

NOTES AND COMMENTS

UNINTENDED POSITIVE COMPLEMENTARITY: WHY INTERNATIONAL CRIMINAL COURT INVESTIGATIONS MAY INCREASE DOMESTIC HUMAN RIGHTS PROSECUTIONS

By *Geoff Dancy** and *Florencia Montal†*

I. INTRODUCTION

The International Criminal Court (ICC) is controversial, acutely so in Africa. The first thirty-nine people it indicted were all African. It did not open any formal investigations outside Africa until the 2016 decision to investigate conduct related to the 2008 Georgia-Russia war. The first three notifications of withdrawal from the ICC Statute, each made in 2016, were by Burundi, South Africa, and Gambia. While South Africa and Zambia reversed their initial intentions, Burundi in fact became the first state party to withdraw from the ICC in October 2017. These maneuvers are closely connected to country-specific political and legal considerations, but they overlap with concerns expressed by governments in other countries including Kenya and Namibia. Among these concerns is that “the ICC has become the greatest threat to Africa’s sovereignty, peace and stability,” and that “the ICC is a colonial institution under the guise of international justice.”¹

These criticisms² in turn have been intensified by serious questions about the effects of ICC intervention. Some conflict experts blame untimely ICC indictments against perpetrators of rights violations, like Ugandan rebel leader Joseph Kony and Sudan’s President Omar al-Bashir, for ruining peace negotiations that might have ended civil wars.³ Some even surmise that Libyan President Muammar Gaddafi would have accepted exile were it not for his indictment by the ICC on February 26, 2011; instead, he dug in his heels and fought a bloody war against rebels.⁴ In December 2014, Prosecutor Fatou Bensouda shelved charges against Kenyan President Uhuru Kenyatta and terminated ongoing investigations into Sudanese

* Associate Professor at Tulane University. The authors would like to sincerely thank the participants of the ASIL Forum in Chicago in 2014, as well as commenters at the War Crimes Research Office 20th Anniversary Conference in March 2016. Most notably, we appreciate feedback from Jane Stomseth, Cecilia Bailliet, Nobuo Hayashi, Richard Decker, Stephen Rapp, Susan SaCouto, and Todd Buchwald. We are also thankful to the following colleagues for their tremendous help and support: Kathryn Sikkink, Beth Simmons, Richard Steinberg, Hyeran Jo, Chris Fariss, James Hollyer, Chris Fettweis, Celeste Lay, Virginia Oliveros, Mark Vail, Patrick Egan, and Menaka Philips.

† Ph.D. candidate at the University of Minnesota.

¹ Peter Fabricius, “*Geography of Justice*” *Riles Africa*, CAPE TIMES (SOUTH AFRICA) (Apr. 10, 2014).

² For extensive background, see CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT (Richard Steinberg ed., 2016).

³ Adam Branch, *Uganda’s Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT’L AFF. 179 (2007).

⁴ Jackson Diehl, *After the Dictators Fall*, WASH. POST (June 5, 2011); Philippe Sands, *The ICC Arrest Warrants Will Make Colonel Gaddafi Dig in His Heels*, GUARDIAN (May 4, 2011).

atrocities.⁵ Citing such examples, observers complain too that the ICC is not a deterrent, and is unlikely to reduce generalized violations of international human rights and humanitarian law.⁶

Mindful of these pessimistic expectations concerning the effects of the ICC's actions, this article argues that the Court may also have had unanticipated but possibly beneficial consequences in some African countries in which it has been involved. These impacts were brought about through a mechanism we refer to as unintended positive complementarity. Whereas the Office of the Prosecutor (OTP) defined positive complementarity as the ICC's coordinated efforts to promote national prosecutions of state and rebel leaders for international crimes within the Court's jurisdiction, we use the term "unintended positive complementarity" to reference the ICC's wider impact on judicial activity, in particular an increase in domestic prosecutions of state agents for human rights violations beyond the attention of the ICC.⁷ Positive complementarity has usually been understood in a narrower way, focused on the possibility that the ICC and state parties might cooperate to try those responsible for international crimes outlawed in the Rome Statute. We argue that ICC investigations have a broader, spillover effect in prompting a range of national prosecutions of state agents in the targeted countries. The evidence we analyze suggests that this effect arises not from direct cooperation between state leaders or agencies and the ICC, but from latent political struggles between ruling coalitions and reformer coalitions that are exacerbated by ICC investigations. We use the term "unintended" as a shorthand, to capture the feature that this effect is not one of the principal effects envisaged in the system of ICC investigations. We do not explore the actual intentions of ICC prosecutors.

Our hypothesis is that ICC investigations into a country's situation will increase domestic human rights prosecutions, which are defined as "the use of formal domestic courts of law to initiate a criminal proceeding—including preliminary trial processes, trial hearings, or verdict and sentencing—for one or more *state agent perpetrators* of human rights violations."⁸ The prosecution of state agents, including members of military and police forces, is a hard test for the theory; ruling coalitions are reluctant to see their own forces targeted for trial, though they are more than willing to punish opposition forces and rebel groups. Therefore, if state agents are going to trial, it means that something other than "victor's justice" is taking place.

Using a new data set collected by the Transitional Justice Research Collaborative (TJRC)—which features yearly counts of domestic human rights prosecutions and of guilty

⁵ *Dark Day for Justice Says ICC Prosecutor, Dropping Charges Against Kenyan President*, UN NEWS CENTRE (Dec. 5, 2014); *ICC Prosecutor Shelves Darfur War Crimes Inquiries*, BBC NEWS AFRICA (Dec. 12, 2014), at <http://www.bbc.com/news/world-africa-30458347>.

⁶ See, e.g., Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SEC. 5 (2003); Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. UNIV. L. Q. 777 (2006); Kate Cronin-Furman, *Managing Expectations: International Criminal Trials and the Prospects for Deterrence of Mass Atrocity*, 7 INT'L J. TRANSITIONAL JUST. 434 (2013). For a review, see Geoff Dancy & Florencia Montal, *From Law Versus Politics to Law in Politics: A Pragmatist Assessment of the ICC's Impact*, 32 AM. UNIV. INT'L L. REV. 645 (2017).

⁷ See *infra* Part III.

⁸ Emphasis added. Geoff Dancy, Francesca Lessa, Bridget Marchesi, Leigh A. Payne, Gabriel Pereira & Kathryn Sikkink, *The Transitional Justice Research Collaborative: Bridging the Qualitative-Quantitative Divide with New Data* (2014), at www.transitionaljusticedata.com.

verdicts produced in those prosecutions from 1970 to 2014 in African states—this article finds that countries under investigation by the ICC annually try on average four times as many state agents such as police officers or low-level soldiers for physical integrity abuses, including torture and sexual violence, than do other African nations experiencing violent conflicts. This finding is potentially significant, since domestic human rights trials in other parts of the world are associated with modest, long-term improvements in human rights protections.⁹

The article also offers a theoretical explanation for this unexpected result. The launch of an investigation by the ICC prosecutor triggers a “willingness game” between ruling coalitions and reformer coalitions in the target country. The former seek to demonstrate their readiness to comply with international human rights law, while the latter aim to expose these efforts as a pretense. In response to the ICC’s investigations, reformers push for what we call gap-filling litigation. The combination of government strategy and pressure from reformers contributes to an increase in domestic human rights prosecutions. Importantly, this theory does not assume that state leaders in fact desire to cooperate with the Court. Nor does the theory hinge on the ICC’s ability to coerce states into positive change. Rather, it is the strategic interactions among the ruling and reformist coalitions, domestic courts, and civil society groups that create the incentives to prosecute lower-level officials who commit human rights abuses.

Section II of this article briefly explains the complementarity principle and reviews both positive and negative assessments of ICC operation. Section III explains in greater detail our process-focused theory for why ICC investigations lead to an increase in domestic prosecutions of human rights offenders. Section III also presents qualitative evidence from select countries subject to ICC investigations, indicating the workings of this mechanism in practice. Section IV offers a straightforward test of this theory based on newly available quantitative evidence and a dataset specifically tailored for this article. Section V concludes with implications of our findings for the legitimacy of the ICC.

II. LITERATURE REVIEW

The principle of negative complementarity limits the ICC, so that (absent a UN Security Council reference to the ICC) the Court cannot act in a particular case where a state with national jurisdiction over the alleged conduct and the alleged perpetrator demonstrates the legal ability and practical willingness to move forward with adequate and appropriate national legal action.¹⁰ Beginning in 2009, the Office of the Prosecutor announced a prosecutorial strategy of “positive complementarity,” which it defined as “a proactive policy of cooperation aimed at promoting national proceedings.”¹¹ The OTP would encourage and publicly disclose national reforms and proceedings during the preliminary examination stage, increasing pressure on officials to investigate and prosecute atrocities.

⁹ Hunjoon Kim & Kathryn Sikkink, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 INT’L STUD. Q. 939 (2010); KATHRYN SIKKINK, *THE JUSTICE CASCADE: HOW HUMAN RIGHTS PROSECUTIONS ARE CHANGING WORLD POLITICS* (2011).

¹⁰ Rome Statute of the International Criminal Court, Art. 17, July 17, 1998, 2187 UNTS 90.

¹¹ PROSECUTORIAL STRATEGY, 2009–2012, at 5 (2010), available at <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPProsecutorialStrategy20092013.pdf>.

Anecdotal evidence supports the idea that external judicial pressure resulting from the exercise of universal or passive personality jurisdiction by foreign courts engenders domestic human rights trials.¹² Spanish prosecutions of political and military leaders in Latin America, for example, are thought to have invigorated subsequent criminal trials of other officials in the region.¹³ Whether a similar effect arises from the ICC's exercise of jurisdiction has yet to be theorized or studied empirically.

Three related literatures are relevant to this issue. First, a number of studies theorize a link between the ratification of multilateral human rights agreements and improvements in rights protections.¹⁴ Other studies find a growing gap between commitments to these treaties and patterns of compliance, which they attribute to cheap talk and costless promises by abusive regimes.¹⁵ Most of these studies treat domestic courts and patterns of litigation as fixed rather than changing, or as untested theoretical mechanisms linking ratification to changes in state behavior.¹⁶ One exception is Dancy and Sikkink, who show a correlation between increased ratification by a state of treaties with individual criminal accountability provisions, including the Rome Statute, and likelihood of prosecutions in that state of its own officials for conduct related to violations of human rights.¹⁷ This line of research has yet to identify the mechanism that leads to an increase in accountability. For example, does ratification of the Rome Statute positively influence human rights practices in countries with already high levels of judicial independence or in legal systems with lawyers and judges already experienced in human rights litigation; or do a state's interactions with the ICC change its existing judicial practices?

A second literature considers why political leaders initiate or support domestic judicial proceedings against human rights violators. For example, studies find that countries who transition from a highly repressive government to a new democratic regime are likely to conduct

¹² Ellen Lutz & Kathryn Sikkink, *The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America*, 2 CHICAGO J. INT'L L. 1 (2001); David Pion-Berlin, *The Pinochet Case and Human Rights Progress in Chile: Was Europe a Catalyst, Cause or Inconsequential?*, 36 J. LATIN AM. STUD. 479 (2004); Naomi Roht-Arriaza, *The Pinochet Effect and the Spanish Contribution to Universal Jurisdiction*, in INTERNATIONAL PROSECUTION OF HUMAN RIGHTS CRIMES 113 (Wolfgang Kaleck, Michael Ratner, Tobias Singelstein & Peter Weiss eds., 2007).

¹³ Roht-Arriaza, *supra* note 12. See also NAOMI ROHT-ARRIAZA, *THE PINOCHET EFFECT: TRANSNATIONAL JUSTICE IN THE AGE OF HUMAN RIGHTS* (2005); PROSECUTING HEADS OF STATE, at chs. 3–4 (Ellen Lutz & Caitlin Reiger eds., 2009).

¹⁴ BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* (2009); Daniel W. Hill, *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 J. POL. 1161 (2010); Courtenay R. Conrad & Emily Hencken Ritter, *Treaties, Tenure, and Torture: The Conflicting Domestic Effects of International Law*, 75 J. POL. 397 (2013); Yonatan Lupu, *The Informative Power of Treaty Commitment: Using the Spatial Model to Address Selection Effects*, 57 AM. J. POL. SCI. 912 (2013); Yonatan Lupu, *Legislative Veto Players and the Effects of International Human Rights Agreements*, 59 AM. J. POL. SCI. 578 (2015); Christopher J. Fariss, *The Changing Standard of Accountability and the Positive Relationship Between Human Rights Treaty Ratification and Compliance*, BRIT. J. POL. SCI. (forthcoming 2017).

¹⁵ Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World. The Paradox of Empty Promises*, 110 AM. J. SOC. 1373 (2005); James Raymond Vreeland, *Political Institutions and Human Rights: Why Dictatorships Enter into the United Nations Convention Against Torture*, 62 INT'L ORG. 65 (2008); James R. Hollyer & B. Peter Rosendorff, *Do Human Rights Agreements Prolong the Tenure of Autocratic Ratifiers?*, 44 NYU J. INT'L L. & POL. 791 (2012).

¹⁶ Jeffrey K. Staton & Will H. Moore, *Judicial Power in Domestic and International Politics*, 65 INT'L ORG. 553 (2011).

¹⁷ Geoff Dancy & Kathryn Sikkink, *Ratification and Human Rights Prosecutions: Toward a Transnational Theory of Treaty Compliance*, 44 NYU J. INT'L L. & POL. 751 (2012).

prosecutions,¹⁸ as are states whose legal systems authorize private citizens to bring criminal prosecutions against state agents.¹⁹ However, region-specific variations make global generalizations difficult, especially given that such transitional justice efforts appear to diffuse across culturally similar clusters of countries.²⁰ In particular, existing theories of transitional justice have mainly focused on Latin America and sub-regions of Europe, ignoring why rights trials happen in some African countries but not in others.

Finally, a third literature sheds light on the legal and political dynamics created by interactions between the ICC and African state leaders. Most notably, a growing body of research examines whether and how the ICC's jurisdiction and activities have affected particular African countries. Some scholars are skeptical that African domestic courts receive enough of a boost from the ICC. These skeptics posit that any spike in domestic trials likely results from capacity-building programs outside of the ICC.²¹ Some also argue, from a normative as well as a practical standpoint, that the ICC should not be treated as a source of "transitional justice" in African states.²² Other scholars are hopeful, arguing that ICC resources, like access to legal information, have the potential to strengthen severely challenged domestic judiciaries.²³ Sarah Nouwen strikes a middle ground, contending that while ICC intervention has led to activation of the judicial sector in Uganda, as well as invigorated debate around transitional justice, the actual operation of the courts has remained limited due to a combination of institutional weakness and political unwillingness.²⁴ Her account points instead to a variety of other effects of ICC intervention that had not been anticipated in the early literature.

These three lines of scholarship do not consider whether or why ICC investigations of a country might lead to an increase in local prosecutions of state agents for a more general range of abuses. Research on the ICC prosecutor's impact through positive complementarity focuses on whether there is a direct connection between ICC involvement and domestic prosecutions of the few international crimes within the ICC's jurisdiction.²⁵ The possibility that

¹⁸ JON ELSTER, *CLOSING THE BOOKS: TRANSITIONAL JUSTICE IN HISTORICAL PERSPECTIVE* (2004); TRICIA D. OLSEN, LEIGH A. PAYNE & ANDREW G. REITER, *TRANSITIONAL JUSTICE IN BALANCE: COMPARING PROCESSES, WEIGHING EFFICACY* (2010).

¹⁹ Verónica Michel & Kathryn Sikink, *Human Rights Prosecutions and the Participation Rights of Victims in Latin America*, 47 L. SOC'Y REV. 873 (2013); Geoff Dancy & Verónica Michel, *Human Rights Enforcement from Below: Private Actors and Prosecutorial Momentum in Latin America and Europe*, 60 INT'L STUD. Q. 173 (2016).

²⁰ Hunjoon Kim, *Expansion of Transitional Justice Measures: A Comparative Analysis of Its Causes* (2008) (unpublished Ph.D. dissertation, University of Minnesota).

²¹ Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in Uganda and the Democratic Republic of Congo*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 37 (Nicholas Waddell & Phil Clark eds., 2008); Géraldine Mattioli & Anneke van Woudenberg, *Global Catalyst for National Prosecutions? The ICC in the Democratic Republic of the Congo*, in *COURTING CONFLICT*, *id.* at 55.

²² Obiora Chinedu Okafor & Uchechukwu Ngwaba, *The International Criminal Court as a "Transitional Justice" Mechanism in Africa: Some Critical Reflections*, 9 INT'L J. TRANSITIONAL JUST. 90 (2015).

²³ Morten Bergsmo, Olympia Bekou & Annika Jones, *Complementarity After Kampala: Capacity Building and the ICC's Legal Tools*, 2 GOETTINGEN J. INT'L L. 791 (2010).

²⁴ SARAH M. H. NOUWEN, *COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN* 12 (2014) ("Neither ICC intervention nor complementarity reduces the often insuperable loyalty costs that domestic proceedings would incur.").

²⁵ 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 (2011).

ICC investigations trigger unintended positive effects—such as the prosecution of lower-level perpetrators for a broader array of abuses—remains unexplored.

The dominant motif in studies of the ICC's interaction with state executives, specifically in conflict zones, has been assessment of any impact the ICC may have in inducing compliance with international norms. Unsurprisingly, the ICC has been shown to lack both the influence to persuade and the power to coerce state leaders to cease fighting civil wars.²⁶ This article moves beyond this (accurate) diagnosis to build from two further insights. First, scholars have focused disproportionately on the ability of the ICC to terminate civil war, which is a very hard test for judicial intervention. Also, focusing on this outcome may obscure other important consequences. One such effect is encouraging combatants to scale back human rights violations in *future* conflict activity.²⁷ Second, theory about the ICC's lack of strategic bargaining power in conflict scenarios has approached the process of interaction as being between two actors: the Court, and the singular state leader, i.e. the executive. We expand this to include the potentially influential role of other domestic actors. Public ICC action, such as the launching of an ICC investigation, may stir action by domestic courts, NGOs, and other members of civil society. As we argue in the next section, ICC investigation generates productive interactions between ruling coalitions and reformer coalitions.

III. UNINTENDED POSITIVE COMPLEMENTARITY

We theorize that the launch of a formal ICC investigation of a particular country is associated with a spike in domestic prosecutions for all human rights violations, and further, that this effect is larger than the impact of the target state's ratification of the Rome Statute or the prosecutor's decision to begin a preliminary examination. This theory is based on a subtle but important distinction between three related phenomena: (1) international criminal prosecution for core international crimes;²⁸ (2) domestic criminal prosecution for core international crimes; and (3) domestic criminal prosecution against state agents that commit human rights violations.²⁹ The original notion of positive complementarity involves the relationship between 1 and 2. The ICC is tasked with prosecuting individuals for specific international crimes, including genocide, crimes against humanity, and war crimes. Where the ICC is able to assist, or induce, national authorities to bring prosecutions for related kinds of conduct, direct positive complementarity is being achieved. Even where the ICC moves from investigation into international prosecutions, it tends to focus not on all low-level perpetrators of these atrocity crimes who "soil[] their hands with flesh and blood," but on "the major criminals responsible for large-scale atrocities."³⁰ ICC prosecution of those primarily responsible for atrocity could theoretically inspire the state judiciary to try lower-level state agents for

²⁶ Kenneth Rodman, *Darfur and the Limits of Legal Deterrence*, 30 HUM. RTS. Q. 529 (2008); David Mendeloff, *Punish or Persuade? The ICC and the Limits to Coercion in Cases of Ongoing Violence* (2014) (paper presented at Law & Society Annual Conference, Minneapolis).

²⁷ Hyeran Jo & Beth Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT'L ORG. 443 (2016). See also Geoff Dancy, *Searching for Deterrence at the International Criminal Court*, 17 INT'L CRIM. L. REV. (2017).

²⁸ "[I]nternational crimes include war crimes, crimes against humanity, genocide, torture, . . . aggression, and some extreme forms of terrorism . . ." ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 24 (2003).

²⁹ We do not here examine national prosecutions of private actors for abuses not constituting international crimes.

³⁰ WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 101 (2d ed. 2004).

international crimes, but in practice this has been difficult to realize for a variety of reasons.³¹

We focus in this article on what we call *unintended* positive complementarity, involving an interaction between prosecution types 1 and 3. This occurs where there is an increase in ordinary national prosecutions of state agents for abuses of power, particularly abuses related to violations of human rights, and that increase is plausibly associated with ICC investigations related to that country (whether or not prosecutions take place in the ICC).

Where such “unintended positive complementarity” occurs, we posit that the mechanism is as follows. The ICC’s effort to investigate actors responsible for committing core international crimes will help produce domestic criminal prosecution against state agents that commit human rights violations. These violations are usually criminalized by a country’s penal code, which often includes provisions that implement commitments to various international agreements.³² We argue that these domestic human rights prosecutions increase due to interactions among local actors. In the shadow of an ICC investigation, ruling coalitions within the state become subject to heightened international attention. Under scrutiny, they attempt to demonstrate their willingness to comply with international human rights and criminal legal norms writ large. While this happens, reformer coalitions try to expose the shortcomings of what they perceived to be feigned willingness to comply with international standards on behalf of the state’s ruling coalition. However, reformers go beyond exposing the limitations of state actions in the area of international criminal law; they also attempt to bring other human rights cases to the domestic judiciary themselves. Because these efforts happen at a time when the ruling coalition is sensitive to international attention, reformers have a better shot at getting the courts to act on their criminal complaints.

The Importance of an ICC Investigation

ICC investigations are often accompanied by puzzling behavior on the part of state actors. For example, the same government leaders who invite ICC intervention may later proclaim it to be unjustified, neo-imperial, or inconsequential.³³ Yet these officials also respond to the investigations by making domestic institutional reforms. We argue that this contradictory behavior is not evidence of political schizophrenia, but rather a calculated strategy by ruling coalitions who engage in a two-level interaction with domestic and international audiences.³⁴

³¹ First, countries under International Criminal Court (ICC) investigation often did not implement laws criminalizing acts like crimes against humanity prior to the situation in question, meaning that prosecution would be retroactive. Second, states have been hesitant to establish courts specifically tasked to try core international crimes. And third, when states do establish these courts—as in Uganda’s International Crimes Division—they are made operationally weak. See Kenyans for Peace, Truth & Justice, *Securing Justice: Establishing a Domestic Mechanism for the 2007/2008 Post-election Violence in Kenya* (2013); Human Rights Watch, *Kenya: Swiftly Enact Special Tribunal: International Criminal Court Should Be a Last Resort for Justice* (Mar. 25, 2009), at <https://www.hrw.org/news/2009/03/25/kenya-swiftly-enact-special-tribunal>; Human Rights Watch, *Justice for Serious Crimes Before a National Court: Uganda’s International Crimes Division* (2012), available at https://www.hrw.org/sites/default/files/reports/uganda0112ForUpload_0.pdf. See generally, WARD N. FERDINANDUSSE, *DIRECT APPLICATION OF INTERNATIONAL CRIMINAL LAW IN NATIONAL COURTS* (2006).

³² MARK BERLIN, *IMPLEMENTING INTERNATIONAL LAW: THE CRIMINALIZATION OF ATROCITIES IN DOMESTIC LEGAL SYSTEMS SINCE WORLD WAR II* (2015).

³³ See, e.g., *Uganda’s Museveni Praises Kenya for Rejecting ICC “Blackmail,”* DAILY NATION (Apr. 9, 2013), at <http://www.nation.co.ke/news/politics/Ugandas-Museveni-praises-Kenya-for-rejecting-ICC-blackmail/1064-1743650-15lxuf7/index.html>.

³⁴ For two-level interactions, see Robert Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427 (1988).

The launch of an official ICC investigation significantly increases the likelihood of international indictments against state leaders for atrocity crimes, a prospect that also releases a wave of debates within the global policy community. The intense scrutiny can place pressure on the country's ruling coalition, which includes the executive, pro-regime judges, defense and security ministries, and governing party legislators. Faced with this situation, we argue that the ruling coalition will attempt to stay in power while avoiding the loss of reputation, or blows to its "recognitional legitimacy,"³⁵ from violating the state's international human rights commitments.

Of all the stages of ICC review of atrocity crimes in a country, an official investigation is the most critical—preliminary examinations do not carry costs as high for states, since the Court does little more than collect information.³⁶ This phase begins when the prosecutor considers the available information to provide enough grounds to open an investigation.³⁷ At this stage the Office of the Prosecutor can request from a Pre-Trial Chamber the issuance of arrest warrants. This has a few implications. First, specific individuals are singled out as potential perpetrators of international crimes, increasing the likelihood of prosecution and punishment.³⁸ Second, the naming of individuals serves as a symbolic marker for investors, diplomats, and other international audiences.³⁹ The opening of an investigation introduces into a country's political discourse the notion that atrocity crimes have been committed. The stigma that comes with this recognition creates "social costs."⁴⁰ Third, an investigation also creates other political complications, such as whether state officials will cooperate in arresting indicted persons who may be part of its own ranks.

Due to the reputational and politically charged nature of the investigation phase, it might be thought that a targeted state would begin human rights litigation during preliminary examination to avoid triggering further ICC scrutiny. We argue, however, that leaders wait until the investigation phase before making concessions to reformers because they are playing a two-level game between international and domestic audiences. At the international level, state leaders seek to demonstrate their commitment to protecting human rights. At the

³⁵ Extensive and detailed research suggests that leaders are very sensitive to outside perceptions of their willingness to commit to and abide by international human rights legal norms. See SIMMONS, *supra* note 14, at 80–111. See also RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013). For recognitional legitimacy, see ALLEN BUCHANAN, *JUSTICE, LEGITIMACY, AND SELF-DETERMINATION: MORAL FOUNDATIONS FOR INTERNATIONAL LAW*, at ch. 6 (2004).

³⁶ These statements about preliminary examination should be interpreted in light of two additional facts. The first is that, de facto, the Office of the Prosecutor (OTP) has followed a "bifurcated" approach, wherein state or Security Council referrals move swiftly through the preliminary examination stage, but *proprio motu* cases progress much more slowly. This is probably because the prosecutor is under more political pressure when she brings the case independently. See David Bosco, *Discretion and State Influence at the International Criminal Court: The Prosecutor's Preliminary Examinations*, 111 AJIL 395 (2017). This might also mean that in *proprio motu* situations, the prosecutor can be more deliberate, and can attempt to invigorate domestic proceedings. Indeed, evidence suggests that preliminary examinations by the ICC prosecutor have promoted accountability in some countries, including Colombia. See Rene Uruña, *Prosecutorial Politics: The ICC's Influence in Colombian Peace Processes, 2003–2017*, 111 AJIL 104 (2017). However, in our model it is investigations rather than preliminary examinations that are likely to trigger that "willingness game" dynamic.

³⁷ In cases when the prosecutor is acting on her *proprio motu* powers, the Pre-Trial Chamber has to approve the prosecutor's decision to proceed with an investigation.

³⁸ Jo & Simmons, *supra* note 27, at 446.

³⁹ Alistair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487 (2001).

⁴⁰ Jo & Simmons, *supra* note 27.

domestic level, their goal is to maintain power, marginalize political opponents, and avoid challenges from civil society. As a result, the ruling coalition will refrain from undertaking local rights-based accountability measures until they absolutely must: when their records are called into question during an ICC investigation.⁴¹

The Ruling Coalition Feigns Willingness to Support Prosecutions of International Crimes

The launch of an ICC investigation means that the ICC prosecution, and in the case of *proprio motu* investigations also the Pre-Trial Chamber, consider the situation to be admissible. That is, there are reasonable grounds to believe the state does not have the requisite level of willingness or capability to prosecute this particular case itself. In many situations, the government has an interest in showing that such an ICC assessment is flawed, by undertaking national efforts to prosecute the same crimes domestically. Even governments which profess themselves willing but unable to prosecute, are likely to try to make some showing of national prosecutions once an ICC investigation starts, to give credibility to their claims and indeed to themselves as a government.

Cases which the government itself has referred to the ICC, including cases where the government has said it prefers an international prosecution, raise special issues. We are aware that our theory presents a stylized sequence of actions between the ICC and ruling coalitions, one that might resemble the processes of investigations launched under the prosecutor's *proprio motu* powers. However, in our theory, a self-referral can also be seen as part of the ruling coalition's strategy.⁴² The concern of states to appear willing to adhere to international criminal law is especially evident when a ruling coalition asks the OTP to investigate its own situation. Two rationales help to explain this puzzling move: political expediency, and a perceived need to preserve the status quo. Ugandan President Museveni sought international assistance to delegitimize and apprehend rebel leader Joseph Kony.⁴³ The Democratic Republic of Congo's Joseph Kabila wanted to use the ICC to get rid of opponents and consolidate power, as did Central African Republic's François Bozizé.⁴⁴ Malian Minister of Justice Malick Coulibaly, acting as an instrument of the president, was, in all likelihood, attempting

⁴¹ It is necessary to recognize that ruling coalitions face stronger incentives to play this two-level game when the ICC is targeting incumbent state officials. However, even in situations when the Court has indicted only rebel leaders, human rights organizations have been quick to demand the ICC prosecutor to not overlook alleged crimes committed by armed forces in their fight against the indicted rebels (e.g., the case of Uganda). Moreover, the limitations to personal jurisdiction contained in the Rome Statute are not concerned with which side of a conflict an individual belongs to. Therefore, we do not expect our theory to be conditional on which individuals are indicted—state officials, rebel leaders, or former rulers. For Uganda and demands to try the state military, see MARK KERSTEN, *JUSTICE IN CONFLICT: THE EFFECTS OF THE INTERNATIONAL CRIMINAL COURT'S INTERVENTIONS ON ENDING WARS AND BUILDING PEACE* 170–80 (2016).

⁴² Democratic Republic of Congo, Uganda, Central African Republic, and Mali have self-referred situations to the ICC. Cote d'Ivoire's referral was de facto a self-referral as well. However, it did not invoke Article 13(a), which entitles a state party to bring a situation before the prosecutor. Because Cote d'Ivoire was not a state party at the time, President Ouattara invoked Articles 13(c) and 15 and invited the prosecutor to use *proprio motu* powers to bring the case. See OTP Weekly Briefing, Issue #87, at 11–16 (May 2011), available at https://www.icc-cpi.int/NR/rdonlyres/3836B9AF-B0DC-4F94-A4A8-4115E95AE76E/283329/OTPWeeklyBriefing_1116May201187.pdf.

⁴³ KERSTEN, *supra* note 41, at 75–79.

⁴⁴ Makau W. Mutua, *Closing the "Impunity Gap" and the Role of State Support of the ICC*, in *CONTEMPORARY ISSUES FACING THE INTERNATIONAL CRIMINAL COURT* 104 (Richard H. Steinberg ed., 2016).

to mobilize international support against Northern Malian rebels with his 2012 letter of referral.⁴⁵

While political calculations are the central motive for referral decisions, leaders are also influenced by worries over their international reputation.⁴⁶ Once the ICC's interest in a country is apparent, leaders can take responsibility for setting the process in motion, simultaneously demonstrating their supposed willingness to comply with international norms,⁴⁷ and seeking to control the politics of the Court's involvement.

In Uganda, President Museveni in December 2003 referred the situation to the ICC, which started an investigation into alleged war crimes and crimes against humanity committed during the conflict between the Lord's Resistance Army (LRA) and state authorities. Shortly after the self-referral, Museveni proclaimed,

I am ready to be investigated for war crimes . . . and if any of our people were involved in any crimes, we will give him up to be tried by the ICC. . . . And in any case, if such cases are brought to our attention, we will try them ourselves.⁴⁸

Museveni's public statements created the impression that his government was willing to prosecute the perpetrators of international crimes but was unable to "succeed in arresting those members of the LRA leadership and others most responsible for [these] crimes."⁴⁹ In sum, Museveni purported to be wholly devoted to the ICC's involvement during the preliminary examination.

At the same time, evidence suggests that Museveni was dissimulating and was in fact unwilling to cooperate with international or domestic human rights enforcement if these diserved his interests or meant loss of his own strength. While he has indeed cooperated with the ICC in relation to the LRA, when the Juba Talks (2006–08) showed some promise, President Museveni threatened to take back his ICC referral in favor of negotiating with the Lord's Resistance Army. He was strongly critical of the ICC's actions in relation to government leaders of Sudan and Kenya. He also showed his disdain for the country's judges. In June 2004, Museveni claimed that the Constitutional Court had "usurped the power of the people" by invalidating a referendum restricting political party opposition, and in 2005 his government publicly deployed its Joint Anti-Terror Team to march into the High Court with guns, disrupt bail hearings for members of the People's Redemption Army, and arrest members of the opposition group.⁵⁰ These challenges to the Ugandan courts were understood by local opponents of the ruling regime as a threat to the independence of the judiciary.⁵¹

⁴⁵ Letter available at <https://www.icc-cpi.int/NR/rdonlyres/A245A47F-BFD1-45B6-891C-3BCB5B173F57/0/ReferralLetterMali130712.pdf>.

⁴⁶ For example, Chief Prosecutor Luis Moreno Ocampo publicly expressed interest in the DRC *before* Kabila made overtures toward international justice: [http://legal.un.org/icc/asp/2ndsession/ocampo_statement_8sep\(e\).pdf](http://legal.un.org/icc/asp/2ndsession/ocampo_statement_8sep(e).pdf). See Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AJIL 403 (2005).

⁴⁷ Håkan Friman, *The International Criminal Court: Investigations into Crimes Committed in the DRC and Uganda. What Is Next?*, 13 AFR. SECURITY REV. 19 (2004).

⁴⁸ Akhavan, *supra* note 46, at 411.

⁴⁹ *Referral of the Situation Concerning the Lord's Resistance Army* 14 (Dec. 16, 2003) (on file with authors).

⁵⁰ The official name is the Referendum (Political Systems) Act of 2000. See International Bar Association, *Judicial Independence Undermined: A Report on Uganda* 21 (2007).

⁵¹ Foundation for Human Rights Initiative, *The Functioning of Multi-party Democracy in Uganda* 122 (2013).

This pattern repeated itself in the Democratic Republic of Congo. After learning of ICC interest in the Democratic Republic of Congo (DRC) in July 2003,⁵² President Joseph Kabila spoke to the United Nations in September about the need for an international criminal tribunal to investigate crimes in the country. However, this appeal was most likely designed to please an outside audience, while in effect assisting in Kabila's strategy to neutralize political opponents.⁵³ So too were a series of legal and judicial reforms that were adopted over the next few years. The government added war crimes and crimes against humanity, together with provisions on sexual violence, to the Congolese Penal Code and Congolese Military Code in 2006, but only after foot-dragging by government officials.⁵⁴ These reforms were a fig leaf to demonstrate the government's willingness to abide by human rights laws, and were in part a response to pressure from activists.⁵⁵ The government only adopted official legislation implementing the Rome Statute in 2015.⁵⁶

A similar process occurred in Kenya, a country that ratified the Rome Statute in 2005 in order to "appear to be progressive."⁵⁷ Kenya found itself in the ICC's orbit following elite-supported post-election violence in 2007–08 that killed over 1,000 people.⁵⁸ Amid demands for justice, the government established a national commission to investigate the violence in 2008,⁵⁹ and passed legislation implementing the Rome Statute in 2009.⁶⁰ These actions occurred during a preliminary examination by the ICC prosecutor. However, the government made no effort to establish a proposed Special Tribunal for prosecuting those responsible for the violence, nor did it pursue other human rights trials or reforms. Instead, government officials, including Uhuru Kenyatta and William Ruto, who were allegedly complicit in the post-election violence, began promoting an ICC referral using the slogan, "Don't be Vague, ask for [the] Hague."⁶¹ This willingness to engage the ICC was, however, feigned. Ruto and Kenyatta had no intention of complying with ICC directives, nor did other Kenyan

⁵² Akhavan, *supra* note 46.

⁵³ William W. Burke-White, *Complementarity in Practice: The International Criminal Court as Part of a System of Multi-level Global Governance in the Democratic Republic of Congo*, 18 LEIDEN J. INT'L L. 557, 566 (2005).

⁵⁴ Avocats Sans Frontières, *The Application of the Statute of Rome of the International Criminal Court by the Courts of the Democratic Republic of Congo* 38 (2009), available at http://www.asf.be/wp-content/publications/ASF_CaseStudy_RomeStatute_Light_PagePerPage.pdf; International Bar Association & International Legal Assistance Consortium, *Rebuilding Courts and Trust: An Assessment of the Needs of the Justice System in the Democratic Republic of Congo* (2009), at <http://issat.dcaf.ch/Learn/Resource-Library/Policy-and-Research-Papers/Rebuilding-Courts-and-Trust-An-Assessment-of-the-Needs-of-the-Justice-System-in-the-Democratic-Republic-of-Congo>.

⁵⁵ Milli Lake, *Organizing Hypocrisy: Providing Legal Accountability for Human Rights Violations in Areas of Limited Statehood*, 58 INT'L STUD. Q. 515 (2014).

⁵⁶ Parliamentarians for Global Action, *PGA Welcomes the Enactment of the Implementing Legislation of the Rome Statute of the ICC by the Democratic Republic of the Congo* (2016), available at <http://www.pgaction.org/pdf/press-releases/2016-01-02-DRC-Implementing-Rome-Statute-Enacted.pdf>.

⁵⁷ Yvonne M. Dutton & Tessa Alleblas, *Unpacking the Deterrent Effect of the International Criminal Court: Lessons from Kenya*, ST. JOHNS L. REV. 37 (forthcoming 2017), available at <http://ssrn.com/abstract=2757731>.

⁵⁸ Human Rights Watch, *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance* (2008).

⁵⁹ COMMISSION OF INQUIRY INTO THE POST ELECTION VIOLENCE (CIPEV) FINAL REPORT (2008), available at <http://reliefweb.int/report/kenya/kenya-commission-inquiry-post-election-violence-cipev-final-report>.

⁶⁰ Antonina Okuta, *National Legislation for Prosecution of International Crimes in Kenya*, 7 J. INT'L CRIM. JUST. 1063 (2009).

⁶¹ *How Kenya Handled Local Tribunal Process*, DAILY NATION (Sept. 17, 2013), at <http://www.nation.co.ke/news/politics/How-Kenya-handled-local-tribunal-process-/1064-1997172-p5vb2y/index.html>.

parliamentarians.⁶² Realizing that no local prosecutions would occur, Luis Moreno Ocampo launched an ICC investigation in March 2010. Only five months later, Kenya adopted a new constitution, in part to deflect criticism from the investigation.⁶³ Among other things, this constitution contains provisions allowing for public interest litigation through direct petitioning of the High Court.⁶⁴ As we will describe below, these provisions, in part the result of gaming on the part of Kenyan politicians, are now being used by human rights activists.

The Reformer Coalition Engages in Gap-Filling Litigation

According to our theory, when political leaders and their allies feign willingness to enforce international criminal laws, the reformer coalition in the country uses the newfound attention surrounding ICC investigation to devote resources to local judicial change. Reformer coalitions frequently include local activists and attorneys linked in with transnational NGOs as well as their allies in government, and in some cases may include legislators, ministers, and judges. These groups capitalize on an ICC investigation to jumpstart local judicial processes with what we call “gap-filling litigation.”

This behavior originates in the fact that while an ICC investigation opens up the possibility that leaders who have committed atrocity crimes will be prosecuted, the likelihood of broader human rights accountability for lower-level police and soldiers is quite remote. This is a result of mainly two factors. First, the OTP in practice focuses “on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.”⁶⁵ Second, many human rights violations that take place in states under investigation escape the Court’s attention because, in addition to the Rome Statute having a subject matter limited to the gravest crimes, the prosecutor investigates with a specific geographical and temporal mandate. And even those acts that do qualify as core international crimes, but fall outside of the ICC’s investigation, are unlikely to be tried as international crimes by specialized domestic judicial bodies.⁶⁶ International criminal justice is thus vastly more limited in focus than local justice can be. One response from local actors is to promote prosecution of human rights abuses in domestic courts, under domestic law. Because they do this when the ruling coalition is sensitive to international attention, which may be a result of ICC investigation and accompanying scrutiny, reformers have a better chance of pressuring courts to pursue at least some criminal cases without fear of reprisal. We do not contend that the investigation by the ICC prosecutor *causes* activism; rather, we claim that the

⁶² PAUL SEILS, HANDBOOK ON COMPLEMENTARITY: AN INTRODUCTION TO THE ROLE OF NATIONAL COURTS AND THE ICC IN PROSECUTING INTERNATIONAL CRIMES (2016), available at https://www.ictj.org/sites/default/files/ICTJ_Handbook_ICC_Complementarity_2016.pdf.

⁶³ Author interview with anonymous subject 501, Nairobi, August 2016 (on file with authors). See also Dutton & Alleblas, *supra* note 57, at 42; SOSTENESS FRANCIS MATERU, THE POST-ELECTION VIOLENCE IN KENYA: DOMESTIC AND INTERNATIONAL LEGAL RESPONSES (2014); SERENA SHARMA, THE RESPONSIBILITY TO PROTECT AND THE INTERNATIONAL CRIMINAL COURT: PROTECTION AND PROSECUTION IN KENYA (2015).

⁶⁴ Constitution of Kenya, Arts. 22(2c), 258(2c), available at <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010>.

⁶⁵ ICC-OTP, *Paper on Some Policy Issues Before the Office of the Prosecutor*, at 7 (2013), available at https://www.icc-cpi.int/nr/rdonlyres/1fa7c4c6-de5f-42b7-8b25-60aa962ed8b6/143594/030905_policy_paper.pdf. See also SCHABAS, *supra* note 30, at 101.

⁶⁶ NOUWEN, *supra* note 24.

government's willingness to cooperate (feigned or otherwise) expands the opportunities for reformer coalitions to litigate and press for other reforms.

Reformers are boosted by ICC investigations in pushing for legal justice, both because they are given some protective cover by international scrutiny, and because there may be less risk that domestic trials will be corrupted or stalled by the ruling coalition. In the case of Kenya, when the ICC was in the preliminary examination stage from 2008 to 2010, Kenyan NGOs expended their resources on a wide variety of reforms like a new constitution and a truth commission, while welcoming an ICC investigation.⁶⁷ But Kenyan human rights activists also welcomed outside intervention because they had lost faith in the ability of domestic actors to fight corruption and impunity. For example, in the aftermath of the violence the police had set up an investigative group that would work with Kenyan women's organizations on sexual and gender-based violence; but within weeks these organizations withdrew, alleging that the police had been misusing them to identify and silence potential witnesses of police violence.⁶⁸ Similarly, when the minister for justice proposed a special division of the High Court to prosecute grave crimes, human rights and legal civil society organizations opposed it, arguing that "the investigative and prosecutorial arms of the judiciary had been compromised."⁶⁹ These groups supported the ICC intervention with the hope that it would provide a "window of opportunity" to restructure the state, reduce poverty, and produce development and stability.⁷⁰

Kenya provides an apt example. While confidence in Kenyan courts is generally low, as is the belief that victims of the post-election violence will receive justice,⁷¹ a series of criminal and public interest cases against abusive police officers have been wending their way through courts.⁷² Many of these cases have been brought by human rights activists following the ICC investigation (see [Figure 3](#)), in part enabled by reforms pushed through by the ruling coalition to deflect that investigation.

Events in other African countries also support the link between ICC investigation and human rights litigation. In Uganda, a pro bono legal aid NGO called the Foundation for Human Rights Initiative (FHRI) maintains regularly updated data on how many cases it has received since it was created in 1991, well before the ICC's involvement in the country. Because the organization has a wide interest in legal accountability and access to justice beyond the situation in Northern Uganda, these data reflect the type of legal impact we are interested in, that is, beyond the specific crimes committed in the situation under ICC jurisdiction. Plotting these data allows us to observe trends in the volume of cases pursued (see [Figure 1](#)). FHRI does not provide filing trends broken down by type of case, so we cannot be sure how many of those cases involve criminal or civil proceedings or particular types of abuses. However, [Figure 1](#) clearly shows the spike in the organization's caseload after the ICC opened its investigation in 2004. This trend corresponds very closely to trends captured by the TJRC dataset, which also depict an increase in reported prosecutions following ICC

⁶⁷ See, e.g., Kenyans for Peace, Truth & Justice, *Press Statement on the Implementation of the Waki Report* (2008).

⁶⁸ MUTHONI WANYEKI, *THE INTERNATIONAL CRIMINAL COURT'S CASES IN KENYA: ORIGIN AND IMPACT* 9 (2012).

⁶⁹ *Id.* at 10.

⁷⁰ Bjork & Goebertus, *supra* note 25, at 226.

⁷¹ See, e.g., Kenyans for Peace, Truth & Justice, *Securing Justice*, *supra* note 31.

⁷² Author interview with anonymous subjects 102, 301, and 401, Nairobi (on file with authors). See also Kenyans for Peace, Truth & Justice, *A Guide to Public Interest Litigation in Kenya* (2015).

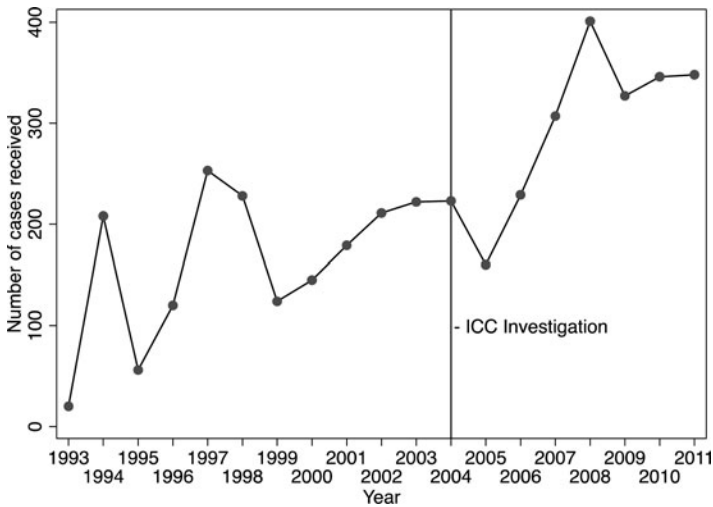


FIGURE 1. Number of Cases Received by FHRI in Uganda

Source: FHRI 2011 Annual Report⁷⁴

investigation in Uganda (see Figure 2). This constitutes preliminary evidence that local reformers, in partnership transnational NGOs, engaged in gap-filling litigation by filing more cases.⁷³

Theoretical Expectations

Based on our theory, positive complementarity does not necessarily transpire the way that ICC planners intend. Because ruling coalitions have an incentive to simultaneously mislead international audiences about their willingness to comply with obligations to prosecute human rights offenses and to avoid loss of power, they promise to enforce human rights and international criminal legal commitments while locally challenging the ICC. However, the Court's investigative interventions might still prove to have a "catalytic" effect on local efforts to pursue justice.⁷⁵ The reason is that slippery state promises inspire legal reformers to call bluffs concerning leaders' rights-compliant intentions. This particular *combination* of feigned willingness and judicial mobilization results in more human rights prosecutions in domestic courts.

This effect is heightened when transnational human rights organizations project the criticism made by local reformers through global information networks. The resultant willingness game resonates onto the international scene and the government must give into some reforms, or it will publicly lay bare its obstructionist or repressive preferences. Paradoxically, at these moments, state leaders' and legal reformers' interests converge on

⁷³ The Foundation for Human Rights Initiative (FHRI) provides legal assistance in cases relating to a variety of matters, including criminal law and torture allegations. Annual reports do not break down its yearly data by type of complaint and we were not able to acquire this information by other means. Foundation for Human Rights Initiative, at <http://www.fhri.or.ug/index.php/about-event/legal-services/legal-aid-assistance>. FHRI numbers are provided simply as corroborating evidence of increased case filing after the onset of ICC investigation.

⁷⁴ Foundation for Human Rights Initiative, *Annual Report 2011* (2011), at <http://www.fhri.or.ug/index.php/2015-07-22-14-08-32/annual-reports/25-annual-report-2011/file>.

⁷⁵ For "catalytic," see NOUWEN, *supra* note 24.

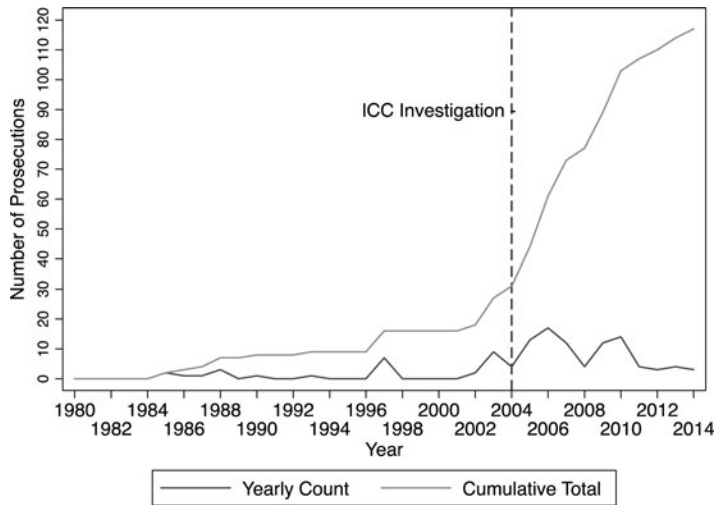


FIGURE 2. Number of Human Rights Prosecutions in Uganda

Source: Transitional Justice Research Collaborative (TJRC)

the need to pursue, or at least allow, domestic human rights prosecutions, although the ruling coalition would prefer much weaker efforts than reformers. The result is that, during ICC investigation, momentum builds for domestic initiatives by judicial reformers to hold state agents accountable for human rights crimes. The next sections test whether this expectation is grounded in cross-national quantitative evidence.

IV. QUANTITATIVE EVIDENCE

The main hypothesis produced by this process-based theory is that ICC investigations into a country's situation will increase domestic human rights prosecutions, by which we mean (as noted above) initiation in state courts of a criminal proceeding against one or more agents of that state accused of offenses relating to violations of human rights violations. Ruling groups have long sought to prosecute captured rebel leaders and other enemies of the state for a variety of crimes, but they have not long pursued much punishment against state agents of violence for human rights violations.

For the purpose of this study, human rights violations are defined as abuses to physical integrity, including torture, political imprisonment, disappearance, unlawful killing, and sexual abuse. Importantly, this study focuses on trials of *all* state agents for abuses to physical integrity—not just those trials that target high-level officials or rebel leaders for international atrocity crimes—as the outcome variable of interest.⁷⁶ The reason is that the spillover impact of ICC intervention should not be limited to trials for crimes under ICC jurisdiction. According to the theory, domestic actors will be emboldened to pursue prosecution for a variety of different human rights violations. Also of interest is the number of guilty verdicts issued in criminal trials. Thus, two outcome variables are examined: yearly counts of human rights

⁷⁶ For atrocity crimes, see DAVID SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS 2* (2012).

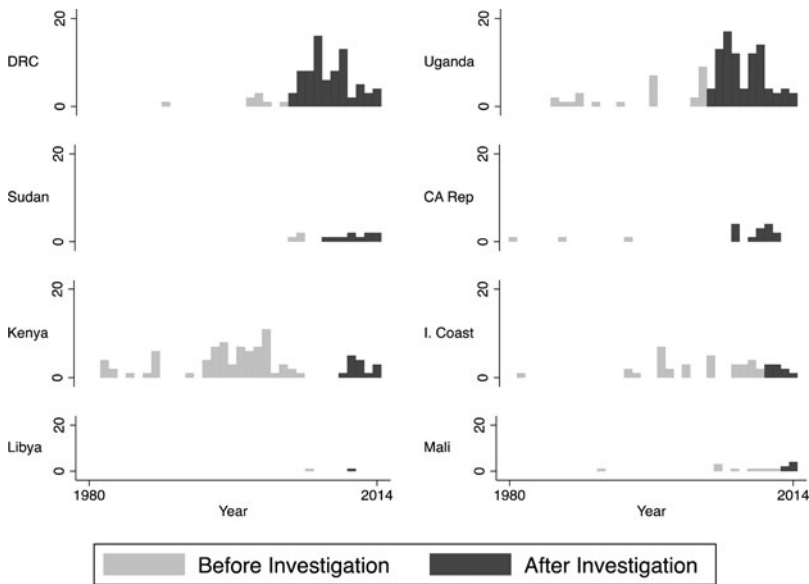


FIGURE 3. Prosecutions Before and After ICC Investigation

prosecutions, and yearly counts of guilty verdicts produced in those prosecutions. Both are taken from the TJRC, which has hand-coded event history data on human rights trials using a variety of secondary sources. It has data on human rights prosecutions in all countries in the world from 1970–2010.⁷⁷ We updated this data set through 2014 for the continent of Africa.⁷⁸

Descriptive Data

The ICC has investigated situation in a total of eight African countries—in chronological order, these are, the DRC, Uganda, Sudan, the Central African Republic (CAR), Kenya, Cote d’Ivoire, Libya, and Mali. In a consideration of statistical evidence, two different stages of ICC intervention are central: preliminary examination, and investigation. Included in the statistical models is a variable measuring the duration of the preliminary examination (ICC-PE), and also a variable that takes on a value of “1” in the year an investigation is announced, and every year after (ICC-INV).⁷⁹ In years where a preliminary examination terminates and an investigation begins, that year is coded “1” for preliminary examination, and for investigation.

Figure 3 depicts a raw count of human rights prosecutions that were initiated in each country before and after ICC intervention. Two of these cases, Uganda and the DRC, show a

⁷⁷ See www.transitionaljusticedata.com for more information.

⁷⁸ Not all prosecutions coded by the Transitional Justice Research Collaborative (TJRC) are included in this study. For example, if a state agent or rebel were charged for treason, that would not be counted as a human rights prosecution. To qualify, defendants must be state agents, and they must be charged with crimes amounting to human rights violations.

⁷⁹ From a statistical standpoint, this overlap does not cause a problem. In fact, it allows us to differentiate the effects of preliminary examinations and investigations in years of their sole occurrence versus years in which they both take place. Data on examinations and investigations are available at <https://www.icc-cpi.int/pages/preliminary-examinations.aspx>.

drastic increase in the number of human rights prosecutions following ICC investigation. Three others, Sudan, Central African Republic, and Kenya, show a moderate increase. CAR and Kenyan trials followed periods wherein no prosecutorial activity was observed. The number of prosecutions in Cote d'Ivoire before and after ICC investigation is roughly equivalent. Since a lag exists between the occurrence and documentation and collection of valid data on prosecutions, it is difficult to assess the situation of Mali which has only recently become the subject of investigation, although there is a hint that more trials are in the offing there.⁸⁰ The one major outlier is Libya, which has held only one human rights prosecution, a flawed proceeding involving many officials of the former Gaddafi regime, including Saif al-Islam al-Gaddafi.⁸¹

Given this data, there are two significant challenges to assessing the causal significance of an ICC investigation. The first challenge is that relatively few cases exist, and they must be compared to region-wide trends toward increased accountability for human rights crimes. The second challenge is that a number of other causal factors must be weighed when considering the causal significance of one single variable. In order to address the first challenge, a cross-national, time series analysis of fifty-one African states is performed for the years 1980 through 2014, the first and last year for which reliable data on African human rights prosecutions is available.⁸²

A sample of African countries is chosen because this is the only region with countries that have thus far been fully investigated by the ICC prosecutor's office.⁸³ Only cases that since 1980 have had at least one period of civil war or systematic repressive violence are selected.⁸⁴ Widespread repressive violence is defined as the attainment of a score of "4" or higher on the Political Terror Scale.⁸⁵ Thus, countries enter the dataset after they have experienced any form of mass violence involving the government. Comparing the pool of eight cases to forty-three other countries is useful because a general trend toward more human rights trials and guilty verdicts is present across the entire African region over the period from 1980–2014 (see Figure 4).

⁸⁰ State Department Human Rights Reports register a number of rights-based prosecutorial events under way in Mali, including those against gendarmes and soldiers charged with disappearance and rape—though these cases are still early in their development. See, e.g., U.S. Dep't of State, 2015 Country Reports on Human Rights Practices—Mali, at 3 (Apr. 13, 2016).

⁸¹ The facts of this case are still unfolding, but if some of these officials, including Abdullah al-Senussi, are put to death, this trial will be removed from the TJRC data because it will no longer qualify as a valid human rights prosecution.

⁸² Arguably, the sample should begin in 1999, the first year in which ratification of the Rome Statute might have exerted an effect on domestic jurisdictions. However, because the move toward domestic prosecutions for human rights violations preceded 1999, it would bias the results to not include years prior to 1999 in the sample. Importantly, the models are not sensitive to these choices; analyses run on a sample that is left-censored in 1999 show the same effects presented in this section (see Models 5 and 6 in Section IV).

⁸³ There is a potential that studying only Africa creates bias. However, very little changes when these models are run on a global sample (these global models are available with the authors).

⁸⁴ Civil war period is defined using the Peace Research Institute Oslo's Onset of Intrastate Armed Conflict, 1946–2014 Dataset. See Nils Petter Gleditsch, Peter Wallensteen, Mikael Eriksson, Margareta Sollenberg & Håvard Strand, *Armed Conflict 1946–2001: A New Dataset*, 39 J. PEACE RES. 615 (2002); Lotta Themnér & Peter Wallensteen, *Armed Conflict, 1946–2013*, 51 J. PEACE RES. 541 (2014).

⁸⁵ Reed M. Wood & Mark Gibney, *The Political Terror Scale (PTS): A Re-introduction and a Comparison to CIRI*, 32 HUM. RTS. Q. 367 (2010).

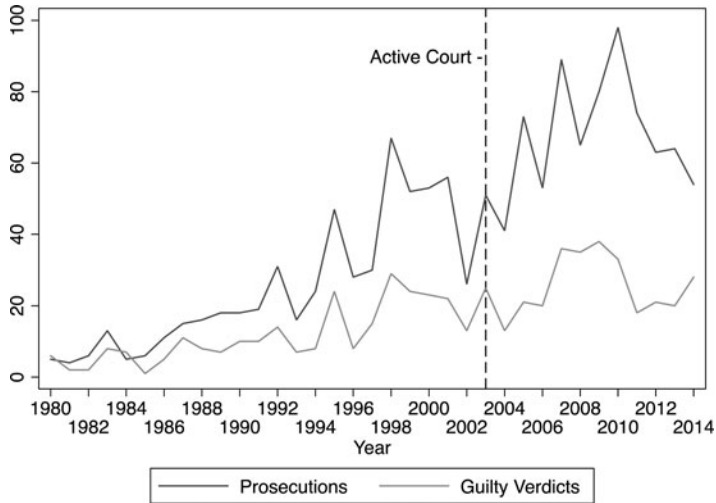


FIGURE 4. Count of African Prosecutions and Guilty Verdicts Over Time

Three of the eight countries that have been subject to full investigation, Uganda, Kenya, and DRC, are atop the list of African countries with the most human rights prosecutions from 1980–2014, ranking second, third, and fourth (see Appendix Table 1). The other countries rank eleventh (Cote d'Ivoire), twenty-fourth (CAR), twenty-sixth (Mali), thirty-second (Sudan), and fiftieth (Libya). That Uganda and DRC have had so many trials, most of which happened after the ICC began its investigations, is good preliminary evidence for our theory. But these basic statistics are only impressionistic; they cannot speak to the strength of the correlation between ICC investigation and domestic trials. To determine whether such a correlation exists, one must analyze whether investigation precedes increases in prosecutions, and examine how strong the relationship between investigation and prosecutions is when compared to other important factors.

Research Design

To assess whether any statistical relationship exists between ICC investigation and human rights prosecutions, we estimate count models, which examine the rise or fall in the total number of new prosecutions in a given year. More specifically, regular and fixed-effects negative binomial regressions are employed. The negative binomial model fits best to the count data used as the dependent variable because it accounts for overdispersion,⁸⁶ and adding a fixed-effects parameter allows the model to account for unobserved differences across countries that may explain the presence or absence of human rights prosecutions.⁸⁷

To present a viable test of the hypothesis that ICC investigations are correlated with human rights prosecutions, it is necessary to control for a series of confounding factors. We included a

⁸⁶ This simply means that the conditional variance is larger than the conditional mean.

⁸⁷ Because the negative binomial is a non-linear, conditional maximum likelihood model, fixed-effects techniques are not as reliable as they are with linear regressions; therefore, fixed-effects negative binomials should be approached with caution. See Paul Allison, *Beware of Software for Fixed Effects Negative Binomial Regression*, STATISTICAL HORIZONS (June 8, 2012), at <http://statisticalhorizons.com/fe-nbreg>.

list of possible confounders that corresponds to three different alternative explanations for variations in the number of prosecutions. First, as discussed in Section II, international relations scholars have argued that ratification of treaties is likely to spur moves toward compliance in the form of judicial reform and mobilization.⁸⁸ In a more negative bent, others worry that the region-wide move toward individual criminal accountability simply indicates that domestic actors are mindlessly applying “international legal frameworks” to their own situations. To state it differently, domestic processes are isomorphic, the products of “replication and dissemination of liberal legalist modalities of justice.”⁸⁹ If this were true, and countries were simply mimicking the legalist trappings of the world community, then all countries that have ratified the Rome Statute should make moves toward individual criminal accountability. Therefore, included is a control that is coded as “1” in the year that a country ratifies the Rome Statute, and every year after. To account for the possibility that governments in Africa are simply emulating their neighbors, many of whom have now engaged in criminal prosecution in accordance with a worldwide “justice cascade,”⁹⁰ we also include a variable that registers how many prosecutions occur in other African countries in any given year.⁹¹ This allows us to capture the propensity for ICC-ratifiers to increase trials simply because all of them are more inclined to do so over time.

Second, transitional justice scholars argue convincingly that the most powerful explanations for the occurrence of trials are features of the domestic political and structural landscape. Some characteristics of the polity contribute to the demand for justice. Because justiciable human rights violations occur during periods of excessive government coercion and civil war,⁹² demands for justice will be most prevalent directly following civil wars or years with high repressive violence. We control for this by including a standard measure of Repression known as the Political Terror Scale (PTS), and a binary measure produced by Uppsala Conflict Data Program/Peace Research Institute Oslo indicating whether the country recently experienced a Civil War. Both are lagged one year.⁹³ Another feature of a country that might contribute to greater demand for justice is the population size, simply because a greater number of people means a greater probability of legal cases being brought against abusive agents. We include a logged measure of Population that is taken from the World Bank Development Indicators.⁹⁴

Other variables may affect supply of justice. For one, countries undergoing democratic institutional transformation are likely to prosecute formerly abusive state agents. This is controlled for using a variable, Dem Trans, which registers whether a country underwent at least one democratic transition since its entry into the dataset.⁹⁵ Judicial Independence is another

⁸⁸ SIMMONS, *supra* note 14; Dancy & Sikkink, *supra* note 17.

⁸⁹ Mark Drumbl, *Policy Through Complementarity: The Atrocity Trial as Justice*, in THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY 216 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

⁹⁰ SIKKINK, *supra* note 9.

⁹¹ To avoid endogeneity, we subtract the number of prosecutions in any given country-year from the number of all other prosecutions within the African continent (Country A_t + Country B_t . . . - Country X_t).

⁹² Christian Davenport, *State Repression and Political Order*, 10 ANN. REV. POL. SCI. 1 (2007).

⁹³ Wood & Gibney, *supra* note 85; Lotta Themnér & Peter Wallensteen, *Armed Conflict, 1946–2011*, 49 J. PEACE RES. (2012).

⁹⁴ Data available at <http://databank.worldbank.org/data/home.aspx>.

⁹⁵ Derived from Polity IV. See Monty G. Marshall, Keith Jaggers & Ted Robert Gurr, POLITY IV PROJECT: POLITICAL REGIME CHARACTERISTICS AND TRANSITIONS, 1800–2010: DATA USER’S GUIDE (Center for Systemic Peace ed., 2013).

factor crucial to rule of law that may enable actors to pursue litigation. Judicial independence is measured using a 0–100 index derived from a statistical analysis of a battery of data series purporting to measure judicial institutions.⁹⁶ The higher the country's score in any given year, the greater the independence of its judiciary. Based on the theory presented in this article, it should also be the case that countries with a larger number of active international NGOs will have more human rights prosecutions, because these organizations assist the reformer coalition in articulating demands and pushing for litigation. This is controlled for with the variable NGOs, which is a logged yearly count of operative non-governmental organizations in the country.⁹⁷

Finally, other scholars have questioned the notion that ICC intervention itself has any independent causal impact on local movements toward accountability. Instead, it could be a byproduct of broader efforts by the international community to promote domestic accountability. For instance, Africanist Phil Clark attributes the increase in judicial activity in the DRC to an influx of aid from external sources. "Since July 2003," Clark writes, "the EU's Ituri-focused investment of more than US \$40 m. towards reforming the Congolese judiciary has seen considerable progress in local capacity."⁹⁸ This argument must be accounted for if one is to claim that ICC intervention has an independent impact. Thus, a measure of bilateral and institutional aid from OECD countries is also included, specifically if it is earmarked for civil society and capacity-building projects. This data is more specific than most aid data, which is aggregated across non-applicable issue areas. The variable OECD Aid, which is measured in billions of 2010 U.S. dollars, was taken from the OECD's Query for International Development Statistics (QWIDS).⁹⁹ We also include a control for GDP per capita in a country, available from the World Bank, reasoning that wealthier countries benefiting from global markets will be more willing and able to pursue criminal justice.¹⁰⁰ A summary of all variables is contained in Appendix Table 2.

Findings

The first step in the analysis was to run a naïve model, including only measures of ICC-PE and ICC-INV, with robust standard errors clustered by country. In this model, the coefficient for ICC-INV (1.77) is statistically significant at the .01 level, where the coefficient for ICC-PE (0.82) is statistically insignificant. In regards to magnitude, the effect of an investigation is very large, associated with a 488 percent increase in the count of prosecutions. In other words, a country subject to an ICC investigation tends to have almost five times more trials per year than other African countries without ICC involvement, and that relationship is robust and statistically significant.

⁹⁶ Drew A. Linzer & Jeffrey K. Staton, *A Global Measure of Judicial Independence, 1948–2012*, 3 J. L. & COURTS 223 (2015).

⁹⁷ These data are available from *The Yearbook of International Organizations*, at <http://www.uia.org/ybio>. For other articles that use this measure to capture the presence of human rights organizations, see Hafner-Burton & Tsutsui, *supra* note 15.

⁹⁸ Clark, *supra* note 21, at 40.

⁹⁹ These data are available at <http://stats.oecd.org/qwids>.

¹⁰⁰ Hun Joon Kim, *Structural Determinants of Human Rights Prosecutions after Democratic Transition*, 49 J. PEACE RES. 305 (2012).

These initial findings, however, do not account for any counter-explanations. Table 1 presents the results from six different multivariate negative binomial count models that account for confounding variables.¹⁰¹ Models 1 and 2 examine the effects of covariates on prosecutions, which are counted in the year they began, and guilty verdicts, which are counted in the year that they decisions were rendered. One might reasonably argue that the initiation of more prosecutions alone is not evidence of a move toward accountability, and that what should be observed is whether state agents are being held guilty for their actions. The first two models do not use fixed effects, so they compare across all observations, clustering errors by country. The coefficient on ICC-INV is statistically significant at the .05 level, regardless of model specification, while ICC-PE is not.¹⁰² What this indicates is that when controlling for confounding factors, preliminary examinations are again not associated with increased prosecutions or guilty verdicts, but ICC investigations are. Three other variables are also positive and statistically significant correlates of human rights prosecutions and guilty verdicts: Repression, African Trials, and Population.

These findings are substantively significant. For each one-level increase in the systematicity of violent repression in the country (on a 5-point scale), the count of prosecutions will increase by 30 percent. For every ten trials that take place on the continent in a given year, the percentage increase in trial count is roughly 10 percent. And for every 500,000 more people a country has, the percentage count for prosecutions increases by roughly 40 percent. These findings are expected. Countries with more repressive violence and larger populations have a higher demand for justice. The coefficient on African Trials likely picks up on temporal trends over time. Any given African country in 2010 is more likely to initiate prosecutions than it was in 1990.

Figure 5 visualizes the statistical effect of ICC Investigation across countries, at different levels of repression. At low levels of repression, there is a small but noticeable difference between those countries with ICC investigations and those without. This difference becomes more pronounced as the level of repression increases. When the PTS score is 4, where “societal violence is pervasive and severe,” countries with ICC investigations have close to five times as many prosecutions of state agents for human rights violations. This simply means that prosecutions are a response to repressive violence, but the number of prosecutions in a repressive environment will increase if the ICC is investigating. The effect subsides as the country reaches a “ubiquitous level” of repression at PTS level 5.¹⁰³ In such a circumstance, the level of violence is so high that it will have a dampening effect on judicial mobilization.

Models 3 and 4 utilize fixed effects. Regular regressions pool all observations together, and treat each observation independently; fixed-effects regressions assume that some observations should be grouped together. In these models, those observations that take place in the same country are treated as if they have their own y -intercept. Where regular regressions tell us

¹⁰¹ The results are not dependent on the choice of count models. In Appendix Table 3, we replicate all of the models using basic OLS regressions. The findings regard ICC-INV change very little, except that the OLS regressions likely overestimate the coefficients because they assume the data are normally distributed.

¹⁰² One concern with this model is that ICC-INV may only achieve significance when ICC-PE is included in the model, given that the two processes are related. To test for this possibility, we re-ran Models 1–4 excluding the ICC-PE variable. The results are presented in Appendix Table 4. ICC-INV is still quite robust in all models.

¹⁰³ For a description of different levels of the Political Terror Scale, see <http://www.politicalterrorsscale.org/Data/Documentation-SVS.html>.

TABLE 1.
DETERMINANTS OF PROSECUTIONS AND GUILTY VERDICTS

	Pros (1)	Guilt (2)	Pros-FX (3)	Guilt-FX (4)	Pros-Full (5)	Pros-FX Full (6)
ICC-PE	-0.482** (0.237)	-0.487 (0.362)	-0.0501 (0.245)	0.0759 (0.362)	-0.159 (0.251)	0.123 (0.248)
ICC-INV	0.564* (0.304)	0.880** (0.361)	0.740*** (0.171)	1.054*** (0.239)	0.911*** (0.237)	0.716*** (0.241)
Rome Ratification	0.372** (0.166)	0.0423 (0.253)	0.133 (0.127)	-0.175 (0.181)	0.0390 (0.159)	-0.257 (0.194)
Dem Trans	0.132 (0.243)	-0.143 (0.241)	0.259** (0.130)	0.168 (0.180)	-0.0643 (0.220)	0.338 (0.249)
Repression (t-1)	0.302*** (0.0855)	0.340*** (0.0939)	0.241*** (0.0605)	0.233*** (0.0818)	0.358*** (0.107)	0.206** (0.0988)
Civil War (t-1)	-0.151 (0.182)	-0.242 (0.183)	0.108 (0.123)	0.0450 (0.165)	-0.0262 (0.186)	-0.0489 (0.172)
African Trials (t-1)	0.00973*** (0.00245)	0.00715** (0.00302)	0.0128*** (0.00198)	0.00987*** (0.00268)	-0.000228 (0.00442)	0.00327 (0.00300)
Population (ln)	0.390*** (0.0953)	0.451*** (0.128)	0.127 (0.0816)	0.173 (0.127)	0.0982 (0.129)	0.433* (0.255)
OECD Aid (billions) (t-1)					0.0834 (0.0704)	-0.0153 (0.0600)
NGOs (ln) (t-1)					0.526 (0.321)	-0.415 (0.557)
Judicial Independence (t-1)					0.0133*** (0.00509)	0.00739 (0.00782)
GDP per cap (ln)					-0.110 (0.141)	0.213 (0.217)
Constant	-8.143*** (1.475)	-9.816*** (2.053)	-3.881*** (1.299)	-4.515** (2.055)	-5.655*** (1.545)	-6.958** (2.753)
Observations	1612	1612	1591	1523	648	627
Countries			48	46	47	45
Log-likelihood	-1763.6	-1764.1	-1484.1	-881.5	-738.8	-398.2

***p < .01 **p < .05. *p < .10. Note: Observations decrease in fixed effects models because panels with all zero values on dependent variable are excluded.

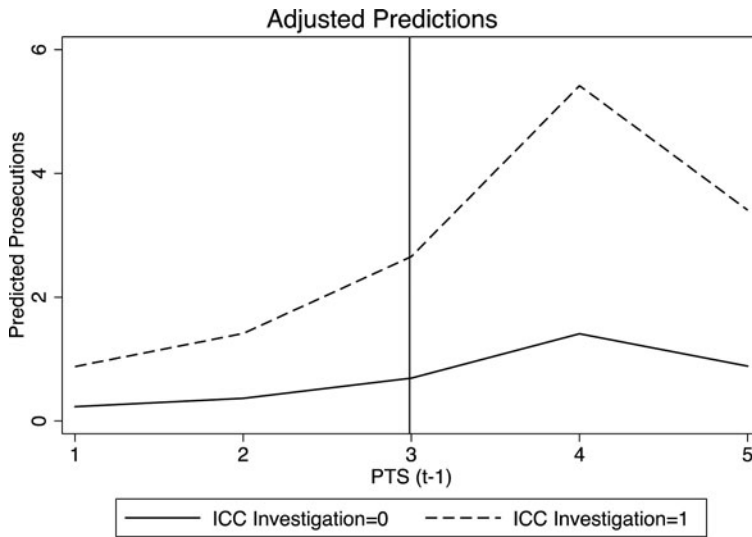


FIGURE 5. Effect of ICC Investigation on Predicted Prosecutions, by Level of Repression

Note: Vertical line represents average PTS Repression score for African continent

what factors correlate to domestic prosecutions across all cases, fixed-effects regressions will tell us what changes within countries produce an increase in prosecutions. With the exception of Population, the same variables are consistently significant. Changing levels of repression, greater experience with trials at the regional level, and ICC investigations are the factors that matter most for changing the probability of prosecutions. Importantly, the ICC-INV strengthens statistically and substantively in the fixed-effects model. It becomes the most robust predictor. This means that the onset of ICC investigations is better at predicting changes in number of prosecutions *within* countries, whereas something like population only explains difference *between* countries. The same holds for guilty verdicts. Based on this, one may conclude that not only are ICC interventions a major correlate of prosecutions, but also of guilty verdicts.

Models 5 and 6 include a number of additional controls, but also have far fewer observations. The reason for this is that some of the data we use is missing a large number of observations for the sample period of 1980–2014. The variables with missing values include OECD Aid, GDP per capita, Judicial Independence, and NGOs. The years for which these variables are all complete series are 1999–2012. Therefore, we include two separate specifications to account for this difference. Model 5 is a regular regression, and Model 6 uses fixed effects. According to Model 5, on average across countries, enhanced judicial capacity does seem to predict increases in human rights prosecutions, as does a prior legacy of repressive violence. The finding regarding ICC Investigations remains as robust as in previous models. The other alternative explanations do not fare so well. With a p-value of .101, the NGOs variable nearly misses conventional levels of significance. Another variable of interest, OECD Aid, also fails to reach statistical significance.

Table 2 records how much a one-standard deviation change in various independent variables alters the count of prosecutions and guilty verdicts in negative binomial models without fixed effects. ICC Investigations are the third-strongest predictor across cases, behind Judicial Independence and Repression. For Model 5, a temporally truncated model with many

TABLE 2.
MAGNITUDE OF CHANGE IN COVARIATES

	Prosecutions	Guilty Verdicts
ICC Investigation	24.9***	41.8***
Repression (PTS)	40.7***	43.6***
NGOs	39.7	8.3
Judicial Independence	33.4**	50.3**
OECD Aid	7.4	-10*

Note: Percent change in expected count of outcome with a one-standard deviation change in each factor.

additional controls, a one-SD change in the ICC Investigation variable is associated with a roughly 25 percent increase in the count of human rights prosecutions.

One possible interpretation of these results is that the effect of ICC Investigations on prosecutions is conditional on a strong judiciary, or that Judicial Independence is the primary determinant of prosecutions. However, we would caution against this conclusion. First, there appears to be little interactive effect between Judicial Independence and ICC Investigations. Figure 6 plots the marginal effect of ICC Investigation on the expected count of prosecutions and guilty verdicts, conditional on different levels of judicial independence. Because the confidence intervals cross the zero line, there is little reason to expect that a strong interactive effect is present. With regard to the presence of a relatively strong or strengthening judiciary predicting changes in prosecutions, the final fixed-effects model dispels this notion. Judicial Independence is insignificant in Model 6, indicating that within-country variation on this factor is not correlated with an increased prosecutions count. The effect of Judicial Independence is most pronounced *between* countries.

In the end, the two dynamic factors most consistently correlated with an increased probability of human rights prosecutions are increasing levels of repressive violence and ICC investigations. In places where the demand for justice is increasing due to the victimization of the population, and where the ICC intervenes, the chance that state agents will be successfully prosecuted increases substantially.

Selection

A correlation between ICC investigations and domestic human rights prosecutions is clearly present in the data. Yet as with all statistical presentations, this correlation cannot “prove” that the causal theory presented in Section III is correct. The possibility remains that a selection effect is present; that is, those countries ripe for human rights prosecutions are also more likely to be investigated by the ICC. The selection theory follows this logic: the ICC does not randomly choose cases to investigate. It could be that Court actors “chase” cases where reform efforts are already under way in order to maximize the positive consequences of ICC involvement.¹⁰⁴ For example, the ICC may have attempted to capitalize on Joseph Kony’s waning power in the LRA’s conflict against the Ugandan government, or responded to Kenyan civil society’s desire to resist impunity for post-election violence in 2008. If this were the true explanation, then it contradicts the prosecutor’s version of events, which holds

¹⁰⁴ Clark, *supra* note 21.

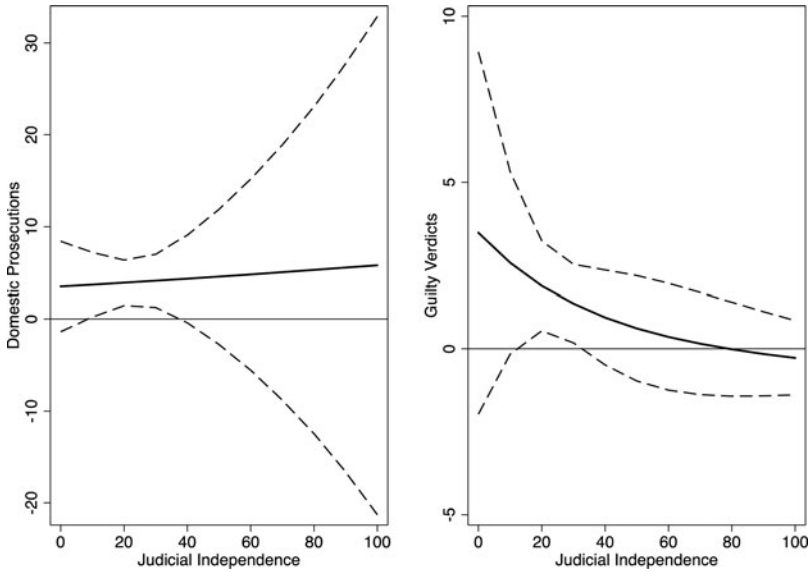


FIGURE 6. Effects of ICC Investigations, Conditional on Judicial Independence

that OTP seeks cases that involve the gravest atrocity crimes. It would also mean that ICC investigations are, like domestic human rights prosecutions, a byproduct of domestic reform, rather than an independent catalyst.

We address this concern in two ways. The first is to consider whether the correlation between ICC involvement and domestic human rights prosecutions is subject to reverse causality, or whether increases in domestic human rights prosecution actually precede the onset of ICC involvement in a country's situations. We test this possibility by performing rare-events Logit models predicting the onset of preliminary examinations and investigations.¹⁰⁵ In these models, we assess whether Prosecutions in one year ($t-1$) are correlated with the initiation of ICC-PE or ICC-INV in the following year. Performing such tests allows for assessment of whether human rights trials begin to increase in countries before the ICC became involved. According to our statistical models, they do not. Appendix Table 5 presents the results of the full models, controlling for a number of factors, including how many acts of mass violence occurred in the country over the last five years.¹⁰⁶ The models show that the increase in domestic prosecutions we are observing does not appear to take place *prior* to ICC examinations and investigations. They also show that it is very difficult in general to predict ICC involvement. When compared to other cases, for example, it does not seem as if the comparative level of mass violence in a country is a true predictor of ICC engagement.

A second strategy we employ is to study the "treatment" effect of ICC investigations on countries, while accounting for selection. Though ICC involvement is non-random, some statistical techniques allow us to approximate random assignment. One method is to

¹⁰⁵ We use an estimation technique called Firth Logit, which can account for the fact that the onset of a preliminary examination or investigation is quite rare among the full sample of observations.

¹⁰⁶ These data are available from Uppsala Conflict Data Program/Peace Research Institute Oslo's (UCDP/PRIO) "One-side violence" data set. Kristine Eck & Lisa Hultman, *One-Sided Violence Against Civilians in War: Insights from New Fatality Data*, 44 J. PEACE RES. 233 (2007).

TABLE 3.
THE AVERAGE TREATMENT EFFECT ICC INVESTIGATION

	Inverse-Probability Weights	
Average Treatment Effect (ICC-INV)	0.922**	(0.415)
Population Mean (ICC-INV = 0)	0.723***	(0.037)

match cases into strata based on shared attributes and analyze the effect of ICC investigations within those matched strata. To do this, we match cases based on whether they are state parties to the Rome Statute, how many acts of mass violence they experienced over the last five years, how many NGOs they have, and whether a peacekeeping operation is present in the country. Each of these factors, we reason, might reasonably be associated with ICC investigation. After accounting for these factors predicting selection, we study the effects of ICC investigation on domestic prosecutions. In one model employing a method called coarsened exact matching (see Appendix Table 6), we again find that ICC-INV is a robust predictor of domestic human rights prosecutions.¹⁰⁷

In another model, we construct weights to predict the probability that a country was chosen for ICC investigation in a given year, and then include the inverse probability of those weights in a model analyzing the subsequent count of human rights prosecutions.¹⁰⁸ These “inverse probability weight” models once more find that the average treatment effect of ICC Investigations is quite large. Table 3 shows the findings from this model. We can see that the population mean of domestic human rights prosecutions for all countries without ICC Investigation is 0.72. The average treatment effect for those countries with ICC Investigation is 0.92. This means that, even when accounting for selection, countries with ICC investigations have over 90 percent more prosecutions. Though causality can never be fully verified with observed data, these models are strong evidence that our theory concerning the catalytic nature of ICC investigations is plausible.

V. CONCLUSION

When reviewing the ICC’s involvement in a situation, activists and skeptics are both unlikely to be satisfied. The ICC is blamed for issuing too few indictments, against insubstantial actors, in too few situations; and for employing insufficient prosecutorial techniques, with little interest in justice, and with little ability to protect witnesses. Still, many continue to demand its involvement in various conflicts around the world. The reason that reformers call on ICC involvement is that they need to invigorate their own campaigns for change with sustained attention from outside the country.

The primary aim of this study is to demonstrate that a relationship exists between ICC investigation and domestic criminal prosecutions for human rights abuses. This relationship

¹⁰⁷ For coarsened exact matching, see Daniel E. Ho, Kosuke Imai, Gary King & Elizabeth A. Stuart, *Matching as Nonparametric Preprocessing for Reducing Model Dependence in Parametric Causal Inference*, 15 POL. ANALYSIS 199 (2007).

¹⁰⁸ For inverse probability weights, see Matthew Blackwell, *A Framework for Dynamic Causal Inference in Political Science*, 57 AM. J. POL. SCI. 504 (2013).

has remained as yet undiscovered. While most politically minded observers of the ICC see negative short-term consequences in the Court's dealings with Africa, this article presents the first systematic evidence that ICC involvement in a country might have at least one potentially beneficial intermediate side-effect: it increases domestic prosecutions and convictions of human rights violators. This increase is not the result of a direct line of support between the ICC and local institutions, nor is it simply a spillover of atrocity crimes cases that are transferred from international to domestic jurisdiction. Instead, ICC intervention increases prosecutions of state agents because reformer coalitions inside and outside the judiciary use the opportunities created by international involvement to litigate human rights cases. These actions are taken in part because governments make commitments to legal justice that they may not be willing to keep, and activists call them out by taking action. Engaged in a two-level game with domestic and international audiences, state leaders allow limited reforms to go through, even if they would prefer to stop them.

The willingness game between governments and reformers is triggered by the onset of an ICC investigation: prior to the opening of an investigation, states face few reputational or political costs, and they do not make any maneuvers; likewise, reformers hold back and wait until investigation begins to devote more resources to litigation, because the attention of an investigation brings a higher chance of success. When the official prosecutorial investigation begins, so do government contrivances and activists' gap-filling litigation. 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 ICC strategists originally envisioned.

This article uses a new dataset to demonstrate that ICC investigations are significantly correlated with domestic prosecutions, controlling for a number of other factors. This finding comes with a few important caveats. First, it is possible that the TJRC data set used in this article, like all others that attempt to count events, is biased. However, in the Ugandan case, the rise of prosecutions documented in the TJRC data matches closely the only other data available (those collected by FHRI).¹⁰⁹ This suggests that the data used for cross-national comparison are externally valid. Still, other sources of data should be probed to further examine the relationship between the ICC and domestic judicial activity.

Second, the findings here do not mean that ICC investigations will produce domestic human rights prosecutions in all cases. They should also not be interpreted to mean that the ICC is more "causally important" than local activism. The effects of the ICC are contingent, and our argument does not presume that the ICC *produces* local activism. Activists always struggle courageously for justice, and for good reason. Instead, our theory is that ICC investigations since 2004 have helped create a situation where reformer and ruling coalitions' interests paradoxically align, and this alignment results in domestic prosecutions. Second, the mechanisms outlined in our theory might not always work in unison to produce positive results, especially if the government is insulated from reputational concerns and opts for a repressive strategy. Case study research should further investigate the relationship between reform-promotion and gap-filling litigation and other potential reformist strategies—as well as government reactions in various contexts.

¹⁰⁹ FHRI, *supra* note 74.

The findings also have important policy implications that reach beyond the cases examined. First, observers should start with low expectations for investigations initiated by UN Security Council (UNSC) referrals. The case with the least national prosecution activity in our observed data is Libya. The most important UNSC referrals to date, in Sudan and Libya, were add-ons among other proposed actions to address very difficult cases. This is not necessarily a recipe for success, nor has there been much. Nonetheless, the UNSC is the only body able to bring cases relating to situations where the territory and major perpetrators are of states that have not ratified the Rome Statute, making it a potentially valuable resource for future involvement.

A second implication is that the Court should pay attention to local activists, and help empower them when it does not compromise the neutrality of the Court. Currently, preliminary examinations are underway for Afghanistan, Colombia, Gabon, Guinea, Iraq/UK, Nigeria, Palestine, Registered Vessels of Comoros, Greece and Cambodia, and Ukraine.¹¹⁰ If these cases move into the investigation phase, as in 2016 occurred with regard to Georgia, responses of local actors might follow the pathways of the model sketched here.

Third, it is possible that the impact of ICC investigations on domestic prosecutions will spill over into neighboring countries that learn lessons from the experience of political actors close in proximity. If the political mechanisms we observe are in place, then nearby countries could begin to move forward with their own proceedings in the hopes of avoiding ICC entanglements. Or, as appears to be the case in Kenya, leaders might learn from previous experiences how to maneuver when the ICC becomes involved.¹¹¹

Fourth, if investigation is the stage of ICC involvement that inspires some activity at the municipal level, then the OTP may find the news discouraging, because it hopes to prevent itself from having to move forward with too many costly and drawn-out investigations. However, the implication of this work is that ICC involvement can lead to potentially productive reforms despite government opportunism, and that changes are normally accompanied by complaints of hypocrisy, concerns over ICC effectiveness, and open criticism from both ruling and reformist groups within the target country.

The ICC struggles with growing pains, problems of miscalculation, a shortfall of resources, continual concerns over legitimacy, and an increasingly unpropitious global political environment.¹¹² Tensions between the ICC and many African governments are not abating. Even if domestic prosecutions have increased in African countries subject to ICC investigations, these are not a very big part of the answer to problems these societies face. As Sarah Nouwen documents, the prosecutions that do take place, including the ones we analyze, do not target enough high-level offenders responsible for serious human rights crimes.¹¹³ Countries like Uganda, DRC, CAR, and Kenya are still troubled by cultures of impunity, civil war economies, cross-border tensions, sexual violence, rapacious leadership, and the dominance of

¹¹⁰ Office of the Prosecutor of the ICC, *Preliminary Examinations*, at <https://www.icc-cpi.int/pages/preliminary-examinations.aspx>.

¹¹¹ Kenyans for Peace, Truth and Justice, *Kenya's 7-Step Formula for Impunity Kenya's 7-Step Formula for Impunity*, at <http://kptj.africog.org/kenyas-7-step-formula-for-impunity>.

¹¹² See, e.g., Kip Hale, *ICC on Trial*, FOREIGN AFFAIRS (Dec. 11, 2014), at <https://www.foreignaffairs.com/articles/kenya/2014-12-11/icc-trial>.

¹¹³ NOUWEN, *supra* note 24.

patronage networks.¹¹⁴ Whatever positive impacts accrue to increased judicial activity as a result of ICC involvement need to be balanced against other negative relationships as they are uncovered in systematic analysis.

¹¹⁴ TOM BURGIS, *THE LOOTING MACHINE: WARLORDS, OLIGARCHS, CORPORATIONS, SMUGGLERS, AND THE THEFT OF AFRICA'S WEALTH* (2015).

APPENDIX
TABLE A1.
THE INTERNATIONAL CRIMINAL COURT IN AFRICA

Country	Rank	Pros	Guilty	ICC-Pre	ICC-Inv	Rome Rat	Dem Trans	Civil War
Algeria	34	13	7	0	0	0	1	1
Angola	28	14	10	0	0	0	0	1
Benin	31	13	4	0	0	1	1	0
Botswana	21	18	6	0	0	1	0	0
Burkina Faso	19	21	11	0	0	1	0	1
Burundi	9	43	23	0	0	1	1	1
Cameroon	13	36	22	0	0	0	0	1
C Af Republic	24	17	9	1	1	1	1	1
Chad	35	12	5	0	0	1	0	1
Comoros	48	3	5	0	0	1	1	1
Congo (Brazzaville)	29	13	6	0	0	1	1	1
Cote d'Ivoire	11	42	17	1	1	1	1	1
DR Congo	4	84	52	1	1	1	1	1
Djibouti	36	11	3	0	0	1	1	1
Egypt	1	120	76	0	0	0	0	1
Equatorial Guinea	27	15	10	0	0	0	0	0
Eritrea	51	0	0	0	0	0	0	1
Ethiopia	12	39	17	0	0	0	1	1
Gabon	45	7	1	0	0	1	1	0
Gambia	43	7	3	0	0	1	0	1
Ghana	10	43	10	0	0	1	1	1
Guinea	30	13	7	1	0	1	0	1
Guinea-Bissau	46	6	1	0	0	0	1	1
Kenya	3	89	26	1	1	1	1	1
Lesotho	41	10	2	0	0	1	1	1
Liberia	20	19	7	0	0	1	1	1
Libya	50	2	0	0	1	0	0	1
Madagascar	39	10	4	0	0	1	1	0
Malawi	17	27	9	0	0	1	1	0
Mali	26	15	5	1	1	1	1	1

Mauritania	38	10	5	0	0	0	1	1
Mauritius	47	5	0	0	0	1	0	0
Morocco	25	16	7	0	0	0	0	1
Mozambique	16	30	16	0	0	0	1	1
Namibia	8	43	10	0	0	1	1	0
Niger	37	11	8	0	0	1	1	1
Nigeria	7	58	6	1	0	1	1	1
Rwanda	6	61	24	0	0	0	0	1
Senegal	22	17	3	0	0	1	1	1
Seychelles	42	9	4	0	0	1	0	0
Sierra Leone	23	17	4	0	0	1	1	1
Somalia	44	7	4	0	0	0	1	1
South Africa	5	74	42	0	0	1	1	1
South Sudan	33	13	1	0	0	0	0	1
Sudan	32	13	8	1	1	0	1	1
Swaziland	40	10	1	0	0	0	0	0
Tanzania	14	35	12	0	0	1	0	0
Togo	49	2	2	0	0	0	0	1
Uganda	2	117	38	1	1	1	1	1
Zambia	15	32	10	0	0	1	1	0
Zimbabwe	18	22	6	0	0	0	1	0

*Prosecution (Pros.) and guilty are cumulative values, and Rank is by Pros. The rest are maximum values for the country.

**Preliminary Examination (ICC-Pre); Investigation (ICC-Inv); Rome Ratification (Rome Rat.); Democratic Transition (Dem. Tr.)

TABLE A2.
SUMMARY OF VARIABLES

Variable	Count	Mean	Std. Dev.	Min.	Max.
Prosecutions	1713	.7962639	1.71985	0	17
Guilty Verdicts	1713	.3321658	.9100932	0	10
Democratic Transition	1713	.3426737	.474742	0	1
Rome Ratification	1713	.2282545	.4198301	0	1
ICC-PE	1713	.0116754	.1074516	0	1
ICC-INV	1713	.0315236	.1747791	0	1
NGOs (ln)	1568	5.711823	.7181267	.6931472	7.585281
Population (ln)	1709	15.69323	1.485098	11.07287	18.99435
GDP per cap (ln)	1623	6.585559	1.085054	4.227814	4.227814
Judicial Independence	1601	29.82321	21.07508	1.07	92.89
PTS	1649	2.993936	1.050872	1	5
One-sided violence	1662	1.401324	3.593535	0	36
Ongoing Civil War	1628	.2266585	.4187985	0	1
African Trials	1713	39.03269	26.10932	2	98
OECD Aid (billions)	697	.6272145	.843398	-.01413	11.42802

TABLE A3.
OLS REGRESSION REPLICATIONS OF MODELS 1–6

	Pros	Guilt	Pros-FX	Guilt-FX	Pros-Full	Pros-FX Full
ICC-PE	−0.0668 (0.630)	−0.234 (0.191)	0.0587 (0.348)	−0.0467 (0.193)	−0.119 (0.632)	0.137 (0.477)
ICC-INV	2.471** (1.115)	1.169* (0.585)	2.416*** (0.240)	1.125*** (0.133)	2.932** (1.243)	2.288*** (0.449)
Rome Ratification	0.440* (0.237)	0.0399 (0.113)	0.163 (0.127)	−0.102 (0.0706)	0.195 (0.264)	−0.157 (0.297)
African Trials (t−1)	0.00316 (0.00281)	0.00156 (0.00156)	−0.00171 (0.00276)	−0.00215 (0.00153)	−0.00730 (0.00575)	−0.00518 (0.00473)
Dem Trans	0.0488 (0.195)	−0.0675 (0.104)	0.0358 (0.128)	−0.0556 (0.0713)	−0.150 (0.262)	0.373 (0.388)
PTS (t−1)	0.169** (0.0638)	0.100*** (0.0368)	0.177*** (0.0556)	0.0764** (0.0308)	0.379*** (0.129)	0.219 (0.139)
Civil War (t−1)	−0.140 (0.182)	−0.0923 (0.0972)	0.109 (0.129)	0.0355 (0.0713)	−0.123 (0.389)	0.125 (0.276)
Population (ln)	0.293*** (0.0821)	0.136** (0.0552)	1.224*** (0.307)	0.763*** (0.170)	0.186 (0.129)	2.096 (1.328)
NGOs (ln)					0.444 (0.335)	−0.896 (1.723)
Judicial Independence					0.0131** (0.00489)	0.00106 (0.0158)
OECD Aid (billions) (t−1)					0.117 (0.104)	−0.0941 (0.125)
GDP per cap (ln)					−0.0403 (0.138)	−0.0350 (0.652)
Constant	−4.614*** (1.253)	−2.170** (0.878)	−19.14*** (4.755)	−11.87*** (2.638)	−5.462*** (1.958)	−27.36* (16.41)
Observations	1612	1612	1612	1612	662	662
Countries			49	49	47	48
R-Squared	0.212	0.143	0.161	0.0966	0.269	0.0701

***p.01 **p < .05. *p < .10. Note: All variables except ICC-PE and ICC-INV lagged one year. Observations decrease in fixed effects models because panels with all zero values on dependent variable are excluded.

TABLE A4.
MODELS 1–4 WITHOUT PRELIMINARY EXAMINATION VARIABLE

	Pros b/se	Guilt b/se	Pros-FX b/se	Guilt-FX b/se
ICC Investigation	0.576* (0.300)	0.904** (0.363)	0.743*** (0.170)	1.051*** (0.239)
Rome Ratification	0.351** (0.171)	0.0110 (0.250)	0.129 (0.126)	−0.170 (0.179)
African Trials	0.00964*** (0.00246)	0.00710** (0.00306)	0.0128*** (0.00198)	0.00985*** (0.00268)
Democratic Transition	0.133 (0.244)	−0.138 (0.242)	0.258** (0.130)	0.169 (0.180)
PTS (t-1)	0.297*** (0.0856)	0.336*** (0.0940)	0.240*** (0.0604)	0.234*** (0.0815)
Ongoing Civil War (t-1)	−0.152 (0.181)	−0.243 (0.182)	0.107 (0.123)	0.0436 (0.165)
Population (ln)	0.386*** (0.0949)	0.446*** (0.129)	0.127 (0.0816)	0.173 (0.127)
Constant	−8.049*** (1.464)	−9.731*** (2.052)	−3.869*** (1.297)	−4.520** (2.056)
Observations	1612	1612	1591	1523
Countries			48	46
Log-likelihood	−1763.3	−1071.2	−1483.3	−881.5

***p.01 **p < .05. *p < .10

TABLE A5.
RARE-EVENTS LOGITS PREDICTING ICC INVOLVEMENT

	ICC-PE b/se	ICC Investigation b/se
Rome Ratification	2.394*** (0.822)	1.394 (0.872)
Prosecutions (t-1)	0.0233 (0.101)	-0.0151 (0.119)
PTS (t-1)	0.491 (0.549)	0.934 (0.628)
One-sided Violence (5 Yr)	-0.0246 (0.0592)	0.00367 (0.0619)
Ongoing Civil War (t-1)	-0.0171 (0.807)	-0.158 (0.857)
Judicial Independence (t-1)	-0.0334 (0.0276)	-0.0183 (0.0308)
NGOs (t-1)	1.324 (0.837)	1.066 (0.881)
UN Peacekeeping	1.057 (1.126)	0.861 (1.105)
Constant	-14.68*** (4.730)	-14.79*** (5.325)
Observations	1426	1426
Log-Likelihood	-30.37	-23.39

***p.01 **p < .05. *p < .10.

TABLE A6.
COARSENEDED EXACT MATCHING MODEL OF ICC INVESTIGATIONS

	CEM b/se
ICC-PE	0.0864 (0.633)
ICC-INV	0.870*** (0.255)
Rome Ratification	0.655* (0.374)
Democratic Transition	-0.450 (0.454)
PTS (t-1)	0.0692 (0.152)
Ongoing Civil War (t-1)	0.233 (0.207)
African Trials (t-1)	0.00566 (0.00520)
Population (ln)	0.223* (0.123)
Constant	-4.279** (2.103)
Observations	1612
Log-Likelihood	-2282.6

***p.01 **p < .05. *p < .10.