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# Can the International Criminal Court Succeed? An Analysis of the Empirical Evidence of Violence Prevention

BY STUART FORD\*

*Abstract:* Despite significant optimism about the future of the International Criminal Court (“ICC”) during its early years, recently there has been growing criticism of it by both scholars and governments. As a result, there appears to be more doubt about the ICC’s ability to succeed now than at any other point in its history. So, are the critics correct? Is the ICC failing? No. This Article argues that, not only can the ICC succeed, there is strong evidence that it is already succeeding. It analyzes several recent empirical articles that have convincingly demonstrated that the ICC prevents serious violations of international criminal law. Prevention of violations is the principal goal of the ICC. Therefore, by preventing violence, the ICC is already accomplishing its most important goal. In other words, it is already succeeding. This may not be the dominant narrative about the Court, but it should be.

## I. INTRODUCTION

At the heart of this Article is a question: Can the International Criminal Court (“ICC”) succeed? This is an important question and one that scholars have grappled with since the Court’s creation. Despite some early detractors,<sup>1</sup> there was significant optimism about the ICC

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1. See, e.g., Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2003) (arguing that the ICC will never be successful because it is unacceptable to the United States).

during its early years.<sup>2</sup> Recently, however, there has been growing discontent with it.<sup>3</sup> There are several different strands to this discontent.

First, a number of African nations have accused the ICC of anti-African bias.<sup>4</sup> This led The Gambia, South Africa, and Burundi to threaten to withdraw from the ICC.<sup>5</sup> While The Gambia and South Africa eventually reversed course, Burundi did withdraw from the ICC in 2017.<sup>6</sup> It has also led the African Union to begin the process of setting up its own international criminal tribunal, partly to insulate African states from ICC jurisdiction.<sup>7</sup> Second, several high-profile investigations and prosecutions have collapsed.<sup>8</sup> Events like the acquittal of President Laurent Gbagbo,<sup>9</sup> the collapse of the prosecution of President Kenyatta,<sup>10</sup> and the suspension of the ICC's investigation into the situation in

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2. David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L. J. 473, 473 (1999) ("Enthusiasm for international criminal prosecutions is running high"); M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997) (arguing in favor of the establishment of the ICC); Darryl Robinson, *Inescapable Dyads: Why the International Criminal Court Cannot Win*, 28 LEIDEN J. INT'L L. 323, 324 (2015) ("The tenor of scholarly discourse surrounding the ICC has gone through phases. At an early point, many scholars in international criminal law ("ICL") were arguably overly protective of the Court, possibly because they were hesitant to criticize a fledgling institution with powerful detractors.").

3. See Robert Cryer et al., AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE (Cambridge University Press 4<sup>th</sup> ed.) 169 ("Assessments of the [ICC's] record to date are mixed and increasingly negative."); see also *id.* at 169-171 (describing criticisms of the court).

4. Geoff Dancy & Florencia Montal, *Unintended Positive Complementarity: Why International Criminal Court Investigations May Increase Domestic Human Rights Prosecutions*, 111 AM. J. INT'L L. 689, 689 (2017) (describing how several African nations have become disillusioned with the ICC and have begun the process for withdrawing from it); Jean-Baptiste Jeangène Vilmer, *The African Union and the International Criminal Court: Counteracting the Crisis*, 92 INT'L AFFAIRS 1319, 1319-20 (2016).

5. See Vilmer, *supra* note 4, at 1322-28 (describing threats by several African nations to withdraw from the ICC).

6. See Dancy and Montal, *supra* note 4, at 689.

7. Stuart Ford, *Between Hope and Doubt: The Malabo Protocol and the Resource Requirements of an African Criminal Court*, in THE AFRICAN COURT OF JUSTICE AND HUMAN AND PEOPLES' RIGHTS IN CONTEXT: DEVELOPMENT AND CHALLENGES 1076, 1082-84 (Charles C. Jalloh et al. eds., 2019).

8. See Nancy L Combs, *International Criminal Court comes of age*, HILL, (Jan. 30, 2019), available at <https://thehill.com/opinion/criminal-justice/426954-international-criminal-court-comes-of-age> (describing recent setbacks for the ICC's prosecutor); ICC Appeals Chamber acquits Mr. Bemba from charges of war crimes and crimes against humanity, June 8, 2018, <https://www.icc-cpi.int/Pages/item.aspx?name=pr1390> (noting that the ICC Appeals Chamber had reversed the conviction of Jean-Pierre Bemba Gombo).

9. See Combs, *supra* note 8 (describing the acquittal of Laurent Gbagbo, the former President of Côte d'Ivoire).

10. See Vilmer, *supra* note 4, at 1323.

Darfur<sup>11</sup> have all been viewed as significant blows to the Court.<sup>12</sup> Third and finally, scholars and academics have become increasingly critical of the Court and its work.<sup>13</sup> For example, the ICC has recently been criticized for its failure to rein in the most powerful states,<sup>14</sup> its failure to prosecute senior leaders,<sup>15</sup> its failure to investigate various situations,<sup>16</sup> its failure to adequately prosecute crimes of sexual violence,<sup>17</sup> and its general lack of legitimacy.<sup>18</sup>

As a result of these challenges, today there appears to be more doubt about the ICC's future than at any other point in its history.<sup>19</sup> While this increasing negativity about the Court is partly a result of events that are specific to the ICC (like the collapse of the Kenyatta trial and the Darfur investigations), it is also part of a broader pattern of skepticism about the utility of international law and international organizations in general.<sup>20</sup> So, are the critics correct? Should we be skeptical

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11. See Stuart Ford, *The ICC and the Security Council: How Much Support Is There For Ending Impunity?*, 26 IND. INT'L & COMP. L. REV. 33, 34 (2016).

12. See *id.*; Vilmer, *supra* note 4, at 1323; Combs, *supra* note 8.

13. Robinson, *supra* note 3, at 324 ("More recently, the critical note has come to dominate the discourse. Today, journal articles, blog postings, and conference presentations feature a variety of increasingly strident criticisms of the Court."); see also *id.*, at 327-328 (providing examples of how the ICC has been criticized no matter how it obtains jurisdiction over situations).

14. See Thomas Cristiano, *The arbitrary circumscription of the jurisdiction of the international criminal court*, 23 CRITICAL REVIEW OF INTERNATIONAL SOCIAL AND POLITICAL PHILOSOPHY 352 (2020) (arguing that the ICC's inability to hold accountable powerful states undermines the legitimacy of the court).

15. See Kirsten Ainsley, *Retreat or retrenchment? An analysis of the International Criminal Court's failure to prosecute presidents*, in Alison Brysk & Michael Stohl eds., *CONTRACTING HUMAN RIGHTS: CRISIS, ACCOUNTABILITY, AND OPPORTUNITY* (Edward Elgar 2018); Gerhard Kemp, *Immunity of High-Ranking Officials Before the International Criminal Court – Between International Law and Political Reality*, in Gerhard Werle & Andreas Zimmerman eds., *THE INTERNATIONAL CRIMINAL COURT IN TURBULENT TIMES* (Spring 2019).

16. See, e.g., John Dugard, *Palestine and the International Criminal Court: Institutional Failure or Bias?*, 11 J. INT'L CRIM. JUST. 563 (2013).

17. See Douglas Irvin-Erickson, *Sixty Years of Failing to Prosecute Sexual Crimes: From Raphael Lemkin at Nuremberg to Lubanga at the International Criminal Court*, in Mary Michelle Connellan and Christine Frohlich eds., *A GENDERED LENS FOR GENOCIDE PREVENTION* (Palgrave MacMillan 2018).

18. See Allen Buchanan, *The Complex Epistemology of Institutional Legitimacy Assessments, as Illustrated by the Case of the International Criminal Court*, 33 TEMPLE INT'L & COMP. L.J. 323 (2019).

19. See Vilmer, *supra* note 4, at 1320 (describing the ICC as facing "the most serious diplomatic crisis in the court's history" and expressing concern that the tension between African states and the ICC will weaken both the ICC and "the entire international criminal justice system"); Combs, *supra* note 8 (declaring that "[t]he international criminal court is in crisis."); Cryer et al., *supra* note 3, at 169 (noting that evaluations of the court have become "increasingly negative" in recent years).

20. See, e.g., Rebecca Friedman Lissner & Mira Rapp-Hooper, *The Day After Trump: American Strategy for a New International Order*, 41 WASH. Q. 7 (2018).

of the ICC and its prospects for success? Is the ICC failing? No. This Article argues that the ICC is already succeeding. There is now extensive empirical evidence that the ICC reduces violence.<sup>21</sup> Since violence prevention is the most important goal of the Court,<sup>22</sup> this means that it is already succeeding. This is not the dominant narrative about the Court, but it should be.

## II. DEFINING SUCCESS

This Article is primarily about whether the ICC is successful. But, we need to begin by defining success. After all, it is impossible to know if the ICC is succeeding if we do not know what success looks like. The dictionary definition of success is to accomplish an aim,<sup>23</sup> which suggests that success is measured against some aim or aims. Accomplish those and you have succeeded. But is this what success means for the ICC? The short answer is yes.

As Professor Shany has persuasively argued, the success of international courts should be measured by whether they accomplish their goals.<sup>24</sup> Those goals almost always involve achieving some concrete change in the world. Thus, knowing whether a court is successful requires distinguishing between its outputs (the direct products of the organization's operations) and its outcomes (the effect of the organization on the external state of the world).<sup>25</sup> A court can produce its intended output and still be a failure if it does not achieve any of its intended effects on the world. It is a court's ability to achieve positive outcomes in the real world that determines its success.

This understanding of success has important implications for the ICC. The principal output of international criminal courts is the trial of those accused of violating international criminal law ("ICL").<sup>26</sup> But simply holding trials is not what makes the ICC successful.<sup>27</sup> Thus, at-

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21. See *infra* Part IV (describing the empirical evidence that the ICC does prevent violence).

22. See *infra* Part III (describing the goals of the Court).

23. THE OXFORD AMERICAN DICTIONARY AND LANGUAGE GUIDE 1007 (1999) (defining success as "the accomplishment of an aim; a favorable outcome"). Other dictionary definitions are similar; see also THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (4<sup>th</sup> ed. 2000) 1728 ("The achievement of something desired, planned, or attempted"); RANDOM HOUSE WEBSTER'S COLLEGE DICTIONARY 1334 (1992) ("the favorable or prosperous termination of attempts or endeavors").

24. See Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 230 (2012).

25. *Id.* at 248.

26. Stuart Ford, *A Hierarchy of the Goals of International Criminal Courts*, 27 MINN. J. INT'L L. 179, 182 (2018).

27. *Id.* at 186.

tempts to define the success of international criminal courts by the number of people indicted, arrested, or tried, are misguided.<sup>28</sup> Rather, it is the accomplishment of its goals that defines the success of the ICC.

If the ICC is accomplishing its goals, then it is fundamentally a success, even if it has problems or there is still room for improvement. The ICC has certainly had its share of problems in recent years.<sup>29</sup> For example, the acquittal of President Laurent Gbagbo, the collapse of the case against President Kenyatta of Kenya, and the Prosecutor's suspension of the investigation into the situation in Darfur were widely and correctly viewed as setbacks for the Court.<sup>30</sup> The Court must respond to concerns about anti-African bias,<sup>31</sup> and there are numerous legitimate scholarly criticisms of the court.<sup>32</sup> Nevertheless, the success of the ICC is not determined by the outcome of particular trials or investigations, by the number of its member states, or by the opinions of scholars. Rather, the Court's success is measured by its ability to achieve its goals.<sup>33</sup>

Of course, as Professor Shany has noted, measuring whether international courts are accomplishing their goals is difficult.<sup>34</sup> But before we get to the question of how to measure whether the ICC is accomplishing its goals, the first problem is to define those goals. After all, if we are to measure the ICC's success by its ability to achieve its goals, we must be able to articulate those goals. This is, itself, a complex problem.<sup>35</sup>

### III. THE INTERNATIONAL CRIMINAL COURT'S GOALS

As the discussion above suggests, the ICC's success is inextricably linked to the accomplishment of its goals. Of course, much has been written about the goals of international criminal courts.<sup>36</sup> A close review of that literature demonstrates that there are at least nine separate goals

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28. See, e.g., Lilian A. Barria & Steven D. Roper, *How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR*, 9 INT'L J. HUM. RTS. 349, 359-362 (2005) (basing an evaluation of effectiveness on the number of individuals indicted, arrested, and tried).

29. See *supra* Part I (describing various reasons why the ICC has come under increasing criticism by states and scholars).

30. See *supra* text accompanying notes 8-12.

31. See *supra* text accompanying notes 1-6.

32. See *supra* text accompanying notes 14-18.

33. See generally Sigall Horovitz et al., *The International Criminal Court*, in ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS 223, 223-252 (Yuval Shany ed., 2014).

34. Shany, *supra* note 24, at 239 (noting that the "goals of public organizations, such as courts, tend to be ambiguous, and the public goods they generate, such as justice, peace, and legal certainty, are hard to quantify").

35. *Id.* at 233 (discussing the problem of goal ambiguity); *id.* at 242-248 (discussing how to identify the various goals of international courts).

36. See *A Hierarchy of the Goals of International Criminal Courts*, *supra* note 26, at 188-92 (discussing the extensive literature on the goals of international criminal courts).

that have been ascribed to international criminal courts.<sup>37</sup> Those goals are: 1) assigning responsibility for wrongs and punishing the guilty; 2) providing closure or redress for victims; 3) establishing a reliable historical record; 4) fostering post-conflict reconciliation; 5) expressing condemnation of abhorrent acts; 6) ending impunity; 7) preventing violations of international criminal law; 8) maintaining or restoring international peace and security; and 9) developing international criminal law.<sup>38</sup> But, until recently, there had been no attempt to systematically evaluate the relative importance of these goals.<sup>39</sup> So how do we decide which goals matter most for the ICC's success?

In a recent article, entitled *A Hierarchy of the Goals of International Criminal Courts*, the author proposed a method for evaluating those goals and establishing a hierarchy amongst them. The article argued that the court should focus on those goals that have the highest expected value.<sup>40</sup> The expected value of a goal is calculated as the benefit that would accrue if that goal were accomplished multiplied by the likelihood of it being accomplished.<sup>41</sup> Using that methodology, it evaluated the goals most commonly ascribed to international criminal tribunals, including the ICC.<sup>42</sup>

That analysis showed that the goal with the highest expected value is that of preventing violations of international criminal law.<sup>43</sup> This is because of the enormous costs associated with serious violations of ICL.<sup>44</sup> Those costs are high because of the widespread and destructive nature of the violations.<sup>45</sup> Serious violations of international criminal law (the kind that warrant the intervention of the International Criminal Court<sup>46</sup>) tend to take place during armed conflicts and are carried out by

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37. *Id.* at 189-90.

38. *Id.*

39. *Id.* at 191-92.

40. *Id.* at 192 (“[T]he goal that yields the greatest expected value is the most important goal and the one that international tribunals should strive to achieve.”).

41. *Id.*

42. *Id.* at 195-242.

43. *Id.* at 238-41.

44. *Id.* at 226-28.

45. *Id.*

46. The ICC only becomes involved when the violations are very serious. The ICC only has jurisdiction over aggression, war crimes, crimes against humanity and genocide. *See* Rome Statute, Arts. 6-8 *bis*. The Rome Statute describes these as “the most serious crimes of concern to the international community. *Id.* Art. 1. Moreover, for the ICC to exercise jurisdiction over a case, the underlying crimes must be “of sufficient gravity to justify” ICC involvement. *Id.* Art. 17(1)(d).

hierarchically organized armed groups.<sup>47</sup> The victims are usually civilians, often women and children.<sup>48</sup> Moreover, the number of victims is large, with the typical ICC investigation involving thousands of rapes and murders, hundreds of thousands to millions of people forcibly displaced, and widespread destruction of property and infrastructure.<sup>49</sup>

These violations have enormous costs for both individuals and societies. The costs for individual victims can include shock, loss of trust, guilt, temporary or permanent incapacity, financial loss, psychological effects, and significant social repercussions.<sup>50</sup> This is especially true of victims of physical and sexual violence, who tend to experience stronger effects that persist for longer periods.<sup>51</sup> Even those who are ‘only’ subjected to forcible displacement suffer significant harm.<sup>52</sup> Family members, friends, and colleagues of the victim also experience many of these effects.<sup>53</sup>

Serious violations of ICL also have enormous costs for the societies where they occur. These include costs associated with medical care, property loss, and loss of productivity.<sup>54</sup> Unsurprisingly, the sort of violence associated with violations of ICL—murder, rape and widespread property destruction—generates the largest societal costs.<sup>55</sup> Research on the costs of mass atrocities suggests that the costs of serious violations of ICL run from tens to hundreds of billions of dollars per conflict.<sup>56</sup>

47. See Stuart Ford, *What Investigative Resources Does the International Criminal Court Need to Succeed?: A Gravity-Based Approach*, 16 WASH. U. GLOBAL STUD. L. REV. 1, 31-32 (2017).

48. *Id.* at 33.

49. *Id.* at 35; see also *id.* at 37 tbl.1.

50. See Joanna Shapland & Matthew Hall, *What Do We Know About the Effect of Crime on Victims?*, 14 INT’L REV. VICTIMOLOGY 175, 178 (2007).

51. *Id.* at 196–97.

52. See, e.g., James M. Shultz et al., *Internally Displaced “Victims of Armed Conflict” in Colombia: The Trajectory and Trauma Signature of Forced Migration*, 16 CURRENT PSYCHIATRY REP. 1, 2 (2014) (“IDPs [internally displaced persons] experience extraordinary adversities, overt danger, and psychological distress throughout all phases along the trajectory of displacement, leading to chronic elevation of risks for victimization, physical ailments, and mental disorders.”).

53. See Shapland & Hall, *supra* note 50, at 179.

54. See Nyantara Wickramasekera et al., *Cost of Crime: A Systematic Review*, 43 J. CRIM. JUST. 218, 218-20 (2015).

55. *Id.* at 221-23 tbl. 2 & 3.

56. For example, one study concluded that the average cost of a civil war was somewhere between \$60 and \$250 billion. See Paul Collier et al., *The Security Challenge in Conflict-Prone Countries*, in GLOBAL CRISES, GLOBAL SOLUTIONS 58, 63-65 (Bjørn Lomborg ed., 2d ed. 2009); see also Hamid E. Ali, *Estimate of the Economic Cost of Armed Conflict: A Case Study from Darfur*, 24 DEF. & PEACE ECON. 503 (2012) (estimating the cost of the conflict in Darfur to be in the tens of billions of dollars); Humberto Lopez & Quentin Wodon, *The Economic Impact of Armed Conflict in Rwanda*, 14 J. AFR. ECONOMIES 586 (2005) (finding that the conflict in Rwan-



As a result of the enormous individual and societal costs associated with serious violations of ICL, preventing those violations has enormous benefits.<sup>57</sup> The costs associated with serious violations of ICL make prevention the most important goal of the ICC.<sup>58</sup> The ICC pursues other goals that have value too.<sup>59</sup> These include retribution,<sup>60</sup> establishing a reliable historical record,<sup>61</sup> and providing closure or redress for victims.<sup>62</sup> But these other goals have significantly less expected value than violence prevention.<sup>63</sup> Thus, while the ICC seeks to accomplish a number of different goals, preventing violations is the most important of those goals.<sup>64</sup> As a result, the ICC's success will be largely determined by whether it can prevent violations of international criminal law.<sup>65</sup>

#### IV. PREVENTING VIOLATIONS

A lot has been written about the ability of international criminal courts to prevent violations of international criminal law.<sup>66</sup> Some schol-

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da reduced gross domestic product by twenty-five to thirty percent); Pieter Serneels & Marjike Verpoorten, *The Impact of Armed Conflict on Economic Performance: Evidence from Rwanda*, 59 J. CONFLICT RESOL. 555 (2015) (finding that the areas in Rwanda that had the worst violence also had the poorest subsequent economic performance); Sanjeev Gupta et al., *Fiscal Consequences of Armed Conflict and Terrorism in Low and Middle-Income Countries* (IMF, Working Paper No. WP/02/142, 2002); Alberto Abadie & Javier Gardeazabal, *The Economic Costs of Conflict: A Case Study of the Basque Country*, 93 AM. ECON. REV. 113 (2003); Anke Hoeffler & Marta Reynal-Querol, *Measuring the Costs of Conflict 3* (Mar. 2003) (unpublished manuscript) (available at [http://conflictrecovery.org/bin/2003\\_Hoeffler\\_Reynal-Measuring\\_the\\_Costs\\_of\\_Conflict.pdf](http://conflictrecovery.org/bin/2003_Hoeffler_Reynal-Measuring_the_Costs_of_Conflict.pdf)); Stergios Skaperdas, *The Costs of Organized Violence: A Review of the Evidence*, 12 ECON. GOVERNANCE 1 (2011); Nicholas Staines, *Economic Performance Over the Conflict Cycle* (IMF, Working Paper No. WP/04/95, 2004).

57. *A Hierarchy of the Goals of International Criminal Courts*, *supra* note 26, at 226-28.

58. *Id.* at 238-41.

59. *Id.* at 235 tbl. 2 (describing the value of the various goals ascribed to international criminal courts).

60. *Id.* at 196-97.

61. *Id.* at 197-201.

62. *Id.* at 201-07.

63. *Id.* at 235 tbl. 2.

64. *Id.* at 238-42.

65. *Id.* (For example, a court that provided retribution, established a reliable historical record, and provided closure for victims would probably not be considered a success if it failed to prevent violence. Conversely, a court that prevented violence would probably be considered a success even if it did not accomplish the other goals).

66. *See, e.g.*, Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001); James F. Alexander, *The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact*, 54 VILL. L. REV. 1 (2009); Wippman, *supra* note 2; *see also* Margaret M. deGuzman, *Choosing to Prosecute: Expressive Selection at the International Criminal Court*, 33 MICH. J. INT'L L. 265, 280 (2012) (noting that prevention is often presented as a primary goal of international courts); *But see* Hyeran Jo

ars, like Professor Akhavan, have argued that international courts can prevent violations.<sup>67</sup> Many others have expressed doubt about this.<sup>68</sup> As a result, the question of whether courts can prevent violations has been described by Professor deGuzman as “highly contested.”<sup>69</sup>

But, the evidence for or against prevention was largely theoretical or anecdotal. For example, Professor Akhavan’s approach was anecdotal (looking at a number of case studies),<sup>70</sup> while Professor Damaška’s approach was theoretical (arguing that deterrence will not work because perpetrators are not rational actors).<sup>71</sup> Until fairly recently, there were no empirical studies of the Court’s ability to prevent violence.<sup>72</sup> This lack

& Beth A. Simmons, *Can the International Criminal Court Deter Atrocity?*, 70 INT’L ORG. 443, 445–46 (2016) (listing scholars who have argued that the ICC cannot prevent violations).

67. See Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RIGHTS Q. 624, 625 (2009) (using case studies of indictments for leaders in Côte d’Ivoire, Uganda, and Sudan, Professor Akhavan argues that the ICC deters violence by raising the potential cost of it); see also 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, 74 (2008) (“Some extant qualitative research studies suggest, for example, that certain ICC indictees were concerned about the prospect of ICC prosecution years before their indictment or arrest,”) (“Paramilitaries have reportedly cited the Court’s potential prosecution as part of their reasoning for relinquishing power”); Yvonne M. Dutton, *Enforcing the Rome Statute: Evidence of (Non)Compliance from Kenya*, 26 IND. INT’L & COMP. L. REV. 7, 19–22 (2016) (arguing that the ICC’s indictments of senior Kenyan leaders following post-election violence in 2008 led those same leaders to use much less combative rhetoric during the next election and ultimately led to much more peaceful elections in 2013).

68. See Mirjan Damaška, *What is the Point of International Criminal Justice?*, 83 CHICAGO-KENT L. REV. 329, 344–45 (2008) (arguing that deterrence is unlikely to work for international crimes because the perpetrators are not rational actors and because there is a very low likelihood of punishment); Justin Levitt, *Developments in the Law - International Criminal Law (Pt. 2): The Promises of International Prosecution*, 114 HARV. L. REV. 1957, 1965 (2001) (noting that both Serbian and Kosovar forces engaged in violations of international criminal law in Kosovo in 1999 and that the ICTY was not able to prevent those violations despite having indicted numerous individuals for violations of international criminal law in the Balkans); deGuzman, *supra* note 66, at 307–08 (noting that many commentators are skeptical of the ability of international courts to deter criminal behavior for various reasons); Wippman, *supra* note 2, at 474 (“Unfortunately, the connection between international prosecutions and the actual deterrence of future atrocities is at best a plausible but largely untested assumption. Actual experience with efforts at deterrence is not encouraging.”); see also Jo & Simmons, *supra* note 66, at 445–46 (listing scholars who have argued that the ICC cannot prevent violations).

69. See deGuzman, *supra* note 66, at 270.

70. See Akhavan, *supra* note 67 (reviewing case studies of the impact of international tribunals).

71. See Damaška, *supra* note 68 (arguing that deterrence will not work because perpetrators are not rational actors).

72. See Sigall Horowitz et al., *supra* note 33, at 228 (“The claim that international criminal adjudication can generate deterrence is difficult to prove or measure empirically . . . .”); *id.* at 248 (“The literature about the ICC includes very few empirical studies about the Court’s actual outcomes.”); Benjamin Appel, *In the Shadow of the International Criminal Court: Does the ICC*

of empirical studies was unfortunate because much could be learned by taking a data-driven approach to the problem.<sup>73</sup> As a result, it was hard to draw firm conclusions about the Court's success.<sup>74</sup> For example, Horovitz et al. were unable to predict whether the ICC could succeed, largely due to the lack of data.<sup>75</sup>

In the last couple of years, however, a series of articles have begun to empirically test whether international courts can prevent violations of ICL. These include articles by Professor Hillebrecht,<sup>76</sup> Professor Meernik,<sup>77</sup> Professors Jo and Simmons,<sup>78</sup> Professor Dancy et al.,<sup>79</sup> and Professor Appel.<sup>80</sup> These empirical articles represent a significant advance in our understanding of the ICC's effect on violations of international criminal law. Each article will be discussed in one of the subparts below. Subpart F below synthesizes their findings.

### A. Reducing Violence in Libya (Professor Hillebrecht)

In a 2016 article, Professor Hillebrecht explored the effect of the ICC's involvement in Libya on civilian deaths.<sup>81</sup> The conflict in Libya began in February 2011 as people took to the streets to protest the rule of Muammar Qaddafi.<sup>82</sup> The protests quickly morphed into a conflict

*Deter Human Rights Violations?*, 62 J. CONFLICT RESOL. 3, 4 (2016) (“[T]here is a lack of empirical research examining whether the Court has fulfilled its mandate and prevented gross human rights abuses.”).

73. See Geoff Dancy & Florencia Montal, *From Law versus Politics to Law in Politics: A Pragmatist Assessment of the ICC's Impact*, 32 AM. U. INT'L L. REV. 645, 660 (2017) (“One of the only ways to draw inferences about conflict prevention is to compare a wide range of data. Cross-national analysis can help us see what is not apparent in specific case studies.”); see also *id.* at 672-73 (noting the shortcomings of focusing on the outcomes of specific instances of violence rather than systematically looking at patterns of violence at a global level).

74. See Appel, *supra* note 72, at 6 (noting that detractors and supporters of the ICC had both made “compelling claims about the ICC's effectiveness” but that the debate could not be resolved because “they have failed to adequately test” those claims).

75. See Sigall Horovitz et al., *supra* note 33, at 252 (“The mixed indicators regarding prospective goal attainment are not resolved by analysis of the Court's performance. The data available to date on this issue are partial in scope.”).

76. See Courtney Hillebrecht, *The Deterrent Effects of the International Criminal Court: Evidence from Libya*, 42 INT'L INTERACTIONS 616 (2016).

77. See James Meernik, *The International Criminal Court and the Deterrence of Human Rights Atrocities*, 17 CIVIL WARS 318 (2015).

78. See Jo & Simmons, *supra* note 66.

79. See Geoff Dancy and Eric Wiebelhaus-Brahm, *The impact of criminal prosecutions during intrastate conflict*, 55 J. PEACE RESEARCH 47 (2018); Dancy and Montal *supra* note 4; Geoff Dancy, *Searching for Deterrence at the International Criminal Court*, 17 INT'L CRIM. L. REV. 625 (2017).

80. See Appel, *supra* note 72.

81. See Hillebrecht, *supra* note 76.

82. *Id.* at 619.

between armed forces loyal to Qaddafi and rebel forces.<sup>83</sup> The conflict was marked by attacks by government forces that left thousands of civilians dead.<sup>84</sup> The international community quickly became involved and the Security Council referred the situation to the ICC for investigation.<sup>85</sup> The ICC subsequently took a number of actions related to the Libyan conflict, including opening a formal investigation, assigning the matter to a chamber, requesting the issuance of arrest warrants, and issuing arrest warrants against Libyan government officials.<sup>86</sup>

Professor Hillebrecht's article explores the effect of those ICC actions on the level of violence in Libya. She hypothesized that if ICC intervention prevents violence then one would expect to see the level of violence in Libya decrease in the aftermath of ICC action.<sup>87</sup> She tested this hypothesis using a statistical model that analyzed whether the civilian death toll decreased in the immediate aftermath of ICC action.<sup>88</sup> Professor Hillebrecht controlled for several variables that are known to affect the civilian death rate; including the intensity of the conflict between the Libyan government and the rebels, the North Atlantic Treaty Organization's ("NATO") military intervention, and the intensity of global news coverage.<sup>89</sup>

She found that civilian death tolls did decrease in the aftermath of ICC intervention.<sup>90</sup> "The results of this analysis suggest that the ICC's involvement in Libya had a negative and statistically significant effect on the number of fatalities."<sup>91</sup> And, this effect was cumulative. The more action the ICC took, the lower the rate of civilian fatalities.<sup>92</sup> Of course, ICC involvement did not stop the violence against civilians, but it did correlate with a statistically significant reduction in that violence.<sup>93</sup>

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83. *Id.*; see also Stuart Ford, *The Gravity of ICC Investigations Carried Out Between 2002 and 2015*, 14-15 (Feb. 6, 2015) (available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2101764](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2101764)).

84. See Hillebrecht, *supra* note 76, at 619-20.

85. See S.C. Res. 1970, ¶ 4 (Feb. 26, 2011).

86. See Hillebrecht, *supra* note 76, at 629.

87. *Id.* at 628 ("Action at the ICC will lead to a decrease in the violence committed during a conflict, particularly government-sponsored killing of civilians.")

88. *Id.* at 628-32 (describing the model and the data).

89. *Id.* at 629-31 (describing the control variables).

90. *Id.* at 632.

91. *Id.*

92. *Id.* (discussing the results of Model 5, which tested for the cumulative effect of ICC intervention).

93. *Id.*; see also Hillebrecht, *supra* note 76, at 634-36 (showing the expected impact of various ICC actions on daily civilian death tolls).

Professor Hillebrecht cautions that, in some ways, Libya represents an ideal situation for testing the ICC's impact because it did not act alone in Libya.<sup>94</sup> The ICC's involvement took place in the context of a significant contemporaneous military intervention by NATO.<sup>95</sup> Theoretically, one would expect the ICC to be most effective when it is supported by other international actors.<sup>96</sup> So, it is not clear if Professor Hillebrecht's findings can be generalized to situations when the ICC acts alone.<sup>97</sup> Nevertheless, her work provides evidence that ICC intervention does prevent violence, at least in some circumstances.

*B. The Effect of Ratifying the Rome Statute on Human Rights Compliance (Professor Meernik)*

In 2015, Professor Meernik looked at the effect of ratification of the Rome Statute on state behavior.<sup>98</sup> He did this against the backdrop of a body of literature, which found that ratification of human rights treaties generally does little to improve state compliance with human rights obligations.<sup>99</sup> But, he argued that the ICC may be in a better position than other human rights treaties to encourage compliance because it has stronger enforcement mechanisms.<sup>100</sup>

His model included data on all non-Organization for Economic Cooperation and Development ("OECD") states.<sup>101</sup> The OECD states were excluded from the sample because "they are the most likely to be predisposed to abide by the rule of law and avoid human rights violations" and Professor Meernik was concerned their inclusion might bias the findings in favor of the ICC.<sup>102</sup> He also controlled for several variables that might affect human rights compliance, including commitment to the rule of law, the strength of democracy, the potential for ethnic conflict, and per capita gross national product.<sup>103</sup>

First, Professor Meernik found that states with a strong commitment to the rule of law had higher levels of human rights protection, fewer instances of human rights abuse, and fewer episodes of internal

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94. *Id.* at 637-38.

95. *Id.* at 622.

96. *Id.* at 625; *see also* Ford, *supra* note 47, at 63 (noting the importance of international support to the ICC).

97. *See* Hillebrecht, *supra* note 76, at 637-638.

98. *See generally* Meernik, *supra* note 77.

99. *Id.* at 320-21.

100. *Id.* at 322 (noting the independent authority of the ICC Prosecutor to open investigations as well as the authority of the Security Council to refer matters to the ICC).

101. *Id.* at 333.

102. *Id.*

103. *Id.* at 327-29.

violence.<sup>104</sup> This is not particularly surprising.<sup>105</sup> But, he also found that the ICC had an impact independent of the state's underlying commitment to the rule of law. States that demonstrated a commitment to the ICC, for example by enacting domestic legislation to implement the state's obligations under the Rome Statute, also had higher levels of human rights protection, fewer human rights abuses, and fewer instances of internal violence.<sup>106</sup> The effect sizes<sup>107</sup> for ICC commitment were, on average, a quarter of those for the rule of law, which suggests that commitment to the rule of law is a stronger predictor of compliance with human rights obligations.<sup>108</sup> Nevertheless, ICC support was also a statistically significant predictor of human rights compliance.

Ultimately, states that exhibited a strong commitment to the ICC had less political violence than countries with a similar commitment to the rule of law but a weaker commitment to the ICC.<sup>109</sup> Professor Meernik also found that states with a strong commitment to the ICC were less likely to be the subject of ICC investigations.<sup>110</sup> Ultimately, he concluded that his findings indicate "that the ICC can exercise a deterrent impact."<sup>111</sup>

### *C. The Effect of the ICC on Civilian Deaths (Professors Jo and Simmons)*

In a 2016 article, Professors Jo and Simmons investigated the effect of the ICC on violence against civilians across a wide range of

104. *Id.* at 330-33.

105. *Id.* at 326-27 (hypothesizing that states that have a strong domestic commitment to the rule of law will be less likely to have human rights abuses).

106. *Id.* at 333.

107. Effect size refers to the magnitude of the effect of an explanatory variable on the outcome variable. Effect size is important because a variable that is statistically significant but has a small effect size has only a small effect on the outcome variable even though that effect is detectable and unlikely to be the result of chance, whereas a variable that is statistically significant and has a large effect size has a much larger impact on the outcome variable.

108. *Id.* at 330-32 (The effect size of the variables can be found in Tables 1, 2, and 3. The ratios of the effect size of the rule of law to ICC support are .251 in Table 1, .311 in Table 2, and .202 in Table 3).

109. *Id.* at 333 ("States that demonstrate further commitment to the ICC by enacting domestic legislation that provides for national prosecution of international crimes; by ratifying the Agreement on Privileges and Immunities for the ICC; and by refraining from concluding a bilateral immunity agreement with the United States are more likely to have better human rights records and be involved in less internal violence").

110. *Id.* at 334-35.

111. *Id.* at 333.

countries and covering a period of more than twenty years.<sup>112</sup> They looked for effects on civilian violence stemming from: 1) ratification of the Rome Statute; 2) the number of ICC actions (preliminary investigations, investigations, arrest warrants, etc.) in a given year; and 3) the presence of a domestic statute criminalizing war crimes, crimes against humanity and genocide.<sup>113</sup> They also controlled for a number of variables that are expected to affect the number of civilian deaths, including commitment to the rule of law, regime type, whether there was an ongoing civil war, and states' preferences for peace and justice.<sup>114</sup>

Professors Jo and Simmons began by exploring the effects of the ICC on government forces. In some ways, the results are not surprising. They found that a commitment to the rule of law decreased civilian deaths while an ongoing civil war increased civilian deaths.<sup>115</sup> But, more importantly, they found that each of the ICC variables independently decreased civilian deaths by a statistically significant amount.<sup>116</sup> Thus, ratifying the Rome Statute, increasing ICC activity, and adopting a domestic statute criminalizing international crimes are associated with a decrease in civilian killings.<sup>117</sup> Strikingly, the ICC-related effect sizes exceeded the effect sizes for the rule of law variable, which suggests that the ICC had a larger effect on government-sponsored killings than that government's underlying commitment to the rule of law.<sup>118</sup> To put it another way, Professors Jo and Simmons estimate that ICC ratification reduces the rate of government-sponsored killings by nearly fifty-percent.<sup>119</sup>

They also looked at how the ICC affected civilian deaths caused by rebel groups. They found that the ICC does not affect rebel groups as much as governments.<sup>120</sup> For one thing, ratification of the Rome Statute had no statistically significant effect on rebels.<sup>121</sup> But, Professors Jo and

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112. See Jo & Simmons, *supra* note 66, at 455-56 (Their sample included all countries since 1945 that experience a civil war. This resulted in data on 101 countries, with countries coming from Africa, the Americas, Asia, and Europe. The data covered the period from 1989 to 2011).

113. *Id.* at 457-58 (describing the independent variables).

114. *Id.* at 458-59 (describing the control variables).

115. *Id.* at 461.

116. *Id.*

117. *Id.* at 460-63.

118. *Id.* at 461. For each of the first three models, the effect size of the ICC-related variable exceeds the effect size of the rule of law variable.

119. *Id.* at 460; see also *id.* at 466 ("Collectively, the evidence is highly suggestive that the ICC has influenced government tactics when it comes to civilian violence.").

120. *Id.* at 470.

121. *Id.* at 467. The variable for ICC ratification is not statistically significant in either Model 1 or 4. Statistical significance is a term used to indicate that an association between an explanatory variable and the outcome variable is unlikely to be the result of chance. Typically, if an asso-

Simmons found that ICC actions (like opening investigations, issuing warrants, and conducting trials) did reduce rebel-sponsored civilian killings and the results were statistically significant.<sup>122</sup> They interpret this to mean that rebel groups do not respond to ratification of the Rome Statute but do take notice and change their behavior when the ICC becomes directly involved.<sup>123</sup> However, even when the ICC reduces violence by rebel groups, the size of that effect is smaller than with governments. Whereas the influence of the ICC reduced government-sponsored killings by nearly fifty percent,<sup>124</sup> it reduced rebel-sponsored killings by only about twenty percent.<sup>125</sup>

Professors Jo and Simmons attribute the smaller effect of the ICC on rebel groups to the nature of those groups.<sup>126</sup> Rebels are not directly responsible to any constituency, their crimes may be harder to investigate, rebels are often hard to apprehend, and they may be less aware of and have a weaker commitment to international law and international norms.<sup>127</sup> Nevertheless, the ICC can still reduce the violence associated with rebels.<sup>128</sup>

#### *D. Conflict Termination (Professor Dancy et al.)*

In recent years, Professor Dancy has written a series of articles exploring the effect of international criminal trials, both on his own and with other collaborators. In a 2017 article, he explored the deterrent effect of the ICC.<sup>129</sup> He made a number of findings. First, states that ratified the Rome Statute during the course of a conflict were more likely to end that conflict through negotiations than other states.<sup>130</sup> Second, conflicts in which the ICC intervened were shorter than conflicts in which

ciation has a p value of less than 0.05, then the association is described as statistically significant. A p value of less than 0.05 indicates that there is less than a 5% chance that the association is the result of random chance (i.e., it represents a greater than 95% chance that the association between the explanatory and outcome variable is real).

122. *Id.* The variable for ICC actions is statistically significant in both Model 2 and 4.

123. *Id.* at 468 (“Rebels do not respond to legal change alone; they are much more impressed with action.”).

124. *See supra* text accompanying note 98.

125. Jo & Simmons, *supra* note 66, at 468 (noting that their data showed that ICC action would deter 17 out of every 100 rebel-sponsored civilian deaths).

126. *Id.* at 467-68.

127. *Id.* at 466.

128. *Id.* at 470 (“Rebels are harder to deter than governments. Nonetheless, even rebels appear to significantly reduce intentional civilian killing when the ICC has signaled its determination to prosecute.”).

129. *See* Geoff Dancy, *Searching for Deterrence at the International Criminal Court*, 17 INT’L CRIM. L. REV. 625 (2017).

130. *Id.* at 638; *see also* Dancy and Montal, *supra* note 73, at 662.



the ICC did not intervene (2.05 years versus 3.41 years).<sup>131</sup> The latter finding, although intriguing, was not statistically significant.<sup>132</sup> He concluded that this was “suggestive evidence” that joining the ICC encouraged parties to reach negotiated settlements of conflicts.<sup>133</sup> At the same time, Professor Dancy acknowledged that the presence of the ICC was just one factor that could result in conflict termination, so it was not possible to draw firm conclusions from his results.<sup>134</sup>

He also looked at one-sided violence against civilians in countries that were the subject of ICC investigations.<sup>135</sup> He found that violence decreased after ICC intervention in four of those situations (the Democratic Republic of the Congo, Sudan, Uganda, and Libya), while violence increased in only two of them (the Central African Republic and Nigeria).<sup>136</sup> In three cases (Kenya, Côte d’Ivoire, and Mali), there was no trend in the violence after the ICC intervened.<sup>137</sup> He viewed these findings as warranting “cautious optimism” that the ICC could deter violence because violence decreased after ICC intervention more often than it increased.<sup>138</sup>

Finally, he looked at the rate at which new conflicts began in ICC members states versus non-members.<sup>139</sup> The results showed that ICC members states were significantly less likely to become involved in new conflicts than non-members.<sup>140</sup> Ultimately, he concluded that there was no evidence that the ICC obstructed peace or prolonged conflicts and that there was some evidence that it shortened conflicts and reduced violence.<sup>141</sup>

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131. See Dancy, *supra* note 129, at 643.

132. *Id.* Professor Dancy reported a p-value of .263. *Id.* at fn. 76. This is roughly equivalent to a 1 in 4 chance that the result is simply random chance. Of course, that also means there is a roughly 3 in 4 chance it is a real result. As more data become available it will probably be possible to clarify this finding.

133. *Id.* at 638.

134. *Id.* at 643 (“While the record indicates that violent rebel groups are generally active for less time following ICC intervention than they are in other cases, it could be that too many other factors contribute to conflict termination – so many that ICC involvement does not have a generalizable effect.”).

135. *Id.* at 647.

136. *Id.* at 648.

137. *Id.*

138. *Id.*

139. *Id.* at 651-652.

140. *Id.* at 652; see also Dancy and Montal, *supra* note 73, at 677.

141. See Dancy, *supra* note 129, at 654 (“[T]his is a substantial finding because the Court does not have an overall negative effect. Though the ICC has received a good deal of criticism for its involvement in conflict zones, if anything, its effect is on average slightly positive.”).

In a 2018 article, Professor Dancy and Professor Wiebelhaus-Brahm explored the impact of criminal prosecutions during civil wars on conflicts.<sup>142</sup> Although their study included an analysis of the effect of domestic trials, this discussion will focus on their analysis of international trials. In their model, they assessed the impact of international criminal trials on conflict termination.<sup>143</sup> After controlling for a number of factors thought to influence conflict termination,<sup>144</sup> they found that international trials were associated with conflict termination.<sup>145</sup> According to their model, the existence of an international trial was associated with a 9-10% increase in the probability that the conflict would end,<sup>146</sup> although the result was not statistically significant.<sup>147</sup> Ultimately, they concluded that, while their study did not provide statistically significant evidence that international trials were associated with ending conflicts, it did largely dispel concerns that ICC involvement prolongs conflicts.<sup>148</sup>

#### *E. Reducing Human Rights Violations (Professor Appel)*

In a 2018 article, Professor Appel explored whether states that ratify the Rome Statute engage in more or less human rights violations than non-ratifiers.<sup>149</sup> His model controlled for a number of variables that are known to be associated with respect for human rights, including population size, per capita gross domestic product, democracy, regime type, an independent judiciary, and any recent history of conflict.<sup>150</sup> Moreover, the statistical technique he used was specifically chosen to minimize the possibility that the ICC would appear to be associated with lower rates of human rights violations because only states with good human rights records join the ICC.<sup>151</sup>

The results showed that ratifiers of the Rome Statute did have fewer human rights violations than non-ratifiers and that this result was sta-

142. See Dancy and Wiebelhaus-Brahm, *supra* note 79.

143. *Id.* at 50 (defining international trials to be trials conducted by international judicial institutions, “including ad hoc international tribunals like the International Criminal Tribunal for the Former Yugoslavia (ICTY); hybrid international-domestic tribunals like the Special Court for Sierra Leone; and the ICC”).

144. *Id.* at 54 (describing the control variables).

145. *Id.* at 56.

146. *Id.*

147. *Id.* at 56-57; see also Dancy and Montal, *supra* note 73, at 670 (finding no statistically significant relationship between ICC involvement and conflict termination).

148. See Dancy and Wiebelhaus-Brahm, *supra* note 79, at 58-59.

149. See Appel, *supra* note 72.

150. *Id.* at 13-14 (discussing the control variables).

151. *Id.* at 14-17 (discussing the problem of endogeneity and why the difference in difference (DiD) technique was chosen to minimize endogeneity).

tistically significant.<sup>152</sup> Since the human rights variable in the model is based on the frequency of acts of torture, summary execution, physical disappearances, and political imprisonment,<sup>153</sup> this means a reduction in human rights violations means a reduction in violence. The effect size of the reduction (i.e., its impact on human rights violations) was similar to the impact of having an independent judiciary, which was also found to reduce human rights violations.<sup>154</sup>

While ratifiers did, on average, have better human rights records than non-ratifiers, the human rights records of ratifiers continued to improve after ratification and improved more than the human rights records of non-ratifiers.<sup>155</sup> These results led him to conclude that states' human rights practices improve after joining the ICC.<sup>156</sup> Or to put it another way, his study represents "systematic evidence that the Court can deter leaders from committing atrocities."<sup>157</sup>

#### V. SUMMARIZING THE RESULTS OF THE EMPIRICAL STUDIES

While many scholars have very strong opinions about whether the ICC can prevent violence, it is only in the last few years that we have seen meaningful attempts to test that question empirically.<sup>158</sup> The research discussed above represents an important new chapter in research about the ICC. For the first time, we can really answer the question of whether the ICC can prevent violations of ICL.

All the articles described above come with some caveats. Professor Hillebrecht notes that studying Libya represents a best case for the influence of the ICC.<sup>159</sup> However, she also controlled for a number of variables other than ICC intervention that could have affected the civilian death rate in Libya.<sup>160</sup> Professor Meernik notes that we don't know exactly why some states respect human rights and thus improved human rights might be the result of something other than the ICC,<sup>161</sup> but he also controlled for a number of variables that we might expect to influence compliance with human rights obligations.<sup>162</sup> Professors Jo and Sim-

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152. *Id.* at 18.

153. *Id.* at 4.

154. *Id.* at Fig. 1.

155. *Id.* at 20.

156. *Id.* at 19-20.

157. *Id.* at 22.

158. *Id.* at 449.

159. Hillebrecht, *supra* note 76, at 617.

160. See *supra* text accompanying note 89.

161. Meernik, *supra* note 77, at 333.

162. *Id.*

mons also express some concern about the influence of unobserved variables.<sup>163</sup> But, they too used control variables to isolate the effect of the ICC from the effect of other variables one would expect to influence violence.<sup>164</sup> Professor Dancy acknowledged that it is hard to isolate the ICC's effect on conflict termination.<sup>165</sup> Professor Appel was concerned that the ICC might appear to reduce violations of human rights if only states that had good human rights records joined the Rome Statute,<sup>166</sup> but he chose a statistical test designed to minimize that possibility and used a number of control variables to try and isolate the effect of the ICC.<sup>167</sup>

Ultimately, there will always be caveats associated with statistical studies – there is always the possibility that the model is effected by variables you have not accounted for.<sup>168</sup> Nonetheless, the authors took pains to control for the variables (other than the ICC) that were most likely to explain the results. By controlling for such variables, they sought to disentangle the impact of the ICC from the impact of other variables that might affect the results. These efforts help ensure the results are robust.

With the exception of Professor Dancy's work,<sup>169</sup> these studies, each using a different data set and a different methodology, independently came to essentially the same conclusion – the ICC does prevent violence. Professor Hillebrecht found that the ICC's intervention in Libya reduced civilian casualties.<sup>170</sup> Professor Meernik found that states with a strong commitment to the ICC had fewer human rights violations

163. See Jo & Simmons, *supra* note 66, at 464 (noting that the effects of ratification of the Rome Statute could be attributable to an unobserved variable like political liberalization).

164. *Id.* at 465 (“The evidence of the ICC’s ability to deter is based on rigorous controls for many underlying conditions that could plausibly contribute both to ratification and reduced government-killing, such as changing regime type, quality of the rule of law, government-rebel reciprocity regarding civilians, even changing experiences and preferences with respect to peace and justice.”).

165. See *supra* text accompanying note 134.

166. See Appel, *supra* note 72, at 14-17.

167. See *supra* text accompanying notes 150-151.

168. This is known as omitted variable bias. See Omitted Variable Bias, <https://www.econometrics-with-r.org/6-1-omitted-variable-bias.html>. The typical way to reduce the impact of this problem is to include as control variables all the variables that are known or expected to affect the dependent variable. This is not always a perfect solution as it is possible that there are variables that affect the dependent variable that are unknown and thus cannot be included as controls. But see Kevin A. Clarke, *The Phantom Menace: Omitted Variable Bias in Econometric Research*, 22 CONFLICT MANAGEMENT AND PEACE SCIENCE 341 (2005) (arguing that control variables do not always reduce the effect of omitted variable bias).

169. Professor Dancy has studied a different phenomenon from the other authors cited in this article and his work is treated separately below. See *infra* text accompanying notes 177-186.

170. See Hillebrecht, *supra* note 76, at 637.

than other states, independent of their overall commitment to the rule of law.<sup>171</sup> Professors Jo and Simmons found that the ICC reduced civilian deaths caused by both the government and rebel groups, though the effect was more dramatic for government forces.<sup>172</sup> Professor Appel found that joining the ICC was associated with a reduction in serious human rights abuses.<sup>173</sup>

We can now say with reasonable confidence that the ICC does prevent violence. Ratification of the Rome Statute is associated with a reduction in violence. Criminalizing violations of international criminal law in domestic law is associated with a reduction in violence. And when the ICC acts, whether to open an investigation, issue an arrest warrant, or try an accused person, there is a reduction in violence. Moreover, these effects appear to be additive.<sup>174</sup> There are no empirical studies showing that it increases violence.<sup>175</sup>

While a single article might not settle the question, a whole series of articles using different datasets and different methodologies that all come to the same conclusion is much more persuasive. In short, when considered together, the available empirical studies strongly suggest that the ICC does prevent violence. Considering how “highly contested” this question has been amongst scholars,<sup>176</sup> the uniformity of the empirical results is particularly striking.

Professor Dancy et al.’s work is different from the other empirical studies discussed in this Article and is treated separately here. The most important difference is that he and his co-authors studied a different phenomenon. Rather than studying violence reduction, their articles dealt with conflict termination.<sup>177</sup> As Dancy and Montal have noted, ending an existing conflict is significantly harder than reducing the amount of violence within an ongoing conflict.<sup>178</sup> Indeed, none of the

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171. Meernik, *supra* note 77, at 336.

172. Jo & Simmons, *supra* note 66, at 469-70.

173. *See supra* Part IV(E).

174. *See supra* text accompanying note 92. This is also implicit in the results of Model 4 in Professors Jo and Simmons’ work. *See* Jo & Simmons, *supra* note 66, at Table 2. In Model 4, Rome Statute ratification, domestic criminalization of violations of international criminal law, and ICC action are all tested simultaneously. And each of them has a separate and statistically significant effect in reducing violence.

175. *See* Dancy and Montal, *supra* note 73, at 675 (“However, the fact remains that [the] only evidence on the systematic murder of civilians . . . shows that ICC ratifiers are more respectful of civilians. No evidence to the contrary has been published.”).

176. *See supra* text accompanying notes 66-69.

177. *See supra* Part IV(D).

178. *See* Dancy and Montal, *supra* note 3, at 659 (recognizing that ending a conflict after it has started is a difficult and perhaps unfair thing to expect the ICC to accomplish); *see also* Dan-

violence prevention articles discussed above found that the ICC reduced the level of violence to zero.<sup>179</sup>

The difficulty of stopping or preventing conflicts may explain why many of Professor Dancy et al.'s tests did not reach statistical significance. Thus, while their models suggest that conflicts involving ICC members are shorter,<sup>180</sup> that conflicts are more likely to end when international trials occurred,<sup>181</sup> and that ICC members are less likely to become involved in conflicts than non-members,<sup>182</sup> the results generally did not reach the level of statistical significance.<sup>183</sup>

As a result of this limitation, Professor Dancy's conclusions are more measured than the other authors. He does not claim that the ICC ends conflicts. Rather, his work provides only "suggestive evidence" that the ICC may be able to end some ongoing conflicts and prevent some new ones.<sup>184</sup> It could be that with more and better data, it would be possible to draw more definitive conclusions.<sup>185</sup> But, at the least, his work largely rules out the possibility that the ICC exacerbates existing conflicts or makes new conflicts more likely.<sup>186</sup>

## VI. CONCLUSION

This Article began with a question: Can the ICC succeed? Answering that question requires that we first know what the ICC is supposed to accomplish. After all, it can only be called a success if it accomplishes its goals.<sup>187</sup> A number of goals have been ascribed to the ICC in the scholarly literature. But not all these goals are equal. Rather, there is a hierarchy amongst them, and the court should be judged by whether it accomplishes those goals that have the highest expected value.<sup>188</sup>

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cy and Wiebelhaus-Brahm, *supra* note 79, at 49 (noting the important difference between reducing violence within a conflict and stopping the conflict).

179. For example, Professors Jo and Simmons found that the ICC could reduce government-sponsored killings by about 50% and rebel-sponsored killings by about 20%. *See supra* Part IV(C).

180. *See supra* text accompanying notes 130-132.

181. *See supra* text accompanying notes 143-147.

182. *See supra* text accompanying notes 139-141.

183. *See supra* Part IV(D).

184. *See supra* text accompanying note 133.

185. If there was a small but positive effect of ICC involvement on conflict termination, then it may be possible to detect that effect with a larger pool of data. Of course, if there really is no effect, then more data would demonstrate that as well.

186. *See supra* text accompanying note 148.

187. Shany, *supra* note 24, at 230.

188. *A Hierarchy of the Goals of International Criminal Courts*, *supra* note 26, at 192.

The goal with the highest expected value is the prevention of violations of international criminal law.<sup>189</sup> This is because serious violations of ICL have enormous costs for the victims of those crimes, as well as their friends, families, neighbors, and colleagues.<sup>190</sup> Violations also have enormous societal costs ranging from the tens of billions to hundreds of billions of dollars per conflict.<sup>191</sup> Thus, preventing those violations has enormous value. Or, as Benjamin Franklin once said, “an ounce of prevention is worth a pound of cure.”<sup>192</sup>

This means that if the ICC can prevent violations of international criminal law, then it is accomplishing its most important goal. Despite many scholars having vehemently argued that the ICC cannot prevent violence, until recently there had been little empirical evidence one way or the other.<sup>193</sup> That is no longer the case. Thanks to recent articles by Professors Hillebrecht, Meernik, Appel, Jo and Simmons, there is now strong evidence that the ICC does prevent violence.<sup>194</sup> There is also some evidence that the ICC can shorten ongoing conflicts and prevent some conflicts from occurring.<sup>195</sup>

Can the ICC succeed? The ICC’s principal goal is to prevent violations of international criminal law and it is already doing that. Therefore, the ICC is already succeeding. But this is not the dominant narrative about the Court. Recently, the Court has been dogged by a number of high-profile problems, and scholarship about the court has become increasingly critical.<sup>196</sup> There is a sense among many international criminal law scholars that the court is in crisis.<sup>197</sup> Nevertheless, the evidence strongly suggests that the ICC is already accomplishing its most important goal. Particularly given how “contested” claims of violence prevention by international criminal courts have been,<sup>198</sup> this is an extremely important finding; one that more scholars and policymakers need to be aware of.

Of course, this does not mean that the ICC is perfect. There are still problems and the ICC might ultimately fail. The acquittal of Lau-

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189. *Id.* at 181.

190. *See supra* text accompanying notes 32-39.

191. *See supra* text accompanying notes 40-42.

192. *See* Daniel Kiel, *An Ounce of Prevention is Worth a Pound of Cure: Reframing the Debate About Law School Affirmative Action*, 88 DENVER U. L. REV. 791, 791 n.3 (2010) (attributing the saying “an ounce of prevention is worth a pound of cure” to Benjamin Franklin).

193. *See supra* text accompanying notes 48-52.

194. *See supra* Part IV(F).

195. *See supra* text accompanying notes 177-186.

196. *See supra* text accompanying notes 3-9.

197. *See supra* text accompanying note 19.

198. *See supra* text accompanying notes 66-69.

rent Gbagbo, the collapse of the Kenyatta trial, and the suspension of the investigation in Darfur really were setbacks for the Court.<sup>199</sup> And the concerns of African states cannot be solved by pointing out that the ICC does prevent violence.<sup>200</sup> But, despite the problems and criticisms,<sup>201</sup> we should not lose sight of the fact that the ICC was set up, in large part, to prevent violations of international criminal law<sup>202</sup> and it is already doing that.<sup>203</sup> Thus, by one very important measure it is already succeeding.

It is also important to note that this is a claim about the present. The evidence discussed in this Article does not show that the ICC might be able, in some vague and distant future, to prevent violence. The evidence convincingly shows that the ICC is already preventing violence all over the world. There are people alive today who would not be alive if the Court did not exist.

The recent wave of empirical studies of the ICC's effect on violence are a very important step in the study of the Court, but there are still many unanswered questions. One obvious avenue for future empirical research is to try and identify which ICC actions do the most to reduce or prevent violations of international criminal law. If we could identify the mechanisms by which the ICC reduces violence, then it could concentrate on those actions that are most likely to prevent violence. Thus, further empirical study might permit the ICC to maximize its preventive effect.

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199. *See supra* text accompanying notes 9-12.

200. *See supra* text accompanying notes 1-7.

201. For example, Dancy and Montal acknowledge that the ICC "has a difficult time building and completing cases, and it faces the same obstacles as other multilateral institutions that intervene in conflict states." Nevertheless, they argued that the results of the recent spate of empirical research was grounds for "cautious optimism" about the Court's ability to prevent violence; *see* Dancy and Montal, *supra* note 73, at 681.

202. Prevention was clearly a goal of the ICC from its founding. The Preamble to the Rome Statute recognizes that "millions of children, women, and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity" and then goes on to claim that prosecuting those responsible for these atrocities will "contribute to the prevention of such crimes." Rome Statute, Preamble.

203. *See supra* Part IV.