

SOVEREIGNTY COSTS, CREDIBLE COMMITMENTS, AND THE INTERNATIONAL CRIMINAL COURT

Allison Marston Danner[†] and Beth Simmons[‡]

I. INTRODUCTION

On February 2, 1999, Senegal became the first country to ratify the Rome Statute, the treaty creating the International Criminal Court (ICC).¹ By the beginning of 2007, just eight years later, one-hundred and four countries had also joined the court. That more than half of the sovereign states in the world would embrace an independent international institution dedicated to prosecuting some of the most serious crimes known to humanity is a remarkable development. Indeed, the decision by the national leaders to join the court seems potentially to run against their self-interest, since it is widely assumed the ICC will focus on prosecutions of high-level figures in countries where mass atrocities occur. Certainly, in no other area of international law have so many states delegated so much unconditional authority so quickly to an international institution over which they have so little control.

We argue that cooperation with the ICC can be understood through the lens of credible commitment theory. This theory provides a mechanism of understanding why states would agree to bind their own hands by irreversibly forswearing certain policy options.² The theory suggests that states engage in this hands tying in order to make their commitment more credible, and as a result, enjoy some benefit that would otherwise not be available.³ We argue that the commitment made by the leaders of states that join the ICC is that they will forswear the commission of atrocities. The commitment is credible because the court includes a prosecutor who acts independently of state control, especially when deciding whether to initiate investigations and prosecutions. This element of prosecutorial independence, coupled with the wide-ranging jurisdiction of the ICC, effectively increases the ex post costs paid by leaders whose states have joined the court and who nevertheless decide to take actions that could be construed as systematic war crimes, crimes against humanity, or genocide.

[†] Professor of Law, Vanderbilt University Law School.

[‡] Professor, Department of Government, Harvard University and Director, Weatherhead Center for International Affairs Harvard University.

We are grateful to members of Coalition for the International Criminal Court (CICC) who provided extensive data for this project. We thank the individuals from the CICC, the International Criminal Court, Amnesty International, and the Andean Commission of Jurists who agreed to be interviewed in connection with our research about the process of ICC engagement around the world. We appreciate the excellent research assistance of Nicholas Fram, Allison Gruenwald, Alexander Noonan, Phillip Riblett, Matthew Roller and Koppel Verma.

¹ *Senegal*, Regional and Country Information, Coalition for the International Criminal Court, at www.iccnw.org; States Parties to the Rome Statute, at <http://www.icc-cpi.int/statesparties.html>.

² The treaty does allow for state withdrawal. We examine this feature further below.

³ James Fearon, *Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs*, 41 J. CONFLICT RES. 68, 70 (1997) (describing the theory of hands tying).

Of course, this commitment involves potentially significant sovereignty costs, namely ceding domestic control over the investigation and prosecution of highly political crimes. Some governments are willing to pay these costs, and others are not. We view ratifying the ICC and implementing its domestic law requirements as a rational strategy based on a calculation of the benefits of ratification versus the likelihood of paying sovereignty costs.⁴ We argue that, when states decide whether or not to join the ICC, they weigh their risks of potential prosecution against their need to establish credibility that they will forego the commission of atrocities. States at high risk of atrocity but with low credibility will join the court, and those at a similar risk of atrocity but with higher credibility will not.

The insights of credible commitment theory explain an interesting but somewhat counter-intuitive empirical regularity: all else equal, democracies that have endured recent internal conflict are much less likely to commit to and cooperate with the ICC than are non-democracies with a recent history of such conflicts. In contrast to theories that invest democracies with strong preferences for international law and cooperation,⁵ or theories that attribute international legal commitments to a world culture⁶ that currently promotes judicialization, support for the ICC manifests states' struggle to make credible promises with an eye to the sovereignty costs such a move implies.

This article is organized into six parts. Part Two provides a brief background to the ICC and discusses the treaty's institutional design. It describes how the designers of the ICC sought to create an institution that would impose real sovereignty costs for states at risk of committing mass atrocities but would simultaneously allow some states to avoid incurring such costs. The court's jurisdictional structure encourages governments to outlaw international crimes and to prosecute alleged offenders in their own domestic courts. Crucially, this implies that some governments can support the court without any serious risk of subjecting their leaders to supranational prosecution. Part Three of this article introduces theories of credible commitment and discusses how this approach relates to the ICC. Part Four discusses our measures and statistical model. Part Five provides empirical support for the theory. In particular it reveals that governments without credible means of forswearing atrocities are indeed most likely to risk the sovereignty costs and join the court. Unlike most prior studies of treaty commitment, our analysis looks beyond the mere act of ratification to study the process of domestic implementation of treaty commitments. This additional information provides important evidence of the nature of states' commitment to the ICC. The conclusion, Part Six, contrasts this argument with alternative understandings of the court and explores how the ICC sheds light on our understanding of the role of international law and institutions in international and domestic affairs.

⁴ We refer to "ratification" for ease of exposition throughout the paper to describe a state's decision to be bound by the Rome Statute, but, in fact, a state may join the ICC either through ratification of or accession to the treaty. The former allows for separation of the signature and ratification stage of treaty commitment; the latter does not. Any state that joined the ICC after December 31, 2000, the date the treaty closed for signature, had to accede to the treaty and did not have the two-step option of signature and ratification. Rome Statute art. 125(1). No legal consequence flows from whether a state joins by ratification or accession, and thus we use the term "ratification" to include both ratification and accession.

⁵ E.g., Daniel E. Ho, *Compliance and International Soft Law: Why Do Countries Implement the Basle Accord?*, J. INT'L ECON. L. 647, 676 (2002) (finding empirical support for theories of "democratic legalism" that suggest democracies are more likely to comply with international obligations);

⁶ On the idea of world culture as an explanation for much nation-state isomorphism, see Meyer, John W., John Boli, George M. Thomas, and Francisco O. Ramirez. 1997. "World society and the nation-state." *American Journal of Sociology* 103 (1):144-81.

II. THE ICC: PURPOSES AND STRUCTURE

A. Why Establish an International Criminal Court?

The idea for an international criminal court to punish international crimes dates at least from the end of World War One.⁷ The court that emerged as the International Criminal Court in 1998, however, had more recent origins. In 1989 the Caribbean states, seeking an international court to prosecute major drug traffickers, sponsored a General Assembly resolution that instructed the International Law Commission (ILC)⁸ to “address the question of establishing an international criminal court.”⁹ The ILC prepared a draft treaty that formed the working document for subsequent negotiations. After several years of preparatory work on the ILC draft, representatives from 160 states met in Rome in the summer of 1998 to hammer out the treaty.¹⁰ The negotiations were contentious and complex. The final text of the treaty was approved on July 17, 1998 by a vote of 120 states in favor, 7 against, and 21 abstentions.¹¹ The treaty, as ultimately approved, creates a permanent court devoted to the prosecution of genocide, crimes against humanity, and war crimes. Despite the original impetus for the court, it does not have jurisdiction over transnational offenses, such as drug crimes or terrorism.

Although the idea for an international criminal court was not new, the 1990s were a propitious time for the creation of such an institution. Most significantly, the end of the Cold War had reinvigorated the search for multilateral solutions to transnational problems, and establishing courts proved a particularly popular strategy. After 1989, a raft of new international courts and quasi-judicial institutions came into existence, including the Appellate Body of the World Trade Organization and the International Tribunal for the Law of the Sea. The general trend in “court-like” solutions in various policy areas is depicted in Figure 1.

[FIGURE 1 ABOUT HERE]

In addition, the global stability maintained for forty years by the United States and the Soviet Union had begun to crumble, leading to a “spiraling of mostly internal armed conflicts, with much bloodshed and cruelty.”¹² The mass rapes, killings of civilians, and torture that accompanied the dissolution of the former Yugoslavia shocked Europeans and disabused them that such behavior had been permanently eradicated in Europe. The Italian Minister of Foreign Affairs, speaking at the beginning of the ICC negotiating conference, warned that Europe “seems to be re-experiencing its history backwards and rediscovering grudges, cruelty and intolerance

⁷ GARY A. BASS, *STAYING THE HAND OF VENGEANCE*, 75 (2000).

⁸ The International Law Commission is a U.N. body of 34 international law experts that work together to draft treaties and other international legal documents. See U.N. Charter, art. 13(1)(a); International Law Commission, at <http://www.un.org/law/ilc>.

⁹ Antonio Cassese, *From Nuremberg to Rome: International Military Tribunals to the International Criminal Court*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, Vol. I, at 3, 10 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds. 2002).

¹⁰ Rome Statute, United Nations Treaty Database, at <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty10.asp>.

¹¹ Roy Lee, *Introduction, the Rome Conference and its Contribution to International Law*, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 1, 26 (1999). Although the vote was officially confidential, those countries voting against are widely reported to have been the United States, Israel, China, Iraq, Qatar, Libya, and Yemen.

¹² Cassese, *supra* note xx, at 11.

that we thought had disappeared forever.”¹³ The killing of hundreds of thousands of civilians in Rwanda horrified the world, prompting further international concern about the spread of civil wars.

In Yugoslavia and then Rwanda, a United Nations that could do little to stop the atrocities decided to establish ad hoc courts to punish the perpetrators. These tribunals formed a key precedent for the creation of the International Criminal Court.¹⁴ These courts at once illustrated that international criminal courts could function outside of the post-World War Two setting and exposed the weaknesses of relying on the politicized Security Council for their creation. As Germany’s Foreign Minister Joschka Fischer noted, “following the Nuremberg Trials and the international tribunals for Rwanda and Yugoslavia, the Statute of the International Criminal Court adopted in Rome in July 1998 introduces us to an international legal principle independent of political opportunism.”¹⁵

The International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR) energized human rights activists around the world to push for a permanent institution devoted to international justice.¹⁶ When state representatives met in Rome to negotiate the ICC treaty in 1998, they were accompanied by 450 individual activists from 236 separate non-governmental organizations (NGOs).¹⁷ NGOs played critical advocacy and logistical roles at the Rome Conference and greatly contributed to the state representatives’ ability to complete the negotiation of the ICC treaty in a single conference.

Justifications for the establishment of the International Criminal Court rest upon both the climate of impunity for mass crimes that prevailed during the Cold War and the violence that followed its termination in 1989. The jurisdiction of the ICC is limited to extremely serious crimes: genocide, crimes against humanity, and war crimes. Supporters of the Court believe that establishing a centralized mechanism to punish these crimes will help to deter their commission and contribute to peace. As a representative of Norway has said of the Court, “justice and legal order are prerequisites for lasting peace and stability, and we believe that the ICC, by combating impunity, will provide the international community long term peace making dividends.”¹⁸ Whether punishment of international crimes in fact deters their commission is a contentious question,¹⁹ nonetheless, the overarching justification for the ICC rests on its ability to make a positive contribution to peace and stability by deterring the worst wartime atrocities.

¹³ Speech by the Italian Minister of Foreign Affairs Hon. Lamberto Dini on the occasion of the opening of the United Nations Diplomatic Conference for the Establishment of the International Criminal Court, June 11, 1998, available at <http://www.iccnw.org/documents/ItalyForMin11June1998.pdf>.

¹⁴ This evolution is described further in Allison Marston Danner, *When Courts Make Law: How the International Criminal Tribunals Recast the Laws of War*, 59 VAND. L. REV. 1, 18-40 (2006).

¹⁵ Speech by Joschka Fischer in the German Bundestag on 24 February 2000 during the first reading of the bill on the ratification of the Rome Statute of the International Criminal Court and the draft amendment of the Basic Law, available at <http://www.iccnw.org/documents/GermanyForMnFischer24Feb00.pdf>.

¹⁶ William R. Pace & Jennifer Schense, *The Role of Non-Governmental Organizations*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, Vol. I, at 105, 109 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds. 2002).

¹⁷ Lee, *supra* note xx. at 14.

¹⁸ Statement of Norway, from Excerpts from the 6th Committee Discussion of Item 164: Establishment of the International Criminal Court/56th Assembly of the United Nations, Nov. 12, 2001, available at <http://www.iccnw.org/documents/Norway6thComm12Nov01.pdf>.

¹⁹ See for example Jack Snyder and Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT’L SECURITY 5 (Winter 2003-2004) (arguing against the deterrent effects of tribunals); Julian Ku and Jide Nzelibe, *Do International Criminal Tribunals Deter or*

In theory, deterrence might be accomplished by courts created for each new set of crimes, but the ICTY and ICTR demonstrated the dangers of “tribunal fatigue” engendered by ad hoc courts.²⁰ For many supporters of the ICC, a critical justification for the court lies in its ability to reduce the transaction costs of the ICTY and ICTR model. Canadian diplomat, now ICC-judge, Philippe Kirsch, for example, has argued that “as a permanent institution, the Court will overcome the delays and other shortcomings inherent in an ad hoc approach.”²¹ The reduction of transactions costs is no mere technical matter. When such costs are especially high, international criminal justice is not likely to be supplied at all.

Finally, the presence of the International Criminal Court was seen as a way to further diffuse the norms of international justice, encouraging states to prosecute mass atrocities in their domestic systems. The Court’s jurisdictional scheme, described further below, provides an incentive for states to amend their domestic criminal codes to include international crimes. The preamble to the ICC treaty highlights this point by “recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.”²²

These, then, were the overarching aims of the supporters of the International Criminal Court. Deterring international crimes, however, necessitated creating a court with some teeth. As long as potential offenders know that the chance of actually being prosecuted for their crimes is vanishingly low, then little long-term deterrence can be achieved. As we explain below, the treaty that emerged at the end of the Rome Conference in fact was much less solicitous of state sovereignty than the original draft proposed by the International Law Commission in 1994. We argue that the court’s design imposes potentially significant sovereignty costs on states. Furthermore, we believe that these costs are actually valuable to post-conflict states, as they support the making of credible commitments to refrain from future potentially destabilizing atrocities. Exactly how sovereignty costs enhance the Court’s effectiveness is discussed below.

B. The International Criminal Court and Sovereignty Costs

1. *The Nature of ICC-Imposed Sovereignty Costs*

We use the term “sovereignty costs” to refer to the costs that a state incurs by delegating a function ordinarily performed domestically to an international institution over which it has little, if any, control.²³ For a state, ceding authority over criminal law enforcement that it would ordinarily regulate domestically imposes a high sovereignty cost²⁴—all the more so in the case of

Exacerbate Humanitarian Atrocities?” 84 WASH. UNIV. L.Q., (forthcoming 2007) (same), available at <http://ssrn.com/abstract=931567>; Payam Akhavan, *Beyond Impunity, Can International Criminal Justice Prevent Future Atrocities?*, 95 Am. J. Int’l L. 7 (2001) (arguing for deterrence).

²⁰ See Michael Matheson, *U.S. Military Commissions: One of Several Options*, 96 AM. J. INT’L L. 354, 358 (2002) (discussing “tribunal fatigue” at the United Nations).

²¹ Statement by Mr. Philippe Kirsch of the Delegation of Canada to the Sixth Committee of the 53rd General Assembly, Oct. 22, 1998, available at <http://www.icnow.org/documents/Canadato6thComm22Oct98.pdf>.

²² ICC Statute, *supra* note xx, at preamble.

²³ Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 436-37 (2000); Curtis A. Bradley and Judith G. Kelley, *The Concept of International Delegation* 16 (working paper prepared for February 2007 Duke Workshop the Law and Politics of International Delegation).

²⁴ Bradley & Kelley, *supra* note xx, at 19 (arguing that “sovereignty costs are higher for subjects that have traditionally been regulated by the state, such as criminal law and punishment”).

the ICC because of its focus on prosecuting leaders. The ICC's current prosecutor, for example, has issued a written policy declaring that he will focus on high-level offenders.²⁵ The prosecutor for the predecessor ICTY and ICTR courts has followed a similar strategy.²⁶ This high sovereignty cost potentially extracted by the ICC, however, does not deter all states from joining the institution. In fact, we argue, the imposition of ex post costs for violations is precisely why certain states find the ICC so attractive.

Unlike the traditional model of international court exemplified by the International Court of Justice, the treaty creating the ICC does not allow states to decide whether or not to accept the court's jurisdiction on a case-by-case basis.²⁷ Instead, the court has jurisdiction over all potential cases of commission of genocide, crimes against humanity, and war crimes that occur in the territory of a state that has ratified the treaty²⁸ or that are committed by a national of a state that has ratified the treaty.²⁹ In addition, the Court has jurisdiction over any case referred to it by the United Nations Security Council under its Chapter VII authority, whether or not the state where the alleged crimes occurred has ratified the treaty.

Furthermore, unlike the original ILC draft for the court, the Rome Statute does not rely solely on states to send cases to the ICC. The ILC's 1994 draft had limited the Court's jurisdiction to cases that formed the subject of a complaint by a State Party or a referral by the Security Council.³⁰ The ILC's commentary to the Draft Statute noted that it did not believe that affording the Prosecutor the power to initiate investigations on his own was advisable "at the present stage of development of the international legal system."³¹ During the treaty negotiations in Rome, however, some states, such as Germany and Argentina, and NGOs advocated for a prosecutor with the ability to commence cases on his own initiative.³² These groups were victorious, and the Rome Statute does grant the prosecutor this independent authority. With the creation of the independent prosecutor, the drafters of the Rome Statute sought to create a court more independent of state control in the initiation of cases and far less protective of state sovereignty.

²⁵ Office of the Prosecutor, International Criminal Court, Paper on Some Policy Issues Before the Prosecutor 3 (2003) (stating the prosecutor "will initiate prosecutions of the leaders who bear most responsibility for the crimes"), available at http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

²⁶ ICTY Press Release CC/PIU/314, Statement by the Prosecutor Following the Withdrawal of the Charges Against 14 Accused (May 8, 1998) (describing the prosecutorial strategy of the office of the prosecutor as "maintaining an investigative focus on persons holding higher levels of responsibility, or on those who have been personally responsible for the exceptionally brutal or otherwise extremely serious offences").

²⁷ Lee, *supra* note xx, at 28.

²⁸

²⁹ Rome Statute, art. 12(2). A state may also accept the jurisdiction of the Court on an ad hoc basis with regard to that particular situation. Rome Statute, art. 12(3).

³⁰ Draft Statute for the International Criminal Court, *in* Report of the International Law Commission on the Work of its Forty-sixth Session, UN GAOR, 49th Sess., Supp. No. 10, at 43-45 (Art. 23 & Art. 25), UN Doc. A/49/10 (1994), *reprinted in* [1994] 2 Y.B. Int'l L. Comm'n 46, UN Doc. A/CN.4/Ser.A/1994/Add.1 (Part 2) [hereinafter ILC Draft]

³¹ ILC Draft, *supra* note xx, at 46. In its report on the ILC draft, the American Bar Association Task Force on an International Criminal Court agreed with the ILC's decision to deny the Prosecutor *proprio motu* powers. Benjamin R. Civiletti et al., AMERICAN BAR ASSOCIATION, REPORT OF THE TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT 22 (Aug. 1, 1994).

³² Danner, Prosecutorial Discretion, at 513-515.

Other aspects of the Rome Statute also increase the likelihood that some member states will have to pay sovereignty costs. The Rome Statute also does not allow states to make reservations to its provisions.³³ While many treaties allow states to choose to commit to some provisions but not others, the Rome Statute presents states with an all-or-nothing choice.³⁴ In addition, the ICC does not recognize any of the immunities traditionally accorded to heads of state and other senior officials under international law. In fact the treaty *overrides* any immunities that states may grant to officials in their domestic systems.³⁵ Thus, there is no presidential, parliamentary, or legislative immunity at the ICC—even for officials currently serving in those capacities. Any state that becomes a party to the ICC, therefore, must allow for the very real possibility that its most senior figures could be prosecuted in this Court.

2. *Complementarity and (Partially) Protecting Sovereignty*

Given these far-reaching provisions, the challenge for the drafters of the Rome Statute was how to encourage *any* state to join the International Criminal Court. How could such a potentially powerful prosecutorial mechanism possibly get off the ground politically? The answer lies primarily in the treaty's emphasis on domestic prosecutions, the so-called complementarity system. Unlike most prior war crimes tribunals, the ICC is meant to supplement—not supplant—domestic criminal law prosecutions. In the Rome Statute's complementarity regime, states with domestic jurisdiction over the crime must first have the option of investigating the case domestically before the ICC can adjudicate it.³⁶ As the Court's first prosecutor has stated, "intervention by the ICC must be exceptional—it will only step in when states fail to genuinely act."³⁷

The complementarity system established in the Rome Statute attempts to balance the treaty's emphasis on domestic prosecutions with concerns that states would exploit the complementarity regime as a way to preclude the Court from hearing a case that the state itself had no intention of truly pursuing. The Court's judges may find a case "admissible" in the Court despite a domestic investigation or prosecution if the Court determines that "the state is unwilling or unable genuinely to carry out the investigation or prosecution."³⁸ Sudan's desultory investigations and prosecutions of crimes committed in Darfur provide a clear example of the kind of behavior the admissibility provisions were designed to override.³⁹ The complementarity regime thus provides an important, but potentially incomplete, protection of state sovereignty. A state with excellent accountability mechanisms and the political will to investigate and prosecute will likely have nothing to fear from the court. A state whose mechanisms are less robust cannot be absolutely sure that the prosecutor and judges will find its investigation or prosecution adequate. Indeed,

³³ Rome Statute, Art. 120.

³⁴ The treaty does officially permit a form of an escape clause, which allows countries to decline to recognize the Court's jurisdiction over war crimes committed by its nationals or on its territories for seven years after the state becomes a party to the treaty. Rome Statute, art. 124. Thus far, only France (who insisted on this provision in the treaty negotiations) and Colombia have entered the requisite declaration.

³⁵ Rome Statute, art. 27.

³⁶ See Rome Statute, Preamble (emphasizing that the ICC "shall be complementary to national criminal jurisdictions").

³⁷ Luis Moreno-Ocampo, *A Global Web of Justice is Up and Running*, INT'L HERALD TRIBUNE, June 12, 2006, available at <http://www.iht.com/articles/2006/06/11/opinion/edocampo.php>.

³⁸ Rome Statute, art. 17(1)(a).

³⁹ See Office of the Prosecutor, International Criminal Court, Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), June 14, 2006, available at http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf.

one of the principal U.S. objections to the court has been that the protections provided by the complementarity mechanism depend ultimately on the judgment of ICC officials.⁴⁰

While the complementarity system is the most important protection of state sovereignty in the Rome Statute, there are other aspects that limit states' exposure to prosecution of their nationals. For example, the treaty contains strict temporal limitations. The court can only hear cases involving crimes committed after July 1, 2002, the date of entry into force of the treaty. Furthermore, for any state party, it can only hear cases arising from incidents occurring at least 60 days after ratification.⁴¹ States that choose to join the court, therefore, need not worry about opening old wounds inflicted by past atrocities. The mission of the ICC is firmly focused on preventing future perpetrations of international crimes.

The most obvious limit to state sovereignty is the one at the heart of the decision to establish an international criminal court in the first place. If a state's nationals do not commit international crimes, they will not be prosecuted by the Court. While frivolous or politically-motivated prosecutions are a possibility (and one that has particularly concerned the United States), the Rome Statute has checks built into it to discourage a prosecutor from acting irresponsibly.⁴² Putting this possibility to one side, a state that seeks to ensure that its officials are not prosecuted before the Court can do one of three things: it can refrain from the commission of international crimes, it can vigorously prosecute allegations of atrocities in domestic courts, or it can choose not to join the ICC at all.

III. A THEORY OF ICC COMMITMENT: JUSTICE, CREDIBILITY, AND DOMESTIC INSTITUTIONS

International efforts to hold individuals accountable for atrocities associated with war have been quite limited in their effects. Despite agreements designed to make mass civilian casualties and other abuses of the state's warfighting prerogative illegal in international law, states nevertheless resort to tactics that recklessly endanger civilians, wantonly mistreat prisoners, and violently persecute opposition groups.⁴³ Some of these acts can reasonably be termed atrocities. The problem with attempts to prevent such tactics is that they may be politically "useful" in the short run; by demoralizing prisoners or the opposition's civilians it may be possible to coerce cooperation or reduce active resistance in the short term.⁴⁴

In the broader perspective, however, such atrocities can have disastrous consequences, not only for the combatants, but for nations and populations not directly involved in the conflict. The commission of atrocities can fuel mistrust among victim groups and render a stable peace

⁴⁰ [add cite to US concern]

⁴¹ Rome Statute, art. 26(1) and (2).

⁴² These are described further in Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510 (2003).

⁴³ Benjamin Valentino, Paul Huth, & Sarah Croco, *Covenants Without the Sword: International Law and the Protection of Civilians in Times of War*, 58 WORLD POLITICS 339, (2006) (finding "no evidence that signatories of international treaties are significantly less likely to kill civilians in war than are nonsignatories").

⁴⁴ Benjamin Valentino, Paul Huth & Dylan Balch-Lindsay, *Draining the Sea: Mass Killing and Guerilla Warfare*, 58 INT'L ORG. 357, 376 (2004) (noting "intentional killing of civilians is often a calculated military strategy designed to combat powerful guerilla insurgencies").

harder to negotiate. It may also imperil the government's survival.⁴⁵ The perpetration of atrocities also tends to make it harder to form cooperative coalitions with an interest in settlement. The international reputation of states that commit atrocities against their own citizens may also suffer. This loss to reputation, or lack of a good reputation in the first place, may result in adverse political or economic consequences. Other states may support rebel groups against a despotic government, and investors may turn to safer places.

While many governments would like to have domestic and international audiences believe that they will not commit mass crimes against their own citizens, the problem they face in post-conflict situations is how to make a credible commitment to forswear atrocity as a quasi-military option. Even if both parties stand to gain from such a commitment, it may be difficult to do so because there is no way to make such a promise "incentive compatible": it is too tempting to attempt to secure a short-term military advantage by whatever tactics, even though that choice spoils the chances for longer term peace in case of a stalemate. One way to make a commitment credible is to raise the *ex post* costs of renegeing.⁴⁶ Our argument is that this constitutes a principal reason that some states are willing to accept jurisdiction of the ICC.

Scholars have explored the implications of credible commitments in a variety of areas.⁴⁷ Credible commitment devices are often part of important international economic agreements, from investment treaties with independent dispute-resolution mechanisms,⁴⁸ to international commitments to peg exchange rates to the currency of a low-inflation nation in order to keep prices stable.⁴⁹ States emerging from decolonization in Africa collectively committed to the international law doctrine of *uti possidetis* to make a credible commitment to avoid future border disputes.⁵⁰ In the case of the ICC, ratification of the Rome Statute can enhance the credibility of a state's commitment to not perpetrate atrocities, because of the *ex post* costs imposed by a ICC investigation or prosecution.

For a state that has joined the ICC, the court significantly narrows a government's discretion in selecting a response to an event that can be described as an international crime. Whether or not member states agree in the instant case, ratification activates a series of rules that effectively removes the decision from the bound government's hands *not* to investigate or prosecute perpetrators. This divestment of domestic discretion that results from the decision to join the court represents the sovereignty cost imposed by the ICC. By effectively tying the hands of the government, the Court raises the risk that high officials responsible for wanton atrocities will spend the rest of their lives in prison.

⁴⁵ Caleb Carr, *THE LESSONS OF TERROR: A HISTORY OF WARFARE AGAINST CIVILIANS* 12 (2002) (arguing "the nation or faction that resorts to warfare against civilians most quickly, most often, and most viciously is the nation or faction most likely to see its interests frustrated and, in many cases, its existence terminated.")

⁴⁶ Fearon, *supra* note xx, at 70.

⁴⁷ For a discussion of commitment theory and domestic constitutions, for example, see Jon Elster, *Ulysses And The Sirens: Studies In Rationality And Irrationality* 88-111 (1979); Stephen Holmes, *Precommitment and the Paradox of Democracy*, in *Constitutionalism and Democracy* 195 (Jon Elster & Rune Slagstad eds., 1988).

⁴⁸ Zachary Elkins, Andrew T Guzman, Beth A. Simmons, *Competing for Capital: The Diffusion of Bilateral Investment Treaties*, 60 INT'L ORG. 811, 823 (2006).

⁴⁹ William Bernhard, J. Lawrence Broz, & William Roberts Clark, *The Political Economy of Monetary Institutions*, 56 INT'L ORG. 693, 706 (2002).

⁵⁰ Steven R. Ratner, *Precommitment Theory and International Law: Starting a Conversation*, 81 TEX. L. REV. 2055, 2065-66 (2003).

It is undoubtedly true that the ICC depends upon state support to provide assistance in the investigation of its cases in it enforcing its orders. This dependency, however, does not allow states to escape paying sovereignty costs altogether. Even if the state where the crimes occurred refuses to participate in a case, other states, international organizations, and even NGOs can help gather evidence of criminal activity and pressure the state into compliance. Furthermore, even if the prosecutor is unable to prosecute fully a case because of lack of state cooperation, the state must endure the issuance of an arrest warrant and indictment detailing the crimes allegedly committed by state officials. At the least, the ICC's case may be highly embarrassing; at most, it can bring with it significant financial and political costs. Serbia, for example, has suffered strong financial penalties for its failure to hand over individuals indicted by the ICTY.⁵¹

Credible commitment theory suggests that, far from uniformly wanting to escape the Court's jurisdiction, governments that have experienced protracted violent conflicts in the past may be among its most enthusiastic endorsers. Just as countries with a poor credit rating may wish to bind themselves to an adjustment program overseen by the International Monetary Fund, and just as a country with a history of the nationalization of foreign property might try to enhance its credibility with a bilateral investment treaty that includes international arbitration, violence-prone states may want to tie their hands to "fight fair" and should be willing to import the impartiality and automaticity of the ICC to make such a promise stick. *This perspective leads us to expect support for the ICC to be strongest among states with violent conflict in their past but without domestic accountability systems.* Examples of such states include, for example, Afghanistan, Peru, and the Democratic Republic of Congo.

In addition to increasing the credibility of a state's promise to refrain from the commission of atrocities, states with a recent history of violence may seek an equally strategic, but more Machiavellian, aim. States may view the ICC as an additional tool to use against rebel groups and thus deter future challenges to their authority. Seen in this light, the commitment to the ICC rests not on the information it provides about the current government but on the strategic possibilities opened up by the ability to threaten potential rebels with ICC investigation and prosecution. This dynamic seems to be at work in the decision by the Museveni government of Uganda to refer atrocities committed by the Lord's Resistance Army to the court. It also may have motivated the referrals by Central African Republic, and the Côte d'Ivoire.

The problem with this vision of the court is that the structure of the Rome Statute does not allow governments to refer cases to the court involving rebel groups without running the risk that the court will also prosecute government officials. The drafters of the Rome Statute were careful to draft language into the treaty that only allows states to refer "situations" to the court (covering the entire course of events) instead of allowing them to limit their referrals to individual cases of wrongdoing.⁵² While governments may try and use the court opportunistically, in theory they are not able to insulate themselves from review. Furthermore, the court's prosecutor may also begin an investigation on his own accord and need not wait for a state referral, thus making any state party vulnerable to prosecution. Whether this view of the court gains currency depends, to a significant degree, on how the prosecutor uses the discretion granted to him by the Rome Statute.

Credible commitment theory also suggests that, by their very nature, such commitments imply high ex post costs: when evidence of atrocity exists, governments lose sovereign control

⁵¹ Nicholas Wood, *A Serbian Region Unravels with its Textile Industry*, N.Y. TIMES, Jan. 29, 2007, available at http://www.nytimes.com/2007/01/29/world/europe/29serbia.html?_r=1&oref=slogin

⁵² Rome Statute, art. 14.

over prosecution. This is a reasonable price to pay for a government whose inherent credibility is low. The logic of substituting international for national capacity is suggestive where the capacity to investigate fairly and transparently is missing or compromised. But to the extent that states can credibly expose and prosecute misdeeds committed in their name, they will try to reestablish their credibility both domestically and internationally *without* surrendering sovereignty to an external institution. In short, the theory predicts a preference for supranational substitution where necessary; but domestic approaches wherever possible. *States with a recent history of violence but relatively good domestic accountability mechanisms should tend to hold the ICC at arm's length.* States falling in this category, for example, might include Mozambique and Turkey.

What about those states whose agents are unlikely to be accused of the commission of war crimes at all? The probability that a national will be investigated or indicted is remote for countries that have not engaged in violent conflicts. For this group of countries, cooperation with the ICC is simply not likely to be very costly. These governments can decide to support the court – if at all – on grounds other than sovereignty costs, since these are effectively zero. One possibility is that they believe the principle of criminal justice is an international public good, and they want to support an institution based on upholding that good. Another possibility is that they may have a direct interest in reducing the negative externalities associated with other countries' violent conflicts: destabilization of neighbors, the stimulation of refugee flows, and the disruption of ongoing conflict in a region in which they may have economic or humanitarian interests.

Countries with a low risk of ever paying any sovereignty costs themselves are free to support the ICC on the basis of either principled beliefs about justice or their assessment of the Court's ability to address the negative externalities of unmitigated conflict, or both. *Countries that have not been involved in violent conflicts are likely to support the ICC because they can do so at little cost to their sovereignty.* Sweden and New Zealand, for example, can support the ICC and make a principled statement about international criminal justice with little downside risk to their political and institutional autonomy. In addition, these states can retain influence over the direction of the court by seeking to have their nationals elected to influential positions, such as in the ICC judiciary or in the office of the prosecutor.

If this perspective is correct, we would expect those countries with both the highest risk of committing atrocities and weakest domestic institutional capacity for credibly committing never to do so in the future to be the Court's most willing supporters. But we should also expect strong support from the principled supporters whose nationals are never seriously at risk of prosecution. This leads us to a quite counterintuitive conclusion: *the ICC will find its strongest support from a coalition of principled, non-violent states, and violent states with weak domestic accountability mechanisms.* The Swedes and Ugandans will both support the court, but for different reasons. *The Court will find its weakest support among countries engaged in recent violent conflicts, but with the institutional capacity credibly to hold those who commit atrocities accountable for their actions.* Countries making this calculation may include the United States (for its role in international conflict) as well as Bangladesh, India and Indonesia (for their turbulent and sometimes violent internal conflicts).

These predictions are quite distinct from other theoretical alternatives. Democratic theorists might expect all democracies to favor an effective ICC, by virtue of their affinity for justice and the rule of law. Realists might expect all violent states to shun the ICC, on the assumption that states facing security challenges will have no interest in forswearing *any* instruments of coercion, regardless of their abhorrence. It is possible to design empirical tests to compare the explanatory power of these approaches, which we do in the following part.

IV. EMPIRICAL TESTING

A. Conceptualizing Conflict, Accountability, and Commitment

Credible commitment theory suggests that states at risk for committing mass atrocities should be among the ICC's strongest supporters. Just who are these states at such risk? While the ICC is, as a legal matter, designed to address mass crimes that occur in international armed conflicts, in civil wars, and during times of "peace," the ICC is most likely to prosecute crimes associated with civil wars.⁵³ As an empirical matter, mass atrocities are highly correlated with civil wars.⁵⁴ Furthermore, the events most responsible for the renaissance of international criminal law—the crimes in Yugoslavia and the genocide in Rwanda—occurred in the context of civil wars.⁵⁵ When states established the institution, therefore, these conflicts formed the relevant precedents in their understanding of the need for international justice.

In addition, the ICC's actual first cases, those involving the Democratic Republic of Congo, Uganda, Central African Republic, and Sudan, also all involve civil wars. While the prosecutor has had complaints about British offenses in Iraq, over which the court theoretically has jurisdiction, he has elected not to pursue these allegations. Indeed, for a politically weak institution like the new ICC, it seems unlikely that the prosecutor will focus on one of the major global military powers. Thus, while war crimes occurring during international conflicts certainly fall within the jurisdiction of the ICC, we believe the states that are at most risk for paying sovereignty costs if they choose to join the court are those with recent domestic political violence. Thus we will test the hypothesis that states who have been involved in civil wars within the past five years are more likely to support the Court, *conditional* on these states' inability to credibly hold perpetrators accountable via domestic institutions. To measure civil war, we code whether the country had experienced a civil war of *any intensity* in the five years prior to our dataset. The category for lowest intensity conflict included in our dataset includes states that have experienced between 25 battle deaths in a year and fewer than 1000 battle-related deaths during the course of the conflict. Thus, our measure is sensitive to internal violence on a relatively minor scale, although it also extends through "wars," which include at least 1,000 battle related deaths in a year.⁵⁶ (This variable, as well as the other variables we used in our analysis, are described further in Appendix C.) Appendix B lists the countries that appear in our dataset as having experienced civil war on any intensity between the years 1992-1997.

⁵³ *Accord Ku & Nzelibe, supra* note xx, at 3 (arguing that "for both legal and political reasons, ICT prosecutions will be directed almost exclusively at individuals engaged in civil conflict").

⁵⁴ William Easterly, Roberta Gatti and Sergio Kurlat, *Development, Democracy, and Mass Killings*, Working Paper No. 93, Center for Global Development 18 (Aug. 2006) (finding "mass killings to be significantly more frequent during civil wars, and marginally so during colonial, imperial, or international wars"); Benjamin Valentino, Paul Huth & Dylan Bach-Lindsay, *Draining the Sea, Mass Killing and Guerilla Warfare*, 58 INT'L ORG. 375, 403-04 Table A1 (2004) (indicating that 27 of 30 episodes of "mass killings" during wars between 1945-2000 occurred in civil wars). We recognize that not all civil wars involve the mass killing of civilians. For an exploration of this question, see Macartan Humphreys & Jeremy M. Weinstein, *Handling and Manhandling Civilians in Civil War*, (forthcoming APSR).

⁵⁵ Indeed, much debate over the benefits, and risks, of the ICC, centers on how the court will affect civil wars. *E.g.*, Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUM. RTS. Q. 90, 90 (2000).

⁵⁶ UCDP/PRIO Armed Conflict Dataset Codebook 3.10 (defining conflict intensity) (Version 3-2005), available at http://new.prio.no/upload/datasets/ac3-2006b/Codebook_v3-2005.pdf.

The next question is, what domestic institutions are indicative of weak domestic accountability? Note that prosecution is not the only way to hold leaders and their agents accountable. Information on government atrocities via a free press, competitive party systems through which policies can be discussed and criticized, periodic elections by which the public can assess the record of governance and decide whether to return a government to power, as well as politically independent courts and military tribunals are all mechanisms through which government agents can be held accountable for the methods they have selected to prosecute wars or maintain security. Without these kinds of institutions, atrocities are more difficult to bring to light, to assess, and to punish, whether politically (through elections) or judicially (via prosecution). A reasonable measure of accountability is therefore the existence of democratic institutions, which as a whole are more effective than autocratic ones for holding governments and their agents responsible for their actions. To measure democracy, we used a coding scheme developed by Freedom House that measures whether a country is “free” or “not free.”

The final issue is how to conceptualize and measure our outcome (or dependent) variable, which is “commitment” to the ICC. Credible commitment theory is predicated on the tying of one’s hands through institutional arrangements that make it difficult or impossible to reverse a promise. Often this is achieved through an irrevocable⁵⁷ act of delegation to an authority over which the government has little control. In the case of the ICC, the crucial “tying of hands” takes place at ratification. Signature is not legally binding; it is only indicative of a states’ willingness to participate in discussions relating to the formation of the Court and a commitment not actively to undermine the institution.⁵⁸ We therefore consider ratification (or accession)⁵⁹ to be the most significant indicator of hand-tying relevant to the commitment theory we have outlined here.

While ratification or accession represents the primary and most important step, states can tie their hands even tighter by enshrining their commitment in domestic law. A government that has not only ratified but has altered domestic legislation specifically to facilitate cooperation with the court will be even more constrained than one who has not. Such a government may in fact be kicking the chair out from under any excuses that may be contrived on the basis of domestic law to refuse to cooperate with the ICC. Certainly, domestic law can be ignored, but in most cases, the implementation of domestic statutes designed to facilitate cooperation with the ICC serves to strengthen a government’s treaty commitment. We expect the passage of cooperation statutes to work in the same way as ratification: democracies with civil wars in the recent past should resist, while their non-democratic counterparts should pass such cooperation statutes. Democracies

⁵⁷ We note that the Rome Statute does allow states parties to withdraw from the court if they provide one year notice. Rome Statute, art. 127(1). The treaty does not, however, release states parties from any obligation to cooperate with the court they incurred while a member of the court. Rome Statute, art. 127(2). We do not believe, however, that the possibility of withdrawal significantly undercuts our argument that joining the court represents effective hands tying. In our view, a state that has joined the court and thereby signals to international and domestic audiences that it has made a strong commitment to the investigation and prosecution of international crimes loses significant credibility to refrain from the commission of such crimes if it withdraws from the court. Although in theory the state could perform such investigations on its own, it also had the authority to do so under the Rome Statute itself. Unless the court appears to be acting in an overtly biased way, the message sent by withdrawal will likely be understood as a desire to preserve the option of engaging in international crimes. Such a message carries with it significant audience costs. James Fearon explores this dynamic in the context of signals about war in James Fearon, *Signaling Foreign Policy Interests: Tying Hands versus Sinking Costs*, 41 J. CONFLICT RES. 68, 70 (1997).

⁵⁸ Vienna Convention on the Law of Treaties, art. 18; Ed Swaine, *Unsigning*, 55 Stan. L. Rev. 2061, 2071 (2003).

⁵⁹ For an explanation of the difference between these two terms, see note 5, *supra*.

experiencing no conflicts, as predicted with respect to ratification, may institute these changes to support international criminal justice in principle, and/or because they expect to benefit indirectly from the positive externalities associated with stability. Since they do not at all expect their nationals to face the Court, passing cooperation statutes involves little downside risk.

Finally, complementarity offers an alternative to international prosecution, and thus a way to loosen a commitment to delegate a case to the ICC. To the extent that governments can prosecute ICC crimes in their domestic courts, they may be able to solve the commitment problem without paying the sovereign costs associated with ICC delegation. It is widely assumed that states must enact some version of the crimes articulated in the Rome Statute in order to help ensure that they will be able to retain primary jurisdiction over cases they choose to investigate and prosecute domestically.⁶⁰ Some have even argued that enacting the ICC crimes into domestic law is an implicit requirement of the Rome Statute,⁶¹ although this conclusion finds little support in the text of the treaty. Thus criminal code reform, we believe, is more accurately described as a strong political expectation than a legal obligation of the treaty.

For most—indeed virtually all—states, conforming their criminal codes to the crimes in the Rome Statute requires legislative action.⁶² Even in “monist” countries whose legal structure does not typically require implementation of treaty terms into domestic law in order to render them legally enforceable, criminal law provisions must be enacted into positive law because of the prohibition on the punishment of crimes not articulated in the penal code (*nullum crimen sine lege*).⁶³

Thus, one of the indicators we test is whether or not governments have altered their domestic laws by “importing” ICC crimes into their national criminal code. In particular we examine whether or not governments have made “crimes against humanity” a crime under domestic law.⁶⁴ What is not clear, however, is whether doing so is truly complementary to the development of international criminal law or a substitute for it. When a government changes its criminal statutes to accommodate specific crimes covered by the ICC, is it *embracing* the Court and its objectives (as many pro-ICC organizations insist), or is it *defending* itself against international prosecution by strengthening the national basis for prosecution? We recognize such a legislative change could represent either of these possibilities. On the one hand, some states have explained the amendment of their criminal codes by indicating that they do not want to become a “safe haven” for accused perpetrators.⁶⁵ Some observers have also described the amendment of penal legislation as a moral show of support for the Court.⁶⁶ Both of these reasons suggest the

⁶⁰ E.g., Speech by Alan Kessel, Deputy Legal Advisor and Director-General of the Legal Affairs Bureau, Canada, Implementation of Substantive Norms in the Rome Statute of the ICC, Universidad Iberoamericana, Mexico City, Apr. 7, 2005; Juliet May, Implementing the ICC Statute in New Zealand, 2 J. Int’l Crim. Just. 191, 194 (2004); Katherine L. Doherty & Timothy L.H. McCormack, ‘Complementarity’ as a Catalyst for Comprehensive Domestic Penal Legislation, 5 U.C. DAVIS J. INT’L L. & POL’Y 147, 152 (1999).

⁶¹ Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 88 (2003).

⁶² Doherty & McCormack, *supra* note xx, at 150.

⁶³ Hugo Relva, *The Implementation of the Rome Statute in Latin American States*, 16 LEIDEN J. INT’L L. 331, 333 (2003).

⁶⁴ We chose crimes against humanity instead of genocide or war crimes because these are the subject of other longstanding treaties that require domestic criminalization and thus would not necessarily reflect the influence of the ICC.

⁶⁵ E.g., Juliet May, *Implementing the ICC Statute in New Zealand*, 2 J. INT’L CRIM. JUST. 191, 210 (2004).

⁶⁶ Damien Vandermeersch, *The ICC Statute and Belgian Law*, 2 J. INT’L CRIM. JUST. 133, 157 (2004).

plausibility of the embracing hypothesis. On the other hand, states that have the authority to open investigations into potential cases of genocide, crimes against humanity, and war crimes can retain control over cases they do not wish to see prosecuted in an international forum; this calculation reflects the defensive hypothesis. The decision of Turkey to amend its criminal code to include crimes against humanity despite not having ratified the ICC treaty represents a likely example of a “defensive” use of criminal code amendment. In sum, the embracing hypothesis would be supported by evidence that altering domestic statutes to include ICC crimes works in the same direction as ratification and cooperation. The defensive hypothesis expects the criminal code changes to work in the opposite direction.

Our central expectations are, in short:

Prediction 1: *Low credibility states (non-democracies) that have recently experienced civil wars are likely to commit to the ICC.*

Prediction 2: *High credibility states (democracies) that have recently experienced civil wars are not likely to commit to the ICC.*

Prediction 3: *High credibility states (democracies) that have not recently experienced civil wars are likely to commit to the ICC.*

If altering criminal statutes to outlaw ICC crimes represents an embrace of the international criminal regime, predictions 1-3 are also expected to hold in the case of criminal code reform. But if states use criminal law reform defensively to exploit the Court’s complementarity provisions, our findings should be reversed.

B. Coding Events of Interest: Ratification and Implementation

1. Signature and Ratification

Our first empirical task is to code cases of state commitment to the ICC. Signing and ratification are unproblematic to code.⁶⁷ Both are public events that are officially registered with the ICC itself. We model both signature and ratification from the time when the Rome Statute was open for signature. For countries that have acceded to the Rome Statute, we coded signature and ratification as occurring at the same time.⁶⁸

2. Cooperation Statutes

Coding for implementation is more complex. “Implementation,” comprises the formal legislation or regulations that countries adopt to comply with the treaty.⁶⁹ The Rome Statute’s implementation obligations fall into two categories: one geared toward making the Court effective, the other toward facilitating domestic prosecutions of international crimes.

Cooperation statutes are an example of the former. Part Nine of the ICC treaty discusses “international cooperation and judicial assistance.”⁷⁰ These provisions require states-parties to enact legislation that will allow them to perform several functions necessary to make the court effective, the most important of which is the ability to arrest suspects and hand them over to the Court for prosecution.⁷¹ In addition, states must be able to comply with investigative requests made by the Court, such as the taking of evidence, service of judicial documents, and the execution of searches and seizures.⁷² The treaty does not dictate the exact form of cooperation legislation but instead simply provides that states “shall ensure that there are procedures available

⁶⁷ As we have argued above, signing does not tie a government’s hands in any significant way. We present a model of signing, but *do not* expect the relationships discussed above to hold. The purpose of examining the signing decision at all is to contrast it with ratification and cooperation, where we expect efforts to create credible commitments to be manifest.

⁶⁸ Our tests for “ratification” include accession, since these events give rise to identical treaty obligations. Our source for this information was the International Criminal Court, List of States Parties, <http://www.icc-cpi.int/asp/statesparties.html>, and Coalition for the International Criminal Court, Regional and Country Information, www.iccnw.org

⁶⁹ This definition parallels that used by Harold Jacobson and Edith Brown Weiss in their study of implementation of international environmental treaties. Harold K. Jacobson & Edith Brown Weiss, *A Framework for Analysis*, in *ENGAGING COUNTRIES: STRENGTHENING COMPLIANCE WITH INTERNATIONAL ENVIRONMENTAL ACCORDS* at 1, 1 (Edith Brown Weiss & Harold K. Jacobson eds. 1998). This definition is narrower, however, from that used by some scholars examining questions of implementation, because we limit the term to formal acts of legislation or regulation. Some scholars, for example, have used “implementation” to “refer to any of those events and activities that occur after the issuing of authoritative public policy directives, which include the effort to administer and the substantive impacts on people and events.” David G. Victor, Kal Raustiala, and Eugene B. Skolnikoff, *Introduction and Overview*, in *THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS: THEORY AND PRACTICE* 1, 4 (David G. Victor, Kal Raustiala, and Eugene B. Skolnikoff, eds. 1998).

⁷⁰ The ICC treaty includes a number of other requirements not falling under Part 9 that also require legislative changes in most countries. Article 48, for example, requires that states provide privileges and immunities to court officials when working in their territory. Article 48 is also supplemented by a separate agreement, the Agreement on Privileges and Immunities, which provides further immunity for court personnel.

⁷¹ Rome Statute, Art. 89.

⁷² Rome Statute, Art. 93.

under their national law for all of the forms of cooperation which are specified under this Part.”⁷³ It is widely assumed that, since the ICC is a new institution without direct legal precedent, states must enact new legislation to allow for cooperation with the Court. These cooperation obligations apply only to states parties, although other states may cooperate with the institution on a voluntary basis.

We coded whether or not each state had drafted legislation that allows for cooperation with the International Criminal Court in some form. Generally, this cooperation takes the form of allowing the surrender of suspects to the court, permitting court officials to collect evidence in the state, and providing immunity for ICC officials. If the state had *drafted* legislation to allow for *any* of these functions, we coded the state as having fulfilled its obligation to enact cooperation legislation.⁷⁴ We coded all drafts and not just enacted legislation because of the complexity of this kind of legislation and the time needed to amend domestic codes. In order to be included in our dataset, however, the draft had to be introduced into some governmental body within the state.⁷⁵ For cases of draft legislation, we coded when the draft was introduced into a legislative body. For countries that had actually enacted the legislation into law, we coded the date of passage into law.⁷⁶ Just as with ratification, we expect states that need but otherwise are unable to make a credible commitment to implement cooperation statutes of this kind.

3. Criminal Code Amendment

For this criminal legislation, we coded whether the country’s penal code contained a provision penalizing “crimes against humanity.” We chose crimes against humanity as the marker of complementarity (instead of the other ICC crimes of genocide or war crimes) because implementation of these latter crimes is already required by other treaties, namely the Genocide Convention and the Geneva Conventions of 1949. We wanted to exclude the potential force of those treaties and thus selected crimes against humanity as the relevant indicator of complementarity. However, we did not judge whether the crimes against humanity provision in the domestic code exactly mirrors the definition in the Rome Statute, since we seek to measure “substantial”—rather than perfect—implementation. Since countries that had not ratified the Rome Statute might also decide to change their criminal code (perhaps to preempt ICC jurisdiction), and because as discussed above states parties are not legally obligated to do so, we model the decision of *any* state (not just ratifiers) to change its criminal code in this way. For states that had ratified the Rome Statute, we looked at penal legislation contemporaneous to, or occurring after, the country’s ratification of the Rome Statute, since we were interested in measuring changes precipitated by the treaty. In addition, we think it unlikely that the few pre-existing criminal provisions of crimes against humanity would fulfill the complementarity

⁷³ Rome Statute, Art. 88.

⁷⁴ While such legislation may not fulfill the letter of the treaty, we are interested in measuring substantial, instead of perfect, compliance.

⁷⁵ While future revisions are always possible, we did not count cases where a country had simply set up a committee to draft legislation. Because of the novelty of the International Criminal Court, we assumed that no country’s pre-existing legislation would allow for fulfillment of the cooperation obligations contained in the Rome Statute.

⁷⁶ Our sources for information on cooperation legislation were Coalition for the International Criminal Court, Regional and Country Information, www.iccnw.org (website current as of 12/2005); Andean Commission of Jurists Report on the ICC and the Andean Countries (June 2005) (on file with authors); Amnesty International’s web page on Implementation of the Rome Statute, <http://web.amnesty.org/pages/icc-implementation-eng>; Progress Reports submitted by members of the Council of Europe in 2001 and 2003 (on file with authors), and The International Committee of the Red Cross, International Humanitarian Law, Implementing Legislation by State, www.icrc.org.

obligation, since their definitions differed so markedly from the definition contained in the Rome Statute.

C. Statistical Methods: Event History Analysis

Our central purpose is to infer the motives states may have for engaging the ICC from their decisions whether to ratify and implement the Rome Statute. Motives based on the desire to make a credible commitment to refrain from atrocity can be inferred from three important steps toward ICC commitment: ratifying, enacting statutes providing for ICC cooperation, and changing domestic criminal statutes to include crimes within the jurisdiction of the Court. We use event history analysis to analyze the extent to which both constant and time-varying factors influence the probability that a government will commit to the ICC in one of the ways discussed in a given time period, given that it has not yet done so.⁷⁷

To use event history statistical techniques, we have arranged our data quarterly, and delimited the following periods of theoretical interest (1) the date from which the statute was open for signature to the date of signature, (2) open for signature to ratification, (3) ratification to the introduction of draft cooperation statutes, and (4) opened for signature to the passage of ECC-consistent domestic criminal statutes. We view these as distinguishable phases, though quite clearly they can happen nearly simultaneously. For example, thirty-seven countries signed the Rome statute in the first two days the instrument was open for signature.⁷⁸ These early signers included Bolivia, Bosnia-Herzegovina, Italy, Samoa, and Zambia. Similarly, a few countries – mostly but not exclusively common law countries – have enacted cooperation statutes before or along with ratification. Examples include Australia and the United Kingdom and some non-common-law countries such as Finland. In these cases, the spell is effectively one period (quarter).

Since the enactment of an ICC cooperation statute is only a realistic possibility once a country has decided to join the institution, we model the cooperation phase from ratification to the passage of a cooperation statute. But because any state may – without joining the ICC – decide to alter its criminal statutes to reflect ICC crimes, we model changing of criminal statutes from the period when the Rome Statute opened for signature to the drafting of new criminal legislation. We will discuss effects in terms of “proportionate hazard ratios.” When these ratios are greater than one, the explanatory variable is interpreted as having a positive effect on the outcome. A hazard ratio of 2.00 means that the presence of a particular condition (or each unit increase) doubles the “risk” that a government will ratify or implement, given that it has not done so

⁷⁷ Specifically we employ a Cox proportional hazard model to examine the effects of a number of continuous and categorical predictors, and because some of these vary over time, the tests presented here use time varying covariates. The Cox model estimates a “hazard rate” which is defined as:

$$h(t) = \frac{\text{probability of event between times } t \text{ and } t+1}{(t+1) (\text{probability of event after time } t)}$$

where the “event” is understood as signature, ratification, enacting a cooperation statute, or changing the criminal code to include crimes against humanity. The hazard rate is then modeled as a function of the baseline hazard (h_0) at time t – which is simply the hazard for an observation with all explanatory variables set to zero⁷⁷ - as well as a number of explanatory variables, the estimates of which indicate proportional changes relative to this baseline hazard. The null hypothesis is that the proportionate hazard rate for any given explanatory variable of interest is 1 (it has no effect on the baseline hazard rate).

⁷⁸ That is, countries that signed on July 17 or 18, 1998. UN Treaty Database, <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp>.

already. When they are less than one, they are interpreted as reducing the likelihood. Analogously, a hazard ratio of .90 indicates a ten percent reduction in the proportionate hazard rate.

V. RESULTS

Our main findings are reported in Tables 1-3. These tables are arranged with the explanatory variables in the left hand column, and each displays a series of models that control for alternative explanations. We report hazard ratios as well as the p-value (smaller values reflect a higher degree of certainty in the estimated hazard ratio) for each explanatory included in the model. The theory of credible commitment-making is primarily concerned with past conflict (civil war within the past five years) and domestic accountability mechanisms (democracy), and their interaction.

A. Signature and Ratification

Ratification patterns provide strong support for the credible commitments theory (Table 1). Democracies without a recent history of civil war are quite likely to join the ICC. We have hypothesized that these countries constitute the Court's principled supporters who themselves are highly unlikely ever to find their nationals indicted. Both a dearth of conflict as well as credible domestic mechanisms for handling war crimes make this group willing to support the ICC secure in the knowledge that they will be highly unlikely ever to pay the sovereignty costs associated with its jurisdiction. This group is more than two and a half times more likely (hazard ratio of 2.6) to ratify the Rome Statute than are nondemocracies without recent civil war experience.⁷⁹

What is surprising from some perspectives, but expected by credible commitment theory, is that nondemocracies with recent civil war experience are even *more* likely to ratify the Statute. According to Ratification Model 1, nondemocracies with civil wars are more than three times more likely to ratify (hazard ratio of 3.34) than are nondemocracies without civil war experience.

Despite their completely different institutions and experiences, peaceful democracies and civil-strife ridden non-democracies tend to display nearly the same ratification propensity. By contrast democracies with a recent history of civil war are far less likely to ratify the Rome Statute. A currently democratic country that has experienced civil war within the past five years is almost 80 percent less likely to ratify the Rome Statute than is a nondemocracy without a similar violent past (hazard ratio .211). This finding supports credible commitment theory: the least credible but most violence-prone governments have joined the principled but non-vulnerable governments in ratifying the ICC treaty.

[TABLE 1 ABOUT HERE]

Certain null results also support the theory of credible commitments. First, we found that these results held up only for *recent* civil wars; civil wars in the more distant past do not seem to affect countries' calculations about whether or not to join the court (not reported here). Since the court's jurisdiction is prospective only, this result is unsurprising. The further in the past the civil war experience, the less necessary is the Court's prospective jurisdiction to the development of credibility. Furthermore, we find the results do not hold up for ongoing civil wars. Perhaps these states do not want to risk the sovereignty costs represented by joining the ICC or perhaps they do not want to assure the rebel groups that they do not intend to commit crimes against them. Either

⁷⁹ Note that non-democracies without recent civil war experience is the excluded category to which all three included democracy/conflict combinations are compared.

way, this finding undercuts the idea that states are simply using the ICC as a tool against rebel groups.

In addition, we found that the results do not hold up for the act of signature alone (see Model 1 for Signature). Signature alone does not commit a state to the court's jurisdiction. Signing the draft statute may have symbolic value, but it certainly does not tie a government's hands to submit its nationals to the Court. Signers are likely to include a number of "false positives" – governments that want to express support but do not want to incur a significant risk of paying any sovereignty costs.

These findings are highly robust to alternative explanations. One obvious alternative explanation is that governments with large military might be hesitant to submit to the court. We find strong evidence that this is the case, consistent with military leaders' likely interest in avoiding prosecution and the domestic political clout large militaries are likely to have. But we also find that countries that supply many peacekeepers tended to ratify more readily. This likely reflects the commitment some governments have – for reasons we have not theorized here – to participate in multilateral projects supporting international peace and stability. For these states, the ICC is simply another tool in the promotion of global order. These two variables – size of military and contribution to peacekeeping – reveal opposite ratification tendencies for countries who use their militaries for primarily national versus primary international purposes.

A few other variables have positive effects, and we include them to see if they alter our main conclusions. Many studies have found that governments are significantly influenced by the ratifications of other countries in their region, whether because they have similar preferences or because they adopt regional practices in order to avoid criticism.⁸⁰ If civil war and democracy cluster regionally, we may mistakenly have attributed regional mimicry to an (uncoordinated) region-wide strategy motivated by credibility considerations. Another possibility is that we have inadvertently confounded support for the ICC with support for human rights treaties in general. Both regional ratifications and a predisposition to ratify human rights treaties are in fact highly correlated with ICC ratification, but neither disturb the main results about credible commitment-making.

It is also possible that governments ratify the ICC because they believe they will be able to control it to some extent. To test for this possibility, we have designated certain countries "leaders" – those with early involvement in ICC design and with the resources to influence the direction of events. We defined this group as the *intersection* of the "like-minded group" of states, which were committed to creating a robust and independent court, and OECD membership (an organization of the wealthiest countries in the world). We also coded those countries whose nationals eventually were elected to ICC positions, and use this as a measure of anticipated influence over the institution. These indicators have moderate to strong effects in the anticipated direction, but have practically no effect on our central finding on credible commitment-making. In fact these findings further reinforce our view that, for a significant number of states,—democracies without recent civil war—the ICC is an institution that these dominant leaders are creating *for others*. The institution's most influential designers do not expect to be prosecuted there, but they do expect their officials to be elected to the court, where presumably they may help protect the state's interests and reaffirm the state's values in the institution.

Another alternative is that ratification patterns may be driven by various domestic hurdles that make cooperation with the ICC institutionally difficult. To capture this possibility, we have

⁸⁰ See Beth Simmons, forthcoming book, Chapter 3.

collected data for each country on whether or not a constitutional amendment is required to cooperate with the Court. Unsurprisingly, countries with such constitutional requirements are indeed much less likely to ratify. Having such a requirement reduces the likelihood of ratifying by between 54 and 63 percent, but leaves the credible commitment story well intact. Finally, supporting our claim that the signature phase is more of a symbolic than a commitment, constitutional provisions seem to have no influence on signing whatsoever.

A thorough set of robustness tests are reported in Table 1, which returned mostly null results. We found no impact of ongoing extra-territorial conflict, which we included because we did not want our results to be driven by several countries' contemporaneous involvement in Iraq and Afghanistan. We included a series of other indicators of atrocities, such as widespread torture, amnesty for ICC crimes, and the use of truth commissions, but none of these affect the results. We also considered the possibility that political relationships with Europe (mostly in favor of the ICC) and the US (vehemently opposed) might influence countries' ratification decisions. There is evidence that military alliance with Europe increases the likelihood of ratifying,⁸¹ but contrary to expectations, so does foreign aid assistance from the United States. We found no evidence whatsoever that the conclusion of a so-called Article 98 Agreement with the US has influenced the decision of countries to ratify. Nor do pro-ICC NGOs, ICC-related conferences, or participation in networks of multilateral treaties which include prosecution provisions influence the ratification decision. (All of these variables are defined in the Data Appendix).

Overall, the evidence that states are motivated to ratify the Rome Statute in order to enhance their ability to make a credible commitment to refrain from atrocities in the future is consistently supported by the ratification evidence. Whether it explains implementation as well is explored in the next section.

B. Cooperation Legislation

Among states that ratify, we found further evidence of credible commitment theory in their implementation of statutes to cooperate with ICC prosecutions. Because of the relatively smaller number of observations, it was necessary to broaden the definition of conflict to include international conflict in this case. But the same pattern emerges with the slightly broader definition of states at risk for the commission of war crimes (Table 2). Democracies without a recent history of conflict as well as non-democracies experiencing recent conflicts were both likely to draft legislation (about six times and three times more likely, respectively) to facilitate cooperation with the ICC. The legislative records of democracies with conflict were not statistically distinguishable from non-democracies that had experienced no conflict. Once again, the group most in need of external support for hand-tying is found to be almost as supportive of the ICC as the state parties whose nationals are least likely to fall under its jurisdiction.

[TABLE 2 ABOUT HERE]

As was the case with ratification, states that support peacekeeping were much more likely to implement cooperation statutes, but this time there was no evidence that states with larger militaries resisted. There are also several conditions associated with implementation of cooperation statutes that were never significant in the case of ratification. Cooperation with respect to criminal prosecutions can be a complicated and highly technical matter compared to ratification alone. It is not surprising, therefore, that higher wealth per capita and participation in

⁸¹ Military alliance with Europe is robust with to the inclusion of Western and Eastern European dummy variables (either is statistically significant), so this is not simply a NATO effect.

other international agreements that establish prosecution and extradition requirements for other transnational crimes is associated with a higher likelihood of implementation. We also found that countries with British legal heritage to be more likely to draft implementing legislation. This is likely due to the practice of Commonwealth countries of drafting implementation legislation contemporaneously with treaty ratification. Countries in our designated “leader” group (the wealthiest among the so-called like-minded group) were moderately more likely to implement, but surprisingly, this result is not very robust. In contrast to ratification, we also found that there is very little regional emulation when it comes to the implementation of cooperation statutes. This is likely because domestic legal change does not have the same outward symbolic value as does ratification itself.

Several other explanations received little support (see Models 2 through 4). We found no evidence that activities of NGOs made much difference, nor did a history of amnesties for past ICC crimes or the use of truth commissions for past abuses. We thought that experience with bilateral extradition treaties might increase the propensity to cooperate with the ICC. If anything, the reverse is likely to be true. Aid and alliance patterns contribute nothing coherent to the picture. The only result here is counterintuitive: a military alliance with the EU is likely to *reduce* the propensity to pass cooperation statutes. Once again, we see practically no influence on cooperation with the ICC associated with Article 98 agreements with the United States.

In short, despite other influences and a thorough check for robustness, nondemocracies that have experienced violent conflicts in the past five years are almost certainly among the most willing to draft legislation to cooperate with the ICC. Such a finding is difficult to understand unless we interpret cooperation with the ICC as an effort to bolster a government’s credibility to refrain from the commission of future atrocities.

C. Criminal Legislation

As discussed above, changing a domestic criminal code to include international crimes could be viewed by states in one of two ways. On the one hand, states could view amendment of the criminal code to be part of the implementation process (the embracing hypothesis). If this were true, then we would expect states to enact cooperation and criminal legislation simultaneously, following the pattern we describe for ratification. On the other hand, states worried about the potential of ICC prosecution could amend their criminal codes to ensure that they can take advantage of the complementarity regime (the defensive hypothesis). Were this the case, we would expect states at risk of atrocity to amend their criminal codes more readily than states not at such risk.

[TABLE 3 ABOUT HERE]

The evidence presented in Table 3 is much more supportive of the embracing interpretation than the defensive interpretation for countries’ recent (or ongoing) amendment of the criminal code. Although the number of actual code changes is small compared to the total “time at risk,” the evidence in Table 3 clearly shows that states seem to treat changing their criminal codes in a way analogous to cooperation legislation. Democracies with no history of civil war are nearly fifteen times more likely to make their criminal statutes ICC-consistent than are non-democracies without recent conflicts. Democracies with a recent history of civil war, however, are much less likely than any other category to change their criminal codes to incorporate international crimes. We estimate that they are a surprising 93 per cent less likely to do so than non-democracies without recent civil war experience. When we singled out the ICC “leaders” (largely democratic and without recent war experience) we found they were only about

88 per cent more likely to implement criminal code reform than were all other countries. This is a surprisingly small impact given the leadership role these countries have taken in designing the ICC in the first place.

Why did the embracing hypothesis receive such strong support compared to the defensive hypothesis? After all, many countries might quite plausibly have strategically changed their domestic statutes the better to protect their nationals from the possibility of ICC prosecution. The answer may be found in the robustness checks reported in Table 3. For the first time, we see a significant and positive effect to efforts of pro-ICC NGOs and participation in international, regional, and bilateral conferences devoted to questions of ICC cooperation. These are the groups and forums that are most likely to push for the adoption of cooperation and the alteration of the penal code as a package of ICC-related reforms. The Coalition for the International Court, for example provides extensive training and organizes conferences on the subject,⁸² and Amnesty International publishes evaluations of draft implementation legislation.⁸³ The strong positive tendency for non-democracies with violent pasts to make their criminal codes ICC-consistent and the consistency of this result with our findings on ratification and cooperation statutes suggests that domestic reforms are viewed as a part of the packaged-deal for enhancing a credible commitment to the international criminal justice regime.

For robustness, we tested a number of alternative explanations, but none come close to disturbing this central finding. Regional criminal statute adoptions had no effect. Neither did the adoption of multilateral agreements containing prosecutorial cooperation provisions. Countries that had previously declared amnesties for ICC related crimes are probably somewhat more likely to change their criminal code (88 percent more likely; $p=.11$), but the past use of truth commissions was not at all correlated with penal code change. None of the alliance-related variables ever mattered (military alliances, aid, or trade with the US and EU), nor did a change in government, British legal heritage or a country's size. The only explanation that consistently seems to matter in the decision to implement ICC standards of criminal culpability into domestic law are those consistent with low sovereignty costs and credible commitments.

VI. CONCLUSION

This article speaks to a puzzle in international relations of the first order—namely, why states would voluntarily delegate an essential sovereign function to an international institution over which they have little political control? While much has been written on the institutional features of the court and the law upon which it is based, our purpose has been to theorize state participation. While it is not possible to observe motives for joining the court, it is possible to infer motives from the patterns of states' legal engagement with it. A surprising number of adherents have had serious problems with violent conflict, with no obvious way to deal with the worst atrocities in a way that inspires trust from domestic groups or the international community. One way to think about the delegation issue is through the lens of theories of credible commitment-making. This approach predicts that states that are at risk for committing the kinds of atrocities governed by the Court but that lack a dependable domestic mechanism for holding government agents accountable are likely to be among the court's most avid subscribers.

The evidence for this interpretation of delegation received strong support in our empirical analysis. Despite exhaustive robustness tests taking alternative explanations into account, we

⁸² For a description of their work on implementation, see <http://www.iccnw.org/?mod=romeimplementation>.

⁸³ The reports are available at <http://web.amnesty.org/pages/icc-implementation-eng>.

found consistently that the least accountable governments with a recent past of violent were at the highest “risk” of ratifying and implementing the Rome Statute. Along with countries whose nationals were least likely to ever be vulnerable to the court’s jurisdiction (and for whom sovereignty costs were therefore likely to be very low), the least credible but most vulnerable governments were found to be among the first ratifiers, first to draft cooperation statutes to facilitate the work of the ICC, and the first to begin the process of adapting their penal codes to make ICC crimes punishable in domestic law. The characteristics associated with a need to make a credible commitment to forswear atrocity as an instrument of war-fighting were consistently associated with high rates of cooperation with the ICC.

One innovation of this research is that it has examined successive steps in commitment to the international criminal regime. Beyond signature (which does not constitute hand tying in any legal sense), we have examined the act of ratification, the most significant first step in granting jurisdictional authority to the independent court. We also examined the depth of countries’ commitment to the ICC regime by analyzing domestic implementation. Our findings in all three cases converge on a possible motive for delegation: the strong desire of some states to establish their credibility to fight fair.

It is important to emphasize what this research does not show. We do not claim that the ICC as an institution will in fact work as its supporters hope in all circumstances. We have not shown that the ICC will in fact deter future atrocities. The point is rather that states’ patterns of delegation to the ICC reflect regularities from which it is most reasonable to infer principled support (at low sovereignty cost) but also a costly effort to tie one’s (or a future government’s)⁸⁴ hands by a nearly irrevocable commitment to allow a supranational institutions to prosecute certain serious crimes, even when committed by government agents.

Nor do we claim credible commitment-making is the only motive at work. Ratification was shown to be influenced by similar actions within a country’s region and to be significantly less likely in states with a large military. Adoption of cooperation statutes are likely influenced by a preference for and experience with international prosecutorial experience in subject-specific treaties. Criminal code reform is quite possibly influenced by normative and technical campaigns spearheaded by non-governmental actors and ICC-related conferences. Yet throughout, we found convincing evidence that governments least able credibly to prosecute war-related atrocities were among those most likely *at every phase* to embrace the new international criminal law regime. This finding is consistent with a new stream of legal research that explores the significance of international law and institutions to bind governments’ hands in ways that allow them to achieve results that would not be possible in the absence of international legal institutions.

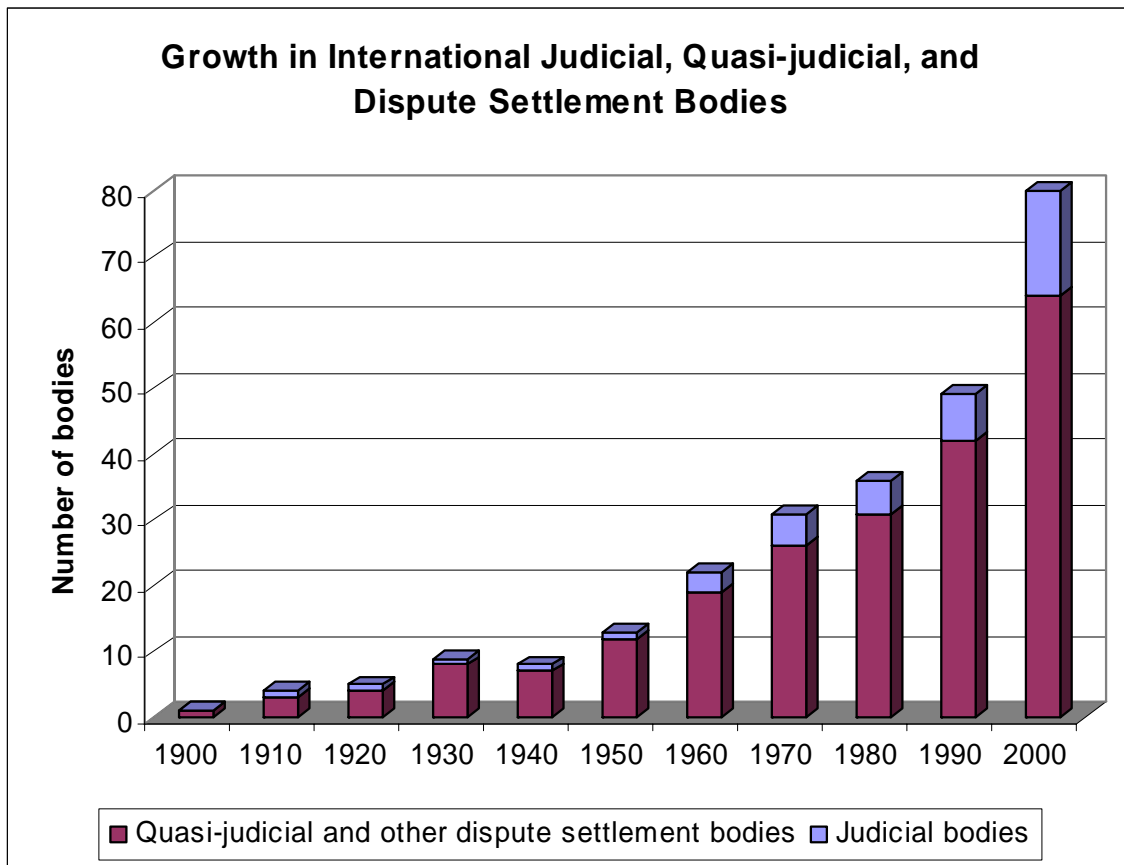
Finally, we do not claim that the Rome Statute’s most significant legacy will necessarily lie in the credibility mechanism we have described.⁸⁵ On the contrary, the treaty’s greatest importance thus far has been to spur domestic criminal code reform to include international crimes. The growth of universal jurisdiction schemes to prosecute international crimes—rejected by the ICC drafters but adopted by many countries when changing their penal codes to implement the treaty—have led to such startling developments as the indictment of Donald Rumsfeld in

⁸⁴ Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT’L ORG. 217, 220 (2000) (arguing that governments turn to international enforcement “when the benefits of reducing future political uncertainty outweigh the ‘sovereignty costs’ of membership”).

⁸⁵ For an exploration of other domestic effects associated with the ICC, see Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic*, 47 HARV. INT’L L. J. 327, 339-41 (2006).

Germany for crimes allegedly committed with respect to the war in Iraq. By its emphasis on domestic prosecutions, the Rome Statute has helped create a web of justice that has the potential to trap many more perpetrators than allowed by the relatively meager capabilities of the international system. Whether the combined effects of the court and the domestic changes it has precipitated will in fact reduce the commission of mass crimes remains the most important, and most elusive, of the questions surrounding the ICC. .

Figure 1:



Source: The Project on International Courts and Tribunals: The International Judiciary in Context

http://www.pict-pcti.org/publications/synoptic_chart/synoptic_chart2.pdf

**Table 1: Signature and Ratification of ICC Treaty
Cox Proportionate Hazard Model
Hazard Ratios (p-values)**

<i>Explanatory Variables:</i>	Signature (Model 1)	Ratif. Model 1 (basic model)	Ratif. Model 2 (torture/ amnesty controls)	Ratif. Model 3 (alliance controls)	Ratif. Model 4 (socialization controls)
Democracies without Civil Wars [†]	1.89** p=.012	2.64*** p=.006	2.66*** p=.006	2.35** p=.028	2.78*** p=.004
Democracies with Civil Wars [†]	.548 p=.153	.221*** p=.005	.224*** p=.005	.271** p=.018	.208*** p=.003
Nondemocracies with Civil Wars [†]	1.35 p=.301	3.34*** p=.003	3.40*** p=.003	3.24*** p=.005	2.89** p=.011
LogMilitary Personnel	.890** p=.038	.776*** p=.001	.804** p=.009	.784*** p=.003	.750*** p=.003
Log Peacekeepers	1.01 p=.785	1.12** p=.026	1.33** p=.011	1.13** p=.011	1.12** p=.020
Regional Event	3.53*** p=.000	6.38*** p=.001	6.30*** p=.001	6.60*** p=.001	7.99*** p=.000
Human Rights Treaties	1.29*** p=.000	1.39*** p=.000	1.38*** p=.001	1.32*** p=.003	1.37*** p=.002
Ongoing Extraterritorial Conflict	1.41 p=.366	.883 p=.770			
Constitutional Amendment Required	.864 p=.449	.364*** p=.002	.363*** p=.002	.468** p=.012	.383*** p=.002
ICC Elected Officials	1.57** p=.015	2.32*** p=.002	2.33*** p=.002	2.54*** p=.002	2.26*** p=.004
ICC Leaders	1.49* p=.067	1.74* p=.061	1.54 p=.150	--	--
Worst Torturers		--	.503 p=.159	--	--
Amnesties for ICC Crimes		--	1.38 p=.429	--	--
Truth Commissions		--	.722 p=.429	--	--
Military Alliance with U.S.		--	--	1.11 p=.562	--
Military Alliance with E.U.		--	--	2.49*** p=.003	--
Aid from U.S.		--	--	1.05**	--

[†] Note: Measure Used is Civil Wars in five years prior to the finalization of the ICC Treaty, namely 1992-1997.

				p=.022	
Aid from E.U.		--	--	1.00 p=.992	--
Article 98 Agreements with U.S.		--	--	1.12 p=.844	--
Log NGOs					1.18 p=.109
Conferences on ICC issues					1.43 p=.125
Log Multilateral Suppression Treaties					1.19 p=.693
# of countries	183	184	182	168	184
# of events	131	90	90	89	90
# of obs.	1922	3667	3611	3224	3367

*=significant at .10; **=significant at .05; ***significant at .01

Note: Several additional variables were tested but were never significant and never affected the results: total share of trade with U.S., total share of trade with E.U., British legal heritage, complexity of ratification procedures.

**Table 2: Implementation of Cooperation Statutes
Cox Proportionate Hazard Model
Hazard Ratios (p-values)**

<i>Explanatory Variables:</i>	Model 1	Model 2	Model 3	Model 4
Democracies without Conflict [†]	5.94* p=.102	5.54 p=.118	6.06* p=.090	9.68 p=.165
Democracies with Conflict	.611 p=.264	.683 p=.396	.614 p=.345	.525 p=.224
Nondemocracies with Conflict	3.32*** p=.001	3.67*** p=.002	3.19*** p=.010	3.37*** p=.009
Log Peacekeepers	1.41*** p=.000	1.52*** p=.001	1.34*** p=.001	1.39*** p=.000
Conferences	1.47** p=.038	1.62*** p=.006	1.44* p=.058	1.53** p=.036
Log Multilateral Suppression Treaties	79.57*** p=.002	262.7*** p=.000	60.9*** p=.001	128.0*** p=.002
GDP per capita	1.000041** p=.012	1.000052** p=.002	1.000035** p=.021	1.000048*** p=.009
Change in Government	.170* p=.055	.248 p=.150	.186** p=.047	.188** p=.032
British Legal Heritage	2.44* p=.065	3.11** p=.026	2.64** p=.036	1.70 p=.328
ICC Leaders	.519* p=.063	.621 p=.208	--	--
Regional Effects of Cooperation Statutes	1.84 p=.569			
Log NGOs		.875 p=.600	--	--
Number of Extradition Treaties		.983** p=.039	--	--
Amnesties for ICC Crimes	--	--	1.23 p=.719	--
Truth Commissions	--	--	1.03 p=.960	--
Military Alliance with U.S.	--	--	--	.739 p=.237
Military Alliance with E.U.	--	--	--	.313*** p=.004
Aid from U.S.	--	--	--	1.16 p=.182
Aid from E.U.	--	--	--	.841 p=.209

Article 98 Agreements with U.S.	--	--	--	.879 p=.842
# of countries	77	79	79	79
# of events	35	35	35	35
# of obs.	815	840	840	840

*=significant at .10; **=significant at .05; ***significant at .01

**Table 3: Criminal Statutes (Enacted and Drafts)-Civil Wars
Cox Proportionate Hazard Model
Hazard Ratios (p-values)**

<i>Explanatory Variables:</i>	Model 1 (Basic)	Model 2	Model 3
Democracies without Civil War [†]	14.70*** p=.009	11.25** p=.021	14.70*** p=.009
Democracies with Civil War [†]	.066** p=.018	.067** p=.017	.067*** p=.019
Nondemocracies with Civil War [†]	10.00** p=.036	10.69** p=.028	8.54* p=.051
Log NGOs	1.34** p=.019	1.37** p=.028	1.32** p=.045
Conferences	1.93*** p=.001	1.69** p=.017	1.94*** p=.002
Log Peacekeepers	1.06 p=.338	1.05 p=.438	1.06 p=.300
ICC Leaders	1.88* p=.076	1.20 p=.651	1.95* p=.053
Regional Criminal Statutes	--	3.95 p=.183	
Log Multilateral Suppression Treaties	--	1.95 p=.175	--
Amnesties for ICC Crimes	--	--	1.82 p=.116
Truth Commissions	--	--	1.45 p=.302
# of countries	191	190	190
# of events	53	53	53
# of obs.	4755	4727	4727

*=significant at .10; **=significant at .05; ***significant at .01

Note: Several additional variables were tested but were never significant and never affected the results: aid from the US and EU, military personnel, change in government, log of GDP, British legal heritage.

[†] Measure Used is Civil Wars in five years prior to the finalization of the ICC Treaty, namely 1992-1997.

Appendix A

**Table of Ratification and Implementation
of the Rome Statute⁸⁶**

Country Name	Signed	Ratified	ICC Cooperation Law Enacted	Crimes Against Humanity in Criminal Code	ICC Cooperation Law Drafted but not Passed	ICC Crimes Law Drafted but Not Passed
Afghanistan	√	√				
Albania	√	√		√		√
Algeria	√					
Andorra	√	√				
Angola	√					
Antigua and Barbuda	√	√				
Argentina	√	√			√	√
Armenia	√			√		√
Australia	√	√	√	√		
Austria	√	√	√			
Azerbaijan				√		√
Bahamas	√					
Bahrain	√					
Bangladesh	√					
Barbados	√	√				
Belarus				√		√
Belgium	√	√	√	√		
Belize	√	√				
Benin	√	√				
Bhutan						
Bolivia	√	√			√	√
Bosnia-Herzegovina	√	√	√	√		
Botswana	√	√				
Brazil	√	√			√	√
Brunei						
Bulgaria	√	√	√			
Burkina Faso	√	√		√		
Burundi	√	√		√		
Cambodia	√	√				

⁸⁶ Table current as of June, 2005 (the end of our data set)

Country Name	Signed	Ratified	ICC Cooperation Law Enacted	Crimes Against Humanity in Criminal Code	ICC Cooperation Law Drafted but not Passed	ICC Crimes Law Drafted but Not Passed
Cameroon	√					
Canada	√	√	√	√		
Cape Verde	√			√		√
Central African Republic	√	√				
Chad	√					
Chile	√				√	√
China						
Colombia	√	√		√	√	√
Comoros	√					
Congo-Brazzaville	√	√		√		√
Costa Rica	√	√		√		√
Cote d'Ivoire	√					
Croatia	√	√	√	√		
Cuba						
Cyprus	√	√				
Czech Republic	√				√	√
Dem. Rep. of the Congo	√	√			√	√
Denmark	√	√	√	√		
Djibouti	√	√				
Dominica	√	√				
Dominican Republic	√	√				
Ecuador	√	√			√	√
Egypt	√					
El Salvador				√		√
Equatorial Guinea						
Eritrea	√					
Estonia	√	√	√	√		
Ethiopia						
Fiji	√	√				
Finland	√	√	√	√		
France	√	√	√	√		
Gabon	√	√				
Gambia	√	√				
Georgia	√	√	√	√		
Germany	√	√	√	√		
Ghana	√	√			√	√
Greece	√	√				
Grenada						
Guatemala						

Country Name	Signed	Ratified	ICC Cooperation Law Enacted	Crimes Against Humanity in Criminal Code	ICC Cooperation Law Drafted but not Passed	ICC Crimes Law Drafted but Not Passed
Guinea	√	√				
Guinea-Bissau	√					
Guyana	√	√				
Haiti	√					
Holy See						
Honduras	√	√				
Hungary	√	√				
Iceland	√	√	√	√		
India						
Indonesia						
Iran	√					
Iraq						
Ireland	√	√			√	√
Israel*						
Italy	√	√			√	√
Jamaica						
Japan						
Jordan	√	√				
Kazakhstan				√		√
Kenya	√	√			√	√
Kiribati						
Kuwait	√					
Kyrgyzstan	√					
Laos						
Latvia	√	√				
Lebanon						
Lesotho	√	√				
Liberia	√	√				
Libya						
Liechtenstein	√	√	√		√	
Lithuania	√	√	√		√	
Luxembourg	√	√				
Macedonia	√	√		√		√
Madagascar	√					
Malawi	√	√			√	
Malaysia						
Maldives						
Mali	√	√		√		√
Malta	√	√	√	√		
Marshall Islands	√	√				
Mauritania						
Mauritius	√	√				
Mexico	√	√				
Micronesia						

Country Name	Signed	Ratified	ICC Cooperation Law Enacted	Crimes Against Humanity in Criminal Code	ICC Cooperation Law Drafted but not Passed	ICC Crimes Law Drafted but Not Passed
Moldova				√		√
Monaco	√					
Mongolia	√	√				
Morocco	√					
Mozambique	√					
Myanmar						
Namibia	√	√				
Nauru	√	√				
Nepal						
Netherlands	√	√	√	√		
New Zealand	√	√	√	√		
Nicaragua						
Niger	√	√				
Nigeria	√	√			√	√
North Korea						
Norway	√	√	√			√
Oman	√					
Pakistan						
Palau						
Panama	√	√				√
Papua New Guinea						
Paraguay	√	√				
Peru	√	√	√			√
Philippines	√					
Poland	√	√	√	√		
Portugal	√	√		√		
Qatar						
Republic of Korea	√	√				
Romania	√	√	√	√		
Russia	√					
Rwanda				√		
Saint Kitts						
Saint Lucia	√					
Samoa	√	√				
San Marino	√	√				
San Vincent and the Grenadines	√	√				
Sao Tome and Principe	√					
Saudi Arabia						
Senegal	√	√				
Serbia	√	√				√

Country Name	Signed	Ratified	ICC Cooperation Law Enacted	Crimes Against Humanity in Criminal Code	ICC Cooperation Law Drafted but not Passed	ICC Crimes Law Drafted but Not Passed
Seychelles	√					
Sierra Leone	√	√				
Singapore						
Slovakia	√	√				
Slovenia	√	√	√			√
Solomon Islands	√					
Somalia						
South Africa	√	√	√	√		
Spain	√	√	√	√		
Sri Lanka						
Sudan	√					
Suriname						
Swaziland						
Sweden	√	√	√			√
Switzerland	√	√	√			
Syria	√					
Tajikistan	√	√				
Tanzania	√	√				
Thailand	√					
Timor-Leste	√	√				
Togo						
Tonga						
Trinidad and Tobago	√	√			√	√
Tunisia						
Turkey						
Turkmenistan						
Uganda	√	√			√	√
Ukraine	√					
United Arab Emirates	√					
United Kingdom	√	√	√	√		
United States*						
Uruguay	√	√			√	√
Uzbekistan	√					
Vanuatu						
Venezuela	√	√		√		
Vietnam						
Yemen	√					
Zambia	√	√				
Zimbabwe	√					

* The United States and Israel signed the Rome Statute but then "unsigned" the treaty and are thus listed as not having signed.

Notes:

Appendix B: Recent Civil Wars, Regime Type, and ICC membership
 (*=party to the Rome Statute)

	Democracy	Non-Democracy
Civil War (of any intensity, 1992-1997)	Colombia* Djibouti* Georgia* Mali* Mexico* Niger* Senegal* Sierra Leone* Spain* Bangladesh Croatia Guatemala India Indonesia Moldova Mozambique Nepal Papua New Guinea Philippines Russia Sri Lanka Turkey	Afghanistan* Bosnia* Burundi* Cambodia* Democratic Republic of Congo* Liberia* Peru* Tajikistan* Uganda* Algeria Angola Azerbaijan Chad Comoros Egypt Eritrea Ethiopia Iran Iraq Liberia Myanmar Pakistan Somalia Sudan Yemen
No Civil War (of any intensity, 1992-1997)	Albania* Andorra* Argentina* Australia* Bahamas Barbados* Belgium* Belize* Benin* Bolivia* Botswana* Brazil* Bulgaria* Canada*	Armenia Antigua* Bahrain Belarus Bhutan Brunei Burkina Faso* Cameroon Centra African Republic* China Côte d'Ivoire Cuba Eq. Guinea Fiji*

	Cape Verde Chile Costa Rica* Cyprus* Czech Republic Denmark* Dominica* Dominican Republic* East Timor* Ecuador* El Salvador Estonia* Finland* France* Germany* Ghana* Greece* Grenada Guinea-Bissau Guyana* Honduras* Hungary* Iceland* Ireland* Italy* Jamaica Japan Kenya* Kiribati South Korea* Latvia* Lesotho Liechtenstein* Lithuania* Luxembourg* Macedonia* Madagascar Malawi* Malta* Marshall Islands* Mauritius* Micronesia Monaco Mongolia* Nauru* Netherlands*	Gabon* Gambia* Guinea* Haiti Holy See Jordan* Kazakhstan North Korea Kuwait Kyrgyzstan Laos Lebanon Libya Malaysia Maldives Mauritania Morocco Oman Qatar Saudi Arabia Singapore Swaziland Syria *Tanzania Togo Tonga Turkmenistan United Arab Emirates Uzbekistan Vietnam Zambia* Zimbabwe
--	---	--

	New Zealand* Nicaragua Nigeria* Norway* Palau Panama* Paraguay* Poland* Portugal* Romania* St. Kitts St. Lucia St. Vincent* Samoa* San Marino* Sao Tome Serbia* Seychelles Slovakia* Slovenia* Solomon Islands South Africa* Suriname Sweden* Switzerland* Thailand Trinidad* Tuvalu Ukraine United Kingdom* United States Uruguay* Vanuatu Venezuela*	
--	---	--

* party to the Rome Statute

Appendix C: Data Appendix

Over the course of our study, we tested a wide variety of variables to consider whether they help explain the pattern of signature, ratification and implementation of the Rome Statute. In Part III of the text we gave an abbreviated description of the data. This appendix describes the variables we used more fully, as well as efforts to test for other relationships for which we ultimately could think of only weak theoretical justifications and which did not have any statistical impact on the findings presented in the paper.

DEPENDENT VARIABLES:

Signature. Whether (1) or not (0) a state has signed the Rome Statute. This variable is used to define the spell between the period open for signature and each country's signing act. Sources: Coalition for the International Criminal Court, Regional and Country Information, www.iccnw.org (website current as of 12/2005); International Criminal Court website, List of States Parties, <http://www.icc-cpi.int/asp/statesparties.html> (updated as of November 2005).

Ratification. Whether (1) or not (0) a state has ratified the Rome Statute. This variable is used to define the spell between the period from open for signature and the act of ratification. Source: Coalition for the International Criminal Court, Regional and Country Information, www.iccnw.org (website current as of 12/2005); International Criminal Court website, List of States Parties, <http://www.icc-cpi.int/asp/statesparties.html> (updated as of November 2005).

Enactment of Cooperation Statute. Whether (1) or not (0) a state has enacted a statute to allow for cooperation (extradition, evidence collection, immunity for ICC officials). This variable is used to define the spell between ratification and enactment of cooperation. Coded 1 if the state has acted to do at least one of the above; otherwise 0. Source: Coalition for the International Criminal Court, Regional and Country Information, www.iccnw.org (website current as of 12/2005); Progress Reports submitted by members of the Council of Europe, 2001 and 2003.

Change in Criminal Code. Coded 1 if the criminal code does contain a provision on crimes against humanity or if the penal code was specifically amended to incorporate crimes from the Rome Statute; 0 otherwise. Sources: Coalition for the International Criminal Court, Regional and Country Information, www.iccnw.org (website current as of 12/2005); International Committee of the Red Cross, International Humanitarian Law, Implementing Legislation by State, www.icrc.org; Progress Reports submitted by members of the Council of Europe, 2001 and 2003.

EXPLANATORY VARIABLES:

Democracy. [Whether](#) (1) or not (0) a country's domestic governing institutions are mostly free. Source: Freedom House.

Civil War. Whether (1) or not (0) each country experienced civil war of any intensity between 1988 and 2004. Source: PRIO/Uppsala Armed Conflict Dataset. http://www.prio.no/cwp/armedconflict/current/Conflict_list_1946-2004.pdf.

International conflict at home. Whether (1) or not (0) each country experienced an international or an internationalized armed conflict (i.e. involving more than one state) of any intensity that occurred on its territory between 1988 and 2004. Source: PRIO/Uppsala Armed Conflict Dataset. http://www.prio.no/cwp/armedconflict/current/Conflict_list_1946-2004.pdf.

Military Personnel. Number of military personnel per country, logged. Source: Correlates of War dataset. www.correlatesofwar.org.

Peacekeepers. The number of peacekeepers (logged) each state sent to foreign territory as part of United Nations peacekeeping missions. Source: United Nations, "Monthly Summary of Contributors of Military and Civilian Police Personnel", <http://www.un.org/Depts/dpko/dpko/contributors/>. Unfortunately, we were unable to secure any reliable data on peacekeepers sent by regional organizations, such as the African Union. Nevertheless, we felt that U.N.-peacekeeping adequately captured the risk of prosecution of peacekeepers.

Torture. A dichotomous, based on the 5-point scale developed by Oona Hathaway: 1: No or isolated beatings; 2: Some beatings, no torture; 3: Beatings are common, some torture; 4: Beatings are routine, torture is common; 5: Torture is routine and widespread. Information is based on U.S. Department of State Country Reports. We code 1 for category 5 (wide-spread and systematic torture) and all other categories are coded 0. These reports do not break information down by quarter, and therefore we entered a single value for each quarter in a given year. Source: Hathaway, Oona. 2002. Do Human Rights Treaties Make a Difference? *Yale Law Journal* 101-99.

Human Rights Treaties. How many of the following treaties on relating to individual political and civil rights the state had ratified by December 31, 2001 (the mid-point of our dataset): the Genocide Convention, the Convention on the Elimination of All Forms of Racial Discrimination; The International Covenant on Civil and Political Rights (ICCPR); the First Optional Protocol to the ICCPR; and the Convention Against Torture. Source: United Nations Treaty Database.

Amnesties for ICC Crimes. Whether (1) or not (0) a country had granted amnesties for ICC crimes between 1974 and 2005. Source: data compiled by Louise Mallinder (on file with authors). We are grateful to Louise Mallinder for sharing this data with us.

Truth Commissions. Whether (1) or not (0) the country had established a truth commission between 1974 and 2005. Each truth commission was dated from the date of its establishment. Sources: U.S. Institute of Peace, Truth Commissions Digital Collection, <http://www.usip.org/library/truth.html>; International Center for Transitional Justice, <http://www.ictj.org/en/index.html>; U.S. State Department Human Rights Country Reports, and Sikkink and Walling, Errors about Trials, Figure 3 (Feb, 2006).

Non-Governmental Organizations. The number of NGOs (logged and lagged one period) in each state that are members of the Coalition for the International Criminal Court (CICC), an umbrella network of over 2,000 NGOs “advocating for a fair, effective and independent International Criminal Court (ICC).” It is our understanding that most NGOs active on ICC issues are members of the CICC. Source: Coalition for the International Criminal Court. We are grateful to CICC for providing us with their membership information.

Constitutional Amendment Required but not Enacted. Whether (1) or not (0) a country will likely have to or must ratify its constitution in order to ratify the Rome Statute but has not yet done so. Source: Coalition for an International Criminal Court and Progress Reports submitted by members of the Council of Europe. www.iccnw.org.

Legal Heritage. Whether (1) or not (0) a country’s legal system is based primarily on common law. Data were collected from two sources: Global Development Network Growth Database, William Easterly and Hairong Yu, World Bank. <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:20701055~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html> and David M. Waguespack and Johanna K Birnir. “Foreignness and the Diffusion of Ideas.” *Journal of Engineering and Technology Management*. 22(1-2):31-50.

Regional Behavior. The proportion of countries within each region that had taken the implementing action (proportion signing, ratifying, enacting cooperation statutes, and changing criminal statutes, depending on the outcome variable under investigation) in the previous observation period. Regions are those defined by the World Bank: East and Southern Africa, West Africa, East Asia and Pacific, Central Asia, Eastern Europe, Rest of Europe, Middle East, North Africa, Americas.

International Conferences. The total number of conferences attended by each country’s government officials each quarter. The criteria for inclusion were 1) conference subject had to directly involve the ICC, 2) conference attendees must include some governmental representative, whether member of executive, legislature, or judiciary, or conference must be sponsored by a governmental entity (of that state or another state) and 3) has to involve a formal meeting or workshop as opposed to meetings (missions) between NGO members and government officials. This list does not include “prepcoms”, “postcoms” or other meetings directly related to negotiations over ICC itself. Also does not include general international meetings at which the ICC was one item on the agenda. We classified the conferences according to whether they involved only a single country (meeting for example with NGOs), regional conferences, or global conferences, involving countries from multiple regions, and

then combined these into a single statistic. Source: original data coded from newsletters and events listings compiled by the Coalition for the International Criminal Court. Specifically, we used the CICC Monitor, available at <http://www.iccnw.org/>, the “archive of events” listed on the CICC, website, <http://www.iccnw.org/>, and CICC regional updates, provided to the authors by the CICC.

Extradition Treaties: The total number of bilateral extradition, mutual legal assistance, or judicial assistance treaties signed between each state and all other countries in the world as of each calendar quarter. For treaties from the UNTS database, date listed is the Signature/Adoption date as listed in the UNTS database. When original and subsequent agreements for the same treaty exist, the date of signature on the original agreement has been used, except when the signing country was not a party to the original agreement, in which case the date of the first signature when that party became a party to the treaty is used. For those treaties for which no Signature/Adoption date was available in the UNTS database, the “Entry into Force” date (found in the UNTS database) has been used, and when Signature/Adoption date and Entry into Force dates are not available, “Date of Effect” was used and each have been indicated as such. Sources: United Nations Treaty Series, <http://untreaty.un.org> (database current through 2003); treaties promulgated by the Council of Europe, <http://conventions.coe.int/Default.asp>; U.S. Treaties in Force collection published by the U.S. State Department, <http://www.state.gov/s/l/treaty/treaties/2006/index.htm>; the United Nations Crime and Justice information network, BILATERAL AGREEMENTS ON EXTRADITION, JUDICIAL/LEGAL ASSISTANCE, CONTROL OF NARCOTIC DRUGS, AND PRISONER TRANSFER BY COUNTRY, <http://www.uncjin.org/Laws/extradit/extindx.htm>, and the Organization of American States, [http://www.oas.org/juridico/english/treaties/b-47\(1\).html](http://www.oas.org/juridico/english/treaties/b-47(1).html)

Cooperative Prosecutorial Agreements. The number of treaties that contain cooperative prosecutorial provisions ratified by each country (of a total possible twenty-one multilateral treaties). These treaties include: International Convention for the Suppression of Terrorist Bombings; International Convention against the Taking of Hostages; International Convention for the Suppression of Acts of Nuclear Terrorism; United Nations Convention against Corruption; International Convention for the Suppression of the Financing of Terrorism; Convention on Psychotropic Substances; Single Convention on Narcotic Drugs; United Nations Convention against Transnational Organized Crime; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; Convention on Offences and Certain Other Acts Committed on Board Aircraft; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention on the Physical protection of Nuclear Material; Protocol on the Suppression of Unlawful Acts of Violence at airports Serving International Civil Aviation; Convention for the suppression of Unlawful Acts Against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; Convention on the Marking of Plastic Explosives for the Purpose of Detection; African Convention on Preventing and Combating Corruption; Inter-American

Convention against Corruption; Europe Criminal Law Convention on Corruption. We thank Sean Murphy for assisting us in developing this list of relevant multilateral treaties.

Military Alliance with the United States. Whether (1) or not (0) the country had a military alliance with the United States at any time during the observation period. Source: Correlates of War Database. <http://cow2.la.psu.edu/datasets.htm>

Military Alliance with the European Union. Whether (1) or not (0) the country had a military alliance with any country of the European Union at any time during the observation period. Source: Correlates of War Database. <http://cow2.la.psu.edu/datasets.htm>

Aid from the United States. Total net overseas development assistance (ODA) received by each country from the United States as a proportion of the recipient's, interpolated to produce quarterly observations and lagged one year. ODA is defined as "... those flows to countries on Part I of the DAC List [of developing and transitional countries] and to multilateral institutions for flows to Part I aid recipients which are: i. provided by official agencies, including state and local governments, or by their executive agencies; and ii. Each transaction of which: a) is administered with the promotion of the economic development and welfare of developing countries as its main objective; and b) is concessional in character and conveys a grant element of at least 25 per cent (calculated at a rate of discount of 10 per cent)." See DAC Statistical Reporting Directives (April 2000): pg. 11-12. Source: OECD Development Assistance Committee, International Development Statistics (IDS), www.oecd.org/dac/stats/idsonline [Accessed 5/17/06].

Aid from the European Union. As above, referring to aid from countries from the European Union. Source: OECD Development Assistance Committee, International Development Statistics (IDS), www.oecd.org/dac/stats/idsonline [Accessed 5/17/06].

Trade with the United States. Value of total trade with the United States as a percentage of total imports and exports for each country. International Monetary Fund, Direction of Trade Statistics. <http://www.imf.org/external/pubs/cat/longres.cfm?sk=154>

Trade with the European Union. Value of total trade between each country and the states making up the European Union (as the membership was constituted in 1995) as a percentage of total imports and exports for each country. International Monetary Fund, Direction of Trade Statistics. <http://www.imf.org/external/pubs/cat/longres.cfm?sk=154>

Article 98 Agreements. Whether (1) or not (0) the country has signed an Article 98 Agreement with the United States; that is, an agreement through which the United States seeks to ensure that its nationals will not be surrendered to the ICC for prosecution by third-states. Sources: State Department's list of U.S. Treaties in Force, <http://www.state.gov/s/l/treaties/>, and data compiled by the Coalition for an International Criminal Court. Coalition for the International Criminal Court, Status of U.S. Bilateral Immunity Agreements.

Leaders. The intersection of Membership in the Like-Minded Group and OECD membership. The “Like-Minded Group” was a coalition of states, led by Canada and then Australia, that emerged before the Rome negotiations for the ICC treaty that shared a commitment to “an independent and effective Court.”⁸⁷ Membership in this group constituted a show of support for the strong Court that eventually emerged from the Rome negotiations. Source: list published by the NGO Coalition for an International Criminal Court at the beginning of the Rome Conference. NGO Coalition for an International Criminal Court, *The Rome Treaty Conference Monitor*, Issue 15, p. 1 (July 3, 1998) (provided to authors by the Coalition for an International Criminal Court).

National Wealth. We considered a variety of measures of national wealth from the World Development Indicators, including annual GDP growth, use of IMF credit, and GDP per capita.

⁸⁷ Philippe Kirsch & Darryl Robinson, *Reaching Agreement at the Rome Conference*, in *The Rome Statute of the International Criminal Court: A Commentary*, Vol. I, at 67, 70 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds. 2002).