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ICC Intervention in the DRC

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***Abstract*:** Central to the study of international law in international relations is whether it and the legal institutions through which its practice flows can address or stem the worst kinds of human rights abuses. The International Criminal Court (ICC) has been one such attempt made by the international community to do just that. This paper analyses whether the ICC has had a deterrent effect on grievous human rights abuses in a context, the Democratic Republic of the Congo, where those abuses have been rife because of the ongoing civil conflicts that have spanned decades. Using time-series analysis and qualitative process tracing, this paper looked at the domestic institutional changes and trends in deliberate killings of civilians by both government and rebel forces to see if the ICC's actions led to declines in violence. This paper finds support that certain ICC actions, specifically arrests and convictions, led to declines in violence by rebel groups, and that implementation of complementarity and social deterrence contributed to a decline in government forces killing of civilians. The implications of this paper are that future research should look at the effects of specific ICC actions in other contexts rather than dismissing or lumping them together generally.

Introduction

The Rome Statute, promulgated July 17, 1998, sets forth the principles and the jurisdiction for the International Criminal Court (ICC). In the preamble of the document, states committing to the Rome Statute affirm "that the most serious crimes of concern to the international community as a whole must not go unpunished," and that the purpose of the ICC is "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes" as the court of last resort.[1] If the creation of the Nuremberg Court in 1946 can be seen as the international community's response to the failure to prevent the Holocaust, then comparably the ICC can be viewed as the international community's belated *mea culpa* for the failure to act to prevent the grievous crimes against humanity, war crimes, and genocides that occurred in the 1990s, such as the Bosnian War or the Rwandan Genocide. Since its founding, the ICC has indicted several high-profile statesmen and rebels for war crimes including Joseph Kony, Omar al-Bashir, and Muammar Gaddafi;[2] and yet, it remains dogged by claims that it lacks legitimacy, is irrelevant, and even is a danger to its own goals of accountability and justice.[3]

This paper seeks to examine these claims about the role and potential effects of the ICC on international politics. More specifically, it will address the question of how, if at all, the ICC has impacted state, insurgent conduct in civil wars where gross human rights violations might be at risk of or are occurring. Having invested considerable resources and diplomatic effort in creating and attracting signatories for the Court, it is of great significance for the international

[1] Rome Statute of the International Criminal Court, "Preamble," July 17, 1998, https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf.
[2] Grono 2012.
[3] Ssekandi and Tesfay 2007, 77.

community to better determine if the Court has been effective at addressing the crimes and prosecuting the perpetrators of those crimes as it was designed to do. Furthermore, this topic has broader importance to scholars and policymakers seeking to understand the potentialities for international organizations (IOs) to significantly affect the course of international politics, even under the conditions of international anarchy.

I argue that the ICC has led to a decline in the perpetration of serious human rights abuses by both state and rebel forces through two mechanisms: social and prosecutorial deterrence. Using qualitative process tracing, I will be able to demonstrate that the conditions necessary for social and prosecutorial deterrence to be operative are met. Then, turning to data on deliberate killings of civilians by government and rebel troops, I will highlight how the patterns of violence have changed over time and their relations to various ICC actions. By tracing these mechanisms in the context of intrastate conflict in the Democratic Republic of the Congo (DRC), I will show how they differentially impact state and rebel forces, with the former being more susceptible to social and indirect prosecutorial deterrence, and the latter by direct prosecutorial deterrence. The DRC is a worthy case for such a study because the protracted nature of its civil war allows for this kind of time series analysis, while also controlling for potentially confounding variables, such as whether the DRC is a signatory to the Court or whether it self-referred the ICC investigation.

Beginning with the institutional design and procedure of the ICC, this paper will then proceed with a discussion of the literature about the Court's effects on international politics, before evaluating the strengths and weaknesses of the various arguments made. From this evaluation, the author will highlight a lacuna in the literature, that being the lack of examination of the potential deterrent effects of the ICC on the protracted intrastate conflict situation in which

the Court is very involved. I will then present my argument, before turning to the empirical investigation of the DRC case. Finally, I conclude with some observations on the implications and limitations of this study for the Court's ongoing investigations and operations in other intra- and interstate conflicts.

Literature Review

Institutional Design of the ICC

Before examining the literature on the Court, it is worth briefly outlining the organizational structure of the ICC and the Rome Statute to better understand the arguments made for and against it. Four years after its signing, the Rome Statute entered into effect in 2002, demarcating the date after which crimes defined under the statute could come under investigation and be subject to prosecution. A year later the Court's judges and prosecutors were sworn in and began their operations,[4] starting with the self-referral of Uganda and the DRC in 2004.[5] The Office of the Prosecutor (OTP) issued arrest warrants in 2006, and the Court began its first trial in 2009 with the case of Thomas Lubanga, former president of the rebel groups Union des Patriotes Congolais/Forces Patriotiques pour la Libération du Congo (UPC/FPLC), charged and convicted in 2012 for the war crime of enlisting and conscripting child soldiers.[6] As of today,

[4] In recent years, the OTP has added two deputy prosecutor positions who are elected by the ASP and created an Independent Expert Review (IER) to research its past work and suggest recommendations for reforms to the Court. These innovations are in response to criticisms leveled at the Court. https://www.icc-cpi.int/news/icc-deputy-prosecutors-be-sworn-7-march-2022-practical-information#:~:text=Ms%20Nazhat%20Shameem%20Khan%20(Fiji,Statute%20(%22ASP%22); https://www.justsecurity.org/77984/to-strengthen-the-icc-office-of-the-prosecutor-karim-khan-is-on-the-right-path/

[5] Mills 2012, 410.

[6] Dietrich 2014, 18.

123 countries are Parties to the Court, with notable exceptions being the United State, Russia, and China.[7]

The Court is composed of three judicial divisions (Pre-Trial, Trial, and Appeals) made up of eighteen judges elected by the Assembly of State Parties (ASP). The OTP, also elected by the ASP, is tasked with independently and impartially conducting preliminary examinations, investigations, issuing arrest warrants, and prosecuting individuals charged with the core crimes of genocide, crimes against humanity, and war crimes. The Court's jurisdiction is triggered when either 1) a State Party to the Rome Statute requests an investigation, 2) the United Nations Security Council (UNSC) refers a situation to the Court (even when that state is not Party to the Rome Statute), and 3) if the Pre-Trial division approves an OTP request to investigate a core crime committed in a State Party's territory or by its nationals.[8]

While the OTP issues arrest warrants according to its own discretion, it is up to State Parties to enforce those warrants, which poses a difficulty when heads of state or leaders of armed forces are the subjects of those warrants.[9] This speaks to the difficulties facing the Court in that it relies on states and the international system for carrying out arrests, while at the same time intruding on traditional notions of sovereignty by carrying out prosecutions and adjudicating on the crimes of states' citizens.[10] However, the ICC's mandate does strike a balance against intruding too far into states' sovereignty over judicial matters through the principle of complementarity, outlined in Article 17 of the Rome Statute.[11] Unlike the International Criminal Tribunal for Yugoslavia (ICTY), whose tribunal trumped national law,

[7] Goldsmith and Krasner 2003, 57.
[8] Wegner 2015.
[9] Moreno-Ocampo 2008, 221.
[10] Wegner 2015, 19.
[11] See Article 17 of the Rome Statute, found here: https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf.

under the Rome Statute "national courts have primary jurisdiction over a situation involving allegations of core crimes," thus nudging states to conduct their own investigations and prosecutions if they have the capability and legitimacy to do so.[12]

The above outline of the Court's institutional design is relevant to the literature on the ICC because it structures much of the theoretical debate, especially so before the Court had the opportunity to demonstrate its potential efficacy through investigations, prosecutions, and trials.

Legal Pessimists

Before the Court had even opened its doors, John Bolton, former National Security Advisor to presidents George W. Bush and Donald Trump, voiced sharp criticisms of the ICC's design. He was ultimately a major influence on Bush's decision to rescind the United States' signature to the Rome Statute, even though the previous president, Bill Clinton, had played a major role in promoting the Court abroad.[13] Bolton argued vociferously on normative grounds that the Court was a major threat to American independence and flexibility, that its design lacked democratic procedures for making its case law legitimate, and that its prosecutor existed outside the scope of any meaningful public accountability. He also made the case that

> "the most basic error is the belief that the ICC will have a substantial, indeed decisive, deterrent effect against the possible perpetration of heinous crimes against humanity. Rarely if ever, however, has so sweeping a proposal had so little empirical evidence to support it…No one seriously disputes that the barbarous actions about which ICC

[12] Ralph 2007, 104.

[13] Human Rights Watch 2002.

supporters complain are unacceptable, but they make a fundamental error in trying to transform international matters of power and force into matters of law."[14]

Indeed, for Bolton, as for many realist thinkers who are not sanguine about the positive effects of international organizations writ large,[15] the lack of a coercive mechanism in the Rome Statute to enforce the Court's warrants and rulings meant that it was doomed to failure and irrelevance from the start with regards to its goal of deterring serious crimes against humanity.

Like Bolton and other realists, legal scholar Eric Posner criticized what he terms the false promise of global legalism of which he sees the ICC as a particular manifestation.[16] Global legalism has special appeal for many in the international community because "it promises a way to solve global collective action problems in a world that cannot be governed in any conventional way, that is, *with a government*," but fails, according to Posner, due to the absence of hierarchy and any coercive mechanisms to enforce international courts' rulings and ensure compliance.[17] Despite these misgivings, he admits that international courts operating under anarchy can still serve as agents of states by resolving "limited disputes when the states are otherwise inclined to settle them."[18] In line with this view, Posner sees the ICC's proper role as adjudicating cases for states when the war criminals "are nationals of a defeated state whose new government seeks to acquire international legitimacy," or in the event that permanent members of the United Nations Security Council (UNSC) agree on the necessity of an international criminal tribunal, as was the case with Rwanda and the former Yugoslavia.[19] And yet, ICC involvement in only cases such as

[14] Bolton 2001, 169, 175.
[15] Mearsheimer 1994.
[16] Posner 2009.
[17] Ibid, 128.
[18] Ibid, 129.
[19] Ibid, 201, 204.

these risks turning it into a mere political tool for delivering victors' justice, belying its image as an independent and neutral arbiter of international justice.[20]

Moving from the broad theoretical critiques made above to more specific ones, a number of other scholars have raised doubts about the possibility of the ICC having a deterrent effect because of its inability to affect the calculations of leaders who may commit atrocities.[21] Cronin-Furman, for instance, argued that the only type of leaders who can be deterred are those who permit or fail to punish subordinates for committing atrocities and not the ones who have overriding benefits in ordering them. Thus, she argued, the ICC's current prosecutorial approach is unlikely to have a deterrent effect because it has focused mainly on prosecuting those in the latter category at the expense of prosecuting the former category whose behaviors could actually be affected.[22] Similarly, Fish claimed that for those considering whether to commit atrocities or not, the ICC would at best be a remote concern, especially when weighed against more immediate costs and benefits, and would require the actor's prior awareness of the Court's purpose and jurisdiction.[23] Also focusing on leaders who may order atrocities, Mullins and Rothe made the case that because certainty of punishment is what contributes most to effective criminal deterrence and the certainty of punishment by the ICC for war criminals is low due to its limited capacity and enforcement issues, the ICC is unlikely to provide any measure of deterrence.[24]

While the arguments made so far have claimed that the ICC is simply unable to contribute to the deterrence of heinous crimes because it lacks effective mechanisms for doing so, Ku and Nzelibe contend that the international criminal tribunals like the ICC may actually be

[20] Roach 2006, 166.
[21] See for example Mendeloff 2014 and Mueller 2014.
[22] Cronin-Furman 2013, 454.
[23] Fish 2010, 1710.
[24] Mullins and Rothe 2010, 781.

counterproductive to their deterrence goals, particularly when operating in weak or failing states in which those crimes a likeliest to occur.[25] They argue this type of situation could occur when the perpetrator of heinous crimes is politically indispensable to a country and their prosecution by the ICC results in greater political instability.[26] Goldsmith and Krasner present a similar case that the lack of concern for the political repercussions of enforcement may lead the ICC to unintentionally worsen human rights catastrophes.[27] These arguments speak to a debate in the scholarship concerning the impact of the ICC on peace building processes, one that is closely related to the question of deterrence because, after all, if the ICC contributes to unwinding peace negotiations for conflicts where atrocities have already occurred, then those atrocities will be more likely recur should the conflict persist.

Peace versus Justice

Because of the Court's involvement in numerous intrastate conflicts through self-referrals and authorizations by the UNSC, scholars have also sought to address the Court's impact on conflict resolution, framing the debate in terms of peace versus justice and often drawing inconsistent conclusions.[28] Simmons and Danner found that ratification of the ICC is associated with greater peace and a reduction in violence in those countries least likely to be able to prevent gross human rights violations.[29] Research by Prorok, however, demonstrated that the ICC decreases the likelihood of conflict resolution in countries where the threat of domestic criminal

[25] Ku and Nzelibe 2006, 783.
[26] Ibid, 778.
[27] Goldsmith and Krasner 2003, 63
[28] Prorok 2017.
[29] Simmons and Danner 2010.

accountability is low.[30] Implicit in all of the arguments against the ICC's contribution to peace is the idea that the ICC does in fact affect the calculations of leaders in a significant way because, if it did not, then it would not be a destabilizing force in peace processes. Wegner has thus suggested moving beyond the simple dichotomy of peace versus justice in favor of exploring how mechanisms of accountability can sometimes hinder and sometimes aid in peace-building efforts.[31] He proposes three mechanisms by which the ICC helps to advance peace and two by which it hinders reconciliation.[32] On the one hand, the ICC promotes peace by facilitating the rule of law, addressing victim needs and individualizing guilt, and deterring and isolating perpetrators.[33] On the other hand, it may harm the ending of conflicts by blocking negotiations and heightening tensions between parties by bolstering support for hardliners or creating power vacuums in the leadership of one side.[34]

Legal Optimists

Despite the numerous criticisms leveled and concerns raised above, proponents of the Court remain bullish about its deterrent effect because of its potential impact on the cost-benefit calculations of would-be human rights violators. Akhavan pointed out that while deterrence by international criminal courts can do little in the face of immediate mass violence, it may well change elites' political decision-making in post- or pre-conflict periods by raising the costs of certain policies.[35] He contended that the Court, by providing "the credible threat of punishment

[30] Prorok 2017.
[31] Wegner 2015, 11.
[32] Ibid, 32.
[33] Ibid, 26-39.
[34] Ibid, 39-44.
[35] Akhavan 2001, 10.

through vigorous arrests and prosecutions[,] removes impediments to stability from the political stage, and provides an incentive for constructive political behavior."[36] Going further, Appel argued that besides the legal threat of imprisonment, the Court's investigations alone raise the domestic and international audience costs, thereby affecting the potential payoffs of human rights abuses.[37]

Seeking to get past generalized claims for and against the ICC's deterrent effect, Jo and Simmons conducted a comprehensive study of the effect that Rome Statute ratification had on the number of civilian casualties in recent civil wars. They used civilian casualties as a proxy for war crimes and crimes against humanity because it is a clear, egregious human rights violation.[38] Their theory of its impact rested on the twin concepts of prosecutorial deterrence (fear of legal punishment causes a would-be-criminal to desist from a criminal act) and social deterrence (fear of negative social reaction to law-breaking behaviors prevents those behaviors). Prosecutorial deterrence "implies that investigations, indictments, and especially successful prosecutions should trigger a reassessment of the likelihood of punishment and a boost to deterrence,"[39] and social deterrence "depends for its effectiveness on the expression of clear standards of behavior as well as enhanced monitoring."[40] While their study returned significant statistical results for positive impacts of prosecutorial and social deterrence on Rome Statute ratifiers, it did not trace these mechanisms in specific ICC member states where the Court has been most active.

Summary

[36] Ibid, 12.
[37] Appel 2018, 4.
[38] Jo and Simmons 2016, 456.
[39] Ibid, 448.
[40] Ibid, 450.

The existing literature contains strong theoretical and empirical disagreements that remain unresolved. Nevertheless, there is a consistent logical fallacy made by the detractors of the ICC in claiming that it is at once a paper tiger with no exogenous impact on state conduct, and that it is a threat to state autonomy and the peace prospects for ending long-standing internal conflicts. On the side of the proponents, there remains an untested assumption that state and rebel leaders are aware of and concerned about ICC actions such that they would alter their behaviors. Although it might seem reasonable to assume that signatory states of the Rome Statute understand their legal obligations under the treaty, turnover in leadership and the lack of clear definitions for the core crimes of war crimes, crimes against humanity, and genocide mean that there probably exists some uncertainty as to what specific actions will prompt the ICC to open investigations and begin prosecutions. Without clear evidence that leaders understand their potential actions to fit the criteria of those core crimes, it is hard to estimate whether the ICC had a deterrent effect.

Considering all the contradictory claims made in the scholarship about the ICC as to its deterrent effects, it is the aim of this paper to trace whether these mechanisms of deterrence functioned as hypothesized in the specific context of the Democratic Republic of the Congo (DRC). Such a study will allow for an evaluation of the empirical veracity of the competing sides of the literature, which thus far have been either theoretical or large-N cross-country analyses that do not allow for close examination of the deterrence mechanisms at work. Careful process tracing is necessary here because, as identified in the literature, deterrence cannot occur if the relevant actor is not aware of the new sanction or the increased threat of apprehension. Without process-tracing, the statistical significance between ICC ratification and decreased civilian casualties found by Jo and Simmons could be the result of endogenous factors that were not

controlled for in the research design. Therefore, the rest of this paper will address this apparent gap in the literature and reveal how these mechanisms operate on specific actors in intrastate conflicts.

Argument

Turning to deterrence theory from domestic politics, I will argue that prosecutorial deterrence and social deterrence remain operative in the DRC case specifically, despite the Court's limited material and enforcement capacity. Both types of deterrence stem from the framework that the chance of someone committing a crime depends on the likelihood and severity of punishment and assumes that the relevant actors are sufficiently aware of and appreciate the changing risks and costs of certain kinds of criminal actions over time.[41] In this sense, the theories are rational-choice ones given that, all else being equal, the likelihood of someone committing a crime will decrease as the certainty and severity of their punishment, or social sanction, increases.

Prosecutorial deterrence refers to the threat of legal sanction causing a would-be perpetrator to desist from committing a criminal violation. Although it was thought that severity of punishment was the main driver behind prosecutorial deterrence,[42] more recent studies have established that increasing the certainty of prosecution more effectively deters criminal violations.[43] As such, the upshot of this theory is that as the Court undertakes actions in the DRC, like launching investigations, issuing warrants and indictments, and securing arrests and convictions, there should be a decrease in the core crimes the Court is meant to target. Although

[41] Becker 1968.
[42] Grasmick and Bryjak 1980.
[43] Kleiman 2009.

the Court may struggle to arrest certain indicted individuals because of its reliance on states for apprehending and extraditing them, it should still theoretically exercise some deterrent effect by reducing the availability of their asylum options.[44] This theory of course relies on ratification of the Rome Statute and compliance by the state, because without these the ICC cannot obtain jurisdiction, nor secure arrests or collect sufficient evidence and witness testimonies.[45]

Social deterrence emphasizes the importance of community norms in discouraging law violations. Community disapproval of a person who litters, for example, may be as or more effective of a deterrent than a legal sanction like a fine or court case. Theories of deterrence that leave out the social aspects of law violation present an incomplete picture, as numerous studies have demonstrated that "extralegal consequences from conviction" are at least as much of a deterrent as the formal legal consequences.[46] That said, clearly expressed standards of behavior by peers and active monitoring are required for social deterrence to be at all effective.[47] This form of deterrence may be predicated on material or immaterial social sanctions. In terms of the material sanctions, states that are reliant on foreign aid from the international community may be more susceptible to community norms and pressure, as they could risk losing aid if they continue to allow or perpetuate grave human rights violations.[48] In terms of immaterial ones, domestic and international mobilization by human rights organizations can act as a check and an active monitor on whether government actions are meeting expectations raised by Rome Statute ratification.[49]

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[44] Gilligan 2006.
[45] Jo and Simmons 2016. 452.
[46] Nagin and Pogarsky 2001, 865.
[47] Agnew 2011.
[48] Hafner-Burton 2013.
[49] Jo and Simmons 2016, 454.

Based on this theory, my first hypothesis is that there will be an observable downward trend in violence in the aftermath of an ICC intervention event. However, in the absence of further successful prosecutions or in the case of failed prosecutions, the positive effects of ICC intervention may wear off or decrease over time. Consistent with a rational-choice theory of deterrence, if relevant actors are consistently adjusting their expectations of legal sanction for criminal violations, then impunity for violations from the Court should mean a decline in their expectations of investigation and prosecution. Thus, I expect that negative prosecutorial events or reversals (e.g., prosecutions that fail to secure a conviction) may result in increasing levels of atrocity crimes.

Secondly, I hypothesize that prosecutorial and social deterrence will have differential impacts on state versus rebel forces. I posit that social deterrence has a greater effect on the state rather than on rebel forces in the DRC, because the state is more concerned with and is more susceptible to the social costs of egregious human rights violations.[50] DRC rebels are not afforded a formal role in international institutions like the ICC, nor in the shaping of international law or the commitment to treaties like the Rome Statute.[51] They are therefore both less aware of and less likely to be affected by the social expectations, pressures, and costs of the international community. Additionally, the state, unlike rebels, is reliant on foreign aid for its budgets, which is sometimes contingent upon maintaining a certain respect for human rights.[52] Furthermore, states are also susceptible to pressure from international and domestic human rights

[50] Jo and Simmons 2016, 454.

[51] Ibid.

[52] See for example the Leahy Amendment, which prohibits the United States government from giving foreign military aid to states that commit significant human rights abuses.

organizations to abide by the human rights treaties they have formally agreed to.[53] Accordingly, state and not rebel actors are susceptible to social deterrence.

On the other hand, I predict that because direct prosecution has more successfully worked against rebel actors,[54] making clear to them that the ICC can punish them for committing atrocities and has failed in conspicuous cases to prosecute state leaders,[55] they are therefore more susceptible to this form of deterrence than state actors. Furthermore, state compliance with the ICC is not a sure thing, as states can and have withheld from assisting the court in gathering evidence and turning over indicted state actors.[56] As such, compliance with the Court is in ways conditional on the domestic politics of the state and views on the legitimacy and efficacy of the Court.

Nonetheless, because the ICC seeks to complement rather than override a state's existing legal regime, adoption of the Rome Statute and the passage of concomitant criminal justice reforms are ways that the Court may indirectly contribute to prosecutorial deterrence. For instance, Colombia, Georgia, and Guinea all initiated reforms following the start of ICC preliminary investigations in those countries.[57] In this sense, the ICC may act as a catalyst for states to undertake their own domestic prosecutions of egregious violations of human rights, knowing that their failure to do so could result in an investigation or prosecution by the Court.

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[53] Simmons 2009.

[54] While the ICC has issued arrest warrants with relative parity between state and non-state actors (19 for the former and 22 for the latter), it has only secured the arrest and transfer of eight individuals, seven of whom are rebels.

[55] See for example, Jordan's unwillingness to comply with the ICC 's arrest warrant for Omar el Bashir during a 2017 visit he made to the country. https://www.hrw.org/news/2019/05/06/icc-jordan-was-required-arrest-sudans-bashir

[56] See for example, Jomo Kenyatta and his political party's tampering with witnesses that led to his failed prosecution by the ICC. Kenyatta and his top deputy, William Ruto, were indicted for their roles in the 2007-08 election-related violence. https://www.coalitionfortheicc.org/cases/uhuru-kenyatta

[57] ICC 2011.

Therefore, I hypothesize that the number of domestic prosecutions for serious rights violations should increase after Rome Statute adoption and complementarity legislation in the DRC, thus demonstrating the effects of indirect prosecutorial deterrence. Figure 1 summarizes my hypotheses.

Figure 1: Hypotheses

Hypothesis 1: Successful ICC actions (Rome Statute adoption, investigations, indictments, arrests, guilty verdicts) will be associated with downward trends in violence towards civilians.
Hypothesis 2: Unsuccessful ones (cases dismissed, not guilty verdicts) will be associated with upward trends in violence.
Hypothesis 3: Direct prosecutorial actions (indictments, arrests, guilty verdicts) will affect rebel forces more than government ones.
Hypothesis 4: Social deterrence and indirect prosecutorial deterrence, measured after Rome Statute adoption and ICC investigation, will affect government forces more than rebel ones.

Case Selection

Historical Background on the DRC

Since securing independence from Belgium on June 30, 1960, after decades of brutal colonial rule and compulsory resources extraction,[58] the DRC has witnessed a series of intrastate conflicts that ranged from secessionist movements to mutinies and coup attempts. In total, seventeen civil wars occurred in the DRC from July 1960 to December 2010, with the bloodiest resulting in more deaths than any other conflict since World War Two.[59] The DRC is thus an important site for testing the efficacy of the ICC to prevent the worst atrocities since it has been the ground for so many conflicts that have had deleterious effects on its citizens. This section

[58] Hochschild 1998.
[59] Kisangani 2012, 2; Bavier 2008.

will detail the historical context and background of the most recent conflicts, covering the period from 1997 through 2021, to identify the leaders of the government and rebel forces who might be subject to and have their calculations affected by the threat of ICC prosecution.

For more than three decades after independence, the DRC (formerly named Zaire) was ruled by a brutal strongman named Mobutu Sese Seko. His rule was based on support from the United States, which propped up his rule as a bulwark against communism in the region but ultimately abandoned him following the demise of the Soviet Union in 1991.[60] With a declining patronage system, Mobutu was not able to maintain the same grip on power and a major rebellion led by the AFDL under Laurent Kabila broke out in 1996. Under his leadership and in alliance with the Rwandan army (RPA), the AFDL took the capital city in May 1997, and Kabila declared himself president of the country shortly thereafter.[61] Seeking out the *Interahamwe* who had fled to and occupied refugee camps in the DRC after the end of the Rwanda genocide in 1994, the RPA engaged in a campaign that killed around 230,000 Hutus during the uprising.

Shortly thereafter, the Mai groups, which had previously fought alongside and supported Kabila, revolted against him in September 1997 because of their opposition to the continued presence of foreign soldiers in the DRC. Their revolt, which resulted in from 6,500 to 10,000 casualties, ended after five months when Kabila ordered the foreign troops out of the country in July 1998.

Conflict in the DRC persisted, however, due to a second civil war launched against Kabila. This war began with his assassination in January 1999 and only briefly petered out in December of 2002 after the deaths of more than four million people and the internal

[60] Ibid, 117.
[61] Ibid, 118.

displacement of one million. Since then, ethnic conflicts in the Ituri and Kivu regions have continued, with fighting principally occurring between government forces and the RCD and the UPC militias (the latter was led by Thomas Lubanga),[62] as well as incursions from Northern Uganda by the Lord's Resistance Army (LRA). Many of these conflict actors, including Kabila's AFDL, conscript child soldiers into their ranks, a major violation of international law that the ICC has sought to address.[63]

According to Kisangani, the politics of exclusion in the DRC and the spoils that derive from controlling a weak state with vast mineral resources and substantial amounts of foreign aid have created the conditions for conflicts that are unlikely to be resolved without rooting out corruption and creating an inclusive political system in which minorities do not fear majority rule.[64]

Given that these underlying conditions for conflict remain and civil wars are situations that offer certain strategic incentives for the mass killings of civilians,[65] the DRC presents a case in which the potential importance of the ICC to deter the worst crimes in conflict is high. Additionally, the DRC is a case where the long duration of the conflict and the high level of ICC involvement allows for an investigation into whether the ICC has influenced the behaviors of the conflict actors and how different kinds of ICC actions may have influenced each. Unlike other countries which did not self-refer or sought to deliberately block ICC investigators, the DRC was the initiator of ICC's investigations and has cooperated successfully with the Court by delivering

[62] Ibid, 205.
[63] Ibid, 202-03.
[64] Ibid, 217-18.
[65] Valentino et al 2004.

indicted individuals, meaning that conflict with the Court will not be a factor bearing on its potential effectiveness.

Using a single case which has a lot of internal variation in the levels of deliberate violence against civilians like the DRC also allows for within case comparison across time while controlling for confounding variables like domestic political circumstances. For instance, during 18 (2001-2019) of the 24 years under investigation (1997-2021), the DRC was led by President Joseph Kabila, meaning that the human rights stances of different presidents could not have been the most significant factor in changing patterns of violence. It is for these reasons that this paper investigates the deterrence effects of the ICC in the DRC context.

Research Design

To illustrate the operation of the ICC deterrence mechanisms empirically, I adopt a multi-step approach. First, I highlight the awareness of the different conflict actors to the ICC and its actions using qualitative information collected from international news media and other scholarship. Then I document qualitatively the effects of various ICC actions on two specific rebel groups that were still active after the first set of indictments and convictions were issued by the Court. Second, I trace the institutional legal changes that resulted from Rome Statute ratification to show that the conditions for social deterrence were present in the DRC and examine patterns of domestic prosecutions for atrocities to demonstrate that these changes had substantive effects. Finally, I look at the overall patterns of violence by state and rebel forces to determine if the Court altered their calculations with regards to the perpetration of serious human rights violations.

Because it is impossible to truly get inside their heads to see if the ICC influenced their decision making or not, this approach relies not only on the conflict actors' words but also their actions. For their actions, I rely on publicly available data sets that track domestic prosecutions, deliberate killings of civilians, and physical security indices for countries across the globe.

Summarizing in brief: for Hypothesis 1 to be operative, the DRC must have adopted the Rome Statute and cooperated with the ICC investigation, and the ICC must have brought a successful range of actions against DRC actors. Hypothesis 1 is falsified if I observe an upward trend in violence against civilians after successful ICC actions. Hypothesis 2 is confirmed if I observe an upward trend in violence against civilians after unsuccessful ICC actions. For Hypothesis 3 to be operative, rebel forces must be generally aware of the ICC's actions. If Hypothesis 3 is correct, I would expect to see ICC actions taken primarily against rebel forces. For Hypothesis 4 to be operative, there must be observable institutional and legislative changes and an increase in the number of domestic prosecutions for human rights violations. If Hypothesis 4 is correct, there will be an observable decline in violence against civilians by government forces after Rome Statute adoption and the opening of an ICC investigation.

Findings

A. Changes in DRC Conflict Actors' Calculations

Before determining the awareness of DRC actors to the presence of the ICC investigation looming over the conflict, it is necessary to establish who has been indicted, arrested, and convicted. Below is a chart (Figure 2) compiled from information provided by the ICC on the warrants, arrests, and convictions of individuals operating in the DRC. Note that out of seven individuals the ICC has indicted only one of them is a DRC's government officials or members of FARDC. This lends initial support to my hypothesis that the effects of direct prosecutorial

deterrence are less likely to have bearing on state actors. Rather it is most plausible for it to have effects on rebels because, as the chart demonstrates, all save for one indicted by the ICC are rebels.

Figure 2: ICC Actions in the DRC
The DRC Government ratifies the Rome Statute: April 2002
Situation referred to the ICC by the DRC Government: April 2004
ICC investigations opened: June 2004
ICC current focus: Alleged war crimes and crimes against humanity committed in the context of armed conflict in the DRC since July 1, 2002.
Current regional focus: Eastern DRC, in the Ituri region and the North and South Kivu Provinces.

Individual (State/Rebel-Organizational Affiliation)	**Date Indicted (sealed/ unsealed)**	**Date Arrested**	**Trial Start Date**	**Verdict Date (guilty/ not guilty)**
Thomas Lubanga (Rebel-FPLC)	Feb. 10, 2006 (sealed)	Mar. 16, 2006	Jan. 26, 2009	Mar. 14, 2012 (guilty)
Bosco Ntaganda (Rebel-CNDP/M23)	Aug. 22, 2006 (sealed) April 28, 2008 (unsealed)	Mar. 22, 2013	Sept. 2, 2015	Jul. 8, 2019 (guilty)
Germain Katanga (Rebel-FRPI)	Jul. 2, 2007 (sealed)	Oct. 17, 2007	Nov. 24, 2009	Mar. 7, 2014 (guilty)
Mathieu Ngudjolo Chui (Rebel-FNI)	Jul. 6, 2007 (sealed)	Feb. 6, 2007	Nov. 24, 2009	Dec. 18, 2012 (not guilty)
Jean-Pierre Bemba (State/Rebel-MLC)	May 23, 2008 (sealed) May 24, 2008 (unsealed)	Jul. 3, 2008	Nov. 22, 2010	Mar. 21, 2016 (guilty) Jun. 8, 2018 (not guilty on appeal)
Callixte Mbarushimana (Rebel-FDLR)	Sept. 28, 2010 (sealed)	Oct. 11, 2010	N/A - Charges dismissed Dec. 16, 2011	N/A

Sylvestre Mudacumura (Rebel-FDLR)	Jul. 13, 2012	N/A – Killed in action Sept. 18, 2019[66]	N/A	N/A

Information collected from the ICC website

While it is fair to say that government officials were of necessity aware of the ICC investigation given that they were the ones to initiate the referral to the OTP in April 2004, it is not enough to assume the rebels' awareness of the ICC indictments and arrest warrants. Instead, I will detail in this section whether rebel actors knew of and how they reacted to ICC indictments and arrest warrants. Direct prosecutorial deterrence would only be operative if these rebel actors were aware of the ICC indictments, thought that there was a real chance of their punishment, and adjusted their behaviors accordingly.

I will be excluding Thomas Lubanga and Germain Katanga from this analysis because both had already been arrested by DRC forces prior to their ICC indictments.[67] Similarly, Mathieu Ngudjolo Chui and Callixte Mbarushimana were both indicted under seal mere weeks before being transferred to ICC custody. As such, direct prosecutorial deterrence could not have affected these actors' subsequent calculations since the crimes they were accused of took place before they were ever indicted. That said, the unsealed indictments, arrests, and convictions should have bearing on the calculations Bosco Ntaganda and Sylvestre Mudacumura, as neither were under arrest at the time of Lubanga's landmark conviction. Therefore, this qualitative analysis will look primarily at whether Ntaganda and Sylvestre Mudacumura were aware of the threat of ICC arrest and whether their actions were swayed such that there was a lessening in the number of atrocities committed by the forces under their command.

[66] Human Rights Watch 2019.
[67] UN News 2007.

The ICC unsealed Bosco Ntaganda's arrest warrant while there was a brief cessation in hostilities between the CNDP and the FARDC following the ceasefire agreement signed in Goma in January 2008.[68] Far from lacking in coverage, local media in northern Kivu, where the CNDP were based, and the nationally broadcast Radio Okapi, which is run by the UN, devoted extensive attention to the unsealed arrest warrant.[69] Additionally, the CNDP itself released a public statement on Mat 9, 2008 responding to the arrest warrant, and interviews with former senior commanders of the CNDP revealed the Ntaganda's arrest warrant was the subject of frequent conversation.[70] One even stated, "Bosco Ntaganda did not want to be arrested. No man wants to be arrested, because to be arrested means you lose everything."[71] All of these details strongly suggest that Ntaganda himself was cognizant enough of the arrest warrant such that he might alter his behavior upon the eventual resumption of hostilities.

Former high-ranking CNDP members also stated that they deliberately chose not to discuss the warrant with their troops for fear of this information leading to widespread defections or their unwillingness to undertake future operations that might be subject to ICC investigation and prosecution.[72] This striking detail reveals that the commanders of the CNDP themselves viewed the ICC indictment of their leader as undermining their operational capacity and legitimacy. Had they viewed the ICC as truly toothless, then they would not have worried about whether their troops knew about the warrant or not.

The effects of the ICC arrest warrant on Ntaganda's position should not be overstated, however. Indeed, there is evidence to suggest that his and the CNDP's finances remained strong.

[68] Broache 2014, 24.
[69] Ibid.
[70] Ibid, 25.
[71] Ibid, 27.
[72] Ibid, 25.

Reports issued by the UN Group of Experts for the DRC make clear that the Rwandan government continued to supply the CNDP with even after the warrant for Ntaganda was unsealed.[73] Furthermore, large and stable revenues from mining and farming operations in North and South Kivu meant that Ntaganda and the CNDP would not be gravely impacted by the loss of support from outside funders because of the ICC's actions.[74]

That said, in the March 23, 2009 Peace Agreement, the DRC government formalized what had already been an informal agreement with Ntaganda not to turn him over to the ICC in exchange for his cooperation in defeating the FDLR.[75] This highlights the inherent weakness of the ICC in that it depends on states to execute its arrest warrants and also calls attention to shifting political and military demands as determining in part why an arrest warrant might be acted upon or not.

However, after the Lubanga conviction, political pressures began to shift as there were mounting demands that the government to turn over Ntaganda too.[76] President Kabila echoed those calls for Ntaganda's arrest, indicating that the state would no longer grant him safe harbor from the ICC. Ultimately, one ex-CNDP officer said that the fear of arrest that led Ntaganda to set up the rebel group M23, stating, "He decided that it was no longer safe for him in the FARDC or in Goma, so he had to go out 'into the forest' and take up arms, so that he could be protected from arrest."[77]

The creation of the M23 no doubt led to a short-term increase in violence against civilians as a new rebellion existed where one had previously not; but when Ntaganda turned

[73] UN Group of Experts on DRC 2008.
[74] Stearns 2013.
[75] Broache 2014, 26.
[76] Ibid, 29.
[77] Ibid.

himself over to the ICC on March 18, 2013, in Kigali, Rwanda, there was a decisive decline in M23's capacity for violence. As greatly feared by the CNDP commanders when they refused to discuss the Ntaganda warrant with their troops in 2008, there was a mass wave of defections following his voluntary surrender that greatly reduced the M23's troop numbers. UN Reports indicate that the group may have lost as many as 1,500 soldiers from its overall strength of only 3,250.[78]

And indeed, interviews with former members of M23 indicate that these defections were directly related to fears of ICC prosecution. For instance, one former member said, "When we heard about Bosco Ntaganda being taken to the ICC, many of us lost our confidence in our mission, because it made us see that even those powerful high commanders can be arrested. So we thought that maybe it will be us next who will be arrested, and so we lost our confidence and morale."[79]

While there is less information available on Muducumura's direct awareness of the ICC's actions, there is considerable evidence to suggest he should have been aware of his arrest warrant prior to his death while fighting against the FARDC. As Rwandan citizen and a former officer of the Rwandan army at the time of the genocide in 1994, it is notable that Muducumura was not amongst those indicted by the International Criminal Tribunal for Rwanda (ICTR), the ad hoc tribunal set up by the UN that was a predecessor to the permanently constituted ICC.[80] The FDLR was originally constituted by ethnic Hutus from Rwanda, many of whom were former members of the *interahamwe* which perpetrated many of the crimes of the genocide, and set up its operations in the Kivu regions of the DRC.[81]

[78] UN Group of Experts on DRC 2012.
[79] Broache 2014, 33.
[80] Human Rights Watch 2015.
[81] Ibid.

While Muducumura commanded its military forces, the FDLR also maintained a political branch in Europe headed by President Ignace Murwanashyaka and Executive Secretary Callixte Mbarushimana, both of whom were listed in the OTP's application for Muducumura's arrest warrant.[82] The fact that Mbarushimana had already been indicted and arrested in 2010, and had his case move to pretrial proceedings in 2011 implies that the leadership of the FLDR, including Muducumura, was well aware of the potential for further ICC actions against them. Furthermore, the OTP listed extensive evidence in their warrant linking Mbarushimana and Muducumura including telecommunications records like call logs and metadata from email accounts.[83]

And although President Murwanashyaka was not tried by the ICC, he was arrested in Germany in 2009 and convicted in 2015 under complementary legislation from the Rome Statute. His charges were for war crimes stemming from his role in directing attacks carried out by Muducumura in the eastern DRC.[84] German prosecutors relied in making their case on telecommunications records documenting the exchange of text messages between Murwanashyaka and field commanders like Muducumura who led the operations.[85] Thus, the frequent and regular contacts between Muducumura and the FDLR's political leadership in Europe indicates that he would have been aware of their arrests if for no other reason than he lost contact with them. That these arrests took place prior to his own arrest warrant being issued by the ICC in 2012 suggests that he was cognizant of the potential for ICC action against him.

Despite the warrant hanging over Muducumura's head, FDLR forces did continue committing atrocities even after 2012. A report by Human Rights Watch details that they "killed at least 94 civilians, raped dozens of women and girls, forcibly recruited children into their ranks,

[82] Office of the Prosecutor 2012.
[83] Ibid.
[84] Fortin 2015.
[85] Wegner 2011.

kidnapped people for ransom, and destroyed countless homes."[86] Thus in Muducumura's case neither the warrant for his arrest nor the arrests of his fellows in leadership of the FDLR led to a complete cessation in atrocities committed by their soldiers.

That said, in similar fashion to the Ntaganda's M23, the group's fighting strength did drop precipitously after Muducumura's indictment in 2012 from 6,000 fighters in 2008 to only 1,400 in 2015.[87] It is therefore plausible that some of the defections were precipitated by the ICC arrest warrant, just as was the case with the M23 fighters. If that were the case, then ICC action directly contributed to weakening the FDLR's military strength and therefore the ability of its leaders to continue perpetrating atrocities.

In tracing the awareness of Ntaganda and Muducumura and their rebel forces to the threat of the ICC, this section has highlighted that whereas arrest warrants may not have as clear of a deterrent effect on rebel actors' calculations, ICC arrests and convictions did.

B. I. Changes in Domestic Institutions and Normative Environments

Prior to 2002 when the ICC first opened its doors, there had been limited capacity in the DRC to prosecute grave atrocity crimes in national courts, not to mention the complete lack of political willingness to do so under the Mobutu regime. Disputes and conflict resolution at the local level, especially in rural areas distant from the capital, had therefore been decided by elders.[88] The inaccessibility of national courts, located in the national or in provincial capitals, meant that financial, logistical, and safety barriers kept victims and witnesses from testifying and seeking justice, barriers which were only compounded by the lack of infrastructure and enduring

[86] Human Rights Watch 2015a.
[87] Ibid.
[88] Sahin 2021, 301.

violence between state and rebel forces.[89] Furthermore, the extent of the violence committed in the previous decade was often so widespread that transporting all of the victims and witnesses a capital city was unfeasible.[90]

Issues with addressing serious human rights violations within the DRC's legal system resulted not only from conflict and long-standing state deprivation under Mobutu; they were also the product of an outdated legislative framework.[91] For instance, the country's existing penal code, introduced in 1940 during Belgian colonial rule, did not include war crimes, crimes against humanity, or genocide.[92] The 1979 military penal code did include provisions for such crimes; however, as violations were only subject to prosecution by military courts and to the discretion of the military higher-ups, they were not effective means for ensuring accountability and transparency.[93]

Starting in 2002 when the DRC ratified the Rome Statute, the international community in conjunction with the government began developing the capacities of domestic legal institutions and reforming legislation, providing the foundation for complementarity to actually function.[94] The UN, private international donors, and international NGOs provided the funding and expertise to buttress existing legal institutions and to train the lawyers and judges to prosecute serious human rights abuses.[95] Avocats Sans Frontier (ASF) and the UN Development Program (UNDP), for example, print and distribute newsletters, legal documents, and reports on international criminal law for lawyers, prosecutors, and judges in the DRC.[96] This has helped to

[89] Ibid.
[90] Ibid.
[91] Ibid, 300.
[92] Sahin 2020, 85.
[93] Sahin 2021, 301.
[94] Ibid, 298.
[95] Ibid.
[96] Ibid, 307.

establish greater consistency in legal practices and making sure all practitioners are up to date on the latest legislative developments.[97] These were necessary and substantial shifts towards building institutional capacity in the DRC from its depleted and moribund state under Mobutu.

However, to overcome the barriers of access for victims and witnesses more was required. Thus, the introduction of mobile hearings in the Eastern DRC conflict zone. These hearings, hailed as "complementarity in action," sought to remove the obstacles victims and witnesses faced in accessing to the criminal justice system by going straight into the communities directly by violence.[98] And research suggests that they have been a quite effective mechanism for doing so. Survey responses support the contention that mobile hearings increased communities' awareness of the formal legal system and that they valued the ability of mobile hearings to allow them to witness the proceedings and see for themselves that political and military figures were not immune to interrogation and prosecution.[99] As such, these hearings, one of the significant domestic reforms after implementation of the Rome Statute, contributed to a strengthening of norms around serious human rights violations by making the DRC's justice system present and visible where it had once been absent and invisible.

Additional domestic legal reforms include the amending the Congolese Penal Code of 1940 and the Code of Penal Procedure of 1959 such that they aligned with the Rome Statute.[100] And despite resistance from DRC political and military elites, the Law of Implementation of the Rome Statute was passed in 2015, further integrating the Congolese legal system with the international criminal law.[101] Significantly, that law was passed in conjunction with an

[97] Ibid.
[98] Perissi and Taquet 2018.
[99] Sahin 2021, 303.
[100] International Federation for Human Rights 2013, 41.
[101] Parliamentarians for Global Action 2016.

amendment to the Military Penal Code transferring jurisdiction over violations of international criminal law from military to civilian courts.[102]

Several high-profile trials reveal that these institutional and legislative reforms bringing the DRC in line with the Rome Statute have resulted in concrete invocations of international criminal law in the case of serious human rights violations. One example is the Songo Mboyo Case in which a military court in the Western DRC prosecuted 12 members of the military including their commanding officer for 119 reported rapes and 86 instances of looting in the villages of Songo Mboyo and Bongandanga.[103] Referencing the Rome Statute in its April 12, 2006 decision, the court convicted seven of the 12, sentencing them to life in prison in what was the first application of the Rome Statute by a domestic court in the world.[104]

Another high-profile example is the trial of Lieutenant Colonel Daniel Kibbi Mutuare and his soldiers for indiscriminate attacks on civilians and mass sexual violence committed in the town of Fizi in January 2011.[105] For these crimes, Kibbi Mutuare and four of his troops were sentenced to 20 years in prison for crimes against humanity.[106] As in the Songo Mboyo Case, the military court referred in its decision on definition of international crimes from the Rome Statute. Kibbi Mutuare is to date the high-ranking Congolese officer to be convicted of international criminal violations under complementarity.[107]

Finally, in a landmark case launched by a provincial military prosecutor, parliamentarian Frederic Batumike and members of his militia, *Djeshi ya Yesu*, were put on trial in 2017.[108] The

[102] Ibid.
[103] UN General Assembly 2015.
[104] Baylis 2015, 4.
[105] International Center for Transitional Justice 2015, 45–46.
[106] Ibid.
[107] Associated Press 2011.
[108] Maclean 2017.

charges brought were based on crimes committed in 2013 when members of *Djeshi ya Yesu* kidnapped and raped 40 girls from their homes in Kavamu.[109] To overcome the provision of immunity afforded members of parliament like Batumike under the Congolese Constitution, the military court relied on Article 27 of the Rome Statute which nullifies immunity in cases involving crimes under international law.[110] The court ultimately gave Batumike and 11 members of *Djeshi ya Yesu* life sentences for crimes against humanity.[111]

This is not to say that complementarity has been applied perfectly in all cases when serious abuses are perpetrated by government forces or officials. For instance, in the Minova Case in which soldiers carried out widespread sexual assaults on civilians and looting, only two soldiers were convicted out of the 39 put on trial in 2013.[112] Additionally, none of their superior commanding officers who bore greater responsibility for the events were ever put on trial.[113] Cases like this suggest that while the Rome Statute adoption and implementation has been crucial to the shifting societal norms away from a culture of impunity that existed prior to 2002, there is still room for further gains.

B. II. Domestic Prosecutions

This section looks at whether afore documented improvements in legal capacity led to an actual increase in the number of prosecutions and number of individuals prosecuted for serious human rights violations. Using data compiled by the Transitional Justice Research Collaborative, I charted domestic criminal prosecutions of state personnel for serious human rights violations

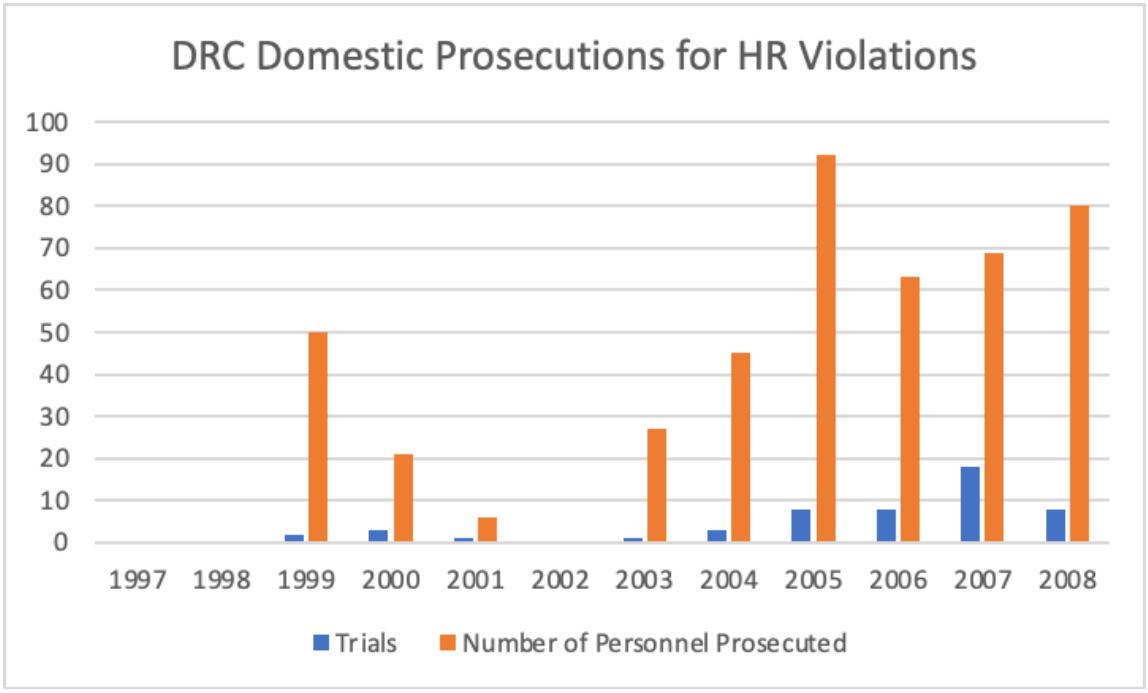
[109] Ibid.
[110] Perissi and Taquet 2018.
[111] Ibid.
[112] Human Rights Watch 2015b.
[113] Ibid, 2.

from 1997-2008.[114] Although the data for the DRC includes trials dating from as far back as 1978 and as recent as 2011, I focused on the 1997-2008 period to have approximately comparable samples for the years prior and after Rome Statute adoption. Their data only includes criminal prosecutions of state personnel (i.e., police and military) because the focus of the researchers was transitional justice and therefore the responses of state to abuses by its own actors. I charted not only the number of trials that took place in the years sample but also the number of state personnel prosecuted. I did so because undertaking larger and more complicated criminal trials for human rights abuses is evidence of improved prosecutorial capacity which in turn should have wider deterrent effects.

I did not document the number of convictions because much of the data is incomplete on the outcome of the trials. This is of course significant drawback to the data because if the increased number of trials and personnel prosecuted did not result in more convictions, then the prosecutorial effects would be null. Nor did the data include clarity on whether those prosecuted were rank-and-file or high-ranking members of the state's armed forces or police. Thus, any analysis of this data must be accompanied by the caveat that it does not demonstrate whether a decline in impunity for senior, well-connected members of the government. Finally, the data does not include the prosecutions rebel actors, which would allow for assessing indirect prosecutorial deterrence against them as well. More robust data collection on the dispositions of domestic criminal trials in the DRC, the rank and affiliation of those tried, and the number of trials holding rebel actors accountable could correct for these omissions.

Figure 3: Domestic Prosecutions in the DRC for Human Rights Violations

[114] Dancy et al 2014.



Data collected from the Transitional Justice Research Collaborative

Figure 3 shows that in the five years prior to the advent of the ICC, there were a total of six domestic criminal trials for human rights violations and 77 state personnel prosecuted for these offenses. In the five years thereafter, there were 38 trials and 296 state personnel prosecuted, which is more than five times increase in the number in trials and a nearly three times increase in the number of personnel prosecuted. Additionally, in most of the years following Rome Statute adoption both the number of trials and the number of personnel prosecuted increased significantly. For instance, from 2006 to 2007 there was an increase of ten trials and six greater personnel prosecuted. These data support the hypothesis that Rome Statute adoption creates the conditions for indirect prosecutorial deterrence through an increase in domestic prosecutions for serious human rights violations. However, this finding is limited to state personnel because of shortcomings in the data collected.

C. Changes in Behavior

I. Deliberate Targeting of Civilians

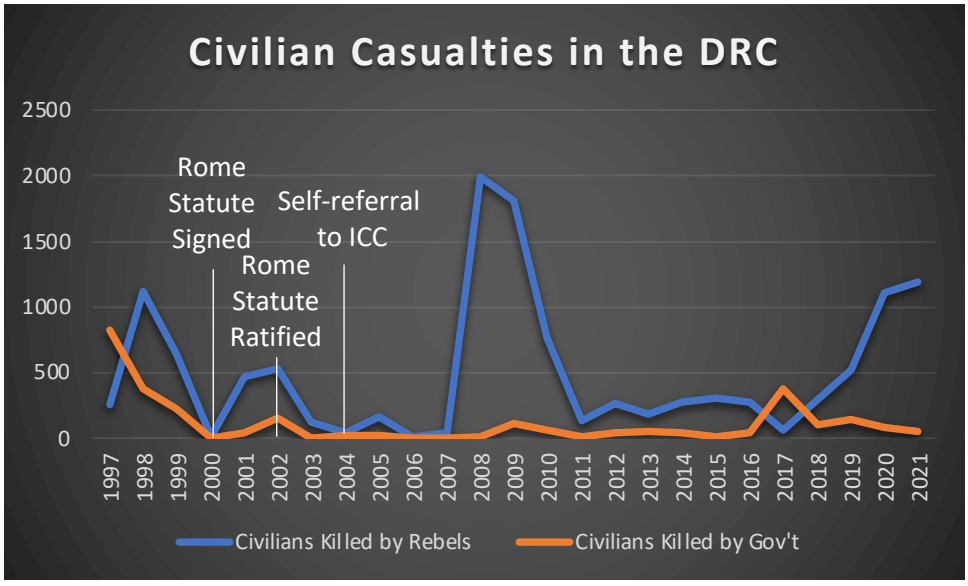
Using data from the Armed Conflict Location & Event Data Project (ACLED), I constructed a time series of deliberate civilian casualties committed by government and rebel forces in the DRC from 1997 to 2021.[115] The ACLED database collects real-time data on political violence and protest events from around the world, including information about deliberate violence against civilians like intentional killings and sexual violence. This data includes detailed information about the location, date, and actors involved as reported by local and international media, academic paper, and reports by international institutions and human rights organizations.

I decided focused on the deliberate killings of civilians because of the gravity and degree of responsibility criteria contained in the OTP's Policy Paper on Case Selection.[116] Although there are other kinds of atrocity crimes that I could have focused on, such as torture or the taking of hostages,[117] I chose to look at civilian fatalities because of the core principle in international humanitarian law that distinguishes between non-combatants and combatants. Additionally, this choice is supported by the Court's actual practice, which prioritizes systematic and intentional killings of civilians over the destruction of cultural heritage, say.[118] This is not to say that every recorded killing of civilians in the ACLED database would indeed meet the threshold for being a violation of international law, but that it is an appropriate measure given the lack of adjudication on every incident.[119]

[115] Raleigh et al 2010.
[116] Office of the Prosecutor 2016.
[117] For a longer list of atrocity crimes as defined under the Rome Statute, see here: un.org/en/genocideprevention/war-crimes.shtml.
[118] Ochi 2016.
[119] Jo 2021, 972.

To compile the time series, I found the total number of civilians killed by rebels and government forces respectively over the course of each calendar year from 1997 to 2021. Rebel groups included the Democratic Forces for the Liberation of Rwanda (FDLR), the Lord's Resistance Army (LRA), the National Congress for the Defense of the People/March 23 Movement (CNDP/M23), the Allied Democratic Forces (ADF), and the Rally for Congolese Democracy (RCD). Government forces were limited to the national army, the *Forces Armées de la République Démocratique du Congo* (FARDC). I did not try to disaggregate the rebel groups by country of origin because this would have excluded groups like the LRA, which originated in Uganda. Originally, I did not disaggregate the rebel groups that were incorporated into the FARDC after striking peace deals with the government, but subsequently examined the CNDP/M23 and FDLR rebel groups separately to assess whether the specific ICC actions taken against their leaders had the deterrence effects posited in the earlier awareness section.

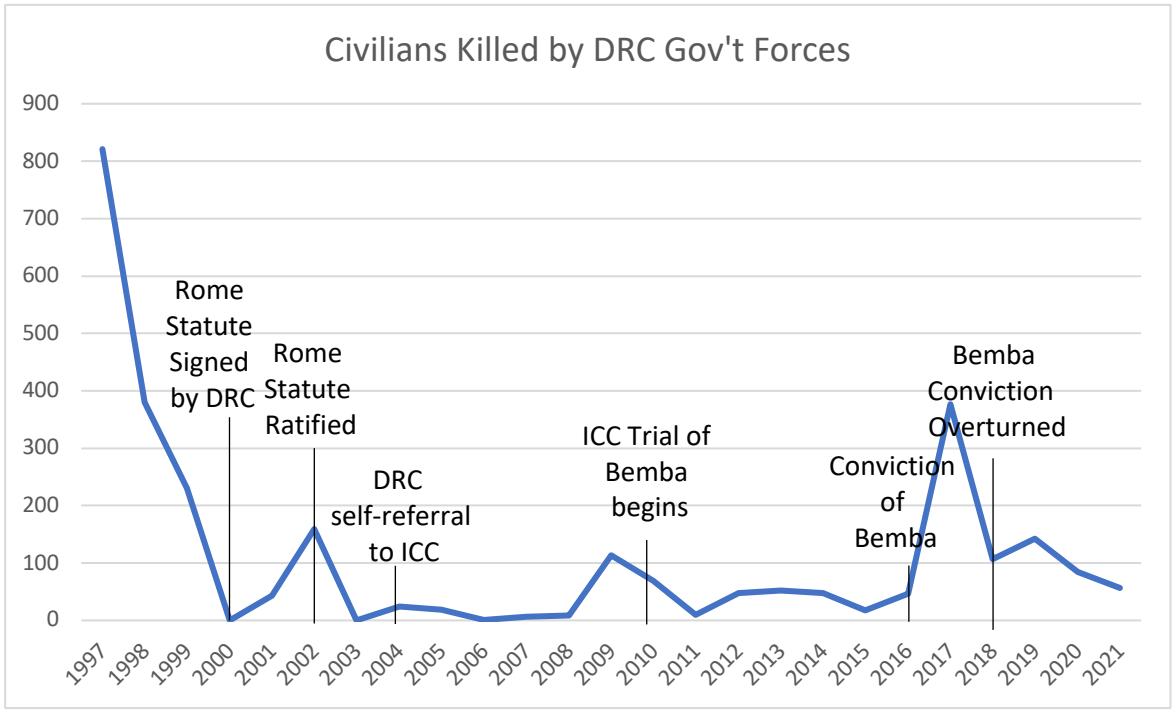
Figure 4: Number of civilians killed by rebel and government forces, 1997-2021



Data collected from the Armed Conflict Location & Event Data Project (ACLED)

Figure 4 illustrates the deliberate killings of civilians by both rebels and government troops from 1997 through 2021. Figure 4 shows that there were significantly fewer casualties caused by government forces than by rebels in all years save for 1997 and 2017, and especially so after 2002 when the Rome Statute was ratified and in 2004 when the ICC's investigation in the DRC began. This lends support to Hypothesis 4 that the ICC's social deterrence and indirect prosecutorial mechanisms may overall be more effective on governmental forces than on rebels.

Figure 5: Number of civilians killed by government forces, 1997-2021



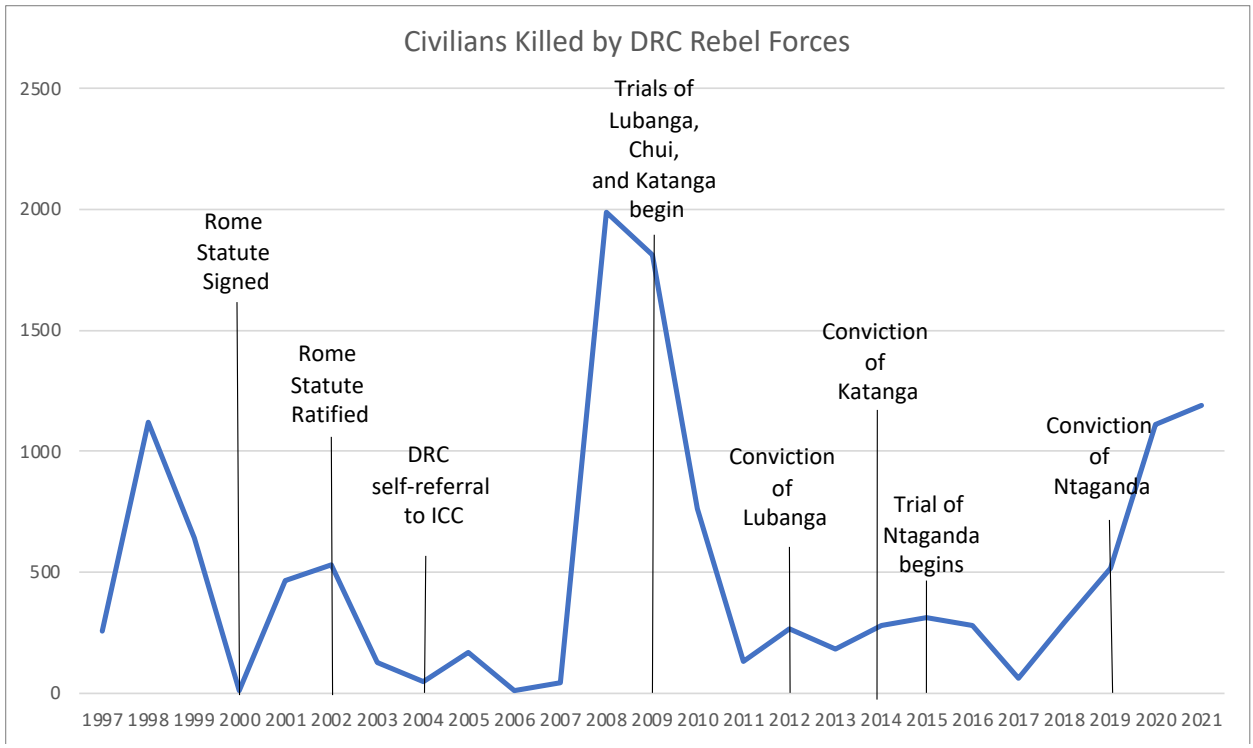
Data collected from the Armed Conflict Location & Event Data Project (ACLED)

Figure 5 presents the yearly totals of civilians killed by government troops from 1997 to 2021. Figure 5 illustrates a significant decline after the Rome Statute was ratified in 2002 and a smaller decline after the government's self-referral. After that date it remained lower than 200 killings per year in all years save for 2017-19. While this is still an extraordinarily high number of killings each year, the improvement is obviously better than not. The decline in the number of

killings supports the hypothesis that the ICC's social and indirect prosecutorial deterrent effects are operative in the DRC case amongst other factors given the absence of ICC actions taken against government leaders or armed forces commanders.

To understand if direct prosecutorial deterrence influenced government forces, I examined whether there were declines in violence following the start of the Bemba trial and his conviction, and an increase in violence following his conviction being overturned. The results were inconclusive, as violence did decline after the start of Bemba's trial in 2010 but not after his conviction in 2016, although it did increase after his conviction was thrown out in 2018. This is not overly confounding as Bemba was never a leader of the FARDC. In fact, the crimes he was accused of occurred outside the DRC in the Central African Republic where he was leading the MLC rebel movement. Bemba's conviction would therefore not be seen by rank-and-file or high-ranking members of the FARDC as one of their own. Instead, his trial and conviction by the ICC were more akin to that of a former rebel. Thus, my hypotheses that social and indirect prosecutorial deterrence would have a greater effect on government forces than direct prosecutorial deterrence is partially supported by the data in this figure.

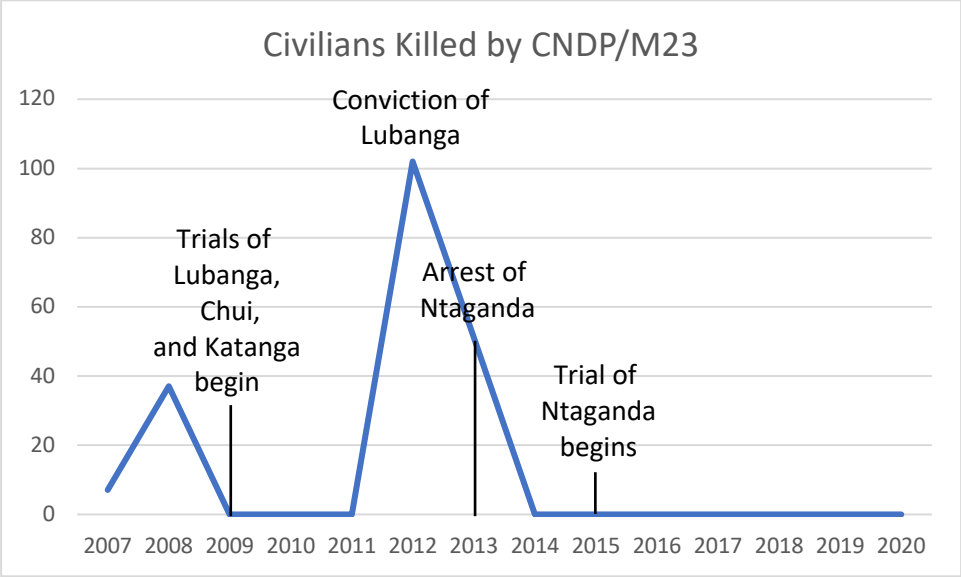
Figure 6: Number of civilians killed by rebel forces, 1997-2021



Data collected from the Armed Conflict Location & Event Data Project (ACLED)

Figure 6 presents the yearly totals of civilians killed by rebel troops from 1997 to 2021. The largest number of killings occurred in 2008-09, when over 1800 civilians were killed in each of those years. The lowest total was 11 killed in 2006. Figure 6 highlights that after the DRC government's self-referral and the start of the ICC's investigation in 2004 there was an uptick in violence. This suggests that the social deterrence mechanism was not effective at deterring rebel violence. However, after the starts of Lubanga, Katanga, and Chui's trials in 2009, there was a steep decline in rebel violence for the subsequent two years, suggesting the direct prosecutorial deterrence may have been operative. Similarly, the conviction of Lubanga in 2012 witnessed a small but noticeable decline in violence in the year thereafter, as was the case after the trial of Ntaganda began in 2015. That said the effectiveness of the ICC's direct prosecutorial actions were not always borne out during the sampled timeframe. In 2020, the year after Ntaganda was convicted, violence increased tremendously and continued its upward trend into 2021, where it remains at its highest levels since the 2008-09 period.

Figure 7: Number of civilians killed by CNDP and M23 rebel forces, 2007-2020



Data collected from the Armed Conflict Location & Event Data Project (ACLED)

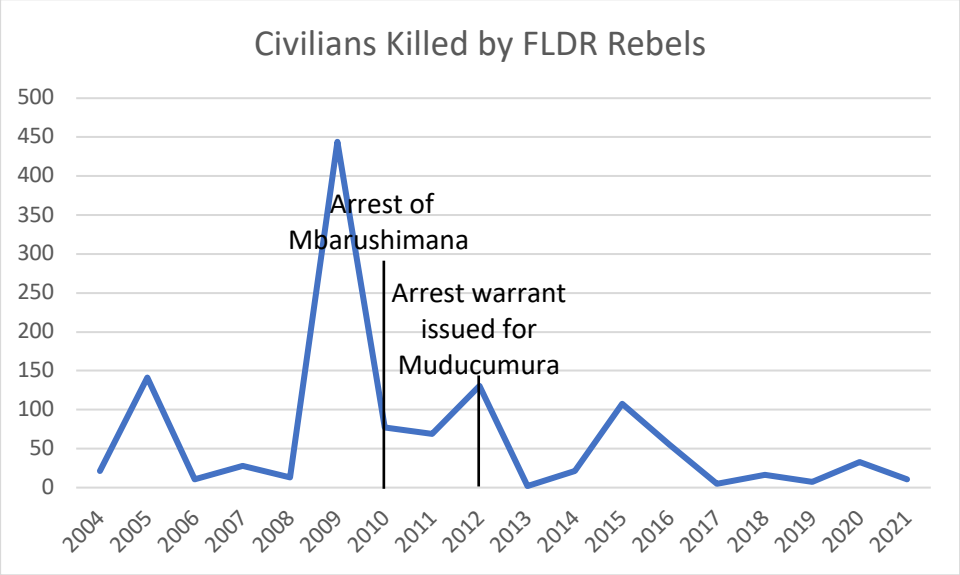
Figure 7 shows the number of civilian casualties committed by the CNDP and its successor group M23 specifically. In total, the CNDP and M23 were responsible for 197 civilians killed over the 2007-2020 period. The ICC arrest warrant issued against Ntaganda in 2008 coincides with a sharp decline from a peak of 37 civilians killed to zero in 2009-11. That said, the ICC arrest warrant was not the sole factor potentially causing the drop in violence as a peace deal was signed between the government and the CNDP on March 23, 2009, which entailed integration of much of the CNDP into the FARDC.[120]

Notably, there was a sharp decline in M23 violence in the year after Lubanga's conviction in 2012 from a high of 102 civilians killed to half that number in 2013. Furthermore, in the year after Ntaganda's arrest on March 22, 2013, M23 ceased killing civilians entirely. These data suggest that the ICC conviction and arrest contributed to the decline in violence

[120] International Crisis Group 2009.

against civilians even as fighting between government and rebel troops was ongoing. However, these declines are not wholly explicable by ICC interventions alone, as the M23 announced a unilateral ceasefire on November 5, 2013.[121] Thus, ICC deterrence through arrests and convictions should be seen as one amongst multiple factors, such as the deployment of UN peacekeepers in 2013, that led to the decline in violence M23 against civilians.[122]

Figure 8: Number of civilians killed by FDLR rebel forces, 2004-2021



Data collected from the Armed Conflict Location & Event Data Project (ACLED)

Figure 8 shows the number of civilian casualties committed by the FDLR forces. The FDLR was responsible for 1193 civilians killed over the 2004-2021 period. Consistent with qualitative information, the ICC arrest of FDLR executive secretary Mbarushimana in 2010 witnessed a small decline in violence against civilians thereafter, from 77 killed in 2010 to 69 in 2011. Likewise, following the ICC arrest warrant being issued against field commander Muducumura in 2012 the violence against civilians declined precipitously, from 131 killed in

[121] Broache 2014, 13.
[122] UN Group of Experts on DRC 2014, 5.

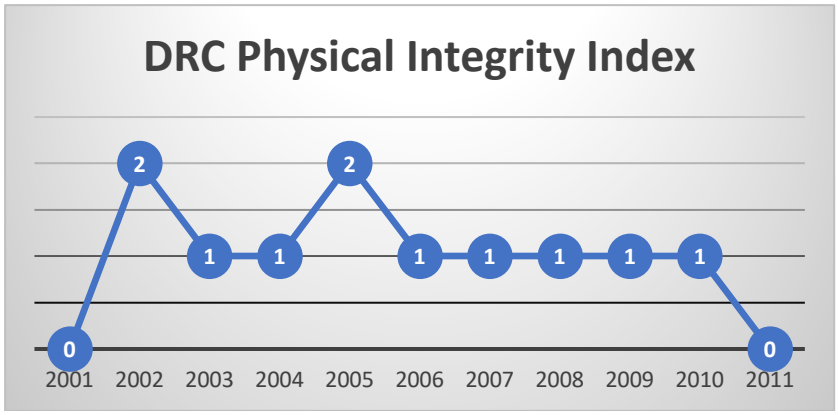
2012 to only two killed in 2013. Although increased pressure from government troops and UN peacekeepers in 2013 is an alternative explanation for this drop, the timing of the ICC interventions against the FDLR suggests that direct prosecutorial deterrence also played a role.[123]

C. II. Human Rights Data

While the above section examined the deterrence effects of the ICC in the DRC in terms of deliberate civilian killings, this section looks at the potential effects of the ICC in terms of broader human rights measures. Using the CIRI Human Rights Dataset, I constructed a time series of the physical integrity index scores for the DRC.[124] This data does not focus on human rights polices or overall human rights conditions which might be impacted by rebel actions. Instead, it deals strictly with the government's human rights practices, and is collected from the annual United States Department of State's Country Reports on Human Rights Practices. The physical integrity index is an aggregate figure made up of from the separate Torture, Extrajudicial Killing, Political Imprisonment, and Disappearance human rights indicators, and ranges from 0, meaning no government respect for these four rights, to 8, meaning complete government respect for these four rights.[125] The sample for which I was able to collect data ranged from 2001 to 2011. This sample is less than ideal because it does not allow for equal comparison of the time periods before Rome Statute ratification in 2002 and afterwards.

Figure 9: Physical Integrity Index for the DRC, 2001-2011

[123] Broache 2015, 242.
[124] Cingranelli and Richards 1999.
[125] Ibid.



Data collected from the CIRI Human Rights Dataset

Figure 9 illustrates a small but not lasting improvement in the DRC's physical integrity scores post-Rome Statute ratification. Whereas the physical integrity index had been at 0 for the DRC in the year prior to ratification, it remained above 0 in all years thereafter in the sample save for 2011. This suggests that the Rome Statute ratification was accompanied by a modest increase in governmental respect for the four physical integrity rights, but not enough to sustain a larger upward trend. Ultimately, this finding is congruent with the earlier findings that ICC intervention has not eliminated government killings of civilians, although it has resulted in a modest decline in their overall levels.

So, although the ICC may have a deterrent effect on a specific kind of atrocity that can be widely recognized as a core crime under its mandate, its effects should not be overstated. Indeed, the data suggest that ICC intervention does not necessarily lead to a long-term improvement in all categories of physical integrity rights due to deterrent effects.

However, the fact that the CIRI data does not show an improvement in the overall human rights picture in the DRC is notable for another reason. During a period that overlapped with numerous ICC interventions in the DRC, Figure 9 supports the contention that there was not some unobservable process in the DRC of general improvement in human rights driving the previously detailed declines in deliberate killings of civilians. Instead, precisely because there

was no significant improvement in overall human rights practices, the declines in direct violence against civilians signal that the ICC's deterrent mechanisms may be more proximate and probable cause.

Conclusion

This paper examined the deterrence effects of the ICC in terms of direct prosecutorial actions, like warrants, arrests, and convictions, taken in response to serious violations of international law and in terms of the indirect and social costs imposed on violators. It did so by looking at changes in the actions of both state and rebel armed forces in the ongoing conflicts in the DRC. This paper first demonstrated the awareness of rebel actors to the threat of ICC prosecution, a necessary condition for direct prosecutorial deterrence to be effective. It then showed that Rome Statute ratification resulted in significant institutional changes in the DRC, including a substantial increase in the number of domestic prosecutions of state forces for serious human rights violations. This signaled that the underlying conditions for indirect prosecutorial and social deterrence were present in the DRC. This was illustrated both in terms of the number of high-profile trials and in terms of aggregate numbers of prosecutions and of those prosecuted.

Then, by measuring the number of deliberate civilian killings over time, this paper noted that certain kinds of ICC actions and deterrence effects coincided with considerable declines in violence. Specifically, arrests and trials were more effective at directly deterring rebel actors than other ICC actions, and the social and indirect deterrence mechanisms were more likely to be play a role in the decrease in civilians killed by government forces because of the dearth of ICC prosecutions of government officials. While this paper noted other potential explanations for the

declines, it did provide evidence that the ICC actions played a direct role regarding the declines in violence by the FDLR and CNDP/M23 rebel movements by removing key leaders.

One of the limitations of the process tracing used in this paper is that its findings are not easily generalizable to other contexts. For instance, future research will be needed to investigate whether the deterrence effects illustrated in the DRC apply to other countries in protracted internal conflict, and whether they apply in interstate conflicts as well. Future research should thus move beyond the general question of whether the ICC plays a role in deterring atrocities and instead delve into whether certain kinds of prosecutorial actions have similar effects across different contexts. This would be a boon not only to scholars of the Court but also legal practitioners and policymakers who have a stake in taking that prevent, discourage, or mitigate serious human rights abuses from occurring.

Another limitation of this study is that the findings on deliberate killings of civilians remain open to other interpretations, such as an internal mechanism causing the declines in violence rather than the ICC's actions. By looking at the effects of ICC actions over a large time period that spans before and after its creation, this paper sought to limit the chances that there was such a separate, consistent internal driver comparable to the sustained actions of the ICC to address the DRC's conflict. However, a future study could investigate whether actions taken by the UN force stationed in the DRC was not more consistently responsible or its actions correlated with declines deliberate targeting of civilians.

Finally, this paper signals that the Court's effects are not limited to direct prosecutorial actions. Therefore, any assessment of the ICC should consider the role it plays in promoting complementarity and judicial reforms, thereby decreasing impunity for serious crimes against humanity at the domestic level.

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