

# **EXPLAINING STATE COMMITMENT TO THE INTERNATIONAL CRIMINAL COURT: STRONG ENFORCEMENT MECHANISMS AS A CREDIBLE THREAT**

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## INTRODUCTION

The creation of the International Criminal Court (“ICC”) on July 1, 2002 was a remarkable event for many reasons. The existence of the court is the result of a journey that commenced with the Nuremberg trials after the conclusion of World War II. In the ensuing period, nations searched for ways to ensure that states and individuals protect against, and are deterred from committing, human rights abuses. The idea of a permanent international criminal court dates from at least 1948, when the Genocide Convention referenced the possibility of individuals being tried by “such international penal tribunal as may have jurisdiction.”<sup>1</sup> Shortly thereafter, the International Law Commission (“ILC”) was tasked with preparing draft statutes for such a permanent court.<sup>2</sup> However, the Cold War intervened, and it was not until another four decades had passed that the global community again took up the idea of an international criminal court.<sup>3</sup>

But even after the idea of a permanent ICC became a reality, the 1994 ILC draft statute envisaged an institution that would allow states to guard much of their sovereignty. For example, regarding the court’s jurisdiction, the 1994 ILC draft provided that by virtue of ratifying the statute creating the court, states would confer upon the court automatic jurisdiction over only the crime of genocide.<sup>4</sup> For other crimes, such as crimes against humanity and war crimes, all states that could otherwise assert jurisdiction

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1. Convention on The Prevention and Punishment of Genocide art. 4, Dec. 9, 1948, 78 U.N.T.S. 277.

2. ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 323 (2d ed. 2008).

3. *Id.* at 323–28.

4. Rep. of the Int’l Law Comm’n, 46th Sess., 1994, U.N. Doc. A/5509; U.N. GAOR, 49th Sess., Supp. No. 10, at 43 (1994) [hereinafter “1994 ILC Draft”].

over the matter (for example, the state where the acts were committed or the state with custody over the accused) would have to consent to conferring jurisdiction upon the court.<sup>5</sup> As to the initiation of investigations and prosecutions, only states or the Security Council—as opposed to an independent prosecutor—could commence proceedings.<sup>6</sup> Finally, according to the 1994 ILC Draft, any permanent member of the Security Council would be able to use its veto power to prevent the ICC from exercising jurisdiction over a matter since no prosecution could be commenced without Security Council approval.<sup>7</sup>

Even though these measures drew support from many major powers, the majority of states rejected this conservative institutional design that preserved state autonomy and sovereignty and instead opted to create an entirely new type of international human rights institution. In the Rome Statute, which was adopted in July 1998, states agreed to create an ICC with a strong and independent prosecutor and a court with significant and legally binding enforcement powers. These measures were designed to encourage state compliance with the goal of ending impunity for perpetrators of the most serious crimes of genocide, crimes against humanity, and war crimes.<sup>8</sup> By committing to the treaty creating the ICC, states grant the court automatic jurisdiction over those core crimes.<sup>9</sup> Moreover, states agree that an independent ICC prosecutor may initiate investigations against their nationals for the covered crimes on his own with the approval of the court, or based on referrals from a State Party or the United Nations Security Council.<sup>10</sup> The prosecutor and court operate without direct United Nations Security Council oversight, with the Council having no veto power over what situations are investigated or

5. *Id.*

6. *Id.* arts. 23, 25.

7. Adriaan Bos, *From the International Law Commission to the Rome Conference (1994–1998)*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY*, VOLUME I 49–50 (Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds., 2002).

8. Rome Statute of the International Criminal Court pmb., July 17, 1998, 2187 U.N.T.S. 3, 91 (1998) [hereinafter Rome Statute]. At the present time, the crimes over which the ICC does have jurisdiction are genocide, crimes against humanity, and war crimes. *Id.* art. 5. The parties to the Rome Statute also declared that the ICC will have jurisdiction over the crime of aggression once a provision is adopted defining that crime and setting out the conditions under which the court can exercise jurisdiction over it. *Id.* arts. 5(2). The parties agreed on that definition at the 2010 Rome Statute Review Conference in Kampala. However, the ICC will not be able to exercise jurisdiction over the crime of aggression until after January 1, 2017, and after the parties vote to amend the Rome Statute accordingly. *See* Rev. Conf. of the Rome Statute, 13th plenary meeting, June 11, 2010, I.C.C. Doc. RC/Res. 6, Annex 1, ¶¶ 2, 3(3), available at [http://www.icc-cpi.int/iccdocs/asp\\_docs/Resolutions/RC-Res.6-ENG.pdf](http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf).

9. Rome Statute, *supra* note 8, arts. 5–8, 11, 12(2).

10. *Id.* arts. 13–15.

prosecuted.<sup>11</sup> In addition, the treaty does not recognize any immunity states may otherwise grant to heads of state who engage in criminal activity.<sup>12</sup>

Finally, although the “complementarity” provision of the Rome Statute allows the ICC to operate as a court of last resort, the ICC can obtain jurisdiction over the nationals of States Parties when the state is “unwilling or unable genuinely” to proceed with a case.<sup>13</sup> “Unwillingness” includes instances where national proceedings are a sham or are inconsistent with an intention to bring the person to justice, either because such proceedings are unjustifiably delayed or are not being conducted independently or impartially.<sup>14</sup> The idea behind including the “unwillingness” provision was to preclude the possibility of sham prosecutions aimed at shielding perpetrators due to, for example, government participation in, or complicity with, the offense.<sup>15</sup> A nation’s “inability” to prosecute includes instances where, because of the collapse or unavailability of its national judicial system, the nation cannot obtain the accused or the necessary evidence, or is otherwise unable to carry out the proceedings.<sup>16</sup> It bears noting that the ICC—not States Parties—determines whether the “unwilling or unable” bases for proceeding before the ICC have been met.

Why would states commit<sup>17</sup> to an institution like the ICC given that commitment can have such profound effects on their sovereign right to mete out justice within their own borders? It is true that the ICC treaty is not the first treaty which purports to bind states to protect individuals against human rights abuses occurring within the state’s own territory. It is also true that states regularly commit to such international human rights treaties.<sup>18</sup> But, as many scholars have noted, those treaties typically

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11. See Lionel Yee, *The International Criminal Court and The Security Council: Articles 13(b) and 16*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 143–52 (Roy S. Lee, ed., 1999) [hereinafter *THE MAKING OF THE ROME STATUTE*]; Jack Goldsmith & Stephen J. Krasner, *The Limits of Idealism*, 132 *DAEDALUS* 47, 55 (2003); Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals*, 55 *INT’L ORG.* 655, 679–80 (2001) (explaining that while the Security Council members do not have a veto power, a unanimous Security Council vote may defer a prosecution).

12. Rome Statute, *supra* note 8, art. 27.

13. *Id.* pmb., art. 17(1)(a).

14. *Id.* art. 17(2).

15. John T. Holmes, *The Principle of Complementarity*, in *THE MAKING OF THE ROME STATUTE*, *supra* note 11, at 50.

16. Rome Statute, *supra* note 8, art. 17(3).

17. When I refer to a country’s “commitment” to an international human rights treaty or its decision to “join” an international human rights treaty, I mean its decision to ratify the treaty.

18. The binding international treaties which are the foundation of this regime are the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] and the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993

contain weak enforcement mechanisms that pose little risk for the state that fails to comply with treaty terms.<sup>19</sup> Thus, states can join them almost indiscriminately and without any intention of complying.<sup>20</sup> In the case of the ICC, however, states run the risk that the ICC prosecutor will choose to investigate the state's own citizens and require those citizens to stand trial at an international criminal court situated in The Hague. Accordingly, while it may be reasonable for states to commit to treaties with weak enforcement mechanisms, the fact that more than 100 states have now committed to the ICC and its strong enforcement mechanisms poses a puzzle.

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U.N.T.S. 3 [hereinafter ICESCR], both of which were opened for signature and ratification in 1966 and came into force in 1976. Thomas Buergenthal, *The Normative and Institutional Evolution of International Human Rights*, 19 HUM. RIGHTS Q. 703, 705 (1997). Additional binding international human rights treaties followed, and the regime now boasts six primary treaties, to which the great majority of states have committed. The additional four treaties are the International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 [hereinafter CERD]; the Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW]; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT]; and the Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC]. Treaty texts and information about their status is on file with the Secretary General of the United Nations at the United Nations Treaty Collection, available at <http://treaties.un.org>.

19. For example, most treaties require only that states self-report compliance and the measures they have undertaken to give effect to the matters addressed in the Covenant. See ICCPR, *supra* note 18, art. 40; ICESCR, *supra* note 18, arts. 16, 17; CERD, *supra* note 18, art. 9; CEDAW, *supra* note 18, arts. 18, 21; CAT, *supra* note 18, art. 19; CRC, *supra* note 18, art. 44. Even the additional opt-in enforcement mechanisms available under some of the treaties—whereby states agree to accept state or individual complaints alleging noncompliance—are far from strong. For example, under Articles 21 and 22 of the CAT, states recognize the competence of the Committee Against Torture to hear complaints by states and individuals, respectively. See CAT, *supra* note 18, arts. 21, 22. Under Article 41 of the ICCPR, states may agree to recognize the competence of the United Nations Human Rights Committee to consider complaints of one state against another claiming the party is not fulfilling its obligations under the treaty. However, the committees' enforcement mechanisms are limited to attempting to facilitate a resolution or providing a report of findings. See CAT, *supra* note 18, arts. 21, 22(7); ICCPR, *supra* note 18, art. 42. Accordingly, states may view commitment to international human rights treaties as essentially costless from a sovereignty standpoint simply because the treaty enforcement and monitoring mechanisms are weak. See, e.g., Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1838–40 (2003).

20. See, e.g., Hathaway, *The Cost of Commitment*, *supra* note 19, at 1856–57 (finding that non-democratic nations with poor human rights ratings were just as likely, and sometimes even more likely, to commit to international human rights treaties than non-democratic nations with better human rights ratings); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935, 1982–87 (2002) (showing, for example, that approximately the same percentage of countries with the most recorded acts of torture ratified the CAT as did countries with no recorded acts of torture); Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1374 (2005) (noting that the average state has ratified a steadily increasing number of human rights treaties, but that the percentage of states reportedly repressing human rights has grown over time, suggesting that states may ratify only as window dressing).

That more than 100 states have ratified the ICC treaty is puzzling because states typically guard their sovereignty and are reluctant to join international treaties with strong enforcement mechanisms, particularly if they cannot comply with treaty terms.<sup>21</sup> Can we expect that the more than 100 states that have ratified the ICC will abide by treaty terms and protect against human rights abuses and/or domestically prosecute any of their citizens who perpetrate mass atrocities? Does the fact that these states willingly committed to an international human rights treaty with relatively strong enforcement mechanisms mean that they are also committed to the goal of ending impunity for perpetrators of mass atrocities? After all, the intent of strong enforcement mechanisms must be to enforce compliance with treaty terms—in this case by ensuring that perpetrators of mass atrocities are brought to justice and other potential perpetrators are deterred as a result.

On the other hand, approximately ninety nations are still not parties to the ICC treaty, and some states have ratified less swiftly than others.<sup>22</sup> Why did these states fail to ratify the Rome Statute or ratify more slowly than others? Given the treaty's relatively strong enforcement mechanisms, should we expect that states with the worst human rights practices are among the states that have not ratified? After all, for these states, joining international human rights treaties with weak enforcement mechanisms may be in their rational self-interest, but joining the ICC may not be. But if the majority of states joining the court are those that already have the best human rights practices, can the ICC really have a significant impact on improving universal respect for human rights and deterring mass atrocities?

This Article explores and seeks to understand the puzzle of state commitment to the ICC. It uses a research design that is unique in empirically examining whether and how the apparently strong enforcement mechanisms associated with the treaty creating the court might influence state commitment decisions.<sup>23</sup> By exploring the puzzle of

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21. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 437 (2000) (suggesting that the sovereignty costs of committing to international institutions providing for centralized decision-making are highest where an issue touches on the hallmarks of Westphalian sovereignty, such as the state's relation to its citizens and territory).

22. See *infra* Appendix A.

23. Few other studies have empirically examined the question of state commitment to the ICC, and the few studies that have examined the question all posit different theories, employ different dependent variables in different empirical models, and reach different conclusions about what variables are and are not driving ICC state behavior. See Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225, 240–46 (2010) (arguing that non-democracies with recent civil wars are most likely to commit to the ICC because

state commitment to the ICC, this Article hopes to shed some light on why states joined or refused to join that institution. In addition, it seeks to contribute to our understanding of how institutional design—and enforcement mechanisms in particular—affects state commitment and compliance in the context of the international human rights regime more broadly. Understanding commitment and why states refuse to commit is important for evaluating the role of international treaties and state ratification of those treaties in bettering state human rights practices and ending impunity for those who abuse individual human rights.

Building on existing scholarship,<sup>24</sup> this Article theorizes that commitment to international human rights treaties is a function of two considerations relative to the costs of noncompliance: (1) the institutional design of the treaty—specifically, the level of enforcement mechanisms to punish noncompliance; and (2) the state’s domestic political characteristics relating to its ability to comply with treaty terms. If states view the enforcement mechanisms associated with the ICC treaty as strong enough to pose a credible threat to their sovereignty, they should only commit if they are able to comply with treaty terms. First and foremost, compliance with ICC treaty terms requires that the state have good human rights practices since the state can best avoid the specter of an ICC prosecution if its leaders and citizens do not commit the kinds of mass atrocities within the court’s jurisdictional purview. As a secondary matter, states can also comply with ICC treaty terms and avoid having their citizens tried in The Hague if they have independent domestic law enforcement institutions that are also capable of prosecuting any human rights violations within their own states.

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they want to tie their own hands and limit their ability to commit mass atrocities); Jay Goodliffe & Darren Hawkins, *A Funny Thing Happened on the Way to Rome: Explaining International Criminal Court Negotiations*, 71 J. OF POL. 977 (2009) (arguing that a state’s dependence networks are a primary influence on ICC commitment); Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 AM. POL. SCI. REV. 573 (2007) (testing ICC commitment preliminary to the study’s main focus on determining why states that joined the ICC would also sign or refuse to sign bilateral immunity agreements with the United States).

24. Oona Hathaway is generally credited with first examining empirically the relationship between state human rights practices and their tendency to enter into international human rights treaties. However, in her 2003 study, the only variables she used to test treaty commitment to several human rights treaties were a state’s human rights ratings and whether or not it was a democracy—without accounting for the timing of ratifications. Although she acknowledged that other variables may influence commitment, she purposely limited her study. See Hathaway, *The Cost of Commitment*, *supra* note 19, at 1849. In a later study, Hathaway included some additional variables testing commitment to several human rights treaties using a Cox proportional hazards model, though her study did not include the ICC. See Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588 (2007).

As such, good human rights practices and independent and capable domestic law enforcement institutions are each individually sufficient for states to conclude that ratifying the ICC treaty will not be overly costly. Thus, if a country has either good human rights practices or independent and capable domestic law enforcement institutions, it should conclude that ICC ratification is relatively costless and should commit to the court. In addition, for a state to conclude that ratification of the ICC is essentially costless because the state can comply with treaty terms, either good human rights practices or independent and capable domestic law enforcement institutions are a necessary condition to ratification. However, because the ICC is able to scrutinize whether member states' domestic prosecutions are adequate to ward off an ICC investigation, this Article suggests that good human rights practices become an almost necessary condition to ratification. Indeed, states concerned about compliance costs may not want to rely only on their own assessment of the independence and capability of their domestic institutions and would be wise to insure that their human rights practices are sufficiently good before committing to the court. On the other hand, a state with weak domestic institutions could nevertheless conclude that commitment to the ICC treaty would be relatively costless as long as the state's human rights practices are good. Of course, even states that meet these conditions may decline to commit to the ICC for other reasons.

Accordingly, I predict that states with better human rights practices and independent and capable domestic law enforcement institutions will view the costs of complying with the ICC treaty's terms as relatively minimal and more readily commit to the court.<sup>25</sup> In fact, because the primary way

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25. Of course, one might ask what benefits a state might obtain from joining an international organization that exists only to promote better human rights practices and domestic institutions. Although my theory posits that a state considering ICC commitment will be most concerned with the costs of compliance and a potential loss of sovereignty, the state will still likely wish to receive some benefits from commitment. I can imagine several benefits even states with already good human rights practices and domestic law enforcement institutions might believe they would obtain from joining the ICC (all of which are likely extremely difficult, if not impossible, to quantify). For example, states with better human rights practices likely believe the norm of protecting human rights is worth spreading to the rest of the world. Thus, there may be some moral benefit to supporting an organization with a mission to improve global human rights practices. Furthermore, a state with good practices may conclude that an organization like the ICC has the potential via its enforcement mechanism to deter future mass atrocities—atrocities which presumably can produce negative consequences beyond the state in which they are occurring—by, for example, disrupting trade patterns and inhibiting production of goods or the extraction of resources. In addition, where mass atrocities occur, other states are often called upon to provide peacekeeping forces or foreign aid, goods, services, and housing to the innocent victims of such atrocities. To the extent such atrocities are deterred by the ICC, all of these negative consequences can be mitigated, thereby creating a potential benefit to the states that otherwise “pay” in some sense for those consequences. In any event, a state may conclude

in which states can avoid an ICC investigation and prosecution is by having relatively good human rights practices, even with weak domestic law enforcement institutions, those states should conclude that the costs of ICC commitment will be relatively minimal. States with poor human rights practices and biased or incapable domestic law enforcement institutions, however, should view commitment to the ICC treaty as costly—even if previous studies suggest they regularly commit to other international human rights treaties. Indeed, even with independent and capable institutions (and there may be few states with such characteristics, in any event), a state with poor human rights practices may view the costs of compliance as being so significantly high that it will refuse to commit to the court.

The results of event history analysis from 1998 to 2008 provide support for the idea that states view the ICC's enforcement mechanisms as a credible threat and more readily join the court when their retrospective calculations about their ability to comply with treaty terms indicates that commitment will not impose significant sovereignty costs. Specifically, the results indicate that states with a past record of better human rights practices are more likely than states with poor human rights practices to commit to the court. In addition, although the evidence is less conclusive about the role domestic law enforcement institutions play in state ratification decisions, there is evidence showing that democracies are more likely to commit to the court—even the relatively few democracies with poorer human rights practices. This finding provides support for the idea that states that already have checks on government power, such as through independent judicial institutions, view commitment to the ICC as less costly. Thus, these states have less to fear from the additional threat of an ICC prosecution since they should expect that they or their citizens would be prosecuted domestically in any event if they committed the kinds of mass atrocities within the ICC's jurisdiction.

Although these results necessarily show that ICC member states tend to have relatively good human rights practices, this does not imply that the ICC and its relatively strong enforcement mechanisms will play no role in improving human rights practices or insuring that perpetrators of mass atrocities are punished. First, because of the ICC's relatively strong enforcement mechanisms, even states with better human rights practices

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that there is some deterrence value—and no harm to itself in the sovereignty sense—in having in place an organization that can prosecute *the citizens of other states* for mass atrocities. Some other potential “benefits” that all states might obtain by ICC commitment are discussed under the “Normative View” section, *infra*, and their influence is tested in the empirical models.

should have reason to insure their practices remain good or improve so as to avoid running afoul of treaty terms. Second, the ICC's jurisdictional reach extends beyond States Parties since the United Nations Security Council is able to refer cases to the court<sup>26</sup>—as it has done with both the Sudan<sup>27</sup> and, recently, Libya.<sup>28</sup> Thus, the existence of the ICC and its independent prosecutor and court should stand as a warning to all states that human rights abuses will not be tolerated, and will instead be punished. Finally, the evidence shows that some states with poor practices do commit to the court. Those states will have to improve their poor human rights practices or risk a costly loss of sovereignty since the ICC has relatively strong enforcement mechanisms to punish noncompliant behavior.

In short, because the evidence suggests that states are taking seriously the threat associated with the ICC's enforcement mechanisms, the implication is that stronger enforcement mechanisms may actually entice states to comply with treaty terms and respect human rights—rather than commit for the purposes of window dressing only and with no regard for compliance. Such a trend would be promising, even for states with “better” human rights practices.

This Article is organized into six parts. Part I provides a brief history of the ICC and discusses the institutional design of the treaty creating the court. Part II reviews the existing literature on commitment to international human rights treaties. I group that literature under two broad categories which this Article labels (1) “the rationalist view” and (2) “the normative view.” In Part III, this Article presents more fully a theory regarding the credible threat associated with stronger enforcement mechanisms and how that threat influences treaty commitment. In Part IV, this Article describes the research design of the empirical analysis.

Part V presents the results of the empirical tests. It begins by comparing the ratification patterns of states with high and low values on the two main explanatory variables: (1) level of human rights practices and (2) quality of domestic law enforcement institutions. It then discusses the results of the quantitative tests which were conducted using event history

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26. Rome Statute, arts. 12, 13(b).

27. Press Release, Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, to International Criminal Court Prosecutor, U.N. Press Release SG/SM/9797AFR/1132 (Mar. 31, 2005), available at <http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm>.

28. Press Release, Security Council, *Security Council Imposes Sanctions on Libyan Authorities in Bid to Stem Violent Repression* (Feb. 26, 2011), available at <http://www.un.org/apps/news/story.asp?NewsID=37633&C>.

analysis and employing a number of control variables suggested by the existing literature. The Article's conclusion suggests how to structure international treaties so that states perceive them as credible threats to punish bad and noncompliant behavior.

### I. BACKGROUND TO THE ESTABLISHMENT OF THE ICC

Situated in The Hague, Netherlands, the ICC is the first permanent, treaty-based international criminal court established to help end impunity for perpetrators of genocide, crimes against humanity, and war crimes.<sup>29</sup> Although the United Nations first began considering the prospect of an international criminal court after World War II, it was not until 1990, following a request submitted by Trinidad and Tobago,<sup>30</sup> that work again commenced in earnest towards drafting a statute for the creation of such a court. The United Nations General Assembly tasked the ILC with drafting a statute for the establishment of an international criminal court.<sup>31</sup> In July 1994, an ILC draft statute was adopted and recommended to the General Assembly.<sup>32</sup> The General Assembly thereafter adopted a resolution to establish an Ad Hoc Committee to address the core issue of the viability of actually creating an international criminal court, and in light of that issue, the possibility of convening a diplomatic conference of states. A Preparatory Committee ("Prep Comm") took over with the objective of negotiating the precise statutory language governing the court and its functions. The Prep Comm met in 1996, 1997, and 1998. The draft statute approved during the April 1998 Prep Comm meeting—which contained 116 articles, many of which included bracketed optional provisions—formed the basis of negotiations at the Rome Conference during the summer of 1998.<sup>33</sup>

The statute creating the court—the Rome Statute—was finally adopted at the conclusion of the Rome Conference.<sup>34</sup> Attending the conference were 160 states, 33 international governmental coalitions, and a coalition

29. Rome Statute, *supra* note 8, pmbl.

30. Letter from the Permanent Representative of Trinidad and Tobago to the Secretary-General, U.N. GAOR, 44th Sess., Annex 44, Agenda Item 152, U.N. Doc. A/44/195 (Aug. 21, 1989).

31. G.A. Res. 44/39, U.N. GAOR, 44th Sess., Supp. No. 49, at 311, U.N. Doc. A/44/49 (Dec. 4, 1989).

32. See 1994 ILC Draft, *supra* note 4, at 44.

33. Preparatory Committee Draft Statute, U.N. Doc. A/CONF.183/2/Add.2 (Apr. 14, 1998); see also THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, *supra* note 7, at 68.

34. See Mahnouch H. Arsanjani, *The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 23 (1999).

of more than 200 non-governmental organizations (NGOs).<sup>35</sup> Of the states in attendance, 120 voted in favor of adopting the statute, 7 voted against, and 21 abstained.<sup>36</sup> In July 2002 after the required 60 states had ratified the statute, the ICC came into existence.<sup>37</sup>

As of August 2010, some 139 countries had signed the Rome Statute, and 113 had actually become States Parties to it.<sup>38</sup> Of the States Parties, 20 are from Western Europe, 17 are from Eastern Europe, 31 are from Africa, 14 are from Asia, and 25 are from Latin America and the Caribbean.<sup>39</sup> The United States, Israel, China, Russia, Indonesia, and India are notable powerful states that have declined to ratify the treaty. Also not parties to the treaty are a number of Islamic and African states, including: Bahrain, Iran, Iraq, Kuwait, Pakistan, Qatar, Syria, Turkey, United Arab Emirates, Yemen, Algeria, Angola, Cameroon, Cape Verde, Cote d'Ivoire, Egypt, Morocco, Sudan, and Zimbabwe. In June 2010, Bangladesh became the first country from southern Asia to join the court.<sup>40</sup>

The adoption of the Rome Statute—particularly in its current form—was anything but a foregone conclusion. Indeed, a handful of core issues concerning ICC jurisdiction over crimes, the mechanism for triggering prosecution, and the role of the United Nations Security Council were the subject of much negotiation.<sup>41</sup> Although a number of states favored an independent prosecutor with power to initiate proceedings and no Security Council veto on prosecutions, some powerful states, such as the United States, pushed for granting the Security Council a greater role in determining which cases to pursue.<sup>42</sup> Nevertheless, at the conclusion of negotiations, the Rome Statute states voted to adopt was one that envisioned a powerful and independent court.

Indeed, the ICC that these states joined differs substantially from any preceding international criminal tribunal. Unlike the ad hoc international criminal tribunals such as those established to deal with crimes committed

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35. See Caroline Fehrl, *Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches*, 10 EUR. J. INT'L REL. 357, 362 (2004).

36. See Arsanjani, *supra* note 34.

37. See generally WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2007).

38. For a list of state parties to the ICC, see [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en).

39. See COALITION FOR THE INTERNATIONAL CRIMINAL COURT ("CICC"), States Parties to the International Criminal Court, available at [http://www.iccnw.org/documents/RATIFICATIONSbyRegion\\_18\\_August2010\\_eng.pdf](http://www.iccnw.org/documents/RATIFICATIONSbyRegion_18_August2010_eng.pdf).

40. *Id.*

41. See SCHABAS, *supra* note 37.

42. *Id.*

in Rwanda and the former Yugoslavia, the ICC's jurisdiction is not circumscribed to dealing with particular atrocities in particular states.<sup>43</sup> Nor can states decide whether or not to accede to the court's jurisdiction on a case-by-case basis.<sup>44</sup> Rather, by committing to the treaty creating the ICC, states agree that investigations may be commenced against the state's own nationals for the covered crimes of genocide, crimes against humanity, or war crimes, as long as those crimes were committed after the court came into existence or after the state ratified the treaty, whichever is later.<sup>45</sup> Furthermore, the ICC treaty is not only backward-looking; by joining the court, states agree that the court can prosecute any future atrocities in the event the state itself does not prosecute those atrocities domestically. Moreover, the treaty does not recognize any immunity that states may otherwise grant to heads of state who engage in criminal activities.<sup>46</sup>

The treaty creating the ICC also has stronger enforcement mechanisms than those traditionally associated with international human rights treaties. According to the terms and provisions of the Rome Statute, an independent ICC prosecutor may initiate investigations against nationals of States Parties for the covered crimes on his own with the approval of the court, or based on referrals from a State Party or the United Nations Security Council.<sup>47</sup> The prosecutor and the court operate without direct Security Council oversight, with the Council having no veto power over what situations are investigated or prosecuted.<sup>48</sup> Not only have States Parties to the ICC delegated authority to independent decision makers, but they have also given those decision makers power to enforce those decisions. Most importantly, the ICC is empowered to issue arrest

43. For example, in 1993, the United Nations established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) to preside over trials against those who had committed atrocities and crimes against humanity during armed conflict in the Balkans. *See generally* PAUL R. WILLIAMS & MICHAEL P. SCHARF, *THE ROLE OF JUSTICE IN PEACE BUILDING: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA* (2002). The United Nations thereafter established the International Criminal Tribunal for Rwanda (ICTR) to preside over crimes committed during the civil war in Rwanda. *See generally* VIRGINIA MORRIS & MICHAEL P. SCHARF, *THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA* (1998).

44. *See* Yee, *supra* note 11.

45. Rome Statute, *supra* note 8, arts. 5–8, 11, 12(2).

46. *Id.* art. 27 (stating that any immunities or procedural rules which may attach to the official capacity of a person under national or international law shall not bar the ICC from exercising jurisdiction over that person).

47. *Id.* arts. 13–15.

48. Rudolph, *supra* note 11, at 679–80; Yee, *supra* note 11, at 143–52; Goldsmith & Krasner, *supra* note 11.

warrants to bring those who have committed mass atrocities to stand trial for their crimes in The Hague.<sup>49</sup>

In sum, the treaty states enacted to create the ICC envisions a powerful and independent prosecutor and court that can significantly invade in the realm of state sovereignty.<sup>50</sup> States committing to the ICC face the possibility that if government officials or any of its nationals commit atrocities, they will be prosecuted at the ICC unless the state prosecutes those atrocities domestically.

## II. EXISTING LITERATURE EXPLAINING COMMITMENT TO INTERNATIONAL HUMAN RIGHTS TREATIES

Although there is little scholarly research empirically testing the question of why states committed to the treaty creating the ICC in particular, there is an ample literature which examines state decisions to join international institutions in general, including international human rights treaties. This Article groups this literature according to its theoretical underpinnings as follows: “the rationalist view” and “the normative view.” The rationalist view assumes that states are self-interested actors that behave based on the logic of consequences. Under this view, states will commit to treaties where the costs of commitment are low or where the costs of commitment are otherwise outweighed by some benefits that may be derived from joining the treaty. By contrast, under the normative view, states may ratify human rights treaties even if commitment is costly—such as a situation in which the state is actually unable to comply with treaty terms. Under the normative view, this occurs because ratification of treaties embracing positive norms may simply be the appropriate thing to do if a state is to be viewed as legitimate.<sup>51</sup> Of course, states may also conclude that doing what is appropriate and embracing the norms favored by other important or influential actors provides additional benefits that flow from being viewed as legitimate. For example, by ratifying human rights treaties, states may be able to reap extra-treaty benefits such as increased aid or trade.

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49. Rome Statute, *supra* note 8, art. 58.

50. See, e.g., Yee, *supra* note 11, at 143–52; Rudolph, *supra* note 11, at 679; Fehl, *supra* note 35, at 375.

51. See, e.g., JAMES C. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 160–62 (1989) (comparing the logic of consequences, which assumes that behavior is willful and motivated by preferences and expectations about consequences, with the logic of appropriateness, which assumes that actions are driven by what is necessary and appropriate under the circumstances).

### A. *The Rationalist View*

Under a rationalist view, states engage in cost/benefit calculations and join those treaties that are least costly and most beneficial to them.<sup>52</sup> Those costs and benefits will often be incurred or derived in the future after ratification. However, states' pre-ratification determinations regarding any future costs and benefits may be based on calculations that are more or less retrospective or prospective in nature. As discussed below, according to some theories, states will, and can, determine the likely consequences of treaty commitment by looking to their past practices and actions. Essentially, states will base their predictions about future behavior on what the record shows they used to do. On the other hand, according to some theories, the treaty's potential to influence state practices and actions in the future may impose costs or benefits that will guide state determinations about the consequences of treaty ratification. Thus, even where past practices may suggest compliance will be difficult, a state may commit to a treaty based on calculations about what it expects the future to look like.

#### 1. *Retrospective Calculations*

##### a. *Compliance Costs: Domestic Practices and Policies*

The most direct costs associated with treaty ratification, and the costs a state will likely calculate by looking backwards at its recent past practices and policies, are those related to compliance with treaty terms. According to George Downs, David Rocke, and Peter Barsoom, most governments prefer to guard against restrictions on their sovereignty, and thus, will avoid costly commitments—namely, commitments to institutions with which they cannot comply. Indeed, these scholars suggest that the reason for widespread compliance with at least some treaties is because states do not negotiate or join treaties that require “deep” cooperation, defined as cooperation that would require the state to depart from what it otherwise would have done in the absence of the treaty.<sup>53</sup> Therefore, states wishing to guard their sovereignty and avoid costly decisions will have incentives to look backwards to determine whether their practices and policies are consistent with those required by the terms of the treaty. This theory posits

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52. See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1860 (2002) (noting that an important benefit of the rationalist view of state behavior is that it provides predictions about how countries will act inasmuch as it assumes that states weigh the costs and benefits of their actions and proceed where benefits outweigh costs).

53. *Id.*

that to the extent their practices and policies are consistent, states should commit to the treaty since compliance costs—and the concomitant loss to state sovereignty—should be minimal.<sup>54</sup>

In the case of international human rights treaties, a state's domestic political realities and its prevailing human rights practices should best predict its compliance costs, which will in turn affect the state's willingness to commit to the treaty. First, regarding the state's domestic political configuration, democratic states generally protect basic human rights, apply the rule of law fairly, and limit state power. Consequently, for those states, state policies should be such that ratification of human rights treaties will not affect the status quo ante.<sup>55</sup> Autocratic regimes, on the other hand, tend not to place legal restraints on their own power. Therefore, because they have not in the past committed to protecting human rights or limited their own ability to respond violently, these states may conclude that ratifying human rights treaties poses significant risks to their sovereignty; if they maintain the status quo ante, these states risk failing to comply with treaty terms.<sup>56</sup> Aside from their political configuration, however, states with a recent history of better domestic human rights practices should also be more likely to ratify treaties protecting human rights. For these states, too, the costs of noncompliance—and the risks to state sovereignty—should be low.<sup>57</sup>

The nature and terms of the ICC treaty, however, may impose additional compliance costs on states than might some other international human rights treaties. Because the crimes covered by the ICC include “war crimes,” states with a greater military presence may face a greater risk of prosecution of their citizens—and therefore view ICC ratification as more costly—than states with a smaller military presence. For example, the United States argued during treaty negotiations that its military forces should be exempted from ICC jurisdiction because those forces were present throughout the world, were critical to international peace and

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54. George W. Downs, David M. Roake & Peter M. Barsoom, *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379, 383 (1996).

55. Wade M. Cole, *Sovereignty Relinquished? Explaining Commitment to the International Human Rights Covenants, 1966–1999*, 70 AM. SOC. REV. 472, 475–76 (2005).

56. *See id.*

57. *See id.*; *see also* Christine Min Wotipka & Kiyoteru Tsutsui, *Global Human Rights and State Sovereignty: State Ratification of International Human Rights Treaties, 1965–2001*, 23 SOC. F. 724, 737 (2008). Along these same lines, Wotipka and Tsutsui also suggest that compliance with human rights norms may be easier for wealthier and more developed countries. *Id.* at 737. Like other scholars testing state commitment to international human rights treaties, they include a measure for economic development in their empirical models to capture this idea. I similarly include such a measure in my model. *See infra* Part IV.C.

security, and would be more exposed to more accusations of wrongdoing than would citizens of other states with less international military involvement.<sup>58</sup> As this example demonstrates, even if a state is a democracy and otherwise protects human rights, if it has a large military presence within the world community, this may lead it to conclude that compliance with the ICC treaty is more costly and requires more policy change (perhaps in the form of military training) than it is willing to take on. The reverse, of course, would likely be true for states with a smaller military presence.<sup>59</sup>

Finally, the costs of complying with international human rights treaties are reduced for states with practices and policies that do not conform to treaty terms so long as the mechanisms designed to enforce compliance are weak or nonexistent.<sup>60</sup> For example, where treaties require only that states self-report compliance, the punishment states face for failing to report or reporting poor conduct is negative comments from the treaty's committee members. But, states risk negative comments by other states and NGOs when they violate human rights norms in their territories even absent ratification of a human rights treaty. Because treaties with weak enforcement mechanisms are not designed to make states accountable for their commitments, even rights-abusing governments may readily bind themselves to international treaties designed to promote and protect human rights, knowing full well that they will not face any real challenges to their practices.

Indeed, as noted above, a number of studies have found that states with a history of poor human rights practices are just as likely as states with good practices to bind themselves to treaties which require them to protect human rights, but that those states thereafter do not change their poor practices. For example, Oona Hathaway found that non-democratic nations with poor human rights ratings were just as likely, and sometimes even more likely, to commit to international human rights treaties than non-

58. See BENJAMIN N. SCHIFF, BUILDING THE INTERNATIONAL CRIMINAL COURT 161 (2000).

59. The results of empirical tests of this theory, however, have been mixed. For example, in their conference paper, Michael Struett and Steven Weldon found that states that spent more of their national income on defense and those that had a greater share of world military spending (when controlling for democracy) were less likely to ratify the treaty creating the ICC. Michael J. Struett & Steven A. Weldon, *Why Do States Join the International Criminal Court: A Typology* (Mar. 1, 2007) (presented at the International Studies Association Annual Meeting). On the other hand, Judith Kelley found that a state's relative military power (measured as military spending in millions of dollars) did not predict a state's affinity for the ICC—or its likelihood of later signing a bilateral immunity agreement with the United States. Kelley, *supra* note 23, at 580.

60. Downs, Roake & Barsoom, *supra* note 54, at 379, 388–92; Hathaway, *The Cost of Commitment*, *supra* note 19, at 1832, 1834–36.

democratic nations with better human rights ratings.<sup>61</sup> She attributed this finding to the absence of both external and internal enforcement mechanisms.<sup>62</sup> Specifically, not only did the treaties themselves lack significant enforcement mechanisms, but autocratic nations also lacked internal enforcement mechanisms in the form of an active and vocal civil society or others who ordinarily push for better practices in democracies.<sup>63</sup> In another study, Hathaway found that approximately the same percentage of countries with the most recorded acts of torture ratified the Convention Against Torture as did countries with no recorded acts of torture.<sup>64</sup> Emilie M. Hafner-Burton and Kiyoteru Tsutsui have reported that the average state has ratified a steadily increasing number of human rights treaties, but that the percentage of states reportedly repressing human rights has grown over time, suggesting that states may ratify weakly-enforced treaties only as window dressing without any intention of actually improving their practices.<sup>65</sup>

*b. Domestic Ratification Costs*

In addition to compliance costs, another cost that may influence a state's ratification behavior and which may require states to examine their past and current practices, is the cost of the state's domestic ratification processes. Beth Simmons identifies the political domestic ratification process as a primary cost that governments face when deciding whether or not to commit to international treaties.<sup>66</sup> For a state to bind itself to an international human rights treaty, it must follow whatever domestic processes are required to make any ratification legal and legitimate. As Simmons notes, governments face the fewest political costs to treaty ratification when they fully control the process, such as when the head of state has the sole right to make ratification decisions. However, many states are subject to a much more onerous process; states may require parliamentary debate or majority or supermajority votes by legislative bodies before the government is permitted to bind itself to an international treaty. With the presence of a greater number of domestic legislative veto players, governments may face opposition to, or delays in, the treaty

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61. Hathaway, *The Cost of Commitment*, *supra* note 19, at 1856–57.

62. *Id.*

63. *Id.*

64. Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 20, at 1982–87.

65. Hafner-Burton & Tsutsui, *supra* note 20, at 1374.

66. BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 68 (2009).

ratification process that can make ratification of an international human rights treaty too politically costly for a government to pursue.<sup>67</sup>

## 2. *Prospective Calculations*

### a. *Uncertainty Costs*

According to some theories, and regardless of their likely compliance costs based on past practices or treaty ratification processes, states will also have reason to look into the future to determine the likely costs associated with ratifying a particular treaty. For example, some states may face unique uncertainty costs that will cause them to avoid ratifying, or move slowly in ratifying, international human rights treaties. In particular, states that follow a common law tradition may find commitment to international legal tribunals more costly than would states following a civil law tradition.<sup>68</sup> Generally speaking, the treaties to which a state commits also become part of that state's law.<sup>69</sup> In the common law tradition, however, the judiciary is generally independent from the government and there is some possibility that it will apply treaty law in a way that creates new government obligations to the state's citizens and others.<sup>70</sup> This uncertainty in how treaty law will be applied in the future after ratification may cause common law states to be wary of ratifying international human rights treaties—even where they agree with its principles and have policies in place that enable compliance with treaty terms.

### b. *Credible Commitment*

Even where the costs of complying with treaty terms are significant, Beth Simmons and Allison Danner suggest that some states rationally calculating the costs of treaty commitment will conclude that those costs are outweighed by the future domestic benefits states can obtain by credibly committing to a treaty with strong enforcement mechanisms.<sup>71</sup> Specifically, Simmons and Danner suggest that in the case of the ICC, non-democracies with poor human rights practices will join the court precisely because it has strong enforcement mechanisms that will allow

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67. *See id.*

68. *See id.* at 71; *see also* Jay Goodliffe & Darren G. Hawkins, *Explaining Commitment: States and the Convention Against Torture*, 68 J. POL. 358, 364 (2006).

69. SIMMONS, *supra* note 66, at 71.

70. *Id.* at 71–74.

71. Simmons & Danner, *supra* note 23, at 233–36.

those states to signal a credible commitment to their domestic audiences to end the cycle of violence and, instead, in the future, respond non-violently to crises.<sup>72</sup> These scholars argue that where the potential gains from making a credible commitment are high, the sovereignty costs of joining the court are overridden, and the state will be rational in deciding to tie its hands and commit to acting differently in the future.<sup>73</sup>

In short, Simmons and Danner argue that non-democratic states with poor human rights practices and a history of violence have incentives to calculate the costs of ratifying the ICC by looking ahead rather than backwards. The results of event history analysis provide evidence supporting their theory. Simmons and Danner find that states that have experienced mass atrocities and that have poor practices (measured by whether the state had experienced a civil war with more than 25 deaths between the period 1990 and 1998) are likely to join the ICC as long as those states also have weak institutions of domestic accountability (measured by, among other things, democracy and rule of law ratings).<sup>74</sup> States with poor practices, but strong institutions of domestic accountability, however, are less likely to join the ICC, a result which Simmons and Danner attribute to the fact that such states already have domestic institutions—such as a civil society and courts that follow the rule of law—which can ensure leaders will be held accountable for any future acts of violence.<sup>75</sup>

Simmons and Danner are likely correct that some states make prospective calculations and join the ICC notwithstanding their past and present inability to comply with treaty terms so as to commit to better their practices in the future. But I am not convinced that non-democratic states would overwhelmingly calculate their ICC commitment decisions in the way these scholars suggest. Rather, I am more persuaded by the underlying logic of Oona Hathaway's argument, which suggests that states are more retrospective in calculating the costs of their treaty commitments and will be less likely to commit where the evidence about their past practices suggests they cannot comply with treaty terms—unless, of course, treaty enforcement mechanisms are weak. Indeed, Hathaway argues that the reason autocratic states with poor practices readily commit to human rights treaties with weak enforcement mechanisms is due to the

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72. *Id.* at 233–36.

73. *Id.*

74. *Id.* at 238 (discussing measures for these two main explanatory variables).

75. *Id.* at 240.

absence of both external and internal enforcement mechanisms.<sup>76</sup> Thus, according to Hathaway's reasoning, autocratic states with poor practices are not committing to international human rights treaties because they want to credibly commit and tie their hands so that they cannot act violently in the future. Instead, for the most part, those autocratic states with poor practices commit to international human rights treaties because commitment will not tie their hands, thus enabling them to continue to disrespect human rights and repress their domestic audience without facing consequences for doing so. And, it makes sense that an autocratic regime which has declined to place domestic constraints on its power to do and act as it pleases may not want to place international constraints on that same power by committing to an international human rights treaty like the ICC which has relatively strong enforcement mechanisms. Thus, and as Hathaway found, I expect that non-democracies with poor practices will typically be wary of joining treaties other than those with weak enforcement mechanisms that cannot be used to punish noncompliant behavior.

In any event, aside from the logic of Simmons' and Danner's theory, I am not convinced that their "recent civil wars" variable captures the concepts it was designed to measure: namely, a state's level of human rights practices or its likelihood of committing mass atrocities.<sup>77</sup> First, twenty-five battle deaths in a year does not necessarily capture "violent states" or states at risk of committing mass atrocities since twenty-five battle deaths is not an enormous number and does not account for whether the deaths were the result of "criminal" action or poor practices on the part of the government or any rebel group. In addition, twenty-five battle deaths are not even sufficient to constitute a civil war as most scholars understand it. The Correlates of War dataset, which is widely used, classifies civil wars as those having over 1000 war-related casualties per year of conflict.<sup>78</sup> If "recent civil wars" does not capture the concept of a state with poor human rights practices or a tendency towards committing mass atrocities, there may be reason to question Simmons' and Danner's empirical results showing that autocratic states with these qualities were

76. Hathaway, *The Costs of Commitment*, *supra* note 19, at 1856–57.

77. Simmons and Danner state that the "recent civil wars" measure is designed to capture states "at risk for committing mass atrocities." Simmons & Danner, *supra* note 23, at 237.

78. See Meredith Reid Sarkees, *The Correlates of War Data on War: An Update to 1997*, 18 CONFLICT MGMT. & PEACE SCI. 1 (2000), available at [http://www.correlatesofwar.org/cow2%20data/WarData/IntraState/Intra-State%20War%20Format%20\(V%203-0\).htm](http://www.correlatesofwar.org/cow2%20data/WarData/IntraState/Intra-State%20War%20Format%20(V%203-0).htm) [hereinafter "Correlates of War Dataset"].

more likely to commit to the ICC so as to tie their hands against acting violently in the future.

Finally, even accepting that “recent civil wars” is an acceptable indicator for the concepts tested, an examination of Simmons’ and Danner’s appendix of states that have experienced such “recent civil wars” provides evidence contrary to their theory.<sup>79</sup> It shows that the autocratic states among those with recent civil wars were *not* more likely than the democratic states to commit to the ICC. Of the twenty-two democratic states listed, nine had joined the court, while thirteen had not.<sup>80</sup> Of the non-democratic states listed, nine had joined the court, but some sixteen had not.<sup>81</sup> Thus, even putting aside questions about the “recent civil wars” measure, it seems that a smaller percentage of the non-democratic states had joined the court—yet these non-democratic states with “recent civil wars” are the very states that Simmons and Danner argue will join the court to demonstrate their credible commitment to end the cycle of violence. For all of these reasons, I am persuaded by the logic of Oona Hathaway’s argument and expect that autocratic states with poor human rights practices will likely commit to international human rights treaties with weak enforcement mechanisms, but be wary of committing to international human rights treaties with strong enforcement mechanisms that could impose external constraints on the states’ abilities to do as they please.

### 3. *Democratic Lock-In*

Finally, and along these same lines, Andrew Moravcsik also suggests that some states will have reasons to be forward-looking in rationally calculating the costs and benefits associated with ratifying a particular

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79. The Appendix A referenced in the Simmons and Danner article published in *International Organizations* is not on their referenced website. See Beth A. Simmons, Abstract of *Credible Commitments and the International Criminal Court*, <http://scholar.harvard.edu/bsimmons/publications/credible-commitments>. Accordingly, I used the Appendix A in their February 2008 draft. See Beth A. Simmons & Allison Danner, Draft, *Credible Commitments and the International Criminal Court*, app. A (Feb. 1, 2008) (on file with author), available at [http://ducis.jhfc.duke.edu/wp-content/uploads/archive/documents/Simmons\\_paper.pdf](http://ducis.jhfc.duke.edu/wp-content/uploads/archive/documents/Simmons_paper.pdf).

80. Appendix A shows that of the democratic states with “recent civil wars,” Colombia, Djibouti, Georgia, Mali, Mexico, Niger, Senegal, Sierra Leone, and Spain joined the court. Simmons & Danner, *supra* note 79.

81. Appendix A shows that of the non-democratic states with “recent civil wars,” Afghanistan, Bosnia, Burundi, Cambodia, Democratic Republic of Congo, Liberia, Peru, Tajikistan, and Uganda joined the court. *Id.*

treaty.<sup>82</sup> Specifically, Moravcsik argues that new transitioning democracies can outweigh the sovereignty costs associated with joining international human rights treaties by locking in the treaty's democratic principles and thereby constraining the activities of future governments that may seek to subvert democracy.<sup>83</sup> In testing this theory, Moravcsik found evidence that dictatorships and established democracies voted against binding human rights guarantees during negotiations of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR"), whereas the newly-created democracies supported binding guarantees.<sup>84</sup> Accordingly, some newly democratic countries may conclude that the costs of complying with international human rights treaties are relatively low since they would have adopted—or at least intend to adopt—policies that are consistent with treaty terms. Furthermore, the benefits that new democracies may realize by locking future governments into following their liberal policies may outweigh the risk that the state may not be able to immediately and fully comply with treaty terms. However, when Moravcsik's theory was tested in connection with state decisions to support the Convention Against Torture and the ICC treaty, it found little support.<sup>85</sup>

### B. *The Normative View*

Under the normative view, states will join international human rights treaties even if it may not appear to be in their rational self-interest to do so—for example, because at the precise moment in time, compliance with treaty terms may be difficult. According to normative theories, states act based on the "logic of appropriateness" and indicate their commitment to particular international norms because they are led to believe that behavior consistent with those norms is appropriate and necessary for states wishing to be viewed as legitimate.<sup>86</sup> Martha Finnemore and Kathryn Sikkink

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82. See Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 225–30 (2000).

83. See *id.*

84. See *id.* at 232. Similarly, Edward Mansfield and Jon Pevehouse have concluded that newly democratizing nations are especially likely to enter international organizations because doing so would allow the state to "credibly commit to carry out democratic reforms and . . . reduce the prospect of reversions to authoritarianism. . . ." Edward D. Mansfield & Jon C. Pevehouse, *Democratization and International Organizations*, 60 INT'L ORG. 137, 138 (2006).

85. See Goodliffe & Hawkins, *Explaining Commitment*, *supra* note 68, at 365; Goodliffe & Hawkins, *A Funny Thing Happened*, *supra* note 23, at 984.

86. See, e.g., MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 5–6 (1996).

argue that after new norms are adopted by a significant number of states, a “norm cascade” will follow, such that other states will feel pressured to commit to the norm as well.<sup>87</sup> Norms are spread through a number of different channels, and states are subjected to normative pressures from powerful democracies, transnational governance regimes like the United Nations, and global civil society.<sup>88</sup>

In this regard, and as many scholars have noted, states may initially succumb to normative pressures because they are rewarded for doing so with, for example: investment, aid, and trade.<sup>89</sup> Although they would prefer to guard their sovereignty and avoid external constraints, states may join international human rights treaties in the hopes that ratification will make them appear more legitimate, and thus, more suitable recipients of investment. Weaker or poorer states may commit to international human rights treaties because they are indirectly or directly pressured to do so by the greater powers on which they rely for aid or trade.<sup>90</sup> It makes sense that states would believe more powerful and wealthier states want them to embrace favorable human rights norms in order to receive certain benefits from them. As Emilie M. Hafner-Burton points out, many preferential trade agreements not only govern market access, but tie that access to a state’s ability to comply with various human rights standards.<sup>91</sup>

States may also be pressured directly or indirectly to embrace the norms and policies that their neighbors embrace. If many states in a region are committing to a particular treaty, other states may feel pressured to similarly commit.<sup>92</sup> A state’s ratification of international human rights treaties can signal to others in the region that it is a legitimate member of that region. In addition, states may be led to understand that with their legitimacy established, they will be eligible for other rewards—for example, participation in regional trade arrangements.<sup>93</sup>

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87. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT’L ORG. 889, 900–04 (1998).

88. See Wotipka & Tsutsui, *supra* note 57, at 736.

89. See, e.g., Goodliffe & Hawkins, *Explaining Commitment: States and the Convention Against Torture*, *supra* note 68, at 361 (citing Frank Schimmelfennig, *The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union*, 55 INT’L ORG. 47 (2001) and Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000)).

90. See SIMMONS, *MOBILIZING FOR HUMAN RIGHTS*, *supra* note 66, at 77; Wotipka & Tsutsui, *supra* note 57, at 734–35.

91. Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT’L ORG. 593, 594 (2005).

92. Goodliffe & Hawkins, *Explaining Commitment*, *supra* note 68, at 361.

93. See, e.g., *id.*

In addition to the pressure from their neighbors to signal appreciation of certain norms, where the ICC is concerned, states may have been subjected to normative pressure to join the ICC by pro-ICC NGOs. In his study of state decisions to join the ICC, Michael Struett found anecdotal evidence suggesting that NGOs played a large role in convincing states that joining the ICC was necessary to be considered a legitimate state: one that would promote the appropriate norm of supporting an international court to help end impunity for crimes against humanity.<sup>94</sup>

### III. STRONG ENFORCEMENT MECHANISMS AS A CREDIBLE THREAT

As is evident from the above discussion, there may be many reasons why states are motivated to commit to, or refuse to commit to, international human rights treaties. However, I focus on compliance costs based on the specific language of the ICC treaty and the backward-looking calculations that states should make if they want to avoid significant losses to their sovereignty for failing to comply with treaty terms. I do so for several reasons. First, it is worth noting that on the whole, international human rights treaties are different from other treaties—such as arms control agreements and trade agreements—which by their very terms provide tangible reciprocal benefits to states in exchange for their pledge to act in particular ways.<sup>95</sup> Second, in all cases of treaty ratification, one primary guide of a state's obligations and the risks associated with failing to comply with those obligations is the terms and provisions of the treaty. For states behaving according to the logic of consequences, treaty terms should be the best and first guide as to whether treaty ratification makes sense from a cost/benefit standpoint. Furthermore, in the case of the ICC, the institutional design of the treaty and its enforcement mechanisms are unique. Accordingly, this is not a case where states can look to other similar treaties or the actions of treaty bodies that oversee compliance with other similar treaties to help them interpret the actual strength and meaning of the ICC's enforcement mechanisms—and therefore, the likelihood that they will be held accountable for failing to comply with treaty terms. While states that wait to ratify the ICC treaty may be able to look at the actions of the ICC prosecutor and the court to help them determine whether the treaty's enforcement mechanisms are actually as

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94. MICHAEL J. STRUETT, *THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGO'S, DISCOURSE, AND AGENCY* 131–48 (2008).

95. Hathaway, *The Cost of Commitment*, *supra* note 19, at 1823.

strong as they appear to be on paper, states that ratified promptly had only the treaty text on which to rely when making their commitment decisions.

In addition, I argue that by contrast to the previous international human rights treaties which contain only weak enforcement mechanisms, states should inherently have something to fear from an independent prosecutor and court. The failure to comply with the ICC treaty's terms carries grave consequences: the possibility of an ICC prosecution of the state's leaders or citizens. Because the ICC's enforcement mechanisms carry with them a potential significant sovereignty loss, doing what is appropriate is more likely something that states will consider after they determine they can comply with the treaty. In short, states should view the ICC's relatively strong enforcement mechanisms as a credible threat and act accordingly. Thus, even though prior studies have found that states often ratify human rights treaties without regard to their ability to comply,<sup>96</sup> state decisions about whether to commit to the ICC should be guided primarily by compliance concerns.

Finally, I focus on treaty terms because in the international human rights context (and others as well), a treaty's institutional design and its enforcement mechanisms can have implications for understanding state behavior and also the likelihood that the treaty's purposes and goals will be realized. As explained above, the ICC treaty has an institutional design and enforcement mechanisms that set it apart from other prior international human rights treaties. Presumably, states structured the ICC treaty in this way because they wanted to ensure compliance with its terms and deter human rights abuses by ending the culture of impunity whereby domestic governments either commit such abuses or fail to bring to justice those within their jurisdiction who perpetrate atrocities. Knowing why states commit to such a regime, and the kinds of states that commit to such a regime, should provide insights about whether structuring international human rights treaties with stronger enforcement mechanisms can ensure greater compliance with international human rights norms.

When I refer to enforcement mechanisms in this context,<sup>97</sup> I refer to the formal grant of power from states to some entity or institution with authority to oversee state compliance with treaty terms. The weakest

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96. See *supra* note 20 and accompanying text.

97. I draw on several scholarly works for this discussion about enforcement and legalization. See Darren Hawkins, *Explaining Costly Institutions: Persuasion and Enforceable Human Rights Norms*, 48 INT'L STUD. Q. 779, 781 (2004); Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385 (2000); Abbott & Snidal, *supra* note 21; Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT'L ORG. 599, 603-05 (1986).

enforcement mechanisms are characterized by “soft law” provisions—using the language of Kenneth Abbott and Duncan Snidal.<sup>98</sup> “Soft law” exists where legal arrangements are weakened by lacking clear obligations, precision, or a clear delegation of authority or responsibility.<sup>99</sup> Stronger, “hard law” enforcement mechanisms are precise and binding: for example, a formal grant of power to a committee or court to engage in authoritative, institutionalized, and legally binding decision making.<sup>100</sup> As Darren Hawkins notes, strong enforcement requires the existence of authorized decision makers who are “officially empowered by states to interpret and apply the rule of law, and [who] control resources that can be used to prevent abuses or to punish offenders.”<sup>101</sup> States should view strong enforcement mechanisms as a credible threat because they are costly; they impose precise and binding restrictions on the state’s sovereign right to control matters of domestic governance.

As a rule, international human rights treaties are characterized by “soft law” enforcement mechanisms<sup>102</sup> as they are lacking clear obligations, precision, or delegation of authority or responsibility.<sup>103</sup> Traditional human rights institutions—such as the CAT and the ICCPR—require only that the state submit regular reports to a committee about its efforts to comply with treaty terms.<sup>104</sup> Additional articles and the optional protocols to these treaties have somewhat more significant enforcement mechanisms in that states can recognize the competence of a committee to receive and review state or individual complaints alleging that a state party has not fulfilled its treaty obligations and has either failed to protect or abused human rights.<sup>105</sup> However, in the present system, committees are not empowered to order a remedy for any violations they find: if the matter cannot be resolved via negotiation, the committee is generally limited to

98. See Abbott & Snidal, *supra* note 21, at 422–24.

99. *Id.*

100. *Id.* at 421–22.

101. Hawkins, *supra* note 97, at 781.

102. Abbott & Snidal, *supra* note 21, at 422–24.

103. This absence of enforcement mechanisms in international human rights treaties is a fact Oona Hathaway emphasizes in explaining her results which showed that non-democracies with poor human rights ratings were just as likely as non-democracies with good human rights rating to commit to such treaties. She notes that non-democracies have few or no internal enforcement mechanisms—such as domestic civil society—which might pressure non-democracies to honor their commitments. Thus, in the absence of external enforcement mechanisms associated with the treaty, non-democracies could conclude that commitment was essentially costless, and perhaps even beneficial, as it would enable them to appear legitimate. Hathaway, *The Cost of Commitment*, *supra* note 19, at 1834, 1856.

104. See *supra* note 17 and accompanying text.

105. See *supra* note 18 and accompanying text.

summarizing its activities in a report.<sup>106</sup> Moreover, according to the Office of the United Nations High Commissioner for Human Rights, as of August 2010, the procedures for interstate complaints had never been used.<sup>107</sup>

In sum, in none of the above instances have states delegated to the committees the power to make legally binding decisions—meaning that the enforcement mechanisms associated with these traditional human rights treaties are far from “strong.”<sup>108</sup> This does not mean the enforcement mechanisms are not helpful or meaningful steps in inducing state compliance or improving human rights. The reports, decisions, and comments by the committees on state noncompliance can be used by NGOs or individuals in an effort to shame the state into compliance. Other states may also use the evidence contained in those reports as ammunition to force a state into compliance; for example, states may withhold aid or trade until a state agrees to improve its human rights record. Even if a state fails to cooperate with its obligations or follow committee recommendations, the committee’s decisions and reports may be valuable in persuading the state to comply. However, regarding the level of the enforcement mechanisms to which states bind themselves pursuant to the treaty’s terms, the fact is that the committees do not have legally binding adjudicatory power with resources to compel compliance with their comments, views, and recommendations. Moreover, even if the state had not joined the particular treaty, NGOs, states, or civil society probably could find equivalent evidence about the state’s poor human rights practices to shame it into improving those practices.

In contrast to these traditional human rights treaties, the ICC is governed by “hard law” enforcement mechanisms. The ICC treaty describes in detail the elements of the covered crimes of genocide, crimes against humanity, and war crimes.<sup>109</sup> By the terms of the treaty, states have also designated to an independent entity the authority to determine that there is evidence to believe an individual or group committed one of the

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106. See, e.g., ICCPR, *supra* note 18, art. 41(h); CAT, *supra* note 18, art. 21(h).

107. See *Human Rights Bodies—Complaints Procedures*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/petitions/index.htm>.

108. See *supra* note 18 and accompanying text; see also AHCENE BOULESBAA, THE U.N. CONVENTION ON TORTURE AND THE PROSPECTS FOR ENFORCEMENT 63 (1999) (discussing the Committee Against Torture); Henry J. Steiner, *Individual Claims In A World Of Massive Violations: What Role For The Human Rights Committee*, in PHILIP ALSTON & JAMES CRAWFORD, THE FUTURE OF UN HUMAN RIGHTS MONITORING 37 (2000) (noting that the Human Rights Committee has no authority to act punitively against any state offending the ICCPR or to impose sanctions against it).

109. Rome Statute, *supra* note 8, arts. 5–8.

covered crimes within the territory of a State Party.<sup>110</sup> In addition, they have delegated the power to determine whether the state which would otherwise have jurisdiction over the matter is itself either unwilling or unable to prosecute the wrongdoers.<sup>111</sup> Furthermore, the ICC has resources to compel compliance with its determinations: it may issue arrest warrants to bring persons or groups to the ICC in The Hague to stand trial for their alleged crimes; it may try alleged offenders; and it may sentence those found guilty to prison terms.<sup>112</sup>

Of course, the ICC cannot effectuate arrests without the assistance of States Parties since the institution itself has no international police force. In addition, even though States Parties commit to cooperate in arresting those individuals for whom arrest warrants are issued,<sup>113</sup> the ICC has no police force to make states comply. Thus, while some states have cooperated in bringing suspects to The Hague for trial,<sup>114</sup> at least a couple of African nations have refused to arrest President Omar Al-Bashir of Sudan for whom an arrest warrant was recently issued.<sup>115</sup> Nevertheless, the power delegated to the ICC is still of a legally binding nature. While a suspect may be able to escape arrest by staying in state or hiding (and suspects can always escape arrest in similar ways even under domestic criminal law systems where police forces can effectuate arrests), those subject to an arrest warrant are not completely free to do as they please. Even President Bashir likely feels the threat of the warrant for his arrest; while he has traveled to some friendly countries in Africa, Bashir probably will not risk a trip to Europe. The warrant is a legal document backed by the power of the law, and States Parties are required to comply with warrants for arrest issued by the ICC.<sup>116</sup> Indeed, the power of the fact of

110. *See id.* arts. 1–4 (describing the establishment and powers of the court), 15 (describing the powers of the ICC prosecutor).

111. *Id.* art. 17.

112. *Id.* arts. 58, 77.

113. *Id.* art. 86.

114. The former Vice-President of the Democratic Republic of the Congo—who was the subject of a sealed arrest warrant—was arrested during a visit to Belgium. *Congo Ex-Official Is Held In Belgium on War Crimes Charges*, N.Y. TIMES, May 25, 2008, at A13.

115. Both Chad and Kenya are ICC States Parties that recently hosted President Bashir in their countries notwithstanding the warrant for his arrest. According to a September 21, 2010 ICC press release, Kenya's Minister of Foreign Affairs acknowledged Kenya's obligation to cooperate with the ICC, but also highlighted its competing obligations to the African Union, regional stability, and peace in explaining Kenya's refusal to arrest President Bashir while he was in the country. Press Release, ICC, President of the Assembly Meets Minister of Foreign Affairs of Kenya (Sept. 21, 2010), available at <http://www.icc-cpi.int/Menus/ASP/Press+Releases/Press+Releases+2010/President+of+the+Assembly+meets+Minister+of+Foreign+Affairs+of+Kenya.htm>.

116. Rome Statute, arts. 58, 89.

potential arrest warrants was recently demonstrated when in June 2010, Darfur suspects appeared in The Hague “voluntarily” so as to avoid having warrants issued for their arrest.<sup>117</sup>

Accordingly, because the ICC treaty has relatively strong enforcement mechanisms that are legally binding in nature, state ratification behavior will likely be influenced by states’ retrospective calculations about how their past practices predict their ability to comply with treaty terms. Principally, compliance requires a state and its nationals to commit to having relatively good human rights practices. Where nationals of States Parties do not commit any of the covered crimes, there will be no opportunity for the ICC to even potentially obtain jurisdiction over a matter. Therefore, a sufficient condition for ICC ratification is good human rights practices, since states with good practices can conclude that ratification will not lead to a costly loss of sovereignty.

Secondarily, pursuant to the ICC treaty’s complementarity provision,<sup>118</sup> compliance also may require a state to have relatively independent and capable domestic law enforcement institutions to prosecute human rights violations—in the event that the state’s government and/or citizens do commit the kinds of mass atrocities that would otherwise be within the ICC’s jurisdictional purview. Independent judicial institutions that follow the rule of law should be able to punish even governments that would otherwise be “unwilling”<sup>119</sup> to punish themselves or their compatriots who commit human rights violations. Capable domestic law enforcement institutions with resources and sufficient expertise should be “able”<sup>120</sup> to conduct the kind of investigations and prosecutions that will ensure that perpetrators of mass atrocities are punished for their conduct. Of course, because states with good human rights practices should not expect to commit the kinds of atrocities covered by the ICC treaty, they can still conclude that ICC commitment is relatively costless even if their domestic law enforcement institutions are not independent or capable.

For states with bad human rights practices, however, the cost of compliance calculations will be less straightforward. For these states, because their government or citizens may commit the kinds of crimes

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117. See Press Release, ICC, As Darfur Rebel Commanders Surrender to the Court, ICC Prosecutor “Welcomes Compliance with the Court’s Decisions and with Resolution 1593 (2005) of the Security Council.” (June 16, 2010), available at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050309/press%20release/pr548> (addressing the arrival of two Darfur rebel commanders to answer charges and face prosecution for their conduct).

118. Rome Statute, *supra* note 8, art. 17(1)(a).

119. See *id.* art. 17(2).

120. See *id.* art. 17(3).

covered by the ICC treaty, complying with treaty terms necessarily rests on whether they are able to take advantage of the treaty's complementarity provision. But, as an initial matter, relying solely on the availability of the treaty's complementarity provision for compliance is risky because pursuant to treaty terms, the ICC prosecutor and court are authorized to determine whether any domestic prosecutions are adequate to ward off an ICC investigation.<sup>121</sup> In addition, however, the data shows that there are relatively few states with poor practices that are also likely to have independent and capable domestic law enforcement institutions (based on either their rule of law scores or their democracy ratings). Thus, it may be that in most cases, states with bad human rights practices are also states where power is concentrated such that the government is able to abuse human rights or is complicit in human rights abuses and also controls the state machinery to such an extent that the judiciary is not independent and the rule of law is not fairly applied. In other words, not only may governments with poor practices risk having the ICC conclude that their domestic prosecutions are inadequate, but also they may be complicit in committing any human rights abuses and, therefore, be "unwilling" to ensure that such abuses are punished. As such, although independent and capable law enforcement institutions should be a sufficient condition for states to conclude that ratification of the ICC treaty is relatively costless, I expect that in most cases, states with poor human rights practices will either be wary of relying solely on this condition, or will be "unwilling" to do so.

In sum, this Article suggests that good human rights practices and independent and capable domestic law enforcement institutions are each individually sufficient conditions for states to rationally commit to the ICC treaty and its relatively strong enforcement mechanisms. Therefore, if a state has either good human rights practices or independent and capable domestic law enforcement institutions, it should conclude that ratifying the ICC treaty does not pose a significant risk to its sovereignty, and the state should commit to the court. In addition, for a state to conclude that ICC ratification is essentially costless because the state can comply with treaty terms, either good human rights practices or independent and capable domestic law enforcement institutions are a necessary condition to ratification. However, because the ICC has the ability to determine whether the state's domestic investigations and prosecutions are adequate

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121. *Id.* art. 17.

to ward off ICC jurisdiction, good human rights practices are almost a necessary condition to ratification.

The table below shows the commitment decisions this Article expects states to make based the theory outlined above.

TABLE 1: STATE COMMITMENT DECISIONS EXPECTATIONS

	Low Likelihood of Human Rights Violation	High Likelihood of Human Rights Violation
Worse Domestic Law Enforcement Institutions	Commit to ICC (since not likely to violate treaty terms)	Least likely to commit to the ICC
Better Domestic Law Enforcement Institutions	Most likely to commit to the ICC	Refuse to commit to the ICC (since can't control ICC determinations about the quality of domestic prosecutions) [but also theoretically unlikely many states in this category]

#### IV. RESEARCH DESIGN

This Article tests the theories and hypotheses laid out above quantitatively. Specifically, it tests the credible threat theory and the idea that states will be more likely to commit to the ICC treaty and its relatively strong enforcement mechanisms only if their rational and retrospective cost calculations suggest they can comply with treaty terms and avoid a costly loss of sovereignty. The Article pits the credible threat theory against the credible commitment theory and normative theories described in Part II, above.

If the credible threat theory is correct, the evidence should show that states with good human rights practices will be more likely than states with poor human rights practices to join the ICC. By contrast, according to the credible commitment theory, states with poor human rights practices that are also non-democracies (which, according to Table 5 is the case for most states with poor practices) should be most likely to ratify the ICC treaty since those states can use the ICC and its strong enforcement mechanisms to signal to their domestic audiences their intention to respond without violence in the future and to end impunity. Finally, if the normative theories advanced are correct, the evidence should show that

even states with poor human rights practices will commit to the ICC notwithstanding their inability to comply with treaty terms because they are directly or indirectly pressured to do so in order to obtain some uncertain or intangible future benefits.

### A. *Methodology*

I use event history analysis, and a Cox proportional-hazards regression model, to test the credible threat theory—and to test it against the credible commitment and normative theories. Event history analysis is a good way to test state commitment to the ICC because it allows the researcher to incorporate both constant and time-varying factors into the quantitative model so as to test each state’s “time until” ratification<sup>122</sup> and what factors speed up or slow down that time line.<sup>123</sup> Because we know the dates that countries have ratified the ICC treaty, I arrange the data quarterly to include that variation in the model. The results will be reported as hazard ratios, which will indicate the proportionate influence a given factor has on a state’s decision to commit to the ICC. Numbers greater than one indicate an increase in the hazard rate of ratification. Numbers less than one indicate a decrease in the hazard rate.

### B. *Dependent Variable*

Ratification data regarding the ICC treaty was coded from information collected by the ICC. The data is assembled at quarterly intervals for more than 190 countries between 1998 and 2008. Countries existing in July 1998 when the ICC treaty was adopted and available for ratification are “at risk” of ratifying at that time. Countries established after that time enter the risk set upon independence—the time when they are eligible to ratify as a sovereign state. Countries at risk are given a value of 0 until they ratify. At the time of ratification, countries are assigned a value of 1. Countries that did not ratify by the end of 2008, when the observation

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122. I use the term “ratify” to refer to state decisions to commit to the ICC treaty by both ratification and accession since both methods equally commit the state to the court. In addition, most states committed to the ICC by ratification, which is the process used for commitment when the state has already previously signed the treaty.

123. For a comprehensive description of event history analysis, see generally PAUL D. ALLISON, *EVENT HISTORY ANALYSIS: REGRESSION FOR LONGITUDINAL EVENT DATA* (1984). *See also* HANS-PETER BLOSSFELD, KATRIN GOLSCH & GOTZ ROHWER, *EVENT HISTORY ANALYSIS: STATISTICAL THEORY AND APPLICATION IN THE SOCIAL SCIENCES* (2007).

period here ends, are right-censored. By the end of 2008, some 108 states were States Parties to the treaty.<sup>124</sup>

### C. Independent Variables

#### 1. *The Main Explanatory Variables: Level of Human Rights Practices and Quality of Domestic Law Enforcement Institutions*

Testing the potential for compliance with ICC treaty terms necessarily requires that any model include measures relating to the ability to comply. In this case, I include the variables that measure a state's level of human rights practices and the quality of its domestic legal institutions.

I use two main measures of a state's human rights practices. First, the Cingranelli-Richards Human Rights Dataset measures a state's physical integrity based on data from U.S. State Department and Amnesty International reports.<sup>125</sup> It conceives of physical integrity as an aggregate of four component parts which it assesses in terms of frequency: tortures, extrajudicial killings, political imprisonments, and disappearances.<sup>126</sup> Each of the component parts receives a score of between 0 and 2. Scores are then aggregated to produce a final score of between 0 and 8—with 8 representing the best human rights. The dataset covers 195 countries from between 1981 and 2008.<sup>127</sup>

Second, genocide—a specific crime over which the ICC has jurisdiction—is measured using data on genocide and politicide.<sup>128</sup> From that data, which exists for the years from 1955 to 2006, I create a dichotomous variable, putting states into a genocide category if they had a

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124. Appendix A *infra* contains a list of the 108 states that had ratified the ICC treaty by the end of 2008, together with their dates of ratification.

125. See David L. Cingranelli & David L. Richards, *The Cingranelli-Richards Human Rights Data Project*, available at <http://ciri.binghamton.edu/faq.asp>.

126. *Id.*

127. *Id.* I considered using the human rights measure from the Political Terror Scale 1976–2008. See Mark Gibney, Linda Cornett & Reed Wood, *Political Terror Scale 1976–2009*, available at <http://www.politicalterror scale.org>. That data is also based on human rights reports issued by Amnesty International and the U.S. Department of State. However, it is based on an aggregate scale of 1 to 5 and does not as specifically quantify human rights practices by disaggregating them into their component parts with assigned scores for each part. Also, it covers fewer countries: 185 instead of 195. Finally, since both datasets cover the entire period in this study, I concluded that for all of the above reasons the Cingranelli-Richards dataset would be the best measure for this study.

128. Barbara Harff, *Annual Data on Cases of Genocide and Politicide, 1955–2006*, compiled for the United States Government's State Failure Task Force, available at <http://globalpolicy.gmu.edu/genocide>.

genocidal episode in that period and putting them in a non-genocidal category if they did not.<sup>129</sup>

To capture whether the state possesses the trustworthy and developed law enforcement institutions necessary to prosecute any violations of the crimes covered by the ICC treaty within its own borders, I use a rule of law measure from the World Bank's Worldwide Governance Research Indicators project.<sup>130</sup> This indicator measures "the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence."<sup>131</sup> I chose to measure the overall ability of the state to comply with the ICC treaty's terms regarding the complementarity provision using the rule of law measure because I believe it is the best available measure that is focused precisely on the state's domestic law enforcement institutions. It is true, as discussed below, that the democracy measure should capture some aspects relevant to the quality of the state's domestic law enforcement institutions—such as the independence of the judiciary—because that measure deals in part with constraints on the chief executive. But, the rule of law measure is solely focused on domestic crime and violence and the quality of the domestic law enforcement institutions to combat those problems. Accordingly, the rule of law measure should capture the idea of independent courts, thereby addressing the complementarity provision's "unwillingness" prong. It should also

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129. I chose not to include a measure of "recent civil wars" as did Simmons and Danner because, as noted above, I do not believe that measure accurately captures the concept of the level of a state's human rights practices or the likelihood that it will commit a mass atrocity. See Simmons & Danner, *supra* note 23 and accompanying text. As noted above, I am not convinced that twenty-five battle deaths in a year are sufficient to constitute a civil war as most scholars understand it, particularly given that the widely-used Correlates of War Dataset classifies civil wars (intra-state wars) as those having over 1000 war-related casualties per year of conflict. Furthermore, I suggest that wars that produce so few yearly battle deaths would not accurately measure the concept the authors indicated they were capturing by that measure: namely, the states "at risk for committing mass atrocities." *Id.* at 237. In addition, the Simmons and Danner "recent civil wars" measure does not account for whether the deaths were the result of "criminal" action or poor practices on the part of the government or any rebel group. On the other hand, the Cingranelli-Richards data on human rights practices and the genocide data directly measure a state's tendency to commit the kinds of human rights violations that would subject the state's leaders and citizens to an ICC prosecution.

130. See WORLD BANK, *Governance Matters 2009, Worldwide Governance Indicators 1996–2008*, available at <http://info.worldbank.org/governance/wgi/index.asp>. Although the data are available from 1996 to 2008, data were reported only biennially until 2002. Therefore, for the period between 1998 and 2002, I use the data from the immediate prior year to extrapolate missing data points.

131. See Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996–2006*, 4 (World Bank Policy Research Working Paper 4280, July 2007), available at [http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2007/07/10/000016406\\_20070710125923/Rendered/PDF/wps4280.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2007/07/10/000016406_20070710125923/Rendered/PDF/wps4280.pdf).

capture the idea of capable courts, thereby addressing the “inability” prong of the complementarity provision.

## 2. *Control Variables: The Rationalist View*

To test the idea that states with democratic governments are more likely than those with autocratic governments to ratify the ICC, I include a Polity IV democracy measure.<sup>132</sup> That democracy indicator is on a 0 to 10 scale, with scores based on several dimensions of democracy: (1) competitiveness of political participation; (2) openness and competitiveness of executive recruitment; and (3) constraints on the chief executive.<sup>133</sup> This measure will specifically capture the democracy/non-democracy concept since that is precisely what the data addresses. But, as noted above, because state ratings also encompass information about the strength of the limits on government power to do as it wishes, this variable should include some information about the strength and independence of the country’s judiciary—although not as expressly as does the rule of the law measure.

I use a state’s gross domestic product (GDP) per capita as a measure of economic development to test the hypothesis that more economically-developed states are more likely than less-developed countries to ratify international human rights treaties. GDP per capita is a standard control variable in cross-national research used as a proxy for a country’s general level of economic development.<sup>134</sup>

With respect to a state’s level of military exposure, I include a variable measuring the state’s military spending. I use a measure of military spending as a percentage of GDP from the World Bank World Development Indicators which is available for all years in this study.<sup>135</sup> Although the human rights data should most directly measure whether the

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132. See Monty G. Marshall & Keith Jagers, *Polity IV Project: Dataset Users’ Manual* (Polity IV Project 2007), available at <http://www.systemicpeace.org/polity/polity4.htm>.

133. *Id.*

134. See SIMMONS, *supra* note 66, at 385; Cole, *supra* note 55; Wotipka & Tsutsui, *supra* note 57. I obtain the measure from the World Bank World Development Indicators dataset, and I log the measure to reduce a skewed distribution. This measure indicates the level of a state’s wealth and is correlated with its level of industrialization. This is a time-varying measure that is reported in constant U.S. dollars. See Indicators, THE WORLD BANK, <http://data.worldbank.org/indicator>.

135. I considered the military expenditure data collected by the U.S. State Department, but that data was only available until 2005. See World Military Expenditures and Arms Transfers, <http://www.state.gov/t/avc/rls/rpt/wmeat/index.htm>. I also considered using data on interstate military disputes from the Correlates of War Dataset, but at the time of drafting, that data was only available up to 2001. See CORRELATES OF WAR, Datasets, <http://www.correlatesofwar.org/Datasets.htm>. Thus, I chose to use more comprehensive data for this measure of military exposure.

state's citizens are likely to commit the kinds of crimes covered by the ICC treaty, this military expenditure data is designed to capture the idea that states spending relatively more on their military are also more likely to have citizens engaged in military operations thereby potentially exposing those citizens to ICC jurisdiction for acts committed during peacekeeping or warfare.<sup>136</sup>

To measure the political costs associated with a state's domestic legislative treaty ratification process, I use data provided by Beth Simmons.<sup>137</sup> That data codes state ratification processes using a four-category scale, designed to capture the level of difficulty in the formal domestic ratification process.<sup>138</sup>

To test the hypothesis that states following a common law tradition are more likely to ratify international human rights treaties than those following a civil law tradition, I include data on a state's legal tradition.<sup>139</sup> I measure this concept using a dichotomous variable indicating whether or not a state follows a common law legal tradition.

Finally, I include a control variable to measure the new democracy, forward-looking, "lock-in" theory advanced by Andrew Moravcsik. Using the Polity IV democracy measure, I create a dummy variable to account for those states that are new democracies. I code new democracies as those that became democracies—with a score of 7 or above on the Polity IV scale<sup>140</sup>—some time during the general negotiation phase of the ICC treaty and which have stayed democratic since that time. Because negotiations began in 1994, and because it is consistent with Moravcsik's argument to believe that a state would still be a transitional democracy if it only

136. Judith Kelley similarly used a measure of military spending to test the theory that states with relatively less military power were less likely to become involved in activities that fall under the ICC's jurisdiction, making them more likely to ratify the statute. Kelley, *supra* note 23, at 579.

137. See SIMMONS, *supra* note 66, at 383.

138. The categories are as follows: (1) treaties may be ratified by an individual chief executive or cabinet; (1.5) there is a rule or tradition of informing the legislature of signed treaties; (2) treaties may only be ratified upon consent of one legislative body; and (3) treaties may only be ratified by a supermajority vote in one legislative body or by a majority vote in two separate legislative bodies. The source and detailed description of this data are available on Simmons' website at Mobilizing for Human Rights, <http://scholar.iq.harvard.edu/bsimmons/mobilizing-for-human-rights>.

139. The data for this variable were obtained from the Global Development Network Growth Database created by William Easterly and Hairong Yu, available at <http://econ.worldbank.org/WBSITE/EXTERNAL/EXTDEC/EXTRESEARCH/0,,contentMDK:20701055~pagePK:64214825~piPK:64214943~theSitePK:469382,00.html#4>.

140. Beth Simmons also used 7 as the number above which she considered countries to have transitioned to "democracy" in her work testing state commitment to and compliance with various international human rights treaties. See SIMMONS, *supra* note 66, at 385.

became a democracy shortly before the creation of the court, I chose 1990 as the cut-off date for new democracies.

### 3. *Control Variables: The Normative View*

I also include several control variables in the model to account for the theories addressed under the normative view of treaty ratification. First, I include a measure to account for the idea that less-developed states may ratify treaties so as to appear to embrace the same norms as their more powerful and wealthier neighbors, and to receive the concomitant extra-treaty benefits that may accrue to them as a result. I use net official development assistance and official aid (“ODA”) in constant 2007 U.S. dollars as a share of GDP to measure this concept.<sup>141</sup> ODA consists of the loans and grants made to developing countries.

I measure the concept concerning regional influence by looking at regional density of the ratification of the various treaties, articles, and optional protocols. Regional density computes ratification by countries in the same region up to the previous year. I classify countries by region using the seven World Bank categories: Sub-Saharan Africa, East Asia/Oceania; Eastern Europe/Central Asia; Latin America/Caribbean; Middle East/North Africa; South Asia; and the West (Western Europe, Australia, Canada, New Zealand, and the United States).<sup>142</sup>

Finally, although a precise measure of NGO influence on state decisions to commit to the ICC may be impossible, I measure this concept using data on the number of NGOs in each state that are members of the Coalition for the International Criminal Court (the “CICC”).<sup>143</sup> The CICC is a network of over 2,000 NGOs advocating for state membership in a fair, effective, and independent ICC.<sup>144</sup>

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141. The data are obtained from the World Bank World Development Indicators, *available at* <http://data.worldbank.org/data-catalog/world-development-indicators>. Simmons used this same measure to capture the idea that states might be influenced to ratify human rights treaties because of the hope that by doing so they may obtain more access to aid. *See id.*

142. *See* Countries & Regions, THE WORLD BANK, <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/0,,pagePK:180619~theSitePK:136917,00.html> (last visited Feb. 23, 2011).

143. *See* COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.iccnw.org/> (last visited Feb. 23, 2011).

144. Measuring this concept of NGO influence is difficult in many respects. First, only qualitative analysis and case studies may actually produce evidence of whether states were really influenced by NGOs to join the ICC. Second, the presence of NGOs in states or even state meetings with NGOs does not necessarily mean a state was persuaded by NGOs to change its behavior. In addition, the data I was able to obtain on NGO members in the CICC is not as precise as it could be. The data list the number of CICC-member NGOs as of March 2009. A more precise measure might account for NGO

Table 2 provides summary statistics for the variables described above.

TABLE 2: SUMMARY STATISTICS

Variable	Obs	Mean	SD	Min	Max*
Level of Human Rights	8256	4.979	2.29	0	8
Genocide or Not	10208	.137	.344	0	1
Level of Domestic Law Enforcement Institutions	9720	-.065	.999	-2.686	2.116
Level of Democracy	7928	5.298	3.935	0	10
Level of Military Expenditure	7376	2.382	2.541	0	39.615
Difficulty of Domestic Treaty Ratification Process	8956	1.700	.654	1	3
Level of Economic Development	9324	7.669	1.604	4.191	11.263
Common Law State or Not	9102	.340	.472	0	1
Transitioning Democracy or Not	8320	.244	.429	0	1
Level of Aid or Assistance	9340	.086	.151	-.033	2.119
Regional Ratification	8504	.307	.291	0	.96
Level of NGO Presence	10208	13.723	33.585	0	305

\* "Obs" means Observations, "SD" means Standard Deviation, "Min" means Minimum Value, and "Max" means Maximum Value.

## V. EMPIRICAL ANALYSES TESTING STATE COMMITMENT TO THE ICC

As an initial matter, examining the ratification patterns of the various states provides preliminary support for the credible threat theory and the idea that states act retrospectively and consider how their past practices predict their ability to comply with treaty terms before committing to a treaty with relatively strong enforcement mechanisms. There is strong evidence that states with better human rights practices are most likely to commit to the ICC, while states with poorer practices are reluctant to ratify. Table 3, below, shows that among states with high human rights ratings (those states with average physical integrity rights scores of between 5 and 8 for the period between 1997 and 2008), some 71% ratified the ICC treaty. Among states with worse human rights practices (those with average scores of below 5), only about 37% ratified the statute. Thus, these results are consistent with the credible threat theory, even

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membership by state according to particular time-periods. However, I was advised by CICC personnel that such data were not maintained in that format.

though it does appear that a number of states with poor human rights practices have ratified the ICC at this snapshot in time.

TABLE 3: ICC TREATY RATIFICATION PATTERNS BASED ON  
LIKELIHOOD OF HUMAN RIGHTS VIOLATIONS

Better Human Rights Practices		Worse Human Rights Practices	
Ratify	Not Ratify	Not Ratify	Ratify
Albania, Andorra, Antigua, Australia, Austria, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia, Botswana, Bulgaria, Canada, Chile, Comoros, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, East Timor, Estonia, Fiji, Finland, France, Gabon, Gambia, Germany, Ghana, Greece, Guyana, Honduras, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Mali, Malawi, Malta, Marshall Islands, Mauritius, Mongolia, Montenegro, Namibia, Nauru, Netherlands, New Zealand, Niger, Norway, Panama, Poland, Portugal, Romania, Samoa, San	Bahamas, Bahrain, Bhutan, Brunei, Cape Verde, El Salvador, Grenada, Guinea-Bissau, Jamaica, Kuwait, Kyrgyzstan, Maldives, Mauritania, Micronesia, Moldova, Monaco, Nicaragua, Oman, Palau, Qatar, Sao Tome and Principe, Singapore, Solomon Islands, St. Lucia, Swaziland, Taiwan, Tonga, Tuvalu, Ukraine, United Arab Emirates, United States, Vanuatu	Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Belarus, Cameroon, China, Cuba, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Guatemala, Haiti, India, Indonesia, Iran, Iraq, Israel, Ivory Coast, Kazakhstan, Kiribati, Laos, Lebanon, Libya, Malaysia, Morocco, Mozambique, Myanmar, Nepal, North Korea, Pakistan, Papua New Guinea, Philippines, Russia, Rwanda, Saudi Arabia, Sri Lanka, Sudan, Syria, Thailand, Togo, Tunisia, Turkey, Turkmenistan, Uzbekistan, Vietnam, Yemen, Zimbabwe	Afghanistan, Argentina, Brazil, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Colombia, Congo, Democratic Republic of Congo, Dominican Republic, Ecuador, Georgia, Guinea, Jordan, Kenya, Liberia, Mexico, Nigeria, Paraguay, Peru, Senegal, South Africa, Tajikistan, Tanzania, Uganda, Venezuela, Zambia

Better Human Rights Practices		Worse Human Rights Practices	
Ratify	Not Ratify	Not Ratify	Ratify
Marino, Serbia, Sierra Leone, Slovak Republic, Slovenia, South Korea, Spain, St. Kitts & Nevis, St. Vincent and the Grenadines, Suriname, Sweden, Switzerland, Trinidad, United Kingdom, Uruguay			

There is also evidence to suggest that the quality of a state's domestic law enforcement institutions influences ICC commitment decisions. Looking at a snapshot in time using average rule of law scores, states with the best average rule of law scores (above 1), regularly ratified the ICC treaty—with an 85% ratification rate. States with the poorest domestic law enforcement institutions (those with average rule of law scores below -1),<sup>145</sup> however, were much less likely to ratify. Only approximately 43% of these states have ratified the treaty. Table 4 shows the ratification patterns of states with the best and worst domestic law enforcement institutions.

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145. Simmons & Danner, *supra* note 23, at 246. In their study of ICC commitment, Simmons and Danner similarly categorized states with World Bank Rule of Law scores of below -1 as those with the “weakest rule of law” when testing the robustness of their measure of “domestic accountability”—the idea that states would hold leaders accountable for any atrocities in violation of the ICC using their domestic institutions. *Id.*

TABLE 4: ICC TREATY RATIFICATION PATTERNS BASED ON LEVEL OF DOMESTIC LAW ENFORCEMENT INSTITUTIONS

Best Domestic Law Enforcement Institutions		Worst Domestic Law Enforcement Institutions	
Ratify	Not Ratify	Not Ratify	Ratify
Andorra, Australia, Austria, Barbados, Belgium, Canada, Chile, Denmark, Finland, France, Germany, Iceland, Ireland, Japan, Liechtenstein, Luxembourg, Malta, Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, United Kingdom	Bahamas, Singapore, Tuvalu, United States	Angola, Belarus, Cameroon, Equatorial Guinea, Guinea-Bissau, Haiti, Iraq, Ivory Coast, Laos, Myanmar, North Korea, Rwanda, Solomon Islands, Somalia, Sudan, Turkmenistan, Uzbekistan, Yemen, Zimbabwe	Afghanistan, Burundi, Cambodia, Central African Republic, Chad, Comoros, Congo, Democratic Republic of Congo, Guinea, Liberia, Nigeria, Sierra Leone, Tajikistan, Venezuela

In fact, a further examination of the ratification patterns of only those states with poor human rights practices provides additional support for the credible threat theory while providing evidence contrary to the explanatory power of the credible commitment theory. As Table 5 below shows, among states with poor human rights practices, non-democratic states are not more likely than democratic states to commit to the ICC. In fact, the evidence shows that non-democratic states with poor human rights practices are far more likely to avoid the ICC than commit to it. About 68% of those states did not ratify the Rome Statute. By contrast, among democratic states with poor human rights practices (although there are few of them), about 54% ratified the treaty. Indeed, comparing the ratification patterns of the non-democracies to the democracies shows that democracies with poor practices are much more likely than non-democracies with poor practices to commit to the ICC since about 54% of the democracies ratified, whereas only about 32% of the non-democracies ratified.

All of this evidence about the ratification patterns of states with poor human rights practices is consistent with the credible threat theory which predicts that because the ICC has relatively strong enforcement mechanisms, states will be retrospective in their calculations and consider whether their past and present practices might make commitment unduly

costly. Indeed, non-democratic states with poor practices are particularly likely to avoid committing to the ICC. This finding is inconsistent with the credible commitment theory. The evidence does not suggest that non-democracies with poor practices are joining the ICC so that they can commit to their domestic audiences to better those practices in the future because of the external enforcement mechanisms a treaty like the ICC can provide.

Rather, the evidence indicates that states without internal enforcement mechanisms and without domestic checks on their power are reluctant to commit to the ICC because commitment would entail a costly loss of their sovereignty and reduce their power to rule and punish as they wish. Democracies with poor practices, on the other hand, have reason to view ICC commitment as imposing fewer risks to their sovereignty. Those states presumably already have some domestic checks on their power—perhaps in the form of an independent judiciary that will punish perpetrators of mass atrocities, even if those perpetrators happen to be government agents or others with whom the government was complicit. Thus, although those states still run the risk that their government or citizens will commit crimes covered by the ICC treaty, they may believe that such crimes would be punished domestically in any event—meaning that they would not risk losing the case to The Hague. Indeed, for these democratic states with poor practices, ICC commitment may not reduce government power. Rather, commitment may potentially increase leaders' power in that the ICC provides a backup forum in which opposition powers can be punished should they commit mass atrocities and should domestic law enforcement institutions otherwise fail to be effective at bringing them to justice.

TABLE 5: ICC TREATY RATIFICATION PATTERNS FOR STATES WITH POOR HUMAN RIGHTS PRACTICES BASED ON WHETHER DEMOCRACY OR NOT

Democracy <sup>146</sup>		Non-Democracy	
Ratify	Not Ratify	Not Ratify	Ratify
Argentina, Brazil, Colombia, Dominican Republic, South Korea, Mexico, South Africa	Guatemala, India, Israel, Thailand, Philippines, Turkey	Algeria, Angola, Armenia, Azerbaijan, Bangladesh, Belarus, Cameroon, China, Cuba, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Haiti, Indonesia, Iran, Iraq, Ivory Coast, Kazakhstan, Kiribati, North Korea, Laos, Lebanon, Libya, Malaysia, Morocco, Mozambique, Myanmar, Nepal, Pakistan, Papua New Guinea, Russia, Rwanda, Saudi Arabia, Sri Lanka, Sudan, Syria, Togo, Tunisia, Turkmenistan, Vietnam, Yemen, Zimbabwe	Afghanistan, Burundi, Cambodia, Central African Republic, Congo, Democratic Republic of Congo, Ecuador, Georgia, Guinea, Jordan, Kenya, Liberia, Nigeria, Peru, Senegal, Tajikistan, Tanzania, Uganda, Venezuela, Zambia

The event history analysis also provides support for the idea that states view the ICC treaty's enforcement mechanisms as a credible threat and make retrospective calculations about how their past practices will predict their ability to comply with treaty terms so as to avoid committing to treaties with strong enforcement mechanisms with which they may not be able to comply. Event history analysis factors in the precise timing of state decisions to commit to the ICC as it relates to the time-varying and constant variables. Table 6 presents results from three multivariate event history models testing the rate of becoming party to the ICC treaty. In

146. See SIMMONS, MOBILIZING FOR HUMAN RIGHTS, *supra* note 66. Again, as Beth Simmons does in her study, I use 7 as the number above which states were classified as democracies. *Id.*

Model 1, I report the results of the baseline model for ratification which includes the main variables of interest: level of human rights practices and level of domestic law enforcement institutions. In Model 2, I add the control variables that measure other costs of treaty ratification suggested by the various rationalist view theories. Finally, Model 3 includes the control variables suggested by the normative view theories.<sup>147</sup>

Most supportive of the credible threat theory—and the idea that states engage in retrospective, rather than prospective, calculations in making ratification decisions—is the fact that in every model, the variable measuring a state’s level of human rights practices is a highly significant and positive predictor (at the 1% level) of ICC treaty ratification. States with good human rights practices are quite likely to join the ICC. With each unit increase in a state’s human right rating, a state becomes between 30% and 38% more likely to commit (see the hazard ratio of 1.307 in Model 1 and hazard ratio of 1.380 in Model 3).<sup>148</sup> The other compliance costs predictors on which this theory particularly rests—past genocide and the level of a state’s domestic law enforcement institutions—are not significant in any of the models. This suggests that states may not factor in their past genocides specifically or their ability to domestically prosecute any violations of the Rome Statute when making ICC commitment decisions.

Rather, the evidence indicates that, in terms of precise compliance costs, states may be most concerned with their general level of human rights practices. If a state’s practices and policies are such that its government or citizens should not commit mass atrocities, then whatever its capacity to prosecute such atrocities domestically, it can still calculate that committing to the ICC will carry few or no costs related to

147. I used the exact method for ties because the data contains tied event times where states ratify in the same quarter.

148. Judith Kelley similarly found that a state’s human rights ratings were a positive and significant predictor of ICC ratification. However, Kelley’s focus of inquiry was on state decisions to sign bilateral immunity agreements, and her ratification model used logistic regression (which is arguably less precise than the event history model which takes timing of ratification into consideration and which includes time-varying covariates). Furthermore, her test of ratification behavior was only preliminary to that primary inquiry and included very few independent variables. *See* Kelley, *supra* note 23, at 578–80. By contrast, Goodliffe and Hawkins found little evidence that a state’s human rights practices predicted whether the state supported a strong and independent ICC based on statements made during Rome Statute negotiations. Of course, that study did not look at state ratification decisions, but instead quantified state positions regarding the court and commitment to it by coding statements state representatives made during various negotiations of the Rome Statute. Goodliffe & Hawkins, *supra* note 23. As noted above in note 129, Simmons included no measure for the level of a state’s human rights practices other than whether the state experienced a recent civil war. SIMMONS, *supra* note 66, at 103.

noncompliance.<sup>149</sup> By contrast, where the state's practices and policies are such that it might expect its government or citizens to commit mass atrocities, it may still conclude that commitment is unduly costly even though it may believe it has domestic law enforcement institutions that are sufficiently independent and capable of prosecuting any such atrocities. As discussed above, because the ICC prosecutor and court are empowered to determine whether the state is "willing" or "able" to prosecute mass atrocities domestically, most states with poor practices may conclude that the complementarity provision does not give them enough protection against a costly loss of their sovereign right to mete out justice within their own borders.

On the other hand, the democracy variable is a positive and significant predictor of ICC ratification in both models in which it was included. With each unit increase in its democracy rating, a state is between 10% and 16% more likely to commit to the ICC (see the hazard ratio of 1.105 in Model 2 and hazard ratio of 1.163 in Model 3). Even though democracy is not a primary indicator of potential compliance with the precise terms of the treaty, democracies more than autocracies tend to have the kinds of policies, laws, practices, and institutions, that favor protecting human rights.<sup>150</sup> Thus, the consistent significance of the democracy variable also adds some support to the credible threat theory and the idea that states with lower noncompliance costs will more readily commit to treaties like the ICC with stronger enforcement mechanisms.

In addition, the positive significance of the democracy variable may provide some support for the idea that the complementarity provision and the ability of the state's law enforcement institutions to conduct independent and capable investigations and prosecutions plays a role in the ICC ratification behavior of some states. One of the democracy variable's components measures constraints on the chief executive, which should include things like checks and balances limiting state power and the independence of the judiciary. Therefore, it may be that where power is not concentrated and where the state already has limits on its power to do as it pleases, it will conclude that commitment to the ICC will not entail a significant loss of sovereignty. By contrast, and contrary to the

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149. As a robustness check, I ran the models using data from the Political Terror Scale 1976–2008 instead of the human rights measure based on data from the Cingranelli-Richards Human Rights Dataset. See Cingranelli & Richards, *supra* note 125. The results still support the credible threat theory. In each of the models a state's level of human rights was a significant and positive predictor of ratification at the 5% level. In each instance, however, there were fewer observations and between ten and twenty-seven fewer countries included in the models.

150. See, e.g., Cole, *supra* note 55, at 475.

predictions of the credible commitment theory, where the state is an autocracy and has no domestic limits on its power, it will conclude that ICC commitment will entail a costly loss of sovereignty and a reduction in its own powers. And, as shown in Table 5, there is support for the idea that even among states with poor human rights practices, those that are more likely to commit to the ICC are those that are also democracies, which — already operate with constraints on their power.

Indeed, the results of this event history analysis not only provide compelling support for the credible threat theory, but they also provide evidence discrediting the explanatory power of the credible commitment theory advanced by Simmons and Danner. The evidence suggests that states guard their sovereignty and calculate treaty commitment costs by looking at their past practices in an effort to determine their ability to comply with treaty terms before committing to an international human rights treaty with relatively strong enforcement mechanisms that can be used to hold them accountable. The evidence shows that states with good human rights practices and democratic states are more likely to join the ICC. States with poor human rights practices and states that are non-democratic are less likely to commit to the court. Thus, at least where enforcement mechanisms are strong, there is no evidence to suggest that states abandon sovereignty concerns (or determine that they are outweighed) and commit to an international human rights treaty that can hold them accountable where they have otherwise decided not to impose upon themselves any domestic accountability mechanisms. Certainly, as noted above, some states with poor practices have committed to the court, but the empirical evidence does not demonstrate an overwhelming trend towards commitment without an ability to comply with treaty terms.

TABLE 6: COX PROPORTIONAL HAZARDS MODELS EXPLAINING RATIFICATION OF THE ICC TREATY

Independent Variable	Model 1	Model 2	Model 3
Level of Human Rights Practices (Physical Integrity)	1.307*** p=0.000	1.323*** p=0.004	1.380*** p=0.003
Past Genocide or Not	.651 p=0.333	.375 p=0.107	.385 p=0.129
Quality of Domestic Law Enforcement (ROL World Bank)	1.249 p=0.104	1.428 p=0.256	1.453 p=0.266
Level of Democracy	--	1.105** p=0.053	1.163** p=0.021
Level of Military Expenditure	--	.789** p=0.031	.837 p=0.125

Independent Variable	Model 1	Model 2	Model 3
Difficulty of Domestic Treaty Ratification Process	--	1.382 p=0.148	1.391 p=0.200
Level of Economic Development	--	.867 p=0.380	.641 p=0.073
Common Law State or Not	--	.935 p=0.837	.758 p=0.468
Transitioning Democracy or Not	--	--	.553 p=0.123
Level of Aid or Assistance	--	--	.013 p=0.097
Regional Ratification	--	--	4.353 p=0.103
Level of NGO Presence	--	--	.997 p=0.511
# of Countries	184	126	123
# of Ratifications	91	65	62
# of Observations	4245	2860	2827

\*\* , \*\*\*= 5%, 1% significance

The significant and negative effect of a state's level of military expenditure on ratification in Model 2 lends some additional support to the credible threat theory. States with greater military expenditures were less likely than states with lower expenditures to commit to the ICC, suggesting that states with more military exposure view noncompliance with the ICC treaty as more costly than states with less exposure. Of course, because the United States and China have not joined the court, and because both have large military budgets, caution may be warranted in interpreting these particular results.

Arguably, a state's level of economic development could also influence its ability to comply with a human rights treaty. This is particularly true if we assume that economically developed countries are also those that are more likely to embrace progress and post materialist values, such as the need to protect citizens against human rights abuses.<sup>151</sup> However, the economic development variable was not a significant and positive predictor of ICC commitment in either of the models in which it was included. On the other hand, the indicator for that variable is highly

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151. See generally RONALD INGLEHART, SILENT REVOLUTION: CHANGING VALUES AND POLITICAL STYLES AMONG WESTERN PUBLICS (1977); RONALD INGLEHART, CULTURE SHIFT IN ADVANCED INDUSTRIAL SOCIETY (1990).

correlated with the indicator for the state's level of domestic law enforcement institutions which may mean that the two variables are overlapping in capturing effects. To ensure that the models were not being compromised as a result of these high correlations, I ran Models 2 and 3 without the indicator for economic development (the variable that had only been included as a control). In each case, the results for the remaining variables did not differ substantially from the results of the models which included the economic development measure.

As to the other theories for which control variables were added in the models, they were not supported by the event history analysis. First, where ICC ratification is concerned, it appears that other costs such as domestic ratification difficulties or uncertainty costs based on a country's legal traditions are less of a concern than the actual ability of the state to comply with treaty terms. Specifically, in neither of Models 2 and 3 were the variables measuring the difficulty of a state's domestic ratification processes or whether it followed a common law or civil legal tradition significant predictors of state commitment to the ICC treaty. Nor was there any support for the idea that governments in the process of a democratic transition ignore (or discount) compliance costs and the credible threat associated with committing to treaties with relatively strong enforcement mechanisms. The notion that a state in transition might try to lock-in those democratic practices for future governments was not borne out. Instead, the event history analysis provides support for the credible threat theory and the idea that states are more rational and look retrospectively to their past practices in making calculations about the likely consequences of treaty commitment, particularly where, as in the case of the ICC, the treaty's enforcement mechanisms are relatively strong.

Furthermore, the quantitative evidence does not suggest that state decisions to commit to the ICC are significantly driven by normative concerns. None of the variables included to test normative theories was a positive and significant predictor of ICC ratification. Yet, importantly, the addition of all of these control variables to account for other theories did not alter the significance of the human rights variable, thus lending additional support for the credible threat theory.<sup>152</sup>

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152. Substituting different measures of military exposure and domestic law enforcement institutions in the final model also did not alter the significance of the human rights variable. Indeed, it remained a significant and positive predictor of ICC ratification at the 1% level. For the military exposure concept, I used various measures obtained from the U.S. State Department data which is reported up to 2005: (1) military expenditure in constant U.S. dollars; (2) military expenditure per capita; and (3) armed forces in thousands. I used the Political Risk Services Group International

In sum, both the positive and null results are consistent with the credible threat theory. The results suggest that where an international human rights treaty contains legally binding enforcement mechanisms backed by resources to punish noncompliant behavior, states are motivated by rationalist concerns and calculate the costs of treaty commitment by looking retrospectively at the evidence which might influence their ability to comply with treaty terms. Where treaties contain weak enforcement mechanisms, even a rational state may commit without intending to or being able to comply if it can envision other benefits—such as increased trade—that may flow from commitment. But, with weak enforcement mechanisms, the costs of noncompliance may be easily outweighed by such potential benefits. Where treaty mechanisms are stronger, the calculation is different. The quantitative evidence suggests that on the whole, states making commitment calculations in such circumstances are concerned with the consequences of failing to comply with treaty terms.

#### CONCLUSION

What explains the puzzle of state commitment to the ICC? Why would states commit to an international human rights treaty with relatively strong enforcement mechanisms even though states typically guard their sovereignty? Can we expect that the more than 100 states that have ratified the ICC treaty will abide by treaty terms and protect against human rights abuses and/or domestically prosecute any of their citizens who commit mass atrocities? Can we further expect that these more than 100 states are committed to the goal of ending impunity for perpetrators of mass atrocities? On the other hand, why did some ninety states fail to ratify the ICC treaty or do so more slowly than others? Given the ICC treaty's relatively strong enforcement mechanisms, can we expect that states with the worst human rights practices and worst domestic law enforcement institutions are among the states that have not ratified? If the majority of states joining the court are also those that already have the best human rights practices, can the ICC really have a significant impact on improving universal respect for human rights and deterring mass atrocities?

These are the questions that were posed in the introduction and to which I suggest this study has provided some answers. The results of the empirical analyses offer evidence that states tend to view the ICC's relatively strong enforcement mechanisms as a credible threat and are

more likely to commit to the court when their retrospective calculations about their ability to comply with treaty terms show that commitment will pose little threat to their sovereignty. States with good human rights records are more likely to ratify the ICC treaty than are states with poor human rights records. The results are consistent with the interpretation of the ICC offered in this Article: that its enforcement mechanisms—in the form of an independent prosecutor and court that can usurp state sovereignty and investigate and punish those who commit offenses prohibited by the treaty’s terms—are strong, such that states view them as a credible threat. This finding regarding ICC commitment is in stark contrast to other published findings for international human rights treaties with the weakest enforcement mechanisms.<sup>153</sup> Indeed, only very recently, Christine Wotipka and Kiyoteru Tsutsui found that states with poor human rights practices were actually more likely to ratify international human rights treaties, but all of the treaties included in their study only require states to self-report their compliance.<sup>154</sup>

On the other hand, the evidence does not support the power of the credible commitment theory or normative theories to generally explain state decisions to join the ICC. For the most part, states are not committing to the ICC treaty even though they cannot comply with its terms so as to demonstrate any future promise to change their ways and commit to ending violence and impunity in the future. Indeed, it makes sense that leaders of non-democracies with poor human rights practices would be concerned about the credible threat posed by committing to an institution like the ICC with which they may not be able to comply and which they cannot control. After all, these same states generally have not implemented domestic accountability mechanisms, suggesting that they may not want to be bound by international mechanisms that could hold them accountable either. Nor does the evidence show that states as a rule are committing to the ICC despite their ability to comply because of normative pressures.

Rather, the evidence suggests that in the case of ICC commitment, states are concerned about the costs of compliance and the relative strength of the ICC treaty’s enforcement mechanisms and thus engage in retrospective calculations about their likelihood of compliance prior to

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153. See, e.g., Cole, *supra* note 55, at 483–84 (noting the insignificance of the variable measuring the influence of human rights ratings on ratification of the ICCPR and ICPSCR).

154. See Wotipka & Tsutsui, *supra* note 57, at 744–47 (noting that results of event history analyses testing state ratification of seven international human rights treaties—all of which contained only reporting enforcement mechanisms—showed that rights-violating governments were more likely to ratify those treaties in a given year, all else being equal).

commitment. But, if the states that are committing to the ICC are primarily states with good human rights records, can strong enforcement mechanisms play the role that they are intended to play: namely, improving respect for human rights and punishing those who fail to respect individual human rights? After all, if the states with the worst practices are not joining the court, can the ICC treaty actually accomplish its goal of deterring mass atrocities and ensuring that the perpetrators of mass atrocities are brought to justice?

Although no unequivocal answer to these questions is possible, there is evidence which provides hope that the ICC can make a difference even as to those states with the worst human rights practices. First, there is some evidence suggesting that the ICC's complementarity provision may play a positive role in prompting at least the more democratic states among those with poor human rights practices to commit to the court. According to the results of the quantitative analyses, a state's level of democracy is a significant and positive predictor of ICC treaty ratification. In addition, Table 5 shows that amongst states with poor human rights practices, the more democratic states are more likely to join the ICC. Therefore, it may be that even though a state has poor practices, where it is more democratic and already has checks and balances on its domestic power—such as through an independent judiciary—it may still conclude that commitment to the ICC does not impose significant sovereignty costs. The government may assume that it will be punished domestically anyway should it commit human rights abuses, and because the ICC treaty's complementarity provision allows the state to avoid an ICC prosecution if it prosecutes human rights abuses domestically, the government could rationally conclude that commitment would not reduce its power.

Indeed, for states with poor human rights practices that are more democratic and have checks and balances on their domestic powers, ICC commitment may in some cases prove beneficial in increasing government power. Even though the state may have judicial or other mechanisms to hold opposition powers accountable should they commit human rights abuses, the ICC can provide an additional fall-back mechanism by which to hold those powers accountable should domestic institutions fail for some reason. On the other hand, as one might expect of non-democracies where leaders enjoy concentrated power, non-democracies with poor practices will view ICC commitment as a costly check on their power to rule and punish as they please domestically. What this implies for the future of international organizations is that they are more likely to be successful in getting nations to risk some costly commitments and a

potential loss of sovereignty where power within the nation is not concentrated.

As such, at least in some cases, we may see that states with poor human rights records that are more democratic will conclude that commitment to the ICC is not overly costly because the leaders of those states already have domestic constraints on their power. Should such states commit to the ICC, because the treaty creating the court has relatively strong enforcement mechanisms, both the current leaders, any opposition powers, and any future leaders will have to comply with treaty provisions. If the state or its citizens commits mass atrocities, and if the state is unwilling or unable to prosecute those crimes domestically, then the state will have to suffer the costly consequences.

Second, even if states with poor practices are not prompted to join the ICC because they already have domestic checks and balances on government power, as Tables 3, 4, and 5 show, a number of states with bad human rights practices and weak domestic law enforcement institutions have joined the court. They have done so notwithstanding that the credible threat theory predicts that states with bad human rights practices would rationally avoid the potentially costly commitment to the ICC. But, because the ICC treaty's terms include relatively strong enforcement mechanisms, states with poor practices and poor institutions will have to improve their potential for compliance with ICC treaty terms unless they want to be the subject of the ICC's next investigation.

This conclusion that the ICC treaty's strong enforcement mechanisms can produce good results even in states with poor human rights practices is supported by a brief review of events concerning Kenya and the ICC. Kenya committed to the ICC in 2005 despite the fact that it had poor human rights ratings.<sup>155</sup> But, in 2009, it became the subject of an ICC investigation based on violence that occurred at the instigation of various government leaders in the aftermath of the country's 2007 presidential elections.<sup>156</sup> Although Kenya was given the opportunity to prosecute those instigators domestically, because it did not do so, in December 2010, the

155. Kenya has scored between 1 and 4 on the Cingranelli-Richards human rights scale (with 8 representing the best human rights practices) between 1998 and 2008.

156. Media Advisory, CICC, ICC Opens Kenya Investigation (Mar. 31, 2010), *available at* <http://www.iccnw.org/?mod=newsdetail&news=3866>; Press Release, ICC, ICC Judges Grant the Prosecutor's Request to Launch an Investigation on Crimes Against Humanity with Regard to the Situation in Kenya (Mar. 31, 2010), *available at* <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/icc%20judges%20grant%20the%20prosecutor%E2%80%99s%20request%20to%20launch%20an%20investigation%20on%20crimes%20against%20humanity%20with>.

ICC prosecutor announced that he would be proceeding with a case against six suspects involved in that post-election violence.<sup>157</sup> Thus, even though ICC commitment did not cause Kenya to improve its practices, there is still good news as it relates to the power of strong enforcement mechanisms to aid in realizing treaty goals—in this case, the goal of ending impunity for those who abuse individual human rights. It appears that at least six suspects who participated in Kenya's 2007 post-election violence will be required to answer for their conduct in The Hague before the ICC court.

Third, the ICC's jurisdictional grant allows it to investigate and prosecute in some circumstances even where the atrocities have not been committed by a citizen of a State Party to the court. Sudan is not a party to the court, but because the Security Council referred that matter to the ICC, President Bashir has become the subject of an ICC arrest warrant. And, although he has not yet been arrested, the fact of the arrest warrant has most certainly curtailed his activities. Only recently, the Security Council also referred to the ICC "the situation in Libya since 15 February 2011, while recognizing that the country is not party to the Rome Statute that created the Court."<sup>158</sup> In the resolution referring the matter, the Council stated it considered the "widespread and systematic attacks currently taking place in the Libya Arab Jamahiriya against the civilian population may amount to crimes against humanity."<sup>159</sup> The fact of the referral overall is a positive sign that the ICC and its relatively strong enforcement mechanisms will play a role in deterring mass atrocities and ending impunity for those who commit them. As one commentator noted, by virtue of the referral to the ICC, those who instruct or carry out instructions to bomb or otherwise use violence against the civil population in Libya now know that they will potentially be subject to international justice.<sup>160</sup>

In conclusion, what this study shows is that where enforcement mechanisms are stronger, states take their commitment to international

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157. Steve Inskip, *ICC Case Accuses 6 Prominent Kenyans of Violence*, NPR.ORG, Dec. 16, 2010, <http://www.npr.org/2010/12/16/132101160/ICC-Case-Accuses-6-Kenyan-Leaders-Of-Violence>; Collins Mbalu, *Kenya: ICC Prosecutor Names 2008 Post Election Violence Suspects*, GLOBAL VOICES, Dec. 16, 2010, <http://globalvoicesonline.org/2010/12/16/icc-prosecutor-names-6-2008-post-election-violence-suspects-in-kenya/>.

158. Press Release, Security Council, Security Council Imposes Sanctions on Libyan Authorities in Bid to Stem Violent Repression (Feb. 26, 2011), available at <http://www.un.org/apps/news/story.asp?NewsID=37633&C>.

159. *Id.*

160. Edith M. Lederer, *US Supports War Crimes Tribunal for First Time*, ASSOCIATED PRESS, Mar. 2, 2011.

human rights treaties seriously. Therefore, it may be that states are not committing to the ICC unless they intend to comply, the implication being that treaties with significant enforcement mechanisms may be more effective at curbing human rights abuses. Presumably this focus by states on the potential for compliance with treaty terms is a positive sign since the point of international human rights treaties is to actually promote better human rights practices. Of course, the ICC treaty can only deal with a small portion of human rights abuses. The court will only adjudicate crimes that amount to mass atrocities committed by the highest-level offenders. If we hope to improve states' domestic human rights practices using international human rights treaties, we should structure those treaties with "hard law" enforcement provisions that are clear, precise, binding, and backed by resources to coerce compliance and punish noncompliance. Otherwise, without the threat of punishment via strong enforcement mechanisms, states may commit as window dressing only and without an actual intention to further the goals of the treaty or abide by its terms. And states appear to be doing just that inasmuch as studies have found that states frequently join international human rights treaties, but thereafter continue to abuse human rights.<sup>161</sup>

Some may argue that ramping up the enforcement mechanisms could create a situation where only those states predisposed to ratify and with good human rights practices will actually commit to human rights treaties. I contend, however, that this potential issue is not a reason to proceed with a regime that is essentially toothless. First, we know from the examination of ICC ratification patterns that even some states with poor human rights records will ratify treaties with stronger enforcement mechanisms.<sup>162</sup> An admittedly optimistic interpretation of this fact is that states with poor human rights records ratify treaties like the ICC with stronger enforcement mechanisms because the norm cascade has reached them, and they want to improve their practices and hold themselves accountable. Of course, states with poor records may also ratify the ICC treaty not because they necessarily want to do what is appropriate, but because they are enticed into doing so for reasons unrelated to their practices. Such motives may include the desire to appear legitimate and/or the hope of receiving extra-treaty

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161. See *supra* note 19 and accompanying text; see also Hathaway, *Do Human Rights Treaties Make a Difference?*, *supra* note 20, at 1981 (concluding that based upon an examination of state commitment to seventeen different human rights treaties—most of which had weak enforcement mechanisms—countries with poor human rights practices were often more likely to ratify those with better practices).

162. See *supra* Table 3.

benefits by appearing to embrace widely-held human rights norms. States with particularly calculating governments may even commit to the ICC for political reasons and to use the threat of an ICC prosecution against their political opponents who use violence. Even if these reasons motivate ratification, however, with strong enforcement mechanisms, such states could be forced into improving their practices. This is the ultimate goal of human rights treaties. Future research<sup>163</sup> should help us determine whether the ICC's enforcement mechanisms are actually promoting better human rights practices.

If the credible threat theory is correct, as I argue, and if the enforcement mechanisms in the ICC treaty are as strong as they appear to be on paper, states that have committed to the ICC—particularly those with poor practices—should be improving their ability to comply with treaty terms. Otherwise, states with poor practices, in particular, face a substantial risk to their sovereignty. Even states that ratified because their practices and institutions were already good may also seek to improve their ability to comply with treaty terms. After all, the ICC covers war crimes. States with otherwise stellar human rights ratings may worry that in times of conflict, one or more of their citizens may commit an act that constitutes a crime under the ICC treaty. Those states may change their military codes or military training practices so that their militaries are forced to comply with the treaty's terms. Furthermore, as to the second prong of ICC compliance, a state can avoid a loss of sovereignty if it prosecutes any covered crimes domestically. Therefore, the fact of ICC commitment may induce states to increase their domestic prosecutions of mass atrocities and other human rights violations.

Of course, even with the credible threat of strong enforcement mechanisms, states simply may not have the ability to improve their practices without outside help. In many cases, NGOs might be able to provide that support. The CICC, for example, provides some resources and advice to states still needing to implement into their domestic legislation all of the crimes covered the Rome Statute (so that such crimes theoretically can be prosecuted domestically).<sup>164</sup> William Burke-White argues that the ICC should have the power and ability to engage in a policy of “proactive complementarity,” whereby the court can help states with the training and

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163. Qualitative case studies should be particularly helpful in determining whether states with poor human rights practices have improved those practices—by enacting laws, for example, or by improving their domestic capacity to try those who abuse human rights.

164. See *Implementation of the Rome Statute*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, <http://www.coalitionfortheicc.org/?mod=romeimplementation> (last visited Feb. 23, 2011).

resources to actually prosecute mass atrocities domestically.<sup>165</sup> States and other policy makers should consider assisting further in these and other ways so that states currently without the ability to comply with the Rome Statute are able to at least able to take steps towards compliance. States may more readily commit to human rights treaties with strong enforcement mechanisms if they know they will receive assistance in their efforts to comply.

This study provides evidence that states view strong enforcement mechanisms in international human rights treaties as a credible threat, causing them to care about their ability to comply with those treaties when making commitment decisions. There seems little point of a regime that encourages states to commit to treaties with which they have no intention of complying. “Hard law” in the form of legally binding enforcement mechanisms can encourage states to commit to treaties with which they intend to comply.

APPENDIX A  
STATES PARTIES TO THE ICC TREATY AND RATIFICATION DATES  
(AS OF DECEMBER 31, 2008)

State	Date	State	Date	State	Date	State	Date
Afghanistan	2/10/2003	Dem. Rep. Congo	4/11/2002	Liechtenstein	10/2/2001	Senegal	2/2/1999
Albania	1/31/2003	Denmark	6/21/2001	Lithuania	5/12/2003	Serbia	9/6/2001
Andorra	4/30/2001	Djibouti	11/5/2002	Luxembourg	9/8/2000	Sierra Leone	9/15/2001
Antigua and Barbuda	6/18/2001	Dominica	2/12/2001	Macedonia	3/6/2002	Slovakia	4/11/2002
Argentina	2/8/2001	Dominican Republic	5/12/2005	Madagascar	3/14/2008	Slovenia	12/31/2001
Australia	7/1/2002	Ecuador	2/5/2002	Malawi	9/19/2002	South Africa	11/27/2000
Austria	12/28/2000	Estonia	1/30/2002	Mali	8/16/2000	Spain	10/24/2000
Barbados	12/10/2002	Fiji	11/29/1999	Malta	11/29/2002	St. Kitts and Nevis	8/22/2006
Belgium	6/28/2000	Finland	12/29/2000	Marshall Islands	12/7/2000	St. Vincent	12/3/2002
Belize	4/5/2000	France	6/9/2000	Mauritius	3/5/2002	Suriname	7/15/2008
Benin	1/22/2002	Gabon	9/20/2000	Mexico	11/28/2005	Sweden	6/28/2001
Bolivia	6/27/2002	Gambia	6/28/2002	Mongolia	4/11/2002	Switzerland	11/12/2001
Bosnia-Herzegovina	4/11/2002	Georgia	9/5/2003	Montenegro	11/23/2006	Tajikistan	5/5/2000
Botswana	9/8/2000	Germany	12/11/2000	Namibia	6/25/2002	Tanzania	8/20/2002
Brazil	6/20/2002	Ghana	12/20/1999	Nauru	11/12/2001	Timor Leste	9/6/2002
Bulgaria	4/11/2002	Greece	5/15/2002	Netherlands	7/17/2001	Trinidad and Tobago	4/6/1999
Burkina Faso	4/16/2004	Guinea	7/14/2003	New Zealand	9/7/2000	Uganda	6/14/2002
Burundi	9/21/2004	Guyana	9/24/2004	Niger	4/11/2002	United Kingdom	10/4/2001
Cambodia	4/11/2002	Honduras	7/1/2002	Nigeria	9/27/2001	Uruguay	6/28/2002

165. See William W. Burke-White, *Proactive Complementarity: The International Criminal Court And National Courts in the Rome System Of International Justice*, 49 HARV. INT'L L. J. 53 (2008).

Canada	7/7/2000	Hungary	11/30/2001	Norway	2/16/2000	Venezuela	6/7/2000
Central African Republic	10/3/2001	Iceland	5/25/2000	Panama	3/21/2002	Zambia	11/13/2002
Chad	11/1/2006	Ireland	4/11/2002	Paraguay	5/14/2001		
Colombia	8/5/2002	Italy	7/26/1999	Peru	11/10/2001		
Comoros	8/18/2006	Japan	7/17/2007	Poland	11/12/2001		
Congo (Brazzaville)	5/3/2004	Jordan	4/11/2002	Portugal	2/5/2002		
Cook Islands	7/18/2008	Kenya	3/15/2005	South Korea	11/13/2002		
Costa Rica	6/7/2001	Latvia	6/28/2002	Romania	4/11/2002		
Croatia	5/21/2001	Lesotho	9/6/2000	Samoa	9/16/2002		
Cyprus	3/7/2002	Liberia	9/22/2004	San Marino	5/13/1999		