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April 10, 2024

Influences on the International Criminal Court's Investigation and Prosecution Decisions

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An abstract of

a thesis submitted to the Faculty of Emory College of Arts and Sciences

of Emory University in partial fulfillment

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Bachelor of Arts with Honors

The Department of Political Science

2024

## Abstract

### Influences on the International Criminal Court's Investigation and Prosecution Decisions

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The International Criminal Court (ICC) is the world's principal legal forum for holding individuals criminally accountable for war crimes, genocide, crimes against humanity, and crimes of aggression. Yet decisions by the ICC (about who to prosecute), like those of all international organizations, are theoretically subject to a variety of political influences and organizational biases. Critics and scholars have identified a number of factors that might influence the court, from the ICC's caseload, to the amount of NGO pressure put on a suspect, to the severity of crimes committed, to the potential deference to or reduced access to evidence about government actors, to the effect of pressure from powerful states. I assess the merits of these hypotheses using an original dataset of 568 individuals leading groups perpetrating one-sided violence, or killings of civilians, from 2002 through 2022. I find that the court is more likely to prosecute someone if that person is subject to NGO pressure or UNSC sanctions and if their crimes are more severe. However, the biggest impact of how severe a person's crimes are is right when they occur and the impact decreases as more time passes from then. I also find that the ICC is virtually guaranteed to defer to, and not act against, a person subject to any alternative or domestic prosecution. Yet, the ICC is not less likely to prosecute government actors, as the previous research has stated, but, perhaps, due to lesser availability of evidence or other deference, it is less likely to act against top leaders of groups than lower-ranked members. Moreover, my findings suggest that the ICC is not responsive to independent pressure from the US government.

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## **Introduction**

The International Criminal Court (ICC) is a liberal international institution established to investigate and prosecute individuals accused of committing the most serious crimes of concern to the global community. The court's primary mission is to end impunity for the offenders of these crimes and contribute to preventing such crimes in the future. Based on this mission, the ICC is supposed to function as a way to hold perpetrators accountable. Therefore, in a perfect world, the ICC would initiate cases against the suspects who have committed the gravest crimes. However, due to the ICC's restricted jurisdiction and the limits of state cooperation, investigating perpetrators of the most significant crimes is not always possible. With that in mind, the ICC can still choose which individuals are investigated from a bigger pool of individuals who commit similar crimes within a designated time frame. In recent years, the ICC's choices regarding which individuals to actively pursue have been a subject of controversy amongst political leaders and scholars. Most prominently, it has raised questions of potential bias surrounding the ICC's decisions on who to prosecute. These are the questions that I will be examining as I analyze how the ICC makes its decisions on who to prosecute.

Many African leaders have accused the ICC of having a bias towards the African continent since most investigations occur there (Voeten, 2020). This criticism of the court has some merit, considering that since its creation, the ICC has indicted more than forty individuals, all from African countries. Scholars have also paralleled these criticisms of the court by speculating whether the ICC displays any other biases. For instance, scholars have examined whether the ICC targets potential cases based on their affiliation with the US military and whether the ICC favors incumbent governments over rebel groups in the civil war conflicts it gets involved in (Krcmaric, 2023; Wegner, 2015). In addition, other scholars have also argued



that the ICC functions as it should and only opens formal investigations on cases of the gravest concern (Smeulers et al., 2015). These conflicting views highlight the importance of a definitive answer on the ICC's possibly partial case selection tendencies.

There are other important determinants to consider that could significantly influence how the ICC selects its cases. Scholars have inquired into how effective the ICC is in imposing its legal authority as an international court. This is an important factor to consider when studying the ICC and how they pick which cases to investigate, because it is possible that their legal authority may not stretch to certain cases, making it hard to impose any laws or punishments regarding human rights violations. This point could explain the biases being noticed by political leaders and scholars when the ICC makes its decisions to not prosecute specific cases over others. Additionally, the legal requirements outlined in the Rome Statute pose as another factor that could have major implications on the court's case selection process. These requirements differ depending on which branch of the court initiates a case against a suspect.

For a case to be investigated, it has to fulfill specific obligations in compliance with the legal mandates that give the ICC its powers and functions. For instance, if the Office of the Prosecutor (OTP) selects a specific suspect to investigate, there needs to be a reasonable basis for investigation, jurisdictional authority when the state in question cannot prosecute the situation itself, case admissibility requirements outlined in the mandate, and interests of justice corresponding with the suspected victims. These factors determine whether the OTP can decide to formally select a case for investigation (Lovisa & Klamberg, 2016). Moreover, the OTP needs approval from the Pre-Trial Chamber, and this branch of the court has a further list of legal requirements for a case to be officially approved. Some scholars argue that it is these internal

workings of the court that give rise to the partiality seen in the ICC's case selection process (Meron, 2005).

Based on literature, there exist many mixed views regarding the particular factors determining the ICC's decisions as well as its potential biases and flaws. Thus, the research displays conflicting answers regarding the ICC's suspected bias in selecting certain criminal situations to formally investigate as cases over others. That is the issue which warrants investigation since the current research is so divided. In addition, the implications of ICC selection bias could have major impacts on the distribution of justice regarding human rights violations which is why getting a definitive answer on the ICC's bias is so salient. Thus, with these disputing views in mind, in this paper I will be answering the question as to why the ICC chooses to investigate some individuals and not others. I will be disentangling these conflicting views and arguments regarding the ICC's suspected selection bias regarding which cases it chooses to formally select for investigation. Additionally, I want to discern what particular factors determine whether a case is more likely to get investigated by the ICC. These factors include the ICC's ability to open new investigations given their current caseload, the amount of attention that some cases get from non-governmental organizations and human rights organizations, powerful state's interests, and the severity of the crimes in each case.

With respect to my argument, I am contributing to both the liberalist/constructivist schools of thought in international relations as I try to explain ICC case selection by incorporating the severity of each person's crimes with how many cases the ICC has opened at a given time as well as how nongovernmental organizations and human rights organizations can put a spotlight on which cases should take priority on the global sphere. More specifically, I want to include an examination into the internal workings of the ICC and take into account biases that

may appear when choosing which suspects to prosecute given the amount of current cases the court has already opened investigations into. In addition, the impact of NGOs and HROs should also be analyzed because both organizations have a profound impact on similar international institutions that parallel the ICC in terms of structure; thus, it is reasonable to expect that they will have the same impact on the ICC. I also want to look at how the ICC claims to function in an ideal world, via choosing cases with the most severe crimes that are of the gravest concern to the international community, and how legitimacy issues regarding jurisdiction and a deference to sovereigns may impact their case selection as well.

This paper starts with an introduction into how the ICC is structured and organized, as well as how it functions. Then, it transitions into discussing the existing scholarship on the ICC and its suspected biases with explanation on how those biases might occur. Following that is an outline of my own theories and hypotheses regarding the ICC's bias and which factors could be contributing to this suspected bias. An outline of my research design is included to show how I constructed my sample, operationalized my variables of interests, and the statistical methods I used. Finally, I conclude with an explanation of the results and any implications that have arisen from these results.

### **Background Information on the ICC**

The International Criminal Court is the world's first and only permanent standing international judicial body with global reach charged with upholding individual criminal liability for crimes against humanity, crimes of aggression, genocide, and war crimes (Klobucista & Ferragamo, 2023). It was created by the Treaty of Rome in 1998 and officially entered into force on July 1st, 2002. Before its creation, the United Nations (UN) set up temporary ad-hoc courts to

deal with individuals committing major war crimes in various regions. These courts were deemed ineffective at deterring individuals from committing these crimes. Thus, many governments agreed that a permanent court was needed to hold perpetrators responsible for the world's most serious crimes (Klobucista & Ferragamo, 2023).

The court's jurisdiction is limited to a specific time frame, which includes any crimes committed after it was officially entered into force on July 1st, 2002. Its jurisdiction is also limited to the territory of countries that have ratified the Treaty of Rome, United Nations Security Council (UNSC) referrals, and non-ratifier countries that choose to opt into the ICC's authority. Additionally, the court can only prosecute individuals, and it typically only prosecutes individuals considered most responsible for the crimes, like political leaders or heads of organizations (Klobucista & Ferragamo, 2023).

The court is made up of four assemblies: the president, chambers, the office of the prosecutor, and the registry. Each of these assemblies has a specific role and a mandate establishing the legality of what actions they can take. The presidency is made up of three judges (the President and two Vice-Presidents) elected by a majority of the eighteen judges of the court for a maximum of two, three-year terms. The presidency administers the court's work by helping organize the work for the judges, and ensuring the enforcement of decisions made by the court. The Chambers consists of the eighteen judges and the three judges in the presidency and these judges are assigned to the ICC's three judicial chambers: the Pre-Trial Chamber, the Trial Chamber, and the Appeals Chamber. The Pre-Trial Chamber is responsible for resolving any issues before an official trial begins. It is involved in working out how investigations are conducted and the gathering of evidence before a trial. The Pre-Trial Chamber consists of judges elected by state parties or appointed by the ICC's president, who rule if a case meets all the

requirements and if the launch of an investigation can be approved (Bakibinga, 2019). The Trial Chamber consists of judges who try the actual case and decide on the guilt of a suspected criminal. The Appeals Chamber is where judges receive appeals on the decision of an initial trial and decide whether to uphold the initial decision, amend it, or even reverse it depending on the strength of the appeal. The Office of the Prosecutor (OTP) is an independent organ of the court. It involves analyzing information on situations or alleged crimes within the ICC's jurisdiction and determining whether there are grounds that merit an official investigation (ICC, 2020b).

The OTP is staffed by 380 members from over 80 different nationalities, including legal investigators and analysts, psycho-social experts, and individuals with experience in diplomacy and international relations (ICC, 2024b). An assembly of state parties elects the Chief Prosecutor and Deputy Prosecutor for a one-time nine-year term. Other staff members are hired based on their qualifications and experience in dealing with global investigations (ICC, 2003). During the preliminary analysis of a potential case, the staff within the OTP is responsible for gathering any supporting materials/evidence that contribute to the Chief Prosecutor's argument to the Pre-Trial Chamber as to why a particular individual should be investigated. Moreover, the staff is also responsible for providing specialist legal advice about admissibility requirements and questions of jurisdictional authority related to a potential case (ICC, 2003). This advice aids the Chief Prosecutor in his decision on whether to present this case to the judges of the Pre-Trial Chamber.

The two most prominent functions of the OTP are rooted within its investigation and prosecution divisions. The investigation and prosecution divisions consist of staff members whose job is to gather evidence before the case is officially investigated, and staff members whose job is to investigate the case are led and directed by the prosecutors. The senior prosecutor in particular, is in charge of presenting the investigated cases in court since they ultimately have

the power to prove the prosecution case. Thus, the senior prosecutor essentially leads both the preliminary and investigation staff member teams to gather the necessary evidence and fully determine if a defendant is guilty. Other lawyers involved with the prosecution function of the court also assist the senior prosecutors in executing their supervisory responsibility during the preparation of cases and in the actual court proceedings that take place (ICC, 2003).

There are a few ways cases can be referred to the ICC. One way is if a UNSC member state refers a specific criminal situation to the court. Any state party to the Rome Statute or any state that is part of the UNSC may refer to the Chief Prosecutor a situation in which one or more crimes within the jurisdiction of the court appear to have been committed. In this case, the state party requests for the Chief Prosecutor to investigate the criminal situation to determine whether the court has grounds to prosecute one or more specific persons (ICC, 2003).

Another way for a case to be referred to the ICC involves the Chief Prosecutor selecting a case and launching an official investigation *proprio motu* (of his own initiative) that meets specific criteria. The Chief Prosecutor can initiate investigations based on information received on crimes within the jurisdiction of the court provided by any source. That being said, the Chief Prosecutor is mandated to analyze the seriousness of this information and, therefore, may have to seek additional information from states, organs of the UN, and nongovernmental organizations (ICC, 2003). This is where potential biases could come into play since NGOs may be able to place varying degrees of importance on particular suspects.

However, to launch an official investigation, the Chief Prosecutor needs approval from the Pre-Trial Chamber, and the case must meet specific criteria as outlined by the OTP mandate. These criteria include the need for a reasonable basis for an investigation, jurisdictional authority, overall case admissibility requirements, and a gravity threshold for how serious the

alleged crimes are (Badagard & Klamberg, 2016). After considering this criterion, the Chief Prosecutor can determine whether to prosecute one or more people associated with a referred criminal situation. The Chief Prosecutor must consider if the factors of each individual's potential case follow the criteria outlined to conclude if there is a sufficient basis for an investigation (ICC, 2003). The state party that made the referral can request for the Pre-Trial Chamber to review the Chief Prosecutor's decision not to investigate or prosecute a specific individual. The Pre-Trial Chamber can also review a decision made by the Chief Prosecutor not to investigate a suspect on its initiative if the initial argument made was based on the fact that an investigation would not be in the interests of justice (ICC, 2003).

The Chief Prosecutor is subject to other limitations on which cases he/she can select. The Prosecutor cannot, on his own motion, initiate investigations concerning states not party to the Rome Statute, unless the matter involves nationals of states parties allegedly involved in committing Rome Statute crimes on the territory of the non-state party in question. The ICC can investigate individuals from non member states if the suspected crimes occurred in a member state's territory or if the non-member state accepts the court's jurisdiction. Depending on the circumstances surrounding a case, the ICC does have the authority to investigate individuals from non-member states with the UNSC's authorization (Klobucista & Ferragamo, 2023). The launch of an investigation signals that the ICC has formally selected a case. Since the OTP relies heavily on the cooperation of many different legal experts and lawyers, there is potential for the personal biases of staff members to impact which cases get investigated. More specifically, when separate divisions of the OTP gather preliminary evidence or information on a case, the information may or may not be sufficient to check all the criteria above based on staff members and their own motivations to investigate a suspect.

## Literature Review

### ICC Jurisdiction

Much of the scholarship surrounding the ICC has focused primarily on its limited timeframe, the ratification patterns of states, and its effectiveness at deterring human rights violations. Based on the articles outlined in the Rome Statute, the ICC has jurisdiction only regarding crimes committed after it enters into force. However, if a state becomes a party to the statute after its entry into force, the court can exercise jurisdiction only concerning crimes it committed after the statute went into force for that state. In other words, the court cannot investigate a country's crimes that happened before that country became a member state to the Rome Statute (OHCHR, 2023). That being said, there have been cases that the ICC has tried that violate these time frame requirements and involve non-member states where the ICC's temporal jurisdiction seemed very weak. These cases often concern ongoing crimes that started before the statute entered into force but continued after that, meaning that these states weren't members since the statute had yet to be put into effect. However, specific cases that were prosecuted by ad-hoc tribunals have since clarified the issue to some extent. For example, in the Ngeze case, the Trial Chamber of the International Criminal Tribunal of Rwanda (ICTR) concluded that it could consider any facts related to the conduct of the suspects prior to when the Rome Statute was put into effect if they were relevant to other facts that fell within the court's temporal jurisdiction (Stahn et al., 2005). Similarly, the European court of Human Rights (ECHR) stated that the European Convention is only binding after its official implementation, but cases that the ECHR has tried address violations that have been ongoing even before the convention's implementation. In accordance with this practice, the ICC could also, in theory, draw on prior acts to, for instance, prove some contextual elements of crimes against humanity since the



circumstances would present a link between the context and the ongoing crimes being committed (Stahn et al., 2005).

### **Ratification Patterns of States**

Regarding the ratification patterns of states, most of the literature finds evidence that democratic states with little internal conflict are much more likely to ratify the Rome Statute and join the ICC as member states. This is because the ICC relies on state participation for it to be an effective mechanism for holding powerful individuals accountable. Compliance with the statute is easiest for those countries since they do not have to bear the costs of ICC investigation due to the state itself having strong political systems in place that deter crimes against humanity. In contrast, states that fear the ICC's effectiveness will be less likely to join since the cost of joining would outweigh any expected benefits. Thus, countries that fear ICC investigation/prosecution costs would be less likely to join. These countries are characterized as democracies with a long history of internal conflict (Terrence et al., 2013). Ratification of the statute sees a trend with member states taking actions to reduce violence and make peace more likely by making commitments to avoid committing human rights violations. In addition, states that ratify the statute seem more likely to commit to the promise of taking steps to start the process of peaceful negotiations if they are in the middle of a conflict (Simmons & Danner, 2010).

### **ICC Effectiveness**

In addition, the current literature outlines how the ICC can deter human rights violations despite having no military enforcement capabilities. These scholars argue that the ICC is effective because it can deter governments from committing crimes against humanity by imposing costs on them through investigations that decrease their expected payoffs from engaging in these abuses (Appel, 2018). Since the ICC lacks enforcement capabilities to capture

and arrest the individuals it prosecutes directly, this decrease in expected payoffs happens due to domestic and international costs. Domestic costs result from ICC investigations that signal to domestic actors that leaders within a government are committing human rights abuses. This awareness decreases domestic support for the individuals being investigated, which leads to leaders being unable to pass their preferred policies or even stay in office altogether.

Additionally, international audience costs come into play when the international community is made aware of a government's crimes against humanity, which causes other states and even the UN Security Council to impose political and economic sanctions. (Appel, 2018; Cole et al. 2023).

### **Allegations of Bias**

While the ICC has a substantial amount of scholarship outlining its many internal mechanisms and impact on the global community, the questions surrounding the ICC's alleged bias have only been a recent addition. These questions were made after the court was subject to criticisms from several prominent political leaders and scholars on how the ICC prosecutes specific individuals over others when it can choose from a vast pool of similar cases. Since the ICC is subject to certain limitations on how many cases it can prosecute given a specific budget and other resources, the decisions on which individuals get formally investigated suggest very serious implications on how impartial the court truly is. That being said, the many criticisms of the court that have been made frequently bring up the ICC's tendency to limit their investigations to one world region. In particular, leaders from Africa and even American presidents have accused the ICC of bias towards their respective regions and have noted the court's penchant for investigating when potential cases in those regions arise. African leaders have frequently accused the ICC of bias against their continent due to the disproportionate number of ICC investigations

on the African continent (Taku, 2013). They argue that the ICC engages in selective justice and infringes on the sovereignty of post-colonial African states (ICC, 2020a). Others argue that since one-third of African states have signed the Rome Statute, the supposed bias is not evident of selective justice but instead simply a byproduct of the high number African member states (Clarke, 2013). Furthermore, the increased amount of conflicts within Africa compared to the rest of the world adds to the argument that the ICC doesn't intentionally signal out the African continent when choosing which cases it investigates. It just so happens that Africa has more conflicts, translating to more cases that may warrant investigation.

American leaders have also pointed direct criticism towards the ICC's selective bias in choosing cases. More specifically, this criticism came in the wake of the ICC's decision to investigate US war crimes that may have been committed in Afghanistan. This caused American policymakers to argue against the court's functions and its intent to prosecute certain cases. Scholars questioned whether the ICC targets potential cases based on their affiliation with the United States military (Krcmaric, 2023). To answer this question, Krcmaric examined how the presence of American troops in a country impacts the likelihood of an ICC investigation (2023). To create his sample, Krcmaric examined cases in the UCDP one sided violence dataset (Davies et al., 2023; Eck et al., 2007), and used the amount of civilian casualties as an indicator to whether the ICC could have plausibly investigated a specific situation. Thus, the cases that the court could have potentially investigated were those characterized as having a greater amount of civilian casualties. Krcmaric also compiled a sample of situations where the ICC does actually open investigations in. Then, he looked at the effect that US military presence had on both samples. Despite the current view from American policymakers, Krcmaric finds no ICC bias against the United States. The estimated effects of US military presence in a given case were

almost identical to zero and did not make the ICC more likely to investigate a certain case over another (2023). Therefore, Krcmaric concludes that US military presence in a given situation has no impact on the ICC's decision to investigate certain cases over others (2023). However, while Krcmaric's study found no ICC bias against US military presence, scholars have found evidence to support that the ICC can be seen favoring incumbent governments over rebel groups in certain civil war conflicts (Wegner, 2015).

Further examination of the ICC's possible bias in case selection can be seen in one particular study looking at the Ugandan civil conflict. In this study, it was argued that the ICC can be seen favoring incumbent governments over rebel groups in civil war conflicts. In the Ugandan case, Wegner claimed that the ICC strengthened the voices within the government of Uganda who called for a military solution through its decision to focus investigations only on the Lord's Resistance Army (LRA), which was considered the group rebelling against the current form of leadership (2015). Moreover, other arguments were made in support of the fact that this clear ICC focus on the LRA isolated the group from receiving any international aid and reinforced the narrative that described the LRA as a crazy terrorist sect (Wegner, 2015).

The ICC has also received criticisms against the prevailing notion that the court operates free from politicization. Put simply, scholars have claimed the ICC does not remain impartial to the political interests of outside actors (Tiemenssen, 2014). These interests usually impact the court most when the ICC is looking into multiple suspects within one conflict situation. These scholars have argued that state referrals of conflict situations to the ICC result in reflecting the preferences of those states (Tiemenssen, 2014). In this case, the potential cases being referred to the ICC have been cases made against individuals that threaten present ruling elites in a certain state. That means that these referrals often conveniently leave out the crimes of the ruling elites

and give detailed descriptions of the crimes of domestic political opponents (Tiemenssen, 2014). In the case of UNSC referrals, scholars theorize that these referrals are limited to states that the major powers feel are undesirable to their own political aims (Tienmenssen, 2014). For example, the UNSC has the power to directly or indirectly prevent the ICC from initiating investigation into individuals that they are allied with. They can do this by refusing to refer potential cases against individuals that fall outside of the ICC's jurisdiction, but still warrant the court's authority due to the severity of the crimes. This is an example of how the major powers of the UNSC and expected political benefits can deter the distribution of justice by biasing the ICC's case selection (Tiemenssen, 2014).

The people making accusations against the ICC about its partiality include not only the leaders of states opposed to the ICC and war criminals who have been charged by the ICC, but also those who support the spread of international human rights norms such as international relations scholars and human rights advocates. They have also expressed worry over the external political influences and strategic interests that may bias the ICC's interventions into certain conflicts. In the instance of the Chief Prosecutor initiating cases, scholars believe that this mechanism of the court leads to more impartial prosecution and should be a more utilized pathway for cases to be selected by the ICC. The OTP subverts external pressures from actors via the gravity criterion that is required for the Chief Prosecutor to consider prior to presenting a case to the Pre-Trial Chamber. This guides the selection of cases and justifies them as of the utmost concern to the international community as a whole, instead of cases that have referred and are of the utmost importance to specific state parties or state leaders (Tiemessen, 2014).

### **Possible Causes of Alleged Bias**

While many scholars have criticized the ICC and its selection bias, others have looked into what could be causing these alleged selection problems to occur. Since the ICC is only able to carry out a few prosecutions per year, the Chief Prosecutor and Pre-Trial Chamber judges have to approve which cases to investigate from a large pool of potential cases. However, scholars argue that the ICC's legal criteria regarding case selection is too vague (DeGuzman, 2012). The criteria puts an emphasis on cases with the most serious crimes. With this criterion, the ICC's selection of particular cases is bound to trigger debate amongst the international community about which cases are serious enough or more deserving to be investigated than others. Furthermore, scholars argue that this debate may call into question the ICC's legitimacy (DeGuzman, 2012). Scholars explain that the solution to this problem with the criteria is that the ICC should select cases based on which cases maximize the court's expressive impact (DeGuzman, 2012). In other words, the ICC should select the cases that would most effectively promote global norms regarding human rights and cases that call for unanimous international agreement as being the most serious or having the most gravity.

Other possible causes that could also be contributing to the ICC's selection bias problem include the limitations of its legal authority in particular cases. Scholars have explained that the ICC has extensive authority which can be defined as an international court's audience expanding beyond its compliance partners to encompass a broader range of actors including civil society groups, bar associations, industries, and legal academics. International courts with extensive authority consistently shape law and politics for one or more legal issues within their jurisdiction (Alter et al., 2015). However, those same scholars have also come to the conclusion that the ICC lacks narrow authority and intermediate authority. Narrow authority exists when only the parties

to a certain conflict take meaningful steps towards compliance with a court's ruling. Narrow legal authority is composed of two elements: the recognition of a legal obligation and the need for a consequential response. The ICC lacks narrow authority since it struggles to enforce the basic requirements of custody over indicted defendants in many cases (Alter et al., 2015). Intermediate legal authority can be seen when international courts have the ability to cast a larger legal shadow that affects the behavior and decisions of other similarly-situated actors. Within the intermediate range of authority, the audiences include potential future litigants as well as government officials who implement the international rules as interpreted by the court. These actors have the power to decide whether to comply with the law as interpreted by the court (Alter et al., 2015). The ICC is very limited in its intermediate authority as its interpretation of the law does not have any direct impact on these potential future litigants to comply with the ICC's interpretations of international law unless the ICC has already started to prosecute them. This is the only time we see the ICC actually influence the behavior of said actors and deter other actors from committing crimes against humanity. Essentially, the ICC's inability to enforce its legal authority on cases limits its capacity to effectively spread human rights norms. Thus, it is reasonable to assume that the ICC would want to select cases based on how much legal impact the court could impose via its rulings and ability to enforce punishments against perpetrators. That is why the ICC could only be picking cases that have garnered more attention and have a better chance of resulting in a conviction.

With the many criticisms being aimed at the ICC regarding its bias and the reasons for this bias, the literature still remains mostly mixed. While many scholars have highlighted there is a selection problem within the court, others have claimed that no such problem exists and that the ICC only investigates cases of the utmost severity and international concern (Smeulers et al.,

2015; Badagard & Klamberg, 2016). There is no clear answer to date on whether the ICC really does display bias towards certain regions with respect to which alleged criminals it chooses to formally investigate. There is also no clear answer as to why this bias occurs or which organs of the court are most responsible. Although, based on the research, it appears that member state referrals may potentially garner a higher likelihood of bias, while cases initiated by the OTP are less likely to garner as much external bias or influence.

The most recent scholarship also does not focus on whether the ICC actually adheres to doing the job it's been mandated to do. In other words, its job is to investigate individuals based on a subjective criterion of gravity that is made by either the OTP staff or the assembly of state parties. Based on this information, I look to uncover some of the internal mechanisms within the court that may be impacting potential case selection and what factors make a case more likely to be investigated by the OTP. These factors could be separate from what is outlined in the articles defining the elements that must be present for the ICC to investigate a criminal situation. With this in mind, I utilize three theoretical frameworks that are frequently applied in international relations in order to theorize which factors could be contributing to the criticisms facing the ICC's suspected selection problem. These three frameworks include realism, liberalism, and constructivism.

### **Theoretical Arguments and Hypotheses**

To untangle the different factors that could be causing the ICC's selection bias, I will use three different theoretical frameworks that are often utilized in international relations scholarship in order to structure my theories and arguments. For my first theory, I examine the role of the



UNSC and how its relationship with the ICC could be influencing case selection. To look at how the role of the UNSC could potentially invite bias, I apply the realism theoretical framework.

The realism theoretical framework posits that powerful states take actions that benefit their own self-interests. Scholars in this school of thought also argue that the ICC is only willing and able to pursue less-powerful individuals and countries (Zvobgo, 2023). In other words, the major powers within the UNSC greatly impact what cases the ICC is most likely to investigate due to their own power and influence within the global community. The court surrenders to powerful states' wants and can only investigate or prosecute states who are weaker. Conversely, the court is not as willing to investigate powerful states for any suspected crimes.

That being said, the court is more likely to prosecute persons that powerful states want prosecuted. UNSC member states could also gain reputational benefits in the international community by referring certain individuals or criminal situations to the ICC, since this shows a country's commitment to upholding human rights. Additionally, the realism framework can also be applied to the theory that incumbents use the ICC to delegitimize their opposition within a specific state, so the ICC is more likely to prosecute rebel leaders than government leaders. This theory has potential merit because the ICC is less able to gather evidence against agents of the incumbent government due to a lack of transparency by high-ranking officials.

The realist perspective when applied to the ICC's case selection shows how member states and the UNSC can utilize the ICC as a strategic intervention to further their own political interests by referring certain cases to the court. If the UNSC refers a case to the ICC, this empowers the court to investigate since it is now getting access to more resources and a bigger budget for cases concerning the UN. By that standard, UNSC referrals limit the ICC's agency as

an independent actor since the court is under much more pressure to investigate UNSC referrals due to UN pressure as well as pressure from the major powers (GIPA, 2017).

The realist explanation can also be observed by the Pre-Trial Chamber's rejection of the Prosecutors' motion to investigate alleged US crimes in Afghanistan. For context, Afghanistan is a member state to the ICC making it legal for the ICC to potentially investigate since the alleged crimes were in ratifier territory (Whiting, 2019). There was reasonable basis to think that the US military may have committed war crimes in Afghanistan, particularly when it came to the treatment and torture methods used on detainees. Ultimately after a change in chief prosecutors, the new chief prosecutor deemed to deprioritize the case made against the US which showed that the ICC was unwilling to investigate or prosecute powerful states. That being said, this narrative may change as the ICC has issued an arrest warrant for Vladimir Putin for war crimes in Ukraine. However, the ICC cannot prosecute Putin or any members of Russia's government for crimes of aggression, which are the most prominent crimes that underlie the war with Ukraine (Zvobgo, 2023). Thus, based on the current evidence, the realist argument regarding the ICC seems plausible.

Another theoretical framework that I use to structure my arguments is constructivism. Constructivists theorize that the most important parts of international relations are shaped by ideational factors which are collectively held. These ideational factors are collectively held beliefs that construct the interests/identities of actors. Constructivism also operates under the assumption that the identities and interests of actors are socially constructed and changeable (Finnemore & Sikkink, 2001). Put simply, the interests and beliefs of actors are what shape institutions or reflect any bias that said institution might have. In the context of the ICC, the staff within the court is only able to prosecute so many cases at once, so the court is less likely to

prosecute a new person if it has initiated more cases in a recent time period. The staff's interests lie in completing investigations that were already opened, thus the court's decisions on who to prosecute may appear biased due to this fact. Moreover, the ICC cannot afford to open too many cases at once because they simply lack the resources necessary to prosecute all the people that may be committing human rights abuses at one time.

Another theory that fits within the constructivist framework concerns existing justice structures that may be prosecuting people who have committed grave international crimes. If that is the case, then the ICC is much less likely to prosecute these people, since they are already facing justice action through an existing tribunal. Given that membership to the ICC is based on whether states choose to ratify the Rome Statute, the court may be deterred from prosecuting people who are already being prosecuted by some sort of domestic tribunal in order to not infringe on a state's sovereignty. However, it is also important to note that domestic tribunals can be used to the advantage of incumbents within a state government, since they are less isolated from state corruption compared to the ICC. Thus, domestic tribunals can be used to manipulate the global justice system to protect incumbents and their loyalists.

Lastly, liberalism is the theoretical framework that aids in organizing my argument regarding the impact of how severe the crimes of the cases are and the amount of attention each case gets from NGOs and HROS. Liberal international relations theorists believe that states can work together to maximize prosperity and minimize conflict (Meiser, 2019). This framework operates under the assumption that actors have a common interest in achieving some goals because it benefits all of them. In terms of the ICC, both state parties and the people working within the court have the common interest to maximize the spread of international norms regarding human rights. For that reason, when the ICC decides on which situations to

investigate, it should be the situations where the most severe crimes are being committed since those are the ones that make the most impact. Hence, ICC scholars in this theoretical framework argue that the ICC only opens investigations of the gravest concern, where many people have died as a result of human rights violations (Smeulers et al., 2015; Badagard & Klamberg, 2016). In this case, the court would be more likely to prosecute individuals responsible for the deaths of a larger number of civilians as opposed to individuals responsible for a smaller number of civilian casualties.

Another theoretical argument that falls under the umbrella of liberalism includes the amount of attention that each case gets from HROs NGOs. HRO and NGO pressure regarding specific people and situations is very important to gauge because naming and shaming can be used as a very effective tool to spur international actors into action. With HROs and NGOs urging the ICC to investigate certain people and shedding light on their crimes to the global community, the court is more likely to take legal action against these accused individuals. This increase in pressure from NGOs and HROs makes the ICC more likely to act in order to appease the international community and confirm its legitimacy of being an international court committed to punishing human rights violations. Therefore, people subjected to HRO and NGO pressure are more likely to be investigated by the ICC over people with no pressure from these organizations.

NGOs and HROs are so effective at pressuring international institutions like the ICC due to their collaborations with other local NGOs and HROs and media news outlets (Murdie, 2013). NGOs and HROs gather information from local media outlets or other local NGOs covering situations across the world. Once they have gathered this information, transnational HROs and NGOs are able to draw more global media attention to the violations occurring in that part of the world. In addition, as more global media attention is being put on these conflicts or situations, it

becomes easier for global news agencies and NGOs to uncover the exact names of the groups and leaders perpetuating the crimes (Meernik et al., 2012). That is how NGOs and HROs are able to bring cases onto the ICC's radar and agenda. These organizations then proceed by putting normative pressure on the court to act once they know that the ICC is aware of what is going on.

To summarize, I utilize three different frameworks frequently mentioned in international relations scholarship to structure each of my theoretical arguments. Under realism, I posit that the ICC is influenced by powerful states' interests. These states include the US and the states within the UNSC. Also under realism, I speculate that incumbents use the ICC as a mechanism to delegitimize their domestic opponents since it's within the interests of the state's current regime. Under the constructivist framework, I propose that the ICC's caseload within a given year is a major factor that determines whether they prosecute certain people over others. If the court's caseload is too heavy, then they are less likely to initiate more new cases. I also posit under constructivism that the ICC is deterred from prosecuting people already being prosecuted by an existing justice structure. Lastly, under liberalism, I argue that the ICC chooses who to prosecute based on the scale of civilian casualties a person is responsible for. Under the same framework, I also argue that NGO and HRO pressure makes the ICC more likely to prosecute an individual. Stemming from these theoretical arguments are seven hypotheses predicting the pattern of ICC case selection are as follows:

H1 (NGO Pressure) : The ICC is more likely to prosecute a person if they are subject to increased international attention/pressure from NGOs and HROs.

H2 (Severity of Crimes) : The ICC is more likely to prosecute a person if they have committed more severe crimes resulting in a large amount of civilian deaths.

H3 (UNSC Interests) : The ICC is more likely to prosecute a person if prosecuting that person aligns with the interests of the UNSC.

H4 (US Pressure): The ICC is more likely to prosecute a person if prosecuting that person aligns with the interests of the US government

H5 (Deference to Sovereigns) : The ICC is more likely to prosecute a person that is not part of a state's government.

H6 (Deference to Alternative Tribunals): The ICC is less likely to prosecute a person who is already being prosecuted by an existing criminal tribunal.

H7 (Caseload): The ICC is more likely to prosecute a person if the court is not dealing with a heavy caseload within the same time period.

## Research Design

### Unit of Analysis and Sample

I construct a dataset with one observation per person  $i$  in year  $t$ . The people in my sample include individuals who could have been prosecuted by the ICC and those actually prosecuted. The list of people prosecuted includes those issued an arrest warrant or summons, as well as those whom the ICC initiated a preliminary hearing against, which shows that the court was in the formal process of gathering evidence against them (ICC, 2024a). The critical challenge is reliably identifying individuals who could have been prosecuted but weren't. Like Krcmaric (2023), I draw on UCDP one-sided violence dataset (Davies et al., 2023; Eck et al., 2007) to generate a set of cases of intentional attacks on civilians by governments and formally organized armed groups. Krcmaric used this list of political groups committing such war crimes or crimes against humanity at a severe enough threshold<sup>1</sup> and examined all the country-years in which such groups committed that level of violence. This thesis extends this method further by

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<sup>1</sup> For UCDP, this is 25 civilian deaths in a given year

identifying every individual person leading these political groups in those years, along with other high officials in those groups. The data generating steps were as follows:

1. Name/location of group actor and year of one-sided violence from UCDP (Davies et al., 2023; Eck et al., 2007).
2. Research name(s) of top leader and high officials of each group, by searching for group name and reading articles and reports about that group's activities in that period, looking for named leaders and officials. The people who count as officials are ones whose names come up most frequently in NGO reports and news articles regarding certain groups as well as the people given specific titles or designations in relation to their rank within a group (for state governments and armies - secretary of state, prime minister, captain, general). For example, Adnan Abu Walid al-Sahrawi is frequently mentioned in news articles about the Islamic State in the Greater Sahara. He is also mainly referred to as the leader of this group and not as a soldier or co-leader. The main sources I looked at to find the names of these people are the US State Department, Human Rights Watch, and Amnesty International. To find the names of the people not in NGO or US State Department reports, I first researched articles about the group, then added people who were often mentioned by multiple news outlets as members. The main sources I used for this group of people include the Africa Report, Africa News, Al Jazeera, Reuters, Sahara Reporters, , and UN News (for a full list of persons and sources used to identify their name, see Appendix).
3. Time period:

- a. The first year for each person is either 2002 (when the Rome Statute was put into effect) or the first year after 2001 a group they were active in is listed in the UCDP one-sided violence data (Davies et al., 2023; Eck et al., 2007), whichever comes last.
- b. The last year for each person is either (i) 2022 (the final year of data on ICC action in this analysis) or (ii) the person's confirmed year of death, because ICC does not prosecute people who cannot be present at trial or (iii) the year of initiation of ICC action taken against that individual, as per one of your various dependent variable measures.

Using this method, the primary analyses include 568 persons, 43 of whom the ICC took action against and another 80 of whom died before 2022 with no ICC action. The dataset contains 7,520 person-years, or an average of 13.2 years each.

### **Dependent Variables**

Broadly, my dependent variable is whether the ICC takes action against a person  $i$  in year  $t$ . I measure this in one of two principal ways: opening an investigation or initiating a formal prosecution. An investigation is opened when the ICC begins collecting evidence against a person in the form of a preliminary examination/hearing, while initiating a formal prosecution is when the ICC issues an arrest warrant or summons (ICC, 2020c). Accordingly, the variable  $Investigation_{i,t}$  is 1 if ICC announced a newly opened investigation against person  $i$  in year  $t$ ; 0 otherwise. For example, if my data included the year 2023 (which it does not),  $Investigation$  would be a 1 for Vladimir Putin in that year, given the ICC's declaration to investigate him after his crimes in Ukraine (ICC, 2023). The variable  $Prosecution_{i,t}$  is 1 in the year the ICC conducts the person's official preliminary examination ; 0 otherwise. Prosecution by this measure



generally follows investigation initiation by an average of 19.6 months, meaning that a couple more years are included in the sample per person for the analysis of *Prosecution* as opposed to *Investigation*.

### **Independent Variables**

Severity of crimes. One-sided violence dataset (Davies et al., 2023; Eck et al., 2007) includes the variable, best fatality estimate, for the number of civilians killed by a given political group in a given year. Each person in my dataset is matched to one or more groups in the UCDP file. My variable, *Severity of Crimes<sub>i,t</sub>* is the (natural log of one plus the) cumulative sum of the killings attributed to person *i*'s group(s) in this source, starting from 2002, up through year *t*. By the year of exit from the sample (year of ICC action, death, or 2022, whichever came first), the groups an average sample individual was affiliated with were responsible for a best estimate of 1,217 cumulative civilian killings, though the values ranged from 25 to 39,353.

The other independent variables I will be using to test my hypotheses include HRO or NGO pressure, UN sanctions, US government pressure, another tribunal prosecuting, being a government official, and a person's position within the group. Each of these variables, except the person's position within a group, is a binary outcome, either a person was subject to these variables or they were not.<sup>2</sup> HRO and NGO pressure is if a person is mentioned in an HRO or NGO report to be committing serious human rights abuses. In other words, if HROs and NGOs are urging the ICC to investigate this person or spreading information about their crimes to the global community, then they meet the criteria for having NGO or HRO pressure being put on them. HRO and NGO Pressure was found on world reports by Amnesty International, Human Rights Watch, Ref World, and the UNSC (for full list of sources refer to Appendix). 329 of the

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<sup>2</sup> US pressure and the action of a different tribunal are also measured on a year-specific basis for person *i*; NGO pressure and UN action are not time varying by person, however.

568 persons in the sample were singled out individually by HRO NGOs in this way; the others were not.

If the UNSC has imposed special restrictions on that person's economic dealings, travel, or diplomatic relationships with other countries, then that person qualifies as being subject to UN sanctions. The UNSC also formally announces which individuals have been put on their sanctions list and for what reason. Online the UN provides their entire sanctions list. (UNSC, 2024). 50 of the 568 people have a 1 for this UN Sanctions variable.

US government pressure comes in the form of sanctions by the US Department of the Treasury or if the US has issued an executive order to kill that person. For many of the designated terrorists in my dataset, the US issued an airstrike to kill that person. A designation typically came from the US Department of the Treasury and an issued airstrike usually came from the US State Department. For instance, Sadio Camera was designated by the U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) for facilitating the expansion of the Wagner Group's activities in Mali (USDT, 2023). 200 of the 568 were individually singled out by US pressure of these types.

The another tribunal prosecuting variable represents whether another criminal tribunal that is not the ICC legally acted against the person in question. This tribunal could be a domestic court trying the individual themselves or even a special criminal tribunal that was created for a certain situation. This would include people like Hafiz Muhammad Saeed, who was prosecuted by a domestic Pakistani court, found guilty, and jailed for a substantial period of time for his group's role in the 2008 Mumbai terrorist attacks (Bukhari, 2022). Most of the information I got for people who were being prosecuted by another tribunal were from Reuters, Al Jazeera, and local news outlets such as Premium Times Nigeria, The Cameroon Journal, India Today, and Iran

Wire (for a full list of sources refer to Appendix). The first two news agencies cover global news, while the last four focus on their respective states. This variable, Tribunal, is 1 for 129 of the 568 persons in the sample.

The being a government official variable indicates if a person is an official or member of their state's government. This variable is important because previous research shows that the ICC may display a bias towards prosecuting opponents of the current governments. Former President of Haiti Jean Bertrand-Astridew was part of Haiti's then-government. His term was marred by many human rights abuses and he himself was accused of purposefully not addressing them (HRW, 2020). I found information about who was considered a government actor mainly from Human Rights Watch, Amnesty International, UN News, and the US State Department's reports (for a full list of sources see Appendix). 244 of the 568 were government leaders or agents; the others, not.

A person's position within the group shows how much control a person has over a group. Basically, this variable is how important a person is to their group based on where they rank in the organization's leadership hierarchy. To be a 1 in the dataset, a person must be a top leader of their group. Musa Hilal, leader of the Janjaweed, would be considered a top leader since the group publicly acknowledged him as their most prominent leader and spokesperson on the global stage (HRW, 2004). Similarly, Abdul-Malik al-Houthi is often cited as the father and leader of the Houthi Movement group (HRW, 2024). To be a 2, a person is not a top leader, but just below the top leader. This includes people who are right hands to their top leader as well as anyone ranked just below a top leader. Twos would include people like Paresh Baruah who is considered the co-chairman of the United Liberation Front of Assam, and the second-in-command of the FARC group Victor Julio Suarez Rojas (Times of India, 2013; Bajak, 2010) People who are

threes in the dataset are all the other members of a group and anyone affiliated with that group that is not directly a member of it. This includes top regional commanders or footmen who mostly carry out the orders given to them by the top leaders or their right hands. For example, threes would include Adnan About Hilweh who served as a regional general within the Syrian government's military and Aisha Keita Conneh who was affiliated with the Liberians United for Reconciliation and Democracy (LURD) group through her husband who was the top leader (Blinken, 2022; NZ Herald, 2020) The dataset includes 253 top leaders, 201 high officials of rank 2, and 114 members of lower ranks or affiliates.

### **Statistical Models**

I first report the bivariate association between my independent variables and the ICC prosecution measures in the form of a cross tab and some simple graphs. The cross tab will reflect each of these associations with 3 models representing the 3 different prosecution measures used.

I evaluate the hypotheses more systematically using a Cox proportional hazards model of the time until a person is investigated (or, alternatively, prosecuted) by the ICC, as a function of the severity of war crimes committed by the person's group up to that point, along with the other various independent variables: the powerful state's interests (UNSC sanctions and US government pressure), deference to sovereigns, and deference to other tribunals prosecuting.

The Cox proportional hazards models of the duration in years, from a person's first recorded one-sided violence killings until ICC action against them is initiated, use the equation

$$h(t|x) = h_0(t)e^{(\beta x_i, \square)}$$

where  $h_0(t)$  describes the shared baseline hazard at duration  $t$  years since the start year,  $t=1$ , for that person;  $x_i, \square$ ) represents the vector of covariates for person  $i$  at duration  $t$ ; and  $\beta$  is a

vector of coefficients. The cumulative hazard  $\hat{H}_{(t)}(\square)$ , calculated with the  $\beta\hat{s}$ , gives the estimated probability that the ICC will initiate action against person  $i$  in year  $t$ , given specified  $x_{(t),\square}$  values.

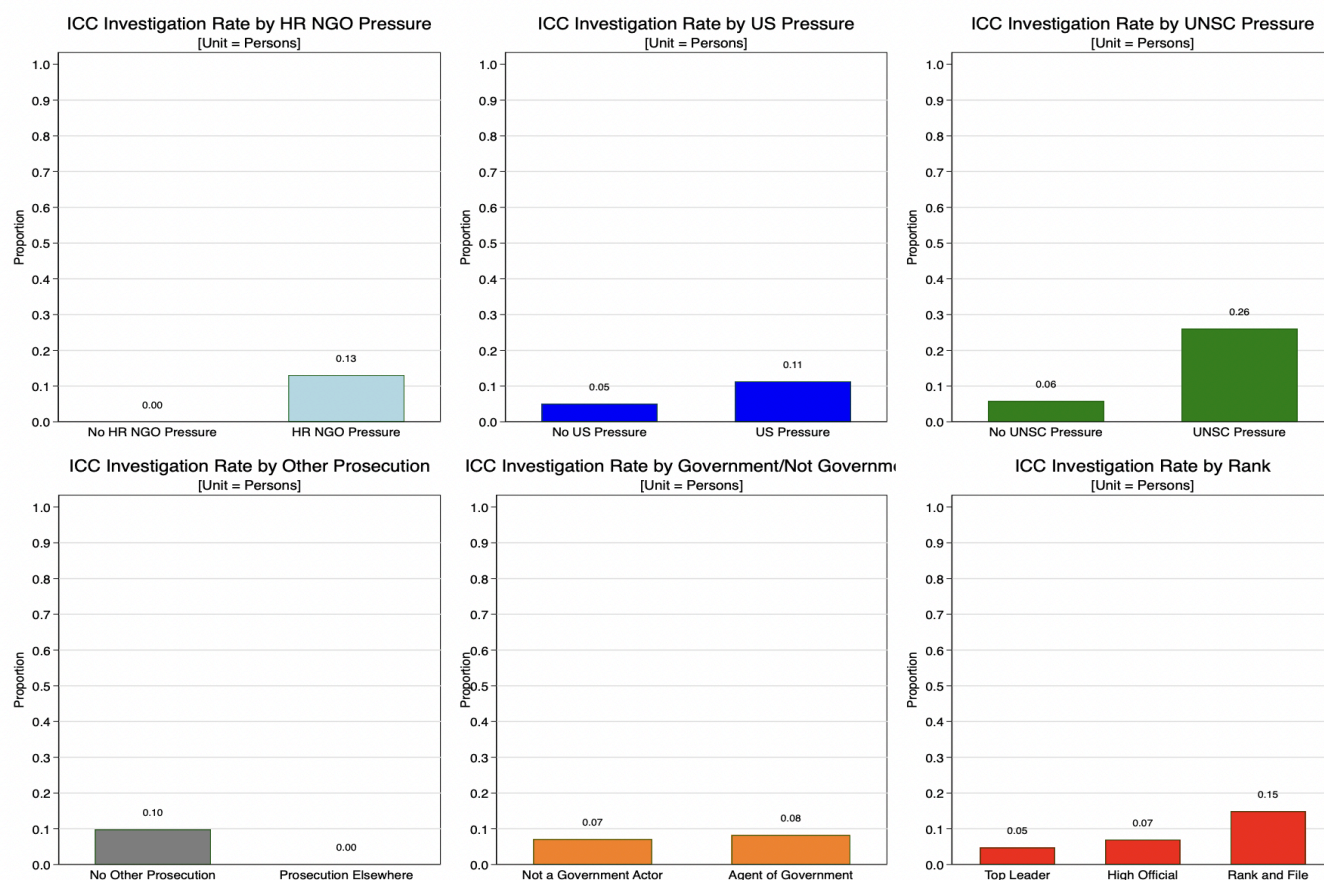
The main models in Table 1 below include all the explanatory variables and alternately examine their impact on two different indicators of ICC action: the opening of an investigation (Model 1), and the initiation of formal prosecution (Model 3). As is well known, Cox models rely on the assumption of proportional hazards, i.e., that the impact of any given covariate is proportionally the same regardless of how much time has passed since initial 'exposure' (the year of first war crimes committed since ICC jurisdiction was active). Model 1, but not Model 3, shows some possible signs of non proportional hazards specifically in the killings variable. Hence I estimate a third model (Model 2), also focusing on the investigation outcome (like Model 1), but allowing the killings variable to have an additional, time-varying coefficient.

## Results

First consider the bivariate associations of each explanatory variable with ICC action. As Figure 1 below shows, at the level of persons ( $n=568$ ), 13% were subject to ICC investigation and HRO and NGO pressure. None were investigated and not pressured by NGOs or HROs. This variable stands out as it shows that HRO and NGO pressure is not sufficient for the ICC to act, but absolutely necessary. In the other direction, Figure 1 also shows that, at the level of persons ( $n=568$ ), 0% of the people investigated were also being prosecuted by other tribunals. This reveals that if another tribunal is prosecuting a person, then this makes it absolutely necessary for the ICC not to act or bring any legal proceedings against that person. US government pressure also appears to have some small effect as more people that are being pressured by the US government are also being investigated by the ICC (According to Figure 1, 11% compared to

5%). Whether a person is part of the government appears to have no impact as both proportions of people appear almost equal (7% of people who were not government actors were investigated and 8% of people who were not government actors were also investigated). UNSC sanctions seems to have a big impact as 26% of those people that were investigated were also sanctioned by the UNSC, compared to only 6% that weren't. Lastly, the rank of a person within their organization also looks to influence ICC investigation rates. People who were simply footmen on rank and file members in an organization were investigated by the ICC about twice as often (15%) compared to top leaders (5%) and other high ranking officials (7%). The last variable I looked at was the averaged investigated person's group number of committed killings per year. The average investigated person's group had committed a cumulative 1,158 killings, versus 1,220 for those not investigated – seemingly not large difference, and certainly not working in the direction of inducing ICC action, at least in this simple bivariate description sense.

Figure 1: The Bivariate Associations of Each Explanatory Variable with ICC action



## Model

To test all of my hypotheses, I use a survival or duration model regression. I use this technique to run my multivariate regression because it adds more richness to my analyses since it does not just see if the court prosecutes but also when they prosecute. Put simply, this technique also accounts for how long it takes the ICC to prosecute/investigate after a person has committed their crimes.

First, I consider the impact of the severity of crimes measured by the log of cumulative killings. In Model 1, this variable's coefficient (not hazard ratio) is positive and statistically significant at two-tailed  $p < 0.05$ . Individuals whose groups have killed more civilians are

statistically more likely to be investigated by the ICC, consistent with H[2]. Notably, and consistent with H[3], the ICC is indeed much more likely to investigate persons targeted by UNSC sanctions. However, the US pressure variable has no statistically significant impact one way or the other. Nor does the ICC's recent caseload. Interestingly, the ICC is far more likely to open an investigation against lower-ranked individuals within a group than against higher officials, and is least likely to investigate the top leaders of such groups. But, surprisingly, the ICC does not appear to be particularly deferential to persons in government as opposed to rebel groups. Finally, the two variables with the strongest impact in Model 1 are what might be called 'perfect predictors': HR NGO pressure and, in the opposite direction, prosecution by other bodies. Since no person is investigated that is not targeted by NGO pressure (even though only 13 percent so targeted are investigated), this variable's coefficient estimate is rather unstable, and the key takeaway is that it is virtually a necessary condition for investigation. Working the opposite direction, we can say the same about Other Prosecution, which, if it occurs, virtually guarantees that a person will not be subjected to an ICC investigation.

Broadly speaking, these same findings apply if we focus on a formal prosecution rather than investigation as the dependent variable, as in Model 3. There, killings have a substantially more modest impact but are still statistically significant, and US pressure takes on more revealed importance than it does for the opening of an investigation. The variables otherwise work in similar ways as before.

For Model 1, a standard test of the proportional hazards assumption (Grambsch and Therneau 1994, see also <https://www.rdocumentation.org/packages/survival/versions/3.5-8/topics/cox.zph>) reveals no basis for violation of that assumption for the overall model or any single covariate, but comes



closest to rejecting the null for the killings variable ( $p=0.16$ ). Model 2 thus includes an extra term interacting the killings variable with the duration at time  $t$ , to determine if (and correct for bias resulting from the possibility that) the killings may have a decreasingly positive impact on the ICC's investigation decision, the longer the ICC has gone without acting against the person in question since their group started the killings. This interaction is itself statistically significant and has a negative coefficient. A test of linear combination reveals that, if the ICC fails to open investigation by about 6 years after the onset of killings, the cumulative amount of killings then has no statistically discernible impact on the odds of an investigation starting at that point. That is, these deaths seem to affect the odds of ICC action early on, but with diminishing impact over time.

Table 1: Estimates of Several Cox Survival Models

	Dependent variable:		
	ICC Opens Investigation (1)	ICC Prosecutes (2)	ICC Prosecutes (3)
Government Actor	-0.307 (0.365)	-0.327 (0.368)	-0.215 (0.376)
Rank 1	-1.621*** (0.401)	-1.613*** (0.401)	-1.652*** (0.395)
Rank 2	-0.995** (0.366)	-1.007** (0.366)	-1.113** (0.369)
HR NGO Pressure	20.477*** (4,499.8)	20.473*** (4,473.1)	20.377*** (4,590.4)
US Government Sanction	-0.596 (0.456)	-0.584 (0.455)	0.897* (0.386)
UNSC Sanctions	1.890*** (0.458)	1.883*** (0.457)	1.090* (0.465)
Prosecuted by Other Bo	-19.627*** (6,744.407)	-19.638*** (6,704.669)	-19.806*** (6,119.670)
ICC Caseload (t-1)	0.037 (0.040)	0.038 (0.040)	0.070 (0.070)
Ln Cumulative Killings (1000s)	0.709* (0.244)	1.355** (0.583)	0.504* (0.224)
TVC(Ln Cumulative Killings)		-0.154* (0.135)	
Observations	7,407	7,407	7,520
R2	0.014	0.014	0.013
Max. Possible R2	0.069	0.069	0.067
Log Likelihood	-215.687	-214.907	-211.132
Wald Test	12,238.260*** (df = 9)	12,347.430*** (df = 10)	10,541.280*** (df = 9)
LR Test	101.003*** (df = 9)	102.562*** (df = 10)	101.540*** (df = 9)
Score (Logrank) Test	96.117*** (df = 9)	98.486*** (df = 10)	94.135*** (df = 9)

Note:

\*p&lt;0.05; \*\*p&lt;0.01; \*\*\*p&lt;0.001

### **Robustness and Sensitivity Analyses**

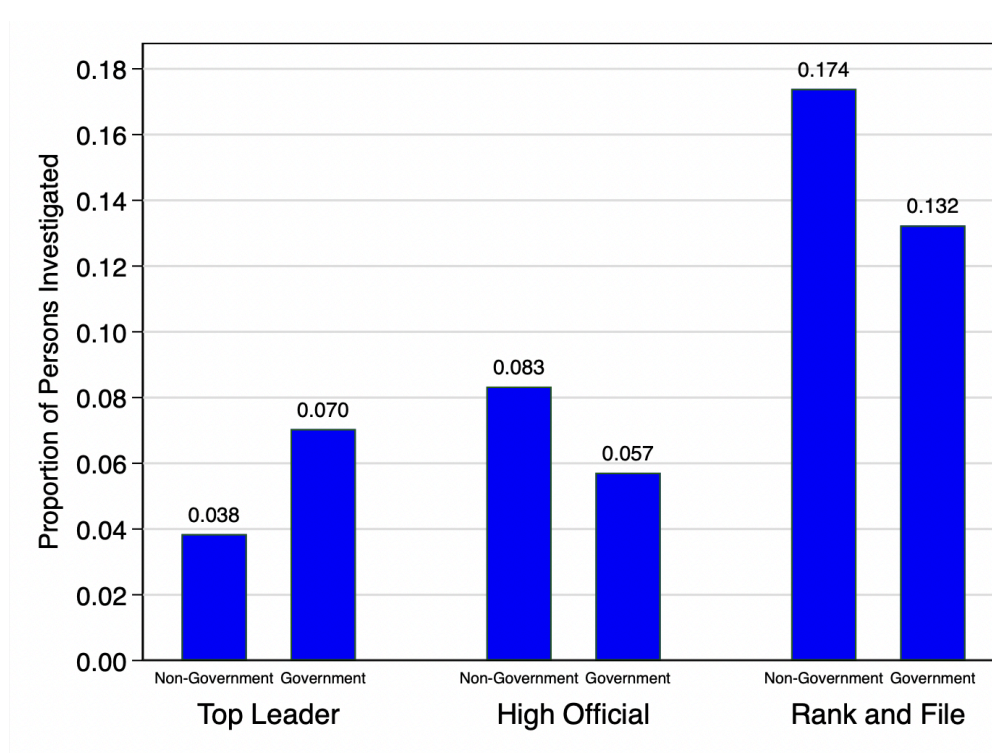
By dropping the rank 3 people from the analysis, I can account for the potential reasons as to why I find the ICC is more likely to prosecute them rather than higher ranked people in groups. For instance, the ICC might find it easier to gather more information or evidence against individuals ranked lower in an organization due to their increased visibility in the media. Higher ranked individuals may be more insulated and protected from media scrutiny and NGO monitoring. Thus, by rerunning the analysis and omitting rank 3 persons, I can see if my original results regarding rank 1 and rank 2 people still hold up. The results of this regression show that my original results hold up and that being ranked 1 or 2 in an organization does not make the ICC more likely to prosecute. The results show no significance comparing only rank 1 and rank 2 members with ICC investigation and prosecution rate.

I ran another analysis to see whether ICC action against government versus non-government actors is contingent on rank. A result supporting this would mirror the expectations of the existing literature regarding the ICC's bias towards prosecuting non-government officials. Perhaps the ICC is more likely to prosecute top leaders of non-government groups as opposed to top leaders of a government. To examine this potential result, I look at a bivariate descriptive graph of how rank and government status interact with each other in relation to ICC investigation decisions. According to the graph (Figure 2), the ICC is not any less likely to act against government top leaders than non-government top leaders – if anything, the opposite looks to be true. The ICC appears to be prosecuting more government top leaders than non-government top leaders. For rank 2 and rank 3 people, the ICC does appear to

prosecute more non-governmental people, but the difference is very small. These results mirror my previous results regarding the ICC's impartiality on whether a person is a government actor.

Lastly, I ran an additional analysis to see if ICC choices have evolved over time. In particular, I wanted to know if having different chief prosecutors impacts ICC choices or our original results in any way. There is a chance that the results of my different independent variables could be changed given differing chief prosecutors. To do this, I add a set of dummy variables indicating whether each of the three CPs was active in year  $t$ , and then I re-run Models 1-3 and to see if anything changes. The results indicate that the ICC was more likely to open investigations during Chief Prosecutor Ocampo and Chief Prosecutor Khan's tenure. During Bensouda's time as chief prosecutor, the ICC was not more likely to open investigations and prosecutions. The results also show that during Khan's tenure, the ICC was also more likely to prosecute individuals. ICC prosecutions were not more likely to occur during Ocampo's tenure

Figure 2: Bivariate Graph of Rank and Government Status Compared with ICC Decisions



## Discussion

Based on the results, many interesting patterns occur. We see that government officials are not shielded from ICC prosecution simply due to their status as incumbents within a state government. We also see that the ICC is sensitive about prosecuting the top leaders of organizations possibly due to the potential political backlash. Moreover, HRO and NGO pressure as well as UN sanctions seem to play a big role in increasing the chances of the ICC opening an investigation, and other judicial tribunals prosecuting diminishes those chances. The ICC also appears to prosecute people who are responsible for the most civilian casualties, but this factor's impact decreases as more time passes (after about 10 years). Lastly, the caseload of the ICC at a given time appears to have no statistically significant effect on the likelihood of initiating an investigation.

Since the ICC is not sensitive to prosecuting government actors, then previous research that accuses the court of going harder on rebel leaders is put into question. More specifically, this research includes Wegner's arguments that claimed ICC favoritism towards government actors (2015). While incumbents do appear to be more protected perhaps due to their ability to hide more of their transgressions, the ICC still prosecutes them at a likelihood similar to that of people who are a part of domestic opposition groups. Based on the results of my regression, whether a person is a government actor is not a statistically significant predictor on the ICC's investigation rate. This means that the ICC is impartial to whether a person is a government actor when they decide who to prosecute. It indicates a lack of ICC bias in favor of government actors

and counters Wegner's argument. However, the ICC does seem to be sensitive to prosecuting the top leaders of groups.

The ICC is not as impartial when it comes to deciding on which members of an organization to prosecute. The ICC is more or less likely to prosecute a person depending on their rank within a group or organization. ICC prosecution of top leaders may garner more political controversy and backlash that could potentially lead to many unintended consequences. For instance, the prosecution of the top leaders of state governments could destabilize a regime or country leading to more conflict and human rights abuses. As a result, the ICC is more likely to investigate the footmen or rank and file members of a group or government. Additionally, prosecuting the top leader of an organization could be a lot more difficult than prosecuting lower-ranked members because of a lack of evidence. It's much harder for tribunals to prosecute people who are top leaders of a group because evidence of their crimes may be buried and hidden to avoid any kind of punishment or retribution. Therefore, the rank of a person within a group does affect whether the ICC is going to investigate them. This result displays ICC bias in favor of prosecuting lower ranked members of a group.

Another important result from this study that indicates some form of ICC bias is when other tribunals also prosecute a person. This circumstance seems to completely bias the ICC from choosing that specific person to prosecute no matter how severe their crimes might be. While it may seem reasonable for the ICC to refrain from prosecuting a person if their own domestic tribunal is already prosecuting, people might be using these domestic courts as a tool to specifically dissuade the ICC from also investigating them. This strategy may be implemented by leaders in a state government to show that their own domestic court is already investigating their alleged crimes. However, there is a higher chance of these leaders corrupting and biasing their

own investigations due their domestic nature. Additionally, domestic investigations are more insulated, meaning that corruption can go undetected by the global community in order for prominent leaders to avoid facing punishment.

When it comes to how severe or grave a person's crimes are, the ICC does appear to be without bias and prosecute only the people with the most civilian casualties. Nevertheless, the impact of this variable declines significantly after time passes most likely due to the fact that people may forget about the person's crimes or their case isn't as much of a priority anymore. This form of bias is discouraging to know as it indicates how some top criminals may be skating by the radar and getting away with their crimes simply due to time making their cases less important.

Powerful state interests were also an important predictor of an ICC investigation. In particular, UNSC sanctions increased the likelihood of an ICC investigation. This result shows how the ICC is responsive to collective pressure from powerful states. It also shows that when the UN targets a specific individual, the court is more urgent to act and bring legal action against that person. However, when I tested the impact of pressure from the US government only, the ICC was not more likely to investigate. Thus, these results exhibit that the ICC is insulated from US government pressure, but not to collective pressure from powerful states (UNSC) and the UN.

The impact of HRO and NGO pressure functioned similarly to UNSC sanctions since both were statistically significant predictors of ICC investigations in my regressions. According to my results, when a person is subject to HRO or NGO pressure, then there is a higher likelihood of the ICC opening an investigation. This result is shown in Figure 1 since it shows that every prosecuted individual has also been subject to HRO or NGO pressure.

That also means that the large coefficient seen in the results cannot be used to gauge just how big of a predictor this variable really is since no data regarding persons that have been prosecuted but haven't had HRO or NGO pressure. Thus, while HRO and NGO pressure appears as a very accurate way of predicting who the ICC prosecutes, its degree of influence cannot be measured accurately.

### **Limitations**

While these results display an accurate analysis of the data that I have gathered, there were some caveats in the method I used to collect the data as well as how I captured the variables of interest. For example, there were 16 groups in the UCDP dataset that I could not find the leaders or members of. These group's leaders were labeled as "John Doe" in my dataset and did not get a person who could have been prosecuted by the ICC. This caveat comes with my method of looking for group members from HRO and NGO reports and from news articles. These sources sometimes don't document the specific names of members, especially for groups that are only active in a region of the world where technology is scarce. Additionally, there were two people who were prosecuted by the ICC (Al Hassan Ag Abdoul Aziz and Ahmad Al Faqi Al Mahdi) that were omitted from the analysis because their groups did not match the UCDP one-sided violence dataset (Davies et al., 2023; Eck et al., 2007). Instead, their groups matched the UCDP non-state violence dataset that documented conflicts where governments were not part of either side.

Moreover, my results regarding people being prosecuted by other tribunals could be subject to influence by which countries have ratified the Rome Statute. It may be the case that for some people, domestic tribunals are the only prosecution that they can be legally subjected to since the ICC does not have the total jurisdiction to prosecute people from countries that have



not ratified the statute. Only under special circumstances, like UN or domestic referrals, can the ICC prosecute individuals from countries that have not ratified. Thus, the ICC may not legally be able to prosecute certain people that I have included in my sample due to limitations regarding their jurisdiction. This is an important caveat because it shows that while the ICC should function to investigate all people committing grave human rights crimes, there are instances where the court is also subject to limitations and is simply not able to prosecute certain people.

Another limitation of this study is that my sample includes a lot less people who were ranked a 3 within their organization compared to the amount of people who were ranked a 1 or a 2. According to my descriptive statistics only 114 people were identified as 3 in their group compared to 253 top leaders and 201 high ranking members. Thus, more threes should have been identified in my sample to make each of my rank groups more equal. However, I account for this limitation by dropping all of the ranked three people in my analysis and seeing that my original results remain unchanged. The ICC is not more likely to prosecute top leaders, even without the rank three people in my analyses.

This study also does not address the most prominent accusation of ICC bias. The accusation of whether the court is biased against prosecuting people from Africa. Since the court has only prosecuted people from Africa so far, this variable functions as perfect. That means that there is a direct indication of ICC bias against African because no other people from different countries have been prosecuted by the court thus far. For us to statistically test whether there is a higher likelihood of the court, the ICC would need to prosecute more people from different parts of the world. There are some ICC cases that prosecute individuals from outside Africa in the 2023-2024 period, so the chance to test for ICC bias against Africa may be possible at a later date.

Lastly, another area of this research that would have been helpful to examine, but wasn't, involved the geographic locations of each conflict. I should have linked the people who could have been prosecuted by the ICC with the places where all their crimes were being committed. By doing this, I could have controlled for the type of political regime in each state and relations between the government and the great powers of the UNSC. However, this analysis was not possible to accomplish due to time constraints in connecting the conflict groups with specific places since most of these groups were operating across multiple locations.

### **Implications and Questions**

With all that being said, these results raise some very important questions and implications. Mainly, with these sources of ICC bias that I have identified, to what degree do they really impact the ICC's case selection process? Now that I know which of my independent variables are significant in predicting ICC investigation/prosecution, which of them play the biggest role in influencing who the ICC decides to prosecute. It's difficult to tell from the coefficients which variable makes the biggest impact since in this study it would be NGO or HRO pressure. However, because everyone that was prosecuted by the ICC was also subject to NGO or HRO pressure, the impact of this variable is once again hard to determine. If the ICC were to prosecute people that were not subject to NGO pressure, then we could determine just how big of a predictor this variable really is.

Furthermore, my results indicate that the ICC is unbiased when it comes to prosecuting government actors, which counters the prevailing literature that the ICC is easier on government actors. This result warrants further research in the future to see if the ICC remains unbiased when it comes to prosecuting government actors. On the other hand, the results that came from another tribunal prosecuting stays consistent with the current literature on the ICC's limited jurisdiction

in countries. The ICC can only prosecute through UN referrals or if the country decides to refer the situation to the court. Otherwise, the ICC cannot prosecute situations in states that have not ratified. The court does not function to impose on another state's sovereignty which is why when a state tribunal decides to investigate a specific person, the ICC is not likely to also launch an investigation into that person. The ICC will only step in if the state refuses or fails to use its criminal justice system to prosecute (Bharadwaj, 2003)

My results also imply that the ICC's prioritization of people responsible for a large number of civilian killings is most evident right when they first happen. However, as time passes, the ICC seems to forget about these people's civilian casualties and moves to prioritize more recent cases. This result shows how there might be a recency effect influencing the ICC's prosecution decisions. This effect may be due to the fact that other people's crimes are being more emphasized on the global stage by NGOs and news outlets, and people's attention is more focused on newer cases. This phenomenon warrants more research to uncover why the ICC tends to forget about older cases with severe crimes in favor of newer ones.

Some other open questions and problems include how the ICC's practices may have evolved over time in response to the negative criticisms surrounding their slow action on certain cases. Public criticisms from media outlets and NGOs may have prompted the ICC to be more swift and efficient in taking action against certain people who are responsible for committing wide varieties of human rights abuses. In particular, these criticisms have definitely prompted the current chief prosecutor, Karim Khan, to take action against top leaders of governments, like Putin, who have committed very severe crimes in recent years. Moreover, pushback from states and regional organizations opposing ICC action against their leaders has also forced the ICC's practices to evolve. For example, in response to the ICC investigating US personnel operating in

Afghanistan and Palestine, the US government issued a sanction against the then-chief prosecutor Bensouda (HRW, 2022). The US government's pushback against the court impeded their investigations of both situations and made it near impossible for the ICC to gather any information on who was truly responsible for the crimes being committed. This pushback kept high ranking US government officials protected from being held accountable by the court.

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