targeted by a full investigation. As Eric Fish argues, “. . . it seems unlikely that guerilla warlords who operate in rural Africa, such as [Joseph] Kony, would have heard of the ICC before being indicted by it.”⁷⁸ These leaders, who suddenly discover they are targeted for arrest, could seek to bargain in order to eliminate the threat of prosecution. This seems to have occurred in Uganda. Following the release of his arrest warrant in 2005, Joseph Kony met with Jan Egeland on the border between Uganda and Congo. Kony “apparently told Egeland that he wanted the ICC warrants lifted as a condition for entering the formal talks.”⁷⁹ Uganda President Yoweri Museveni approved of this idea, and he attempted to bargain away the arrest warrant in order to achieve a negotiated settlement at the Juba talks held in July 2006. The dilemma, of course, is that the Prosecutor faced the “ex post problem.”⁸⁰ Having no legal discretion to suspend the arrest warrant once it was issued, he had to resist Kony’s amnesty. This put the ICC in the position of obstructing the terms of the peace settlement, which eventually broke down. The Court then received blame for getting in the way of peace.⁸¹

This case raises a number of unknowns regarding Kony’s motivations. For one, it is possible that the only reason Kony agreed to discuss terms in the first place was his worry over being targeted by the ICC, meaning that the ICC was critical in producing the initial

77. *Id.* at 10.

78. Eric S. Fish, Comment, *Peace Through Complementarity: Solving the Ex Post Problem in International Criminal Court Prosecutions*, 119 YALE L.J. 1703, 1710 (2010).

79. BOSCO, *supra* note 8, at 129.

80. Fish, *supra* note 78, at 1707-08 (exposing Museveni’s attempts to negotiate with Kony; further asserting that the ICC’s lack of discretion creates an “ex post problem” where the ICC is forced to prosecute war criminals even in cases where doing so causes more harm).

81. Branch, *supra* note 11, at 184 (opining that the court’s intervention disrupted the Ugandan peace negotiations by eviscerating the amnesty offered to the rebels).

impulse to negotiate. A second possibility is that Kony never had any intention of reaching a deal with the government, and that he used the ceasefire and the Juba talks to delay so that his forces could relocate and rearm. He had followed this course in previous negotiations.⁸²

We cannot be sure of Kony's true motivations, but the effect of the arrest warrant is clear: it led to the LRA's marginalization. Writing in 2005, Payam Akhavan contended that the referral set in motion a change reaction:

Sudan has been persuaded to end its support of the LRA, culminating in a March 2004 Protocol allowing Ugandan People's Defense Forces (UPDF) to attack LRA camps in southern Sudan. This unhindered access has measurably weakened the LRA's military capability, encouraged significant defections among LRA commanders, and forced otherwise defiant leaders to the negotiating table.⁸³

Still, much has changed since Akhavan wrote his hopeful assessment. Kony fled to the Congo, where he has remained ensconced, free from arrest. The LRA began fighting again in October of 2008—against a formal coalition of governments including Uganda, the Democratic Republic of the Congo (DRC), Central African Republic, Sudan, and South Sudan. That low-level conflict eventually subsided in late 2011, but erupted again in October 2013.⁸⁴ Low on allies but hard to kill or capture, Kony continues to produce violence, though with much less devastation than in the early 2000s.

The case of the Uganda referral is one of mixed impact. How one reads the situation will depend on one's outlook. However, we may

82. See CHRIS DOLAN, SOCIAL TORTURE: THE CASE OF NORTHERN UGANDA, 1986-2006 57 (2011) (asserting that Kony's failure to sign the final agreement in April 2008 created doubts about whether any of the potential protocols would be realized); see also BOSCO, *supra* note 8, at 128-29 (speculating upon the way in which ICC involvement correlated with increased contact between the LRA and the Ugandan government, as well as Kony's worries about the ICC during his meeting with Jan Egeland).

83. Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 404 (2005).

84. UCDP, *Replication Datasets*, v. 1-2015, 1946-2014, http://www.pcr.uu.se/research/ucdp/datasets/replication_datasets/.

look to other cases in Africa for additional evidence of ICC involvement and marginalization. In the DRC, researcher Michael Broache suggests that Bosco Ntaganda's surrender to the ICC in March 2013 contributed to the dismantling of the M23 rebels:

After Ntaganda's surrender, over 750 combatants loyal to him fled to Rwanda, and over 240 more surrendered to the UN disarmament program in DRC. M23 also lost important financial and material support from communities in northern Rwanda. . . . Ntaganda's surrender to the ICC thus significantly weakened and incapacitated M23 and contributed at least marginally to its eventual defeat.⁸⁵

Of course, this is only the end of the story. In 2008, the DRC government apparently promised not to enforce an earlier ICC arrest warrant against Ntaganda, in exchange for an agreement to integrate his former rebel group, the National Conference for the Defense of the People ("CNDP"), into the state military. Still, after M23 defected from this arrangement in June 2012, the DRC government used a newer ICC arrest to marginalize Ntaganda and defeat the rebellion.⁸⁶

These ICC warrants have also been used to marginalize opponents in Central African Republic (CAR) and Côte d'Ivoire. After François Bozizé took power in CAR in a 2003 coup, he sought to neutralize Jean-Pierre Bemba Gombo, leader of the Mouvement de Libération du Congo ("MLC"). Bemba had allied with CAR's former president Ange-Félix Patassé to put down the coup. When Bozizé succeeded, he cooperated with the ICC to target Bemba. The ICC issued an arrest warrant in June 2008, and Bemba was quickly transferred one month later. Bozizé thus rid himself of a political opponent, and the ICC obtained control of a militant who became the Court's third conviction in March 2016.⁸⁷ In Côte d'Ivoire, President Alassane Ouattara pursued a similar strategy when he cooperated with the ICC

85. Michael Broache, *Beyond deterrence: the ICC effect in the DRC*, OPEN DEMOCRACY (Feb. 19, 2015), <https://www.opendemocracy.net/openglobalrights/michael-broache/beyond-deterrence-icc-effect-in-drc>.

86. *See id.*

87. *See* Courtney Hillebrecht & Scott Straus, *Who Pursues the Perpetrators? State Cooperation with the ICC*, 31 HUM. RTS. Q. 1, 18 (forthcoming February 2017), https://courtneyhillebrecht.files.wordpress.com/2016/02/final_icc_cooperation_hillebrecht_status.pdf (highlighting how Bozizé used the ICC to remove a political opponent).

to indict his political rival, former president Laurent Gbagbo. This strategy of using the ICC to attack armed and political opposition, which Hillebrecht and Straus inventively dub the “international legal lasso,” appears prevalent in the Court’s African cases. If it is generalizable to all ICC involvement, we should observe a relationship between investigations and government victories in violent conflict.

Thirty-seven armed dyads have fought in the shadow of ICC involvement. They stop fighting for one of three reasons: negotiation, victory, or low activity. Twenty-one of thirty-seven (57%) conflicts end in low activity, basically meaning that each side stopped battling in the absence of a formal agreement. Nine cases ended in victory, and seven ended in a negotiated settlement. These patterns are mixed, and not robust. When statistically compared to all other dyadic conflicts, there appears to be no significant correlation between ICC involvement and the end of fighting. ICC involvement does not increase the probability and termination in general, nor does it enhance the risk of a negotiated or victorious end to conflict. Moreover, ICC involvement does not appear to be associated with longer or shorter fighting episodes.⁸⁸

When it comes to the effect of ICC involvement on the termination of conflict, we could make one of two tentative conclusions. The first is that ICC involvement is simply one of many factors that get incorporated into the dynamics of compellence. As such, the Court does not exert an independent and measurable effect when compared to all conflicts. The second is that each case of ICC involvement is unique and involves a combination of inducement and marginalization. Neither of these mechanisms is more common in large comparisons.

88. We perform a series of bivariate logits with robust standard errors clustered by country. No matter what dependent variable we chose—end of conflict, negotiated settlement, or victory—a binary variable measuring the presence of an ICC intervention never achieves significance. To study the duration of conflict, we perform a Cox model to examine whether ICC intervention is associated with longer or shorter periods of fighting prior to termination. This, too, is insignificant.

B. DETERRING FUTURE VIOLENCE

In the previous section, we find that legal commitments to the ICC do not reduce the chances for negotiated settlements to conflict, nor do they prevent Rome-ratifying states from issuing amnesties. We also present evidence that ICC involvement does in some cases appear to alter the strategic peacemaking environment, and compel an end to fighting, but that these impacts are not generalizable. These findings have two implications. First, the ICC is selectively incorporated into the political calculations of some leaders some of the time; however, we cannot pretend that leaders will always engage the Court the same way. Governments have used the Court to further their own interests, and they have resisted it when it does not do their bidding.⁸⁹ Short of achieving 100% compliance among the pantheon of venal politicians in the world, the ICC mission will always be diluted by these political realities. There is no alternative, but that does not doom the project to irrelevance. Second, the particularism of the ICC's impact on peacemaking means both sides of the peace versus justice debate are probably overblown. ICC involvement does not wreck every chance for peace, leading to widespread death and destruction; nor does it produce unimpeachable justice that cures violence.

Argument over the peacemaking potential of the ICC may be a distraction from the Court's primary mission, which after all, is not to outlaw all war, but to "outlaw *specific violations of the laws of war*."⁹⁰ The Rome Statute traces a more indirect line between Court activity and peace that is overlooked by theorists studying its on-the-ground effects amid ongoing wars. The argument of the Statute's preamble is that deterring certain acts of brutal violence can contribute to the long-term resolution of conflict. Populations victimized by atrocity remain aggrieved for generations.⁹¹ Fewer atrocities translates into fewer grievances that will, in the future,

89. See Rodman, *supra* note 56, at 545 (surmising that states withdraw support from the ICC when it conflicts with domestic interests).

90. Jo & Simmons, *supra* note 39, at 445.

91. See Noam Lupu & Leonid Peisakhim, *The Legacy of Political Violence across Generations 20* (unpublished manuscript), http://www.noamlupu.com/Lupu_Peisakhin_Crimea.pdf (asserting that the degree of political violence against individual Crimean Tatars had measurable effects on the ethnic loyalty and resentment towards Russia of their grandchildren).

erupt into violent contestation over political power.⁹² To consider whether the ICC produces a long-term effect on peace, we must shift the discussion from compellence to deterrence. Instead of examining whether the ICC can get actors to stop committing acts they are already committing, we must examine a far more difficult question: can the ICC stop actors from choosing atrocity-level violence in the first place?

Answers to this question nearly always include cherry-picked anecdotes of severe violence that exist in the world today. The ICC did nothing to prevent hospital-bombings in Sri Lanka's final military assault on the Tamil Tigers in 2009, nor could it stop the Syrian government from indiscriminately killing civilians in its attempts to repulse rebels.⁹³ The ICC does nothing when Boko Haram ravages villages in the Nigerian countryside, or when the Islamic State beheads its opponents and takes women as sex slaves.⁹⁴ Of course, the statements are true, but the utility of this kind of "anecdotal" in discussions of the ICC and deterrence is limited.⁹⁵ To seriously consider the question, research must systematically

92. See Oskar N.T. Thoms & James Ron, *Do Human Rights Violations Cause Internal Conflict?*, 29 HUM. RTS. Q. 674, 704 (2007) (positing that discrimination can create powerful grievances which facilitate the creation of antagonistic groups and the possibility of collective violence).

93. See GORDON WEISS, *THE CAGE: THE FIGHT FOR SRI LANKA AND THE LAST DAYS OF THE TAMIL TIGERS* 89 (2012) (highlighting the occurrence of hospital bombings during the war with the Tamil Tigers); see also U.N. Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, ¶ 135, U.N. Doc. A/HRC/30/48 (Aug. 13, 2015) [hereinafter *Inquiry on the Syrian Arab Republic*] (arguing that the presence of opposition forces does not justify the Syrian government's indiscriminate bombing of civilian populations).

94. See *West Africa: Regional Boko Haram Offensive*, HUM. RTS. WATCH (Feb. 11, 2015), <https://www.hrw.org/news/2015/02/11/west-africa-regional-boko-haram-offensive> (describing Boko Haram's reign of terror against civilian targets from mid-2009 to 2014); see generally Fannie Lafontaine & Erick Sullivan, *And Justice for All? International Criminal Justice in the Time of High Expectations*, in *JUSTICE BELIED THE UNBALANCED SCALES OF INTERNATIONAL CRIMINAL JUSTICE* 219, 221 (Sebastien Chartrand & John Philpot eds., 2015) (highlighting the high expectations held of the ICC when it was originally formed and the hopes that it would be able to hold individuals accountable and contribute to maintaining international peace).

95. See Dancy and Fariss, *supra* note 20, at 8-9 (criticizing the use of "anecdotal" as a means of judging the effectiveness of the ICC because it misses the fact that the number of human rights violations are decreasing).

compare patterns of violence in the world today to a counterfactual world in which the ICC does not exist.⁹⁶ Newer social science research performs these kinds of comparisons, and it discovers that the ICC does deter certain behaviors.

1. Ratification

Filing an instrument of ratification to the Rome Statute entails a commitment to abide by certain standards embodied in the international criminal regime. As such, it can create incentives for actors under the jurisdiction of the Court to alter their behavior. Early rationalist treatments were divided on the potential of the ICC to deter non-compliant behaviors. One article suggested that human rights violators are so risk-acceptant that the costs created by commitment to the Rome Statute would not alter their choices.⁹⁷ Another employed game theory to demonstrate that wide ratification of the Rome Statute, by removing exile options for abusive leaders, “may deter some atrocities at the margin.”⁹⁸ However, newer empirical research seriously challenges both the narrow rationalist assumptions and the conclusions of this early theoretical work.

First, convincing cross-national evidence suggests that ratification of the Rome Statute is associated with significant improvements and government protection of physical integrity rights. Using a simple and ingenious statistical method called a difference-in-differences (“DiD”) model, Benjamin Appel compares changes in human rights protections in ratifying states to non-ratifying states – both before and after the Rome Statute was available for ratification. In so doing,

96. See generally Kathryn Sikkink, *The Role of Consequences, Comparison and Counterfactuals in Constructivist Ethical Thought*, in MORAL LIMIT AND POSSIBILITY IN WORLD POLITICS 83, 101 (Richard M. Price ed., 2008) (criticizing counterfactual theorizing from policy makers because of its subjectivity and inability to be proven definitively).

97. See Ku & Nzelibe, *supra* note 12, at 807 (asserting that human rights abusers are unlikely to be deterred by the prospect of prosecution and imprisonment by the ICT because they already accept greater risks such as death and torture).

98. Michael J. Gilligan, *Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime*, 60 INT’L ORG. 935, 937 (2006) (inferring that the ICC deters human rights abuses at the margins because it provides an option for asylum-granting states to refrain from offering asylum to leaders who otherwise might have a means of fleeing retribution in their own countries).

he is able to account for the fact that some states, like high-income countries with rule of law cultures, are more prone to ratification than others. But even when controlling for this screening effect, the evidence suggests that ratification has an independent causal effect on state behavior. On this basis, Appel concludes the following: “While it is true that states that ratify the Rome Statute have on average better human rights records than nonratifiers, it is also the case that the human rights practices of ratifiers have improved since the Court’s establishment. . .”⁹⁹

The link between ratification and generally improving human rights conditions is significant for two reasons. First, violations to physical integrity, still quite common among state governments, are not the main focus of the Rome Statute, which aims to combat genocide, crimes against humanity, and war crimes. While certain acts of violent repression, like torture and arbitrary killing, fall within these categories, the primary aim of the ICC is not to stop governments from committing everyday acts of repression. The ICC takes aim at only “grave” offenses. That Rome ratification decreases repression more generally should be considered an *unintended positive* consequence of Court formation.¹⁰⁰ Second, Appel de-links the deterrent impact of the ICC from the probability of prosecution. He contends that the ICC is powerful because it invites judgment from domestic constituencies and international audiences alike. In secondary analyses, Appel shows that ICC involvement in a country increases the probability that that country will be subject to outside economic pressure, and also that it will experience a change in government. Knowing this, government officials wise up following

99. Benjamin J. Appel, *In the Shadow of the International Criminal Court: Does the ICC Deter Human Rights Violations?*, J. CONFLICT RESOL. (forthcoming 2016) (manuscript at 17-18), <http://jcr.sagepub.com/cgi/doi/10.1177/0022002716639101> (finding that the pre-existing differences which may have contributed to ratification cannot entirely explain the fact that human rights practices of ratifying states have improved more than the human rights practices of non-ratifying states since the establishment of the ICC).

100. See Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 42 (Oct. 30, 2015) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2736519 (asserting that the ICC is more likely to involve itself in states with extreme levels of violence).

ratification, and improve their practices. Indeed, this could be taken as evidence that the Court behaves as the “shamer-in-chief” in world politics, setting standards by which government legitimacy is judged.

Appel’s study dovetails with other research indicating that ratification of human rights treaties in general, and the Rome Statute in particular, create domestic social costs for governments.¹⁰¹ Hyeran Jo and Beth Simmons argue that the ICC has a deterrent effect not limited to the costs associated with actual prosecutions; instead, it serves as a “social deterrent.”¹⁰² Also using a DiD model, and controlling for a number of other factors, Jo and Simmons find that Rome-ratifying governments intentionally kill 60% fewer civilians than their non-ratifying counterparts.¹⁰³ This is the case even when ratifying countries are “matched” and compared to other non-ratifying countries in the same region and with the same income levels. Jo and Simmons’ article has been criticized for focusing too heavily on governments as opposed to rebel actors, who are the true threat to civilians.¹⁰⁴ However, the fact remains that only evidence on the systematic murder of civilians—grave atrocity crimes specifically within the purview of the Rome Statute—shows that ICC ratifiers are more respectful of civilians. No evidence to the contrary has been published.

a. One-sided Violence

Figure 2 depicts yearly incidents of one-sided violence in the world since 1996, weighted by the number of civilians killed. Acts of one-sided violence are defined as “the use of armed force by the government of a state or by a formally organized group against civilians which results in at least 25 deaths.”¹⁰⁵ In Figure 1, the data points are sorted by whether the total number of mass-violence

101. See SIMMONS, *supra* note 43, at 109-10.

102. Jo & Simmons, *supra* note 39, at 449.

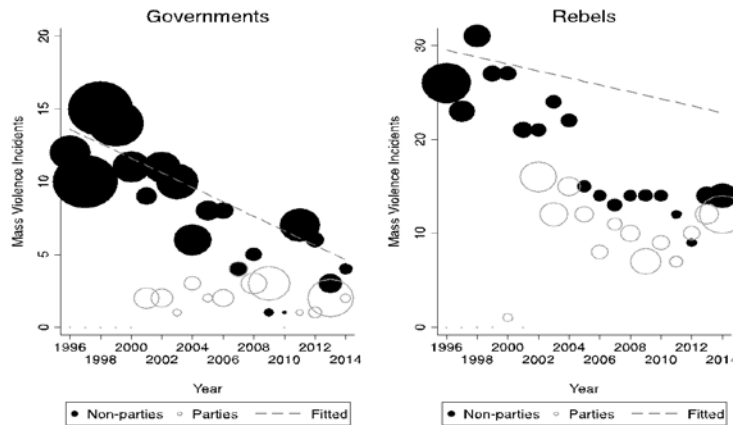
103. *Id.* at 460.

104. See Kate Cronin-Furman, *Can We Tell if the ICC Can Deter Atrocity?* JAMES G. STEWART (Mar. 21, 2016), <http://jamesgstewart.com/author/kate-cronin-furman/> (hypothesizing that the conclusion that ratification reduces intentional violence against civilians is a result of selection effects created by the focus on state actors in Jo and Simmons’ study).

105. Kristine Eck & Lisa Hultman, *One-Sided Violence Against Civilians in War: Insights from New Fatality Data*, 44 J. PEACE RES. 233, 235 (2007).

incidents that took place in countries not party to the Rome Statute, versus how many took place in all state parties. The size of the circles corresponds to how many total civilians were killed in any particular year. One can observe three basic facts from these charts. First, the number of mass-killing episodes directed at civilians is decreasing across the board, though more so for government actors. Second, the total number of civilians intentionally killed each year seems to be decreasing as well, though with upticks in recent years. Third and finally, with the exception of only a few years, the number of mass-killing incidents that occur in ratifying states is less than the number that occur in non-state parties. These are the patterns Jo and Simmons are capturing with their systematic and controlled statistical analysis. Fewer massacres against civilians occur in states under the jurisdiction of the Court.

Figure 2. Acts of one-sided violence over time

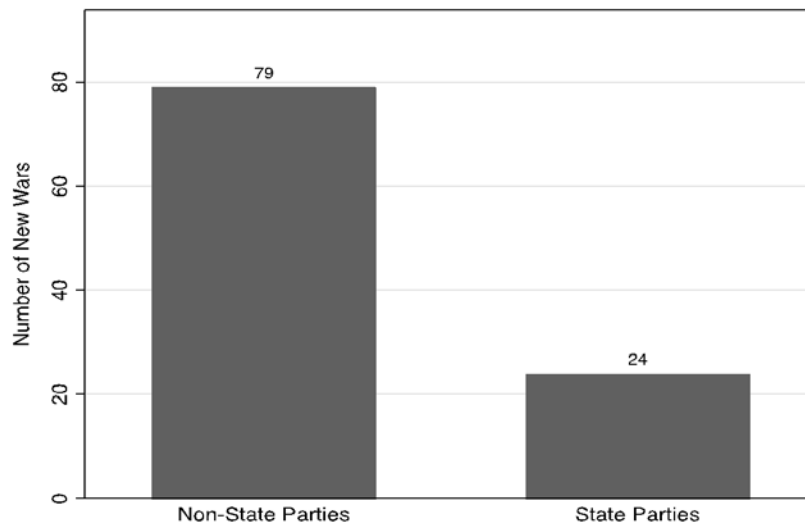


b. New Wars

State commitments to the Rome Statute are correlated with fewer violations to physical integrity and fewer incidents of mass killing. Yet it is also possible that ratification has another effect that remains unexplored. What if actors in ratifying states are less likely to begin new civil wars in the first place, for risk of attracting the attention of the ICC? Figure 3 is a bar chart depicting the number of conflicts that began in non-ratifying states versus ratifying states since

1998.¹⁰⁶ Over three times as many civil wars onsets occurred in non-ratifying states. By itself, this is not evidence of a causal relationship, but a statistically significant correlation also exists between state-party status and the propensity to engage in new civil wars.¹⁰⁷ The relationship is substantively small but distinguishable from zero. State parties are 3% less likely to experience civil war onset. When combined with the empirical evidence presented in this section, one might reasonably conclude that commitment to the Rome Statue has at least a marginal deterrent effect on repressive violence, mass violence against civilians, and civil war.

Figure 3. New wars since 1998



106. Therese Pettersson & Peter Wallensteen, *Armed Conflict, 1946-2014*, 52 J. PEACE RES. 536, 548 (2015) (presenting a list of dyadic conflicts from across the world between 1964 and 2014); see generally Nils Petter Gleditsch et al., *Armed Conflict 1946-2001: A New DataSet*, 39 J. PEACE RES. 615, 616 (2002) (asserting that the number of armed conflicts has decreased since the end of the Cold War and remained fairly stable since 1995, with most conflicts consisting of intrastate fighting).

107. See Akhavan, *Preventing Genocide*, supra note 56, at 23 (illustrating a method of measuring the success of genocide prevention through case studies of Macedonia, Cote d'Ivoire, and Burundi).

2. ICC Involvement

The best evidence available suggests that ratification is associated with a decline in violence. This is what is referred to as general deterrence, but what about specific deterrence? Are actors targeted by ICC interventions less likely to commit atrocity crimes? Again, anecdotal evidence suggests that leaders in ICC crosshairs are willing to commit human rights violations. Shortly after the arrest warrant for Kony was issued, he killed six foreign visitors and aid workers, “forcing aid agencies to cut back their operations in the region.”¹⁰⁸ In Sudan, when OTP announced it was pursuing an arrest warrant for President Bashir in July 2008, the regime labeled Luis Moreno Ocampo a “terrorist” and staged protests against the ICC; when that arrest warrant was officially announced in March 2009, the government kicked aid agencies out of the country.¹⁰⁹ These examples are not encouraging, and there are certainly more examples of violence in DRC and the Central African Republic following ICC involvement.

Moving beyond anecdotal evidence, systematic research offers mixed evidence on the question of whether direct involvement by the Court can serve as a specific deterrent. Using measures that combine both domestic and international trials, Hunjoon Kim and Kathryn Sikkink find that human rights prosecutions targeting state agents associated with significant declines in average abuses to physical integrity, even in countries fighting civil wars.¹¹⁰ Other research counters that human rights prosecutions produce a negative neighborhood effect: “personalist” dictators in the same region as countries with human rights prosecutions are 3% less likely to democratize.¹¹¹ They hang

108. BOSCO, *supra* note 8, at 117 (exploring the extent of the ICC’s power to ensure indicted individuals would appear for trial and concluding that such power lies with the member states).

109. *See id.* at 144 (recounting the events surrounding Bashir’s indictment by the ICC).

110. *See* Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions*, 54 INT’L STUD. Q. 939, 957-58 (2010) (arguing that the deterrence impact of prosecutions results from normative pressures and material punishment).

111. *See* Abel Escriba-Folch & Joseph Wright, *Human Rights Prosecutions and Autocratic Survival*, 69 INT’L ORG. 343, 345 (2015) (assessing the influence of human rights prosecutions on autocratic regime change in neighboring dictatorships).

on to power avoid losing sovereign immunity to prosecution.

These early studies use relatively blunt instruments of measurement. More nuanced data paints a complex, though at times hopeful, picture of the specific deterrent effect of international tribunals. James Meernik argues that the International Criminal Tribunal for the former Yugoslavia's (ICTY) operation is correlated with improvements in the former Yugoslavia: "human rights scores are generally fairly good in Bosnia, Serbia, and Croatia. Their citizens' human rights are not being systematically or substantially violated, at least since the early 2000s."¹¹² The same goes for Sierra Leone following the operations of the Special Court. However, the Rwandan government has ramped up human rights violations in recent years, after a significant decline in violence in the years directly following the genocide and the formation of the International Criminal Tribunal for Rwanda (ICTR).

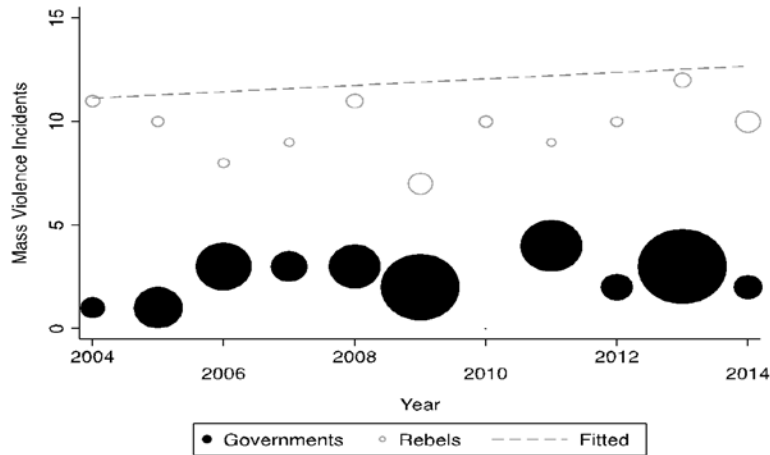
Meernik also uses detailed events history data on conflict in Africa to examine the impact of ICC involvement. He finds that "lethal repression of human rights protests have increased over time in several of the states under ICC investigation."¹¹³ Figure 4 captures a piece of this puzzle. Using the same one-sided violence data plotted in Figure 2, this chart counts the number of mass killing events in all states that have been subject to ICC involvement, sorted by whether the acts were committed by government forces or by rebels. One can see that the trend is stable, hovering around ten to twelve such events each year. Government violence is less frequent but more fatal, indicated by the size of the data points. The magnitude of government violence has also not abated over time. One can conclude that across all countries subject to ICC involvement, there has been no substantial decrease in violence against civilians. Or, as Meernik writes, the "ICC appears to have, at best, no impact on these states."¹¹⁴

112. MEERNIK, INTERNATIONAL TRIBUNALS AND HUMAN SECURITY, *supra* note 27, at 79.

113. *Id.* at 97.

114. *Id.* at 98.

Figure 4. Acts of one-sided violence in countries following ICC involvement



This “no impact” finding is not universal. Two exceptions are Uganda and Libya. Uganda features far fewer acts of lethal repression against civilians than in years past.¹¹⁵ In Libya, ICC intervention coincides with a significant decline in “government-sponsored civilian casualties.”¹¹⁶ However, the fact remains that the Court also faces significant obstacles in countries like Kenya, where in 2013 the public elected an ICC indictee, Uhuru Kenyatta, to the office of president. Kenyatta then set about intimidating and killing witnesses, and systematically dismantling the OTP’s case.¹¹⁷ It is hard to see how such a situation could be stopped. Until the international community comes to routinize its support for the Court in its pursuit of war criminals, and condemn blatant non-compliance by leaders like Kenyatta, specific deterrence will remain elusive.

115. *Id.* at 97.

116. Courtney Hillebrecht, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, 42 INT’L INTERACTIONS 616, 632 (2016) (finding that ICC actions such as issuing statements and arrest warrants contributed to decreased violence).

117. See *Kenya’s 7-Step Formula for Impunity*, KENYANS FOR PEACE WITH TRUTH & JUSTICE (2014), <http://kptj.africog.org/wp-content/uploads/2014/12/Kenyas-Seven-Step-Formula-for-Impunity.pdf> (speculating that the Kenyan government forced the ICC to drop charges against Kenyan President Uhuru Kenyatta through deliberate, calculated steps).

C. DISCUSSION

As a whole, the newest research on the link between the ICC and violence prevention urges us toward cautious optimism. The Court has not been a resounding success. It has a difficult time building and completing cases, and it faces the same obstacles as other multilateral institutions that intervene in conflict states. Like military or economic interventions, the ICC cannot “solve” problems of local politics.¹¹⁸ However, like other international institutions, it can become enmeshed in local strategic interactions in ways that are sometimes productive.¹¹⁹ It can also exert a dampening effect on violence more generally.

Our discussion thus far yields two important lessons. First, state commitment to the Rome Statute is associated with positive outcomes. Contrary to some expectations, Rome-ratifiers are no less likely to pass amnesties, and they are slightly more likely to end civil wars with negotiations. Rome-ratifiers are also less likely to be home to mass violence against civilians, and less likely to experience civil war onset. This general deterrent effect of state commitment to Rome is likely due to the social influence of the Court. It serves as a focal institution in the world of human rights. Fear of being singled out by the ICC, as opposed to fear of punishment itself, alters the strategy of leaders worried about their status in the society of states. This should lead critics who continually advance the futility thesis—that the ICC cannot create costs and thereby has not deterrent properties—to reconsider.

Second, ICC involvement in a country, through preliminary examination or investigation, is not itself positive. In DRC and

118. See Alexander Downes & Jonathan Monten, *Forced to Be Free?: Why Foreign-Imposed Regime Change Rarely Leads to Democratization*, 37 INT’L SEC. 90, 130 (2013) (suggesting that removing foreign leaders is unlikely to foster democracy, intervening in a newly established democracy can safeguard against autocracy, and taking domestic context into account is key to successful democratization abroad); see also Reed Wood, “A Hand Upon the Throat of the Nation:” *Economic Sanctions and State Repression, 1976-2001*, 52 INT’L STUD. Q. 489, 508-09 (2008).

119. See MICHAEL W. DOYLE & NICHOLAS SAMBANIS, *MAKING WAR AND BUILDING PEACE: UNITED NATIONS PEACE OPERATIONS 4-6* (2006) (proposing that the UN is more suited to peace-building through mediation and international assistance than to imposing policies through force).

Uganda, ICC presence has played a role in inducing rebels to bargain, though it also made negotiations more difficult. In Colombia, ICC preliminary examination compelled paramilitaries and rebels to demobilize (we return to this case below). In Uganda, DRC, CAR, and Côte d'Ivoire, political leaders used the ICC to consolidate power and marginalize opposition; this has at times contributed to the termination of civil war, though it has done little to advance norms of accountability. In terms of specific deterrence, ICC involvement has not made lethal violence less likely in situation states, though a few cases have seen declines in violence after the ICC entered the situation.

Another way of summarizing the findings on violence prevention is this: the ICC is more important for what it is than what it does. As a standard-bearer, and as “shamer-in-chief,” the ICC influences self-conscious state leaders. As an intervener, it has a mixed record. The results concerning direct ICC involvement are sobering for Court supporters. However, observers should also take note that the ICC’s impact has also not been, on balance, negative. It has not produced more turmoil. It simply has failed to transform already-violent states into human rights-compliant states in the short term. This brings us to a third lesson. Drastic transformation of violent political societies is probably too high a standard for judging the Court after 14 years of existence. In the words of Payam Akhavan, commentators may be “placing a burden on international criminal justice that it cannot bear, by making it a substitute for, rather than a complement to, preventive action.”¹²⁰

Evidence on conflict prevention indicates the ICC is more important than observers often assume. An additional matter for consideration is whether the ICC helps lay the foundations for long-term change—change that has yet to bear fruit in some cases. One source of long-term change is legal reform. However, save for some notable exceptions, research has been slow to examine the relationship between the Court and domestic legal change. As comparative law scholar Naomi Roht-Arriaza contends, “Often,

120. Akhavan, *Rise, and Fall, and Rise*, *supra* note 53, at 530 (using the examples of the Rwanda and Burundi to show that the first priority in preventing mass genocide should be prevention, while international criminal justice should be a response of last resort).

despite the universal lip service paid to so-called ‘positive’ complementarity, in terms of resources and attention national prosecutions for international crimes have been seen as somehow peripheral to the international justice project, but they are integral to both its origins and its future.”¹²¹ In the next section, we turn to this question. Is the ICC contributing to productive legal change at the domestic level?

IV. LEGAL CHANGE

Intrinsic to the Rome Statute project is the notion that the heavy lifting of providing justice should be done by national jurisdictions. For that reason, in order to take stock of the Court’s work, we need to look beyond its deterrence effects to the different ways in which the ICC may be affecting the legal and political environment at the local level.¹²² In this section, we review evidence on various forms of domestic legal change. This kind of change could range from the adoption of new legal rules to a change in the parameters of peace negotiations or an increase in levels of domestic prosecutorial activity. These are both legal and political effects; and they are a product of the availability of the Rome Statute as an international standard, as well as active promotion by ICC officials.

In what follows, we assess legal changes at the different stages of ICC involvement in a given country, starting with membership to the ICC, then move on to preliminary examinations and investigations. We conclude with cases in which legal changes should be least likely, those of non-party states. We proceed in this fashion because we believe it is important that political scientists interested in the effects of international institutions understand the legal specificities of a given international treaty. Different ICC stages have specific legal consequences; they empower ICC officials and domestic actors differently and generate diverse incentives for stakeholders. As we

121. Naomi Rhot-Arriaza, *Just a “Bubble”? Perspective of the Enforcement of International Criminal Law by National Courts*, 11 J. INT’L CRIM. JUST. 537, 537 (2013) (suggesting that recent developments in the law and corrected expectations should inform the relationship between national courts and international criminal law).

122. *See id.* (examining the shift in focus from international criminal justice towards national trials in state courts and asserting that resources for national courts are integral to international criminal justice).

will show, the ICC produces important legal and political effects at the national level.

A. RATIFICATION AND LEGAL CHANGE

Legal change should result from ratifying the Rome Statute. Given the complementarity scheme¹²³— as well as the different cooperation requirements for member states like the execution of arrest warrants, the surrender of individuals and the provision of sensitive information¹²⁴— ratification is expected to create substantial changes to domestic legal systems. Whether states need to adopt accompanying legislation in order to implement the Rome Statute in their national systems depends on each legal system's relation to international law. Most of the provisions in the Statute are considered to be self-executing; that is, they are specific enough to be applied by domestic courts directly. This is especially true in the definitions of crimes because the drafters of the Rome Statute provided definitions of the crimes and state parties agreed to adopt the Elements of the Crimes.¹²⁵ However, even states with monist systems have found the need to pass some implementing legislation for matters of cooperation with the Court, especially in relation the surrendering of individuals and transferring of information.¹²⁶

Political science research on human rights treaties rarely pays attention to implementation, making ratification the variable of interest instead.¹²⁷ However, this is normally not enough to enable

123. See Rome Statute, art. 17 (outlining instances in which the Court should determine a case inadmissible, including when a state that has jurisdiction over the case is already investigating or prosecuting it).

124. See generally, Rome Statute, arts. 86-102.

125. WILLIAM SCHABAS, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE, 405 (2010).

126. See Otto Triffterer, *Legal and Political Implications of Domestic Ratification and Implementation Processes*, in THE ROME STATUTE AND DOMESTIC LEGAL ORDERS VOLUME I: GENERAL ASPECTS AND CONSTITUTIONAL ISSUES 1-5 (Flavia Lattanzi & Claus Kress eds., 2000) (analyzing the procedural issues associated with states' obligation to cooperate with the Rome Statute and asserting that a step by step approach would be more effective in achieving the Court's mission).

127. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935, 1939 (2002) (focusing on the relationship between human rights treaty ratification and human rights practices to determine whether countries comply with treaties and whether these countries improve their human rights

State Parties to fulfill their obligations to cooperate with the Court's proceedings and to exercise jurisdiction themselves. For example, the ICC has no police force of its own that could arrest suspects; it requires domestic law enforcement agencies to do so and surrender them to the Court.¹²⁸ In order to comply with this obligation, Canada had to amend its Extradition Act in order to create a surrender process to the ICC. The amendment included, among other changes, the impossibility for individuals subject to a Court request to claim immunities under law.¹²⁹ Empirical evidence shows that implementation is not automatic. Some states have passed implementing legislation quickly while others have lagged. Additionally, while some member states have fully implemented the Rome Statute, others have only passed complementarity or cooperation laws, or none at all. By 2012, of the 120 Rome-ratifiers, sixty seven had passed complementarity legislation, while fifty two had passed cooperation legislation.¹³⁰

Only recently have researchers tried to explain this variation. Wayne Sandholtz develops a rule of law explanation for Rome

practices after ratifying it); see also Ryan Goodman & Derek Jinks, *Measuring the Effects of Human Rights Treaties*, 14 EUR. J. INT'L L. 171, 173-74 (2003) (questioning the focus on ratification as the point of acceptance of human rights norms); see also SIMMONS, *supra* note 43, at 80-81 (examining treaty engagement and dropping a country from the analysis once it ratifies a treaty); see also Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOCIOLOGY 1373, 1377-78 (2005) (recognizing that domestic practices do not always align with treaty ratification but arguing that this aspect of compliance is only one part of the bigger picture).

128. Rome Statute, art. 89(1).

129. See *id.*; see also Valerie Oosterveld, Mike Perry & John McManus, *The Cooperation of States with the International Criminal Court*, 25 FORDHAM INT'L L.J. 767, 775-77 (2001) (including other amendments such as the inclusion of "ICC" among the Extradition Act's terms section and the elimination of some grounds by which an executive might refuse surrender under the ICC).

130. See also COALITION FOR THE ICC, 2013 STATUS OF THE ROME STATUTE AROUND THE WORLD 9 (2013), http://www.iccnw.org/documents/RomeStatuteUpdate_2013_web.pdf (providing national statistics on the complementarity and cooperation legislation enacted to implement the Rome Statute); see generally *International Criminal Court: Updated Checklist for Effective Implementation*, AMNESTY INT'L (2010), <https://www.amnesty.org/en/documents/document/?indexNumber=ior53%2f009%2f2010&language=en> (indicating complementarity and cooperation requirements under the Rome Statute and recommending an implementation checklist to effectively balance the ICC with national courts).

Statute implementation.¹³¹ Implementing legislation represents an opportunity cost, given the financial and political resources invested in legal reforms and enforcement cost, and because the legislation provides the legal infrastructure for the prosecution of domestic officials. According to Sandholtz, the states that are willing to pay these costs are those that value and uphold the rule of law domestically. Because the Rome Statute contributes to the realization of an international rule of law, political elites in countries where the rule of law is strong will see the ICC project as consistent with their national norms and values.

Sandholtz's statistical analysis of legislation enactment, as well as anecdotal evidence elsewhere,¹³² shows that Rome Statute membership can lead to domestic legal change; however, this is conditional on other variables that would seem to indicate state quickened willingness to support the Court, such as rule of law, level of democracy, and type of legal system. By itself, implementation would not amount to much more than bringing a state's domestic statutes more in line with international criminal law. However, under certain conditions, these norms can have more concrete effects.¹³³ For example, although Sudan's President Al-Bashir remains at large, his indictment has reduced his mobility. Last year, he was prevented from leaving South Africa after the Southern African Litigation Center filed a complaint before a High Court demanding his arrest in accordance with South Africa's Implementation of the Rome Statute Act 27 of 2002¹³⁴ Similarly, when visiting Nigeria in 2013, Bashir

131. See Wayne Sandholtz, *Implementing the International Criminal Court*, APSA 2014 ANNUAL MEETING PAPER 1, 36 (2014) (finding that a more democratic country is more likely to enact legislation implementing the treaty but is not necessarily considered a 'low-cost' implementer).

132. See generally *International Criminal Court: Updated Checklist for Effective Implementation*, *supra* note 132 (listing requirements for effective implementation of complementarity and cooperation legislation); see generally Triffterer, *supra* note 126, at 1-5 (emphasizing the importance of local implementation legislation for the Rome Statute and the ICC).

133. See generally SIMMONS, *supra* note 43, at 12-14 (arguing that treaties usefully solidify the government's focus by revealing the gap between current behaviors and the treaty provision standard of behavior).

134. *South Africa/Sudan: Seeking Implementation of ICC Arrest Warrant for President Bashir*, SOUTH AFRICAN LITIG. CTR. (2016), <http://www.southernafricalitigationcentre.org/cases/ongoing-cases/south-africasudan-seeking-implementation-of-icc-arrest-warrant-for-president-bashir/> (detailing events

had to abruptly cut his trip short when activist lawyers began mobilizing to demand his arrest in court.¹³⁵

The Al-Bashir example is evidence of Court weakness because he has not been apprehended. However, it is also evidence of something else: the increasing necessity of accounting for international legal norms when conducting affairs of state. As implementing legislation continues to pass, amassing in countries around the world, the jurisdictional net of the ICC widens. This could very well have long-term effects as time goes on. Next, we review the evidence on the consequences of further ICC involvement, both at the preliminary examination and investigation stages. A variety of literature seems to indicate that when state willingness to support the ICC and commitment to accountability weakens, a more active role by ICC officials could lead to domestic legal and political changes.

B. PRELIMINARY EXAMINATION: THE CASE OF COLOMBIA

Colombia is a case that demonstrates the power of ICC actors to monitor a conflict situation, and steward the application of law in a country that has passed complementarity legislation. The internal armed conflict in Colombia goes back over five decades and throughout that time multiple armed groups have taken part in the hostilities. The largest groups with the most continuous participation have been the left-wing *Fuerzas Armadas Revolucionarias de Colombia* (FARC) and the *Ejercito de Liberación Nacional* (ELN), and the right-wing paramilitary group *Autodefensas Unidas de Colombia* (AUC). The effects of the conflict reached a mass scale. Official figures for the 1964 and 2007 period report 95,000 armed conflict-related casualties, 51,530 kidnappings, 24,579 terrorist acts and 4,499 massacres. The number of displaced persons ranges between 3 and 4.6 million, making of Colombia the country with the second-most displaced individuals, surpassed only by Sudan.¹³⁶

leading up to the government's appeal to the Constitutional Court of the ruling that the government's failure to arrest President Bashir was unlawful).

135. Norimitsu Onishi, *Bid by Omar al-Bashir of Sudan to Avoid Arrest is Tested in South Africa*, N.Y. TIMES (June 14, 2015), <http://www.nytimes.com/2015/06/15/world/africa/bashir-sudan-international-criminal-court-south-africa.html> (describing how Bashir's case may be a test of the ICC's relevance to the African continent).

136. See KAI AMBOS, THE COLUMBIAN PEACE PROCESS AND THE PRINCIPLE OF

Colombia ratified the Rome Statute on 5 August 2002. Together with France, Colombia was the only ratifier that made use of article 124, which allows ratifying countries to issue a declaration delaying the Court's jurisdiction for war crimes for seven years. This meant that while the ICC has jurisdiction for two of the core crimes, genocide and crimes against humanity, committed since November 2002, it can only prosecute war crimes committed after November 2009.

The situation in Colombia has been under preliminary examination since 2004, although the examination only became public in 2006.¹³⁷ The first step was to assess subject matter jurisdiction, that is, whether crimes under ICC jurisdiction were being committed. Given the scale of the conflict, it did not take long for the Prosecutor to reach that conclusion and the effort moved towards the admissibility question. That is, was Colombia conducting genuine prosecutions that would satisfy the complementarity principle?

What follows is not a legal assessment of whether this particular policy passes the complementarity test or not.¹³⁸ This is an analysis of the political construction of a particular scheme of judicial accountability involving various stakeholders: the parties to the conflict, the ICC and civil society. We show how the OTP's strategy was not to play a passive part of evaluating complementarity in order to determine whether to step in or not. Even if taking a less salient role, it became an important part in the construction of an accountability process that by design would keep the Court away. The OTP strategy was to make itself unnecessary. It did so by pressing for specific provisions in the peace agreement that would satisfy the Rome Statute requirements. During these three years the OTP conducted at least five missions to Colombia and has consulted

COMPLEMENTARITY OF THE INTERNATIONAL CRIMINAL COURT: AN INDUCTIVE SITUATION BASED APPROACH 52 (2010) (listing internal displacement, forced disappearances, torture, and indiscriminate attacks among the factors that contribute to the gravity of the systemic character of crimes in Colombia).

137. See *Report on Preliminary Examination Activities*, ICC: OFFICE OF THE PROSECUTOR ¶ 61-64 (2011), <https://www.icc-cpi.int/NR/rdonlyres/63682F4E-49C8-445D-8C13-F310A4F3AEC2/284116/OTPreportonPreliminaryExaminations13December2011.pdf> [hereinafter *2011 Preliminary Report*].

138. See generally AMBOS, *supra* note 136, at 37-39 (defining the complementarity test and the preliminary steps that must be satisfied before applying it).

with Colombian officials regularly.¹³⁹

The Colombian government has attempted multiple peace processes involving different accountability schemes for human rights abuses. We will focus on the most recent of these policies, the Special Peace Jurisdiction (*Jurisdicción Especial para la Paz*) of 2015 that is part of the agreement that resulted from three years of peace negotiations between the government and the FARC in Havana, Cuba.

Early on, the question of accountability appeared as one of the thorniest issues to be resolved. The government got caught between demands from the ICC¹⁴⁰ and transnational NGOs¹⁴¹ that it comply with its international obligations to punish the gravest crimes, and the FARC's expectation that the resulting legal framework would include amnesties and alternative sentencing.¹⁴² On the same month the talks began, the ICC Prosecutor released an interim report which made clear that the focus of the examination would be on the proper prosecution of sexual and gender-based violence (SGBV), forced displacement, and the practice of "false positives."¹⁴³ This would become a normal practice of the OTP during the following

139. See generally *Colombia*, ICC: OFFICE OF THE PROSECUTOR (last visited October 12, 2016), <https://www.icc-cpi.int/colombia> (reporting the ongoing preliminary examination being conducted in Colombia in relation to alleged crimes against humanity, war crimes, and national proceedings regarding these crimes).

140. CPI: "Cualquier proceso de paz debe ser compatible con el Estatuto de Roma," AMBITOJURIDICO.COM (April 19, 2013), <http://www.ambitojuridico.com/BancoConocimiento/Laboral-y-Seguridad-Social/noti-130419-15-cpi-cualquier-proceso-de-paz-debe-ser-compatible-con-el-estatuto-de-roma>.

141. Así hablaron defensores y detractores del Marco Jurídico para la Paz, AMBITOJURIDICO.COM (August 27, 2013), <http://www.ambitojuridico.com/BancoConocimiento/Constitucional-y-Derechos-Humanos/noti20130828-01-asi-hablaron-defensores-y-detractores-del-marco-juridico-para-la-paz>.

142. Marco para la Paz no puede contemplar amnistías e indultos a miembros de las Farc, EL PAÍS (Sept. 12, 2012), <http://www.elpais.com.co/elpais/judicial/noticias/marco-para-paz-puede-contemplar-amnistias-e-indultos-miembros-farc>.

143. See *On Their Watch: Evidence of Senior Army Officers' Responsibility for False Positive Killings in Colombia*, HUM. RTS. WATCH 1 (June 24, 2015), <https://www.hrw.org/report/2015/06/24/their-watch/evidence-senior-army-officers-responsibility-false-positive-killings> [hereinafter *On Their Watch*] (defining 'false positives' as the name given to a particular practice by sectors of the Colombian Armed Forces who, under pressure by superior officials to show results, would stage operations against guerrilla fighters in which most of the casualties were actually civilians).

years – to constantly remind the Colombian authorities that although national proceedings might be ongoing, those cannot just cover certain categories of crimes while ignoring others.¹⁴⁴

The final agreement refers to the Rome Statute in multiple parts. The accountability provisions grant amnesties but preclude them from benefiting those responsible for the most serious crimes, those under ICC jurisdiction. It also creates a special jurisdiction with its own judges. Most of the magistrates will be Colombian nationals, but a minority of foreigners is allowed to participate.¹⁴⁵ Small decisions like this one, including making the text of the agreement available in English, suggest that Colombian authorities are interested in projecting this last transitional justice effort to an international audience.

The agreed sentencing scheme benefits individuals that come forward with their crimes and contribute to the establishing of truth. Those who recognize responsibilities for serious crimes will receive sentences between five and eight years. Those who do not will be prosecuted in a conventional criminal trial and could face sentences of up to twenty years. Sentencing was one of the issues the ICC pressed the most. In May 2015, Deputy Prosecutor James Stewart recognized that although states have considerable discretion regarding the type and length of sentences they impose, penalties need to be congruent with the goals of the Rome Statute in terms of public condemnation, acknowledgement of victims' suffering, and deterrence. The OTP made this position clear to the Colombian government. Declared Stewart,

This was done confidentially and in advance of formal negotiations on the sentencing issue in the peace talks. . . . The step was prompted by our concern to alert the national authorities to our interpretation of the

144. See *Report on Preliminary Examination Activities*, ICC: OFFICE OF THE PROSECUTOR, 37-38 (2015), <https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf> [2015 Preliminary Report] (reporting the OTP's follow-up with the national government's proceedings in false positive cases and outlining the steps OTP has taken to ensure the national authority's statements regarding active investigations of cases are supported by sufficient evidence).

145. Acuerdo Final Para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, Colom.-Fuerzas Armadas Revolucionarias de Colombia, art. 5.1.2 par. 65 (Aug. 28, 2016), https://www.mesadeconversaciones.com.co/sites/default/files/24_08_2016acuerdofinalfinalfinal-1472094587.pdf.

provisions of the Rome Statute in a timely way, and not after the fact.¹⁴⁶

After the agreement was publicized, the Office released a statement noting that it was pleased with the exclusion of amnesties for war crimes and crimes against humanity.¹⁴⁷ At the same time, the largest transnational NGOs did not express the same enthusiasm for the agreement. Both Amnesty International and Human Rights Watch criticized the Special Peace Jurisdiction for its ambiguity and omissions, which could lead to individuals responsible for serious crimes not serving any jail time at all.¹⁴⁸

The evidence demonstrates that the ICC clearly impacted the most

146. James Stewart, *Transitional Justice in Colombia and the Role of the International Criminal Court*, ICC: OFFICE OF THE PROSECUTOR 11 (May 13, 2015), <https://www.icc-cpi.int/iccdocs/otp/otp-stat-13-05-2015-ENG.pdf> (illustrating the need for communication between ICC and national officials).

147. See *Statement of the Prosecutor on the Agreement on the Creation of a Special Jurisdiction for Peace in Colombia*, ICC: OFFICE OF THE PROSECUTOR (Sept. 24, 2015), https://www.icc-cpi.int/Pages/item.aspx?name=otp_stat_24-09-2015 [hereinafter *Statement of the Prosecutor*] (“I note with optimism that the agreement excludes the granting of any amnesty for war crimes and crimes against humanity, and is designed, amongst others, to end impunity for the most serious crimes.”).

148. Both organizations are centrally concerned with the ability of the justice system to impose sentences on those confessed human rights violators. The final peace agreement prescribes alternative sentences for less egregious acts, designated as political and other related crimes by a proposed Amnesty Law, foreclosing jail time in circumstances not connected to “grave violations of domestic and international human rights.” Those that admitted criminal responsibility for serious crimes would receive sentences between five and eight years of “effective restriction of personal liberty” and requiring participation in restorative projects to aid victims. They argue that application of these alternative sentences is not proportional to the gravity of the crimes and Colombia would be in violation of their international legal obligations to punish atrocities. See *Human Rights Watch Analysis of Colombia-FARC Agreement*, HUM. RTS. WATCH (Dec. 21, 2015), <https://www.hrw.org/news/2015/12/21/human-rights-watch-analysis-colombia-farc-agreement>; see also *Amnesty International Report 2015/16: The State of the World’s Human Rights*, AMNESTY INT’L 123 (2016), https://www.amnestyusa.org/pdfs/AIR15_English.PDF (suggesting that a primary concern is alternative sentencing, where individuals who admitted criminal responsibility for serious crimes would receive sentences between five and eight years, but the text of the agreement also allows for sanctions not including jail time, such as five to eight years of participating in restorative projects to aid victims; further arguing that if Colombia applies sanctions not proportional to the gravity of the crimes then it would be in violation of international legal obligations to punish atrocities).

recent effort to provide accountability for human rights violations in Colombia, the Special Peace Jurisdiction. The ICC Prosecution made itself consequential by pressuring the Colombian government to create the conditions that would keep the OTP from a full investigation. Arguments about the 'shadow of the ICC', which have been regularly made by supporters of the ICC, do not properly capture the kind of involvement the Court has had, at least in the Colombia case. The idea that government officials have been negotiating the peace agreement in the shadow of the Court suggests a much more static role by the OTP and exogenous role. Government officials did not operate in the shadow of the ICC; they operated face to face with Court members.

It cannot be argued that the ICC had only positive effects on the Colombian peace process. There has been criticism on many fronts. One is that the OTP's narrow focus on complementarity and its inability to consider "gender biases inherent in laws in each state that interfere with the investigation and prosecution of crimes of sexual violence."¹⁴⁹ Another type of criticism recognizes the positive effects the ICC had on legal reforms and capacity building, but concludes that the perpetual examining role of the ICC cannot go on forever. The OTP created a 'no-win' situation in which if the preliminary examination closes, forces pushing for broad accountability would weaken. If the examination advances onto a full investigation, it would antagonize national institutions and diminish the progress achieved so far. And if the situation remains under preliminary examination, the OTP will lose its capacity to influence the political process given that the threat of the investigation would lose credibility.¹⁵⁰ It should be noted, however, that this argument surfaced in 2011, and the OTP has still found ways to influence the accountability component of the latest peace agreement.

It is clear that the ICC did not cause the Special Peace Jurisdiction. In other words, had the ICC refrained from conducting a preliminary examination in Colombia, an accountability component would likely

149. Louise Chappell et al., *The Gender Justice Shadow of Complementarity: Lessons from the International Criminal Court's Preliminary Examinations in Guinea and Colombia*, 7 INT'L J. OF TRANSITIONAL JUST. 455, 473 (2013).

150. Alejandro Chehtman, *The Impact of the ICC in Colombia: Positive Complementarity on Trial*, DOMAC 59 (2011), <http://www.domac.is/media/domac-skjol/Domac-17-AC.pdf>.

still exist in the peace agreement. However, those provisions would have looked different; therefore, OTP involvement changed the contours of the accountability provisions themselves. There is evidence to suggest this counterfactual is plausible. Putting an end to the fifty-year-old conflict has always been in the agenda of President Santos; however, the way in which he would pursue peace and justice together was not clear at the beginning of his presidency. For example, in an address to the United Nations General Assembly of 2012, Santos announced the beginning of peace talks, but made absolutely no reference to accountability measures.¹⁵¹ His speech from 2015, given days after the Special Peace Jurisdiction was adopted, is dominated by the post-conflict justice theme. This change cannot be understood without the participation of the ICC. However, as Santos noted in his last General Assembly appearance, Colombia is achieving “the maximum of justice that allows us to transit towards peace.”¹⁵² That is, the ICC was able to exert its influence because Colombia’s political actors, interested perhaps in international validation and legitimacy, provided the Court with the space to do so. The OTP could have pressed for an even more rigorous accountability mechanism, with harsher and longer sentences, but that could have proved too costly for the government if it had compromised its ability to deliver on peace.

The last years of the Colombian peace process show how the Rome Statute structured the context of peace negotiations in a way that certain accountability policies, most notably amnesties and pardons for serious crimes, are off limits for negotiators. In accordance with the quantitative evidence presented above, amnesties are still implemented in conflict termination. However, the purpose of the ICC in Colombia was to keep those policies within certain legal boundaries. In this sense, a parallel could be drawn with the 1999 Lomé Accord for Sierra Leone, an agreement struck in a very different stage of international criminal justice. The Lomé Accord determined the cessation of over ten years of hostilities and a power-sharing scheme between the Sierra Leone government and the

151. U.N. GAOR, 67th Sess., 10th plen. mtg., at 1-3, U.N. Doc. A/67/PV.10 (Sept. 26, 2012).

152. U.N. GAOR, 70th Sess., 16th plen. mtg., at 30-32, U.N. Doc. A/70/PV.16 (Sept. 29, 2015).

opposing Revolutionary United Front (“RUF”).¹⁵³ The accountability provisions of the agreement amount to what is known as a blanket amnesty, an unconditional shield from prosecution granted to all warring parties.¹⁵⁴

That the final deal would contain amnesties had been decided upon even before the peace talks started. As the talks continued, civil society tried to engage the government on this question, but received little substantive information. It was not immediately clear to UN representative Francis Okello that the blanket amnesty and pardon for crimes of the war would be a problem in relation to UN policy.¹⁵⁵ The day before the signing of the Accord, Okello received orders from New York not to sign the agreement precisely because it granted a blanket amnesty. However, the final decision was not to stand in the way and upon signing the agreement, the UN representative wrote a disclaimer in the margins stating that according to the UN’s understanding, the amnesty would not apply to serious crimes under international law. The note read, “the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes, and other serious violations of international humanitarian law.”¹⁵⁶

It is clear how the Lomé Accord was negotiated in a very different context from the one in which the Colombian peace process developed, both legally and politically. In legal terms, the existence of the Rome Statute and its full force over Colombia after article 124 reservations expired provide clear rules in relation to amnesties. In the Sierra Leone case, the issue of the legal relationship between the amnesty articles of the Lomé Accord and the Special Court for Sierra

153. See JEFFERY, *supra* note 65, at 118.

154. See Priscilla Hayner, *Negotiating Peace in Sierra Leone: Confronting the Justice Challenge*, INT’L CTR. FOR TRANSITIONAL JUST. CTR. FOR HUMANITARIAN DIALOGUE 5 (Dec. 1, 2007), https://www.files.ethz.ch/isn/55192/SierraLeoneReportrevise_1207.pdf [hereinafter *Negotiating Peace in Sierra Leone*] (discussing the strong international condemnation of Sierra Leone’s blanket amnesty provisions).

155. Priscilla Hayner, *The International Role in Justice and peacemaking in Sierra Leone*, EUROPEAN COUNCIL ON FOREIGN RELATIONS 2 (Nov. 2013), http://www.ecfr.eu/page/-/IJP_SierraLeone.pdf [hereinafter *International Role in Justice*].

156. JEFFERY, *supra* note 65, at 118.

Leone's statute arose in the form of admissibility challenges. The Special Court dismissed the challenges by deciding that the Lomé amnesties were contrary to international customary law. However, given the absence of relevant treaty law applicable to Sierra Leone that imposed a duty to prosecute,¹⁵⁷ the Special Court recurred to international custom, taking an approach that some commentators considered to be odd.¹⁵⁸ In terms of the political differences, the active role played by ICC representatives early on contrasts sharply with that of the UN officials that only brought up the amnesty issue at the very end of the Lomé negotiations, risking the adoption of the entire deal.

This review of the Colombia case shows how preliminary examinations provide spaces for ICC officials to influence political processes on the ground. The next step is to look into the evidence arising from situations under investigation to see what kinds of effects investigations have given the higher level of scrutiny and prosecutorial powers they entail.

C. INVESTIGATION: THE CASES OF UGANDA AND DRC

Uganda and DRC, the two countries with the longest history of ICC investigation after both onsets in 2004, provide evidence of what we have elsewhere called unintended positive complementarity.¹⁵⁹ With this concept, we refer to a diffuse effect of the ICC on judicial activity in terms of an increase in municipal prosecutions of state agents for all human rights crimes, not just trials

157. See Simon M. Meisenberg, *Legality of Amnesties in International Humanitarian Law: The Lomé Amnesty Decision of the Special Court for Sierra Leone*, 86 IRRC 837, 849 (Dec. 2004) (mentioning that Common Article 3 of the Geneva conventions, pertaining to non-international armed conflict, contains no explicit obligation to prosecute or extradite; further discussing the inapplicability of the Genocide Convention and the Torture Convention).

158. See, e.g., William A. Schabas, *Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, 11 U.C. DAVIS J. INT'L L. & POL'Y, 145, 159-60 (2004-2005) [hereinafter *Amnesty, the Sierra Leone Truth and Reconciliation Commission*] (quoting the Appeals Chamber's finding of a non-violation of the Lomé agreement, and stating that it is "certainly an odd statement from the Special Court").

159. E.g., Dancy & Montal, *supra* note 100, at 5-7 (defining unintended positive complementarity as "general causal effects" of the ICC, such as increasing domestic prosecutions for all human rights crimes, and identifying Uganda and the DRC as examples of this).

of state and rebel leaders specifically for atrocity crimes. Although the policy of positive complementarity has been part of the OTP repertoire for years, the effect we find is unintended from the Prosecutor's policy in two main ways.¹⁶⁰ First, the ICC has not openly promoted general domestic accountability in states targeted for intervention; instead, it has tended to focus on atrocity crimes arising from the situations that led to the Court's involvement. Second, in this notion of positive complementarity, increases in domestic judicial activity does not result from state cooperation but from latent political struggles between ruling and reformer coalitions that ICC involvement exacerbates.

The possibility of an increase in the level of domestic prosecutorial activity as a result of an investigation, although one of the goals of the whole Rome Statute system, has been discounted by critical scholars. Sarah Nouwen's thoroughly researched book argues that while ICC intervention has invigorated debates around legal justice in Uganda, the actual operation of the courts has remained limited, and Ugandan courts have not effectively prosecuted high-profile cases of atrocity crimes.¹⁶¹ The main reason behind this is a deficit of political will: "Neither ICC intervention nor complementarity reduces the often insuperable loyalty costs that domestic proceedings would incur."¹⁶² Nouwen's account is no doubt accurate, but at the same time it stops short of examining the possibility that ICC intervention has more diffuse and unintended legal effects.

Most of the work on positive complementarity, which like Nouwen's has come to negative findings, focuses on whether there is a direct connection between ICC involvement and state-led proceedings, through leveraging or the sharing of evidence, for those

160. See *Prosecutorial Strategy 2009-2012*, ICC: OFFICE OF THE PROSECUTOR 4 (2010), <https://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf> (identifying positive complementarity as one of the four fundamental principles of ICC prosecutorial strategy).

161. SARAH M.H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* (2013).

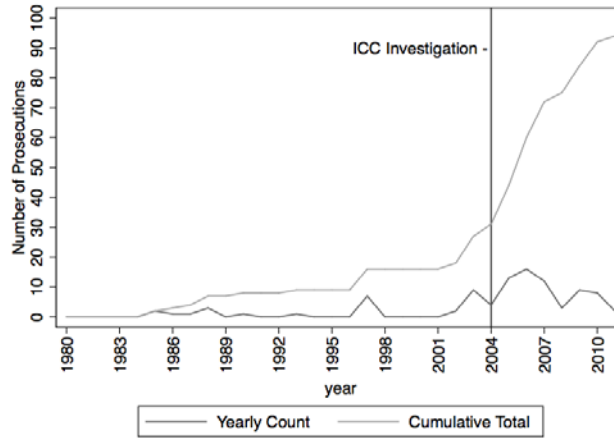
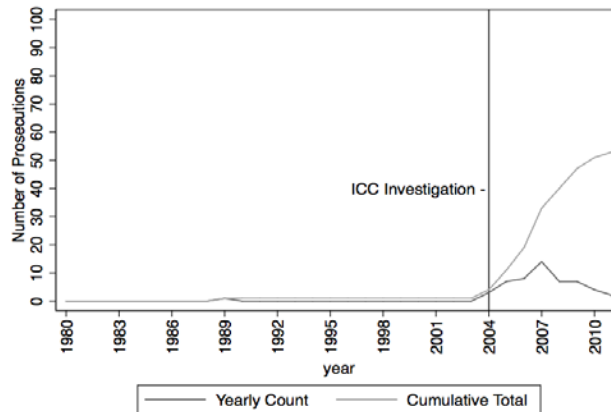
162. *Id.* at 12.

crimes specifically under ICC jurisdiction.¹⁶³ However, statistical analysis of determinants of all domestic human rights prosecutions in African states from 1980 through 2011 shows that a country subject to an ICC investigation tends to have roughly three times more trials per year than other African countries without ICC involvement, and this effect holds even when we account for confounding factors like presence of human rights NGOs, judicial independence, democratic transition and foreign aid earmarked for civil society and capacity-building. Interestingly, preliminary examinations do not have this effect on domestic judicial responsiveness; only full-fledged investigations do.¹⁶⁴

The mechanisms driving this effect rely on legal differences between preliminary examinations and investigations. These sit at the heart of the political clashes between state actors favoring impunity and the reforming opposition that pushes for accountability. Preliminary examinations do not carry high costs for targeted states since the Court is not empowered to do much more than collect information. However, an official ICC investigation means the almost certain prosecution of a country's nationals for serious crimes. Of all the stages of ICC involvement, the official investigation is the most critical from a reputational point of view because at this point state agents can be put on the "wanted by the ICC" list, which serves as an international status marker. At the same time, state authorities are put in an uncomfortable position since they are expected to cooperate in the punishment of state agents that are part of its own ranks.

163. See Christine Bjork & Juanita Goebertus, *Complementarity in Action: The Role of Civil Society and the ICC in Rule of Law Strengthening in Kenya*, 14 YALE HUM. RTS. DEV. J. 205, 210 (2011) (stating the objectives of research into complementarity as a search for a direct link between ICC preliminary examination and domestic accountability).

164. See Dancy & Montal, *supra* note 100, at 46 ("... when controlling for confounding factors, preliminary examinations are not associated with increased prosecutions, but ICC investigations are.")

Figure 5. Number of human rights prosecutions in Uganda¹⁶⁵Figure 6. Number of human rights prosecutions in DRC¹⁶⁶

165. See *Records: Uganda*, TRANSITIONAL JUST. RESEARCH COLLABORATIVE, <https://transitionaljusticedata.com/browse/index/Browse.countryid:121> (last visited Oct. 10, 2016) (select “Domestic Criminal Prosecutions” and filter by “Year”) (listing domestic criminal prosecutions in Uganda from 1972 to 2011).

166. See *Records: Congo, Democratic Republic of the*, TRANSITIONAL JUST. RESEARCH COLLABORATIVE, <https://transitionaljusticedata.com/browse/index/Browse.countryid:26> (select “Domestic Criminal Prosecutions” and filter by “Year”) (last visited Oct. 10, 2016) (listing domestic criminal prosecutions in the DRC from 1978 to 2011).

Amid this sensitive moment for the regime, which is attempting to avoid reputational losses, reformers engage in three strategies we term demand-making, capacity-building, and gap-filling litigation. The reforming opposition consists of coalitions of activists and attorneys linked in with transnational NGOs along with their allies inside the system like progressive legislators, ministers, and judges. Demand-making includes actions like issuing statements about the reticence of government officials to support local human rights responses, along with a number of calls for more domestic judicial empowerment. Capacity-building means participating in legal conferences, training programs, and human rights education initiatives. For example, in 2009 alone the Ugandan Foundation for Human Rights Initiative (“FHRI”), which maintains ties with western INGOs and donors, trained a total of 284 members of community-based organization in human rights and gender-based violence.¹⁶⁷ Similarly in DRC, *Avocats Sans Frontières* (“ASF”) and the American Bar Association (ABA) have carried out different projects in the area of access to justice including training magistrates and other local NGOs.

Making demands and building capacity, though, do not themselves mobilize domestic courts. For this, groups wishing for change pursue litigation in domestic courts themselves. For example, the Ugandan FHRI is an organization with a wide interest in legal accountability and access to justice that exceeds the situation in Northern Uganda. The trend in cases received by the FHRI shows a remarkable increase after the opening of the ICC investigation in 2004 and it is suggestive of an increase in NGOs’ efforts to promote access to justice during that period.¹⁶⁸ In DRC, international NGO involvement in gap-filling litigation rose to the point of providing the physical courts in which trials could take place. Between 2009 and 2012 these mobile courts, which are established for a specific period of time in remote areas, provided the setting for twenty court sessions and heard 382 cases that resulted in 286 convictions and sixty-seven

167. See *2009 Annual Report*, FOUNDATION FOR HUMAN RIGHTS INITIATIVE 55-57 (2010), <http://www.fhri.or.ug/index.php/2015-07-22-14-08-32/annual-reports/23-annual-report-2009/file> (discussing different capacity building courses that FHRI held for community organizations during 2009).

168. See *id.* at 41 (listing a yearly increase in cases from 2004 to 2009, from 223 to 378).

acquittals.¹⁶⁹ As Lake argues, the actions of anti-impunity groups created a situation where “complex functions of domestic governance, such as the production of high quality judicial decisions by domestic courts, are able to persist, even flourish, in an area where the state is characterized by extreme fragility and weakness.”¹⁷⁰

Figures 5 and 6 chart data on human rights prosecutions to show that a significant increase in trials occurred in Uganda and the DRC following ICC investigation. Because reforming coalitions pursue these strategies in a moment when the government is sensitive to international attention, they are more likely to succeed at pressuring the courts to pursue criminal cases without fear of reprisal. The result is a significant increase in domestic human rights prosecutions—an unintended byproduct of ICC investigations that does not look like the positive complementarity that OTP officials originally envisioned.

D. NON-PARTY STATES AND LEGAL CHANGE: THE CASES OF INDONESIA AND INDIA

The last place where we should expect the ICC to have any effect should be non-party states that are under no form of scrutiny by the Court. However, there is evidence of ICC legal impact even in such cases. India and Indonesia are non-party states that mimicked Rome Statute language in their own legislation even though they are under no obligation to implement it.

Differently from state parties that are expected to implement the entire Rome Statute upon ratification, non-members need not pursue such legislation. There is, however, evidence of partial incorporation when political openings in these states allow activists and other progressive actors to bring municipal legislation more in line with international standards. That international treaties influence domestic

169. Open Society Foundations. (2013). *Justice in DRC. Mobile Courts Combat Rape and Impunity in Eastern Congo*, p. 7. (<https://www.opensocietyfoundations.org/sites/default/files/justice-drc-20130114.pdf>)

170. Milli Lake, *Organizing Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood*, 58 INT'L STUD. Q. 515, 515 (2014) [hereinafter *Organizing Hypocrisy*].

legislation should not come as a surprise¹⁷¹ since what is particular about the Rome Statute is that it is a highly progressive legal instrument. Additionally, the accompanying Elements of the Crimes and Rules of Procedure and Evidence convey a level of specificity that reduces states' space for insincere adoption of legal norms that are easily interpreted in self-serving ways.

Decided in 2004, *Sakshi v. Union of India*¹⁷² was an important case for India's judicial treatment of sexual and gender-based violence. The women's rights NGO Sakshi petitioned the Supreme Court to affirm a broader definition of rape. Although the Court upheld the traditional conservative definition, it recognized that it is one "contrary to the contemporary understanding of sexual abuse and violence all over the world" and urged the legislature to make changes to criminal laws governing sexual violence.¹⁷³ This created momentum for women's rights groups, which pursued intense advocacy on this definitional issue. At a time when important stakeholders from the judiciary and civil society were arguing for change towards more correspondence with international standards, the Rome Statute was the natural source for an updated definition.

The largest advocacy group, the National Commission for Women, considered "the Rome Statute definition as being at the forefront of the international feminist movement."¹⁷⁴ To import language from the ICC Statute means to draw from "the most progressive definition of rape included to date in any international treaty."¹⁷⁵ The Indian Criminal Law Amendment Act of 2006 lifted the language directly from the Rome Statute Elements of the Crimes for its definitions of rape and consent, making Indian municipal law much more progressive and changing the entire legal infrastructure

171. See SIMMONS, *supra* note 44, at 126 (illustrating the causal relevance of treaties as a formal institution through the example of international human rights treaties, which create stakeholders domestically and generate huge impacts on the relationships between a government and its citizens).

172. *Sakshi v. India*, (2004) 5 SCC 518, ¶ 35 (India) (identifying the cases of child abuse and rape as advancing the "cause of justice" and being "in the larger interest of society").

173. *Sakshi v. India*, ¶ 4.

174. Milli Lake, *Realizing Complementarity: Bridging the gap between international law and domestic jurisdictions*, 18 (2009) [hereinafter *Realizing Complementarity*].

175. *Id.* at 5.

used in prosecutions for rape. India remains outside the ICC, meaning rape could only be prosecuted as an ordinary crime instead as a crime against humanity or war crime. Still, this domestic transformation shows “an important aspect of complementarity practiced through changing the way that the crime of rape is conceptualized legally and socially.”¹⁷⁶

Another example of unexpected legal effects of the Rome Statute takes place in Indonesia. In 2002, Indonesia’s government expressed its willingness to become a member of the Rome Statute before 2009, and after failing to do so, it announced again its disposition to join, this time before 2014. Although it participates from the Assembly of State Parties as an observer, to this date Indonesia remains outside of the ICC, and observers point to the armed forces as the strongest opposition to ratification because of fear of prosecution against its own high ranks.¹⁷⁷

Despite its non-member status, the Rome Statute system still influenced Indonesia domestic legal change to some extent. In 1999, Indonesia passed the Law on Human Rights as a breach with former President Suharto’s legacy of human rights violations. This law called for the creation of a special jurisdiction and a year later, the legislature passed the complementing Law on Human Rights Courts. The law draws heavily from the Rome Statute and incorporates the crimes of genocide and crimes against humanity as well as the principle of command responsibility. The commentary accompanying the legislation acknowledges that some articles were taken entirely from the Statute of the ICC.¹⁷⁸ At the same time, and again due to military opposition, the law left war crimes outside its subject matter.¹⁷⁹ For this and other reasons, Amnesty International has voiced its concern with the law’s shortcomings that make it

176. *Id.* at 20.

177. See Lasse Schudt, *Southeast Asian Hesitation: ASEAN Countries and the International Criminal Court*, 16 GER. L.J. 75, 85 (2015).

178. See, e.g., Suzannah Linton, *Accounting for Atrocities in Indonesia*, 10 SING. Y.B.I.L. 199, 215 (2007) (pointing to Article 9(h) as an example of one taken directly from the Statute of the ICC).

179. See Amrita Kapur, *Asian Values v. The Paper Tiger: Dismantling the Threat to Asian Values Posed by the International Criminal Court*, 11 J. INT’L CRIM. JUST. 1059, 1071-72 (2013).

inconsistent with international standards.¹⁸⁰ Similarly, the Commission of Experts for East Timor appointed by the UN Secretary General criticized the law to the extent that it differed from the Rome Statute.¹⁸¹

These two cases show how the Statute of the ICC has become the international standard for human rights legislation. When an opening appears to push for expansive human rights norms, as with the Sakshi decision in India or the post-Suharto reforms in Indonesia, stakeholders can demand to bring the national legislation up to date with international standards. In so doing, they can produce some of the most progressive pieces of international law at hand. Indonesia's importation of Statute crimes has been incomplete, leaving war crimes aside; as unsatisfying as this might be, we should remember that this also means that it was not possible to adopt hollow legal rules regulating war crimes in an attempt to please international audiences. Another consequence of non-ICC membership is that India's progressive rape definition could not be prosecuted as war crimes or crimes against humanity, just as ordinary crime. However, the India example shows how Rome Statute-inspired legal changes short of full implementation can still have significant consequences for domestic legal systems.

E. DISCUSSION

We found earlier that, when it comes to conflict prevention, the ICC appears more important for what it is than what it does. In the case of legal change, we find both: legal change is inspired by the Rome Statute itself, *and* by direct consultation and monitoring on the part of the Court. Because of the Court's limited resources to intervene in multiple places, the effects that come from its direct

180. See Amnesty International's *Comments on the Law of Human Rights Courts (Law No.26/2000)*, AMNESTY INT'L (Feb. 9, 2001), <https://www.amnesty.org/download/Documents/128000/asa210052001en.pdf> [hereinafter *Amnesty International's Comments*] (suggesting that the government review the legislation, and identifying, for example, that there is no provision prohibiting the admissibility of statements obtained via torture).

181. See Linton, *supra* note 178, at 15 (comparing the Indonesian law, which obligates commanders to act only when unlawful acts are occurring or just after the acts occurred, with international law, which requires commanders to prevent international acts).

involvement, as in the cases of Colombia, DRC and Uganda, are important but restricted to those strategic environments. The discussion in this last section, however, result from the particular status of the Rome Statute as an international standard. In this regard, we should only expect more influence in the future as its place in the world's legal architecture solidifies. Evidence from Indonesia and India supports this idea by showing how the Rome Statute has a gravitational pull that affects even some non-party states.

The opening of the Rome Statute era deeply transformed international standards, mostly due to an unprecedented specificity that remove the possibility of state manipulation as well as its heavy reliance on national jurisdictions. That is, the Statute demands states to amend their national laws in order to comply with their obligations and at the same time it provides them with the elements to do so with. As Rome Statute definitions get entrenched as international standards, they become 'all-or-nothing' legal norms. There is less space for insincere talk when states reduced margins for emptying international human rights norms of consequential meaning.

V. CONCLUSION

In 1872, Swiss lawyer Gustave Moynier called for criminal courts to enforce the first Geneva Conventions.¹⁸² It took 130 years later for a fully operational International Criminal Court to get up and running. The Court is imperfect, and political realists criticize it either for being unable to maintain the separation between legal and political spheres, or oppositely, for failing to engage the political consequences of its actions. It is either too political or too *apolitical*, too consequentialist or too normative. So it goes. While the Court does and should stand for the high standards embodied in international criminal law, we do not see the point in denying that the Court's work is enmeshed in the realities of practice. In the words of Judith Shklar, "the morality of justice" is "not above the political world but in its very midst."¹⁸³ Instead, we seek to gauge the influence that the Court actually has in the political world.

Our stock-taking exercise shows that the Court, despite setbacks,

182. SCHIFF, *supra* note 4, at 20.

183. SHKLAR, *supra* note 26, at 123.

has a significant role to play. With regard to violence prevention, the ICC is on balance neither futile nor perverse, as deterrence theorists tend to argue. Ratification of the Rome Statute is associated with a higher probability that civil wars will end with negotiation, and in specific instances it has been used to marginalize violent opposition groups. Ratification is also correlated with less repressive violence, fewer incidents of mass killing of civilians, and fewer onsets of civil war. The newest scientific research suggests that these correlations are attributable to the social effects of the Court. Fearing the loss of status and support that comes from ICC attention, leaders within the jurisdiction of the Court improve their behavior. Critically, though, the ICC's direct involvement in specific situations does not have generalizable pacifying effects. It is sometimes associated with the end of wars, and sometimes not. Likewise, it sometimes is associated with less violence against civilians, and sometimes not. On this basis, we should be aware of grandiose generalizations about the Court's involvements. The impact of its interventions varies by circumstance.

With regard to legal change, we discover that the Rome Statute and Court involvement in countries has "jurisgenerative" properties at the domestic level.¹⁸⁴ Rome ratifiers change their laws to fit the standards of the Court, but unexpectedly, so too do non-ratifiers like India and Indonesia. Under extended preliminary examination, Colombia altered the course of its peace negotiations to move closer to international standards. In Uganda and the DRC, ICC investigation set in motion interaction between reformers and the government in a way that has increased domestic criminal prosecutions. Many of these impacts are unexpected, and the reason is that the Court, for all of its faults, is becoming part of the domestic political landscape. It is moving from a new Court to an indelible, everyday institution. The reason is that the ideas it embodies, those of the Rome Statute, edit the script in the domestic theater where law and politics play out their drama.

184. See Benhabib, *supra* note 23, at 696 (defining 'jurisgenerativity' as "the law's capacity to create a normative universe of meaning that can often escape the provenance of formal lawmaking").