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Assessing the International Criminal Court¹

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One of the most important issues surrounding international courts is whether they can further the dual causes of peace and justice. None has been more ambitious in this regard than the International Criminal Court (ICC). And yet the ICC has been the object of a good deal of criticism. Some people claim it has been an expensive use of resources that might have been directed to other purposes. Others claim that its accomplishments are meager because it has managed to try and convict so few people. And many commentators and researchers claim that the Court faces an inherent tension between the dual objectives of securing the peace and ending impunity for perpetrators of some of the most egregious crimes, including genocide, crimes against humanity, war crimes, and crimes of aggression.²

This chapter assesses the ability of the ICC to deter. In so doing, we follow the lead of the introduction and think not only about the Court's performance in the narrow sense (e.g., how many people have been tried?) but rather think about the ways in which the ICC has contributed to a broader culture that refuses to tolerate impunity for violations of international criminal law. Because we must limit our topic to manageable proportions (and because we are social scientists and not lawyers) our focus is primarily on *outcome performance* rather than procedural performance. We focus on two outcomes alluded to in the introductory chapter: 1) reaching desired goals, and 2) deterring atrocities against civilians.

As a criminal court, the ICC is much different than courts that settle disputes between states or disputes between private parties (e.g., investors) and states. The ICC fits four out of five of the criteria set out in the introduction. It decides issues of guilt or innocence on the basis of

²² Rome Statute, Article 5(1)a-d.

international law (greatly influenced in this case by domestic criminal procedures); it follows pre-determined rules of procedure, detailed in the Rome Statute, its founding document; the Court issues legally binding decisions and is composed of independent judges. States are parties to the Rome Statute, but only individuals are on trial in the criminal cases that come before the Court.³ The Office of the Prosecutor has been empowered by the States Parties to bring criminal charges against individuals accused of violations of international criminal law.

There are many ways one could judge the ICC's performance. It might be evaluated based on its contribution to justice (Goodman and Jinks 2003), on its normative value (Bass 2003), on its capacity to offer societal "atonement" (Bikundo 2012), and/or on its legitimacy in the eyes of local victims (Clark 2011a). We will concentrate on examining the extent to which the ICC succeeds in achieving its desired outcomes (Introduction). The preamble of the Rome Statute makes it clear that the ICC's job is to improve the possibility of deterring the most egregious human rights violations and war crimes. The Court understands its own mission as being "to help end impunity for the perpetrators of the most serious crimes of concern to the international community."⁴ Indeed, in its referral to the ICC, Uganda (the first state to refer a case to the Court) appealed for "the suppression of the most serious crimes of concern to the international community as a whole," although it is widely recognized in this case that the intent was to wield a legal threat against rebels alone.⁵ At the same time, the purposes of the ICC were

³ States Parties may have an active role in admissibility proceedings. See for example Rome Statute, Articles 17-19.

⁴ ICC, at https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx.

⁵ "Referral of the situation concerning the Lord's Resistance Army," submitted by The Republic of Uganda, 16 December 2003. At <http://www.rohan.sdsu.edu/~abranh/Current%20Projects/Uganda%20ICC%20Referral%202003.pdf>. The original referral reflects the government of Uganda's hope that the Court could be used to prosecute rebels alone. While this was in fact the decision of the Office of the Prosecutor (OTP) in this case, referrals inherently allow for investigation and indictments of any individuals. See the discussion in Nouwen (2103), pp. 114-115.

to be achieved while protecting state sovereignty to prosecute crimes committed in their jurisdictions, through complementarity.⁶

How should we then assess the performance of the Court? We present evidence of two kinds: first, we look for the imprint of the ICC on domestic law. In the case of the ICC, States Parties have strong incentives to reconcile domestic criminal statutes with international criminal law, since to do so allows them to take jurisdiction should they want to do so.⁷ One of the major performance outcomes of the ICC is therefore the extent to which it has encouraged legal change within the domestic crime statutes of members. Second, we look for actual evidence that the ICC or the domestic laws it has encouraged have contributed to crime deterrence. Does the extension of the ICC jurisdiction through ratification actually deter the crimes it was designed to punish? Do changes in crime statutes that the ICC has stimulated done so?

Evidence exists that the ICC has performed well in this regard (Jo and Simmons 2016). We discuss broad-based evidence of its deterrence effects, but we also focus in on a specific and very violent case: that of Uganda. We believe there is some evidence that the ICC has deterred some heinous crimes even in this difficult case. We discuss the evidence that the ICC's jurisdiction and action have deterred both state agents and rebel groups from committing atrocities against civilians in this case. In so doing, we recognize that this may not be what the government of Uganda originally intended when they ratified the ICC. Nonetheless, as the

⁶ Concerns about preserving state sovereign via carefully worded complementary jurisdiction was a strong emphasis of many states during negotiation of the ICC statute. See paragraphs 91-93 and 100 of the United Nations Report of the Ad Hoc Committee on the Establishment of an International Criminal Court General Assembly Official Records, Fiftieth Session Supplement No. 22 (A/50/22), Available at http://www.legal-tools.org/uploads/tx_ltpdb/doc21168.pdf.

⁷ A case is inadmissible when "The case is being investigated or prosecuted by a State which has jurisdiction over it" (Rome Statute, Article 17(1)(a)). If a states wants to have a credible objection to admissibility, then, there are clear incentives to define the crimes listed in Article 5(1)a-d in domestic criminal statutes.

introduction entreats us, we should look for evidence of court performance in individual cases as well as more broadly. The case of Uganda helps us to understand, in greater detail, just how international justice institutions, such as the ICC, become relevant on the ground.

I. Background on the ICC

The twentieth century has been a remarkable period of international judicialization.⁸ International courts and court-like institutions have sprouted in surprising numbers to deal with specific functional problems, like conflict over trade agreements or disagreements over the application of the Law of the Sea, and regional concerns such as individual human rights. The ICC is different from nearly all of these institutions. Post-Cold War *internal* conflicts caused non-governmental human rights, humanitarian organizations, and some states⁹ to call for an end to impunity for crimes against humanity and genocide (Lee 1999, Pace and Schense 2002, Glasius 2006). International Criminal Tribunals for the former Yugoslavia and then Rwanda primed the international community to think about the creation of the International Criminal Court (Tochilovsky 2003, Danner 2006). After several years of negotiation, a standing Court was established with the ability to prosecute high officials – even national leaders. Today, the ICC is the only international court devoted to the enforcement of international *criminal law*, holding

⁸ On the development of international law and judicial institutions over the past few decades see (Abbott 2000, Keohane, et al. 2000). On the development of “new style” ICs that give individuals a right to launch cases (in criminal cases, a prosecutor) see Alter (2011).

⁹ See for example the Statement of Norway, Nov. 12, 2001, available at <http://www.iccnw.org/documents/Norway6thComm12Nov01.pdf>.

individuals accountable for violations with the potential to imprison for life persons convicted of such crimes, operating potentially on a global scale.

The Court has jurisdiction over all potential cases of genocide, crimes against humanity, and war crimes that occur after July 1, 2002 in the territory of a state that has ratified the treaty or that are committed by a national of such a state.¹⁰ Unlike the traditional model exemplified by the International Court of Justice, the treaty creating the ICC does not allow States Parties to decide whether or not to accept the Court's jurisdiction on a case-by-case basis.¹¹ Furthermore, unlike the original draft treaty for the Court,¹² the Rome Statute invests a prosecutor with the ability to commence cases on her or his own initiative without relying solely on the referrals of states (Danner 2003:513-15).¹³ The Rome Statute does not allow States Parties to make reservations to its provisions.¹⁴ Adherence is an all-or-nothing choice.¹⁵ 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

¹⁰ Rome Statute, art. 12(2). 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.

¹¹ A non-party 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).

¹² 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).

¹³ 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. These are described further in (Danner 2003).

¹⁴ Rome Statute, Art. 120.

¹⁵ The treaty does officially allow countries to decline to recognize the Court's jurisdiction for seven years after the state becomes a party to the treaty. Rome Statute, Art. 124. Furthermore, the Court does not have jurisdiction over crimes of aggression until 2017. See RC/Res.6 "The Crime of Aggression" (Kampala Amendment, 2010) at http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf.

to presidential, parliamentary, or legislative officials in their domestic systems.¹⁶ The result is a court much more independent of state control in the initiation of cases and far less protective of state sovereignty than was originally contemplated or has ever existed in modern history.

Enthusiasts of the ICC point out that its membership is very widespread. As of 2015, 123 states had ratified the Rome Statutes (Figure 1), thus becoming parties to the agreement and placing their nationals under the Court's (complimentary) jurisdiction. Detractors, however, see the glass as much more than half empty, with some of the most powerful and populous states in the world – including the United States, India, China and Indonesia – as non-members. Some argue the Court has been overwhelmed, while others argue it has not done much. On this point, we simply let the facts speak for themselves: the ICC has issued 31 arrest warrants (eight individuals remain fugitives), heard 23 cases, and convicted two men (Thomas Lubanga in 2012, and Germain Katanga in 2014, both rebel leaders of different rebel organizations in Democratic Republic of Congo (DRC)). The Court is now examining crimes against humanity in Uganda, the Central African Republic, the DRC, Côte d'Ivoire, Sudan, Kenya, Libya, and Mali, and has begun preliminary investigations to decide whether or not to proceed with indictments¹⁷ in Afghanistan, Georgia, Guinea, Colombia, Honduras and Nigeria.

[Figure 1 about here]

¹⁶ Rome Statute, Art. 27.

¹⁷ We use the words “indict,” “indictment” and “indictee” to refer to persons for whom the ICC has served warrants and related processes. The word “indict” does not appear in the Rome Statute.

This background information about the ICC powers and purposes are food for thought. But its performance should be assessed systematically, and we suggest the best outcome performance measure is the extent to which the ICC has helped to deter the crimes within its jurisdiction. This can be done *indirectly* (through the development and encouragement of national capacities) and *directly*, by sending strong signals that impunity is a waning option.

II. The ICC and Deterrence: Theory and Mechanisms

In this section we justify our focus on the capacity of the ICC to deter crimes within its jurisdiction as one of the most important aspects of its performance, of which there are potentially many. We cannot possibly address all aspects of institutional performance in a single paper. Nor is our expertise in process performance. We therefore concentrate on *outcome performance*. Second, we refrain from attempting to read the minds of the creators of the ICC by devising creative interpretations of the Court's purposes. Instead, we take seriously the plain meaning of the words of the preamble of the Rome Statute: *the ICC was meant, at least indirectly by addressing impunity, to contribute to the prevention of international crimes*. For us, this means the ICC was designed to deter the kinds of atrocities that are within its jurisdiction. Note this does not mean the ICC was created to put an end to war, although the preamble clearly expresses the idea that such crimes do "threaten the peace, security and well-being of the world..." Nor should the ICC be judged by the (inevitable) fact that some perpetrators may not actually face trials. The preamble is clear that the purpose of the ICC is to "put an end to

impunity,” which means that there should no longer be *presumed exemption from punishment*.¹⁸ The extension of jurisdiction via ratification ends *impunity* understood as exemption. *No one is exempt* from consequences flowing from the *obligation* to refrain from committing crimes under the ICC’s jurisdiction. International criminal law applies to all, whether or not a specific individual actually faces trial. The number of trials held is, for our purposes, only relevant insofar as it undermines the ability of the ICC to contribute to the prevention of international crimes. The key performance indicator therefore should be: has the ICC contributed to *crime deterrence*?

We argue that it has. Prosecutorial deterrence refers to the omission of a criminal act out of fear of sanctions resulting from legal prosecution. People are increasingly likely to be deterred from violating the law when the chances and severity of a legal sanction, such as a fine, incarceration or capital punishment, increases. As such, law violation is a function of prosecution and sentencing. As the risk of more severe penalties is perceived to increase, the likelihood that an individual will commit a crime is reduced and the crime rate falls (holding any “utility” resulting from the violation constant).

For decades, the criminal deterrence literature has debated the question of exactly which elements of this rationalist model account for the deterrence of criminal behavior. The idea that severity of punishment largely drives deterrence (Grasmick and Bryjak 1980) fueled the move toward harsher sentencing in the United States in the 1980s. However, a growing consensus in the deterrence literature suggests that the swiftness and especially the *likelihood* of punishment

¹⁸ See <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF-8#q=define%20impunity>.

may more effectively deter crime than severity of punishment (Kleiman 2009, Wright 2010). Empirical researchers employing surveys, experiments and scenarios also conclude that the likelihood of punishment is key for deterring crimes ranging from tax evasion to theft to sexual assault (Nagin and Paternoster 1993, Nagin 1998).

Raising the risk of punishment where the rule of law is otherwise weak is precisely the *formal* role envisioned for the ICC. The Court was designed to do this in two ways. The first is through its own authority to prosecute. The Court's jurisdiction applies to cases of genocide, crimes against humanity, and war crimes¹⁹ that occurred after July 1, 2002 in the territory of a state that has ratified the treaty or that is committed by a national of such a state or in cases referred to it by the UN Security Council.²⁰ The Office of the Prosecutor ultimately decides which situations to pursue, but cases may be referred by member states (e.g., Uganda, the DRC, the Central African Republic, and Mali), the Security Council (Sudan and Libya), or initiated by the Prosecutor herself (Kenya and Côte d'Ivoire).

General deterrence is only possible if the Court's existence and actions raise the perceived likelihood that an individual will be tried and punished. Above we discussed the growing salience of international criminal law by various measures. To date, the ICC prosecutor has indicted more than 35 persons, and a further nine situations (involving Afghanistan, Honduras, Korea, Nigeria, Colombia, Georgia, Guinea, Palestine, and Ukraine) are under preliminary examination for jurisdiction and admissibility. Prosecutorial deterrence theory implies that investigations, indictments and especially successful prosecutions should trigger a

¹⁹ See Rome Statute, Article 5. We refer to these below as "ICC crimes" or "international crimes."

²⁰ Rome Statute, Art.12(2); Chapter VIII covers UNSC authority to refer.

reassessment of the likelihood of punishment and a boost to general deterrence (Geerken and Gove 1975) – a result consistent with Kim and Sikkink’s (2010) study of national human rights trials in transition countries.

The most common rejoinder of ICC skeptics is that nine investigations and 35 indictments is not much, and not enough to affect the behavior of governments and rebels locked in violent conflict with each other with civilians as pawns often in between. Our first response is that 35 indictments is considerable, *compared to impunity*. But moreover, there is no reason we should suppose governments and rebels sift through evidence in a completely objective way. These actors are as susceptible as any other with a human brain in their heads to biases produced by availability heuristics. Availability heuristics, for example, make it far more likely that people will remember ICC investigations and warrants rather than their lack, as well as convictions rather than acquittals. The former are salient while the latter often go unnoticed. Just as an example, a look at google trends for 2012 shows a significant search trend for Thomas Lubanga Dyilo (who was convicted for war crimes in March 2012) yet nothing but a flat line for Mathieu Ngudjolo Chui (who was acquitted for similar crimes in December that same year). The name of the convicted man also has about 30 per cent more google hits, and 230 per cent more press coverage, as measured by articles in the Lexis-Nexis database, than the name of the acquitted man. Conviction is news; acquittal, not so much.²¹ Note we are not claiming that rebels and government officials do these searches; we are simply demonstrating that small numbers of convictions do not undercut our deterrence argument for well-known psychological

²¹ The trial of Slobodan Milosevic provided an exceptionally poignant image of a national leader subjected to the humiliation of an international trial.

reasons. Arguably, the ICC is an institution that is likely to make the risk of punishment both salient and vivid.

The common rejoinder also neglects a crucial indirect deterrence mechanism. The Rome Statute's "complementarity regime" creates a channel for the ICC to support prosecutorial deterrence at the *national* level as well. The ICC is designed to complement, and not to preempt or substitute for national prosecution.²² National courts have the option of investigating a case domestically before the ICC can adjudicate it.²³ As the Court's first prosecutor stated, "intervention by the ICC must be exceptional—it will only step in when states fail to genuinely act."²⁴ The ICC may nonetheless find a case admissible despite domestic action if the Court determines that "the state is unwilling or unable genuinely to carry out the investigation or prosecution."²⁵ Sudan's desultory investigations and prosecutions of crimes committed in Darfur provide an example of the kind of behavior the admissibility provisions were designed to override (ICC 2006).

This complementarity principle bolsters the ICC's prosecutorial deterrence to the extent that it creates incentives for states to strengthen their own legal capacities to try and convict individuals of international crimes (Dunoff and Trachtman 1999, Burke-White 2008). A recent ICC report to the United Nations notes several national legal reforms implemented after the

²² See Rome Statute, Preamble (emphasizing that the ICC "shall be complementary to national criminal jurisdictions").

²³ See Rome Statute, Preamble and Art.1. For a discussion of the conditions under which domestic courts are likely to enforce international human rights law, see Lupu (2013).

²⁴ 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>.

²⁵ Rome Statute, Art.17(1)(a).

launch of preliminary examinations, including reforms in Guinea, Colombia, and Georgia (ICC 2011). Sarah Nouwen (2013) documents how ICC investigations catalyzed legal reforms in Uganda and Sudan. Uganda's ICC implementing legislation was passed only recently, in 2010, but it facilitates prosecution of international crimes in the Ugandan High Court (Nouwen and Werner 2011).

The evidence that the Rome Statute has contributed to strengthening of the laws and institutions to deter international crimes is strong and systematic. A careful look at the dates of ratification and of domestic criminal law reform indicates that ICC ratification *precedes* most of these crime statute reforms, indicating that the reform cases are, in fact, plausibly connected with the ICC regime.²⁶ Among the 44 ratifying countries, 10 countries did not reform their crime statutes at all, 28 countries implemented some reform, and 6 underwent substantial reform. Among non-ratifying states, only 2 countries reformed their crime statutes to conform with ICC law. Note also that the list of crime statute reformers includes unlikely candidates in the absence of an ICC obligation: Uganda, Kenya, Niger, Cambodia, Georgia, Mali, Senegal, Burkina Faso, Central African Republic, Peru, Chile, Argentina, and Uruguay. In a sample of over 100 states with a post-World War history of domestic civil war violence, Jo and Simmons (2016) report a strong statistical correlation between ICC ratification and changes in domestic crime statutes that strengthen the ability to prosecute international crimes. Thus, an *indirect* channel through which the ICC may exert prosecutorial deterrence is through stimulating domestic laws and structures that overtime enhance the ability of national courts to act (Stahn and El Zeidy 2011), theoretically bolstering prosecutorial deterrence. We consider this to be an indirect *multiplier*

²⁶ Source: ICC Legal Tools, Implementation Database, <http://www.legal-tools.org/go-to-database/>.

effect of the ICC itself. One might expect a certain asymmetry in the use of domestic law, since governments are likely to have much more influence over the domestic legal machinery than do their opponents, but as we show below in Uganda, government allies - local defense units, for example – have been prosecuted at least in some instances. Arguably, national courts have contributed to a broader system-wide expectation that impunity is no longer quietly tolerated (Sikkink 2011).²⁷

But do perpetrators and potential perpetrators take note? Qualitative research reveals such changes become part of leaders' updated calculations. For example, the former Colombian President Pastrana expressed concerns that he might get prosecuted by the ICC, and the paramilitary leader, Vicente Castano of the Autodefensas Unidas de Colombia (AUC), was “sharply aware and fearful of the possibility of ICC prosecution, a fear that reportedly directly contributed to his demobilization” (Grono 2012). Even some rebel groups have begun to assess risks in the ICC's shadow. For example, the two main rebel groups in Colombia – the Fuerzas Armadas Revolucionarias de Colombia (FARC-EP) and the Unión Camilista - Ejército de Liberación Nacional (UC-ELN) – have published internal documents assessing the likelihood of prosecution by the ICC or domestic courts (Cantor and Engstrom 2011). ICC investigations, indictments and convictions or those triggered by complementarity are likely to encourage actual or potential perpetrators to reassess the risks of punishment – *relative to the status quo, which is often impunity* – and to moderate their behavior.

²⁷ Many legal experts consider the development of such national capacities to be the most important legacy of the ICC. See Slaughter and Burke-White (2006:339-41) and Burke-White (2008).

Moreover, there may be good reasons to think that changing domestic statutes matters. For one thing, it may increase the domestic capacity to prosecute egregious human rights violations domestically. The correlation coefficient between crime statute reform and domestic human rights trials in the next year is strong and positive,²⁸ which implies a clear positive relationship between enhanced crime statutes and trials. In other words, ratification of ICC statutes is associated with a chain of consequences: ratification creates incentives to change domestic laws, which in turn are associated with prosecutions.²⁹ Recent research suggests this account is quite plausible. For example, Dancy and Montal (2014) find an increase in African countries' human rights related domestic trials of state agents, specifically after the ratification of Rome Statute. The authors note a significant increase in the number of human rights prosecutions and guilty verdicts following ICC investigation in Uganda³⁰ and DRC,³¹ a moderate increase in the Central African Republic and Sudan, and no notable trends in the case of Cote d'Ivoire and Kenya (which are too recent to assess). We are not naïve enough to believe any of these cases represent international standards of justice, nor do they overturn the prevalent culture

²⁸ The trials variable is from Kim and Sikkink (2011). The correlation coefficient between reform and human rights trials is .176 (p-value: 0.000). Spearman correlation test for ordered variables returns a similar result. Spearman's rho is 0.166 with p-value of 0.000.

²⁹ Dancy and Sikkink (2011-2012) also find quantitative as well as qualitative evidence that "countries that ratify treaties protecting core rights with individual accountability provisions are more likely to use human rights prosecutions than countries that have not ratified these treaties (751)."

³⁰ Opinions vary as to whether the trial was impartial, credible and fair Nouwen (2012a) notes that "The prosecution of Kwoyelo was prompted by opportunism rather than law or policy. Kwoyelo is considered of little use by the ruling party. Rather, Kwoyelo, as a Ugandan 'Tadic', could satisfy the ICD's institutional craving for a first case, and during the ICC Review Conference in Kampala the preparations for his case served to demonstrate the host country's commitment to international justice at home" (p.221-2). See also Nouwen 2012b: "Critics charge that Kwoyelo was politically convenient; his submission for amnesty was ignored; it was a political show before the Ugandan government hosted the ICC Review Conference in 2010; and that it was the only trial thus far taken up by the ICD."

³¹ See also the Transitional Justice Research Collaborative, events history data on human rights trials <https://transitionaljusticedata.com/>.

of impunity in these and similar cases, but they do suggest that some institutional change has occurred in some of the worst cases in which the ICC has had an influence.

In sum, we argue that ICC performance should be assessed in terms of its ability to deter the kinds of crimes under its jurisdiction. The ICC and the norms it embodies are highly salient institutions that have caught the attention of would-be perpetrators, and influence them to reassess their prospects for apprehension and punishment. Prosecutorial deterrence is therefore enhanced by conditions that make prosecution more likely in a given jurisdiction, such as ratification of the Rome Statute, passage of ICC implementing legislation, national trials or court reforms that make trials more probable and credible.³² In the next section, we discuss the evidence for these propositions in one of the most violent cases: that of Uganda.

III. ICC's Deterrence Potential in Uganda

Uganda is one among eight situations currently on the ICC docket. Uganda was the very first situation the Court took up in July 2004, which gives us greater temporal coverage than is possible with other cases. The Ugandan government signed the Rome Statute in March 1999, ratified the Statute in June 2002, and self-referred its case to the Court in December 2003. The Ugandan military has fought the Lord's Resistance Army (LRA) over two decades, and civilian abuse and brutality are well-documented on both sides (Schomerus 2007). Many observers think that the ICC failed in Uganda (Branch 2011) and are cynical about the Ugandan government's

³² On the phenomenon of "enforcement spillovers" by which monitoring and enforcement increases compliance even in areas without monitoring or enforcement see Rincke and Traxler (2010).

self-referral to the Court, suspecting the Court's bias (Clark 2011b). Against this backdrop, we evaluate the effects of Court's actions in Uganda. Is there any evidence that the jurisdiction and actions of the Court have deterred ICC crimes? We focus specifically on violent attacks against civilians – one of several international crimes under the Court's jurisdiction. We argue that there is plausible evidence of a deterrent effect of the ICC, even in this case, one of the most violent situations in which the Court has been involved.

ICC and Ugandan Military Attacks

Table 1 summarizes the key events described above, including not only military and political developments that might impact the LRA's behavior toward civilians, but also ICC interventions relevant to the situation, starting from 1997.

[Table 1 about here]

Examining data from the Armed Conflict and Location Event Data (ACLED v.2) from January 1, 1997 to March 28, 2010, reveals two general patterns.³³ First, government attacks on civilians decreased in magnitude during this time, and those that do occur are harder to attribute with certainty to the government. The number of “accused” (that is, unsubstantiated) attacks increases as a share of total violations. Second, there is a reduction in coordinated actions by government forces, such as aerial bombardments, which suggests that the Ugandan chain of command may have refrained from coordinating military attacks against civilians, at least at the

³³ The data include government violence against civilians within and outside of Uganda, although the majority of violence instances occurred primarily within Uganda.

highest levels. Much of this change can be attributed to the diminished presence of LRA forces in northern Uganda and a decrease in the number of battles. But it is notable that the change in the government's military tactics coincides with ICC involvement as well.

The demonstrated willingness of the ICC to prosecute may also have encouraged some changes in domestic law, institutions and practice. After ICC ratification, Uganda began to reform its own capacity to detect and deter war crimes (Witte 2011). As noted in polls discussed above, in the mid-2000s, Ugandans had much more confidence in the ICC than in their own legal system. But since its encounter with the ICC, the state has invested in its domestic court system's capacity to try war crimes and crimes against humanity (Nouwen 2012). The ICC Bill (drafted in 2006, passed in 2010) is an example of the domestic legal changes the ICC stimulates and civil society increasingly demands.³⁴ The Uganda People's Defense Force's reduced violence toward civilians may be a result of both external monitoring by the international community (Allen and Vlassenroot 2010) and internal monitoring within the UPDF itself.

Moves to prosecute war crimes domestically are also present. A remark by Uganda's President Museveni in 2004 reveals something of the shadow cast by the ICC on the domestic legal regime in Uganda: "I am ready to be investigated for war crimes ... and if any of our people were involved in any crimes, we will give him up to be tried by the ICC.... And in any case, if such cases are brought to our attention, we will try them ourselves." We do not think that Museveni's political motivations are benign – many targets for such trials were largely

³⁴ For the discussion of civil society in Uganda, see Oola (2010). For example, the Uganda Victims Fund pressured government to consider victim's participation and reparations in the 2010 ICC Bill that set out the domestic judicial reform.

‘convenient’ from the government’s perspective – but they are associated with some change in Uganda’s actual military behavior. For example, the government utilized military tribunals³⁵ to try its own soldiers. Local defense units, in particular, have in fact been charged with committing violence against civilians.³⁶ No one thinks the Museveni government is now free of human rights violations. But would the government of Uganda have adopted this series of measures – ranging from legal reform to military sanctioning – if it were not for ICC intervention? Our answer is probably not; it is rather unlikely that such measures would have been taken if the ICC regime was not in place and the OTP had not launched an investigation.

In short, the Court made it clear in 2004 that it was determined to prosecute. The Prosecutor’s office opened an investigation in July 2004 and issued warrants in 2005, supported by international efforts to pressure Sudan to cut aid to the LRA (International Crisis Group 2004). The ICC’s display of prosecutorial determination and the added threat of material pressure by the European Union and the United States may well have contributed to a perception on the part of the Ugandan government that the costs of law violation were likely to escalate.

ICC and the Lord’s Resistance Army

The ICC may also have had some effect on rebel behavior in Uganda. The qualitative evidence suggests that ICC actions – in particular investigations – indirectly contributed to internal defections. True, the first wave of rebel defection came before the ICC entered into

³⁵ Such a move has been criticized, however, because military tribunals lack transparency compared to civilian courts (Witte 2011).

³⁶ UN report on children and armed conflict.

force: after the 2000 Amnesty Law.³⁷ By mid-2004, more than 5000 members surrendered and applied for amnesty. But even more defections came around the time of the announcement of the ICC's investigations in July 2004, the most prominent of which was the LRA's chief negotiator Sam Kolo in February of 2005 (Akhavan 2005). It is plausible to suppose that the defections were related purely to the success of Operation Iron Fist that started in March 2002, at which point LRA soldiers may have calculated the rebellion was in serious decline. But the fact that defections occurred in 2004 suggests the additional influence of ICC investigations.

Far from undermining the domestic amnesty process, ICC investigation of the situation in Uganda appears to have contributed to fissures within the rebel leadership (at least some of whom were prompted to jump ship) and to have encouraged defection of rank-and-file soldiers. The fact that Kony placed withdrawal of the ICC arrest warrants at the top of his negotiating agenda suggests that he and other LRA leaders were concerned about ICC indictments. Even if the weakening rebel position could be attributed in good part to Sudan's agreement to stop supporting the LRA, the increasing likelihood of prosecution by the ICC likely entered the rebel calculation.

Figure 2 graphs the monthly count of civilian fatalities associated with LRA attacks, as well as vertical markers indicating where the major military and diplomatic events and ICC actions, over time. We use monthly data of violence against civilians by the LRA from the Armed Conflict Location and Event Dataset (ACLED v.5).³⁸ The data include rebel violence

³⁷ Note that the Government of Uganda adopted the Amnesty Act in 2000, after signing into the Rome Statute in 1999. As we argued elsewhere (Jo and Simmons 2016), signature is a weaker form of commitment than ratification. Therefore, we do not expect much deterrent effect upon signature alone.

³⁸ For cross-national analyses on ICC crime deterrence, see Jo and Simmons (*forthcoming* 2016).

within and outside of Uganda, including Sudan, Central African Republic, and the Democratic Republic of Congo. As indicated by Table 1, there were four major ICC actions related to the prosecution of the LRA: Uganda's *ICC Signature*, Uganda's *ICC Ratification*, the ICC's *Investigation* and the ICC's issuance of *Arrest Warrants*. Figure 2 shows that Uganda's signature on the Rome Statute and issue of arrest warrants for rebel leaders did little to perturb the series. In fact, there is a considerable spike in rebel attacks on civilians associated with ratification, though this is likely attributable to the launch of Operation Iron Fist than with any action by the ICC. But more crucially, there is a precipitous fall in fatal attacks on civilians by rebels occurring just after the ICC began investigation of the situation in Uganda.

[Figure 2 about here]

Time Series Intervention Analysis

Is the ICC in some way responsible for this welcome decline? In order to answer this question, we conduct a time-series intervention analysis. We use the logged fatalities in Figure 2 as the dependent variable due to a couple of outlier events.³⁹ The intervention method allows us to determine whether there is a statistically significant difference in the level of a group's violence before and after an ICC intervention, while accounting for alternative explanations as well as the series' random component. If we observe no difference, then we have no reason to

³⁹ In particular, there are two extreme outliers for December 2008 and December 2009, which are nearly 3 and 4 times larger than the next highest data point, respectively. These outliers correspond to the Christmas and Makombo Massacres in northeast DRC. Without logging, outliers can cause our analysis to falsely present mean shifts that are not there. Logging the measure also helps with concerns that the series does not have variance stationarity.

believe that the ICC affected the outcome. But if we observe a difference over time, we will have some evidence that the ICC affected the pattern of violence.

Intervention analysis involves two modeling decisions: whether the effects are permanent (mean-shifting) or temporary (non-mean-shifting) and whether the effects are abrupt or gradual (that is, the rate at which the effects appear and subside). The effects reported in these models are assumed to permanently and abruptly shift the mean. Key events associated with the ICC constitute a “change of state” within Uganda and we expect them to have a “permanent” impact on the behavior of LRA. Additionally, we expect any change to be rather “abrupt” because these ICC events are expected to have a major impact on the lives of key leaders in the LRA, who have strong incentives to keep themselves informed and to change their behavior almost immediately.⁴⁰ In order to model the effects of events as permanent and abrupt shifts, each independent variable (binary indicators for *Signature*, *Ratification*, *Investigation*, and *Warrants*) is coded as 0 for every month before the event and as 1 for every month after the event.⁴¹

Since interventional analysis can lead to spurious results when key events of interest are correlated with other factors and events, we use two strategies to ensure that our results are robust: controlling for rival events. For rival events, we include events other than ICC actions that likely caused the level of fighting to escalate or diminish. We control for two military operations: one by the Ugandan government (*Operation Iron Fist*) and one by the government of

⁴⁰ We also checked the results with different combinations of modeling assumptions: (permanent, gradual), (temporary, abrupt), and (temporary, gradual). Permanent and abrupt models provide the best fit.

⁴¹ In the time-series analysis of multiple interventions, the influence of each intervention only holds until the next event (see Montgomery, et al 2015, pg. 471).

the DRC (*Operations Rudia I*). Moreover, we include a variable for the effect of the *Juba Peace Talks* and the introduction of the United States as a conflict actor with the passage of the *LRA Disarmament Act*. We also use a more general variable, *Battles*, which is the monthly count of battles between the LRA and governmental or international forces. The LRA's propensity to exhibit violence towards civilians might also have been the result of their wartime fortunes. Defeats might have left the group more desperate for civilian support and supplies causing them to use violence and coercion as a means to secure these necessities. We use a variable to account for this military balance (*Government Territory Gain*), which are monthly counts of battles in which the government claimed territory. The purpose of these controls is to minimize the possibility that we are misattributing a reduction in violence toward civilians to the ICC rather than to other battlefield conditions.

Table 2 presents the results of intervention analysis of LRA violence. Model 1 estimates the effects of four ICC interventions: *Signature*, *Ratification*, *Investigation* and *Warrants*. Of these, only two ICC interventions have a significant effect on the fatality series: ratification and investigation. Since the dependent variable is logged, the coefficients indicate a proportional change in the mean. Model 1 indicates that approximately three civilian casualties occurred each month from LRA attacks before Uganda ratified the Rome Statute, and after that event, the mean increased by more than 30 times to about 104 casualties per month. However, when the ICC demonstrated its determination actually to investigate crimes, this casualty rate plummeted by nearly 94% to a new mean of about 6.5 casualties per month.

[Table 2 about here]

The full model with rival events is displayed in Model 2. The results are revealing. It appears that ICC ratification effects are largely attributable to the start of *Operation Iron Fist*. Three other non-ICC events appear to have an effect on the series as well. The *Juba Peace Process* depressed the casualty rate while the collapse of this peace process, and the subsequent launching of *Operation Rudia I* increased the LRA violence towards civilians. This new, increased level of violence would persist until US involvement into the conflict (*LRA Disarmament Act*), when the number of casualties dropped to a rate lower than pre-*Rudia* levels. In order to generate substantive results, we track the mean level of monthly casualties through time by re-running Model 3 with just the significant events. The model estimates that the ICC investigation was able to substantially decrease this loss of innocent life to about 11 deaths per month, meaning that 107 fewer people lost their lives each month, *even as the fighting raged on*.

The final model in Table 2 (Model 4) switches our dependent variable from a logged measure of civilian casualties to the monthly number of LRA attacks on civilians. All events, with the exception of the Juba Peace Process, are still significant. Model 4 also shows a rather strong relationship between the intensity of fighting and the level of LRA violence towards civilians. Each additional battle increases the attack rate on civilians by 0.3. However, further examination of these two series reveals a remarkable pattern. Figure 3 shows the battles and attacks series together. Before the ICC investigation, the two series track each other rather closely; the two series are highly correlated (Pearson's $r=0.74$). But during the two-year period between the start of the ICC investigation and the Juba Peace Process (when fighting essentially

fell to zero), correlation between the two series weakens substantially to 0.22.⁴² This is at least suggestive evidence that the drop in civilian violence was the result of a conscious and concerted effort by Joseph Kony and LRA leadership to decrease violence against civilians during the investigation and not merely a consequence of battlefield dynamics.

[Figure 3 about here]

We recognize several concerns and alternative explanations in establishing plausible causation between the ICC actions and violence patterns. First, some might question: what about other forms of violence (e.g. torture, rape, pillaging, etc.)? Even though civilian fatalities are down after ICC investigations, other forms of violence might increase. We investigated the violence substitution possibility by disaggregating ACLED data into four different types of LRA attacks: *Killings*, *Kidnappings*, *Pillaging* and *Scorched Earth Tactics*.⁴³ Table 3 shows the results of intervention analysis with these four different series.⁴⁴ The key takeaway from this table is that civilian killing was not replaced by other forms of violence. The ICC investigation led to a statistically significant decrease in both LRA attacks with civilian deaths (*Killings*) as well as those incidents that were atrocious but non-lethal (*Kidnappings*, *Pillaging* and *Scorched Earth*).

⁴² There is a similar pattern between logged fatalities and battles. The correlation between the series is 0.68 before the investigation and falls to 0.28 after.

⁴³ The authors used the “Notes” sections within ACLED’s country-level datasets to ascertain these descriptions. Keywords for killings were killed, death and fatalities. For kidnappings, it was kidnapped and abducted. For pillaging, it was looted, raided, pillaged, robbed or stole. For scorched earth, it was burned or torched.

⁴⁴ It was the authors’ intention to test the effect of the ICC’s efforts on the occurrence of rape. Unfortunately, this was not feasible due to the low event count in the ACLED data. It is authors’ belief that this is result of the well-established underreporting of the crime by victims and media sources.

Similar patterns for fatal and non-fatal attacks suggest that the different forms of violence are not substitutes but occur simultaneously.⁴⁵

[Table 3 about here]

The second possibility is that the depletion in the civilian population (due to fatalities and displacement of persons) was so significant, that at the time of the ICC interventions, there were simply fewer civilians to kill, thus accounting for the decline in civilian fatalities. It is true that a vast number of civilians left their homes in Northern Uganda and entered internally displaced persons (IDP) camps. Displacement particularly impacted the three districts within the Acholi region (Gulu, Kitgum and Pader), where nearly 95% of the population vacated their homes and left a region the size of Belgium largely unoccupied (Bøås and Hatløy 2005). One of the Uganda government's major strategies was to actively isolate the LRA from civilian populations in which the group could hide (Atkinson 2009).

However, we submit that our results are not being produced by civilian displacement for three reasons. First, the decline of civilian fatalities does not coincide with the increase in civilian displacement. The drop in civilian fatalities occurred in mid-2004 and it was abrupt. In contrast, civilian displacement was gradual and experienced its sharpest increase between 2002 and 2003 (Internal Displacement Monitoring Centre 2012). Second, IDP camps were not an

⁴⁵ To be clear, the *Killings* variable is a count of attacks where there was at least one civilian fatality and not a fatality count. Since, by definition, the non-fatal attacks do not have fatalities, we use a count of fatal attacks for the *Killings* variable in order to provide a fairer comparison. Figures of the four series also show very similar patterns and are on file with the authors.

effective means of civilian protection; these “safe havens” were still located in Northern Uganda and were frequently attacked by the LRA (Mills 2015). In fact, when we isolated attacks to only those that occurred at IDP camps, we found a very similar pattern to that of the violence at large.⁴⁶ Third, and finally, the conflict was mostly confined to three northern regions—Acholi, Lango and Teso—but the majority of displacement was in Acholi. Our additional analysis shows that the ICC investigation had a statistically significant downwards effect on the number of attacks and civilian fatalities for both the Acholi region and regions lying outside of Acholi.⁴⁷ We take it as evidence that civilian displacement does not affect our conclusion about the ICC deterrence effect.

IV. Conclusions

The world’s first international criminal court has been a game-changer in international criminal law. A non-conventional Court comprised of States Parties but that holds individuals accountable for criminal acts, the ICC has become a focal institution of international criminal law. How well has the world’s first criminal court actually performed? We have argued for a specific understanding of performance found right in the Preamble of the Court: the ability to prevent atrocities toward innocent civilians. We argue that deterrence is theoretically possible, both through the actions of the ICC itself, as well as indirectly, through the impact that the ICC has had on domestic laws and institutions designed to prosecute violators of international criminal law.

⁴⁶ Results on file with the authors.

⁴⁷ Results on file with the authors.

We test these claims in the context of an especially violent case: the Ugandan civil war. While some might argue that the Ugandan government ratified the Rome Statutes primarily to unleash the ICC on its political and military opponent, we found that, with the involvement of the ICC, the government strengthened criminal statutes, improve monitoring of its own military, and even prosecuted some of its own soldiers for atrocities. Of course, simply announcing an investigation is not likely on its own to deter atrocities. Visible and ongoing involvement of the ICC and clear indications of international support are likely to be necessary to send a clear signal about the end of impunity. Nor do we claim that the ICC has revolutionized the rule of law in Uganda. To be sure, there is much room for improvement in local justice. But the evidence suggests ICC-inspired movement in a modestly positive direction.

We also took the case to systematic statistical analysis to see whether ICC interventions matter on the ground; that is, whether the ICC has contributed to a reduction of violence against civilians. We are fully aware that Uganda constitutes just one case, and that one must be careful about generalizing.⁴⁸ Nonetheless, the results are striking. Using time series intervention analysis, we found highly suggestive evidence that ICC actions, and in particular investigations, have discouraged rebels from intentionally killing civilians. Some might raise the concern that this case illustrates the risks of government impunity, since the Court only charged rebel leaders. Regarding this possibility, however, we remind readers that nearly half of the individuals wanted for ICC trial have been government officials.

⁴⁸ But note that these results for Uganda are consistent with a broader set of all civil war cases analyzed in Jo and Simmons (2016). We do not claim the ICC deters in every case, but rather that it reduces intentional killing on average, and especially where it has ongoing investigation underway.

Certainly, the ICC faces many challenges ahead. Efforts by the African Union to undermine the Court's legitimacy could fuel backlash. Kenyatta's apparent "win" represented by the ICC's decision to drop charges against him could undermine some of the positive developments we have discussed in this article. U.S. cooperation remains episodic, although the January 2015 surrender and transfer of Dominic Ongwen via the Central African Republic to The Hague for trial with American assistance is a positive sign. The surrender of this child-soldier-turned-LRA-commander constitutes "...the first commander of an internationally listed terrorist organization to give *acte de presence* at the [ICC]."⁴⁹ We also note that trials generally have not delayed peacemaking in ways that early detractors predicted (Dancy and Wiebelhaus-Brahm 2015). Much remains to be done to assess the consequences of the turn to develop and enforce international criminal law, but this research suggests some important positive effects.

⁴⁹ See <http://africanarguments.org/2015/01/20/dominic-ongwen-born-at-the-time-of-the-white-ant-tried-by-the-icc-by-thijs-b-bouwknegt/>.

Tables:

Table 1: Major Events for Lord's Resistance Army (1997-2014)

Events	Dates
Uganda signs Rome Statute	03/17/1999
Nairobi Agreement	12/08/1999
Amnesty Act	01/21/2000
Operation Iron Fist	03/08/2002
Uganda ratifies Rome Statute	06/14/2002
ICC investigation into LRA	07/28/2004
Sudan's Comprehensive Peace Agreement	01/09/2005
ICC warrants for LRA	10/13/2005
Juba Peace Talks start	07/14/2006
Operation Rudia I (DRC)	09/2008
Juba Peace Talks fail	11/30/2008
Operation Lightning Thunder	12/2008-03/2009
Operation Rudia II (DRC)	05/2009
LRA Disarmament Act	05/24/2010
US deploys military advisors	10/14/2011
Four-nation AU force deployed	03/23/2012

Note: ICC events in bold

**Table 2: Intervention Analysis on Monthly Count of
Logged Civilian Fatalities and LRA Attacks (1997-2014)**

	ICC Events	Rival Events	Battlefield Conditions	Attacks as DV
Operation Iron Fist		4.35** (0.80)	3.32** (0.43)	11.97** (2.96)
ICC Ratification	2.79** (0.72)	-0.52 (0.81)		
ICC Investigation	-2.80** (0.85)	-2.40** (0.50)	-2.04** (0.43)	-12.52** (3.15)
ICC Signature	0.58 (0.73)	-0.08 (0.41)		
ICC Warrants	0.25 (0.74)	0.22 (0.63)		
Juba Peace Talks		-1.26* (0.58)	-0.86 (0.44)	1.01 (3.22)
Operation Rudia I		3.31** (0.46)	3.12** (0.45)	19.03** (3.33)
LRA Disarmament Act		-3.54** (0.41)	-3.31** (0.41)	-15.97** (2.98)
Battles			0.03* (0.01)	0.33** (0.07)
Govt. Gains (-1)			0.06 (0.11)	1.33* (0.57)
AR(1)	0.46** (0.06)	0.14* (0.07)	0.18* (0.07)	0.43** (0.06)
Constant	1.03 (0.60)	0.96** (0.32)	0.76** (0.19)	1.58 (1.54)
Observations	215	215	214	214
Adjusted R-Squared	0.481	0.610	0.622	0.663
Bayesian Information Criterion	1333.58	1289.66	1267.81	2001.39
Durbin-Watson	2.13	1.97	2.03	2.04
Q Statistic P-value (Lags 1-36)	0.11	0.40	0.13	0.25

*p<0.05, **p<0.01, two-tailed test

Mean of Logged Fatalities: 1.99

Mean of Attacks: 8.38

Moving average terms are included, but not shown

**Table 3: Intervention Analysis on Different Type of LRA Attacks
on Civilians (1997-2014)**

	Killings	Kidnappings	Pillaging	Scorched Earth
Operation Iron Fist	3.62* (1.49)	2.48 (1.47)	1.23** (0.42)	1.98** (0.48)
ICC Investigation	-4.64** (1.63)	-3.26* (1.58)	-1.87** (0.44)	-2.59** (0.48)
Juba Peace Talks	0.62 (1.63)	0.66 (1.63)	0.77 (0.45)	0.76 (0.48)
Operation Rudia I	14.60** (1.75)	8.60** (1.68)	0.15 (0.47)	-0.44 (0.50)
LRA Disarmament Act	-12.80** (1.55)	-5.90** (1.52)	0.40 (0.42)	0.50 (0.45)
Battles	0.15** (0.04)	0.13** (0.03)	0.06** (0.01)	0.05** (0.02)
Govt. Gains (-1)	0.51 (0.31)	-0.67** (0.25)	0.03 (0.09)	0.37** (0.12)
AR(1)	0.30** (0.07)	0.43** (0.07)	0.27** (0.07)	0.15* (0.07)
Constant	0.42 (0.73)	0.41 (0.80)	0.06 (0.20)	-0.04 (0.22)
Observations	214	214	214	214
Adjusted R-Squared	0.646	0.576	0.424	0.393
Bayesian Information Criterion	1773.95	1666.41	1237.14	1325.13
Durbin-Watson	2.08	1.97	2.01	2.00
Q Statistic P-value (Lags 1-36)	0.43	0.99	0.11	0.67

*p<0.05, **p<0.01, two-tailed test

Mean of Killings: 3.52

Mean of Kidnappings: 2.91

Mean of Pillaging: 0.76

Mean of Scorched Earth: 0.59

Moving average terms are included, but not shown

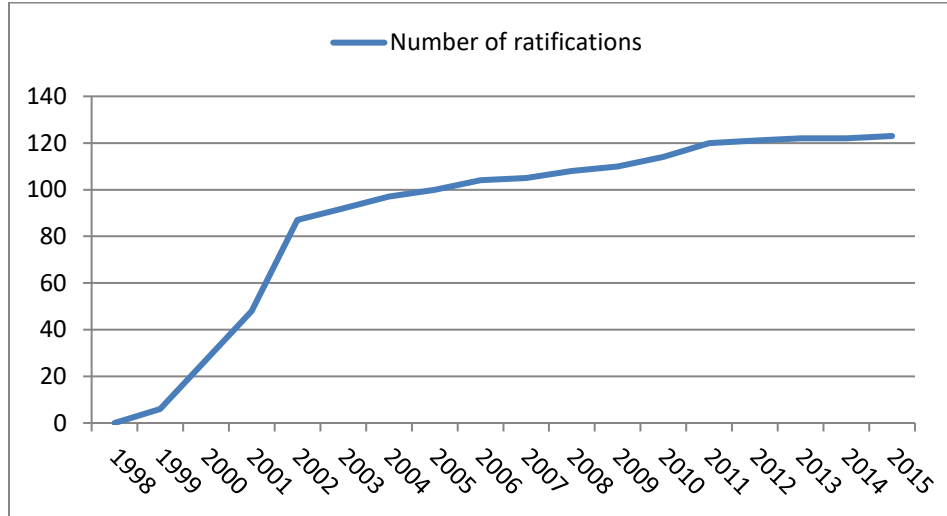
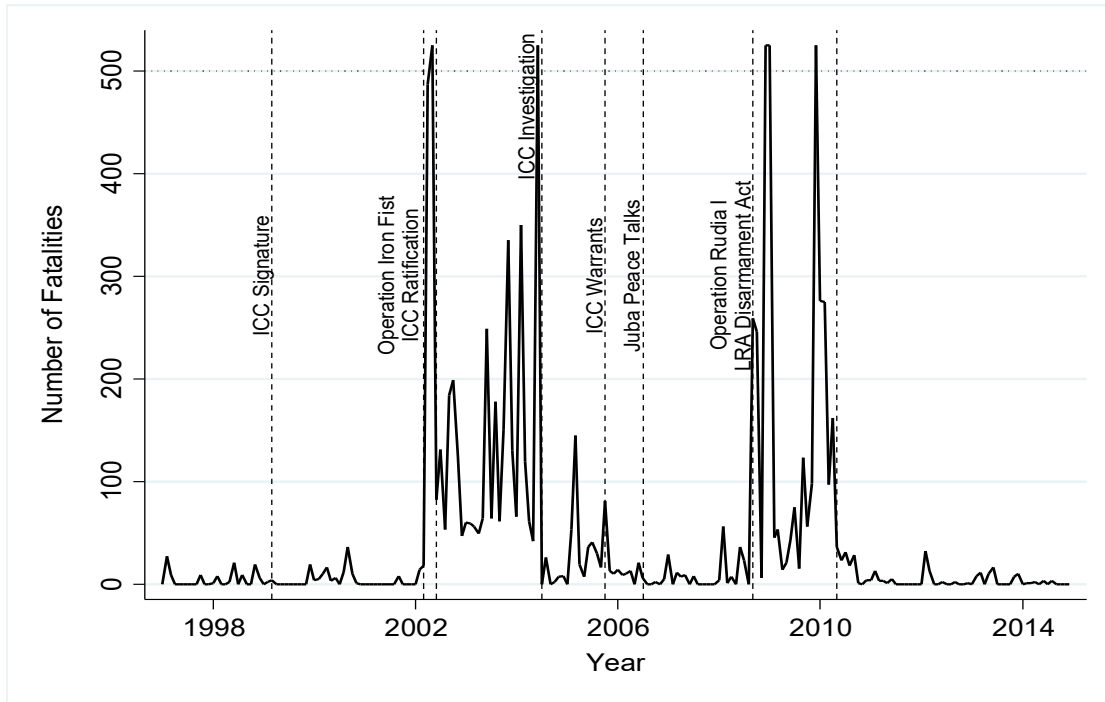
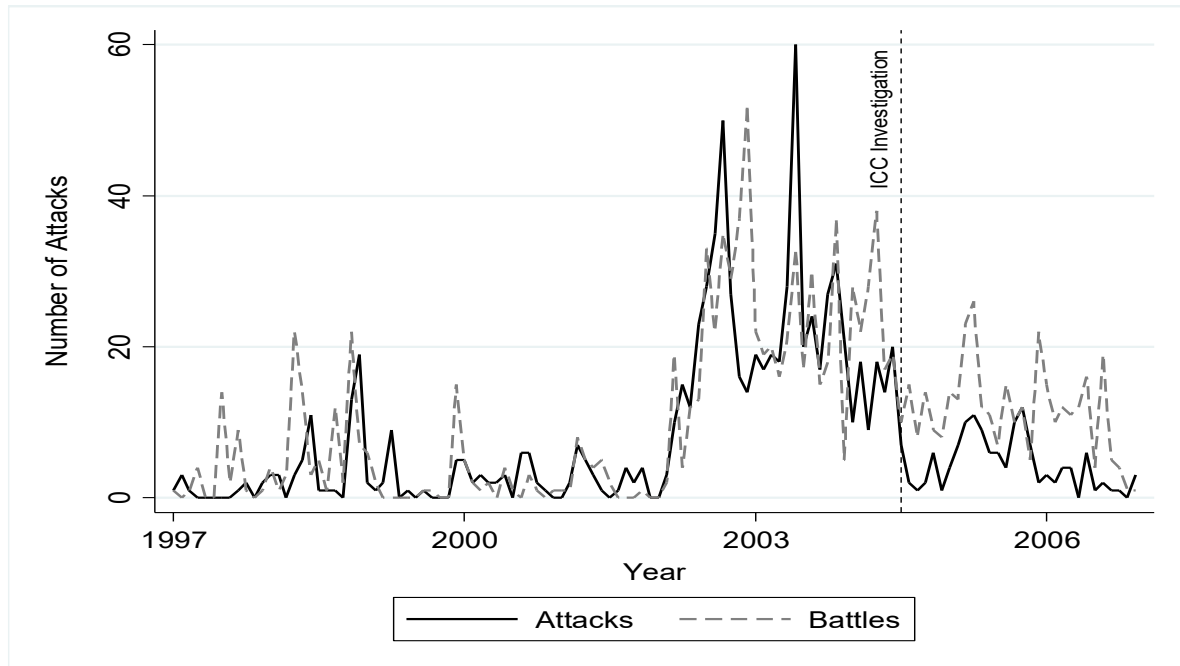
Figures:**Figure 1: States Parties to the ICC Statutes**

Figure 2: Monthly Count of Civilian Fatalities from LRA Attacks (1997-2014)



Note: Horizontal dotted line indicates scale break at 500 civilian fatalities.

Figure 3: Monthly Count of Civilian Fatalities from LRA Attacks Compared with Number of Battles (1997-2014)



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