

The Limited Prospects of Deterrence by the International Criminal Court: Lessons from Domestic Experience

The preamble of the Rome Statute establishing the International Criminal Court (ICC) states that the parties are “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes.”¹ Theoretically, there are multiple ways in which the ICC could prevent crimes. It could, for example, incapacitate abusers through imprisonment, or could impose sufficient punishment to lessen the chance of revenge attacks. From the founding of the ICC, though, supporters have also stressed that prevention could come through deterrence of future abuses.² The principle of deterrence is that no rational actor will commit an abuse if the perceived costs of that action exceed the perceived gains from the action. The ICC’s focus on deterrence is demonstrated in the first *Report of the International Criminal Court to the United Nations* which states, “By punishing individuals who commit these crimes, the Court is intended to contribute to the deterrence of such crimes.”³ Additionally, the report asserts, “The establishment of the International Criminal Court was a historic development in efforts to hold accountable perpetrators of the most serious international crimes and to deter such crimes.”⁴ Furthermore, Leslie Vinjamuri has noted that, over time, ICC supporters have put more stress on arguments of deterrence and other such “instrumental purposes of justice,” rather than on the “moral obligation or a legal duty to prosecute the perpetrators.”⁵

The ICC now has over 120 member states that have accepted ICC jurisdiction over their countries and citizens covering crimes occurring after 2002. This broad jurisdiction should give the ICC a greater deterrent effect than previous ad hoc tribunals whose limited jurisdictions meant violators could gamble that their actions would never come under international review. The deterrent effect should be strongest among member states, but since the UN can refer cases

of non-members for investigation, a strong ICC in theory also could deter non-members. Some scholars and experts believe, even with limited specific evidence, that there should be a default assumption that deterrence will work, because humanity's core rationality means that "the *more* [emphasis in original] reasonable claim surely seems to be that punishment exerts a deterrent effect."⁶ Unfortunately, these hopes have not translated into reality. There have been recent massive human rights violations, for example, in Syria, Burma, and Turkmenistan, as well as ongoing violations in Uganda, Sudan, and Libya, despite ICC investigations and indictments in those cases. These facts demonstrate that the ICC has had only a minimal deterrent effect in its first ten years of existence.

This limited deterrent effect is in line with what many academics from a range of backgrounds predicted. These scholars argued that politicians and ICC supporters were optimistically exaggerating the deterrent impact of international courts.⁷ These and other scholars fall into two camps: those who feel that the realities of the court and the international system mean that the ICC will never have a significant deterrent effect, and those who argue that deterrence could increase in the future as the court matures⁸ or implements specific institutional reforms.⁹

The basic dispute over whether the ICC can have a deterrent effect and the secondary question of whether institutional reforms could significantly increase future deterrence show the importance of further exploring the logic of effective deterrence. Significant insight can be gained by applying the lessons learned from the broad literature in criminology, legal studies, psychology, economics, and other fields that have examined the effectiveness of deterrence in the domestic setting. Most writings and commentaries from all sides of the ICC discussions pay little or no attention to domestic experiences, and assume that deterrence is a fully proven and

effective concept that must simply be recreated in the international court system. In fact, several recent reviews of the domestic literature in different disciplines conclude exactly the opposite.

As Paul H. Robinson and John M. Darley state, “Rule formulation has a deterrent effect only in those unusual situations in which the preconditions to deterrence exist. Even there, the deterrent effects are quite minor and unpredictable.”¹⁰

Pratt and his co-authors find that “the effects of the variables specified by deterrence theory on crime/deviance are, at best, weak—especially in studies that employ more rigorous research designs.”¹¹ Raymond Paternoster concludes, “We do not have very solid and credible empirical evidence that deterrence through the imposition of criminal sanctions works very well.”¹²

Finally, Cook and Roesch argue, “‘Tough on crime’ policies are . . . ineffective at deterring individuals from committing crimes.”¹³

The studies arguing that domestic deterrence has not been generally effective have been able to establish criteria needed for successful deterrence. Deterrence only works if potential criminals 1) make rational calculations before their actions, 2) know the laws and, ideally, accept them as legitimate limits on their behavior, 3) feel that the benefits of a given crime are relatively low, and 4) believe the costs of the crime are high as influenced by the certainty, swiftness, and severity of punishment. Meeting all four criteria is difficult in domestic settings, so domestic deterrence effects are often low.

There only have been a few studies that have directly attempted to connect the domestic literature and international courts.¹⁴ These studies are useful to show why meeting the criteria for deterrence is even more difficult in the international arena, but they do not fully extrapolate all the possible points from the domestic examples, and they lack evidence from the most recent years of the ICC.

A more complete exploration of the domestic lessons, in conjunction with an examination of the current realities of the international system and a review of the existing experiences and studies of the ICC and of other recent international courts - such as the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) - yields many insights. This combined approach allows a more in-depth understanding of why ICC deterrence has been minimal so far, answers the challenge of those who say that the default assumption should be that deterrence will work, and suggests why deterrence will continue to be low in the future unless reforms go beyond technical changes to a significant reordering of the international system.

Before proceeding, it is important to clarify a few key ideas. The precise measurement of deterrent effects is impossible in part because it is more difficult to empirically measure the absence of an action rather than its occurrence. Also, multiple variables could contribute to an increase or decrease in abuses, so determining the precise impact of the ICC would require an in-depth examination of how dozens of variables affected thousands of individual decisions. Still, since deterrence is based on individual calculation and different people have different thresholds of cost-benefit, it is logical to conclude that the ICC deterrent impact is more than zero. Those deterred, though, are likely the people least committed to abusive actions and therefore also the ones most susceptible to other forms of preventive action. Thus, the existence of occasional cases of effective deterrence do not justify claims that the ICC is having a major impact or prove that it is the best route to prevention.

In domestic settings, analysts typically draw a distinction between methods of *specific deterrence*, which seek “to deter individuals already convicted of crimes from committing crimes in the future,” and those of *general deterrence*, which attempt “to deter all members of society

from engaging in criminal activity.”¹⁵ In the case of international courts, specific deterrence is of less importance, since most human rights violators will not return to positions of power if they are successfully tried and punished. The ICC therefore usually focuses on general deterrence, where prosecution of someone from one country seeks to deter crimes being committed in other countries. Additionally, David Bosco has made the useful observation that the ICC may at times seek *targeted deterrence* where investigating a particular individual or group that has already committed some abuses in a given country seeks to generally deter future abuse in that specific country.¹⁶ For example, indicting Serbians at the ICTY could target deterrence at other Serbians committing violations. General deterrence thus focuses on overall abuse prevention and targeted deterrence focuses on stopping extant abuses. The reasons why both general deterrence and targeted deterrence usually will fail are similar, but some of the following arguments are more applicable to one or the other deterrence type.

To date, the ICC has used its discretion to focus on state leaders, other high-level officials, or prominent rebel leaders, but the ICC Appeals Chamber has argued, in relation to events in the Democratic Republic of Congo that, “It seems more logical to assume that the deterrent effect of the Court is highest if no category of perpetrators is per se excluded from potentially being brought before the Court.”¹⁷ Thus, most of the following arguments will focus on leaders, but some attention will be paid to the possible deterrence of lower-level perpetrators.

Rationality of Decision

The principle of deterrence rests on a rational calculation of costs and benefits. The idea that criminal actions come from rational calculations was raised in the eighteenth century by Cesare Beccaria and Jeremy Bentham, whose works greatly influenced the study of criminology.

Their ideas, though, were not universally accepted and, over time, became the minority view. Later work focused on crime as a product of psychological factors or social conditions, so deterrence was not a major part of government crime prevention strategies. It was not until the late-1960s that work by economist Gary S. Becker and others revived the idea of rational criminals.¹⁸ Since then, much academic study has focused on exploring claims of criminal rationality and the idea of deterrence has become central to tougher policing and punishment strategies.

In part because the academic focus on rationality is relatively new and challenges long-held beliefs, some dispute remains; however, there is now widespread support for the idea that most criminals are rational. Rationality in this case does not mean that criminals must have perfect information, or process information without their own perceptions somewhat skewing the conclusions. Instead, rationality means that most criminals “intuit the values and costs of an action . . . and act within the limits of their abilities to pursue what they perceive as the most satisfying.”¹⁹

There are, though, several factors on an individual or group level that can interfere with such rational calculations at the time of a crime, so there is a subset of criminals whose thought process would not be considered rational by most observers. For example, some crimes are committed by people suffering from diagnosable mental or physical illnesses. Others commit crimes while under the influence of drugs or alcohol. Additionally, a given person can be affected by short-term psychological stressors. The desire for revenge is one trigger that can induce rage leading to criminal action in an otherwise law-abiding person. Some studies of domestic deterrent effects therefore suggest that crimes of passion and other cases lacking premeditation cannot be deterred.²⁰ Group effects also can alter calculations. Prestige within the

group may depend on bold and even criminal activities. Studies show a group “arousal effect” that can lead to sprees of violence.²¹ Other classic studies suggest a phenomenon called “deindividuation” that leads people to believe that their individual actions as part of a violent mob will be lost in the overall group movement.²² Criminals affected by any of these factors will not make the rational calculations necessary for deterrence.

On the international level, most potential criminals are rational. Genocides are not primitive, emotional outbursts of group violence. They are calculated policy choices. Similarly, torture, group rape, systematic denial of personal rights, and other such crimes, are political calculations, not random actions. One sign that human rights abusers make some rational calculations is that they often attempt to conceal their crimes by burying bodies, wearing masks, or setting up complex command structures to provide a degree of deniability if actions are investigated. Thus, there is usually an overall rationality and purpose behind human rights violations; however, some individual violators may not be rationally considering their actions for reasons similar to the subset of non-rational domestic criminals.

On the leadership level, true psychosis or repeated alcohol and drug impairment is difficult to prove, but certainly academics and other observers have questioned the decision-making processes of some leaders. Leaders with true impairment, though, should be relatively rare since maintaining power requires careful calculations. Leaders’ rationality may, though, be skewed by their passionate belief in the superiority of their own nation, ethnicity, religion, or ideology. They might feel they are working “to create a ‘better world’ . . . [and] see their actions as necessary or serving a higher good.”²³ They also may devalue or dehumanize the enemy, so believe it is acceptable to kill or torture them. Over time, leaders may disengage their internal moral controls so actions that they themselves might initially oppose become seen as justified.²⁴

These factors help explain events such as genocides and torture of those labeled terrorists or enemies of the state. If driven by these factors, leaders may still be rational in the sense of being goal-driven and calculating, but their calculations are so far outside the norm that deterrent threats would be ineffective.

On a broader level, evidence suggests that as a group, domestic criminals have personality traits that encourage deviant actions and decrease fear of punishment. They are “less inclined to think at all about the consequences of their conduct or to guide their conduct accordingly. They often are risk-seekers, rather than risk-avoiders, and as a group are more impulsive than the average.”²⁵ “They are prone to hyper-discounting of risk and inflation of the immediate value of their actions.”²⁶ Internationally, potential abusers may have traits that make their calculations different from average people. In some cases, they would not have risen to power if they did not possess a degree of aggressive behavior and ruthlessness. Many are also unusually high risk-takers which decreases deterrent effects. For example, Ku and Nzelibe studied African coup plotters and concluded that international courts with a low probability of punishment will have little deterrent effect on these types of actors given the risks they are already willing to assume.²⁷

Average soldiers, police, and other citizens may be affected by some of these same factors since they also may be passionate believers in a cause or swept up in the government’s propaganda. They also have more chance of being mentally impaired at the time of action. In Rwanda, Sierra Leone, Somalia, and elsewhere there is evidence of widespread use of drugs and alcohol at the time of combat.²⁸ Many countries also employ child soldiers, whose mental abilities are not fully developed and who may be susceptible to extreme agitation at time of great stress. Additionally, in times of war or when domestic order has broken down, individual and

group ideas change so that acts that would normally be considered murder become heroic. Like domestic rioters, groups of soldiers can be affected by arousal and deindividuation, which can lead to massacres, group rape, or wanton destruction of property.

All together, these leader and follower traits have led Payam Akhavan, a believer in some deterrent effects of international courts, to note, “The threat of punishment . . . has a limited impact on human behavior in a culture already intoxicated with hatred and violence.... [I]ndividuals are not likely to be easily deterred from committing crimes when engulfed in collective hysteria and routine cruelty.”²⁹

Unfortunately, there are many modern international examples where such conditions are the rule, rather than the exception. Thus, while many potential human rights abusers are rational, an important subset will fail to meet the first criteria necessary for deterrence.

Knowledge and Acceptance of the Laws and Courts

For deterrence to work, potential criminals do not need to be legal experts, but they must know that a law exists, have some understanding of what the limitations the law imposes, and the potential punishments it brings. Furthermore, deterrence works best when criminals accept both the law and the courts as legitimate, since they can then internalize the rules and self-regulate. Studies of U.S. residents show that a majority of citizens do not know the laws of their state that have been specifically designed to encourage or deter actions, such as their legal duty to report known felonies or regulations about the use of deadly force in protection of property.³⁰ Criminals might be expected to have better than average understanding of the law since it is more likely to affect them, but another study found that only 22 percent of males who had been

imprisoned for a felony reported that they had known “exactly what the punishment would be” for the crime they committed.³¹ Criminologists also have stressed the importance of accepting a law’s legitimacy arguing that “not viewing a particular law as legitimate is viewing it unfavorably. If one feels a law should not be followed, individuals will not see it as a right and proper restriction of behavior.”³²

The leaders and elite of the world are likely to know about the existence and essential outlines of international law. International laws, though, are often broadly worded and their exact meanings are frequently debated by legal experts. For example, U.S. soldiers are made aware of the Geneva Conventions governing the treatment of prisoners of war and of U.S. and international laws on torture. On the other hand, there is ongoing dispute among experts on the legal status of those captured in the war on terrorism, and on definitions of torture, so broad knowledge of the laws may not equate to specific guidance on what tactics are allowable. The meaning of laws also can shift over time. Although rape has been considered a war crime for decades, it was not until the ICTR’s 1998 ruling in the *Akayesu* case that organized rape came to be considered an act of genocide. Looking at the ICC specifically, it can prosecute individuals for genocide, crimes against humanity, and war crimes. This specific list gives the ICC more clarity than past ad hoc international tribunals, but there remain legal disputes over the meanings of all the terms.

Additionally, there are few clear documents tying international crimes to specific punishments. The documents establishing the ICTY, ICTR, and the ICC list crimes that fall within the courts’ jurisdiction, but describe the punishments that the courts can impose in a separate section. There is no effort to match particular crimes to specific sentences, or even to clearly rank the severity of the crimes to indicate which should receive the longest sentences. In

fact, Tribunal judges intentionally resisted creating explicit sentencing guidelines, so that sentences could be “individualized” to reflect aggravating and mitigating factors. There may be good reasons for flexibility as institutions develop, but the lack of consistency means that even a knowledgeable potential human rights violator cannot know exactly what punishments his actions could bring.

In a domestic setting, potential criminals may not know exactly what court would hear their case if they violate a law, but they do know that some court has jurisdiction. In the international setting, jurisdiction is much less clear. As noted, previous international courts and tribunals were established ad hoc to investigate events only in certain areas at certain time periods. The establishment of the ICC removes some of the uncertainty of jurisdiction, but still leaves important limits. The ICC has jurisdiction for crimes committed in member countries or by citizens of member countries. As of 2013, 122 states are parties to the Rome Statute. This leaves roughly eighty members of the UN, including the well-known exceptions of the United States, China, Russia and India, outside the permanent international court system. The ICC also can investigate when a situation is referred to the Court by the UN Security Council, as was done in the cases of Sudan and Libya. This referral system means that the governments of these countries did not know before their early actions that they would face the ICC. Also, the fact that the UN referred Libya, but not Syria, shows that uncertainty about who will face the ICC remains.

In terms of legitimacy, international law faces at least two major hurdles. One problem is the overall balance between domestic and international law. In a world of sovereign states, most of the power to create and enforce laws remains with state governments. At the same time, the ICC is asserting that certain actions are governed by international laws and should be punished

by an international court. This tension is a major reason why the principle of complementarity was developed, with the ICC only hearing cases when national courts cannot provide effective justice. There are mechanisms for determining when the ICC should step in, but there is also flexibility, so violators might hope that their case will be heard in national courts that they could possibly influence. Philosophically, many world leaders will not accept a decline in sovereign power, or see international law and the ICC as being legitimate sources of legal and moral restraint. Again, the ICC's deterrent effect is weakened.

Secondly, legitimacy rests on the idea of fair and equal treatment. There are long-standing accusations that international law and institutions are biased in favor of Western values, are merely tools of selected Great Powers, or are a form of "victor's justice." Noted scholars such as E.H Carr³³ and Stanley Hoffman³⁴ have argued that other actors may not accept the legitimacy of laws structured by the great powers. For example, President Omar Al-Bashir of Sudan repeatedly has argued that international law, the UN, and the ICC are all biased. The fact that the ICC's first seven investigations were of African states has drawn attention. If the ICC only focuses on Africa, it will lose legitimacy in the eyes of some, but if it opens an investigation elsewhere and is perceived as simply trying to appease political pressures, it will lose legitimacy in the eyes of others. It is possible that a leader may fear the actions of even what he considers an illegitimate court, but questions of legitimacy do decrease the chance that such leaders will internalize the ICC's moral goals and act with self-restraint.

Foot soldiers or lower level officials who commit violations may be affected by the same issues affecting leaders, but also may have a simple lack of knowledge. The education levels and limited communications in some areas make it highly improbable that the average members of the *janjaweed* in Darfur or Lord's Resistance Army in Uganda are aware of the Universal

Declaration on Human Rights, the Genocide Convention, or past rulings of international courts establishing what constitutes a war crime. Even if they are aware, the potential violators may not see that as a signal of what will happen directly to them. International courts are located far from conflict areas, conduct their business in languages not spoken universally, and are rarely covered by local media. Their actions thus may seem quite removed from everyday life. This helps explain why the Rwandan government objected to locating the ICTR in Arusha, Tanzania, feeling that some of the deterrent effect of the trials would be lost by conducting them so far away from the crimes scenes. The ICC does attempt education efforts, but they are targeted at areas with investigations, so, while important in explaining ongoing proceedings to citizens, they are unlikely to inform potential violators ahead of time. If some potential violators are unaware of the international criminality of their actions or feel that the laws and courts are unclear or illegitimate, then for that group another criterion for deterrence fails.

Costs and Benefits

While potential criminals must be able to think rationally and know the laws designed to limit their actions, the core requirement for deterrence is that the potential violator perceives the total costs of an action as exceeding its total benefits. Understanding costs and benefits involves calculating not only the possible positive or negative outcomes, but also the probability and timing of a given outcome. In attempting to deter crime, lawmakers usually focus on altering things on the cost side, either by increasing the amount of punishment or increasing the chance of punishment. Game research shows that the expected level and chance of positive rewards is

also very important.³⁵ If criminals perceive that crime will lead them to riches, power, personal security, or other gains, they are encouraged to break the law despite costs.

Benefits

Assessing the cost-benefit calculations made in the international arena begins with the idea that international courts deal with only the most serious violations of international law such as genocide, crimes against humanity, and war crimes. These types of crimes do not develop spontaneously, or arise from a series of miscalculations, but rather stem from leaders' choices on how to achieve political goals and to address threats. For example, leaders may pursue clear goals of advancing their ethnic group or expanding their territory. Leaders and their followers then may adopt brutal tactics to achieve these goals. Asserting control of an area, while driving others out, can be seen as a path to future economic and material gain, and to easier future political control as the area comes closer to the model of a nation-state and challengers are weakened. Ethnic cleansing and genocide may look like random violence from the outside, but there is calculation of how to achieve goals behind it.

On the threat side, leaders seek to stay in power, so they will often oppress members of rival political, economic or ethnic groups, or support tough tactics against outside enemies. When these differences rise to the level of civil or international war, the leaders are likely to increase the brutality of the tactics they endorse. The leaders know they will face international criticism, but the perceived benefit of staying in power is a major incentive. In the same way that domestic criminals may not be deterred if the payoff is large enough, the ability to reduce a threat may offset leaders internal moral norms and any punishment that outsiders could threaten.

Human rights abusers in lower levels of authority may be driven by the same ambitions as their leaders, but also face additional pressures. Lower officials may feel it is necessary for their advancement or even personal security to follow the brutal orders of superiors. International courts have ruled that violations cannot be excused with the “simply following orders” defense, but this does not change the reality that the short-term benefit of loyalty may be high. Tomer Broude notes, “We also know that many of the most serious crimes are committed by individuals as ‘crimes of obedience,’ in structures of authority that demand compliance in ways that the jurisdiction of the Court cannot compete with.”³⁶ When order further breaks down, new pressures arise. Mark A. Drumbl notes that “Amid the social disintegration and group-based reconstitution that usually precedes mass violence, individuals often end up joining a marauding group because to do so is the only viable survival strategy.”³⁷ Joining may provide physical security and a sense of belonging and support at a time of crisis.

None of these comments is meant to in any way excuse human rights abuse, but rather to suggest that violators often perceive major benefits from violations. They also are balancing an immediate reward versus a chance of future punishment.

Probability of Punishment

On the cost side of the equation, a key calculation is the probability of being punished. Looking at domestic deterrence, probability of punishment is the variable most closely tied to deterrent effects.³⁸ Past gaming studies show that punishment rates of 50 percent will have a significant deterrent effect. If, however, the chance of punishment decreases, the deterrent effect quickly dissipates.³⁹ Since the overall conviction rate for criminal offences committed in the United States is estimated to be only 1.3 percent, effective domestic deterrence is low.⁴⁰ Since

the ICC faces both structural and political limits that decrease the chance of arrest and further factors that limit the chance of conviction effective international deterrence is even less probable.

As noted earlier, one structural constraint on the ICC is its limited jurisdiction so that some violators face no threat of arrest unless the UN Security Council refers their country for investigation. A second major limit is the lack of an international police force to arrest suspects. This role can at times be filled by troops, but events and policies in the former Yugoslavia show that international troops do not prioritize arresting suspects. Even if a police force was created, it would still face the major barrier of sovereignty, so could only act when backed by force or when invited in by the state government. A third limit is that the ICC only has the resources to conduct a limited number of trials. As one ICC judge said, “If only for reasons of cost and capacity, the Court will never be able to do more than conduct a few, exemplary trials.”⁴¹ These resource limits, along with the principle that cases should have “sufficient gravity,” have so far limited the ICC to only focus on leaders, so the current threat of arrest for most violators is almost zero.

Political limits affect both the chance of ICC investigation and arrest. States choosing not to join the court greatly decrease their chance of investigation. Political limits also exist because of UN Security Council voting rules. If there was a resolution calling for the investigation of a great power who is not a member of the ICC, any one of the five great powers with veto rights could block the resolution. Similarly, the great power could block investigation of a close ally. Once an investigation does begin, the ICC relies on state cooperation, which may not be forthcoming, to get access to evidence and witnesses. After indictment, member states are obligated to arrest and transfer suspects to the ICC. However, the African Union’s July 2009 Resolution opposing cooperation with ICC in the case of al-Bashir and his subsequent travel to ICC member countries show that, even for ICC members, politics can trump legal obligation.

Further, even if states would like to cooperate, they may not be able to capture suspects, as illustrated by Uganda's inability to capture leaders of the Lord's Resistance Army. As William W. Burke-White has noted, while Joseph Kony may have at first feared ICC helicopters carrying him off, "[y]ears later and still at large, Kony and other international criminals must have come to realize that helicopters are not on their way and life on the run—even as an indicted international criminal—is not so bad."⁴².

Domestic realities also decrease the chance of trial for many leaders. Dictators and other abusers have often maintained power for a long time through a mix of intimidation and co-opting rivals. Their chance of being overthrown and turned over to international courts is not zero, as shown in the case of Milosevic, but it is not high. Further, leaders tend to surround themselves with loyal officials who reinforce their sense of control. Thus, for practical and psychological reasons, leaders may feel close to invulnerable.

The ICC has publically indicted thirty-six people, but only six have been put on trial, with another seven in the pre-trial phase. Compared to the number of violators globally, these numbers show a given violator has an extremely low chance of facing trial. The numbers could be skewed by the court's early years of institutional building, so further insight can be gained from examining numbers from the ICTR and ICTY, with the caveat that in those cases there were political circumstances favoring arrests. In Rwanda, estimates put the 1994 death toll at 500,000 and a complete list of Rwandan human rights abuses surely would be several times that number. The Rwandan government responded by jailing well over 100,000 people. Yet, the ICTR has handed down only ninety indictments. As of 2012, only sixty-nine of the tens of thousands of abusers had completed a trial and some of these cases are still under appeal. In the former-Yugoslavia there were fewer domestic arrests to use as a proxy number for all abusers,

but again the number of international law violators is certainly considerably higher than the 161 people indicted by the ICTY or the seventy-seven who have completed Tribunal trials.

Reaching trial does not guarantee a conviction. Prosecutors may find evidence is difficult to gather and witness testimony difficult to obtain. Also, to their credit, the ICC and other international courts have done their best to provide fair trials and judgments. Only in March 2012 did the ICC complete its first conviction. Thomas Lubanga Dyilo from the Democratic Republic of the Congo was convicted of war crimes, although he is appealing. At that point another official, Mathieu Ngudjola Chui was acquitted and released. Again the tribunals provide further insight. At the Tribunals, some had cases dropped in process and others were acquitted, so the number of convicted and sentenced stands at fifty-nine for the ICTR and sixty-four for the ICTY. Notably, most defendants face multiple counts. As of September 2004, excluding those who pled guilty, Meernik, King, and Dancy found that defendants were found guilty on 48.8 percent of individual counts. Subdividing the data they find “the percentage of guilty verdicts for war crimes, crimes against humanity, and genocide cases are 49.8 percent, 62.5 percent, and 20 percent, respectively.”⁴³ These numbers are higher than the zero they would have been for years before international courts for human rights were established. Thus, the court can claim progress in ending impunity. However, from the perspective of deterrence, these numbers indicate a very low probability of punishment and thus a low chance of deterring future violations.

Speed of Punishment

For both benefits and costs, there may be some delay before the final outcome. People tend to discount future costs when compared to current costs. Therefore, a 10 percent chance of

being executed five years in the future will not carry the same weight as a 10 percent chance of dying in a gun battle today. Benefits are similarly discounted over time, but often the benefits occur more immediately than the potential costs. Overall, scholars suggest, “the criminal justice system reflects a picture of a threat of delayed punishment pitted against the attraction of immediate benefits of crime.”⁴⁴

On the international level, the process of getting a violator through the courts is long and complex. First, violations must occur and must rise to the level to draw international attention. Then, investigations must be made and arrests must occur, both of which can take years. Once arrested, the accused go through a series of pre-trial, trial, and appeals stages and there are often delays and pauses at each step.

As mentioned previously, the ICC has only completed a single case. The example of the Central African Republic’s Jean-Pierre Bemba Gombo gives some indication of the process. He led the Movement for the Liberation of Congo and was accused of violations in 2002. The case was referred to the Court by the Central African Republic Government in December 2004. The prosecutor opened an investigation in May 2007 and a sealed arrest warrant was issued in May 2008. Bemba was arrested in Belgium and transferred to the ICC only days after the arrest warrant, so that step went unusually quickly. The pretrial chamber confirmed two charges of crimes against humanity and three charges of war crimes in June 2009. His trial started in November 2010. The trial has had a number of delays and recesses, so Bemba even requested, but was denied, provisional release during Court recesses. At least a decade will pass between Bemba’s alleged crimes and completion of his trial, and should there be an appeal, it could stretch even longer.

Similar experiences can be seen from the Tribunals. Established in 1993, the ICTY still has not completed its work almost two decades later. The court projects that it will at least mid-2017 before it completes its final cases. Measured against the immediate benefit of a given action, the possibility that one might face trial twenty years later is not a great deterrent for most actors.

Severity of Punishment

There is more dispute over the impact of increasing the severity of punishments. Criminologists often argue that “the likelihood of punishment tends to matter more than the severity of punishment,” whereas economists argue “an increase in either the likelihood or the severity of punishment will tend to reduce the net subjective payoff” and therefore reduce crime.⁴⁵ This disagreement is one reason why so much research attention has been focused on whether the threat of capital punishment marginally increases deterrence in comparison to the threat of a life sentence. The findings on capital punishment and other similar increases in severity remain mixed,⁴⁶ so it seems reasonable to still consider severity of punishment as a variable, but to not expect a huge surge in deterrence if punishments are increased.

In contrast to the Nuremberg trials after WWII, recent international court punishment options do not include death sentences because of growing international opposition to capital punishment. The ICC can impose sentences up to thirty years, but in extreme cases the Court may impose a life sentence. The judges take into consideration the severity of the crime, but also numerous aggravating and mitigating factors in determining the individualized sentence. These aggravating factors include such things as whether the offense was against women, the accused was in a position of authority, and whether there was direct and enthusiastic participation in the

crime. Mitigating factors include cooperation with the prosecution, remorse, willing surrender, age, and character before and after the violations.

The sentencing guidelines make no explicit reference to the goal of deterrence, or any other overall goal to use in determining punishment. The Tribunals also lacked firm sentencing guidance, but the judges provided explanation of their sentences, which led to development of something of a sentencing philosophy. In the *Tadic* case, the ICTY judges argued “deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law.”⁴⁷ In the *Rutaganda* case, the judges noted, “it is clear that penalties imposed on accused persons found guilty by the Tribunal must be directed on the one hand, at retribution . . . and over and above that, on the other hand, at deterrence to dissuade for good, others who may be tempted in the future to perpetrate such atrocities.”⁴⁸

Since the ICTY has handed out the most sentences, a review of its sentences provides some indication of what future violators can expect. The median final sentence imposed for those found guilty by the ICTY is just thirteen years.⁴⁹ Only one life sentence has been imposed and only about one-third of cases saw a punishment of twenty years or more. Some of those receiving sentences of a dozen years or less include the killer of seventy Muslims at Srebrenica, and others convicted of multiple counts, including inciting genocide. These sentences provide a degree of retribution, but they are not severe enough for a potential future violator to always judge that the costs of action outweigh the benefits.

The domestic literature suggests costs can include more than just incarceration. For example, a conviction may hurt someone’s reputation, lead them to be ostracized from groups, or hurt their earning potential. In the international arena, ICC convictions, and even indictments,

can bring costs. Leaders may not be able to travel abroad if they fear arrest. Their reputations and place in history will be forever associated with the ICC, and they may not be able to retire in luxury as did many past dictators. Still, these costs are still relatively low compared to the benefits of continued rule. They also may not be as great as expected, as witnessed by Bashir's travel after indictment and the 2013 election of Uhuru Kenyatta as President of Kenya despite his existing ICC indictment. Therefore, the ICC's specific non-incarceration impact will not be enough to deter many.

Overall, the costs of violations, as affected by probability of punishment, speed, and severity of punishment, often will be judged low, so the ICC will not meet the core criteria of effective deterrence.

Implications for the Future

Overall, the chance that the ICC will deter human rights violators is very small since some potential violators will not be acting rationally at the time of committing an abuse. Others will not know about the international laws and courts or will not see them as legitimate. Even those who make rational calculations and are aware will often conclude that the benefits of violation exceed the costs. This conclusion is in line with the facts that violations have continued globally despite the Tribunals and creation of the ICC and that some of the worst violations in the former Yugoslavia, Sudan and Libya occurred after indictments of several leaders. It is also in line with reports of limited impact in Congo following Lubanga's conviction.⁵⁰

The limits on deterrence are many, so significantly increasing the deterrent effect would be difficult unless there were radical changes in the international system. For example, deterrence could increase if a higher percentage of violators were brought before the court. Achieving this goal could require a strong international police force, but such a force would require a new commitment in funding, and, more importantly, a new willingness to support enforcement mechanisms for international institutions and to weaken sovereignty. Similar ideas have been considered by the UN for decades, but the UN remains without a permanent force or the unfettered right to intervene in sovereign states. Arrests and transfers also might increase if states placed the goal of arresting violators above other political calculations; however, since many powerful states show no signs of joining the ICC and even member states adjust their compliance to political needs, this change is unlikely to occur any time soon.

Since deterrent effects are likely to remain minimal, supporters of the ICC should stop touting deterrence and rather stress goals that the ICC can achieve. If they want to pursue prevention, there are other mechanisms. If they are still focused on deterrence, they could explore the use of domestic courts and truth commissions or other forms of international punishment like targeted sanctions that can be imposed more quickly. Deterrence also should be dropped as a basis for sentencing practices of international courts. Whether more focus on retribution or incapacitation would lead to significantly different sentences is unclear, but at least those sentences would have a firmer moral and legal basis.

Endnotes

¹“Rome Statute of the International Criminal Court,” accessed January 13, 2013, <http://www.un.org/law/icc/index.html>.

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- ² David Bosco, "The International Criminal Court and Crime Prevention: Byproduct or Conscious Goal?" *Michigan State Journal of International Law* 19 (2011): 172-5.
- ³ *Report of the International Criminal Court to the United Nations*, accessed November 20, 2011, http://www.icc-cpi.int/NR/rdonlyres/EDBEBEC0-7896-46EC-9AD6-7C867F67CF1B/278503/ICC_Report_to_UN.pdf, 2.
- ⁴ *Ibid*, 14.
- ⁵ Leslie Vinjamuri, "Deterrence, Democracy, and the Pursuit of International Justice," *Ethics & International Affairs* 24 (2010): 191.
- ⁶ Jakob von Holderstein Holtermann, "A 'Slice of Cheese' – a Deterrence-Based Argument for the International Criminal Court," *Human Rights Review* 11 (2009): 296.
- ⁷ See for example, Gary Johnathan Bass, *Stay the Hand of Vengeance – The Politics of War Crimes Tribunals* (Princeton: Princeton University Press, 2000); Julian Ku and Nzelibe Jide, "Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?" *Washington University Law Review* 84 (2006): 777-833; Martin Mennecke, "Punishing Genocidaires: A Deterrent Effect or Not?" *Human Rights Review* 8 (2007): 319-39; Jack Snyder, and Leslie Vinjamuri, "Trials and Errors. Principle and Pragmatism in Strategies of International Justice," *International Security* 28 (2003/04): 5-44; and David Wippman, "Atrocities, Deterrence, and the Limits of International Justice," *Fordham International Law Journal* 23 (1999): 473-88.
- ⁸ Pablo Castillo, "Rethinking Deterrence: The International Criminal Court in Sudan," *UNISCI Discussion Papers No. 13* (2007).
- ⁹ Kenneth Anderson, "The ICC Would Increase Its Prevention Ability If the Prosecutor's Discretion Were More Visibly Limited," accessed November 11, 2011, <http://uclalawforum.com/#Anderson/>; and David Scheffler, "Maximizing Opportunities to Deter Future Atrocity Crimes," accessed November 11, 2011, <http://uclalawforum.com/#Scheffer/>.
- ¹⁰ Paul H. Robinson and John M. Darley, "Does Criminal Law Deter? A Behavioral Science Investigation," *Oxford Journal of Legal Studies* 24 (2004):173.
- ¹¹ Tarvis C. Pratt, et al "The Empirical Status of Deterrence Theory: A Meta-Analysis," in *Taking Stock: The Status of Criminological Theory* ed. Francis T. Cullen, John Paul Wright, and Kirstie R. Blevins, (Piscataway, NJ: Transaction Publishers: 2006), 370.
- ¹² Raymond Paternoster, "How Much Do We Really Know About Criminal Deterrence?" *The Journal of Criminal Law and Criminology* 100 (2010):766.
- ¹³ Alana N. Cook and Ronald Roesch, "Tough on crime' reforms: What psychology has to say about the recent and proposed justice policy in Canada," *Canadian Psychology/Psychologie Canadienne* 53 (2012): 219.
- ¹⁴ John W. Dietrich, "Can International Courts Deter Human Rights Abusers?" (paper presented at the International Studies Association Conference, Chicago, Illinois, March 2, 2007); Dawn L. Rothe and Christopher W. Mullins, "Beyond the Juristic Orientation of International Criminal Justice: The Relevance of Criminological Insight to International Criminal Law and

-
- its Control A Commentary,” *International Criminal Law Review* 10 (2010): 97-110; and Christopher W. Mullins and Dawn L. Rothe, “The Ability of the International Criminal Court to Deter Violations of International Criminal Law: A Theoretical Assessment,” *International Criminal Law Review* 10 (2010): 771-86.
- ¹⁵ Daniel E. Hall, *Criminal Law and Procedure* (Clifton, NY: Thompson Delmar Learning: 2004), 27-8.
- ¹⁶ Bosco, 170.
- ¹⁷ Situation in the Democratic Republic of Congo Case No. ICC-01-04, Appeals Chamber, Judgment on the Prosecutor’s Appeal Against the Decision of Pre-Trial Chamber 1 Entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58” (2006), 73.
- ¹⁸ Gary S. Becker, “Crime and Punishment and Economic Approach,” *Journal of Political Economy* 76 (1968):169-217.
- ¹⁹ David A. Ward, Mark C. Stafford, and Louis N. Gray, “Rational Choice, Deterrence, and Theoretical Integration,” *Journal of Applied Social Psychology* 36 (2006): 572.
- ²⁰ Daniel Glaser, “The Realities of Homicide versus the Assumptions of Economists is Assessing Capital Punishment,” *Journal of Behavioral Economics* 6 (1977): 243-68.
- ²¹ Paul F. Cromwell, James N. Olson, and D’Aunn Wester Avary, “Breaking and Entering: An Ethnographic Analysis of Burglary,” *Crime, Law & Justice* 8 (1991):69-70.
- ²² Phillip G. Zimbardo, “The Human Choice: Individuation, Reason, and Order Versus Deindividuation, Impulse, and Chaos,” *Nebraska Symposium on Motivation* 17 (1969): 237-307.
- ²³ Ervin Staub, *The Roots of Evil: The Origin of Genocide and Other Group Violence* (Cambridge University Press, New York: 1992), 25.
- ²⁴ Albert Bandura, “Moral Disengagement in the Perpetration of Inhumanities,” *Personality and Social Psychology Review* 3 (1999): 193-209.
- ²⁵ Robinson and. Darley, 177.
- ²⁶ Jeffrey Fagan, Franklin E. Zimring, and Amanda Geller, “Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty,” *Texas Law Review* 84 (2006): 1808-9.
- ²⁷ Ku and Nzelibe.
- ²⁸ Mullins and Rothe, 783.
- ²⁹ Payam Akhavan, “Beyond Impunity: Can International Justice Prevent Future Atrocities?” *American Journal of International Law* 95 (2001): 9, 12.
- ³⁰ John M. Darley, Kevin M. Carlsmith, and Paul H. Robinson, “The Ex Ante Function of the Criminal Law,” *Law and Society Review* 35 (2001): 165-89.
- ³¹ David Anderson, “The Deterrence Hypothesis and Picking Pockets at the Pickpockets’ Hanging,” *American Law and Economics Review* 4 (2002): 307.
- ³² Rothe and Mullins, 103.
- ³³ Carr, E.H. *The Twenty Years' Crisis, 1919-1939* (London: Macmillan and Company: 1939).

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- ³⁴ Stanley Hoffman, "The Uses and Limits of International Law," in *International Politics: Enduring Concepts and Contemporary Issues* ed. Robert J. Art and Robert Jervis (New York, Pearson: 2009), 114-8.
- ³⁵ Ward, Stafford, and Gray.
- ³⁶ Tomer Broude, "The Court should avoid all considerations of deterrence, contributing to crime prevention by buttressing a durable, consistent, credible, and legitimate normative environment in which serious crimes are not tolerated," accessed November 11, 2011, <http://uclalawforum.com/#Broude>.
- ³⁷ Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge, England: Cambridge University Press, 2007), 172.
- ³⁸ Paternoster, 817.
- ³⁹ Nathan Azran. W. Holz, and D. Hake, "Fixed Ratio Punishment," *Journal of the Experimental Analysis of Behavior* 6 (1963): 145.
- ⁴⁰ Robinson and Darley, 180.
- ⁴¹ Hans-Peter Kaul, Second Vice-President of the International Criminal Court, as quoted in Bosco, 166.
- ⁴² William W. Burke-White, "Maximizing the ICC's Crime Prevention Impact Through Positive Complementarity and Hard-Nosed Diplomacy," accessed November 11, 2011, <http://uclalawforum.com/#Burke-White>.
- ⁴³ James Meernik, Kimi Lynn King, and Geoffrey Dancy, "Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National, and International Factors," *Social Science Quarterly* 86 (2005): 699-700.
- ⁴⁴ Robinson and Darley, 186.
- ⁴⁵ Philip J Cook, "The Deterrent Effects of California's Proposition 8", *Criminology and Public Policy* 5 (2006): 414.
- ⁴⁶ John J. Donahue and Justin Wolfers, "The Ethics and Empirics of Capital Punishment: Uses and Abuses of Empirical Evidence in the Death Penalty Debate," *Stanford Law Journal* 58 (2005): 791-844.
- ⁴⁷ Prosecutor v Tadic, Case No. IT-94-1, Sentencing Judgment, as quoted in Bosco, 194-5.
- ⁴⁸ Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgment and Sentence, as quoted in Bosco, 195.
- ⁴⁹ Author's calculation of sentences imposed by the trial judges or appeals court based on data at the ICTY website, <http://www.un.org/icty/cases-e/index-e.htm>.
- ⁵⁰ Mark Kersten, "The International Criminal Court and Deterrence – The 'Lubanga Syndrome'," accessed January 21, 2013, <http://justiceinconflict.org/2012/04/06the-international-criminal-court-and-deterrence-the-lubanga-syndrome/>.