

The Limits of an International War Crimes Regime

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Abstract

Despite some early pessimism about the International Criminal Court (ICC), recent work is much more optimistic about the influence of the ICC on the behavior of national leaders. One strand of this literature points to ratification patterns as evidence that countries entering the ICC likely intend to alter their behavior. We extensively analyze ICC ratification patterns and argue that they support a more cautious evaluation of the ICC's likely effects. The countries with the least to fear from ICC ratification are the most likely to join, suggesting that the ICC does not likely represent deep cooperation. Ratifiers have significantly lower levels of past violence, stronger rule of law, and better domestic judicial institutions than non-ratifiers. By far, democratic domestic institutions are strongest predictors that a country will ratify the Rome Statute. Ratification appears driven by regional diffusion as much as other political factors. We revisit arguments about the influence of the ICC on even those countries that ratify and show that its influence may be overstated. More broadly, we argue that ratification patterns are an important and often overlooked indicator of the likely effectiveness of international organizations, even beyond the ICC.

Do international legal institutions influence state behavior? While international relations has become increasingly legalized (Goldstein et al. (2000)), there remains considerable debate about the independent effect of international law on state behavior. Optimists point to institutions like the World Trade Organization and other increasingly legalized areas of international relations where cooperation and compliance seems to go beyond what one would expect in the absence of explicit rules (e.g. Chayes and Chayes (1993); Franck (1990)). Pessimists, however, argue that because international law relies fundamentally on the consent of governments, many instances of compliant behavior are really examples of “shallow cooperation,” with states entering into agreements that do not force them to dramatically alter their behavior (Downs, Rocke and Barsoom (1996)).

The recently created International Criminal Court (ICC) is an important international institution, occupying a large amount of attention within the debate over the effects of international institutions. Before looking at any data or theoretical arguments, the ICC would appear to be an extremely “hard” case for observing the independent influence of international law. The ICC is an international organization that attempts to influence state behavior in a highly sensitive area of state sovereignty, that of the occurrence of war crimes and the quality of governments’ human rights practices. The ICC specifically targets individuals, either national leaders or members of opposition groups, for whom the stakes are very high. The maximum sentence if found guilty of war crimes under the ICC is life imprisonment and no pre-trial plea bargaining takes place (Ritter and Wolford (2010)). If the type of behavior that the ICC attempts to influence were not difficult enough as is, the ICC lacks independent enforcement capabilities, instead relying on the cooperation of individual states for the capture of indicted war criminals and the facilitation of evidence gathering (Gilligan (2006)). Unlike institutions or laws that govern trade or monetary relations, the gains from cooperation over bringing perpetrators of atrocities to justice are less readily observable for any given state that is not directly involved in the conflict in which the atrocities were committed, and there are clear disincentives to voluntarily submitting to the jurisdiction of the ICC for states that are involved in ongoing violent conflicts in which war crimes might occur or for states that utilize repression internally. The ICC also operates on the principle of complementarity, ostensibly meaning that it prosecutes cases when a country’s domestic legal system is unable or unwilling to

do so. Given the complementarity principle, cases tend to be referred to the ICC by state signatories, although the UN Security Council and the ICC prosecutor has some discretion to initiate investigations independently. These procedural rules mean that a permanent member of the UN Security Council that is not a signatory can block investigation of its nationals with a veto (Goldsmith (2003)). Despite these challenges, recent theoretical and empirical work on the court has been decidedly optimistic about the influence of the ICC on state behavior. One commentator has even suggested that “a phenomenon of judicial globalization is afoot” (Schabas (2007), 54).

The question of “who ratifies the ICC” is an important way to analyze the effects of the creation of the ICC. The ICC’s intended effects are largely localized to the countries that ratify the treaty, unlike other areas of international cooperation where the benefits of ratifying and complying with a treaty are diffuse. This article provides a thorough examination of the types of countries that have and have not ratified the ICC. We argue that ratification patterns strongly suggest “shallow” cooperation. States that have the least to fear from ratifying the ICC are the most likely to do so. In particular, states with worse existing political and legal institutions and with more severe recent civil conflicts tend to avoid ratifying the Rome Statute. The vast majority of support for the ICC, in terms of joining the regime and submitting consensually to its jurisdiction, comes from those for whom compliance will be easiest: stable democracies with good judicial institutions. Amongst the countries for whom the ICC could potentially have a large effect, those with higher potential costs of ratification are significantly less likely to join.

In this paper, we present a broad array of evidence supporting this trend, and conduct the most extensive analysis of ICC ratification patterns to date. We examine the association between various measures of political stability and violence, political and judicial institutions, and ratification of the Rome Statute. We show that across multiple measures of these concepts, ratifiers of the Rome Statute score better. We also reassess evidence from Beth Simmons and Alison Danner’s (2010) study, which argued that ratification rates showed the ICC to be a way for states to credibly commit to certain behavior. Their study is an important and first empirical examination of this important topic and demonstrates some interesting patterns of ICC accession. However, we show that ratification rates are more consistent with shallow participation in the regime than with credible

commitments. Democracies are by far the most likely countries to ratify the Rome Statute, followed by non-democracies with some history of civil war and peaceful non-democracies. Furthermore, most of the difference in ratification rates amongst non-democracies is driven by decisions of how to measure a country's history of civil war. A more fine-grained measure suggests that there is no difference in ratification rates across non-democracies with different civil war histories. We also suggest important alternate theoretical interpretations of their findings about ratification rates and their use of instrumental variables to determine the causal effect of the ICC on state behavior.

Our analysis also examines regional patterns of ICC ratification. Ratification patterns exhibit regional clustering: ratification seems to be a phenomena of Europe, South America, and North America (with the exception of the United States). The vast majority of countries in Asia, North Africa and the Middle East have not ratified the ICC. The one area where ratification patterns provide the most cause for optimism is Sub-Saharan Africa. Even here, however, extant ICC cases point toward a simple alternative explanation: sub-Saharan African countries have joined the regime and used it to prosecute former rebel groups, not tie their own hands. Another potential reason many Sub-Saharan African countries that would seemingly have high *ex post* costs for ratification have submitted to ICC jurisdiction is because of pressure from the European Union. A few non-democratic countries with considerable violence in their past that are outside of Africa have joined the regime. Yet, most of these countries, in particular Afghanistan, Tajikistan, and Cambodia have avoided cooperating with the regime by failing to implement their ICC obligations and by signing bilateral Article 98 agreements with the United States, which forbids investigation and prosecution of U.S. military personnel. These countries have technically joined the regime, though their behavior is not indicative of "deep" cooperation.

Our study also addresses the broader literature on international organizations by emphasizing the importance of ratification patterns in and of themselves. The vast majority of recent work examining whether and how international institutions affect the behavior of their members acknowledges that ratification of an agreement is endogenous to compliance with that agreement (Downs, Roake and Barsom (1996)). Some recent empirical work has used increasingly sophisticated techniques to isolate explicitly the effects of international institutions on member state

behavior, separate from the factors that induced the member state to join the institution in the first place. However, whether or not a country ratifies the treaty is relegated to the “first stage,” and the endogenous relationship between ratification and post-ratification behavior is often treated as an econometric obstacle to be overcome before looking at the effect of the treaty on those that ratify. Put differently, we focus on the effect of the creation of the ICC, and not solely on the effect of the ICC on those that ratify.

In the case of the ICC, separating these two effects is very important for how we approach both the ICC and the conclusions we draw from our experience with it. The ICC, like most international treaties, is entered into voluntarily. Whether or not the ICC has a significant effect on the countries that ratify is an important question, to be sure. But we should be cautious when making statements about trends in judicial globalization or the aggregate deterrent effects of the ICC if the countries that are most at risk of committing prosecutable offenses do not ratify, especially given that there are serious obstacles to indicting and prosecuting non-signatories (Goldsmith 2003; Ginsburg, forthcoming). The fact that the ICC is not being ratified by the countries for whom it is likely to have the strongest effect should give pause to global conclusions, even if we are convinced that the ICC has the intended effect on member states, something which is hotly contested.

We proceed as follows. We begin by discussing existing theoretical claims in support of the argument that the ICC influences member state behavior. We then examine the evidence about what types of countries sign and ratify the Rome Statute, as well as reanalyze existing evidence. In doing so, we use the widest range of measures of domestic political and legal institutions, and also of internal conflict, of any extant study. We also reanalyze evidence for the credible commitment arguments advanced by Simmons and Danner (2010) and point out inconsistencies in how those results have been discussed and alternative interpretations of those results. We then examine regional ratification patterns and specific cases that shed light on whether the ICC has had the intended effect even upon those countries that have ratified. Again, our conclusions are more pessimistic than recent studies: it is not clear that ratification changes countries’ behavior from what they otherwise would do and several arguments from the judicial politics literature suggest limitations to ICC influence due to the strategic complexities of prosecuting citizens of sovereign

states.

1 ICC Optimists

Despite some early legal scholarship critiquing the newly created ICC, recent political science scholarship is decidedly optimistic. A common thread in this work is the argument that the ICC can deter atrocities by raising the *ex post* costs to a leader of committing an atrocity. The ICC is thus a deterrent for leaders who have ratified, discouraging government leaders that might otherwise employ repression and engage in atrocities against their own citizens. There are at least two theories of how the ICC could raise these costs. The first, and most prominent, version of the deterrent argument supposes that the creation of a permanent international criminal court means that there will be more monitoring and enforcement of a leader's behavior (Schabas (2007); Scheffer (2002); Akhavan (2001)). The ICC raises the possibility that a leader will be exposed to prosecution after committing an atrocity.

A similar argument was recently articulated by Beth Simmons and Allison Danner (2010). According to their argument, the ICC is a way for governments to credibly commit to refrain from ICC-violating acts. But not every country needs to make such a commitment. Simmons and Danner point to a country's domestic institutions and the presence of internal violence in the country's recent history as two features affecting the need to make credible commitments. Non-democracies with a recent history of internal violence are most in need of credible commitments to domestic populations and international audiences, since these countries cannot credibly promise to forgo the use of violence and repression as tools of government. Democracies are less in need of this commitment device because their domestic institutions suffice to ensure that their leaders will not commit atrocities. Summarizing their argument and findings, Simmons and Danner say

... states that are at risk for committing the kinds of atrocities governed by the Court but that lack a dependable domestic mechanism for holding government agents accountable are likely to be among the Court's *earliest and most avid* subscribers. The evidence for this interpretation of delegation received strong support in our empirical analysis.

Despite exhaustive robustness tests taking alternative measures and explanations into account, we found fairly consistently that the least accountable governments — the least democratic, with the weakest reputations for respecting the rule of law, the least politically constrained — with a recent past of civil violence were at *the highest ‘risk’* of ratifying the Rome Statute (252, emphasis added).

A second argument, from Michael Gilligan (2006), reasons that the ICC provides a politically credible alternative for countries that would, in the absence of the ICC, be likely to grant asylum to brutal dictators in exchange for them voluntarily relinquishing their hold on power. Dictators face altered expected utility comparisons in a world with the ICC. Without the ICC, dictators chose between continued rule and repression, which carries with it some risks of deposition and subsequent asylum in a friendly host country. With the ICC, these dictators face a choice between continued rule with some risk of deposition and voluntary surrender to the ICC. Since the maximum sentence under ICC rules is life imprisonment, compared to the worse consequences of deposition for most brutal dictators, the expected payoff committing atrocities is lower in a world with the ICC. Since the asylum option is taken off the table in a world with the ICC, the potential outcomes of engaging in serial human rights abuses is lower for dictators, and atrocities should be deterred at the margins.

Gilligan’s argument does not rely on a assumption of enforcement of ICC dictates, but it does rely on the assumption that asylum is less likely in world with the ICC and that leaders are very foresighted. The asylum assumption likely has some practical limits, as allies of an indicted dictator may find it politically difficult to deny asylum and some potential asylum granters may calculate that granting asylum and achieving immediate cessation of abuses is preferable to prolonged rule and eventual surrender to the ICC. Also, the argument could easily be applied to a number of international human rights instruments that make it politically difficult to offer asylum to unsavory leaders, as well as the possibility of creation of ad hoc tribunals in modern times, so it is not clear that the ICC is unique in this regard.

Most importantly for our study, all of the above arguments apply most strongly to countries that ratify the ICC. The “teeth” of the ICC are in the potential for prosecution, which is much more

likely for signatory states. ICC jurisdiction does not extend to nationals of non-signatory countries whose alleged crimes were committed in non-signatory states. The only exception is if there is a referral of the case by the United Nations Security Council. Because of these hurdles, the calculation of whether to commit atrocities for leaders of non-signatories closely resembles the calculation in a world without the ICC. Of course, the indictment of Sudanese President Omar al-Bashir points to an exception to the rule, as the investigation was initiated at Security Council behest. But the political difficulties of achieving this resolution were substantial. Violence in Darfur erupted in early 2003, but the Security Council resolution referring the case to the ICC prosecutor was adopted only in March 2005, and the arrest warrant for President Bashir was not issued until March of 2009. The early part of this process was marked by substantial difficulty in securing cooperation on the Security Council vote from China. The latter part was spurred by substantial media coverage of atrocities in Darfur and a world wide grass roots movement encouraging multilateral intervention. These factors point toward this case being more of an exception than the norm. Finally, despite the arrest warrant, Bashir has not been taken into custody, and is free to travel amongst nonsignatory countries.¹

2 Patterns of Ratification

Ratification patterns are an important component of assessing optimism about the effect of the creation of the ICC. What type of countries have ratified the ICC? In particular, we are interested in assessing whether patterns of participation represent “deep” or “shallow” cooperation (Downs, Rocke, and Barsoom 1996).² Deep cooperation occurs when membership in an IO causes member states to behave in ways that they would not otherwise have behaved, had they not been a member. Even those countries for whom the institution requires a costly adjustment in their behavior choose

¹Even signatory countries, like Chad and Kenya, have allowed Bashir to travel freely to their countries without arrest, casting further doubt on the actual costs of the ICC to non-signatories. A recent regional conference on Sudan was moved from Kenya (an ICC signatory) to Ethiopia in order to allow Bashir to attend without fear of arrest. See: *The Independent*, South Africa, <http://www.iol.co.za/news/africa/al-bashir-attends-east-africa-summit-1.875750>.

²Downs, Rocke, and Barsoom (1996) originally modeled cooperation to solve a collective action problem. Participation in the ICC is slightly different, as it involves submitting to jurisdiction. But the general point that countries tend to opt out of international agreements for which they are at an increased risk of noncompliance is applicable here.

to join the institution. Shallow cooperation, on the other hand, describes a situation where members of an institution behave in the same manner as they would have in absence of the institution. This can occur because the institution does not require costly changes in behavior for its members or because countries that have low costs to bringing their behavior in line with the institution's obligations are the ones most likely to join. We focus on the latter explanation: countries for whom ratification is most costly, or those countries at the highest risk of being noncompliant, avoid ratification.

If the ICC does indeed represent deep cooperation, then ratifiers and non-ratifiers should not be systematically different in ways that correlate with their expectations about the costs of ratifying or likelihood of noncompliance. If the ICC merely represents shallow cooperation, then only countries that expect to comply with the treaty should ratify.³

What determines the potential dangers of ratifying the ICC for a particular country? Alternatively, what might go into the calculations of a leader comparing a world where they choose to ratify the ICC with one in which they do not? The primary danger for a leader is that they will face ICC prosecution. For this to occur, there are two things that must happen: (1) a leader must commit an offense and (2) the ICC must choose to pursue prosecution afterwards.⁴

With regard to the first concern, that of the occurrence of a violation, we analyze data that describe the overall level of internal conflict in a particular country, which is correlated with the probability of a future ICC offense. Specifically, we compare ratifiers and nonratifiers based on the severity of civil conflict, World Governance Indicators of political stability and violence, and PRS political risk ratings. Ideally, we would have a model predicting the probability that a particular government will run afoul of the ICC in the future. While none of the measurements is a per-

³Carrubba (2005) raises an important caveat to consider: states cannot always perfectly predict their future costs of ratification. Countries might join an institution and then be affected by their obligations even when they experience high or low future costs of compliance. However, this again relates to the provision of a collective good. Since joining the ICC exposes nationals to prosecution, countries at an increased risk of committing prosecutable offenses may choose not to join the regime.

⁴In reality, there are many more things that must happen: the ICC prosecutor must go through all the steps involved in indictment and prosecution; some country or body must actually gather evidence against the accused; the accused must be apprehended; the prosecution must succeed in convicting them; they must receive a stiff punishment, etc. None of these are trivial, and many have been put forth elsewhere as significant limits on the deterrent threat of the ICC. We simplify the process here to focus on features of the costs associated with the ICC that can most easily be compared cross-nationally.

fect predictor of ICC violations, these measures are theoretically and empirically linked with the probability of an ICC-prosecutable violation occurring, since events like genocide, mass killing, and targeted killings of civilians are more likely to occur in countries commonly experiencing large scale civil violence and political instability.

With regard to the second concern, that of the ICC's prosecution decision, we analyze the type of political and judicial institutions present in the country, and how they impact the probability of an ICC case being pursued after a violation has occurred. As explained in greater detail below, the ICC works on a principle of complementarity with domestic institutions. Countries with stronger domestic institutions have less to fear from ICC prosecution, because the ICC only prosecutes cases when domestic institutions are deemed insufficient.

Along both dimensions, internal conflict and the strength of domestic institutions, we find that ratifiers are systematically different from non-ratifiers, in ways that suggest shallow cooperation. Ratifiers are countries with less internal conflict and with stronger domestic institutions. We first present simple cross tabs and summary statistics to show the differences between ratifiers and non-ratifiers. These results are summarized in Table 1. We then revisit the existing empirical analysis regarding credible commitments specifically. We show that, even using existing data and methods, non-democracies who experienced civil war in the 1990s are not particularly likely to ratify the ICC, which is contrary to claims that countries most needing to make a credible commitment are among the most likely to ratify. Using an alternate measurement of civil conflict, we show that past civil conflict has a negligible effect on the rate of ratification and that democracies with and without a recent civil war are by far the most likely to sign. Lastly, we suggest an alternate theoretical interpretation of existing work attempting to isolate the causal effects of ratification on leader behavior.

2.1 Past Internal Conflict and ICC Ratification

We first examine whether countries with civil conflict during the 1990's are more or less likely to ratify the ICC. Following existing literature, we focus on the period from 1990-1997 because the Rome Statute is opened for signature in 1998. Countries that experienced more civil con-

flict in the 1990's have a higher risk of further atrocities.⁵ All ICC actions to date have dealt with allegations concerning civil conflicts, suggesting that this is an area of focus for the ICC. Valentino, Huth and Balch-Lindsay (2004) demonstrate that the majority of mass killings of the last half century occurred during civil conflicts. The amount of civil conflict that a country experienced in the period prior to the ICC's entry into force is thus a telling indicator of the likelihood of that country running afoul of the ICC in the future.

For the first measure, we use data describing the number of battle deaths from civil conflicts during the 1990's. While existing work has used binary codings of civil conflict, we measure the actual number of battle deaths resulting from a particular civil conflict.⁶ Using battle deaths as a continuous measure of civil conflict is an improvement over the binary codings used in existing work for two reasons. First, and most simply, the severity of civil conflict matters. Whether or not a country experienced a civil war in the 1990s is a crude measure of the level of violence in a particular society. Many countries experienced some form of civil conflict during the 1990's but are not equally likely to experience future civil conflict or crimes against humanity. For instance, one commonly used cutoff criteria in the literature would code the United Kingdom and Iran the same (both experienced civil conflict between 1990 and 1997) but treating those countries as having equally as much to fear from future ICC ratification is likely to be inaccurate. More severe civil conflicts are more likely to be associated with mass killing events and other atrocities that fall under the scope of ICC law (e.g. Huth, Valentino, and Lindsay 2004). Second, existing work has shown that the choice of "cutoffs" for what does and does not constitute a civil conflict greatly affects empirical results (Hegre and Sambanis (2006)). In the empirical study of the onset and occurrence of civil war, variation in the definition of civil wars results in datasets that are very poorly correlated with one another, with different datasets yielding opposite results for important variables. We avoid this problem by using a continuous measure of civil conflict.

On average, the countries that have ratified the ICC experienced significantly less civil violence in the 1990's than the countries that have not ratified.⁷ The average number of battle deaths from

⁵Simmons and Danner make this argument, pp. 237-238.

⁶These data come from the Uppsala PRIO Battle Deaths dataset, version 3.0, (Lacina and Gleditsch (2005)).

⁷These numbers use "type-3" conflicts only, which do not include conflicts classified as "internal conflict with outside intervention." Results do not change if you include those conflicts as well.

civil conflict during the period 1990 to 1997 for countries that ratify the ICC is 1,315, while the average for non-ratifiers is 4,725.⁸ If we exclude countries that didn't experience any battle deaths during the 1990's, the difference becomes even more stark. The average number of deaths for ratifiers is 5,416, compared to an enormous 13,413 for non-ratifiers.⁹ Of the countries with strictly positive numbers of battle deaths from 1990-1997, there are nearly twice as many non-ratifiers as ratifiers. Figure 1 plots a histogram of the same data.¹⁰

Examining the specific countries with high numbers of battle deaths and which have ratified the ICC intensifies this trend. Afghanistan ratified the ICC, despite experiencing an estimated 54,000 battle deaths from civil violence in the 1990's. This is a large outlier, as shown in Figure 1. The severity of the Afghan civil conflicts greatly inflates the average number of battle deaths for ratifying countries. Excluding Afghanistan, the average number of battle deaths from civil conflict for the ratifying countries drops from 1,315 to 867, a 34% decrease. We highlight Afghanistan specifically, because, while including Afghanistan in the category of countries that have ratified the ICC is technically correct, in reality, it is substantively misleading. While Afghanistan has ratified the ICC on paper, as of late 2009, it had not taken any serious action to fulfil its ICC obligations by amending national law.¹¹ Afghanistan has also taken steps to effectively prevent the ICC from prosecuting U.S. military personnel that might be suspected of atrocities by signing a so-called Article 98 agreement with the U.S., which generates immunity from prosecution by the Afghan government for U.S. soldiers and prohibits the Afghan government from surrendering U.S. personnel to the ICC. It is thus far from clear that Afghanistan is an example of deep cooperation with the ICC, even though it is a nondemocracy that experienced civil conflict during the 1990's.¹²

Battle deaths are not the only barometer of a country's internal climate. Other measures, which do not require that internal strife actually erupt into civil conflict, show similar patterns.

⁸p value for difference in means is 0.02 For this and other references to p values comparing means of measurements for ratifiers verses non-ratifiers, we use a simple difference in means t test.

⁹p value for the difference in means is 0.07

¹⁰The sample for these two figures is limited to countries with strictly positive numbers of battle deaths in the 1990's. Countries with zero battle deaths are not pictured.

¹¹<http://www.watchafghanistan.org/files/ReportEnglish.pdf>

¹²Tajikistan is the next highest outlier amongst the ratifying countries and it has also signed an Article 98 agreement with the United States, insulating U.S. forces from prosecution for potential war crimes committed on Tajik soil. Tajikistan also last experienced battle deaths from civil conflict in 1998, when government and opposition groups signed a ceasefire. They have since had two violence-free elections, and ratified the ICC in May of 2000.

The World Bank’s Governance Indicators include a measure of the “Political Stability and Absence of Violence” for a country-year, based on survey responses from experts, think tanks, citizens, and business leaders. The data “captur[e] perceptions of the likelihood that the government will be destabilized or overthrown by unconstitutional or violent means, including politically motivated violence and terrorism” (Kaufmann, Kraay and Mastruzzi (2010) pp. 4). Recent research on the factors associated with the mass killing of civilians by Valentino, Huth and Balch-Lindsay (2004) argues that mass killings are more likely to occur during guerrilla wars with stronger opposition forces that pose a larger threat to the government. The measure ranges from -3, which indicates the highest likelihood of instability and violence, to 3, which indicates the lowest likelihood. This measure is particularly interesting because it is explicitly forward looking- it captures perceptions that a country will experience violence in the future. During the 1990’s, ratifying countries had an average political stability score of 0.08, compared to -0.31 for non-ratifiers (p value = 0.01). Countries that ratified the ICC were significantly less likely to experience political violence or instability.

The PRS Group¹³ also provides an often-used measure of political risk ratings for a large number of countries, measured monthly. The measurement is intended to broadly capture the political stability of a country, based on component scores on dimensions like government stability, internal/external conflict, socioeconomic conditions, law and order, and democratic accountability. The scores range from zero to one hundred, with higher scores indicating more stability and less risk. Ratifying countries again outperform non-ratifiers. The average risk score during the 1990’s for ratifying countries is 67.75, compared to 58.70 for non-ratifying countries (p value < 0.01).

2.2 Political and Judicial Institutions and ICC Ratification

While the above analysis focused on civil conflicts during the 1990’s, ratifiers are also systematically different from non-ratifiers when looking at their political institutions, their rule of law, and various measures of judicial independence. These institutional measures are important for assessing a coun-

¹³See [http : //www.prsgroup.com/ICRG_Methodology.aspx](http://www.prsgroup.com/ICRG_Methodology.aspx) for their description of the data.

try's risk of running afoul of the ICC because of the ICC's use of the complementarity principal.¹⁴ The ICC only has jurisdiction over a crime when domestic legal mechanisms are deemed insufficient to deal with the problem. The ICC is a self-described "court of last resort." "It will not act if a case is investigated or prosecuted by a national judicial system unless the national proceedings are not genuine, for example if formal proceedings were undertaken solely to shield a person from criminal responsibility."¹⁵

Democracies, countries with strong rule of law and high judicial independence, are thus likely to have less to fear from ICC prosecution because of the strength of their existing institutions. Complementarity creates an additional hurdle to be overcome or test to be passed, should a crime be committed. These domestic political institutions are thus a sort buffer against the possibility that the ICC will impose costs on these governments if they ratify. To be clear, the complementarity principle does not allow domestic courts to issue disingenuous free passes to the perpetrators of crimes. But to the extent that existing institutions provide credible threats of prosecution, ratifying the ICC does not represent any *additional* costs or risk. Valentino, Huth and Balch-Lindsay (2004) provide an additional link to the strength of domestic political institutions and the likely costs of ICC ratification, arguing that more autocratic regimes are more likely to engage in mass killings. Even apart from the complementarity principle, regime type is associated with the probability that a leader will violate the ICC in the future, as democracies tend to have fewer human rights violations than non-democracies. The data strongly support our argument: countries that ratify the ICC are more democratic, have stronger rule of law, and have higher judicial independence. The additional potential costs to these countries of ratifying the ICC are thus much lower.

We first look at Polity scores as a measure of a country's democratic institutions. We examined the average Polity score for a country during the 1990's and compared the averages for ratifiers and non-ratifiers.¹⁶ Again, rather than using binary coding, we look at the actual scores for reasons

¹⁴Simmons and Danner also consider institutions important for their arguments. Non-democracies and countries with weak rule of law and low judicial independence often suffer from "weak domestic institutions of accountability" (pg. 235), so they stand to gain the most by using the ICC as a credible commitment device.

¹⁵From the ICC website: <http://www.icc-cpi.int/Menus/ICC/About+the+Court/ICC+at+a+glance/>

¹⁶Recall, the higher the Polity score, the more democratic the country. Polity IV scores range from -10 to 10 (Marshall et al. (2002)). To statistically compare ratifiers and non-ratifiers, we report p values for simple difference in means tests.

similar to those motivating our use of the severity of civil war. The average Polity score in the 1990's for ratifiers was 4.7, compared to -1.3 for non-ratifiers (p value < 0.01). Ratifiers are much more democratic than non-ratifiers.

This result is also not simply an artifact of the very high scores of the advanced Western democracies, like Norway or Switzerland, who were among the ICC's earliest and strongest supporters. Limiting our sample to only those countries which are non-democracies,¹⁷ the differences are still stark. The average score for non-democratic ratifiers was -2.99 compared to -6.05 (p value < 0.01) for non-democratic non-ratifiers. Even amongst non-democracies, countries with higher Polity scores are more likely to ratify the treaty, while countries that will find it more difficult to hide behind the complementarity principle avoid ratification.

Executive restraint is facet of domestic political institutions that is immediately relevant to the ICC. The types of war crimes targeted by the ICC are often thought of as actions undertaken at the discretion of national executives. To examine this concept, we also looked at the most relevant Polity component score, which measures executive restraint. The executive restraint score ranges from 1 (unlimited executive authority) to 7 (executive parity or subordination). The average executive constraint score for ratifiers was 5.16 compared to 3.54 for non-ratifiers (p value < 0.01). Additionally, the executive restraint component of Polity is also used in studies related to judicial independence (Ríos-Figueroa and Staton (2010)) because it accounts for this concept. Having an independent judiciary is an indicator associated with an executive restraint score of three or higher. 85% of ratifiers have an executive restraint score of 3 or higher, compared to only 62% of non-ratifiers (p value < 0.01). Non-democratic ratifiers have a higher average executive constraint score, 2.42, compared with 2.21 for non-ratifiers, though the difference is not significant (p value 0.37).

These findings are robust to other measures of the democratic nature of political institutions. Freedom House constructs a measurement of whether a country is "free", "partially free," or "not free." If we assign a numerical coding to these three categories, with "free" coded as a 3, "partially free" as a 2, and "not free" as a 1, we can summarize this data and make some comparisons between

¹⁷Here, we use Simmons and Danner's binary cutoff to establish the category of non-democracy, which is actually based on Freedom House scores, as explained below.

the countries that ratify and do not ratify.¹⁸ The “mean” Freedom House score for countries that ratify is 2.43, compared with 1.81 for the non-ratifiers (p value < 0.01). Ratifying countries rank higher on the Freedom House index of freedom than do non-ratifiers. To ensure that our numericization of the data is not misrepresenting the data, Figure 3 displays the histograms of the Freedom House scores for ratifiers and non-ratifiers.

The World Bank’s Governance Indicators include a commonly used measure of the Rule of Law for each country, similarly to the above WGI data. The Rule of Law measure captures “perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence” (Kaufmann, Kraay and Mastruzzi (2010) pp. 4). The Rule of Law measurement ranges from -3, where respondents have the most negative perceptions of the country on the above dimensions, and 3, where respondents have positive perceptions. Again, ratifying countries enjoy significantly better rule of law scores than non-ratifiers. The average rule of law score during the 1990’s for ratifiers is 0.16, compared to -0.39 for non-ratifiers (p value < 0.01).

What about judicial institutions more specifically? Judicial independence is particularly important when considering the complementarity principle, since the ICC reserves jurisdiction if they deem that the courts trying a leader are beholden to that leader. Keith, Tate and Poe (2009) construct a categorical measure for the level of *de jure* independence of judicial institutions for a number of countries, based on the United States State Department’s Human Rights Reports. These data code the constitutional provisions associated with the independence of the judiciary along 9 dimensions.¹⁹ The Keith et. al. measure is more precisely tied to this concept than broader measures of political institutions. A country receives a 2 if that state’s constitution provides explicitly and fully for the independence of the judiciary along that dimension, 1 if the constitution does so partially or ambiguously, and 0 if the constitution does not provide for that dimension at all.

¹⁸Obviously, there are some assumptions embedded in numericizing this categorical variable. Our intention is simply to present an easy way to summarize the data. We also used the average score for each country during the 1990’s to remain consistent with other sections.

¹⁹These dimensions are described much more extensively in their article, pp. 649-50. The data were generously provided by the authors.

We use these measurements to construct an additive version of these elements, simply adding up each dimension to get a judicial independence sum for a country. The measure thus ranges from -1 to 18, with 18 representing the most constitutionally independent judiciary possible.²⁰ Countries with non-independent judicial institutions are therefore more likely to face ICC prosecution. This is reflected in the data: countries that ratify the ICC have an average score of 8.8 on this additive scale, compared to 6.25 for non-ratifiers (p value < 0.01). Ratifiers thus have courts that enjoy significantly stronger constitutional protections of their independence than countries that do not ratify.

3 Credible Commitments and Patterns of Ratification

The previous sections showed that ratifiers of the Rome Statute differ systematically on the quality of their judicial institutions and in their recent history of domestic political violence, both important determinants of whether a country is at risk of experiencing an ICC-prosecutable offense and of facing potential investigation and prosecution. However, in an important recent empirical contribution, Beth Simmons and Alison Danner (2010) argue that a significant portion of ICC ratifications can be explained by a country's desire to make a credible commitment to refrain from ICC violations. According to their argument, not only do each of the dimensions we examined above — civil conflict history and quality of domestic political institutions — alone matter for the likelihood of ratification, but there may be a conditional interaction between the two. Simmons and Danner use duration analysis to analyze the rate at which countries ratify the ICC. They find support for their primary claim: non-democracies with a history of civil war are among the ICC's strongest supporters, which supports the idea that the ICC is a credible commitment device. They conclude that “nondemocracies with recent civil war experience are highly likely to ratify the Statute quickly” (240).

Simmons and Danner's research is a critical first step towards understanding why countries ratify the Rome Statute and provides a valuable contribution to the literature on international

²⁰The -1 comes from the possibility of scoring “-1” along the “No exceptional or Military Courts” dimension, along which a country can score -1 if the constitution explicitly establishes the possibility of civilians being tried in exceptional or military courts (650).

treaties and, at first glance, suggests that the bivariate associations we show here may belie some deeper patterns of cooperation. However, in this section we reanalyze these results and disagree with their interpretation of their core findings. In particular, we find that their results, as well as theoretically appealing modifications to their models, show that nondemocracies with past civil conflicts are not particularly likely to ratify the ICC. In fact, Simmons and Danner’s own results demonstrate that the the most likely countries to ratify, by far, are democracies, for whom civil war has little effect. Democracies of all types are followed by non-democracies with civil wars, and finally non-democracies without civil wars. Alternate specifications further show that past civil conflict has little effect on the rate of ICC ratification, even on nondemocracies.²¹

We replicated the results from Simmons and Danner’s Model 1, as shown in Table 2, columns 1 and 2.²² Column 1 reports the hazard ratios from their Model 1, which are identical to those in the original article, and column 2 reports the coefficients.²³

Simmons and Danner focus on the first three rows of Table 2. Specifically, they focus on interaction terms that are a combination of two other variables. The first constituent term, which is in the first row of Table 2, is a categorical variable that is coded 0 if the country experienced no civil wars during the 1990’s, 1 if the country experienced 1 to 4 total years of civil war during the 1990’s, and 2 if the country experienced a civil war for 5 or more years during the 1990’s.²⁴ The second constituent term, in row two, is a dummy variable that equals one if a country is “free” or “partially free” according to Freedom House scores and zero otherwise. Simmons and Danner refer to “free” or “partially free” countries as democracies, and “not free” countries as nondemocracies. The two constituent terms and the interaction term (third row) thus combine to create six different groups of countries (Democracy/Nondemocracy, Civil War of 0,1, or 2). Simmons and Danner’s regressions use non-democracies without a history of civil conflict as the base category. Simmons

²¹To prevent confusion, the event history framework used by Simmons and Danner is concerned with the rate of ratification of the ICC, not simply whether or not a country ratified. The preceding sections established that the type of country that ratifies the ICC is systematically different from the type of country that does not, regardless of *when* a country ratifies or how quickly.

²²We used data generously provided by the authors. There may be some negligible rounding errors, since the data appendix for their article is still forthcoming.

²³We focus on Model 1, since it is their baseline model and they characterize the rest of their models as robustness checks.

²⁴Simmons and Danner describe this variable as being binary in the text of their article. The explanation of the variable that we use here was furnished to us by the authors via email.

and Danner also include a host of theoretically informed control variables that they describe in their article. Simmons and Danner’s interpret their results by looking at hazard ratios, as in column 1 of Table 2. They conclude that

... despite their completely different institutions and experiences, peaceful democracies and civil-strife ridden nondemocracies tend to display similar ratification propensities. By contrast, democracies with a recent history of civil war are far less likely to ratify the Rome Statute. (240)

Our disagreement is from differing interpretation of Simmons and Danner’s results. Thomas Brambor, William Clark, and Matt Golder (2006) argue that interpreting the substantive effects of variables in multiplicative interactive models (like those used in Simmons and Danner) can be facilitated by plotting those substantive effects, and that interpreting results tables alone can be difficult.²⁵ With hazard ratios instead of coefficients, interpretation of Simmons and Danner’s results is further complicated. The easiest way to see our interpretation of the results is by plotting the hazard rate for each of the six categories of countries, which we present in Figure 4.²⁶ The ordering of “risk” of ratification is consistent with a shallow cooperation story. Democracies are at much higher risk of ratification than non-democracies. The hazard for a nondemocracy that experienced civil war is significantly lower than that of a democracy, regardless of their history of civil conflict, and nondemocracies with past civil conflict are not more likely to ratify than democracies with past civil conflict.²⁷ In summary, Simmons and Danner’s core results could be interpreted as demonstrating shallow cooperation with the ICC because *democracies* of all types

²⁵Brambor, Clark and Golder (Winter 2006) (74-75).

²⁶We produced this plot using the post-estimation commands available in STATA 10.1. We hold all other variables at their means and plot the hazard rates for each of the six categories created by the interaction term and components described above.

²⁷We can arrive at this conclusion looking at hazard ratios, as well. If we convert the hazard ratios from Simmons and Danner’s Model 1 into coefficients, as in column 2 of Table 2, we can further see support for our interpretation of the results. The coefficients on the constituent terms are: β for civilwar = 1.04, β for democracy = 2.54, and β for the interaction term (civilwar*democracy) = -0.99. The summation of the coefficients on the risk of ratification yield 2.54 for a democracy without a civil war, 2.59 for democracies with civil wars, and 1.04 for nondemocracies with a civil war. Recall, nondemocracies without a civil war are the base category, so the interpretation of these “summed” coefficients are that a positive number is associated with an increase in the hazard for that category, relative to the base category. The ordering of the summed coefficients shows that democracies with civil wars have the highest hazard, followed very closely by democracies without civil wars, and then nondemocracies with civil conflicts, and nondemocracies without civil conflicts.

are simply more likely to have ratified the Rome Statute than other types of countries.

3.1 Replication Using a Continuous Measure of Civil War

In the preceding section we showed that existing models do not provide strong evidence of credible commitments. Yet the results did demonstrate the interesting feature that nondemocracies with worse histories of civil conflict were at greater risk of ratifying the ICC than nondemocracies with more peaceful pasts. In this section, we show that this result is likely an artifact of coding civil war as a trichotomous categorical variable. Using a continuous measure of the intensity of past civil conflicts, specifically, the number of battle deaths, there is little evidence that past civil conflict affects the rate of ICC ratification. Democracy, not history of violence, seems to overwhelmingly account for ratification rates.

We again re-estimated Simmons and Danner's Model 1, only instead of using a categorical variable for civil war, we used the number of battle deaths that a country experienced from civil conflicts in the 1990's, as described in the above sections.²⁸ We reestimated Model 1 twice, first on the full sample of countries and then on all countries except Afghanistan. As noted above, Afghanistan is both an outlier in terms of battle deaths in the 1990s and is a ratifying country that has not made much progress on its ICC obligations and has signed an Article 38 agreement with the United States, undermining its commitment to the ICC. Columns 3 and 4 of Table 2 show the coefficients from these regressions. To again facilitate the interpretation of results, Figure 5 shows the smoothed hazard rates for democracies and nondemocracies, varying the number of battle deaths.

The first thing to note is that the number of battle deaths has virtually no effect on the hazard for ratification, especially for nondemocracies. The coefficient on battle deaths for non-democracies is essentially zero and it does not approach statistical significance. In the left pane of Figure 5, which

²⁸For the models that we were able to replicate (Models 2-4,6, and 7), we largely find similar results as with Model 1 (not shown, but available in the data appendix). The one exception is Model 7, which uses World Bank Rule of Law scores to measure domestic political institutions, and shows the strongest support for Simmons and Danner's argument. The World Bank measure is poorly correlated with the Freedom House and Polity measures (pairwise correlation coefficients of 0.39 and 0.33 respectively) and we suspect that these differences drive this discrepancy. We were not able to replicate the results from Model 5.

is for nondemocracies, we allow the number of battle deaths to vary from zero to 10,000.²⁹ Varying the number of battle deaths in this way has virtually no effect on the hazard rate for ratification. Further, going from zero to 10,000 deaths is a tremendously large movement through the “sample space.” Only 14 countries experienced more than 10,000 battle deaths from civil war in the 1990’s (and 10 of those did not ratify the ICC). Hence, the rate of ratification for non-democracies varies little with respect to civil conflict severity.

The right pane of Figure 5 shows the effect of varying battle deaths for democracies. Higher numbers of civil conflict battle deaths are associated with lower rates of ratification. However, this effect is small and insignificant; there is little discernible difference between nondemocracies’ propensity to sign based on number of recent civil war battle deaths. More importantly, one can see that the risk of ratification is much higher for democracies than nondemocracies, regardless of recent history of civil violence. For illustration, the bottommost predicted hazard in the right pane of Figure 5 shows the significance of this difference. For a democracy to display similar ratification rates as a nondemocracy, we have to imagine a democracy that experienced approximately 50,000 battle deaths (dashed red line). Such a hypothetical country would be an extreme outlier in the sample. The only “democracy” that experiences anything close to this amount of civil conflict is Russia, which experienced approximately 47,000 battle deaths during the 1990’s, and which is coded as a democracy in Simmons and Danner’s data only until the end of 2003.³⁰ Democracy appears to be the major determinant for the rate at which countries ratify the ICC. Higher numbers of battle deaths marginally decrease the risk of ratification for democracies and have no apparent effect for non-democracies.³¹

In the model estimated on the full sample, the effect of the number of battle deaths on ratification rates for nondemocracies is still in the same direction as Simmons and Danner originally found

²⁹Same procedure as described above, holding other variables at their sample means.

³⁰The countries with the next highest numbers of battle deaths, and which Simmons and Danner code as democracies at some point in the sample, are Sri Lanka (36,000 deaths), Turkey (31,000), India (25,000), Ethiopia (24,000) and Peru (12,500).

³¹We also reran these regressions using the natural log of the number of battle deaths (results not shown, see data appendix). Results are the same- democracies of all types are by far the most likely to ratify. Amongst nondemocracies, higher battle deaths are associated with a higher ratification hazard rate, but this result is substantively very small compared to the effect of democracy, and is again statistically insignificant when excluding Afghanistan. The results above all hold when excluding Western Democracies and Japan as well, so our results obtain even when excluding advanced democracies.

(positive). More deaths are associated with higher ratification rates for nondemocracies, though the effect is extremely small. However, this result is contingent on whether one includes Afghanistan. As shown in column 4 of Table 2, the coefficient on deaths for nondemocracies (4th variable) is negative when the model is run excluding Afghanistan, though it is still statistically insignificant. At the very least, this shows that this difference in predicted ratification rates among non-democracies is not robust to one-by-one exclusions of certain countries.³²

There is an obvious trade off to categorical versus more continuous variables: while the continuous measure involves some measurement error, the categorical version discards information. In this context, the continuous measure is more useful, especially since the trichotomous variable is based on the same battle deaths data. By establishing arbitrary thresholds for what does and does not constitute a civil war, the categorical variable would simply “rearrange” any existing measurement error, without eliminating it. It could possibly be argued that the severity of a civil war, as measured by the number of battle deaths, is irrelevant, and that we are really interested in whether or not a country experienced any type of civil conflict, no matter how severe. This argument seems untenable when we consider some examples. The trichotomous variable codes Israel, Iraq, Sudan, and Afghanistan the same (they are all 2’s), even though Israel experienced approximately 1,000 deaths, while the other three experienced over 20,000. Similarly, the United Kingdom and Spain are coded the same as Iran, the Congo, and the DR Congo (they are all 1’s). The continuous measure better allows us to discriminate between these countries.

3.2 The Effect of the ICC on Leader Behavior

Even without the empirical questions raised above, the finding that nondemocracies with civil conflicts were likely to ratify the ICC does not necessarily imply support for a theory of credible commitments. A strong candidate alternative explanation recognizes that the amount of civil strife in a country is strongly correlated with the amount of repression imposed by a government. In the case of non-democracies, the non-occurrence of a civil war may simply be an indication of a successful repressive regime or a society where challenges to the state are so unlikely to succeed

³²For an example of the use of this robustness check, see Miguel, Satyanath and Sergenti (2004).

that they aren't attempted. The list of non-democracies without civil wars in the 1990's (Cuba, North Korea, Syria, etc.), who are also non-signatories of the ICC, illustrates this point. These countries are unaffected by the ICC, but are among the most repressive regimes in the world. This observation is consistent with James Vreeland's (2008) arguments regarding the United Nations Convention Against Torture (CAT). He finds that amongst non-democracies, those that torture more frequently are actually more likely to join the CAT. According to Vreeland, dictatorships where power is less concentrated are more likely to torture and then they also join the CAT as a concession to their power-sharing partners. On the other hand, many repressive regimes have low realized levels of torture simply because their repressive apparatus deters challenges to the state that might provoke torture as a response. This interpretation would be consistent with the notion that the ICC represents shallow cooperation- the most repressive regimes, who therefore experience the least civil conflict and who might be considered likely candidates for committing war crimes, are not likely to ratify the ICC.

One way to move beyond different interpretations of entry patterns is to attempt to deal with the causal ambiguity introduced by the overwhelming patterns of selection bias we identify above. Simmons and Danner attempt this by analyzing how ICC ratification affects the likelihood peaceful resolutions of ongoing civil conflicts, using an instrumental variables approach. Instrumental variables based approaches are useful for demonstrating causality in the presence of endogeneity or selection bias because they leverage the insight that variables that are theoretically exogenous to an outcome (e.g. civil war termination) that are also strong predictors of some endogenous regressor (e.g. ICC ratification) allows the analyst estimate the direct effect of the endogenous regressor on the outcome in the presence of reciprocal causality. Simmons and Danner argue that the presence of a constitutional amendment required for ratification of the ICC, a civil law legal tradition, and the signing of international human rights treaties are good predictors of ICC ratification, yet are uncorrelated with the likelihood of peace during a civil conflict, and are thus appropriate instruments for this analysis.

In this section we call into question this approach for assessing the effect of ICC ratification on country behavior. Any claims based on instrumental variables regression are only valid to the

extent that the instrumental variables are both “strong” predictors of the endogenous regressor and exogenous to the ultimate outcome of interest. In this case, the statistical strength and exogeneity of these instruments are unclear, which calls into question the causal interpretation of the effects of ICC ratification on civil war cessation.

First, the predictive power of these instruments seems insufficient to establish strong claims in the presence of endogeneity. Simmons and Danner do not report anything regarding the strength of the instrument, other than to reference their first set of results, in which these variables were correlated with ratification rates. If their approach used the linear probability model in the first stage, then the instruments do not meet conventional cutoffs for instrument strength. For democracies the F statistic for the instruments is 9.07. For nondemocracies, the F statistic is a very low 2.30.³³ The instruments also appear to be very poor predictors of ICC ratification for nondemocracies, which are the subsample that would most need the hand-tying benefits of credible commitments,

Second, it is not clear that these instruments are theoretically or empirically exogenous. In a footnote, Simmons and Danner describe the results of an auxiliary regression, where they show that the instruments do not predict peace, claiming that the variables are insignificant and the pseudo R^2 is low. It is well known that this is insufficient to demonstrate the exogeneity of an instrument. As Allison Sovey and Donald Green (forthcoming) put it: “occasionally, one observes political scientists arguing that an instrument is valid because it does not significantly predict Y_i in a regression of Y_i on X_i , Z_i , and covariates. This misguided regression does not provide reliable information about whether Z_i is excludable.” This auxiliary regression is only meaningful if it is indeed the true model of civil war termination, i.e. correctly specified, and without any endogeneity problems, neither of which are likely to be true.

More directly, there are strong theoretical reasons to suspect that these instruments are not exogenous to the probability of a peaceful settlement of a civil conflict. First, the instruments are correlated with concepts like democracy, which have been linked with civil conflict. A simple probit estimation of democracy with Simmons’ and Danner’s instruments as independent variables

³³We are unclear the exact model used in this section. The article describes their approach only as “instrumental variables probit”. It is not clear that this approach was designed for binary endogenous regressors (like ICC ratification), but rather for continuous endogenous regressors. If we treat the first stage as a simple probit regression, the pseudo- R^2 ’s are also very low: 0.04 for democracies and 0.03 for nondemocracies.

produces the following coefficients (standard errors in parentheses): constitutional amendment required for ratification 0.861 (0.338); British civil law legal tradition 0.671 (0.244); human rights treaties 0.116 (0.066).³⁴ A second probit estimation of having had civil war in the 1990s and democracy, based on Simmons and Danner's codings, shows a significant, negative association with a coefficient of -0.370 (0.212).³⁵ Although scholars such as Hegre, Gates, and Gleditsch (2001) argue that civil conflict is less likely in consolidated democracies, there has been some debate over the relationship between democracy (specifically as measured by Polity scores) and civil conflicts.³⁶ Without weighing in on this debate, we think it suffices to say that the instruments used are correlated with concepts like political institutions, and that these have been theoretically linked with relevant aspects of civil conflict, which raises questions about their exogeneity. The number of human rights treaties that a country has ratified seems particularly unlikely to be exogenous, since ratification of human rights treaties has been linked to important aspects of internal civil conflict, (Vreeland (2008a)). The problems with their approach are potentially compounded by a sample selection problem as well- that the instruments are correlated with the likelihood of having a civil war in the first place, which is a prerequisite to entering into Simmons and Danner's sample. Given questionable exogeneity, it is unclear what we learn from an instrumental variables approach.

A related, and perhaps more fundamental, concern is the choice of the appropriate outcome with which to assess the effects of the ICC. Gilligan (2005) argues that the deterrent effect created by the presence of the ICC should result in fewer atrocities over time. Large scale atrocities, as evidenced by the mass killing data collected by Valentino, Huth and Balch-Lindsay (2004), are rare and are likely to be only partially observable in the short-run. Atrocities often come to light only years after the fact and can only then be objectively assessed for severity. This implies that while the ideal test of the effects of the ICC on state behavior would examine the frequency of atrocities before and after the creation of the ICC for countries with similar initial conditions, we currently lack an adequate empirical record to perform such a test.

³⁴The first two are significant at the 0.05 level, the latter at the .10 level. For this, we used robust standard errors clustered by country.

³⁵Significant at the .10 level.

³⁶For a recent survey of this literature, see Vreeland (2008b). Vreeland (2008b) argues that Polity as a measure of democracy explicitly includes relevant concepts like the level of political violence in a country.

Simmons and Danner argue that the credible commitment theory predicts that, in addition to reducing atrocities, ICC ratification should influence civil war cessation. The basis for this claim is that the ICC “raises the government’s *ex post* of renegeing” (2010, 234) on the commitment to end civil violence. Yet nothing in the ICC explicitly addresses the need to cease civil conflicts. Though the ICC has focused on war crimes committed during civil conflicts, it is possible to have civil conflicts without atrocities being committed, and presumably the ICC would be unconcerned with these clashes. Additionally, civil war cessation requires the commitment of multiple groups (Walter (2001)), many of whom are uninvolved in the government decision to enter into an international treaty. If ICC ratification in fact raises these *ex post* costs equally for all substate actors, we might expect it to be positively correlated with civil war cessation. However, the existing pattern of ICC cases and the logic of investigations and prosecutions do not support this idea. The only successful captures and prosecutions of actors have been aimed at former rebels, not government officials. This pattern has not gone unnoticed; for instance, Ugandan rebels have withdrawn from ceasefire talks explicitly because the the ICC issued indictments, at the behest of the Uganda government, targeting LRA leaders. This example illustrates the strategic complexities involved in civil war termination and that the effect of ICC ratification on civil war termination is indeterminate.³⁷

4 Regional Patterns

In this section, we examine important regional ratification patterns, and find that regional differences in ratification are consistent with the patterns of shallow cooperation we have identified. Unsurprisingly, the strongest support for the ICC comes from Europe and the other Western democracies. The vast majority of countries in North Africa, the Middle East, and Asia have not ratified. To classify countries by region, we use region codings from the well known article on civil war onset and occurrence, Fearon and Laitin (2003). There is early and near universal support for the Rome Statute from the region “Western Democracies and Japan.” In four of the five remaining re-

³⁷In a working paper, Nalepa and Powell argue that ICC ratification may actually undermine credible commitments leaders make to rebels in order to end civil wars. Since civil war cessation relies on credible promises on both sides, but the actors involved may not be able to credibly restrain international prosecution, which can undermine nascent or would-be peace agreements.

regions, “Eastern Europe and the Former Soviet Union,” “Asia,” “North Africa and the Middle East,” and “Latin America and the Caribbean,” ratification patterns are as described in the preceding sections: democracies and countries with relatively peaceful histories are the most likely to ratify. Sub-Saharan Africa is the one notable exception, which we discuss in greater detail below. The ICC’s experience in that region and a closer examination of those countries’ reasons for ratification are far from supportive of optimistic ICC forecasts.

Table 3 shows the number of countries that have ratified the Rome Statute by region and Figure 6 displays patterns of ratification across the globe. It is easy to see from Figure 6 that participation in the ICC is largely a phenomena of Western industrial democracies and Sub-Saharan Africa, which together account for 55 percent of total ratifiers, but only 41 percent of all countries in the world. Of the 20 countries that Fearon and Laitin (2003) code as being in the region “Western Democracies and Japan,” only the United States has not ratified the ICC, and its reasons for nonratification are particular to its position as a superpower, and are well documented elsewhere (see Scheffer (1999) for example.). Latin America and Eastern Europe are the regions with the next most ratifying countries, with 16 apiece (59 percent for E. Europe and 70 percent for Latin America), which is unsurprising given the large waves of democratization in these countries in the second half of the twentieth century. These patterns are also consistent with patterns of geographical diffusion. Past research shows that diffusion patterns drive international norms regarding human rights (Finnemore and Sikkink (1998)), the adoption of liberal economic policies (Simmons and Elkins (2004)), and patterns of war and democratization (Gleditsch (2002)). These processes may also affect the adoption of international treaties, particularly among states that do not have much to fear from entering into a given treaty.³⁸

³⁸When we factor in the possibility of unobserved regional heterogeneity, Simmons and Danner’s results they do not fare as well. For instance, if we simply run a panel logit estimation on ratification [results not shown], instead of a survival analysis, including the same independent variables as Simmons and Danner, we see similar substantive patterns as they find. However, if we include regional dummies, the coefficient indicating the effect of civil war for non-democracies becomes insignificant. Moreover, measures of model fit, like the BIC, for the model with region dummies is 190.15 compared to an BIC of 218.54 for the model without region dummies, suggesting that regional trends are, at a minimum, an important omitted variable. While these regressions are far from conclusive, they are suggestive that regional ratification diffusions patterns are, at a minimum, a possible source of omitted variable bias. Also note that Simmons and Danner’s results do not obtain when excluding countries in sub-Saharan Africa. Simmons and Danner dismiss regional emulation as a potential explanation for this clustering because it is a “risky” move to submit to ICC jurisdiction, particularly for non-democracies (pp 244).

The only region where ICC participation does not display clear patterns of shallow cooperation is sub-Saharan Africa, where some non-democracies that experienced recent civil wars have ratified the ICC.³⁹ While the ratification patterns of sub-Saharan Africa do not immediately support the shallow cooperation story, a closer look at how the ICC has actually affected Africa does not support optimistic conclusions about the ICC. Not surprisingly, all extant ICC cases involve countries in sub-Saharan Africa except one, Sudan, which as we have already pointed out is likely an extreme exception. Yet these cases involve the prosecution of non-state actors, not state leaders, a phenomenon which extant theories of the ICC's effects say nothing about. An article in the June 5, 2010 issue of *The Economist* summarizes the ICC's fragile relationship with African nations: "the ICC's indictments can be counterproductive: rather than end impunity, they force offending leaders to cling to power. And when it is not viewed as neo-colonialist or counter-productive, the court is seen by even more Africans as just ineffective." The article goes on to point out why existing ICC cases are exclusively located in Africa, "The ICC is meant to be a court of last resort. It intervenes in Africa so much only because African countries have been unable or unwilling to handle complex and costly trials themselves." This suggests that cooperation with the ICC in sub-Saharan Africa may be more an example of poor capacity than a credible commitment. After all, the Court is a useful forum to try politically divisive cases stemming from civil wars, which allows new governments to avoid appearing as if they are merely doling out "justice of the victor." Tom Ginsburg (Forthcoming) argues that most countries that ratify the ICC are "trying to make a strong commitment to prosecute, without necessarily committing to *being* prosecuted (emphasis in original, page forthcoming)." Our findings that ratifying countries have stronger political institutions, more executive restraints, and higher levels of judicial independence, even when looking at nondemocracies is supportive of this distinction. Ginsburg summarizes his reasons for skepticism:

While it may seem that signing up to the ICC expands the prospective likelihood of governmental officials being prosecuted as well, the government holds the keys to complementarity. The government can initiate prosecutions of its own functionaries and

³⁹Only three countries outside of sub-Saharan Africa are nondemocracies with past civil wars and ratify the ICC: Afghanistan, Tajikistan, and Cambodia. Afghanistan was described in detail above. Note that Tajikistan and Cambodia have both signed ICC-undermining article 98 agreements with the United States.

avoid international prosecution. Thus the effective quality of prosecution under the ICC regime is more likely to improve vis-a-vis rebels than governmental officials. The reason states sign the Rome Statute may be to ensure prosecution of their opponents, not themselves. Ensuring that rebels will be prosecuted by international, as opposed to domestic, prosecution agents may also be attractive given the costs involved. War-torn autocracies tend to be poor, and so signing onto the ICC essentially sloughs off the costs of prosecutions onto the international community. ... The government is tying its own hands to ensure that prosecutions will go forward, but not trying to tie its hands with regard to tactics.

A separate, and possibly reinforcing explanation of patterns of participation in Africa is that sub-Saharan African countries, some of which are the poorest countries in the world, have ratified the ICC because of material inducements and pressures from the European Union. Goodliffe et al. (N.d.) (2010) show that “dependence networks,” which take into account trade relationships and alliance partnerships, are a primary determinant of ICC ratification patterns. These dependence networks are strong between the EU and sub-Saharan African. For instance, Hafner-Burton (2005) discusses cases in which EU Lome conventions benefits to sub-Saharan Africa have been conditioned on respect for human rights. Recently, the EU made movements toward ratifying the ICC an explicit condition for participation in the Cotonou Partnership Agreement which establishes provisions for development assistance. Sudan withdrew from the Cotonou agreement specifically because of the ICC clause. Nonetheless, the premise of development assistance provides a strong material incentive for poor countries to ratify the ICC, aside from their intent to cooperate with prosecutions or their likelihood of coming under indictment.

5 Ratification Patterns and Policy Implications

We have shown that participation in the ICC reflects patterns of shallow cooperation- those countries with the least to fear are amongst the treaty’s supporters and vice versa. We have further argued that evidence of direct influence of the ICC on state behavior is inconclusive at best. Anal-

ysis of ratification patterns with the goal of assessing an institution's overall impact is far from an esoteric academic point because of the potentially far-reaching policy implications of evidence held up in support of this influence. The credible commitment and deterrent arguments have clear policy implications: the ICC is effective at reducing deplorable political strategies of repression and countries that care about reducing these "public bads" should invest resources and political capital to facilitate its development. However, if the evidence held up in support of these arguments is much less conclusive than previously thought, it should give reason to critically assess where resources and political efforts should be directed. The international community has many potential strategies at hand to try to reduce atrocities, some of which rely on multilateral cooperation like that envisioned in the Rome Statute while others rely on the initiatives of individual states. Before the creation of the ICC, there was significant debate over whether a standing institution offered advantages over ad hoc tribunals or truth and reconciliation measures, and this debate continues. If we are basing our optimism about global justice on the ICC, then our research suggests pause: it is not clear that the ICC represents a "phenomenon of judicial globalization" just yet.

These findings also point toward devoting more effort to understanding how states could simultaneously incentivize the countries that are most at risk of having atrocities committed in their territory to sign the Rome Statute and how to strengthen the ability of the court to prosecute cases both within signatory and nonsignatory states. Currently there may many examples of war crimes and crimes against humanity that are very difficult to prosecute because the perpetrators are either difficult to capture or because the crimes in question involve politically sensitive invasions of sovereignty. Finding a way to more effectively pursue the worst perpetrators while not undermining sovereignty is important because, as many contributions to the judicial politics literature demonstrates, courts care about their legitimacy among important constituencies (Caldeira and Gibson (1992); Carrubba (2009); Staton (2006); Vanberg (2001)). Since the ICC is in its infancy, and because it deals with such a sensitive area of law, the emergence of international support and legitimacy amongst key states and citizens around the world is an important part of its development. The court's legitimacy might be undermined several ways.

First, ICC prosecutors must consider the political consequences of beginning investigations and

issuing indictments for fear of appearing too activist and engaging in too much interference in sovereign matters. Although many states ratified the Rome Statute, several key states, including the United States and Russia, have not, largely over concerns about the possible prosecution of their military personnel or civilian leaders over complicated war time abuses. The United States went so far as to pass the American Service Members Protection Act under the Bush Administration, which authorized the use of military force to free any U.S. citizen detained by the ICC (Schabas (2007)). Although the U.S. reaction to the Court is extreme, opposition from the world's most militarily powerful country, and the country most capable of helping to capture and enforce ICC decisions, demonstrates the potential costs to the Court of garnering an overly interventionist reputation. Such a reputation might also undermine the state cooperation necessary to detain and try wanted war criminals.⁴⁰

Second, the Court's legitimacy may be undermined by appearing too ineffective. That is, while the ICC has reasons to avoid appearing too interventionist, it also cannot seem too toothless. When the Court issues indictments for which arrest is highly unlikely, it risks this appearance. Since arrests are much less likely for state leaders, both because of their control of state resources and because other sovereign states will be less likely to cooperate in their arrest, the Court faces fewer incentives to indict and prosecute state leaders than it does non-state actors. Again, the Sudan case is likely an outlier given the level of media coverage and international consensus about the culpability of the Sudanese government. Very few events within a states' own border that technically qualify as crimes against humanity will generate a similar amount of international attention and consensus. Even for this case, the extent to which the indictment has imposed costs on the Sudanese leadership or made capture more likely is hotly debated.

The indictment of leaders of the Lord's Resistance Army (LRA) in Uganda further illustrates this tension. The ICC initially opened its investigation of atrocities committed by the LRA in

⁴⁰This is not an insignificant hurdle, and this type of cooperation is central to Gilligan's (2006) theory of how the ICC might deter war crimes. If the Court's popularity were to decrease, fewer countries would be willing to operate by this logic, which might undermine the Court's ability to deter atrocities at the margins. Likewise, the ability of the ICC to impose costs on a leader like Bashir of Sudan depends on the cooperation of countries to deny travel or sanctuary. This cooperation is likely to be much weaker for state allies of the accused, and cooperation from these allies more generally may wane with overly aggressive prosecution. Cooperation may also be more forthcoming for the capture of non-state actors than for government leaders, which further undermines the argument that the ICC dramatically alters the incentives of sovereign leaders or serves as a credible commitment device.

early 2004 at the request of the Ugandan government and President Yoweri Museveni. Arrest warrants for Joseph Kony, Vincent Otti, and other LRA leaders was issued in July 2005. However, the Uganda government subsequently requested that the indictment be lifted because the accused LRA leaders refuse to engage in peace talks under the shadow of the ICC indictment. Fearing the potential reputation effects of appearing toothless, the ICC refused to rescind the indictment, and the parties are currently at an impasse. One possible implication is that the ICC is likely to try to avoid such embarrassing situations in the future by avoiding prosecutions which will generate political disputes and legal ambiguity of this sort. For these reason, the Court may be more constrained in its ability to indict and prosecute war crimes than the more optimistic accounts let on.

None of our research is to say that the Court can never successfully investigate, indict, and prosecute war criminals, or that the ICC can not evolve to become an institution that successfully achieves its goals. Rather, there are current practical limits to its ability to do so that limit the substantive impact of the ICC so far. Given that (a) the ICC relies on state cooperation for enforcement; (b) state cooperation is less forthcoming for the arrest of sovereign leaders; (c) the ICC must be attentive to its legitimacy; (d) legitimacy may be undermined by acting too aggressively or by appearing too toothless, both of which are more likely to result when pursuing state leaders; the effect of the advent of the ICC on global justice may be overstated, largely because the countries for whom ICC ratification would be most significant do not join.

6 Conclusion

In this paper we have provided the most extensive analysis of ICC ratification patterns to date and found that patterns of ratification are indicative of shallow cooperation with the regime. Using a broad range of measures, we find that countries with past histories of internal conflict and weak domestic political and judicial institutions are much less likely to ratify the ICC. We also showed that existing analysis of ratification patterns provides further support that democracy drives ratification and that support for credible commitments arguments is much less clear. The biggest determinant of the rate at which a country ratifies the ICC is simply whether or not it is a democracy, and other

factors are secondary. We also critically evaluated the empirical record and logic behind existing arguments in favor of the effectiveness of the ICC. There is only a very thin empirical record to evaluate, since the ICC is in its infancy, but we find ample reason to be skeptical about the ICC. We analyzed regional patterns of ratification and found that they too supported the conclusion that ICC ratification has been shallow. It is difficult to conclude that the inception of the ICC is having a large effect globally on the likelihood of atrocities in the twenty-first century.

Our focus on the ICC is interesting because the ICC represents such a dramatic departure from past attempts at post-conflict justice. Most previous *ad hoc* attempts to prosecute war crimes targeted former government leaders or rebel actors *after* they were defeated or deposed. The ICC envisions a different process, although in practice the majority of its targets have been non-government actors. Since the ICC has been heralded by some as a revolution in international law, it is important to evaluate arguments and evidence about its effectiveness with rigor.

This analysis has broader implications for the study of international regimes. We have (re)called for not only an analysis of the effect of entering into a regime or institution on its participants, but also a broader and more basic examination of the degree of participation in the regime. In other words, we view the process of selecting into an institution not as an empirical nuisance to be dealt with in order to isolate the effect of the regime on its members, but as central to assessing the effectiveness in the first place. Although scholars have noted a trend toward increasing legalization of international affairs in the second half of the twentieth century, because international law is fundamentally based on consent, it is important to assess the global reach of these trends. Our analysis shows that the creation or invention of a new instrument of international law may not be applied equally across countries, and may not even be applied with regularity to the issues it was designed to address. General participation in a regime may obscure important differences amongst participants and those that choose to remain outside of the regime. This seems especially true for the ICC, an instrument designed to influence states in the highly sensitive and sovereign area of human rights and atrocities within a country's own borders. The ICC has a long way to go before affecting the behavior of leaders in the countries most in need of its laudable goals.

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Figures

Figure 1:

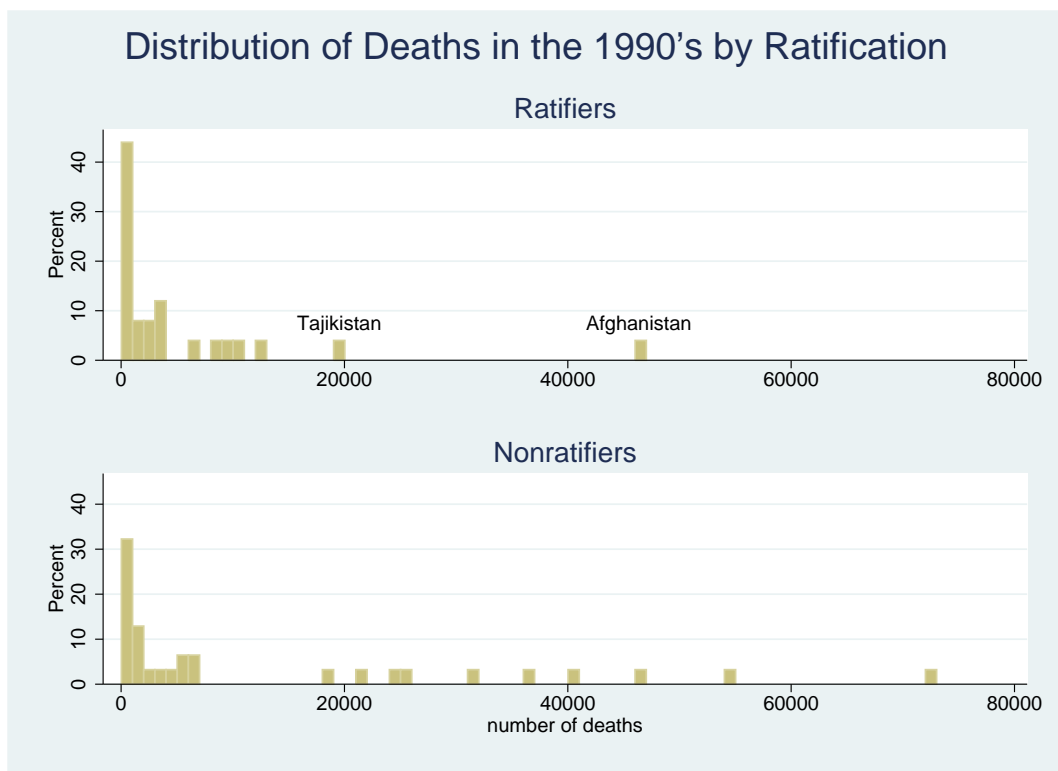


Figure 2:

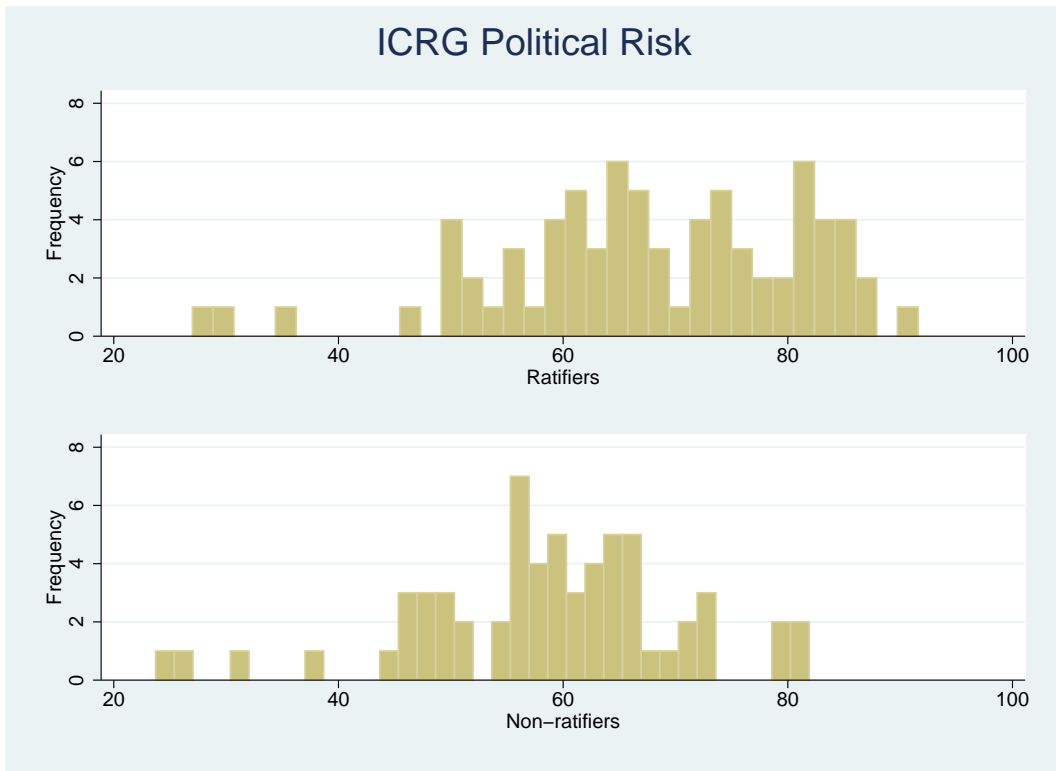


Figure 3:

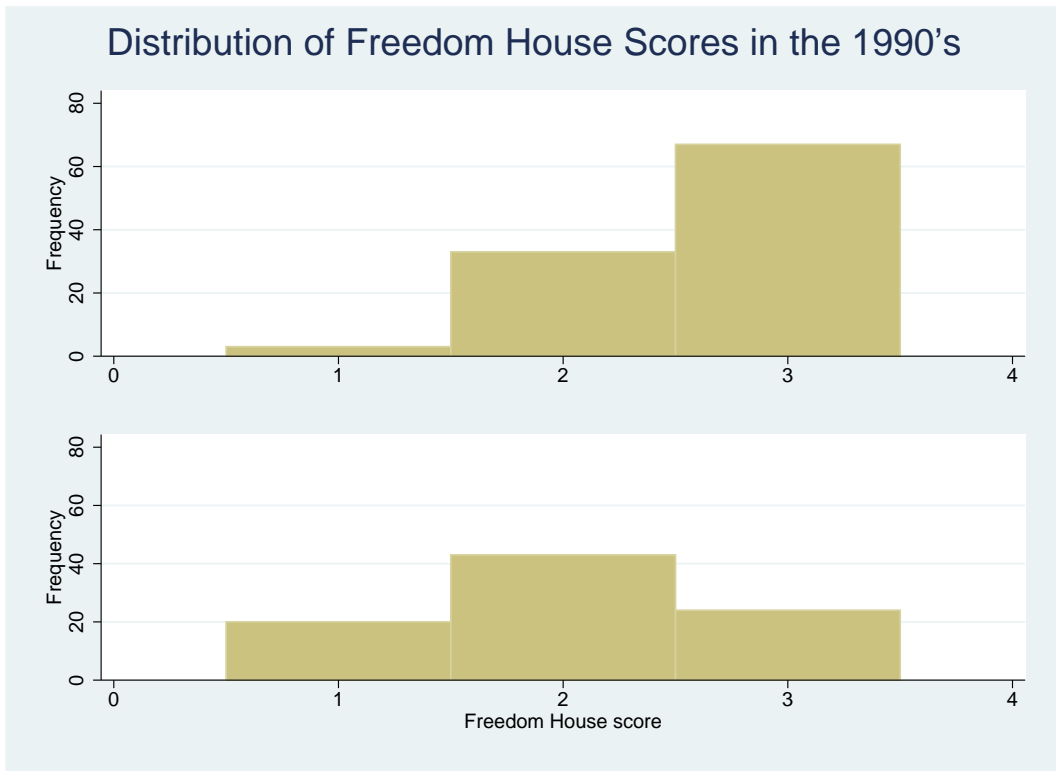


Figure 4:

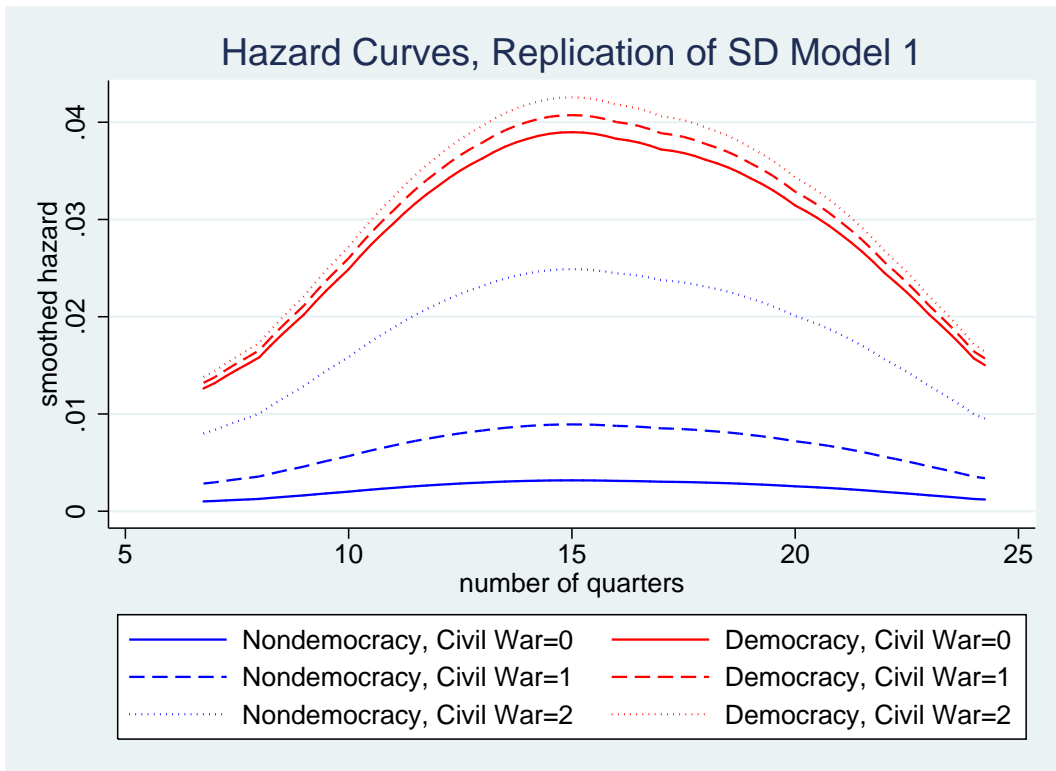


Figure 5:

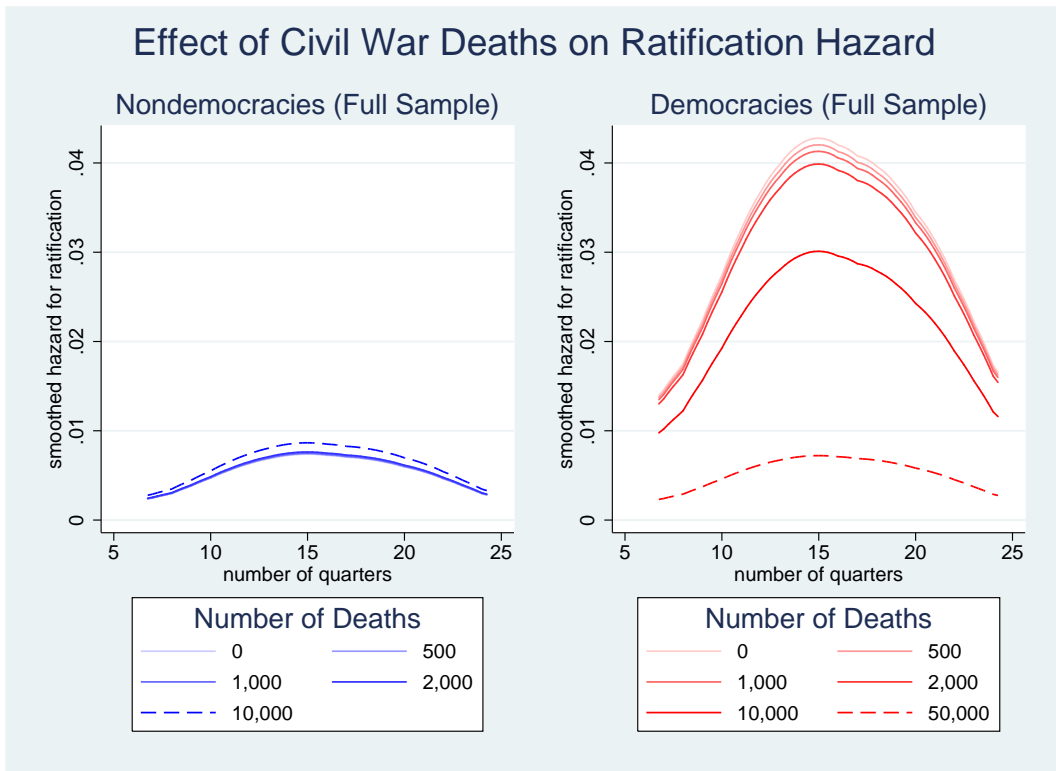
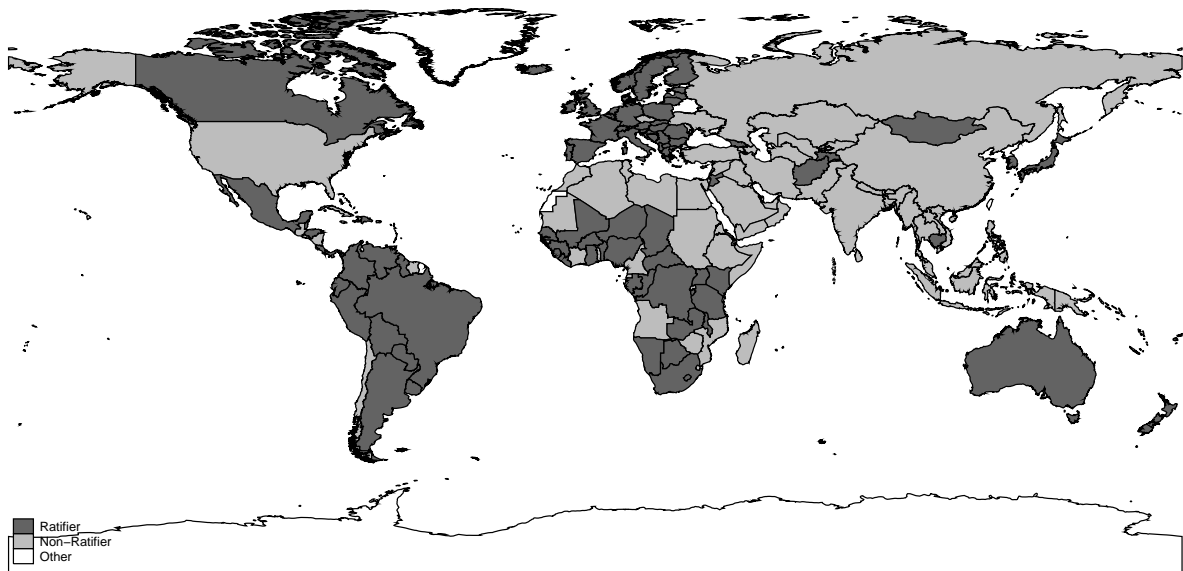


Figure 6:
ICC Ratification by Region



Tables

Table 1: Differences Between Ratifiers and Non-ratifiers

Variable		N	Mean	Std. Dev.	Min.	Max.	p Value
Conflict History							
Battle Deaths 90's							
	Ratifiers	103	1,315	5,377	0	47,000	0.02
	Non-ratifiers	88	4,725	12,999	0	72,700	
Battle Deaths 90's (Strictly Positive)							
	Ratifiers	25	5,416	9,986	30	47,000	0.07
	Non-ratifiers	31	13,413	19,226	25	72,700	
Battle Deaths 90's (Excl. Afghanistan)							
	Ratifiers	102	867	2,886	0	20,000	0.00
	Non-ratifiers	88	4,725	12,999	0	72,700	
Political Risk							
	Ratifiers	75	67.75	13.49	27	91.60	0.00
	Non-ratifiers	62	58.70	11.78	23.72	81.9	
WGI Political Viol.							
	Ratifiers	99	0.08	1.02	-2.60	1.48	0.01
	Non-ratifiers	81	-0.31	0.91	-2.54	1.16	
Institutions							
Polity 2							
	Ratifiers	88	4.7	5.3	-6	10	0.00
	Non-ratifiers	69	-1.3	6.5	-10	10	
Polity 2 (Non-democ.'s Only)							
	Ratifiers	12	-2.4	2.3	-6	1.3	0.00
	Non-ratifiers	33	-6.5	2.7	-10	0	
Exec. Constraint							
	Ratifiers	87	5.2	1.9	1	7	0.00
	Non-ratifiers	69	3.5	2.0	1	7	
Freedom House							
	Ratifiers	103	2.43	0.67	1	3	0.00
	Non-ratifiers	87	1.81	0.72	1	3	
WGI Rule of Law							
	Ratifiers	100	0.16	1.05	-2.17	2.02	0.00
	Non-ratifiers	85	-0.39	0.79	-2.18	1.68	
Judicial Independence							
	Ratifiers	98	8.82	4.57	-1	16.6	0.00
	Non-ratifiers	80	6.23	4.37	-1	17	

Table 2: Replication of Simmons and Danner's Model

	SD Model 1 (Hazard Ratios)	SD Model 1 (Coeff.)	Cont. Deaths (Full Sample)	Cont. Deaths (Excl. Afg.)
	(1)	(2)	(3)	(4)
Civil War (0,1,2)	2.83 (0.504)**	1.039 (0.504)**		
Democracy Dummy	12.65 (0.794)***	2.537 (0.794)***	1.786 (0.482)***	1.805 (0.493)***
Democracy*Civil War	0.37 (0.526)*	-.993 (0.526)*		
Deaths 90-97			0.00002 (0.00002)	-2.26e-06 (0.00003)
Democracy*Deaths			-.00005 (0.00004)	-.00003 (0.00005)
Log Military Pers.	0.72 (0.086)***	-.329 (0.086)***	-.272 (0.082)***	-.283 (0.083)***
Log Peacekeepers	1.08 (0.056)	0.082 (0.056)	0.068 (0.054)	0.075 (0.054)
Regional Ratification	1.01 (0.015)	0.011 (0.015)	0.011 (0.015)	0.01 (0.015)
Human Rights Treaties	1.38 (0.089)***	0.323 (0.089)***	0.33 (0.088)***	0.331 (0.088)***
Ongoing Ext. Conflict	1.07 (0.508)	0.07 (0.508)	0.099 (0.508)	0.123 (0.509)
Const. Amend. Req.	0.39 (0.31)***	-.934 (0.31)***	-.943 (0.309)***	-.936 (0.309)***
ICC Elected Officials	2.74 (0.268)***	1.009 (0.268)***	0.942 (0.264)***	0.935 (0.263)***
ICC Leaders	2.37 (0.33)***	0.862 (0.33)***	0.767 (0.319)**	0.756 (0.319)**
British Legal Heritage	0.59 (0.261)**	-.527 (0.261)**	-.463 (0.26)*	-.470 (0.261)*
Observations (N)	3937	3937	3937	3918

***: significance at 0.01 level; **: 0.05 level; *: 0.10 level.

Table 3: Regional Ratification Patterns

Region	Non-Ratifiers	Ratifiers	Total
Western Democracies and Japan	1	20	21
Eastern Europe and Former USSR	11	16	27
Asia	20	6	26
N. Africa and Middle East	18	2	20
Sub-Saharan Africa	17	29	46
Latin America and Caribbean	7	16	23