Abstract. This article shows that International Criminal Court investigation in a country situation is correlated with increased domestic human rights prosecutions in the intermediate term. Using evidence from Africa, the article argues that this relationship results from a “willingness game” between ruling coalitions attempting to feign commitment to human rights norms and reformer coalitions, who use the onset of ICC investigations as an opportunity to effectively engage in three reformist behaviors—demands for judicial reform, capacity-building, and gap-filling litigation. This link between ICC investigation and domestic criminal prosecutions, unanticipated by Court employees and unexamined by scholars, is evidence that the ICC may have some surprising positive impacts.
I. INTRODUCTION

Only a dozen years after it began operations, the International Criminal Court (ICC) finds itself in a legitimacy crisis. In December 2014, amidst a long-simmering dispute between the Court and the African Union over its faulty “geography of justice,” or the ICC’s exclusive prosecution of African leaders, Prosecutor Fatou Bensouda dropped charges against Kenyan President Uhuru Kenyatta and terminated ongoing investigations into Sudanese atrocities.¹ For some leaders, this was a welcome sign that the ICC was getting its comeuppance after years of meddling in African affairs. Participants in a “high-level seminar meeting” in Addis Ababa earlier in the year had issued a number of incendiary statements about the Court, arguing 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.”² The Court’s recent embarrassments are perhaps evidence of a greater problem: international courts face terrific obstacles in building “diffuse support” because these institutions have to appeal


² Id.
to a much wider and more diverse audience than do national judiciaries. The ICC must please many masters, very few of whom are going to be satisfied with its activities.

The ongoing row with African countries, including South Africa’s recent threats to leave the Rome Statute, is not the only challenge to ICC legitimacy. Another comes from scholars and experts, who have produced a number of articles highly critical of ICC action. For example, 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. 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. Critics also complain that the ICC lacks anything resembling true deterrent capabilities, meaning that its decisions will do almost


nothing to promote peace or prevent generalized violations of international human rights and humanitarian law.\textsuperscript{7}

Never mind that the factual accuracy of some of these criticisms is questionable; case in point, Gaddafi rejected an offer of exile \textit{before} he was indicted by the prosecutor’s office.\textsuperscript{8} Many critical arguments reveal a proclivity among academics and journalists to report on short-term negative unintended consequences. This should not be a surprise. After all, warning that well intentioned, progressive action unexpectedly leads to perverse outcomes is one of the primary and most useful contributions of social science.\textsuperscript{9} Much to form, social scientists began publishing about an ICC “backlash” even


\textsuperscript{8} Gaddafi appears to have been offered exile before February 23, which is the date that he gave the infamous ‘cockroach’ speech in which he threatened to massacre opponents. The ICC indictment came down after this speech, on February 26. See Kareem Fahim & David D. Kirkpatrick, \textit{Qaddafi’s Grip on the Capital Tightens as Revolt Grows}, \textsc{New York Times}, February 22, 2011; David Smith, \textit{Where could Colonel Muammar Gaddafi Go if He Were Exiled?}, \textsc{The Guardian}, February 21, 2011.

before the Court officially formed on July 1, 2002, and they have continued publishing similar arguments ever since.¹⁰

Mindful of myriad pessimistic expectations surrounding the ICC’s actions, this article argues that the Court may be having unanticipated beneficial consequences in some African countries in which it is involved. This is an area of interest because Court employees and proponents tend to justify their interventions on the basis that they should do good in the long term, which is harder to observe than short-term missteps and backlashes. However, now that the ICC has been active for over 10 years, scholars can begin to understand what impact it might have beyond the immediate short term.

One way in which the ICC may be creating change down the road is through a mechanism we refer to as unintended positive complementarity. This should be contrasted with the established concept of positive complementarity—which signifies the coordinated attempt by the ICC to promote legitimate domestic proceedings for perpetrators of atrocity crimes, erasing the need for further international involvement.¹¹


¹¹ Atrocity crimes “describe particularly heinous crimes suitable for criminal prosecution before international tribunals and special national courts for which leaders of nations, armies, and rebel groups must be held responsible.” These include acts that may qualify as genocide, war crimes, crimes against humanity, and crimes of aggression. See David
Unintended positive complementarity refers to more general causal effects that the ICC might have on judicial activity, like increasing municipal prosecutions of state agents for all human rights crimes, not just national trials of state and rebel leaders that have committed atrocity crimes. This article finds that countries under investigation by the ICC try roughly three times as many state agents per year for physical integrity abuses like torture and sexual violence, compared to averages in other conflicted states in Africa. For a number of reasons, more domestic human rights prosecutions could be seen as a sign of progress, however minor: where observed in other parts of the world, domestic rights trials portend unfolding long-term trends like enhanced concern for rule of law, and improved human rights protections.12

The form of positive complementarity documented here is unintended because the ICC has not openly promoted general domestic accountability in states targeted for intervention; instead, it has tended to focus on a specific set of high-profile crimes. It is also unintended for another reason: the increase in domestic prosecutions does not result from state cooperation but from latent political struggles between ruling coalitions and reformer coalitions that are exacerbated by ICC involvement. The current literature has overlooked these linkages because it has understandably keyed in on the outcomes of

Scheffer, All the Missing Souls: A Personal History of the War Crimes Tribunals 429 (2012).

ICC trials, like number of guilty verdicts handed down and their potential symbolic and deterrent impacts. This article’s theory focuses more on the process of ICC intervention.

The argument is as follows: the ICC’s full, active involvement in a country, which is marked by the beginning of official prosecutorial investigations, creates a “willingness game” between domestic ruling coalitions and reformer coalitions. The former attempt to demonstrate their willingness to comply with human rights norms, while the latter try and expose hypocrisy. In the wake of investigations, reformers engage in demand-making, capacity-building, and gap-filling litigation—each contributing to an increase in domestic human rights prosecutions. Importantly, this theory is not based on the naïve assumption that state leaders are motivated by the desire to behave cooperatively toward the Court. Moreover, it poses a challenge to standard models that assume the ICC attempts to coerce states into positive change. If this were the case, the ICC should have more influence in the earlier preliminary examination stages of its involvement, when the threat of future investigation should inspire leaders into action to avoid penalty. This paper argues, however, that the onset of an ICC investigation is politically catalytic: it sets in motion strategic interactions among members of ruling groups, domestic courts, and local civil society organizations. The next section sets out to explain this process-focused theory, starting with a description of the ICC’s built-in complementary compromise, and then moving to referral, examination and investigation stages of the ICC involvement.

Section 3 of this paper then goes on to review both positive and negative assessments of ICC operation, all of which have passed over the potentially productive characteristics of the ICC process of involvement. Section 4 offers a theory linking that
process, specifically ICC investigation, to an increase in domestic prosecutions for human rights offenders, and Section 5 structures a straightforward test of this theory based on newly available quantitative evidence. Part of the challenge in testing these relationships is selecting appropriate cases to compare and controlling for other explanations, which we do by creating a dataset specifically tailored for this article. Section 6 presents comparative qualitative evidence from Uganda, the Democratic Republic of Congo, the Republic of Congo (Brazzaville) to demonstrate the mechanisms linking ICC investigation to domestic prosecutions. Finally, the paper concludes with implications of this research for the legitimacy of the ICC.

II. THE ICC PROCESS

The Complementarity Compromise

The Rome Statute establishing the International Criminal Court entered into force on July 1, 2002, after 10 countries, two of which were African, simultaneously filed instruments of ratification at UN headquarters in New York, pushing the number of ratifying states over the necessary threshold of 60. This international treaty did not introduce the concept of individual criminal accountability (ICA), wherein the subject is an individual perpetrator, who faces a prison sentence if found guilty. The Nuremberg Trials, the International Criminal Tribunal for the former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR) each punished individual state agents for grave human rights abuses they committed. What sets the Rome Statute apart from these previous ad hoc efforts is not only its permanent nature, but also the principle of complementarity. The complementarity principle holds that the Court should be a last

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13 SIKKINK, supra note 12.
resort for justice when states are “unwilling or unable” to genuinely carry out an investigation or prosecution.\textsuperscript{14} In this complementarity model, the ICC can act only after it has determined state parties to be reluctant or incapable; thus, the Court provides the last layer of jurisdiction for cases in which states fail to exercise their own jurisdiction.

Although projects for a permanent international criminal tribunal had been around for decades, diplomatic consideration at the UN turned serious in the early 1990s. One of the toughest points of negotiation was the level of independence the Court would feature. The Security Council had just created the two ad hoc tribunals—the ICTY and the ICTR—that had primacy over national states. But this new court would be permanent, and it would not require the affirmative vote of the UN Security Council to take up a new situation. This made the prospect of primacy highly unattractive for the permanent five members because it would provide too much power to the Court. The original solution was to invert the ad hoc model and to establish a Court in which only states could initiate complaints. However, the like-minded state delegations in favor of the ICC, together with a network of NGOs lobbying for the most independent court possible, were intensely opposed to that option.\textsuperscript{15}

The stalemate between UN powerbrokers and the like-minded state delegations was resolved by the complementarity compromise, which introduced a complex strategy


\textsuperscript{15} \textbf{Marlies Glasius, The International Criminal Court: A Global Civil Society Achievement (2005).}
of involvement.\textsuperscript{16} When crimes are committed but states do not prosecute them, those cases can be deemed admissible by the ICC. However, if states clearly demonstrate the ability and willingness to themselves move forward with appropriate legal action, then the ICC’s jurisdiction will not be triggered. The whole system is built upon the idea that national procedures are preferred; it follows that the ICC has strategic reasons to still encourage states to take action because this prevents the Court from having to expend its limited resources conducting a lengthy investigation. Thus, once it becomes initially involved, the question is “how could the ICC work itself out of the job?”\textsuperscript{17} Upon taking office in 2003, Chief Prosecutor Luis Moreno-Ocampo issued a statement often misunderstood by observers, where he acknowledged the interest of the ICC to erase the need for its own involvement over time: “As a consequence of complementarity, the number of cases that reach the Court should not be a measure of its efficiency,” he argued. “On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.”\textsuperscript{18}


Preliminary Examination and Investigation

ICC intervention unfolds in multiple, and at times non-linear, stages. It starts with a preliminary examination in which the admissibility of a “situation” is determined. The criteria include whether the situation falls under the jurisdiction of the Court and if the alleged crimes are appropriate subject material; whether the case qualifies based on complementarity and gravity; and whether the case suits the interest of justice. Only after the extensive consideration of evidence can a preliminary examination advance to a full investigation. To date, 20 situations have been subject to preliminary examination, eight of which have proceeded to the next stage (3 did not, and 9 are still ongoing).19

The Office of the Prosecutor (OTP) can start a preliminary examination in three different ways: a member state can refer a situation to the Prosecutor regarding crimes committed by a national of a member state or in its territory20; the Prosecutor can be asked by the UN Security Council to look into a situation (in this case the target country need not to be an ICC party)21; and the Prosecutor can decide independently, using proprio

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21 Id. at Article 13. This opens up the reach of the Court to all UN members by relaxing the jurisdictional requirements; the country where the crimes had been committed or the country of those allegedly responsible do not need to be ICC parties. This is how the ICC became involved with the conflict in Darfur and the civil war in Libya, both of which took place in states that are not members of the Rome Statute.
motu powers, to conduct a preliminary examination in the absence of any referral.\textsuperscript{22} If the OTP acts on its findings, then it must request authorization from a Pre-Trial Chamber to later open an official investigation.

During the formal investigation, the Prosecution is empowered to present cases and request arrest warrants from the judges or to summon individuals to appear. Since the ICC does not allow for prosecutions in absentia, once arrest warrants or summons to appear are issued, either openly or under seal, suspects need to be arrested and surrendered to the Court by the custodial state, or they must present themselves voluntarily. Only then the process can advance to the confirmation of charges stage, in which a panel of three judges agrees on all or some of the charges presented by the Prosecution. After these steps are taken, a trial can finally take place.

\textit{Positive Complementarity}

By 2009 the Office of the Prosecutor officially based its prosecutorial strategy on what it calls “positive complementarity,” defined as “a proactive policy of cooperation aimed at promoting national proceedings.”\textsuperscript{23} This means that the OTP would start encouraging national reforms and proceedings after the referral stage and during

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\textsuperscript{22} The OTP has staff monitoring the Court’s entire jurisdiction, and it also receives petitions from civil society, composed of both individuals and NGOs, who can write directly to the OTP and provide information about alleged crimes.

preliminary examination, which would be publicized. The idea behind publicizing preliminary examinations is to put states on notice so that they ramp up efforts to pursue their own national proceedings. “The anticipated reaction from a State under ICC scrutiny,” write Bjork and Goebertus, “is that it will ‘aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it.’”24 With this strategy, official OTP policy morphed from encouraging referrals to avoiding full investigations. “Positive complementarity turned increasingly from an instrument to strengthen the Court into a tool to strengthen domestic jurisdiction.”25 Positive complementarity found its way into official policy documents and into the agenda of the Rome Statute review conference of 2010, showing that both the Court and State Parties were keen to foster national proceedings.

III. WHAT IS KNOWN ABOUT POSITIVE COMPLEMENTARITY?

Is positive complementarity a reality? Despite the endorsement of this principle by the Court, and even though scholarly work on the ICC is extensive, little systematic research has focused on the relationship between ICC involvement and domestic proceedings for human rights crimes. Anecdotal evidence supports the idea that pressure


from the outside, including the exercise of extraterritorial jurisdiction by other states under universal or passive nationality jurisdiction, inspires domestic trials in response. This is especially effective when domestic legal institutions show scant ability or willingness to reform on their own volition. Spanish prosecutions of Latin American military officials, for example, are thought to have invigorated further territorial trials in some cases, the most famous example being Pinochet’s arrest in London after a Spanish arrest warrant and the momentum it generated for trials in Chile. It is possible that a similar effect is caused by the exercise of extra-territorial jurisdiction on the part of the International Criminal Court, but this is an under-theorized and little-understood prospect.

Three related literatures indirectly address the empirical question of whether ICC involvement could produce more national proceedings for human rights crimes. First, a number of studies in International Relations theorize a linkage between the


ratification of various multilateral human rights treaties and compliance with those treaties, which is measured by changing patterns in rights protections.\(^{28}\) Other studies find a growing gap between commitments and patterns of compliance, which is attributed to cheap talk and costless promises on the part of abusive regimes.\(^{29}\) Most ratification studies in the field of International Relations, though, treat domestic courts and litigation as fixed rather than changing, or as untested theoretical mechanisms linking independent legal treaties to outcomes.\(^{30}\) One exception is Dancy and Sikkink, who show that states ratify more treaties with individual criminal accountability provisions, including the


Rome Statue, are more likely to initiate human rights prosecutions in any given year.\textsuperscript{31}

Still, this research is unable tease out what mechanism is operative. Is this correlation between ratification and trials due to the catalytic effect of domestic treaty implementation, or the monitoring and oversight of international treaty bodies and courts? While this empirical literature might expect domestic ratification of the Rome Statute to positively affect human rights practices in those ratifying countries with more robust judicial practices, insufficient attention has been paid to the possibility that a country’s direct dealings with the ICC could change its judicial practices.

A second literature addresses the issue of why state leaders conduct domestic proceedings for human rights abuses. Research highlights various factors to account for this phenomenon. For example, countries that undergo a clean break from a highly repressive government to a new democratic regime are likely to conduct prosecutions\textsuperscript{32}, as are states that possess institutions that allow for private citizens to bring criminal prosecutions against state agents.\textsuperscript{33} However, region-specific patterns make global

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generalizations difficult, especially given that such “transitional justice” efforts appear to diffuse across culturally similar clusters of countries.\footnote{34} This is important because any study of the ICC must necessarily analyze Africa, and current theories have mainly focused on Latin America and subregions of Europe. Missing from the transitional justice literature, it seems, is an adequate empirical account for why rights trials happen in some African countries but not in others.

Finally, a third descriptive literature on the ICC sheds light on the legal and political dynamics created by the interaction of the Court and African state leaders. For example, legal research focuses on the degree to which emergent practices at the OTP, like the acceptance of state self-referral by the Democratic Republic of the Congo and Uganda, diverged from the intentions of the drafters of the Rome Statute.\footnote{35} Studies also examine the legal and normative grounds on which the Prosecutor may actively encourage national proceedings.\footnote{36} Most important to our enterprise, though, is a growing body of research that examines whether and how the endorsement of positive complementarity has made an impact on African states. Some are hopeful, arguing that

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ICC resources, like access to legal information, have the potential to strengthen severely challenged domestic judiciaries. Other observers are far more skeptical, arguing that domestic courts are willing to cooperate, but that they receive little actual support from the ICC. Skeptics posit that any boost in domestic efforts to try war criminals likely results from capacity-building programs outside of the ICC.

The empirical work most relevant to this question is Sarah Nouwen's extensively researched *Complementarity In the Line of Fire*, a legal-anthropological account of the ICC's influence in Sudan and Uganda. Nouwen contends that while ICC intervention has led to activation of the judicial sector in Uganda, as well as invigorated debate around legal justice, the actual operation of the courts has remained limited. Ugandan courts have not effectively pursued high-profile prosecutions of those responsible for atrocity crimes. The reason for this is less lack of institutional strength,  


combined with problems of political will: “Neither ICC intervention nor complementarity reduces the often insuperable loyalty costs that domestic proceedings would incur.”

While Nouwen's account is no doubt accurate, and the most authoritative treatment on the subject, it stops short of examining the possibility that ICC intervention has more diffuse and unintended legal effects beyond the high-profile prosecution of atrocity crimes.

No studies have theorized whether or why ICC investigations into a country would lead to an increase in general rights-based litigation, and none have gone about systematically analyzing whether ICC intervention does in fact increase domestic prosecutions. Most of the work on positive complementarity, like Nouwen's, has focused on whether there is a direct connection between ICC involvement and state-led proceedings, through leveraging or through the sharing of evidence, for those crimes specifically under ICC jurisdiction. The possibility remains that a more unintended positive effect of ICC investigation exists, which manifests in the prosecution of lower-level perpetrators for human rights crimes other than those strictly regulated by the Rome Statute.

Outside the work of Nouwen and a few others, interactions between the ICC and domestic legal institutions have fallen off the radar because emerging theories have devoted more attention to the fraught role of the ICC in interacting with state executives, specifically in conflict zones. Observers presuppose that the role of the Court should be to compel states into compliance with international norms of peace and security; theorists

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40 Id. at 12.

41 Bjork and Goebertus, supra note 24.
then go on to find, unsurprisingly, that it lacks the power to coerce state leaders to cease fighting civil wars.⁴²

This weakness is evident, but two further points are worth consideration. First, scholars have focused disproportionately on the ability of the ICC to terminate civil war, which is not only a very hard test for judicial intervention, but also may obscure other effects that the Court is having. One such effect is encouraging combatants to scale back human rights violations in future conflict activity.⁴³ 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. Left out is the potentially influential role of other domestic actors.⁴⁴ The preference toward thinking of the “target” state as a unitary actor makes sense mostly in two situations in which the ICC has become involved: Sudan and Libya. In both, institutionally unchecked dictators found themselves in the crosshairs of the ICC. Sudan’s

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⁴⁴ The elision of domestic civil society from research is odd given that many post-colonial and critical scholars themselves tend to argue that international institutions ignore local actors or contexts. Scholars, it seems, are often guilty of the same thing they are criticizing.
Omar al-Bashir sought to subvert the Court by cynically proving that local institutions have the capacity to try perpetrators for war crimes. For example, Al-Bashir quickly established the Special Criminal Court on the Events in Darfur (SCCED) to create the façade of domestic accountability. Libya’s Muammar Qaddafi had less time to engage in such overtures. He decided to fight before the ICC made its move, and in a matter of months his regime fell to rebel fighters assisted by NATO airstrikes. The Security Council referred the situation as the UN and Western allies pursued other means of intervention. In effect, this obscures the impact of ICC involvement.

Sudan and Libya are indeed important cases, especially for humbling the international community in its strategic use of the Court, but the impulse to conceive of ICC intervention as involving a simple two-actor interaction between the ICC and the executive is too narrow. The launching of an ICC investigation also involves domestic courts, NGOs, and other members of civil society. As is theorized in the next section, ICC investigation generates productive interactions between ruling coalitions and reformer coalitions. Specifically, an ICC investigation initiates what could be called a “willingness game” between government defenders and activists promoting change.

IV. UNINTENDED POSITIVE CONSEQUENCES

We theorize that ICC investigations into a country’s situation are associated with a spike in domestic prosecutions for all human rights crimes at home—and the effect of investigations will be larger than the impact of a state's ratification of the Rome Statue.

45 The SCCED came into being on June 7, 2005, one single day after ICC Prosecutor Luis Moreno-Ocampo announced that he was beginning an official investigation into atrocities committed in Darfur.
or the Prosecutor’s decision to begin a preliminary examination. The reason is not necessarily that the ICC has developed a coherent strategy to influence states to reform during the investigation stage, nor that state leaders are particularly cooperative with the Prosecutor. Instead, domestic prosecutions happen because ICC investigation generates unintended interactions between local actors. Specifically, ruling coalitions within states attempt to demonstrate their willingness to comply with international legal norms, while reformer coalitions try to expose state non-willingness.

*The Importance of an ICC Investigation*

ICC investigations are usually accompanied by puzzling behavior on the part of states actors. For example, the very same government leaders will both invite ICC intervention and later proclaim it to be unjustified, unwarranted, or neo-imperial. Leaders also claim that the Court is inconsequential, but they often engage in various institutional reforms when it is present (See Section VI). These contradictions are not evidence of political schizophrenia, but calculated strategy on the part of ruling coalition leaders engaged in a two-level interaction with domestic and international audiences.

An official ICC investigation means the almost certain prosecution of a country’s nationals for atrocity crimes, a prospect that releases a wave of debates, discussions, and articles within the global policy community. The sudden interest in a

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country can serve as a kind of exogenous shock to the country’s ruling coalition, which is composed of the executive and the network that keeps that executive in power—including conservative members of the judiciary, defense and security ministries, and the legislature. An ICC investigation is a high-profile public event that involves the public face of a nation-state, and the decision that the ICC has jurisdiction will necessarily enhance scrutiny and serve as a crucible for the ruling coalition’s devotion to international human rights norms. Amidst this situation, the ruling coalition attempts to avoid reputational loss, or blows to its “recognitional legitimacy.”

Of all the stages of ICC involvement, the official investigation is the most critical from a reputational point of view. Preliminary examinations do not carry high costs for states since the Court is not empowered to do much more than to collect information. During an investigation, however, the Prosecutor becomes empowered to request arrest warrants. This has a few political implications. First, individual nationals are singled out as alleged criminals, beginning a public legal investigation of the existence of extreme human rights violations in the country. At this point, state agents can be put on the “wanted by the ICC” list, which serves as a symbolic marker for investors, diplomats and other international audiences. This could also be politically

48 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 Simmonds, supra note 28 at 85–95. 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 Ch. 6 (2004).
troublesome for the ruling coalition, which must cooperate in the punishment of state agents that are part of its own ranks.

An ICC investigation also implies judgment from members of diplomatic society belonging to international institutions.\textsuperscript{49} For a warrant to be issued, a Pre-Trial Chamber composed of three international judges must agree with the preliminary case presented by the Prosecutor. Recent ICC history suggests that the judges are much harder to portray as politically motivated than the Prosecutor, who has been accused of an anti-African bias by some and of being too lenient to governments by others.\textsuperscript{50} This means that states under investigation fall under fairly objective scrutiny from international institutions. Investigations also create other diplomatic complications. The issuance of arrest warrants by necessity introduces the issue of state cooperation for the arrest of indictees. This has proven to be a thorny issue not only for states directly under investigation but also to surrounding states, especially when the suspect is a high-ranking official. For example, nearly every time an African Rome Statute signatory hosts a summit, concern arises over Sudan’s Omar al-Bashir’s attendance because he is the subject of an outstanding ICC arrest warrant.

Due to the reputational and politically charged nature of the investigation phase, one may expect that targeted states begin strategically engaging the Court during the

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preliminary examination phase, if only because such examinations have the potential to become full investigations, with all of the scrutiny that entails. We argue that preliminary examinations do in fact inspire strategic behavior on the part of a target country’s ruling coalition, but that this strategy will stop short of enabling criminal litigation. Instead, leaders tactically feign willingness to comply with the Court.

The Ruling Coalition Feigns Willingness

The ruling coalition’s strategy following the onset of ICC preliminary examination is often to feign a willingness to comply with human rights legal norms while avoiding sovereignty costs – which accrue with mounting perceptions that leaders lack sovereign authority.\(^{51}\) Thus begins the willingness game involving strategic interactions with domestic reformers in front of an international audience. The government has an interest in making it seem as if lack of compliance with human rights and humanitarian norms of enforcement prior to ICC involvement is not directly attributable to the absence of ruling coalition willingness, but to other factors limiting its opportunity, like the difficulties posed by civil war. If a country’s conservative rulers were to initiate rights-based enforcement mechanisms amidst ICC preliminary examination, then it would become clear that the government had always possessed the capability to pursue greater human rights enforcement, but was never willing to introduce reforms in earnest until it faced external pressure. The rulers’ actions would thus belie their own ex ante non-compliant intentions. By waiting out the ICC preliminary examination, the ruling coalition leaves open the possibility that the Prosecutor will not

advance to the investigation stage, meaning the shock of ICC intervention subsides. If and when the Prosecutor proceeds to investigation, the ruling coalition simply stays the course, as if it had always consented to international involvement.

The concern of states to appear willing to adhere to human rights laws is especially evident when the ruling coalition brings its own situation to the OTP for investigation—a phenomenon known as self-referral. Ruling coalitions that decide on self-referral, as Democratic Republic of Congo Uganda, Central African Republic, and Mali have done, are surrendering the notion of absolute control over their states, which is a puzzling move. One reason they engage in this behavior is for political expediency. Ugandan President Yoweri Museveni, with his self-referral, sought international assistance with the de-legitimation and apprehension of rebel leader Joseph Kony in 2004. Malian Minister of Justice Malick Coulibaly, acting as an instrument of the president, was probably attempting to mobilize international support against Northern Malian rebels with his letter of referral. But state governments are also more influenced by worries over international reputation than most assume. Uganda’s Museveni referred the LRA situation to the ICC very shortly after Prosecutor Luis Moreno-Ocampo announced his intent to use his propio motu powers and get authorization to investigate the Ituri province in DRC. Realizing that ICC investigations in the region were a fait accompli, President Museveni made the first move to self-refer, which was followed shortly after by Joseph Kabila in the DRC.\textsuperscript{52} By referring, these leaders took the

responsibility for setting the process in motion—likely to make a show of their supposed willingness to comply with international norms.\footnote{Håkan Friman, The International Criminal Court: Investigations into crimes committed in the DRC and Uganda. Why is Next?, 13 AFR. SECUR. REV. (2004).}

\textit{The Reformer Coalition Seizes the Opportunity}

reformers call on ICC involvement is that they need to invigorate their own campaigns for change with sustained attention from outside the country.

After those aligned with the government try to demonstrate their willingness to enforce rights laws, the reformer coalition in the country uses the newfound attention surrounding ICC investigation to unmask the endemic abuse of local rule of law. Reformer coalitions include activists and attorneys linked in with transnational NGOs, along with their allies inside the system, including progressive legislators, ministers, and judges within the judiciary—all of whom are eager to strengthen democratic rule of law in their home countries. Part of the reformers’ efforts involves exposing the ruse of government leaders feigning cooperation with the ICC. This is the second stage of the domestic willingness game. Reformers issue statements about the reticence of government officials to support local human rights responses, along with a number of calls for more domestic judicial empowerment. Speaking in the wake of recent disruptions in the Central African Republic, and staking out an anti-interventionist position, former Tanzanian President Benjamin Mkapa argued that African courts should be empowered to handle atrocity crimes. He asked, “Rather than refer cases to the International Criminal Court at The Hague, why not enable our Courts to handle these cases?”

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During ICC investigations, reformers engage in three actions: demand-making, capacity-building, and gap-filling litigation. After ICC investigations are initiated, groups start mobilizing the public around demands for reform. They wait for investigations to begin demand-making, both because they are given some protective cover by an international presence, and because they do not want to inspire cheap concessions from the ruling coalition prior to investigation. The Court could misinterpret such concessions as state efforts to fulfill rights obligations, which would potentially prevent the Court from triggering international jurisdiction.

Post-investigation demand-making occurs alongside reformers’ direct cooperation with transnational activists to build local capacity, in hopes that doing so will build momentum for a strengthened rule of law. Capacity-building means participating in legal conferences, training programs, and human rights education initiatives. Making demands and building capacity, though, do not themselves mobilize domestic courts. For this, groups desirous of change pursue gap-filling litigation. Reformer organizations realize quickly that not all human rights violations rise to the level of atrocity, meaning that many lower-level cases are left untouched by the ICC. One response from local actors might be to themselves go after those cases outside international jurisdiction. Because they do this in a moment when the ruling coalition is sensitive to international attention, the chances they are likely to succeed at pressuring the courts to pursue criminal cases without fear of reprisal increases.

*Theoretical Expectations*

Based on this theory, positive complementarity does not necessarily transpire the way that ICC planners intend. Because ruling coalitions have an incentive
simultaneously to mislead the international public about their willingness to abide by human rights norms and to avoid sovereignty costs, they promise to enforce human rights laws while locally challenging the Court. Those who study international policies expect this kind of reaction because sovereign control is coveted, and outside interventions of any type are thoroughly resisted by those in power. ICC interventions are thus attacked by local leaders for being neo-imperial even when the ICC is invited to investigate a country through self-referral; ICC efforts at capacity-building are also frowned upon for being inadequate and insensitive to the local environment; and ICC investigations are charged for being selective and insufficient in scope.

Despite all of this, the ICC’s investigative interventions might still prove to have a “catalytic” effect on local efforts to pursue justice. The reason is that slippery state promises inspire legal reformers to call bluffs concerning leaders’ rights-compliant intentions. This effect is heightened when transnational human rights organizations are assisting and projecting the criticism of local reformers through global information networks. The resultant willingness game resonates onto the international scene; the government must give into some reforms or it will publicly lay bare its obstructionist or repressive preferences. Paradoxically, at these moment state leaders’ and legal reformers’ interests converge on the need to pursue domestic human rights prosecution, 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 tests whether this expectation is grounded in quantitative evidence.

57 For “catalytic,” see NOUWEN, supra note 39.
V. 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, 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.”58 The prosecution of state agents, including members of military and police forces, is a hard test for the theory; ruling coalitions are little willing 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. 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 this study, human rights violations are abuses to physical integrity, including torture, political imprisonment, disappearance, unlawful killing, and sexual abuse. Importantly, count of human rights prosecutions is chosen as the outcome variable, rather than trials for the specific crimes under the jurisdiction of the ICC. 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 atrocity crimes—as the outcome

variable of interest. The reason is that the unintended impact of ICC intervention should not be limited to trials for specific types of human rights crimes. 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 data series are examined: yearly counts of human rights prosecutions and yearly counts of guilty verdicts produced in those prosecutions. Both are taken from the Transitional Justice Research Collaborative, which has hand-coded events history data on human rights trials using a variety of secondary sources.

The ICC has investigated a total of six African countries—Uganda, the Democratic Republic of Congo (DRC), the Central African Republic, Kenya, Cote d’Ivoire, and Sudan. 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 every year following the onset of an investigation (ICC-INV). In years where a preliminary examination terminates and an investigation begins, that year is coded “1” for preliminary examination, and the investigation variable does not become “1” until the next year.

59 For atrocity crimes, see SCHEFFER, supra note 11.

60 See www.transitionaljusticedata.com for more information.

61 These data are available at http://www.icc-cpi.int/en_menus/icc/situations\%20and\%20cases/situations/Pages/situations\%20index.aspx (Visited June 4, 2014).

62 In this way, ICC-INV is coded as a lagged variable.
Figure 1. Prosecutions and Guilty Verdicts before and after ICC investigation

Figure 1 depicts a raw count of human rights prosecutions and guilty verdicts that were initiated in each country before and after ICC intervention. Two of these cases,
Uganda and the DRC, have shown a drastic increase in the number of human rights prosecutions and guilty verdicts following ICC investigation. Two others, Central African Republic and Sudan, have shown a moderate increase. The final two, Cote d’Ivoire and Kenya, have become the subject of investigation so recently that it is difficult to assess temporal trends. 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 casual significance of one single variable.

Figure 2. Cumulative Count of African Prosecutions and Guilty Verdicts Over Time
In order to address the first challenge, a cross-national, time series analysis of 42 African states is performed for the years 1980 through 2011, the first and last year for which reliable data on African human rights prosecutions is available. 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. Only cases that since 1980 have had at least one period of civil war or systematic repressive violence are selected. Widespread repressive violence is defined as the attainment of a score of “4” or higher on

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63 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. Results from these alternative models are available with the authors.

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

the Political Terror Scale.\textsuperscript{66} Thus, countries enter the dataset after they have experienced any form of mass violence involving the government. Comparing the pool of six cases to 36 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 1980-2011 (See Figure 2).

Two of the six countries that have been subject to full investigation, Uganda and DRC, are atop the list of African countries with the most human rights prosecutions from 1970-2010, ranking 1st and 4th (See Table 1). The other countries rank 5\textsuperscript{th} (Kenya), 8\textsuperscript{th} (Cote d’Ivoire), 19\textsuperscript{th} (CAR), and 27\textsuperscript{th} (Sudan). 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.

\textsuperscript{66} Reed Wood & Mark Gibney, \textit{The Political Terror Scale (PTS): A Re-introduction and a Comparison to CIRI}, 32 HUM. RIGHTS Q. 367–400 (2010).
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<th>ICC-Inv</th>
<th>Rome Rat.</th>
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*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.)**
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To first assess whether any statistical relationship exists between ICC investigation and human rights prosecutions, models were estimated using count models that take examine the rise or fall in the number of events in a given year. More specifically, regular and fixed-effects negative binomial regressions are employed, with multiple imputation to address the problem of missing values in the covariate matrix. The negative binomial model fits best to the count data used as the dependent variable because it accounts for overdispersion, 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.

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67 The dependent count variables have no missing values, and are therefore not imputed. Imputation algorithms are used to generate values for three variables: HRNGOs, Judicial Independence, and OECD Aid. Imputations are created with a Bayesian iterative Markov chain Monte Carlo (MCMC) procedure in Stata, which assumes a multivariate normal model. Twenty iterations were performed, and these variables were assumed to be a function of time in years, level of repression, civil war, population, and GDP. The imputation procedure was also performed using Amelia II software, and no significant differences appeared.

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

69 The fixed-effects negative binomial is estimated with the inclusion of country-specific over-dispersion parameters. 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. They are used here simply to demonstrate robustness. See Allison, Paul, *Beware*
Table 2. Summary Statistics

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</tr>
<tr>
<td>OECD Aid (billions)</td>
<td>0.059</td>
<td>1.017</td>
<td>0</td>
<td>11.428</td>
</tr>
</tbody>
</table>

The most basic model considers the effects of investigation, controlling for the effects of preliminary examinations and two other factors that are most likely to increase demand for human rights prosecutions: levels of repression (Repression) and the presence of a civil war (Ongoing Civil War). Because justiciable human rights violations occur during periods of excessive government coercion and civil war,™ demands for justice will be most prevalent directly following civil wars or years with high repressive violence. Also included is a Time variable measured by year to control for the possibility that the

---

ICC-INV dummy is capturing the effects of the justice cascade, or the higher likelihood for states to hold human rights prosecutions with the passage of world time.\textsuperscript{71} A list of variables and summary statistics is available in Table 2.

Table 3. Determinants of Prosecutions

<table>
<thead>
<tr>
<th>DV: Prosecutions</th>
<th>Regular b/se</th>
<th>Fixed Effects b/se</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC-PE</td>
<td>0.392</td>
<td>0.391</td>
</tr>
<tr>
<td></td>
<td>-0.555</td>
<td>-0.319</td>
</tr>
<tr>
<td>ICC-INV</td>
<td>1.199***</td>
<td>1.029***</td>
</tr>
<tr>
<td></td>
<td>-0.38</td>
<td>-0.23</td>
</tr>
<tr>
<td>PTS</td>
<td>0.357***</td>
<td>0.111</td>
</tr>
<tr>
<td></td>
<td>-0.081</td>
<td>-0.0766</td>
</tr>
<tr>
<td>Ongoing Civil War</td>
<td>0.0468</td>
<td>0.335**</td>
</tr>
<tr>
<td></td>
<td>-0.177</td>
<td>-0.159</td>
</tr>
<tr>
<td>Time</td>
<td>0.0635***</td>
<td>0.0602***</td>
</tr>
<tr>
<td></td>
<td>-0.00835</td>
<td>-0.00682</td>
</tr>
<tr>
<td>Constant</td>
<td>-128.8***</td>
<td>-121.2***</td>
</tr>
<tr>
<td></td>
<td>-16.65</td>
<td>-13.59</td>
</tr>
</tbody>
</table>

***p<.01 **p<.05. PTS and Civil War lagged one year. Observations decrease in fixed effects models because panels with all zero values on dependent variable are excluded.

Table 3 presents the results of the most straightforward statistical models. The coefficient for ICC-INV is statistically significant at the .01 level, where ICC-PE is only significant at the .10 level. In regards to magnitude, the effect of an investigation is robust, increasing the count of prosecutions by 331%. In other words, a country subject to

\textsuperscript{71} SIKKINK, supra note 12.
an ICC investigation tends to have roughly three times more trials per year than other African countries without ICC involvement, and that relationship is robust and statistically significant. Level of repression also has a statistically and substantively significant effect; 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 50%. In this model, civil wars do not appear to inspire prosecution. Importantly, ICC-INV is the only statistically significant variable in the fixed-effects model, and previous repression is no longer a significant predictor of prosecutions. This means that ICC investigations explain changes in number of prosecutions within countries, whereas level of repression only explains difference between countries.

Table 4. Determinants of OTP Examination

<table>
<thead>
<tr>
<th>DV: ICC-PE</th>
<th>Logit b/se</th>
<th>Fixed F/X Logit b/se</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutions</td>
<td>0.0815</td>
<td>0.0584</td>
</tr>
<tr>
<td></td>
<td>-0.106</td>
<td>-0.131</td>
</tr>
<tr>
<td>PTS</td>
<td>1.389***</td>
<td>0.937</td>
</tr>
<tr>
<td></td>
<td>-0.231</td>
<td>-0.61</td>
</tr>
<tr>
<td>Ongoing Civil War</td>
<td>-1.336</td>
<td>-1.39</td>
</tr>
<tr>
<td></td>
<td>-0.717</td>
<td>-1.228</td>
</tr>
<tr>
<td>HRNGOs</td>
<td>0.0637***</td>
<td>0.0800**</td>
</tr>
<tr>
<td></td>
<td>-0.0221</td>
<td>-0.0406</td>
</tr>
<tr>
<td>Constant</td>
<td>-11.78***</td>
<td></td>
</tr>
<tr>
<td></td>
<td>-1.737</td>
<td></td>
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<tr>
<td>Observations</td>
<td>1406</td>
<td>233</td>
</tr>
<tr>
<td>Countries</td>
<td>8</td>
<td></td>
</tr>
</tbody>
</table>

***p < .01 **p < .05. All variables lagged one year. Observations decrease in fixed effects models because panels with all zero values on dependent variable are excluded.
Is it possible that the increase in domestic prosecutions precedes ICC investigation? One possible check is test for reverse causality, or whether the lagged count of prosecutions predicts the onset of an ICC Preliminary Examination. Performing such a test allows for assessment of whether trials were already increasing in countries before the ICC became involved. Table 4 presents the results of Logit models assessing the effects of Prosecutions (t-1) on the initiation of a preliminary examination, which marks the move from referral to serious consideration of the country’s situation. As before, this model controls for level of repression and civil war because the ICC is more likely to involve itself in states with extreme levels of violence.

The coefficient on the Prosecutions variable is insignificant, meaning that one cannot reject the null hypothesis that no relationship exists between previous prosecutions and ICC involvement. In other words, the increase in domestic prosecutions we are observing does not appear to take place prior to ICC examinations. If anything, what predicts ICC involvement is the previous level of repressive violence that a country exhibits. Though causality can never been fully verified with observed data, these models are strong evidence that our theory concerning the catalytic nature of ICC investigations is plausible.

The possibility remains that the correlation between ICC investigations and domestic trials is in actuality attributable to other confounding factors. The list of these possible confounders is long, but from a review of the appropriate literature, four additional factors should be controlled for to ensure robustness. First, as discussed in Section III, International Relations scholars have argued that ratification of treaties is
likely to spur moves toward compliance in the form of judicial reform and mobilization.\textsuperscript{72} In a more negative bent, some scholars 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. State differently, “domestic processes simply become more isomorphic,” the products of “replication and dissemination of liberal liberalist modalities of justice.”\textsuperscript{73} 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.

Second, other scholars have questioned the notion that ICC intervention itself has any independent causal impact on local movements toward accountability. 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 $40m. towards reforming the Congolese judiciary has seen considerable progress in local capacity.”\textsuperscript{74} 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

\textsuperscript{72} Simmons, supra note 28; Dancy and Sikkink, supra note 31.

\textsuperscript{73} Mark Drumbl, Policy through complementarity: the atrocity trial and justice, in The International Criminal Court and Complementarity , 215–6 (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

\textsuperscript{74} Clark, supra note 38 at 40.
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 US dollars, was taken from the OECD’s Query for International Development Statistics (QWIDS).

Finally, transitional justice scholars have shown convincingly that countries undergoing democratic institutional transformation are likely to prosecute formerly abusive state agents. This is controlled for with a variable, Democratic Transition, which registers whether a country underwent at least one democratic transition since its entry into the dataset. Also controlled for is Judicial Independence, a 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. 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 human rights NGOs will have more human rights prosecutions, because these organizations assist the reformer coalition is articulating demands and pushing for litigation. This is controlled for with the variable HRNGOs, which is a yearly count of operative human rights organizations in the country.

---


# Table 5. Full Models of Correlates of Prosecutions and Guilty Verdicts

<table>
<thead>
<tr>
<th></th>
<th>Prosecutions</th>
<th>Pros. Fixed</th>
<th>Guilty</th>
<th>Guilty Fixed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>b/se</td>
<td>b/se</td>
<td>b/se</td>
<td>b/se</td>
</tr>
<tr>
<td>ICC-PE</td>
<td>0.195</td>
<td>0.441</td>
<td>-0.245</td>
<td>0.204</td>
</tr>
<tr>
<td></td>
<td>-0.298</td>
<td>-0.332</td>
<td>-0.606</td>
<td>-0.627</td>
</tr>
<tr>
<td>ICC-INV</td>
<td>1.090***</td>
<td>0.973***</td>
<td>1.831***</td>
<td>1.444***</td>
</tr>
<tr>
<td></td>
<td>-0.332</td>
<td>-0.252</td>
<td>-0.455</td>
<td>-0.355</td>
</tr>
<tr>
<td>Rome Ratification</td>
<td>-0.00518</td>
<td>-0.131</td>
<td>-0.347</td>
<td>-0.517**</td>
</tr>
<tr>
<td></td>
<td>-0.225</td>
<td>-0.18</td>
<td>-0.334</td>
<td>-0.253</td>
</tr>
<tr>
<td>OECD Aid (billions)</td>
<td>0.265**</td>
<td>0.0589</td>
<td>0.172</td>
<td>-0.0582</td>
</tr>
<tr>
<td></td>
<td>-0.115</td>
<td>-0.0681</td>
<td>-0.132</td>
<td>-0.13</td>
</tr>
<tr>
<td>Jud. Independence</td>
<td>0.0187***</td>
<td>0.0148***</td>
<td>0.0187***</td>
<td>0.0206**</td>
</tr>
<tr>
<td></td>
<td>-0.00606</td>
<td>-0.00571</td>
<td>-0.00549</td>
<td>-0.00859</td>
</tr>
<tr>
<td>HR NGOs</td>
<td>0.0324***</td>
<td>0.00502</td>
<td>0.0369***</td>
<td>0.00832</td>
</tr>
<tr>
<td></td>
<td>-0.0108</td>
<td>-0.00893</td>
<td>-0.0103</td>
<td>-0.0117</td>
</tr>
<tr>
<td>Demo. Transition</td>
<td>0.319</td>
<td>0.309</td>
<td>0.146</td>
<td>0.211</td>
</tr>
<tr>
<td></td>
<td>-0.254</td>
<td>-0.185</td>
<td>-0.291</td>
<td>-0.264</td>
</tr>
<tr>
<td>PTS</td>
<td>0.378***</td>
<td>0.141</td>
<td>0.388***</td>
<td>0.128</td>
</tr>
<tr>
<td></td>
<td>-0.106</td>
<td>-0.0811</td>
<td>-0.105</td>
<td>-0.11</td>
</tr>
<tr>
<td>Ongoing Civil War</td>
<td>0.208</td>
<td>0.366**</td>
<td>-0.0307</td>
<td>0.143</td>
</tr>
<tr>
<td></td>
<td>-0.218</td>
<td>-0.168</td>
<td>-0.212</td>
<td>-0.224</td>
</tr>
<tr>
<td>Time</td>
<td>-0.0131</td>
<td>0.0387**</td>
<td>-0.0166</td>
<td>0.0395</td>
</tr>
<tr>
<td></td>
<td>-0.0223</td>
<td>-0.0181</td>
<td>-0.0211</td>
<td>-0.0244</td>
</tr>
<tr>
<td>Constant</td>
<td>22.31</td>
<td>-79.34**</td>
<td>28.47</td>
<td>-80.86</td>
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<td>-44.29</td>
<td>-35.93</td>
<td>-41.99</td>
<td>-48.34</td>
</tr>
<tr>
<td>Observations</td>
<td>1342</td>
<td>1171</td>
<td>1342</td>
<td>1011</td>
</tr>
<tr>
<td>Countries</td>
<td>41</td>
<td>35</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

***p<.01 **p<.05. All independent variables except for Time are lagged one year. Observations decrease in fixed effects models because panels with all zero values on dependent variable are automatically excluded.

Because they only cover the period 1990-2004, missing values are accounted for through multiple imputation techniques.
The results of the four models with more controls are reported in Table 5. The first two use prosecution counts as the dependent variable, and the second two examine guilty verdicts. For each dependent variable, a regular and a fixed-effects negative binomial model are performed. As before, the coefficient on ICC-INV is highly statistically significant, regardless of model specification, while ICC-PE is not. What this indicates is that when controlling for confounding factors, preliminary examinations are not associated with increased prosecutions, but ICC investigations are. Three other variables are also positive and statistically significant predictors of human rights prosecutions in African countries: HRNGOs, Judicial Independence, and PTS. However, these variables are only consistently significant in the models not utilizing fixed effects. As before, this suggests that the only variable relating to a change within countries, rather than between countries, is the onset of an ICC investigation. The other variables are only significant when all observations are pooled together.

A fair criticism of these findings would be 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. Here, the models predicting count of guilty verdicts become relevant. Again, ICC-INV, HRNGOs, Judicial Independence, and PTS are statistically significant in the regular models. Based on this, one may conclude that not only are ICC interventions a major causal determinant of prosecutions, but also the meting out of some justice for victims of human rights abuse. Moreover, it is the most significant factor when changes within states are examined. It seems that ICC investigation could be a powerful predictor of the increase in African human rights prosecutions for state agents.
Still, the theories from prior research have some relevance. On average, enhanced judicial capacity does seem to predict increases in human rights prosecutions, as does a prior legacy of repressive violence. It is also the case that the presence of an active NGO sector increases the count of prosecutions and guilty verdicts in a country. This supports the theoretical expectations detailed in Section IV. How strong is the ICC investigation-prosecution relationship compared to the other variables? In order to answer this question, diagnostics were performed on the models without fixed effects. A move from no investigation to a full investigation by OTP increases the count of trials by 203%, which is by far the largest effect of a one-unit change in any variable in the model. But because the variables are scaled differently, it is most useful to compare the percent change associated with a one-standard deviation change.

<table>
<thead>
<tr>
<th></th>
<th>Prosecutions</th>
<th>Guilty Verdicts</th>
</tr>
</thead>
<tbody>
<tr>
<td>ICC Investigation</td>
<td>27.2</td>
<td>29.4</td>
</tr>
<tr>
<td>PTS (Repression)</td>
<td>41.3</td>
<td>42.6</td>
</tr>
<tr>
<td>HRNGOs</td>
<td>107.1</td>
<td>127.3</td>
</tr>
<tr>
<td>Judicial Independence</td>
<td>42.1</td>
<td>39.7</td>
</tr>
<tr>
<td>OECD Aid</td>
<td>23.9</td>
<td>14.6</td>
</tr>
</tbody>
</table>

Note: Percent change in expected count of outcome with a one-standard deviation change in each factor. Figures calculated from negative binomial models using means values from 20 imputations.

Table 6 records how much a one-standard deviation change in the statistically significant independent variables alters the count of prosecutions and guilty verdicts in the negative binomial models without fixed effects. One can see that previous levels of
repression have roughly the same effect as an ICC investigation, which is intuitive because without government violence, it would prove unnecessary to hold state agents accountable. Judicial independence is correlated with a 42% increase in the count of prosecutions. But the strongest predictor by far is the presence of human rights NGOs in a country. Each additional NGO is associated with an increase of 6.1% in the expected count, but a one-standard-deviation change increases the expected count of prosecutions by around 107%.

Some might interpret these results in the following way: NGOs are the primary determinant of prosecutions, not the ICC. While the effect of NGO presence is strong, these results should be approached with caution. Of the variables included in the model, HRNGOs possessed the most missing values, much of which occur in the period 2005-2011. As a result, this variable is unreliable and best interpreted as a control. Rather than overwhelming the effect of ICC investigation, the presence of HRNGOs is better understood as a scope condition for the theory. That is, in countries with little NGO or civil society activity, ICC intervention will probably not have much impact.

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78 Originally, HRNGOs was excluded from the models for this reason, but was included following from reviewer suggestions. Until better NGO data are produced, we cannot know for sure what the true effects of NGO involvement is.

79 Because of the lack of data, we treat HRNGOs as an exogenous factor, but a topic for further research is the possibly endogenous relationship between NGO activity, especially transnational organizations, and ICC involvement. Do NGOs ramp up activity in countries where the ICC is involved? Do they change the content of their programs to
Figure 3. Effect of ICC Investigation on Predicted Prosecutions, by Level of Repression

Note: Vertical line represents average PTS Repression score for Africa

Figure 4. Effect of ICC Investigation on Predicted Prosecutions, by Number of NGOs

Note: Vertical line represents average number of NGOs for Africa

include justice components? Or does the ICC choose to involve itself in cases that are getting attention from NGOs?
Other scope conditions are likely also present. For instance, one should expect countries with higher levels of repression to be more likely to initiate prosecutions. To test the effects of scope conditions, interactive effects were modeled and examined. Figure 3 shows that countries subject to ICC investigation have a much higher expected count of human rights prosecutions than those without, at each level of repression. 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. Similarly, Figure 4 demonstrates that while higher numbers of HRNGOs are associated with higher predicted counts of prosecutions, the presence of an ICC investigation significantly enhances the effect.

Figure 5. Conditional Effects of ICC Investigations
The statistical studies presented in this section show beyond a reasonable doubt that a strong correlation between ICC investigation and domestic human rights prosecutions is present. Figure 5 shows the statistical effects of ICC investigations, *conditional* on other factors. While the interactive effects of judicial independence and OECD aid on ICC investigations are negligible, the conditional effects of NGOs on ICC involvement are clearly observable. The greater the number of HRNGOs in a country, the stronger the effect of ICC investigation will be on the number of human rights prosecutions and guilty verdicts. This finding supports the theory because NGOs play an integral role in the reformer coalition keen on enhancing accountability amidst ICC investigation.

**VI. Qualitative Evidence**

Quantitative evidence cannot demonstrate the operation of causal mechanisms. Even if there exists a relationship between ICC investigations and domestic human rights prosecutions, one could not know based on increased prosecution counts whether ruling coalitions and reformer coalitions are acting strategically in response to ICC involvement in their countries. The ideal evidence to validate the argument would be open declarations by rulers and reformers in one or more countries clarifying their motivations at each step in the process, but that evidence is very difficult to obtain. Short of perfect information on motivations, this section presents a controlled comparison of two cases with ICC investigations, DRC and Uganda, and one without, the Republic of Congo (Brazzaville). Here, the evidence suggests that domestic prosecutions are in part inspired by ICC investigation, which generates unintended interactions between local actors. This section traces how the onset of the investigation triggered these political dynamics in the cases of
Uganda and DRC. This evidence is complemented with data from Congo (Brazzaville), which did not feature the same political interactions due to inattention from the Court and the other international actors that come with it. Although a party to the Rome Statute, Congo’s violent period is outside the temporal jurisdiction of the ICC, which prevents the Prosecutor from launching an investigation. In accordance with our expectations, domestic prosecutions for human rights violations in Congo (Brazzaville) have not increased at the same rate as in the other two countries considered.

_Uganda_

Figure 6: Uganda Trends in Prosecutions

![Uganda Trends in Prosecutions graph](image-url)
Figure 6 reveals that human rights prosecutions in Uganda increased significantly after the ICC opened its investigation. As previously stated, the investigation, together with the sudden interest in the country that comes with it, works as an exogenous shock to the country’s ruling coalition; whose strategy consists of, at least, feigning willingness to comply with human rights legal norms while avoiding as much sovereignty costs as possible. This can be observed in President Museveni’s decision to self-refer the situation in Northern Uganda to the ICC in January 2004. Three months later, he stated, “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 cease are brought to our attention, we will try them ourselves.”

Museveni’s intentions likely were to create the image that his government was willing to pursue enforcement for human rights, but that it was simply unable to “succeed in arresting those members of the LRA leadership and other most responsible for…crimes.” At the same time, the government was trying to couple feigned willingness with efforts to avoid sovereignty costs. Museveni took the additional step of arguing that domestic institutions were in fact robust and capable of trying war criminals. The December 2003 letter of referral states, “The Ugandan judicial system is widely recognized as one of the most independent, impartial, and competent on the African

80 Akhavan, supra note 52 at 411.

continent… Contentious political issues are regularly submitted to the Ugandan judiciary and vigorously litigated.\textsuperscript{82} Amidst the investigation, the ruling coalition pretended to be wholly devoted to ICC involvement.

Though he had before been called a “true believer” in human rights, evidence suggests that Museveni was prevaricating in this circumstance: he had little willingness to cooperate with international or domestic human rights enforcement if it meant loss of his own strength, and he also had little trust in Uganda’s judiciary.\textsuperscript{83} When the Juba Talks (2006-8) showed some promise, President Museveni threatened to take back his referral of the case to the ICC in favor of negotiating with the Lord’s Resistance Army. By that time, he had already showed his lack of confidence in local judicial institutions. In June 2004, Museveni claimed that the Constitutional Court had “usurped the power of the people” by ruling unconstitutional a referendum restricting political party opposition, and in 2005 his government publicly deployed its Joint Anti-Terror Team (JATT) to march into the High Court with guns, disrupt bail hearings for members of the People’s Redemption Army (PRA), and arrest members of the opposition group.\textsuperscript{84} The challenge

\textsuperscript{82} \textit{Id}, 13-14.


\textsuperscript{84} The official name is the Referendum (Political Systems) Act of 2000. See \textit{International Bar Association, Judicial Independence Undermined: A Report}
to the Constitutional Court and the armed invasion of the High Court were understood locally to be executive intrusions into the judiciary by an overreaching President. Members of the judiciary and the wider legal profession went out for the first time in Ugandan history to protest this affront. However, these events stayed local. At the international level, Museveni appeared a valuable partner in the effort to build the strength of the ICC through cooperation with target states.

In 2015, an LRA commander, Dominic Ongwen, appeared before the ICC for the first time. This new case is the result of the government’s latest strategic willingness showcase. In January 2015, when Ongwen was arrested in the Central African Republic and handed over to Uganda, Museveni had a chance to “reinvigorate his image as a champion of international justice.”

Ongwen could have been tried at home, and in that instance, the ICC would have had to challenge Uganda’s ability and willingness to conduct legitimate prosecutions. However, the government quickly transferred him to The Hague, and Ongwen appeared before the ICC Judges for the first time on January 26th. This move resembles the logic behind the initial self-referral. Museveni appears as a key enabler for real progress to be made on the first case ever opened by the ICC; a case


that will illuminate LRA crimes whilst “deferring attention away from atrocities allegedly committed by government forces.”

In 2005, when the ruling coalition initially tried to play this game, balancing the external imperatives to be cooperative with the domestic incentives to keep accountability under executive control, the reformer coalition attempted to capitalize the newfound attention surrounding the ICC investigation and began mobilizing the public around demands for reform. However, in Uganda this was not automatic. Following the beginning of the ICC investigation, hesitation prevailed among Ugandan legal actors. Even after arrest warrants against five LRA commanders were issued in October 2005, many Ugandans lawyers and judges favored a “peace” strategy including The Juba Talks in combination with traditional forms of reconciliation like matu oput. The argument was that avoiding criminal justice would promise a peaceful end to the longstanding conflict that did not risk further torment for the Acholi and other Northern Ugandans.

Eventually, legal reformers within the judiciary used persistent involvement of the ICC to strengthen local efforts. According to Sarah Nouwen, “government actors have allowed transitional justice norm entrepreneurs to operate in Uganda because they have something to offer: training with ‘sitting allowances,’ study tours abroad and needs assessments.” An important example of capacity-building practices is the paralegal training conducted by the local Foundation for Human Rights Initiative (FHRI), which

87 Id.

88 Erin Baines & Adrian Bradbury, Peace in Northern Uganda, But Whose Justice?, SUDAN TRIBUNE, August 2, 2007; Branch, supra note 5.

89 NOUWEN, supra note 39 at 167.
maintains ties with western INGOs and donors. In 2009 alone, these meetings trained a total of 284 members of community-based organization in human rights and gender-based violence.\footnote{FOUNDATION FOR HUMAN RIGHTS INITIATIVE, ANNUAL REPORT 2009, http://www fhri.or.ug/images/publications/Annual\textcopyright 20Report\textcopyright 009.pdf (last visited Oct 6, 2015).} As Nouwen further discusses, “The search for an alternative to the ICC has also created a role for the Ugandan legal sector in an area Ugandan lawyers and officials of law enforcement agencies previously shunned.”\footnote{NOUWEN, supra note 39 at 179.}

That the legal sector was revived in the wake of ICC investigation is evident in data kept by the FHRI. Though information about litigation in Uganda is scarce, this pro-bono legal aid NGO maintains regularly updated data on how many cases it has received since it was created in 1991. These data thus extend back to seven years prior to the ICC’s creation with the Rome Statute, and 14 years before the ICC got involved in Uganda. This allows us to observe the trend over time in the volume of cases they have pursued. Additionally, because the organization has a wide interest in legal accountability and access to justice that exceeds the situation in Northern Uganda, these figures better reflect the type of legal activity that we are interested in, that is, low-level human rights prosecutions.
FHRI does not provide time trends broken down by type of case, so we cannot be sure how many of those cases involve abuses by state agents; however, the overall trend presented in Figure 7 follows very closely the trends in the Transitional Justice Research Collaborative’s prosecutions dataset (See Figure 7). One can clearly see that after the ICC opened the investigation in 2004, a spike in human rights prosecutions takes place. The spike was accompanied by a proportional increase in NGOs’ efforts in access to justice. This constitutes preliminary evidence that local NGOs, in partnership with transnational NGOs, engaged in gap-filling litigation.

The increase in new cases corresponds to some heavily criticized institutional reforms. An International Crimes Division, also referred to as the War Crimes Division,
was added to the Ugandan High Court in 2007, and in 2010, the ICC Act, outlining the terms of Uganda’s cooperation with the Court, was passed to “domesticate crimes under the Rome Statue.” Only in 2011, six years after Ugandan reformer networks began to develop their own approaches, did the ICC endorse an official cooperative strategy with domestic courts. “The strategy for complementarity in Uganda is settled. The High Court, and specifically the War Crimes Division (WCD), will be responsible for trying international crimes. The international community will focus on the needs of the WCD, and donors are undertaking measures to ensure that capacity needs are well defined.”

Uganda is a case that demonstrates the longer-term pull toward capacity-building in the wake of ICC investigation, which can develop even in the absence of executive will and with limited ICC outreach efforts.

Major players in the effort to demand reform at the local level are NGOs with transnational partners, not the ICC itself. These NGOs include the Public International Law and Policy Group (PILPG), the Institute for International Criminal Investigations (IICI), No Peace Without Justice (NPWJ), and the International Bar Association (IBA), which have assisted in training local investigators, and facilitating interactions between the Directorate of Public Prosecutions, the ICC, and the public. The ICC has led from


93 Id. at 80.
behind on these developments, adapting its approach to positive complementarity in response to changes already afoot at the local level.

*Democratic Republic of the Congo*

*Figure 8. DR Congo Trend in Prosecutions*

Evidence from the DRC also suggests the trend in domestic human rights prosecution changes after the formal opening of the ICC investigation in 2004 (See Figure 8). The ICC Prosecutor had been examining the situation in the Ituri region of the DRC since September 2003. Prosecutor Luis Moreno-Ocampo announced that he was planning on using his *propio motu* powers to request a Pre-Trial Chamber authorization to open an investigation
but that the active support from the DRC would be preferable.\textsuperscript{94} In March 2004, in the most patent example of feigned willingness, the DRC referred the situation to the Court and pledged to cooperate with the procedures.\textsuperscript{95}

From 2004 to 2007 the DRC also prompted a series of legal and judicial reforms. However, consistent with our expectations, these reforms did not come about after DRC ratified the Rome Statute in 2002, but after the OTP launched its investigation in late 2003. War crimes and crimes against humanity, together with provisions on sexual violence, were included in both the Congolese Penal Code and Congolese Military Code. Interestingly, during the implementation process what proved most valuable for the emergence of domestic prosecutions was not so much the inclusion of the four statutory crimes in domestic law but the internalization of the accompanying elements of the crime and rules of procedure and evidence. Before the elements of the crime made their way into Congolese law, there was no definition of rape to be invoked even in normal criminal cases.

These might seem like legitimate efforts by the DRC government to support the goal of accountability for human rights violations. However, other governmental actions conflicted with these efforts, lending support to the idea that governments selectively engage with international audiences to enhance their reputation as justice supporters, at the same time

\textsuperscript{94} LUIS MORENO-OCAMPO, REPORT OF THE PROSECUTOR AT THE SECOND SESSION OF THE ASSEMBLY OF STATE PARTIES (2003),

trying to control domestic accountability as much as they can. In 2006 the ICC Prosecutor issued a sealed arrest warrant for Bosco Ntaganda, a leader of the Forces Patriotiques pour la Libération du Congo (FPLC). In 2009, Ntaganda and his forces were integrated into the DRC army; during this period he remained at large. It was not until 2012, when he led a mutiny by a new rebel group named the Mouvement du 23-Mars (M23), that the DRC government appeared determined to arrest him but not to surrender him to the ICC. In the words of President Kabila, “We don’t need to arrest Bosco and bring him to the ICC… We ourselves can arrest him and we have more than a hundred reasons to do so and to try him here.”

From the side of the reformist coalition, the DRC shows the catalytic effect of ICC investigations can exert through gap-filling litigation. Civil society groups have voiced disappointment with the ICC because it has not pursued prosecution against state agents, and it has set its sight on a woefully small number of elite suspects in a few conflict countries. One response to this is for transnational organizations to seek remedies by reforming and mobilizing local institutions. Avocats Sans Frontières (ASF), an organization with funding from Belgium, the UK Department for International Development and USAID, has been present in DRC since 2002, carrying out different projects in the area of access to justice.

From 2005 onwards, it has focused on justice for international crimes, with a substantial focus on sexual and gender-based violence (SGBV). The American Bar Association (ABA), with extensive funding from the US and Dutch governments, is another organization with a strong presence in DRC. Together these NGOs trained magistrates and other local groups; provided mobile courts and legal advice and assistance; and offered legal representation for victims and defendants of international crimes. Much of the focus has been on SGBV crimes, which is not surprising if one considers that according to 2007 figures, “(a)approximately 1.69 to 1.80 million women aged 15 to 49 years had a history of being raped.”

The extremity of violence in DRC, combined with a high-profile but insufficient ICC intervention, has led to robust efforts at gap-filling litigation. Intriguingly, this has created a situation where “complex functions of domestic governance, such as the production of high quality judicial decisions by domestic courts, are able to persist, even flourish, in an area where the state is characterized by extreme fragility and weakness.” Congolese domestic courts were the first ones in the world to invoke the Rome Statute in the conviction of seven soldiers for war crimes and crimes against humanity in 2006. Since then, numerous decisions and judgments were rendered combining national civil, criminal and military law together with international human rights protections, including the Rome Statute and the ICC’s rules of procedure and procedure and

97 Amber Peterman et al., *Rape Reporting During War: Why the Numbers Don’t Mean What You Think They Do*, FOREIGN AFF., 1063 (2011).

evidence. The potential for a spillover effect from military to non-military criminal courts is something to consider as well since magistrates have been increasingly hearing cases of rape. This was possible, in part, because of the inclusion of the elements of the crime and rules of procedure and evidence into domestic law, which provided a definition of rape that could be invoked in normal criminal cases.

The extent to which these international NGOs participated in gap-filling litigation rose to the point of providing the physical courts in which trials could take place. Between 2008 and 2012 ABA participated in 55 mobile court hearings involving 813 cases in which 459 convictions were secured for SGBV crimes and 121 for other offenses.99 Also, newly reformed courts in the Ituri province heard a number of cases of atrocity crimes committed by both rebel and government actors. In the end, a situation emerged where “the courts have produced remarkable (and rapid) results...”100 but NGOs continue to push forward, unsatisfied. As ASF wrote in 2009, “Congolese courts had attempted to take up the challenges of complementarity and increased the prospects for the domestic prosecution of international crimes by applying the Rome Statute of the International Criminal Court directly...there are chronic structural challenges facing the

99 Not all of these prosecutions are included in the TJRC data used in this article, for two reasons. First, the TJRC only focuses on state perpetrators, and second, the data are based on State Department Human Rights Reports. Thus, the counts reflect the sample of state agent cases reported in that source material over time.

fight against impunity in the DRC that can’t be met through a handful of prosecutions.”\(^{101}\)

Although we identify analogous processes in Uganda and DRC after the onset of each ICC investigation, the DR Congolese case shows a much deeper and direct involvement of transnational NGOs in the administration of justice. The DRC’s state fragility created greater openings for transnational NGOs to have decisive influence.\(^{102}\) This suggests that the constitution of the reformist coalition, and the balance between local and transnational elements in such coalition, is context-specific and responds to the institutional characteristics of each national system.

*Republic of the Congo (Brazzaville)*

As shown in Figure 9, the amount of domestic human rights prosecutions that have taken place in Congo (Brazzaville) has remained practically invariable at a very low level. This constitutes a control case for our theory, because although violence achieved comparable levels in Congo as it did in regional neighbors DRC and Uganda, the ICC has never investigated the violence in Congo. According to our theory, an increase in domestic human rights prosecutors comes from local actors that decide to initiate


\(^{102}\) Lake, *supra* note 98.
proceedings themselves. We theorize that because they do this in a moment when the ruling coalition is sensitive to international attention, the chances increase for pressuring the courts to pursue criminal cases for human rights abuses without fear of reprisal. The Congo case shows what happens when the initial mobilization by local pro-accountability actors faces a strong ruling coalition that is not under the specific type of international scrutiny that comes with an ICC investigation.

*Figure 9. Republic of Congo Trend in Prosecutions*
The second civil war in the Republic of the Congo took place from 1997 to 1999, leaving an estimated toll of 20,000 people dead and another 800,000 displaced. 103 From 2002 until 2003, fighting reignited in the Pool region between the government and rebels, resulting in significant numbers of civilian deaths and displacements. 104 Both of these situations, however, are out of the temporal jurisdiction of the ICC since the Congo ratified the Rome Statute in 2004. This precluded the mechanisms identified in Uganda and DRC from activating in Congo because the ruling coalition was not under heightened scrutiny from the international community, and reformist actors could not draw on the same political and material resources as their Ugandan and DR Congolese counterparts.

There has been significant civil society mobilization towards accountability for one specific incident, the disappearances of Brazzaville Beach. From 1999 to 2001, thousands of refugees were returning to Congo from the DRC. In May 1999, a number of returning refugees were detained at Brazzaville Beach and presumably executed by government forces and/or paramilitary forces. 105 An association of relatives of victims of forced disappearances sought alternative avenues for justice, both domestically and abroad.

103 Claire Lauterbach, Commitment to the International Criminal Court Among Sub-Saharan African States, 5 EYES ICC 85 (2008).


105 Id.
In 2001 the government set up a commission of inquiry into the disappearances. Half of the commission’s twelve members, however, were political allies of President Denis Sassou Nguesso. The integrity of the domestic procedures is questionable, given that relatives had not been called to testify before the commission.\(^{106}\) Amnesty International recalls one member of the commission claiming that “allegations of ‘disappearances’ were an incitement to war and not a service to the cause of human rights.”\(^{107}\) Unlike in other cases, members of this accountability mechanism in Republic of the Congo did not even bother feigning willingness to abide by international norms. They faced no willingness game, and they acted with impunity. The commission was dissolved by 2002 before it was able to publish its findings. Relatives of the victims filed a complaint before Congolese courts in 2000. In late 2002, an investigative Judge interviewed relatives of the disappeared and gathering testimony from members of the security forces.\(^{108}\) Criminal proceedings began in 2004 against fifteen individuals, both high- and middle-ranking security officials. The trial opened in 2005 and in August, the High Court acquitted all of the accused.\(^{109}\) With the help of European NGOs, relatives also filed proceedings against top executive and military officials, including President Nguesso, before French and Belgian courts. None of these suits got to the trial stage,

\(^{106}\) Id. at 11.

\(^{107}\) Id. at 12.

\(^{108}\) Id. at 12.

although they are still underway in France. Congolese authorities have continually denied
the charges and have not cooperated with European judiciaries.$^{110}$

Interpreting the meager figures from Figure 10 in the light of this narrative shows
how governments free of judicial scrutiny from the international community, and whose
leaders face no risk of international indictment, are more able to contain the efforts of
pro-accountability actors. At the same time, away from the ICC spotlight, local reformist
groups do not count on the same type of assistance from international NGOs. Although
the relatives of the Congolese victims received support in making their claims locally and
abroad, foreign NGOs fell short of engaging in direct administration of justice, as in the
case of the neighboring DRC.

VII. CONCLUSION

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 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

$^{110}$ Denis Sassou Nguesso, TRIAL WATCH, http://www.trial-ch.org/en/resources/trial-
watch/trial-watch/profiles/profile/350/action/show/controller/Profile.html (last visited Oct
13, 2015).
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 demand legal reforms, to build local capacity, and 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 until an investigation begins, because only with an investigation can they bring pressure on the government to change. When the official prosecutorial investigation begins, so do government contrivances and activists’ pressures. 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 to the only other data available (those collected by FHRI). 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, one should not expect ICC involvement to be very meaningful in political contexts where civil society is not operative. States lacking in reformist elements will not fit our theory well. Future research should examine the interactions between the NGO campaigning, foreign aid, and judicial reforms following ICC involvement. This could help address certain empirical discrepancies, like why the DRC has pursued a great deal more human rights prosecutions than the Central African Republic, though these countries share many characteristics. 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 demands for reform, capacity-building, and gap-filling litigation--and government reactions in various contexts.

The findings also have important policy implications that reach beyond the cases examined. First, observers should lower expectations for investigations initiated by UN Security Council referrals. The Office of the Prosecutor has an informational advantage over the UNSC; it knows more about the local situation and the potential local response. That said, the UNSC is the only body able to bring cases against non-ratifiers of the Rome Statute, making it a potentially valuable resource for future involvement. Still, UNSC referrals to date, in Sudan and Libya, have been enacted as a sort of add-on
among other proposed actions to address very difficult cases. This is not necessarily a recipe for success.

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 Honduras, Central African Republic, Ukraine, Iraq, Afghanistan, Colombia, Georgia, Guinea, and Nigeria. As these cases move into the investigation phase, observers should follow the responses of local actors. Seldom are local anti-impunity groups given much press because it makes for a more interesting story to highlight, for example, the embittered conflict between the African Union and the ICC. But the AU does not represent all Africans. In fact, it mainly represents African leaders, many of whom are avidly opposed by local actors that desire progress around human rights litigation.111

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 subvert the aims of the Court with clever political maneuvering.112 This should be followed closely.

111 The Inquirer (Monrovia), Liberian NGO, 18 Others Reject Impunity for Leaders, May 20, 2014.

112 Kenyans for Peace with Truth and Justice, supra note 46.
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. Moreover, the relationships uncovered here are only one of many relationships that may exist between ICC involvement and positive changes in practice. For example, the ten-year preliminary examination in Colombia, many have argued, has served as an external source of pressure and advocacy for government and rebel actors amidst civil war-ending negotiations.\(^{113}\) In this sense, the ICC is showing that it can act as an international steward in some situations.

That said, this article should not be taken as a victorious trumpet blow for the ICC. The institution is still plagued by growing pains, problems of miscalculation, a shortfall of resources, and continual concerns over legitimacy.\(^{114}\) And domestic prosecutions across African countries are not the answer to all of society’s ills. As Sarah Nouwen documents, the prosecutions that do take place, including the ones we analyze,


\(^{114}\) Hale, supra note 54.
do not target enough high-level offenders responsible for serious human rights crimes. Countries like Uganda, the DRC and Central African Republic are still troubled by cultures of impunity, civil war economies, cross-border tensions, sexual violence, rapacious leadership, and the dominance of patronage networks. 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.

Finally, while this article discovers a direct relationship between ongoing ICC investigations and domestic prosecutions, whether the momentum generated by this process can be sustained and converted into long-lasting reform is yet unknowable. Still, amidst all of this, human rights groups are working for change, and they are assisted by the attention that they get from international donors and supporters. ICC investigations are one way to generate concern for accountability and justice in war torn and underdeveloped states. The long-term goal, as always, should be to nourish that concern.

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