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The International Criminal Court and the Prevention of Atrocities: Predicting the Court's Impact

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THE INTERNATIONAL CRIMINAL COURT AND THE PREVENTION OF ATROCITIES: PREDICTING THE COURT'S IMPACT

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"A weak and distant [International Criminal] Court will have no deterrent effect on the hard men like Pol Pot most likely to commit crimes against humanity. Why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed? Holding out the prospect of ICC deterrence to the weak and vulnerable amounts to a cruel joke."

– Under Secretary of State John Bolton in 2002[1]

"We should be a member of the ICC . . . . Supporting the ICC . . . will help promote lasting peace and security, enable members of communities victimized by these crimes to rebuild their lives, and send a strong message to all would-be tyrants that their crimes will not go unpunished."

– Former Senator and Presidential Candidate John Edwards in late 2007[2]

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1. John R. Bolton, Under Sec'y of State for Arms Control & Int'l Security, Remarks to the Federalist Society (Nov. 14, 2002), *available at* http://www.state.gov/t/us/rm/15158.htm.

2. Am. Soc'y of Int'l Law, International Law 2008 Project, Survey Response of Senator John Edwards, http://www.asil.org/edwardssurvey.cfm (last visited Oct. 27, 2008).

I. INTRODUCTION

DETERRENCE figures prominently among the classical purposes of criminal punishment. Decision-makers in a domestic criminal justice system seek to implement laws and strategies that will deter as much crime as possible given the system's resource constraints. Unfortunately, measuring the deterrent effect of a given policy can be extraordinarily difficult, despite centuries of experimentation in the context of domestic systems.[3]

In view of the rapid development of international criminal law over the last fifteen years, questions about criminal deterrence have suddenly become relevant to the international legal order.[4] May one reasonably expect the work of international criminal tribunals to deter potential perpetrators of humanitarian atrocities? Are there ways in which the work of such tribunals might actually increase the risk that atrocities will occur? Will it even be possible to provide a useful answer to these questions in the near term?

The creation of a permanent International Criminal Court (ICC), based in The Hague, The Netherlands, signifies an important development in the quest to prevent atrocious crimes of international concern.[5] In the late 1990s, delegations from over 120 states negotiated the Rome Treaty, the instrument that established the ICC.[6] The court would exercise jurisdiction over genocide, war crimes, and crimes against humanity.[7]

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3. *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 977-89 (2003) (cataloguing serious information and complexity problems that limit ability of lawmakers to measure deterrent effect or to increase it through doctrinal manipulation).

4. The United Nations (UN) Security Council established the International Criminal Tribunal for the Former Yugoslavia in 1993. *See* S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993). This was the first creation of an international criminal tribunal since the immediate post-World War II period.

5. I do not here attempt to add to the large corpus of fine institutional and historical overviews of the ICC. *See, e.g.*, YUSUF AKSAR, IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM THE *Ad Hoc* Tribunals to a Permanent International Criminal Court 43-68 (2004) (describing history of movement for international criminal court in twentieth century); Dominic McGoldrick, *Criminal Trials Before International Tribunals*, *in* THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES, 40-45 (Dominic McGoldrick & Eric Donnelly eds., 2004) (summarizing ICC's history and principal legal features); Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381 (2000) (exploring court's basic structure and procedures with useful charts and graphs); *see also* WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT (2d ed. 2004) (detailing ICC's creation, principles, structure, and procedures); BETH VAN SCHAACK & RONALD C. SLYE, INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT 63-81 (2007) (superbly introducing the ICC).

6. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf [hereinafter Rome Statute].

7. Rome Statute, *supra* note 6, arts. 5-8 (discussing court's jurisdiction). The Statute also grants jurisdiction over "the crime of aggression." *See id.* The treaty

Personal jurisdiction was limited to nationals of ratifying states and individuals committing the relevant crimes in the territory of a ratifying state.[8] The Rome Statute entered into force in 2003; as of November 2008, 108 states have ratified it.[9]

The ICC represents not merely another international criminal tribunal, but rather something qualitatively different from any other international court. All other international criminal tribunals have operated with jurisdictions that were limited territorially and usually temporally. This includes the Nuremberg Tribunal following the Second World War, the "ad hoc" tribunals created by the United Nations (UN) in the 1990s to address crimes in the former Yugoslavia and Rwanda, and the hybrid national-international courts for Sierra Leone, East Timor, Bosnia, Kosovo, Cambodia, and Lebanon.[10]

Unlike those courts, the ICC is potentially universal in territorial jurisdiction and has continuing temporal jurisdiction over a state following that state's accession to the Rome Statute.[11] Moreover, the ICC's regime of complementary jurisdiction (described in Sub-Part II.B. below) is utterly novel on the international level. Finally, the ICC, including its prosecutor, operates with an unprecedented degree of political independence.[12] The prosecutor may initiate cases of his own accord

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negotiators were unable to agree upon a definition of this crime; therefore, it remains undefined and beyond the court's purview. *See id.* art. 5, ¶ 2. In this Article, the terms "atrocities" and "ICC crimes" refer to genocide, war crimes, and crimes against humanity as they are defined in the Statute. *See id.*

8. *See* Rome Statute, *supra* note 6, art. 11.

9. *See* International Criminal Court, The States Parties to the Rome Statute, http://www2.icc-cpi.int/Menus/ASP/statesparties/ (last visited Mar. 2, 2009) (listing current membership of ICC). Technically, a state may "ratify," "accept," "approve," or "accede to" the Statute. *See* Rome Statute, *supra* note 6, art. 125 (noting methods by which countries may adopt Rome Statute). This distinction is immaterial to the joining country's legal obligations, and this Article uses the terms interchangeably.

10. The International Criminal Tribunal for the Former Yugoslavia (ICTY) may exercise jurisdiction only over persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991. *See* The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, Annex, art. 8, U.N. Doc. S/25704 (May 3, 1993) (proposing ICTY jurisdictional provisions); S.C. Res. 827, *supra* note 4, ¶¶ 1-2 (adopting Secretary General's report and establishing ICTY). The International Criminal Tribunal for Rwanda (ICTR) may prosecute persons responsible for such violations in Rwanda and Rwandan citizens responsible for such violations in neighboring states, but only for violations that occurred in 1994. *See* S.C. Res. 955, Annex, art. 7, U.N. Doc. S/RES/955 (Nov. 8, 1994). The hybrid tribunals have similar jurisdictional limitations. *See* Robin Gieß & Noëmie Bulinckx, *International and Internationalized Criminal Tribunals: A Synopsis*, 88 INT'L REV. RED CROSS 49, 56–57 (2006), *available at* http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/review-861-p49/$File/irrc_861_Geiss-Bulinckx.pdf (comparing jurisdiction of ICC, ICTR, ICTY, and hybrid tribunals).

11. *See* Rome Statute, *supra* note 6, art. 11 (defining court's jurisdiction).

12. As a separate multilateral arrangement, the ICC does not depend on the UN for its authority, although the two organizations cooperate across several areas.

(*proprio motu*), subject to review by the court's pre-trial chamber.[13] In short, the ICC regime has several characteristics that are historically novel, even when compared to other recently-created tribunals.

A stated goal of the ICC is to "contribute to the prevention of [grave] crimes."[14] Debates about the wisdom and usefulness of the ICC have often focused on the likelihood that the ICC will actually succeed in preventing such atrocities. It is important to note that, unlike most domestic crime, the crimes adjudicated by international tribunals often occur during a severe breakdown in public order. This complicates the deterrence question insofar as an international criminal tribunal's actions can influence the quality of public order in the affected society. To judge whether a tribunal will actually contribute to a reduction in humanitarian atrocities, one must therefore examine all preventive effects, including the impact on public order. Classical "deterrence" is only a part of the broader question of "prevention."

Though ICC proponents assert that the court will deter dictators and rebels from perpetrating genocide, war crimes, or crimes against humanity, ICC critics argue that such claims have no established basis in empirical fact—that they are merely wishful thinking. Indeed, critics often assert that the ICC is likely to do more harm than good. For example, the court may undermine peace deals that would actually prevent further violence and atrocities by deterring important parties to a conflict from laying down their arms, for fear of being prosecuted in the ICC once they do so. A recent spate of political science and legal literature has begun to ex-

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See Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, Resolution ICC-ASP/3/Res.1 (Oct. 4, 2004), *available at* http://www.icc-cpi.int/library/asp/ICC-ASP-3-25-III_English.pdf (discussing relationship between ICC and United Nations). Early drafts of the ICC Statute required referral of all cases by the Security Council, but the Rome Conference ultimately rejected this option. Some ICC framers feared that Security Council politics and inertia could hamper the workings of the court and de-legitimize its rulings. *See, e.g.*, Silvia A. Fernandez de Gurmendi, *The Role of the Prosecutor, in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 55, 55-56 (Mouro Politi & Giuseppe Nesi eds., 2001) ("Subordinating the Court's activity to the decisions of political actors such as States or the Security Council, could lead to impunity, discrediting the Court.").

13. The Statute provides three mechanisms by which the ICC might take cognizance of a case: referral by a state party, referral by the UN Security Council, or initiation by the ICC prosecutor of his own accord (the controversial *proprio motu* power). *See* Rome Statute, *supra* note 6, art. 13. The Security Council may, however, vote to block an investigation or prosecution for twelve months, and it may renew this request indefinitely. *See id.* art. 16 (limiting ICC power). This arrangement provides some role for the Security Council, but it "reverses the burden of Security Council inertia by permitting an ICC case to go forward as long as a single permanent member supports a prosecution and thus vetoes any delay." Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 90-91 (2003) (analyzing UN's power to block ICC from investigating or prosecuting case).

14. Rome Statute, *supra* note 6, pmbl. (stating goals of ICC).

amine the empirical and theoretical underpinnings of claims about the ICC's preventive potential.[15]

Since the ICC began operating in 2003, questions about the court's ability to prevent atrocities have had little chance of impacting policy decisions in the United States. Early in his presidency, President Bush strongly opposed membership in or involvement with the ICC, and he famously "unsigned"[16] the Rome Statute in 2002.[17] The United States Congress, controlled at the time by President Bush's Republican party, supported the President's stance.[18]

In its later years, the Bush administration began to temper its antipathy toward the ICC. For instance, in March 2005, the Bush administration decided not to block a UN Security Council decision to refer the ongoing humanitarian crisis in Darfur, Sudan, to the ICC.[19] More recently, the United States decided to stop punishing ICC member states that refused

15. *See infra* notes 183-208 and accompanying text.

16. President Clinton signed the Rome Statute on the last day it was open for signature, but he did not submit it to the Senate for ratification. *See generally* David J. Scheffer, *Staying the Course with the International Criminal Court*, 35 CORNELL INT'L L.J. 47, 68-86 (2001-2002) (recounting attitude and concerns of Clinton Administration regarding ICC). Although the United States was not bound by the Statute's provisions prior to ratification, signature of a treaty creates an international legal obligation "to refrain from acts which would defeat the object and purpose of a treaty" under customary international law. *See* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331. The Bush administration did not wish to be subject to such an obligation.

17. *See* Fact Sheet, Bureau of Political-Military Affairs (August 2, 2002), http://www.state.gov/t/pm/rls/fs/23426.htm (last visited Nov. 28, 2008) (stating that "[t]he U.S. strongly opposes the Rome Statute as seriously flawed . . . ."); *see also* Diane F. Orentlicher, *Unilateral Multilateralism: United States Policy Toward the International Criminal Court*, 36 CORNELL INT'L L.J. 415, 421 (2004) (stating that "the Bush administration regards [the ICC] as 'an institution of unchecked power' . . . [and] has seemingly assumed that a politicized, anti-American court is all but inevitable") (footnote omitted).

18. Congress passed the American Servicemembers' Protection Act of 2002, which is sometimes called the "Hague Invasion Act" because it authorizes the President to "use all means necessary and appropriate" to effect the release of any U.S. national or ally detained by or for the ICC. *See* 22 U.S.C. § 7427 (2002); *see also* 22 U.S.C. § 7426 (2002) (prohibiting U.S. military assistance to any state party to ICC—with exceptions—unless President waives prohibition for national security reasons or because state in question has signed Article 98 agreement). For general discussions of U.S. opposition to the ICC, see JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 61-64 (2007) (describing Bush Administration and Republican Congress's "fierce resistance" to ICC); Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597 (2002-2003) (arguing that antitreaty discourse by U.S. officials focused on procedure obscures substantive debates about ICC and degree to which U.S. military power should be subject to constraint).

19. *See* John Stompor, *The Darfur Dilemma: U.S. Policy Toward the ICC*, 7 GEO. J. INT'L AFF., Winter/Spring 2006, at 115. Sudan is not a state party to the Rome Statute, but the ICC can exercise jurisdiction over a case referred to it by the UN Security Council. For a discussion of the ICC's jurisdiction, see *supra* note 13 and accompanying text.

to sign Article 98 agreements[20] by cutting off military aid—a practice which, in the words of then-U.S. Secretary of State Condoleezza Rice, amounted to "shooting ourselves in the foot."[21] Despite these changes, the American orientation toward the court remained suspicious, though perhaps no longer openly adversarial.

The outcome of the 2008 U.S. elections increases the likelihood that the United States will soon engage in a reevaluation of its relationship with the ICC. President Obama, newly inaugurated as of the time this Article was being prepared for publication, signaled during his campaign that he would review the U.S. relationship with the ICC.[22] Obama will govern with a more multilateralist Congress that may be expected to share his agenda of reversing America's perceived loss of standing in the world resulting from Bush's unilateralist approach.[23] In short, the question of the American relationship with the ICC will, in the next few years, present a live issue in a way that it did not during the Bush presidency. And as the United States and, indeed, other major powers consider their respective relationships with the ICC in the coming years, the salience of debates about the ICC's preventive potential will likely increase.

The remainder of this Article comprises four Parts. Part II examines the ICC's potential to prevent humanitarian atrocities from occurring. Taken together, numerous legal and political commentaries have suggested a hodgepodge of mechanisms by which the ICC might arguably prevent atrocities. Here, I attempt to offer a balanced description, explanation, and critique of each major mechanism suggested. In this Part and Part III, I do not claim to canvass every bit of the voluminous literature on

20. The United States State Department has negotiated a series of bilateral treaties (called "Article 98 Agreements") by which foreign nations agreed not to turn over U.S. nationals to the ICC under any circumstances. *See* Rome Statute, *supra* note 6, art. 98, ¶ 2 (providing that court may not require state to surrender person if such surrender would violate state's obligations under other international agreements); Press Release, Richard Boucher, U.S. Dep't of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), *available at* http://www.state.gov/r/pa/prs/ps/2005/45573.htm (announcing Article 98 agreement with Angola).

21. *See Contemporary Practice of the United States Relating to International Law*, 101 AM. J. INT'L L. 185, 214 (2007).

22. *See* Am. Soc'y of Int'l Law, International Law 2008 Project, Survey Response of Senator Barack Obama, *available at* http://www.asil.org/obama.cfm (detailing Senator Obama's stance on U.S. policy towards ICC). Professor Samantha Power, a high-profile scholar and ICC supporter, has served as a key foreign policy advisor to then-Senator Obama.

23. It is also worth noting that some influential Republicans, including Obama's erstwhile rival, Senator John McCain, have signaled a warming to the court. *See* John McCain & Bob Dole, *Rescue Darfur Now*, WASH. POST, Sept. 10, 2006, at B7 (recommending that United States remind Sudanese officials that they may be prosecuted in ICC and that United States use its intelligence assets to support prosecutions); *see also* Nora Boustany, *A Shift in the Debate on International Court*, WASH. POST, Nov. 7, 2006, at A16 (reporting that fresh assessment of ICC seemed to be underway among Republicans and Democrats, due in large part to performance of ICC Chief Prosecutor Luis Moreno-Ocampo).

the subject, but rather strive to present every important argument about the court's preventive effect fairly and concisely.[24]

Part III examines the other side of the ledger: arguments that the ICC may in fact aggravate atrocities in certain circumstances. For instance, the court may have a negative effect by indicting important political players and thereby undermining potential peace agreements. In Parts II and III, I often refer to ICC "supporters" or "advocates" and ICC "opponents" or "critics." Clearly, not every commentator fits neatly into one of the two categories; nevertheless, this bit of linguistic shorthand not only simplifies the prose but also reflects the fact that the academic commentary has tended to be rather polarized.[25] Also, by definition, the factors in Part II will have a positive effect, if any, on prevention, whereas the factors in Part III will have a negative effect, if any.

Part IV summarizes the considerations to be taken into account to arrive at a bottom-line answer as to whether the ICC represents a net gain or net loss for prevention. The unpredictable potential for some considerations to swamp others means that, in the near term, accurately predicting the ICC's preventive potential poses grave difficulties.[26] This Part canvasses the current state of scholarly knowledge to show that no one has yet developed an empirical or theoretical model capable of arriving at a usefully predictive bottom-line.

Part V observes that claims about the ICC's likelihood of preventing or aggravating atrocities continue to play a role in policy discourse, notwithstanding the difficulty of verifying claims that the court will do either. I argue that it is important for policymakers to unmask the real meanings of such discourse rather than simply to take claims about prevention at face value.

Before proceeding further, I briefly note that there are reasons other than prevention that may be used to justify supporting or opposing the

24. The topic of this Article touches upon several distinct and extensive bodies of the academic literature, including criminal deterrence, transitional justice, and norms literature, not to mention the extensive literature on the ICC's institutional characteristics and legal framework.

25. *See* Joanna Harrington, Michael Milde & Richard Vernon, *Introduction*, *in* BRINGING POWER TO JUSTICE? THE PROSPECTS OF THE INTERNATIONAL CRIMINAL COURT 1, 9 (Joanna Harrington, Michael Milde & Richard Vernon, eds. 2006) [hereinafter BRINGING POWER TO JUSTICE?] ("The advent of the ICC has led to radically opposed reactions and predictions."). An important exception is David Wippman. *See generally* David Wippman, *Exaggerating the ICC*, *in* BRINGING POWER TO JUSTICE? 99 (arguing that ICC will have little effect, positive or negative). In his article, Wippman canvassed a number of arguments for and against the ICC. *See id.* This Article, unlike Wippman's, focuses on prevention, and it approaches the various claims of both ICC advocates and critics charitably. Wippman drew a number of conclusions based on anecdotal and limited historical evidence, whereas I seek to probe the extent to which rigorous empirical studies have offered evidence regarding the various claims. *See id.*

26. This Article examines the court "as is," and does not address hypothetical changes to the court's structure or jurisdiction that might come about following future review conferences.

ICC regime. For instance, one may favor the ICC as a means to achieve retributive or expressive goals, by meting out deserved punishment to perpetrators or articulating the international community's revulsion at atrocities. Similarly, one may be perfectly convinced that the ICC will have a preventive effect, but may nevertheless harbor fears about one's country losing sovereignty or becoming the target of politically motivated prosecutions. This Article addresses only the question of the ICC's preventive potential, which is only one consideration—albeit an important one—that a policymaker must weigh when considering her country's relationship with the ICC. Considerations such as providing justice to victims and creating accurate historical records are discussed below, but only insofar as these may be expected to impact the prevention of atrocities. Because the issue of prevention does not, alone, dispose of the question whether the United States[27] or any other country[28] should join or support the ICC regime,[29] this Article reaches no conclusions regarding such questions.

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27. The ICC's potential to prevent atrocities may be partially a function of the support it does or does not receive from powerful states like the United States. Several commentators have argued that the lack of U.S. support, in particular, undermines the court's effectiveness. *See, e.g.*, Goldsmith, *supra* note 13, at 89 (arguing that ICC states parties defeated their own goal of creating effective court by refusing to make compromises necessary to gain U.S. support). *See generally* Robert C. Johansen, *The Impact of US Policy Toward the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes Against Humanity*, 28 HUM. RTS. Q. 301 (2006) (arguing that U.S. obstructionism has impeded court's work). This Article will not include the failure to obtain support from powerful nations as a consideration in determining the ICC's preventive potential, because it assumes that the extent to which the United States and other powerful nations will ultimately lend support to the ICC remains an open question.

28. Although 108 countries, a numerical majority of the world's states, have joined the ICC regime, this total includes only three of the world's ten most populous countries: Japan, Brazil, and Nigeria. The other seven most populous countries are the People's Republic of China, India, the United States, Indonesia, Pakistan, Bangladesh, and Russia—non-party states to the Rome Statute, collectively comprising more than half of the world's population. Additionally, many other militarily significant states, such as Israel and Iran, have not joined. *See* The States Parties to the Rome Statute, *supra* note 9 (listing states parties at official ICC website). For a discussion of China's position regarding the ICC, see generally Lu Jianping & Wang Zhixiang, *China's Attitude Towards the ICC*, 3 J. INT'L CRIM. JUST. 608 (2005). For a discussion of India's position, see generally Usha Ramanathan, *India and the ICC*, 3 J. INT'L CRIM. JUST. 627 (2005).

29. Joining and supporting the ICC actually present two distinct sets of issues. A country with capabilities like the United States might choose to provide uniquely valuable support to ICC prosecutions, e.g., airlift to transport suspects or satellite imagery of scorched-earth campaigns, without becoming a state party to the Rome Statute. In fact, John Bellinger, Bush's State Department Legal Advisor, stated in 2007, "We . . . have expressed a willingness to consider assisting the ICC Prosecutor's Darfur work should we receive an appropriate request." *See Contemporary Practice of the United States Relating to International Law*, 101 AM. J. INT'L L. 636, 637 (2007); *see also* John B. Bellinger III, Remarks at Stanford Law School (Feb. 19, 2008) (notes on file with author) (reaffirming same).

II. How The ICC May Prevent Atrocities

In what ways may the ICC contribute to preventing the occurrence of genocide, war crimes, and crimes against humanity? The literature on the subject suggests five primary mechanisms. First, the court's operation may provide a general deterrent effect, convincing those who contemplate orchestrating atrocities that such actions will harm more than help them. Second, the court's unique regime of complementary jurisdiction may allow it to leverage national jurisdictions into action—an effect here referred to as "complementary deterrence." Third, the ICC may sideline specific perpetrators so that they cannot commit further crimes. Fourth, the ICC may end cycles of violence by displacing private justice, individualizing collective guilt, and developing a reliable historical record of atrocities. Finally, and most ambitiously, the court may serve as a tool of global moral education that helps shape the norms of combatants and state leaders.

The first and second of these mechanisms seek to deter atrocities from occurring at all. The third and fourth would operate in the near and medium-term to eliminate conditions that foster atrocities in societies recovering from mass violence. The fifth mechanism will have relevance, if at all, more globally and over the longer term. ICC critics have subjected each of these proffered mechanisms to various critiques.

A bit of vocabulary will prove useful in this discussion. The particular usages of terms such as "prevention" and "deterrence" often vary among writers on criminal law.[30] In this Article, I use the term "prevention" broadly to denote all methods by which an institution mitigates the occurrence of the crimes in question. Prevention is a consequentialist rather than a deontological purpose of punishment. That is, prevention is motivated by the desire to achieve some concrete result in the world (here, preventing crimes), rather than by a sense of being morally compelled regardless of the consequences.[31] Prevention may be achieved by incapacitating a criminal,[32] reforming a criminal,[33] or deterring a person (who may or may not yet have committed previous crimes) from committing

30. *Compare* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 1.5 (2d ed. 2003) (defining "prevention" as punishment aimed at deterring particular criminal), *with* CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 3 (15th ed. 1993) (using "special deterrence" to denote same).

31. The most well-known type of consequentialism is utilitarianism: achieving the greatest good (or happiness) for the greatest number of people. This Article assumes that the ICC's consequentialist goal regarding prevention is to decrease the overall number and severity of atrocities globally and, in particular, among ICC states parties.

32. Called variously "incapacitation," "restraint," "isolation," or "disablement." *See* LAFAVE, *supra* note 30, § 1.5(a)(2).

33. Called "reformation," "rehabilitation," "correction," or "education." *See id.* § 1.5(a)(3), § 1.5(a)(5).

crimes. In this Article, "general deterrence"[34] refers to the goal of deterring people generally from committing certain crimes, whereas "specific deterrence"[35] refers to the goal of deterring a specific person (usually one who has previously committed the crime in question or a similar one). As noted, I also use a new term, "complementary deterrence," to denote certain potential deterrent effects arising from the ICC's unique regime of complementary jurisdiction.

A. *General Deterrence*

On the day the Rome Statute entered into force, then-UN Secretary General Kofi Annan said, "We hope [the ICC] will deter future war criminals and bring nearer the day when no ruler, no state, no junta and no army anywhere will be able to abuse human rights with impunity."[36] General deterrence provides a key rationale for international criminal justice.[37] Yet the theory of general deterrence inevitably spawns controversy in whatever context it appears, because the general deterrent effect of most policies relies on questionable premises and is infamously difficult to measure.[38] It comes as no surprise that ICC proponents and critics have vociferously contested the court's potential for general deterrence, notwithstanding the difficulty of actually substantiating their claims. As we shall see, understanding the potential for general deterrence will not, by any means, answer ultimate questions about the ICC's preventive potential. But general deterrence provides the most conceptually straightforward rationale for creating such a court, so this subject is the right place to begin our inquiry.

General deterrence relies upon a foundational logic that may be summed up in a simple formula: A potential perpetrator "will commit the [criminal] act if and only if his expected utility from doing so, taking into

34. Often called "general prevention" or simply "deterrence." *See id.* § 1.5(a)(4).

35. Often called "particular deterrence," "prevention," "intimidation," or "special deterrence." *See id.* § 1.5(a)(1).

36. Marlise Simons, *Without Fanfare or Cases, International Court Sets Up*, N.Y. TIMES, July 1, 2002, at A23 (quoting Annan); *see also* United Nations, The International Criminal Court: An Overview, http://www.un.org/law/icc/general/overview.htm, *reprinted in* THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE 24-29 (William Driscoll, Joseph Zompetti & Suzette W. Zompetti eds., 2004) (website no longer available) (describing effective deterrence as one "primary objective" of ICC).

37. The ICTR Trial Chamber has often cited, as a general principle for the determination of sentences, the necessity to "dissuade for ever, others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights." *See, e.g.*, Prosecutor v. Rutaganda, Case No. ICTR 96-3-T, Judgment and Sentence, ¶ 456 (Dec. 6, 1999), *available at* http://69.94.11.53/ENGLISH/cases/Rutaganda/ judgement/7.htm.

38. *See* Robinson & Darley, *supra* note 3, at 953-56 (describing most significant hurdles to effective deterrence).

account his gain and the chance of his being caught and sanctioned, exceeds his utility if he does not commit the act."[39] Thus, the deterrent effect of a particular sanction is a function of the potential criminal's expectations regarding both the likelihood and the severity of punishment.[40] This simple economic model assumes that the sanction's target will make a rational assessment of the risks and rewards of the sanctioned criminal act. This Sub-Part assesses the ICC in light of each of the deterrence model's key factors: certainty of punishment, severity of punishment, and the underlying rationality assumption.

1. *Certainty of Punishment*

The ICC has no police or military forces to apprehend suspects or to enforce its orders. It is wholly reliant upon states for enforcement. ICC Prosecutor Luis Moreno-Ocampo has observed that he had thousands of police officers working for him when he was a prosecutor in Buenos Aires, but now that he is responsible for half the world, he has zero.[41]

The willingness of a given state to assist the court may be expected to depend upon that state's political motivations. For example, as of this writing, the Congolese government had assisted the court by capturing and surrendering three important rebel leaders indicted by the court for various crimes against humanity.[42] Conversely, the arrest warrants for two Sudanese officials connected with the atrocities in Darfur have gone unexecuted because the suspects were under the control of the Sudanese government, which had no intention of assisting the court.[43] Indeed, a state

39. *See* A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement Law*, 38 J. ECON. LITERATURE 45, 47 (2000) (citation omitted).

40. *See Developments in the Law: International Criminal Law*, 114 HARV. L. REV. 1943, 1963-64 (2001); *see also* Johannes Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 960, 964 (1966) (writing that risk of detention, apprehension, and conviction as well as severity of penalties affect deterrence). Gary S. Becker built on this insight and "initiated the modern use of economic analysis to study the criminal law." *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968) (presenting modern use of economic analysis for criminal law); Patrick J. Keenan, *The New Deterrence: Crime and Policy in the Age of Globalization*, 91 IOWA L. REV. 505, 518 (2006) (explaining Becker's analysis).

41. *See* Luis Moreno-Ocampo, Prosecutor, Int'l Criminal Court, Remarks at Stanford Law School (Jan. 30, 2007) (notes on file with author) (comparing resources as Buenos Aires prosecutor and ICC prosecutor).

42. *See* Press Release, International Criminal Court, Third detainee for the International Criminal Court: Mathieu Ngudjolo Chui (Feb. 7, 2008), *available at* http://www.icc-cpi.int/press/pressreleases/329.html (noting capture and surrender of three important rebel leaders indicted by court).

43. *See id.* (reporting on unexecuted arrest warrants for two Sudanese officials connected with atrocities in Darfur). One of the Sudanese indictees, Ahmed Harun, is still a minister in the Sudanese government. *See* Press Release, International Criminal Court, Media Advisory: ICC Prosecutor on Darfur: "Stop the crimes, Stop the criminals" (June 2, 2008), *available at* http://www.icc-cpi.int/press/pressreleases/373.html.

may also be willing to assist the court but unable to do so. The court has indicted several top leaders of the Ugandan rebel group known as the Lord's Resistance Army, but the Ugandan government is currently unable to arrest the indictees.

Such problems are endemic to international criminal tribunals, and the ICC will likely often find itself hard-pressed to execute arrest warrants. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR)—referred to as "the ad hoc tribunals"—have finally managed to obtain custody of most of their key suspects, although the ICTY, in particular, struggled to do so during its first years of operation.[44] In Rwanda, Paul Kagame's Tutsi-dominated post-genocide government had every incentive to apprehend defeated Hutu perpetrators of the genocide; moreover, the international community pressured surrounding states to seek out and hand over fugitives.[45] In the former Yugoslavia, the NATO-led Stabilization Force (SFOR) arrested many, though not all, of those indicted by the ICTY.[46]

The ICC may occasionally benefit from such circumstances, but it is difficult to predict how often this will be the case. More likely than not, the ICC will often confront Darfur-like situations in which the power with physical control over suspects is unwilling to turn over suspects and cannot be compelled to do so absent outside military intervention. The fewer perpetrators who are brought to justice, the less certainty of punishment and consequent deterrent effect may be expected.

Problems with gaining physical control over suspects notwithstanding, the length of international criminal trials often limits the number of persons who can be tried. The experiences of the ad hoc tribunals shed light on this challenge. These two tribunals have themselves carried out but a tiny number of prosecutions and convictions in comparison to the thousands of perpetrators of atrocities in the Former Yugoslavia and Rwanda.[47] As of November 2008, the ICTY had rendered judgment on sixty-seven accused; forty-five were still subject to ongoing proceedings.[48]

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44. *See* RACHEL KERR, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: AN EXERCISE IN LAW, POLITICS, AND DIPLOMACY 147-74 (2004) (recounting problems of obtaining custody of accused). For an introduction to the ad hoc tribunals, see VAN SCHAACK & SLYE, *supra* note 5, at 37-63.; *see also* S.C. Res. 827, *supra* note 4, ¶ 2 (establishing ICTY); S.C. Res. 955, *supra* note 10, ¶ 1 (establishing ICTR).

45. *See* Hans-Peter Kaul, *The International Criminal Court: Current Challenges and Perspectives*, 6 WASH. U. GLOBAL STUD. L. REV. 575, 580 (2007) (noting that most arrests for ICTR were made by neighboring states).

46. *Id.* (noting that most arrests for ICTY were made by NATO and coalition forces).

47. Of course, the ICTY and ICTR are not the only courts trying suspects for atrocities committed in the former Yugoslavia and Rwanda. National and local courts in both countries have tried large numbers of cases.

48. *See* ICTY at a Glance, Key Figures of ICTY Cases, http://www.un.org/icty/glance-e/index.htm (follow "Key figures" hyperlink) (last visited Mar. 2, 2009) (providing statistics on ICTY ongoing and concluded proceedings).

At the same time, the ICTR had rendered judgments on thirty-seven accused; another thirty-seven accused either had trials in progress or were awaiting trial.[49] Considering the long odds of prosecution, the numbers are arguably "too small to make a rational wrongdoer hesitate."[50]

The pace with which many of the ad hoc tribunals' cases have proceeded, often requiring many years, partially explains why relatively few trials have taken place. Observers often attribute the tribunals' sometimes frustratingly slow pace not only to the complexity of the cases, but also to the otherwise praiseworthy fact that they rigorously ensure respect for defendants' due process rights.[51] The more resources that trials require, the less trials that can be held, decreasing the certainty of punishment for any given perpetrator.[52]

Of course, the importance of the perpetrators who are prosecuted affects the deterrence calculus. Although the ICTR has tried relatively few accused, the list of convicts and suspects includes several prominent

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49. *See* International Criminal Tribunal for Rwanda, Latest News, http://69.94.11.53/default.htm (follow "Status of Detainees" hyperlink under New Documents) (last visited Mar. 2, 2009) (giving statistics on ICTR's trials and convictions).

50. *See* Diane Marie Amann, *Assessing International Criminal Adjudication of Human Rights Atrocities*, THIRD WORLD LEGAL STUD. 169, 174 (2000-2003). Indeed, in the former Yugoslavia, serious atrocities continued to occur in the face of a functioning tribunal and despite warnings that war crimes would be prosecuted. The worst atrocity of the Bosnian war, the Serb massacre of Muslim civilians at Srebrenica, happened in July 1995, after the ICTY was already up and running and had indicted several high-ranking Bosnian Serb leaders. *See* Theodor Meron, *Answering for War Crimes*, FOREIGN AFFAIRS, Jan./Feb. 1997, at 2, 6 (recounting timing of Srebrenica massacre). *But see* MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 219 (1997) (reporting former ICTY and ICTR Prosecutor Richard Goldstone's claim: " 'Fear of prosecution in The Hague . . . prompted Croat authorities to issue orders to their soldiers to protect Serb civilian rights when Croatia took control of the Krajina and Western Slavonia regions of the country [in August 1995].' ") (citation omitted).

51. Helena Cobban, *International Courts*, FOREIGN POL'Y, Mar./Apr. 2006, at 22, 23 (noting critically that ad hoc tribunals and ICC "operate under civilian law and provide generous protections to defendants" and suggesting that result "is a ballooning of the courts' timelines and cost"). One commentator has suggested that "the safeguards developed to protect the poor and defenseless against the juggernaut of the state" may make no sense in the context of international crimes, where evidence is much harder to obtain. *See* Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 HUM. RTS. Q. 90, 95 (2000). Note, however, that the jurisprudence of the ad hoc tribunals has responded to the difficulties in obtaining evidence in this context by extending the scope of superior responsibility and conspiracy-like doctrines. *See generally* Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

52. I explore the financial costs of the ICC in greater detail in Sub-Part III.C. International justice proponents predictably respond to concerns about limited resources by offering the normative prescription that states should contribute more to international justice and act with greater diligence in effectuating the enforcement of international tribunals' orders. *See, e.g.*, Theodor Meron, *From Nuremberg to The Hague*, 149 MIL. L. REV. 107, 110-11 (1995).

figures at the time of the genocide: the Rwandan head of government (Prime Minister Jean Kambanda), fourteen government ministers, and several others holding leadership positions.[53] Prosecuting such "big fish" should have a greater chance of deterring other big fish. One commentator observed in 2000: "The clearest lesson to emerge from the experience of the ICTY is the need to indict and arrest the people with criminal responsibility at the highest political and military levels."[54] Former ICTY Judge Patricia Wald has noted that, at the beginning, the ad hoc tribunals "indicted too many low- and medium-level defendants [in order] to justify their existence."[55] When NATO was later able to deliver higher-ranking suspects to the ICTY, the tribunal found its docket burdened with too many "small fries."

Unlike the ICTY and the ICTR, the ICC and its first prosecutor, Mr. Moreno-Ocampo, have determined to focus the court's efforts on the big fish from the outset. The Rome Statute includes provisions emphasizing that the ICC has jurisdiction over "the most serious crimes of concern to the international community as a whole"[56] and that a case is inadmissible if "not of sufficient gravity."[57] The Office of the Prosecutor has interpreted these provisions to suggest that it should focus its "resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes."[58] Clear intentions about whom the prosecutor will target naturally impact the deterrent effect of possible ICC prosecution upon variously situated perpetrators. Although a low-level foot soldier of genocide faces a low risk of punishment by the ICC, the court's target group—high-level instigators—should face a substantially greater chance of punishment.

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53. *See* International Criminal Tribunal for Rwanda, The Tribunal at a Glance, http://69.94.11.53/ENGLISH/factsheets/1.htm (last visited Mar. 2, 2009) (providing statistics on ICTR trials and convictions).

54. *See* Sandra Coliver, *The Contribution of the International Criminal Tribunal for the Former Yugoslavia to Reconciliation in Bosnia and Herzegovina, in* INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT 19, 28 (Dinah Shelton ed., 2000). Belgrade delivered former Yugoslav President Slobodan Milosevic and former Bosnian Serb leader Radovan Karadzic to the ICTY in 2001 and 2008, respectively.

55. Patricia M. Wald, *International Criminal Courts—A Stormy Adolescence*, 46 VA. J. INT'L L. 319, 339 (2006). For instance, the defendant at the ICTY's first trial, Dusko Tadic, had committed atrocities but was considered "a bit player" in the scheme of the violence in the former Yugoslavia. *See* SCHARF, *supra* note 50, at 222.

56. Rome Statute, *supra* note 6, pmbl. & art. 5, ¶ 1.

57. Rome Statute, *supra* note 6, art. 17, ¶ 1(d) (listing this and other factors used to determine a case's admissibility).

58. *See* International Criminal Court Office of the Prosecutor, Paper on Some Policy Issues Before the Office of the Prosecutor, at 7, (Sept. 2003), http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf.

2. *Severity of Punishment*

Even if a high-level perpetrator would anticipate a significant *possibility* of punishment, the anticipated *nature* of that punishment would, according to the theory, also play into his calculation. This issue highlights a paradox of today's international criminal law. On the one hand, the law calls to account perpetrators of the most heinous crimes condemned by the international community.[59] On the other hand, sentences are meted out to the perpetrators of such crimes as if the court were responding to routine criminal acts.[60] Thus, a perusal of ICTY and ICTR opinions reveals, for example, an eight-year sentence for the crime of attacks on civilians;[61] a thirteen-year sentence for the combined crimes of torture, cruel treatment of detainees, and personally participating in the murders of nine detainees;[62] and a fifteen-year sentence for the crimes of genocide and extermination.[63] As of August 2004, the mean sentence in the ICTY was 13.9 years and the median sentence was twelve years.[64]

At the time of this writing, the ICC has yet to convict or sentence any individual. As a result, it remains speculative whether the ICC will, on average, inflict longer sentences than have the ad hoc tribunals. Unlike the statutes of the ad hoc tribunals, the Rome Statute limits prison terms

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59. *See* Rome Statute, *supra* note 6, pmbl. ("Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity . . . .").

60. Mark Drumbl has argued that international lawyers too often import domestic criminological assumptions into the international realm whole cloth. According to Drumbl, this tendency is nowhere more apparent—or incongruous—than in the context of punishment. *See* Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539 (2005) [hereinafter *Collective Violence and Individual Punishment*]; *see also* MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW (2007) (explicating these issues in greater detail); Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 HARV. HUM. RTS. J. 39, 94-97 (2002) (questioning application of standard criminal paradigm to extraordinary evils such as genocide).

61. *See* Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶¶ 478, 481 (Jan. 31, 2005).

62. *See* Prosecutor v. Limaj, Bala & Musliu, Case No. IT-03-66-T, Judgment, ¶¶ 741-42 (Nov. 30, 2005).

63. *See* Prosecutor v. Seromba, Case No. ICTR 2001-66-I, Judgment, ¶ 104 (Dec. 13, 2006).

64. *See* Drumbl, *Collective Violence and Individual Punishment*, *supra* note 60, at 557 (laying out historic ICTY statistics). The ICTR, it should be noted, has tended to impose higher sentences than the ICTY. According to Drumbl, eleven of the twenty accused sentenced at the time of his writing had been sentenced to life imprisonment, and the lowest sentence was ten years. *See id.* (comparing statistics of two tribunals); *see also* Mark B. Harmon & Fergal Gaynor, *The Sentencing Practice of International Criminal Tribunals: Ordinary Sentences for Extraordinary Crimes*, 5 J. INT'L CRIM. JUST. 683, 711-12 (2007) (urging that ICTY's lenient sentencing practices "weaken respect for human dignity and the rule of law").

to thirty years, unless a life sentence is "justified by the extreme gravity of the crime and the individual circumstances of the convicted person."[65]

Severity is not merely a function of length of sentences. Conditions of punishment matter as well. Critics have noted that the "big fish" who serve their time at The Hague quite often do so in more humane conditions than the "small fries" serving their time in places like Rwanda or the Congo. Tom Farer wrote in 2000 that "there is no prison in Rwanda that even approaches internationally recognized minimum prison conditions," a fact that "rais[es] the possibility that those convicted of masterminding the genocide will serve their sentences in country club settings, while those convicted by Rwandan courts will serve their time in appalling prison conditions."[66] Since Farer wrote, Rwanda has made incremental improvement to its prisons, but prison conditions in many countries, particularly in Africa, remain well below international minimum standards. Moreover, some of the individuals convicted by the ICTR have been HIV positive; improved access to quality medical care may mean that incarceration actually provides some substantial *benefit*.[67]

Though prison in The Hague is almost certainly preferable to domestic prisons in countries likely to be subject to the ICC's exercise of jurisdiction, ICC supporters point out that prison anywhere generally remains something to be avoided. Under the ICC's complementarity regime (described in Sub-Part II.B. below), the court will be trying individuals who would otherwise escape punishment. Thus, argue ICC supporters, the proper comparison is not between serving time in The Hague or in an African prison, but rather serving time in The Hague or not at all. In any event, serious questions remain about whether ruthless and ambitious leaders will view punishment by the ICC as a real deterrent to crimes.

3. *The Rationality Assumption*

As in other contexts, the assumption of rationality here poses serious problems for deterrence theory. Moreover, the sort of criminality implicating ICC jurisdiction presents its own particular twist on the problem. Effective general deterrence requires potential perpetrators of atrocities to

65. Rome Statute, *supra* note 6, art. 77, ¶ 1. Wippman attributes this provision to European attitudes that "view long sentences, especially life sentences, as inhumane." Wippman, *supra* note 25, at 113. It may be, however, that a life sentence has only negligibly more deterrent effect than a thirty-year sentence. *See* Andenaes, *supra* note 40, at 964 ("At least since the time of Beccaria, it has been commonly accepted that the certainty of detection and punishment is of greater consequence in deterring people from committing crimes than is the severity of the penalty."); *see also* JOHN BRAITHWAITE, CRIME, SHAME AND REINTEGRATION 69 (1989) (listing several studies that support this conclusion).

66. Farer, *supra* note 51, at 93.

67. *See Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda*, 16 HUM. RTS. WATCH, Sept. 2004, at 9-10, *available at* http://hrw.org/reports/2004/rwanda0904/rwanda0904.pdf (noting that defendants receive anti-retroviral therapy and treatment for opportunistic infections of AIDS).

be, at least to some degree, rational actors who balance the expected disutility of punishment against the expected utility to be gained from committing crimes. Many critics have argued that even if a well-resourced ICC could deter so-called rational actors, those who commit atrocities are often simply not acting rationally, but rather out of bloodlust or paranoia.

Circumstances of general strife and lawlessness often accompany descents into atrocity. Tom Farer has noted that "civil conflict is, by definition, coterminous with the collapse of public order," concluding that the "remote threat of criminal sanctions, it could be argued, will not resonate in the paranoid world of domestic armed conflict" where most atrocities occur.[68] In a state of paranoia or bloodlust, *genocidaires* may simply fail to engage in the sort of cost/benefit analysis implied by general deterrence. Mark Drumbl has asked:

> [W]ill a suicide-bomber be deterred by fear of punishment in the event of capture? Does the existence of a permanent ICC necessarily mean that those imbued in political paranoia will see their actions as legally or morally wrong? Do genocidal fanatics make cost-benefit analyses prior to initiating violence? Do ordinary people swept up in supremacist euphoria have the moral resources to make dispassionate decisions?[69]

Perhaps even more troubling, some individual actors capable of making cost-benefit tradeoffs may not be "rational" in the technical sense used in economic models, i.e., these actors may not be self-interested. Rather, they may value a nation, ethnicity, or political agenda more than they fear any sort of individual punishment. To quote Drumbl again: "Assuming arguendo that rational choice was possible in the cataclysm of mass violence, for some people the value of killing or dying for a cause actually exceeds the value of living peacefully without the prospect of punishment."[70] Whether most or even many perpetrators of atrocities find their motivation in selfless service to a cause presents an important question. Undoubtedly, though, some perpetrators will be undeterrable by any legal sanction, including those meted out by the ICC.

An ICC advocate might counter that genocide and systematic human rights abuses do not stem from spontaneous outbursts of violence; rather, they require rational planning at the highest levels. Leila Sadat and Payam Akhavan have separately argued that in both Rwanda and Yugoslavia, the violence was, in Sadat's words, "deliberately and systematically induced by unscrupulous leaders."[71] Although an ordinary person caught

68. Farer, *supra* note 51, at 98.

69. Drumbl, *Collective Violence and Individual Punishment*, *supra* note 60, at 590-91.

70. *Id.* at 591.

71. *See* LEILA NADYA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 51 (2002) (using this concept to support theory that viable threat of punishment

up in "supremacist euphoria" may not be deterrable, state leaders thinking about fanning hatreds to support their own instrumental ends might be. It is precisely the "big fish"—the Slobodan Milosevics of the world—upon whom the ICC is focused. Also, unlike the ad hoc tribunals, a permanent ICC already exists and is ready to act when necessary.[72]

Yes, parry ICC critics, the big fish may not be caught up in the throes of bloodlust like the common *genocidaire*, but they may either overestimate their own power to evade punishment[73] or might simply have a "taste for . . . risk."[74] Julian Ku and Jide Nzelibe have persuasively argued that perpetrators of humanitarian atrocities are likely the kind of people who have a higher tolerance for risk and, thus, are less likely to be deterred by threats of criminal sanctions.[75] Needless to say, it is a difficult matter to

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helps to prevent recurrence and repair affected societies); *see also* Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 741, 752 (1998) (stating that one premise of international justice is that ethnic conflicts are neither historically determined "clashes of civilizations" nor "spontaneous outbursts of bloodlust" but rather end products of deliberate—and deterrable—campaigns to incite violence).

72. General deterrence provided an important rationale for creating a *permanent* international court. Potential perpetrators would know that the ICC was already monitoring their situation and ready to act. *See generally* David J. Scheffer, *Developments in International Criminal Law: The United States and the International Criminal Court*, 93 AM. J. INT'L L. 12, 13 (1999) ("[A permanent ICC] would also serve as a more effective deterrent than the uncertain prospect of costly new ad hoc tribunals.").

73. It is possible, after all, that "a position of power makes perpetrators quite often feel outstanding and incontestable." Otto Triffterer, *The Preventive and Repressive Function of the International Criminal Court*, *in* THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 137, 161 (Mouro Politi & Giuseppe Nesi eds., 2001). Might ordinary people, on the other hand, sometimes overestimate their chances of being brought to justice by an international court? Some have opined that for low-ranking offenders, the odds of being brought before an international court must seem like a lottery. *See, e.g.*, David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473, 477 (1999) (analogizing international prosecution to lottery). Yet, people routinely overestimate their chances of winning a lottery (or else they would not play it). I have seen no discussion of this point in the ICC literature, but common experience suggests that people are, at least under some circumstances, more likely to think they will get caught doing something wrong than they really are.

74. Julian Ku & Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 WASH. U. L. REV. 777, 802 (2006) (discussing certain African leaders' quest for power despite high probability of murder, exile, and imprisonment).

75. *See id.* at 807. One need look no further than to former New York Governor and ethical crusader Eliot Spitzer, who resigned his office in March, 2008 following a prostitution scandal, to find an example of a powerful person who apparently relished risky behavior or felt invulnerable to "getting caught." *See Experts Analyze Spitzer's Thinking*, CNN, Mar. 11, 2008, http://web.archive.org/web/20080314140120/http://www.cnn.com/2008/LIVING/personal/03/11/spitzer.psychology.ap/index.html (offering experts' views on why some powerful individuals tend toward reckless behavior).

parse out what is going through the mind of the average ruthless political leader with criminal tendencies.

This Sub-Part has explored the ICC's preventive potential through the lens of the classical criminal deterrence model, analyzing two variables (certainty and severity) and one assumption (rationality). As the foregoing discussion suggests, grappling with just these three factors presents a complicated set of problems and no clear answers. Yet the question of the ICC's preventive capabilities involves a number of potential issues in addition to general deterrence. It is to these considerations that we now turn in the remainder of Part II and in Part III.

B. *Complementary Deterrence*

The delegations at Rome had to grapple with a fundamental question about the new ICC's jurisdiction: Would the ICC, like the ad hoc tribunals, have primacy over domestic courts?[76] That is, would the ICC be invested with the power to demand that states turn over suspects so that they would be tried by the ICC rather than a domestic court? In the end, granting the ICC primacy over national courts in all circumstances was simply a step too far for most of the delegations at the Rome Conference. On the other hand, a court that must always defer to national authorities at their request would likely have been unable to enforce the international criminal laws against members of governments or powerful domestic groups in any case. To strike a balance between the sovereign prerogatives of states parties and the ICC's effectiveness, the states parties created a novel jurisdictional scheme, known as the system of "complementarity."

Under the complementarity system, the ICC may not exercise jurisdiction over a case if it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution . . . ."[77] A state need only conduct a genuine investigation, not necessarily prosecute or punish, in order to invoke the principle of complementarity and remove jurisdiction from the ICC. Just how and when the court should determine that a state is "unwilling or unable genuinely" to investigate or prosecute has been a fertile subject for debate. "Inability" can mean something as fundamental as

76. Under a system of primacy, a tribunal like the ICTR could demand that Rwanda surrender suspects for trial at The Hague rather than try them domestically. For this and other reasons (including the fact that the ICTR did not impose the death penalty), the post-genocide Rwandan government, which happened to hold a rotating seat on the UN Security Council at the time, registered the only vote against establishing the ICTR. U.N. SCOR, 49th Sess., 3453d mtg. at 16, U.N. Doc. S/PV.3453 (Nov. 8, 1994) (explaining Rwanda's voting against resolution despite support for parts of it).

77. Rome Statute, *supra* note 6, art. 17, ¶ 1(a); *see also* ICC R. P. & EVID. 51, *available at* http://www2.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Official+Journal/Rules+of+Procedure+and+Evidence.htm (last visited Mar. 2, 2009) (setting out types of information court may consider in making determinations under Article 17 of Rome Statute).

the total breakdown of government and the judicial system in a country. But it may also indicate a situation in which there is a functioning judiciary but the national government has not domestically criminalized the ICC crimes as part of its substantive domestic criminal law.[78]

Because national-level investigation and prosecutions may often trump those of the ICC, the principle of complementarity provides for a court that is weaker than it would be if it operated under a principle of primacy. Yet complementarity may be seen not just as a limit but also "as a way of empowering national courts."[79] According to some, it "fundamentally changes the incentives for national courts and should make them more likely to address international crimes directly."[80] In the best case, complementarity might encourage states to "aggressively and fairly pursue domestic prosecutions of international crimes so as not to trigger the jurisdiction of the ICC over the case and invite the glare of the eyes of the international community upon it."[81]

This view of complementarity is premised upon the idea that the ICC can exert leverage over governments that might otherwise fail to investigate or prosecute grave crimes. The court can cajole states into action by threatening to thrust the issue onto the global stage by taking up the case itself. Lacking forces of its own to enforce ICC law, the court and its prosecutor may thus increase the deterrent potential of *national* courts.[82] As

78. *See* Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT'L CRIM. JUST. 86, 89 (2003) (explaining that "inability" under Rome Statute's Article 17 can mean simply not having right laws in place).

79. *See* William W. Burke-White, *The International Criminal Court and the Future of Legal Accountability*, 10 ILSA J. INT'L & COMP. L. 195, 201 (2003) (explaining how ICC should not be seen as limiting but empowering national courts).

80. *Id.*

81. Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 223 (2002-2003); *see also* Hans-Peter Kaul, *Construction Site for More Justice: The International Criminal Court After Two Years*, 99 AM. J. INT'L L. 370, 384 (2005) (arguing that complementarity is "an organizational principle that shapes the architecture of the international criminal law system as such"); Kleffner, *supra* note 78, at 113 (noting that ICC's activities may "result in national courts being more disposed to diligently investigate, prosecute and convict"); Diane F. Orentlicher, *Judging Global Justice: Assessing the International Criminal Court*, 21 WIS. INT'L L.J. 495, 508 (2003) (arguing that ICC may provide "a credible threat of international prosecutions if domestic institutions fall short"); Wasana Punyasena, *Conflict Prevention and the International Criminal Court: Deterrence in a Changing World*, 14 MICH. ST. J. INT'L L. 39, 69 (2006) (characterizing ICC "as a safety net to ensure that cases do not escape prosecution"); Steven R. Ratner, *The International Criminal Court and the Limits of Global Judicialization*, 38 TEX. INT'L L.J. 445, 447 (2003) (noting that complementarity may be "way of signaling to domestic courts that they should prosecute").

82. *See generally* Anne-Marie Slaughter & William Burke-White, *The Future of International Law is Domestic (or, The European Way of Law)*, 47 HARV. INT'L L.J. 327, 329 (2006) ("Assuming that current political, economic, and technological trends continue, the future effectiveness of international law will turn on its ability to influence and alter domestic politics.").

noted above, a national court may be considered "unable" to carry out a prosecution or investigation under Article 17 of the Rome Statute if the state has not enacted legislation criminalizing the crimes punishable by the ICC.[83] The threat of ICC action, in accordance with the principle of complementarity, ought then also to create incentives for states parties to pass the appropriate legislation.[84] In fact, many states parties have done so or are in the process of doing so.[85]

Non-party states can also invoke the principle of complementarity in those situations in which a national might be subject to ICC jurisdiction.[86] Such situations can occur when the UN Security Council refers a matter to the ICC or when the non-party state's national is accused of committing crimes on the territory of a state party.[87] To invoke complementarity, however, a non-party state, like a state party, must have domestically implemented the substantive law of the Rome Statute.[88] In this way, the ICC's complementarity regime may affect the domestic legal systems of even states that are not parties to the Rome Statute.

Mr. Moreno-Ocampo, the current ICC prosecutor, has recognized the potential power of leveraging complementarity. In fact, he has opined that an absence of trials in the ICC, if a consequence of the regular functioning of national courts, would signal a major success for the ICC.[89] The Office of the Prosecutor refers to this as a "positive approach to complementarity."[90]

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83. *See supra* note 78 and accompanying text (explaining scope of "inability" under Article 17).

84. Some jurists argue that the Rome Statute *obligates* parties to criminalize the ICC crimes, but there is no consensus on the point. According to Jann Kleffner, a purposive approach to interpreting the statute might support this obligation, but a textual approach does not. In any event, complementarity is a mechanism that might provide a political incentive to criminalize, apart from any legal duty. *See* Kleffner, *supra* note 78, at 94 (noting recent moves of many states to criminalize ICC crimes).

85. *See Symposium on National Implementation of the ICC Statute*, 2 J. INT'L CRIM. JUST. 133 (2004) (analyzing measures to implement Rome Statute adopted by Australia, Belgium, The Netherlands, and New Zealand); Symposium, *National Implementation of the ICC Statute (Part II)*, 5 J. INT'L CRIM. JUST. 419 (2007) (analyzing measures adopted by Argentina, England and Wales, Italy, and South Africa).

86. *See* Kleffner, *supra* note 78, at 111.

87. *See* Rome Statute, *supra* note 6, arts. 12, 13 (detailing preconditions for and exercise of jurisdiction).

88. *See* Kleffner, *supra* note 78, at 111 (noting incentives for non-party states "to criminalize the same range of conduct as is punishable before the ICC").

89. *See* Luis Moreno-Ocampo, Statement to the Assembly of States Parties to the Rome Statute of the International Criminal Court (Apr. 22, 2003), *available at* http://www.iccnow.org/documents/MorenoOcampo22Apr03eng.pdf (explaining that success of court "should not be measured [simply] by the number of cases that reach the court or by the content of its decisions"); Moreno-Ocampo, Remarks at Stanford Law School, *supra* note 41.

90. International Criminal Court Office of the Prosecutor, Report on Prosecutorial Strategy, at 5 (Sept. 14, 2006), http://www.icc-cpi.int/library/organs/otp/OTP_Prosecutorial-Strategy-20060914_English.pdf (noting how this sys-

If the ICC can enhance deterrence at the domestic level, then simply examining the deterrent effect of ICC investigation and prosecution itself would fail to capture the total deterrent impact of the ICC. We must revise our deterrence formula by adding the increased likelihood of punishment in a *domestic* court that is attributable to the threat that the ICC will exercise its powers. How much this affects the overall deterrence picture would depend upon the ICC's success in leveraging its power into improvements in the domestic administration of laws against atrocities.

In the minds of some, apparently including Mr. Moreno-Ocampo, what I here call "complementary deterrence" may ultimately represent the court's greatest preventive impact. Such impact depends, however, upon the degree to which national governments will actually fear negative consequences from proceedings in the ICC. If the court fails to maintain its profile and salience, any fears about the "glare of the eyes of the international community" may evaporate.[91]

C. *Specific Deterrence, Rehabilitation, and Incapacitation*

Criminal law seeks not only to deter members of society at large from committing criminal acts but also to stop those who have committed crimes from perpetrating further offenses. This goal may be brought about in at least three different ways. A penal system may, for one, strive specifically to deter criminals from committing further crimes. The theory of specific deterrence holds that an individual who receives punishment for, say, stealing a car, should later hesitate to steal another car or commit similar crimes, for fear of receiving punishment again. A second theory, rehabilitation, promotes the same goal as specific deterrence, but proceeds from the premise that the criminal in question may be reformed such that he or she will realize his or her own criminal actions to be morally wrong. Whereas specific deterrence aims to convince a criminal that recidivism will bring bad consequences, rehabilitation seeks to reform the character of the criminal.

Neither specific deterrence nor rehabilitation has played much of a role in justifying the creation of the ICC or in contributing to arguments about the court's preventive impact. One struggles to name any historical occurrence in which an individual has been convicted of a crime like genocide by an international tribunal, served time, was released, and then found himself or herself in a second situation in which he or she might again commit genocide. ICC crimes are the sort rarely perpetrated by only one person and typically carry little danger of post-punishment recidivism.[92] For these reasons, discussions of deterrence in this context almost

tem encourages national resolution of cases where possible and generally fosters international cooperation).

91. Ellis, *supra* note 81, at 223.

92. ICC crimes also differ from ordinary crime in that there may be no substitution effects. Increasing the likelihood or severity of punishment of ordinary crime may simply cause the incidence of another to rise. *See* Keenan, *supra* note

invariably refer to general deterrence, rather than specific deterrence.[93] Rehabilitation, too, tends to apply more appropriately to the societal level, where general moral education may be thought to decrease the resort to atrocities. Sub-Part II.E. below treats the notion of general moral influence in detail.

Specific deterrence and rehabilitation notwithstanding, a third method of sidelining individual perpetrators does, in fact, apply in the setting of grave international crimes: incapacitation.[94] A justice system may incapacitate a criminal, i.e., eliminate a criminal's capacity to commit crimes, by removing that individual from society.[95] The death penalty provides the most extreme method of incapacitation, but incapacitating a criminal is typically achieved through imprisonment. A prison inmate cannot harm society except insofar as he or she can harm other prisoners or prison employees.

Incapacitation takes on some interesting twists in the context of ICC crimes. The ICC targets those who commit the sorts of crimes that generally require them to hold some position of power. Masterminds of crimes against humanity tend to be rebel leaders, government officials, or military commanders.

Because the ability to commit these sorts of atrocities depends upon an individual's power and position, it will not always be necessary for the ICC to imprison a perpetrator in order to incapacitate him or her. Otto Triffterer has pointed to the example of Bosnian-Serb leaders Radovan Karadzic and Ratko Mladic to illustrate this point: "[ICTY] indictments and international warrants of arrest . . . [for] Karadzic and Mladic. . . .

40, at 521 (noting substitutional aspect by which, when cost rises, parties switch to comparable alternatives). For instance, cracking down on auto theft might cause car thieves to switch to convenience store robbery. In the case of extraordinary crimes like genocide and torture, there are arguably no substitute crimes. For an illuminating treatment of substitution effects, see generally Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2389-402 (1996-1997) (analyzing substitution effects in criminal law and other fields such as tax and torts).

93. To the extent that the ad hoc tribunals have explicitly referred to special deterrence, they have "do[ne] so more frequently as an objective of sentencing than of prosecution itself." *Developments in the Law: International Criminal Law*, *supra* note 40, at 1963 n.36. In a sense, however, an action like the proposed ICC indictment of Sudanese president Omar al-Bashir for crimes in Darfur could be thought of as a loose type of "specific deterrence." If al-Bashir has committed crimes, so goes the argument, a pending indictment might create an incentive to refrain from further crimes in the hope that the charges would be dropped.

94. Miriam Aukerman rightly dismissed the idea that "incapacitation" in its traditional formulation ("rendering the offender incapable of reoffending through physical restraint") applies in any significant way to international crimes. Aukerman, *supra* note 60, at 44 n.24. Here I use the term "incapacitation" in a broader sense that includes removing offenders from positions of power. This sort of incapacitation may be achieved without incarceration or even prosecution.

95. *See generally* LAFAVE, *supra* note 30, § 1.5(a)(2) (equating incapacitation to restraint, isolation, or disablement imposed upon dangerous people in order to protect society).

resulted in a loss of political and military power. . . . By thus abolishing a condition for committing the crimes mentioned in their indictments, these cases have a strong preventive effect on the two indicted persons. . . . "[96] Triffterer noted that individuals indicted by international tribunals cannot travel abroad without fear of arrest (limiting their ability to act in any official capacity) and that entrusting such individuals with official functions can endanger the international reputation of their state.[97]

In the context of genocide, war crimes, and crimes against humanity, "incapacitation" of a perpetrator can, therefore, simply mean effecting the removal of that perpetrator from positions of responsibility. This being the case, the ICC as an institution may exercise some ability to incapacitate dangerous perpetrators of atrocities simply by indicting them. Naturally, one can envision situations in which an indictment or prosecution by the ICC could *enhance* a political figure's political prestige—one need only recall Slobodan Milosevic's use of his ICTY trial as a platform to stir Serbian nationalism. Ultimately, we may reasonably expect the ICC's capacity to sideline individual perpetrators to play a markedly lesser role in preventing atrocities than most of the other mechanisms offered in support of the court. Yet, the court may demonstrate some capacity to incapacitate perpetrators and thereby prevent atrocities.

D. *Ending Cycles of Violence*

ICC supporters point to a number of ways in which prosecution of crimes by an international court may help end the cycles of violence that lead to humanitarian atrocities. For instance, insofar as the ICC (directly, or indirectly through complementary deterrence) increases the odds that perpetrators will be brought to justice, victimized individuals and groups will have less incentive to exact private justice. Whether the court can have more than a negligible effect upon victim retribution is largely a function of the certainty and speed of capture and punishment.[98] And, with a focus on "big fish," the court may be unable to affect violent acts of revenge on the local level.

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96. Triffterer, *supra* note 73, at 168. A new government in Belgrade captured Karadzic, who was living in Belgrade disguised as a bearded New Age healer, and turned him over to the ICTY in July 2008. As of this writing, Mladic remained at large.

97. *See id.* It has been argued that the Special Court for Sierra Leone's surprise indictment of Liberian President Charles Taylor in 2003 "de-legitimised Taylor, both domestically and internationally[,]" affected the morale of his troops, and positively changed the dynamics of the contemporaneous peace negotiations. Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*, HD REP., Nov. 2007, at 9.

98. *See, e.g.*, Hassan Fattah, *Will Iraqis Find Justice in War Crimes Tribunals?*, MIDDLE E. REP., Winter 2003, at 32, 33 (Winter 2003) ("A rash of assassinations of former Baathists in Basra and other southern cities in October [2003, a few months after the United States toppled Saddam Hussein's Baathist regime,] highlighted the growing impatience of Iraqis seeking justice.").

The ICC might also moderate cycles of violence by individualizing guilt. Following mass atrocities, victims may naturally hold the entire antagonist group responsible for committing the crimes. If "the Serbs" massacred civilians at Srebrenica, then all Serbs may deserve to be the targets of hatred and violence. By bringing important players to justice, trials may transform a perception of collective guilt into one of individual guilt.[99] Trials provide concrete villains in lieu of an amorphous sense that everyone in a group is a villain. Scholars have suggested that the Nuremberg tribunal played such a role.[100] By assigning guilt to individuals like Göring and Keitel, the tribunal lifted some guilt from the collective shoulders of the German people, enlarging the potential for reconciliation between Germany and its neighbors.

Finally, prosecution requires the assembly and publication of a great deal of information about the alleged crimes. By providing impetus to discover and record facts about the occurrence of atrocities in a systematic manner, the ICC might play a special role in recording the history of a conflict so that future generations can benefit by learning the lessons of the past.[101] Of course, international prosecution is neither necessary nor sufficient to ensure that the relevant history is recorded. Insofar as the ICC makes any judgments about whom to prosecute based on prudential concerns, it might ultimately provide a skewed perspective on the history or contain significant omissions.

It must be noted that none of the potential effects described in this section are ICC-specific. Ad hoc or hybrid courts (and perhaps other mechanisms) might just as readily serve the goals of preventing victim retribution, individualizing guilt, and recording history. Thus, these considerations support the role of international prosecution generally (including the ICC), rather than the ICC specifically.

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99. *But see* Victor Peskin & Mieczslaw P. Boduszynski, *International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia*, 55 EUROPE-ASIA STUD. 1117, 1118 (2003) (observing that some Croatian nationalists rhetorically turned individualization of guilt rationale on its head by charging that ICTY's indictments against individuals actually "cast blame on all Croatians").

100. *Cf.* Madoka Futamura, *Individual and Collective Guilt: Post-War Japan and the Tokyo War Crimes Tribunal*, 14 EUR. REV. 471 (2006) (arguing that Tokyo tribunal did not have salutary effect of individualizing guilt that is imputed to Nuremberg tribunal).

101. *See* Richard Goldstone, *Justice Now, and For Posterity*, INT'L HERALD TRIB. Oct. 14, 2005, http://www.iht.com/articles/2005/10/14/opinion/edgold.php (noting that Nuremberg tribunal, ICTY, and ICTR created historical records making it impossible for future generations to deny reality of horrific events that occurred).

E. *General Moral Influence*

Some ICC advocates anticipate that the ICC will promote what Johannes Andenaes called "the moral or educative influence of criminal law."[102] Just as criminal justice might serve to rehabilitate or reeducate an individual criminal, institutions like the ICC might act as positive moral influences upon whole societies. Payam Akhavan has summarized the moral influence theory as follows:

> In the long term, . . . expressions of disapproval against genocidal crimes will help produce unconscious inhibitions against massive human rights violations in the élite culture of international diplomacy as well as world public opinion in general. Concerns for justice, customarily at the periphery of decision making, will converge increasingly with mainstream pragmatism such that accountability for war crimes will become a matter of course.[103]

Akhavan argued that "the moral propaganda of international justice" can create a "condition of habitual lawfulness" vis-à-vis basic human rights, all across the globe.[104] In addition to deterring crime by punishing it, international courts may, according to this logic, affect the deterrence equation by changing preferences for committing the crimes at issue.[105]

Akhavan's formulation suggests that the moral influence of international criminal law may be felt both in "the élite culture of international diplomacy" and in "world public opinion in general."[106] In fact, there are at least three main groups over which the ICC might hope to have moral influence: common people in conflict-prone countries who may be most susceptible to becoming direct perpetrators of atrocities; leaders in conflict-prone countries who might be most tempted to orchestrate atrocities; and elites in powerful, developed nations with the capacity to intervene in and affect conflict situations. ICC critics have been quick to discount the notion that the ICC can have a significant impact upon any of these groups. The idea that the ICC can have a significant impact on everyday people around the world seems particularly problematic, for reasons discussed below. But in order to exert a moral influence upon any audience, the court must establish and maintain a perception of legitimacy.

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102. *See* JOHANNES ANDENAES, PUNISHMENT AND DETERRENCE 110-28 (1974) (explicating moral influence theory).

103. Akhavan, *supra* note 71, at 742.

104. *See id.*; *see also* Andrea Birdsall, *Creating a More 'Just' Order: The Ad Hoc International War Crimes Tribunal for the Former Yugoslavia*, 42 COOPERATION & CONFLICT 397, 407 (2007), *available at* http://cac.sagepub.com/cgi/content/abstract/42/4/397 ("The establishment of the ICTY [was] a norm affirming action that cascades expectations of appropriate behaviour in the context of international society.").

105. *See generally* Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1131 (1986) (arguing that legal system should not necessarily take private preferences as exogenous variables).

106. Akhavan, *supra* note 71, at 742.

For the ICC to have any impact, including one of moral influence, "a threshold level of social consensus that the prosecution process is itself legitimate" is necessary.[107] As is the case with other contemporary international criminal tribunals, the ICC's structure and procedures bear a heavy imprint of Western jurisprudential conceptions (mixing aspects of civil law and common law traditions). Some argue that the court's Western character does little to enhance the legitimacy of the institution in societies that do not share some of these conceptions.[108]

Furthermore, absent an enormous increase in resources, the ICC's decisions about whom to prosecute will be highly selective. This selectivity threatens to undermine the perception of the court's evenhandedness and legitimacy. For instance, in December 2003, Uganda referred to the ICC the situation regarding the Lord's Resistance Army (LRA) in the northern part of that country.[109] The ICC Office of the Prosecutor continues to investigate this situation—and has indicted several top LRA leaders—but it has not investigated allegations of crimes perpetrated by the government and army in other parts of Uganda. Mr. Moreno-Ocampo has explained—undoubtedly correctly—that these allegations did not rise to the level of gravity that would merit ICC investigation.[110]

This rationale provides a reasonable justification for a practical necessity (triage), but it highlights the unavoidable danger that some will perceive the ICC as too selective in its investigation of crimes or, even worse, as taking sides in violently polarized disputes. One need look no further

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107. *See Developments in the Law: International Criminal Law*, *supra* note 40, at 1967 (addressing concerns about unfairness and illegitimacy expressed by some in Rwanda and the former Yugoslavia, but noting that overall comprehensive assessment cannot be made for perhaps decades).

108. *See* Catherine Lu, *The International Criminal Court as an Institution of Moral Regeneration: Problems and Prospects*, *in* BRINGING POWER TO JUSTICE?, *supra* note 25, at 197 (highlighting idea that cultural differences shape expectations regarding crime and punishment). The commentator wrote:

> We need not entertain the argument that cultural distinctness can ever justify genocide, war crimes, and other crimes against humanity such as rape, disappearances, torture, and so on. Yet despite the universal condemnation of such acts, the fact of cultural pluralism may justify different kinds of responses to such acts. Critics might worry that an international legal mechanism of accountability would be an unjustifiable imposition on societies that have distinct cultural values pointing to alternative responses to atrocity.

Id.

109. *See* Payam Akhavan, *Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 406-11 (2005) (discussing LRA and referral by Uganda of case to ICC). The Lord's Resistance Army (LRA) is the rebel group led by the messianic leader Joseph Kony. The group is thought to have abducted and conscripted over 38,000 child soldiers through August 2004. *Id.* (recounting history of LRA).

110. Luis Moreno-Ocampo, *Integrating the Work of the ICC into Local Justice Initiatives*, 21 AM. U. INT'L L. REV. 497, 501 (2006) (noting different gravity of heinous crimes attributed to LRA and lesser criminal allegations against army).

than to the experience of the ad hoc tribunals. Many Serbs view the ICTY simply as an anti-Serb institution.[111] The ICTR's image has also suffered, particularly among Hutus, from the perception that it has dispensed victor's justice.[112] Whether the work of the ICTR has done more to promote inter-ethnic reconciliation in Rwanda or to fuel continuing animosity remains a point of dispute. If the ICC hopes to do a better job of shaping the norms of behavior in conflict-prone countries, it must somehow overcome the stigmatizing effect of any perception that it is taking sides—a perception that may be inevitable in some cases. To influence anyone morally, the court must well establish that its processes and results are morally legitimate.

Even should the court succeed in doing so, the general moral influence theory remains particularly problematic when the audience is comprised of not leaders or elites, but common people in conflict situations. First, skeptics note that many of the pronouncements about normative formation conspicuously fail to mention mechanisms by which the ICC may effectively disseminate the appropriate norms. Often, parts of the world presenting circumstances posing the greatest risk of humanitarian atrocities are also those farthest from the globalized flow of free information.

David Wippman, a leading skeptic of the moral influence theory, has noted that relatively few Rwandans understand much about the ICTR aside from the fact that it exists, due in no small part to the fact that few Rwandans have significant access to mass media.[113] It is even less likely that the ICTR's work impacts the norms of equally poor and isolated people in other lands who have no immediate interest in the situation in Rwanda. In an age of near-universal internet access in the developed world, the global elite may fail to appreciate the hurdles to disseminating information, however compelling, into villages in war-torn countries.

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111. *See* Wippman, *supra* note 25, at 118-19 (noting opposition from Serbs and even some Croats and Bosniaks to ICTY, especially early in tribunal's existence). The slogan "They are killing Serbs in The Hague" has often appeared on the walls of housing complexes in Belgrade. *See* Marek K. Kaminski, Monika Nalepa & Barry O'Neill, *Normative and Strategic Aspects of Transitional Justice*, 50 J. CONFLICT RESOLUTION 295, 299 (2006) (suggesting that "[t]ransitional justice in Serbia may have harmed reconciliation").

112. *See* Kingsley Chideu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26 FLETCHER F. WORLD AFF. 21, 38-42 (2002) (discussing ICTR's need to cultivate more press coverage and better image).

113. *See* Enrique Armijo, *Building Open Societies: Freedom of the Press in Jordan and Rwanda*, 2 J. INT'L MEDIA & ENT. L. 105, 125 (2008) (stating that in 2002 less than one percent of Rwandans owned televisions and about eleven percent owned radios). Access to impartial media was also a problem in the former Yugoslavia as the ICTY began its work. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 126 (1998) ("Yet even were such broadcasts [of the ICTY's proceedings] technologically and economically feasible, the lens of interpretation would be shaped by the local leaders. The presence of only one independent newspaper in the region severely impairs the coverage of the tribunal's work.").

Critics also suggest that the supposed inculcation of norms, even if successful, may not itself stop atrocities from occurring. Well-established norms may nevertheless be "suspended" when each warring group believes it is engaged in a "desperate struggle to defend its own community from attack."[114] At such times, morality may be inverted so that acts normally considered deviant (e.g., torture or extermination) may instead become manifestations of loyalty to the group and socially appropriate behavior.[115] Wippman has argued that the norms themselves were not the issue in the former Yugoslavia—that the population generally accepted the legitimacy of the laws of war but did not view the actions of its own group members to be wrongful, even when those actions included attacks on civilians.[116]

The fact that everyday norms of behavior may be jettisoned in situations of total war or extreme crisis does not, of course, mean that all attempts by the ICC to inculcate norms are bound to be futile. Nevertheless, it does suggest that the inculcation of norms is by no means a straightforward guarantee of prevention. People must hold these norms so strongly that they will not only espouse them in normal situations, but will actually follow them in situations of great fear and danger. It remains questionable whether the ICC or any similar institution is equipped to have a significant effect upon combatants' basic moral imperatives.

Bearing these hurdles in mind, it would be unfair to imply that any ICC proponent has suggested that the court would have a major moral influence in the near term. There is little question that such an effect would be extremely difficult to measure and could take decades, if not longer, to manifest itself. Noting that a full 130 years passed between Gustave Moynier's 1872 proposal for an international criminal court and the ICC's creation, ICC Judge Hans-Peter Kaul has urged that the significance of the court not be judged "in terms of short attention spans and impatience."[117] If effective, the other mechanisms discussed—general deterrence, complementary deterrence, incapacitation, and ending cycles of violence—likely possess a greater potential to prevent atrocities in the near and medium-term. But if we embrace a longer time horizon, we cannot summarily dismiss the possibility that the ICC may have a long-term general moral influence, despite the difficulties—although difficulties there are.

III. HOW THE ICC MAY BACKFIRE, UNDERMINING PREVENTION

Critics of the ICC have not merely denied the court's effectiveness in deterring atrocities. Some also argue that the court's efforts are, in fact,

114. Wippman, *supra* note 73, at 478 (suggesting that such effect occurred during war in Bosnia).

115. *See* Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7, 7 (2001).

116. Wippman, *supra* note 73, at 477.

117. *See* Kaul, *supra* note 45, at 384 (discussing future of ICC).

more likely to precipitate atrocities than to deter them by subverting peace deals, discouraging military interventions in ongoing humanitarian crises, and diverting scarce resources from institutions that might more efficiently prevent atrocities. The first issue, sometimes styled a conflict of "peace versus justice," represents the most significant and hotly contested criticism.

A. *Protracting Conflicts ("Peace Versus Justice")*

Arguably, the best way to prevent atrocities is to remove those political and social conditions that make them likely. First and foremost, societies must establish peace and security. Experts in transitional justice[118] and post-conflict studies have engaged in a long and voluminous debate about the impact of judicial processes on peace negotiations and the role of courts in post-conflict reconstruction. Detailing all of the contours of this important debate is beyond the scope of this Article.[119] We cannot fully explore the debate about the ICC's preventive potential, however, without addressing the broad outline of the "peace versus justice" debate. Although ICC proponents argue that the court can assist efforts at national reconciliation after a conflict has occurred, ICC critics suggest that the court may sometimes undermine peace.

The ICC and other international criminal tribunals are premised on the idea that impunity for atrocities cannot be allowed to stand; the Rome Statute commits the states parties to "put an end to impunity for the perpetrators" of atrocities.[120] Yet, governments have in numerous instances seen fit to grant amnesties to perpetrators of atrocities in order to achieve peace.[121] By threatening to prosecute where states are unwilling to do so, the ICC may sabotage efforts that would secure peace through guarantees of amnesty to possible political spoilers. As one commentator noted:

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118. For an exploration of the meaning of "transitional justice" and the intellectual development of the post-War transitional justice movement, see generally Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).

119. *See, e.g.*, Eric Blumenson, *The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801 (2006) (canvassing key issues in debate and urging that concern for human rights will sometimes warrant looking beyond prosecution to alternate possibilities); Alfred P. Rubin, *Legal Response to Terror: An International Criminal Court?*, 43 HARV. INT'L L.J. 65 (2002) (arguing that international prosecution undermines both peace and democratic ideals); Leila Nadya Sadat, *Exile, Amnesty, and International Law*, 81 NOTRE DAME L. REV. 955 (2006) (arguing that "swapping peace for justice" is morally and practically unacceptable, because it fosters culture of impunity where violence becomes norm); Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283 (2007) (arguing that amnesties are sometimes necessary for peace and proposing balancing test for international community to judge when to recognize domestic amnesties).

120. Rome Statute, *supra* note 6, pmbl.

121. *See* Hurst Hannum, *Peace Versus Justice: Creating Rights As Well As Order out of Chaos*, 13 INT'L PEACEKEEPING 582, 583 (Dec. 2006) ("Sadly, the worst perpetrators are often significant military and/or political actors, and threatening them with criminal sanctions is unlikely to get them to the bargaining table.").

> Perpetrator regimes may cling more tenaciously to power if relinquishing power would mean facing prosecution. While opposition leaders attempting to oust an abusive regime in a particular state may be prepared to grant amnesty to the leaders of the perpetrator regime in return for their peaceful relinquishment of power, this type of bargain is less likely to be struck if the perpetrators may reasonably anticipate prosecution in the ICC, . . . notwithstanding the amnesty in effect in their own country.[122]

The situation may operate in the reverse as well. The ICC may undermine a government's offer of amnesty to a rebel group given as part of an agreement to end an insurrection. In either case, an ICC that helps to reignite violent conflicts could hardly be judged successful in its mandate to prevent atrocities from occurring.

The court may also undermine peace not by scuttling negotiations but by complicating the efforts of the UN and other international bodies to stabilize conflicts. The ICC prosecutor's July 2008 request for an arrest warrant for Sudan's president provides a case in point. The prosecutor charged President Omar Hassan Ahmad al-Bashir with ten counts of genocide, war crimes, and crimes against humanity.[123] This was the first time that the ICC prosecutor asked for an arrest warrant for a sitting head of government. If, pursuant to the prosecutor's request, the ICC pre-trial chamber indicts al-Bashir, the question will be whether Khartoum will respond by striking out against the international community in the only way it can, i.e., by expelling or circumscribing the UN/African Union peacekeeping force in Darfur. As of this writing, the ICC has not acted to indict al-Bashir, so it remains to be seen whether Khartoum will respond in this manner to an indictment. If an ICC indictment leads to an expulsion of the peacekeepers, whatever added stability the peacekeepers have brought to Darfur will be lost.

ICC advocates typically offer three sorts of responses to the "peace versus justice" or "spoilers" critique. The simplest and least satisfying response is to deny that amnesties can be effective and to maintain that there simply can be "no lasting peace without justice[.]"[124] Although "no

122. Madeline Morris, *Lacking a Leviathan: The Quandaries of Peace and Accountability, in* POST-CONFLICT JUSTICE 135, 135 (M. Cherif Bassiouni ed., 2002); *see also* Rome Statute, *supra* note 6, art. 27 ("[O]fficial capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute . . .").

123. *See* Press Release, ICC, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur (July 14, 2008), *available at* http://www.icc-cpi.int/press/pressreleases/406.html.

124. *See, e.g.*, Mark S. Ellis, *Combating Impunity and Enforcing Accountability as a Way To Promote Peace and Stability—The Role of International War Crimes Tribunals*, 2 J. NAT'L SECURITY L. & POL'Y 111, 113 (2006) ("Decisions not to prosecute are often premised on a misguided belief that it is necessary to choose between justice and

peace without justice" has served as a powerful slogan for the international human rights movement, there is compelling evidence that amnesties have helped establish peace in some situations.[125] Though by no means conclusive, such evidence belies the simple conclusion that there can never be peace without putting perpetrators of atrocities on trial. Rather, the answer for any particular country is likely to be highly contextual.

ICC proponents offer a second response to the "spoilers" argument: the short-term gain bought by amnesties in a given situation carries a long-term price globally. Even if amnesties are helpful in specific situations, they "send[ ] a message to other regimes and other potential violators that they, too, may continue committing such crimes and hope for amnesty when their time comes."[126] Or, as one commentator argued, "Legal or political protection from prosecution following the commission of mass crimes only gives confidence to those who would contemplate perpetrating them."[127] Thus, in deciding whether to recognize an amnesty, one must recognize this signaling effect in order to factor *all* of an amnesty's consequences into a decision whether to recognize it.[128] Leila Sadat opined that the logic of refusing to grant amnesty to perpetrators of atrocities mirrors the logic of refusing to negotiate with terrorists or hostage takers.[129]

The force of this response depends upon the degree to which potential perpetrators take into account the punishments that have been meted out to past criminals. Hitler's reported remark to his generals on the eve of his attack on Poland—"Who, after all, speaks today of the annihilation of the Armenians?"—ranks as the most notorious example of a leader taking a cue from an earlier amnesty.[130] It is hard to believe that Hitler

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peace, but this is a false choice. There can be no lasting peace without justice, and justice cannot exist without accountability.").

125. South Africa in the 1990s provides the clearest example. Nelson Mandela and other African National Congress leaders knew that insisting upon the prosecution of leaders of South Africa's white Apartheid regime would risk inciting further civil strife. Rather than prosecute those who had committed atrocities, South Africa instituted its much-acclaimed truth and reconciliation commissions. Perpetrators were obligated to tell the truth about what they had done, but with a guarantee of immunity against penal sanctions. *See generally* HELENA COBBAN, AMNESTY AFTER ATROCITY: HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES 80-135 (2007) (assessing South Africa's path toward reconciliation).

126. Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions, and the International Criminal Court*, *in* BRINGING POWER TO JUSTICE?, *supra* note 25, at 217; *see also* Michael P. Scharf, *Swapping Amnesty for Peace: Was There a Duty to Prosecute International Crimes in Haiti?*, 31 TEX. INT'L L.J. 1, 39 (1996) (arguing that 1994 Haitian amnesty would have this effect).

127. Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS., Autumn 1996, at 127, 128.

128. *See* Robinson, *supra* note 126, at 222.

129. *See* SADAT, *supra* note 71, at 72.

130. LOUIS P. LOCHNER, WHAT ABOUT GERMANY? 2 (1942) (reporting Hitler's remark).

would have acted differently if individuals had been held accountable for atrocities in Armenia, but the question is whether today's dictators and warlords might take a cue from examples of impunity.[131] And, as Darryl Robinson noted, it is circular to argue that because few crimes are punished, regimes will not be deterred; such an argument assumes that the "practice of allowing such regimes to enjoy impunity" will continue—and this, after all, is what the debate is about.[132]

The third response to the "spoilers" argument is that the ICC need rarely make an "either/or" decision between peace and justice. The Rome Statute set up a system that allows the prosecutor and judges the discretion necessary to avoid disrupting sensitive situations in which peace is at risk—if they will use it. Article 53, in particular, allows the prosecutor to choose not to investigate or prosecute in a given situation upon his or her determination that such an investigation or prosecution would not be "in the interests of justice."[133]

Whether peace and national reconciliation are part of "the interests of justice" remains a debated subject, as does the more general question of whether there is a duty to prosecute under international law.[134] The fram-

131. Reed Brody has argued that the "spoilers" argument is usually inapplicable to "bloody despots," because they "are overthrown or leave kicking and screaming when their time is up, anyway." Reed Brody, Book Review, 96 AM. J. INT'L L. 268, 273 (2002) (reviewing INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS (Dinah Shelton ed., 2000) and THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Mauro Politi & Giuseppe Nesi eds., 2001)) (citing examples of Cedras and Duvalier in Haiti, Somoza in Nicaragua, Idi Amin in Uganda, Mobutu in Zaire, and Suharto in Indonesia). This view suggests that neither the "spoilers" argument nor the response that dictators look to past precedent matter: Bloody despots are going to do what they are going to do.

132. *See* Robinson, *supra* note 126, at 217.

133. *See* Rome Statute, *supra* note 6, art. 53, ¶ 1 ("The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether: . . . (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.").

134. *See* Michael P. Scharf, *The Amnesty Exception to the Jurisdiction of the International Criminal Court*, 32 CORNELL INT'L L.J. 507, 526 (1999) (arguing that "international procedural law imposing a duty to prosecute is far more limited than the substantive law establishing international offenses"). Scharf also pointed to several provisions of the Rome Statute that might, under certain circumstances, permit the ICC to recognize an amnesty provision: the preamble, Article 16 (action by the UN Security Council), Article 53 (prosecutorial discretion), Article 17 (complementarity), and Article 20 (*ne bis in idem*, or double jeopardy). *See id.* at 521-27; *see also* Andrew A. Rosen, Note, *D'Amato's Equilibrium: Game Theory and a Re-evaluation of the Duty to Prosecute Under International Law*, 37 N.Y.U. J. INT'L L. & POL. 79 (2004) (arguing, based on game theoretic approach, that duty to prosecute under international law cannot exist as absolute duty). *But cf.* Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) (arguing that wholesale impunity breaches state's obligations under customary international law).

ers of the Rome Statute, however, clearly compromised on Article 53's deliberately ambiguous formulation with the intent that the prosecutor and judges would be able to develop practices to best respond to future events.[135] Unlike the ad hoc tribunals, which the UN is now pressing to complete their mandates, a permanent ICC can wait patiently to "time its arrests to advance both peace and justice" as situations arise.[136]

The problem, an ICC critic might respond, is that the ICC and its prosecutor may not be institutionally equipped to make the kinds of political judgments that the exercise of such discretion requires. The current prosecutor, Mr. Moreno-Ocampo, is quite aware of the "peace versus justice" issue and has called upon experts and scholars to develop criteria for determining when it is appropriate to refrain from prosecution in the interests of peace and reconciliation.[137] But even if the current prosecutor has some sensitivity to the issue, it may be true that "there is no reason to think [the prosecutor] has the perspective, information, or incentives to make this decision wisely."[138] Arguably, both the ICC prosecutor and judges may have distorted perspectives or incentives, insofar as their focus is to "legitimate the uniform progressive development of international hu-

135. *See* Michael P. Scharf, *Justice Versus Peace*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 179, 186 (Sarah B. Sewall & Carl Kaysen, eds., 2000) ("According to the chairman of the Rome Diplomatic Conference, Philippe Kirsch, the adopted provisions reflect 'creative ambiguity' that potentially could allow the ICC Prosecutor and Judges to interpret the Rome Statute as permitting recognition of an amnesty exception to the jurisdiction of the Court."); *see also* Robinson, *supra* note 126, at 212 ("[T]he drafters turned to the faithful and familiar friend of diplomats, *ambiguity*, leaving a few small avenues open to the Court and allowing the Court to develop an appropriate approach when faced with concrete situations."). The current prosecutor has taken the position that his authority includes the power to delay an investigation if it is in the interests of victims to refrain from undermining chances for peace. *See* Moreno-Ocampo, *supra* note 110, at 498-99.

136. *See* Samantha Power, *Court of First Resort*, N.Y. TIMES, Feb. 10, 2005, at A23.

137. *See* Moreno-Ocampo, *supra* note 110, at 498-99. *But see* Luis Moreno-Ocampo, Building a Future on Peace and Justice, Address at Nuremberg (June 2007), http://www.icc-cpi.int/otp/otp_events/LMO_20070624.html (stressing importance of executing arrest warrants in accordance with law, regardless of objections that peace agreements could be imperiled). Michael Scharf has already proposed a set of six criteria for judging the appropriateness of refraining from prosecution. *See* Scharf, *supra* note 134, at 526-27.

138. Jack Goldsmith & Stephen D. Krasner, *The Limits of Idealism*, 132 DAEDALUS 47, 54 (Winter 2003). The International Crisis Group's Gareth Evans has agreed that the prosecutor cannot make such tradeoffs, but he responded that the prosecutor should not, therefore, even try to do so; rather, the prosecutor should "get on with justice" unless the UN Security Council votes to block a prosecution in the name of peace. *See* Gareth Evans, Presentation to the Second Public Hearing of the Office of the Prosecutor (Sept. 25, 2006), http://www.crisisgroup.org/home/index.cfm?id=4431&l=1. Because a single permanent Security Council member desiring that a prosecution go forward could veto such an action, such an approach might practically mean that accountability would almost always trump peace and stability.

manitarian law," rather than to achieve an optimal result in any given situation.[139] This focus, it is argued, may lead them to overestimate the importance of trials (which are, after all, their job) and underestimate the importance of political compromises that require amnesties.

The ICC has worked to develop institutional capacities and internal procedures that would allow the court, and particularly the prosecutor, to consider "peace versus justice" issues. A division within the Office of the Prosecutor is responsible for assessing and advising the prosecutor on the likely political consequences of decisions to indict and prosecute individuals in a particular situation.[140] Ultimately, if the ICC is to avoid undermining its goal of preventing atrocities, both the prosecutor and the court itself (in particular, the pre-trial chamber) must have the willingness and ability to delay indictments and prosecutions in the interest of peace. (Although, optimizing the court's deterrent impact would require not admitting that they were doing so!) How well they will fulfill this requirement is yet to be determined.[141]

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139. Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365, 481 (1999).

140. *See* Paul Seils & Marieke Wierda, *The International Criminal Court and Conflict Mediation*, INT'L CTR. FOR TRANSITIONAL JUST., June 2005, at 13, *available at* http://www.ictj.org/images/content/1/1/119.pdf ("From the early experiences of the ICC, it is clear that the Prosecutor will seek to evaluate the threat of instability or of prolongation of the conflict through detailed discussion with well-placed sources on the ground who have expertise in relevant social, military, and political aspects . . . . It should be noted that the particular nature of the considerations the Prosecutor has in this regard prompted the creation of a separate specialized division that had no parallel in ICTY or ICTR. Part of the Jurisdiction, Complementarity, and Cooperation division's function is to assess and advise the Office on these issues.").

141. The ICC may be facing its first moment of truth in Uganda. In the spring of 2008, the Ugandan government and the rebel Lord's Resistance Army (LRA) seemed close to striking a peace deal that included ceasefire and demobilization provisions. Negotiations have foundered, however, due at least in part to LRA leader Joseph Kony's reluctance to disarm so long as an ICC arrest warrant against him is outstanding. Despite the Ugandan government's urgings, the ICC has so far not agreed to rescind its arrest warrants against Kony and some of his top commanders. *See Might the Lord's Resisters Give Up?*, THE ECONOMIST (U.S. Ed.), Mar. 15, 2008, at 59; Jeffrey Gettlemen & Alexis Okeowo, *Warlord's Absence Derails Peace Effort in Uganda*, N.Y. TIMES, Apr. 12, 2008, at A9, *available at* http://www.nytimes.com/2008/04/12/world/africa/12uganda.html?_r=1&scp=1&sq="peace%20effort%20in%20uganda"&st=cse&oref=slogin. If the ICC refuses to relent and there is renewed bloodshed, the Ugandan situation may be viewed as a vindication of the "spoilers" argument (however difficult it may be to establish a causal nexus). As this Article was being prepared for publication, Kony had still not signed a peace deal; however, the LRA leader has cited several reasons for not doing so aside from worries about the ICC. *See* BBC News, Ugandan Rebel "Threatened on Deal", (Dec. 1, 2008), http://news.bbc.co.uk/2/hi/africa/7758416.stm (reporting that Kony is stalling because he fears of mutiny by his generals and has received death threats).

B. *Deterrence of Humanitarian Interventions*

Criminal courts are, by their nature, backward-looking. A crime has been committed, so the perpetrators must be punished. Yet stopping crimes from ever occurring is clearly preferable to punishing completed crimes. Some fear that tribunals like the ICC may actually help keep powerful countries from "putting boots on the ground" to stop atrocities in conflict situations. This argument comes in two varieties. International criminal tribunals may either provide political cover for inaction by powerful countries, or tribunals may actually deter countries from getting involved by threatening their nationals with prosecution for war crimes.

First, as a visible international institution, the ICC may provide powerful, developed nations with a "fig leaf"—a forum which allows countries to cover up their inaction. Some commentators have argued that the UN Security Council members who voted to create the ad hoc tribunals did so for less than perfectly noble reasons. Gary Jonathan Bass wrote that "the establishment of the [ICTY] was an act of tokenism by the world community, which was largely unwilling to intervene in ex-Yugoslavia but did not mind creating an institution that would give the *appearance* of moral concern. The world would prosecute the crimes that it would not prevent."[142] Former ICTY/ICTR Chief Prosecutor Louise Arbour conceded that "cynics" could suggest that the ICTR "was born of the sheer guilt of having done little more than count the hundred days that it took for half a million people to be killed by their countrymen somewhere in Africa."[143]

Although trials might have their uses after a mass atrocity has occurred, so the argument goes, direct intervention that actually stops the atrocities is much to be preferred.[144] To the extent that the ICC provides a fig leaf to cover inaction on the part of the developed world, it may actually discourage the prevention of atrocities by direct intervention.

The stronger version of the argument holds that the ICC could affirmatively deter humanitarian interventions. The Rome Statute allows the ICC to exercise jurisdiction over crimes committed by nationals of non-party states if those crimes were committed on the territory of a state party.[145] Thus, the court could, in principle, try and punish soldiers of non-party states involved in humanitarian missions on the territories of states parties. Some U.S. military lawyers have argued that the risk of ICC prosecution increases the potential costs of humanitarian interventions to

142. GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 207 (2000).

143. Louise Arbour, *The Prosecution of International Crimes: Prospects and Pitfalls*, 1 WASH. U. J.L. & POL'Y 13, 15 (1999).

144. *See* Juan Mendez, *Lou Henkin, Transitional Justice, and the Prevention of Genocide*, 38 COLUM. HUM. RTS. L. REV. 477, 484-85 (2007) (advocating international accountability but also urging that international community must be ready, if it wishes to prevent genocide, to simultaneously protect populations at risk militarily).

145. Rome Statute, *supra* note 6, art. 12.

countries like the United States, thus making such missions less likely.[146] A non-party state like the United States may avail itself of the provisions of Article 98 of the Rome Statute by requiring a state party to sign a non-surrender agreement, in which case the state party would arguably have no obligation to surrender U.S. nationals to the court.[147] Nevertheless, critics have argued that adversaries of countries like the United States could deter those countries from undertaking military interventions by leveraging the court's visibility to embarrass and discredit them, even when no crimes have occurred and the ICC has no jurisdiction.[148] And, as Goldsmith and Krasner have argued, "the ICC will most likely chill U.S. military action not when central U.S. strategic interests are at stake (as in Afghanistan), but rather in humanitarian situations (like Rwanda and perhaps Kosovo)," the latter representing situations "where the strategic benefits of military action are low, and thus even a low probability of prosecution weighs more heavily."[149]

ICC supporters respond to such charges by pointing out that the court has built-in safeguards against abuse, including the power of the court's pre-trial chamber to review the decisions of the prosecutor.[150] Moreover, the court has every institutional incentive not to alienate powerful countries, to "tread very gently," to be "deferential to states on the issue of complementarity," and to avoid overreaching for fear of "being exposed as a paper tiger."[151] Arguably, Mr. Moreno-Ocampo has already demonstrated an understanding of the need to reassure countries like the United States that the court is not a loose cannon in the way he has handled allegations that the United States committed crimes in Iraq. He could not, in any case, have undertaken an official investigation of those allegations, since neither Iraq nor the United States have acceded to the Rome Statute. The prosecutor nevertheless went out of his way to argue that

146. *See, e.g.*, W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291, 324-32 (2006); Michael L. Smidt, *The International Criminal Court: An Effective Means of Deterrence?*, 167 MIL. L. REV. 156, 239-40 (2001).

147. For a further discussion and description of Article 98 agreements, see *supra* note 20 and accompanying text.

148. *See generally*, Austin & Kolenc, *supra* note 146 (arguing that groups such as terrorist organizations could use ICC as weapon of asymmetric "law-fare").

149. Goldsmith & Krasner, *supra* note 138, at 56-57.

150. *See* Rome Statute, *supra* note 6, art. 15; *see also* Allison Marston Danner, *Navigating Law and Politics: The Prosecutor of the International Criminal Court and the Independent Counsel*, 55 STAN. L. REV. 1633, 1646-48 (2003) (noting that virtually every decision prosecutor makes is reviewed by some institution within ICC, including decision to commence investigation on own initiative).

151. Ratner, *supra* note 81, at 452 (arguing that court will neither run amok nor make much difference to human rights enforcement).

even if the court had jurisdiction, he would have found the allegations insufficient to meet the Rome Statute's gravity requirements.[152]

Reed Brody has contested the position that the ICC deters intervention by observing that this argument fails to account for the "near-universal" ratification of the Rome Statute by states that regularly contribute troops to peacekeeping and humanitarian operations.[153] Although some of the most dire predictions concerning the dangers of "law-fare" are exaggerated,[154] it is hard to dismiss the possibility that some state leaders will anticipate politicized ICC trials and accordingly adjust their calculus about when to intervene in conflict situations. To the extent that powerful states choose not to intervene and allow atrocities to occur, the ICC might actually serve to undermine its own prevention rationale.

C. *Opportunity Costs*

Even if the ICC can, on balance, help to prevent atrocities, it is necessary to address whether the countries that support the ICC could actually help *more* by dedicating resources earmarked for the ICC to other purposes. Using the same financial and diplomatic resources, the international community might do more to prevent atrocities by employing other means.

The ad hoc tribunals have demonstrated that international justice can be expensive. As of September 2008, the ICTY, located in The Hague, had 1,126 staff members; the ICTR, located in Arusha, Tanzania, had 1,032 authorized posts.[155] From 1993 through 2007, the ICTY's cumulative regular budget outlays amounted to just over $1.24 billion.[156] The ICTR will have spent an estimated $1.03 billion by the end of 2007.[157]

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152. Letter from Luis Moreno-Ocampo to the General Public Regarding Allegations of U.S. Crimes in Iraq (Feb. 9, 2006), at 8-9, *available at* http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf.

153. Brody, *supra* note 131, at 273.

154. *See, e.g.*, Austin & Kolenc, *supra* note 146, at 344-45 ("For the United States—a nation at war against terrorism and the world's only superpower—misuse of the ICC could provide asymmetric warriors the sling with which David can slay Goliath. A nation built on law can be undone by law.").

155. *See* ICTY at a Glance, General Information, http://www.un.org/icty/glance-e/index.htm (follow "General Information" hyperlink) (last visited Mar. 2, 2009); *see also* ICTR, General Information, http://69.94.11.53/ENGLISH/geninfo/index.htm (last visited Mar. 2, 2009).

156. ICTY at a Glance, General Information, *supra* note 155. This figure represents actual budget outlays (not adjusted for inflation).

157. Stephanie Nieuwoudt, ICC—Africa Update: Slow Progress at Rwandan Tribunal, Institute for War and Peace Reporting, July 27, 2006, http://www.iwpr.net/?p=acr&s=f&o=322581&apc_state=heniacr2006. The regular biennial UN budget for 2006 and 2007 was $3.79 billion. *See* Press Release, United Nations, General Assembly Adopts 2006-2007 Budget of $3.79 Billion, As Main Part of Sixtieth Session Concludes (Dec. 23, 2005), *available at* http://www.un.org/News/Press/docs/2005/ga10442.doc.htm (last visited Mar. 2, 2009). This includes budgets of about $305 million for the ICTY and about $270 million for the ICTR. *See id.*

Tribunal critics routinely compare the dollars spent on the tribunals to the number of individuals tried.[158] As noted in Sub-Part II.A. of this Article, roughly 112 suspects have been sentenced or acquitted by the ICTY or are subject to ongoing prosecution.[159] Dividing the ICTY's $1.24 billion price tag (through 2007) by the 112 sentenced suspects yields a cost of roughly $11.1 million per suspect. The ICTR has rendered judgments on thirty-seven; another thirty-seven accused either have trials in progress or are awaiting trial.[160] Dividing its $1.03 billion price tag by these seventy-four suspects would yield a rough cost of about $13.9 million per suspect.

Critics suggest that prosecutions, as a method of trying to prevent atrocities, are not only expensive but also inefficient when compared with other available accountability mechanisms. For instance, Helena Cobban has compared the high cost of ICTR prosecution with the less than $4,300 per case it cost South Africa's truth and reconciliation commission to process amnesties and the $1,000 per case cost of programs to demobilize and reintegrate thousands of former combatants in Mozambique.[161]

More broadly, the ICC may draw attention and resources away from other areas of post-conflict reconstruction within war-torn societies themselves. Advocating an "ecological" model of response to social breakdown, Laurel Fletcher and Harvey Weinstein have chastised criminal justice advocates for focusing too narrowly on legal processes and for implying that "a focus on legal process is adequate to resolve the individual and social harm."[162] Simply putting perpetrators on trial will not suffice to rebuild societies. Discussing Rwanda in 2000, Mark Drumbl noted the need for the government to display competence by building schools, clinics, and roads: "After all, what would have been the transformative potential of the Nuremberg trials and post-Holocaust public inquiries without the implementation of the Marshall Plan?"[163] The Rwandan government has urged that the funds the international community spends on the ICTR would be

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The combined budgets for the ad hoc tribunals therefore represented about 15% of the total UN budget for that time period.

158. *See, e.g.*, Smidt, *supra* note 146, at 194 (concluding that ad hoc tribunals have provided little "bang for the buck"); *see also* Cobban, *supra* note 51, at 22 (making same point).

159. *See* ICTY at a Glance, Key Figures, *supra* note 48.

160. International Criminal Tribunal for Rwanda, Status of Cases, http://69.94.11.53/ENGLISH/cases/status.htm (last visited Nov. 17, 2008).

161. *See* Cobban, *supra* note 51, at 22.

162. Laurel E. Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 584 (2002). Fletcher and Weinstein's "ecological" model holds that not only justice but also democracy, prosperity, and reconciliation are necessary for social reconstruction. *See id.* at 623. Further, the authors suggested a number of possible international interventions beyond legal interventions. *See id.* at 631-35.

163. Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to* Civis *in Rwanda*, 75 N.Y.U. L. REV. 1221, 1303 (2000).

better spent on improving the country's infrastructure or its own domestic judiciary.[164]

International justice advocates acknowledge that prosecution can play only a limited role in rebuilding war-torn societies,[165] but their arguments implicitly reject the implications of a simple cost-per-suspect assessment of the tribunals' cost-effectiveness. The point, after all, is not simply to convict as many perpetrators as possible, but to prevent future atrocities (by strengthening general deterrence, moral education, and the like). They argue, moreover, that the existence of a permanent ICC obviates the need to start up a new tribunal for each situation, allowing greater cost-effectiveness as well as deterrent impact.

A permanent ICC should have greater economies of scale than the ad hoc tribunals.[166] The 2008 budget for the ICC is roughly $141 million, which includes compensation for an authorized staff level of 679 employees.[167] As of November 2008, the ICC was investigating four situations and had initiated cases against eleven individuals.[168]

There is a keen awareness of the criticisms concerning the high cost of ad hoc tribunals and of the reluctance of UN member states (which significantly overlap with ICC states parties) to continue funding them.[169] The ICC has explicitly committed itself to minimizing costs, for instance, by centralizing many functions for all ICC offices within the court's regis-

164. *See* Wippman, *supra* note 25, at 131 ("The Rwandan government notes with some bitterness that if it had received the level of financial and political support showered on the ICTR, it could have substantially improved a national judicial system that tries hundreds of genocide suspects for every one tried by the ICTR, but one that does so subject to such serious resource constraints that due process violations are frequent.").

165. *See* Moreno-Ocampo, *supra* note 110, at 503 ("Even if we succeed . . . to stop the crimes [in northern Uganda] and to prosecute those responsible, someone else has to train these children [the child soldiers], to offer them job opportunities, a family, and a community. National issues are not just about prosecution, nor are they just a job for lawyers."); Orentlicher, *supra* note 81, at 498, 502 n.26 (acknowledging that ICC advocates have often made strong claims, but disputing Fletcher and Weinstein's assertion that such advocates believe international courts are *only* important part of post-conflict repair); *see also* Fletcher & Weinstein, *supra* note 162, at 584 (making such assertion).

166. *See generally* Power, *supra* note 136 (noting financial benefit of using standing tribunal for Darfur situation, rather than creating new ad hoc court).

167. The authorized budget is €90,382,100. *See* Programme Budget for 2008, the Working Capital Fund for 2008, Scale of Assessments for the Apportionment of Expenses of the International Criminal Court and Financing Appropriations for the Year 2008, Resolution ICC-ASP/6/Res.4 (Dec. 14, 2007), http://www.icc-cpi.int/library/asp/ICC-ASP-6-20_Vol.I_Part_III_English.pdf. The dollar amount is calculated using a €1 = $1.56 conversion rate.

168. The situations and cases involved Sudan (Darfur), D.R. Congo, Northern Uganda, and the Central African Republic. *See* ICC, Situations and Cases, http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/ (last visited Mar. 2, 2009) (listing current situations and cases).

169. *See* S.C. Res. 1503, ¶ 7, U.N. Doc. S/RES/1503 (Aug. 28, 2003) (calling on ICTY and ICTR to complete all trials by end of 2008 and to wrap up all work by end of 2010). These deadlines have since been pushed back.

try. There are, however, some structural aspects of the ICC that will necessarily make its cost-per-case significantly higher than that of domestic courts. Unlike jurisdictions in which separate police forces investigate crimes, the ICC Office of the Prosecutor (and thus the ICC itself) bears all investigation costs.[170] The ICC will also likely bear the full cost of defending suspects and maintaining them in detention, as well as protecting witnesses.[171]

Devising an appropriate metric to determine whether supporting the ICC is the most efficient use of money to prevent atrocities is, as should be apparent, an elusive goal. Moreover, one may again point to the possibility that the system of complementarity will have an effect on domestic accountability, in which case simply dividing the ICC's budget by the number of prosecutions seems even less appropriate.[172]

In addition to fiscal costs, the ICC may impose non-fiscal opportunity costs. For instance, the ICC may trump other mechanisms of accountability and healing that may be more appropriate in a given situation. Justice Richard Goldstone, in reflecting on the experiences of his country of South Africa, has written, "Criminal prosecution is the most common form of justice. Prosecution is, however, not the only form, nor necessarily the most appropriate form in every case . . . . The work of truth commissions or judicial inquiries share with criminal prosecutions the ability to bring significant satisfaction to victims."[173] In some situations, courts and other

170. Cesare Romano, *Financing the ICC: What Can Be Learned From the Ad Hoc Tribunals?*, RRN NEWSLETTER (Overseas Development Institute/Relief and Rehabilitation Network, London), 1998, at 7 (discussing ICC investigaton costs); *see also* Kaul, *supra* note 81, at 373 (noting that prosecutor must conduct investigations, duty usually carried out by police in domestic legal systems).

171. *See* Romano, *supra* note 170 (recognizing ICC's involvement in defending and detaining suspects).

172. Even acknowledging that there may be more effective near-term means to prevent atrocities than international prosecution, ICC proponents might proffer a "diversification" argument. I have not seen this argument in the literature, but it is a logical extension of the claim that the ICC can fundamentally affect norms over the long-term. Imagine an individual who inherits some money and must decide how to invest it. That individual would be advised to diversify his or her portfolio by investing in some high-risk financial instruments as well as some low-risk instruments. The individual would also be advised to choose some instruments that may provide a short-term payoff as well as some that should be kept for the long haul. Simply investing in low-risk securities with a small expected short-term payoff would fail to optimize the total return. In the same vein, it might be argued that the international community should not focus all of its resources on near-term payoff but should also invest some resources in projects like the ICC, which are riskier in terms of guaranteeing a payoff, but may have a dramatic effect in the long-term. One would then be required to justify supporting the ICC rather than devoting those resources to some other high-risk, long-term project.

173. Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 485, 491 (1996). In addition to truth commissions and domestic or international judicial inquiries, non-prosecution accountability mechanisms potentially include lustration, civil liability, reparations, and historical inquiry. *See* Aukerman, *supra* note 60, at 43 (questioning assumption that prosecutions are always optimal way to pursue justice in

accountability mechanisms may work hand-in-hand, but in others, the former may displace the latter to ill effect.

Finally, efforts aimed at convincing countries to support the ICC carry diplomatic opportunity costs. ICC proponents often advocate putting pressure upon governments to accede to the Rome Statute and to support the work of the ICC.[174] Steven Ratner has warned against placing an undue emphasis on the ICC to the detriment of other important human rights regimes: "Is the ICC Statute the treaty that we really want China to ratify, or is it the International Covenant on Civil and Political Rights, the Torture Convention, or some of the other key conventions that some of the states with less-than-stellar human rights records are ratifying?"[175] If countries decide to bind themselves to international human rights obligations as a matter of political trade-off, then a decision to accept one set of obligations may offset a decision to reject another. Persuading resistant states to accede to the Rome Statute and to support the court may, therefore, impose costs on other preventive efforts.

IV. Prevention's Blurry Bottom Line

The foregoing discussion has described how the ICC's actions may sometimes help to prevent atrocities and may sometimes actually create conditions conducive to atrocities. But what is the bottom line? Can policymakers, deliberating upon their countries' relationships with the ICC, come to firm conclusions about whether the ICC may be expected to serve as a net benefit or a net liability to the cause of preventing humanitarian atrocities?

The answer is, in short, no. Among the various reasons for engaging the ICC (e.g., expressing global solidarity in the face of atrocities) or spurning it (e.g., resisting a perceived loss of sovereignty), prevention provides little guidance. This Part explains why this is the case. First, it examines the simple reality that a rather large assortment of variables must be dealt with. Some of these variables, based as they are upon historically novel characteristics of the ICC, are at present truly imponderable, having the potential to swamp the effects of the other variables in play.

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societies in transition). For a now-classic discussion of the purposes of and experiences with truth commissions, see Minow, *supra* note 113, at 52-90; *see also* Symposium, *Truth and Reconciliation Commissions*, 862 Int'l Rev. Red Cross 221 (2006), *available at* http://www.icrc.org/Web/Eng/siteeng0.nsf/html/all/section_review_2006_862?OpenDocument. It is beyond the scope of this Article to explore the advantages and disadvantages of the various non-judicial accountability mechanisms.

174. For instance, the Coalition for the International Criminal Court currently sponsors a "Universal Ratification Campaign" that urges people to send letters to politicians of a particular target country, which changes monthly. *See* Coalition for the International Criminal Court, http://www.iccnow.org (last visited Mar. 2, 2009).

175. Ratner, *supra* note 81, at 450.

Following a brief discussion of these "wild card" variables, this Part canvasses the sparse empirical and theoretical work so far completed that bears on the ICC's preventive potential. Although scholars have investigated various aspects of the problem, often in ingenious ways, it will become clear that numerous issues critical to resolving the prevention debate remain unaddressed or underappreciated. The empirical studies done to date shed some light on several issues that play a role in prevention, but they offer only limited assistance in predicting the ICC's preventive potential in the foreseeable future.[176]

A. *Known Unknowns and Wild Cards*

Regardless of how one may view Donald Rumsfeld's tenure as U.S. Secretary of Defense, there is no question that the man—once called "Bush's Wild Card" by Bob Woodward[177]—has a special way with words. Responding to a question in 2002 about whether Iraq might provide terrorists with weapons of mass destruction, Rumsfeld famously explained, "[T]here are known knowns; there are things we know we know. We also know there are known unknowns; that is to say we know there are some things we do not know. But there are also unknown unknowns—the ones we don't know we don't know."[178] Parts II and III of this Article catalogued and analyzed the most important unknowns in the ICC prevention debate. Though all of these issues, from general deterrence to opportunity costs are, in some sense, "known unknowns," the impact of some of these variables is less knowable than that of others.

The ICC is in many ways a historically novel institution. For instance, the framers of the Rome Statute created complementary jurisdiction essentially out of whole cloth, as a compromise between primacy and deference to national jurisdiction.[179] There is no clear historical precedent to suggest to what degree the phenomenon of complementary deterrence will materialize. There is at least some possibility that complementary deterrence will have a large effect. It is conceivable that many states will view

176. I should note that this Article does not purport to evaluate the overall importance or feasibility of empiricism in the contemporary study of law. *See generally* John J. Donohue, *The Search for Truth: In Appreciation of James J. Heckman*, 27 LAW & SOC. INQUIRY 23, 29 (2001) ("Although the technical sophistication of many recent empirical studies reveals that researchers have learned a great deal, the scholars of the second rank have not grasped one of the most important lessons embodied in [Nobel laureate James J.] Heckman's overall body of work: the truth is incredibly difficult to uncover and it cannot be assured by simply following a state of the art statistical protocol.").

177. Bob Woodward, *Bush's Wild Card*, WASH. POST, Jan. 12, 2001, at A25.

178. U.S. Dep't of Defense, Dep't of Defense News Briefing—Sec'ry Rumsfeld and Gen. Myers, Feb. 12, 2002, http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2636; *see also* Hart Seely, *The Poetry of D.H. Rumsfeld*, SLATE, Apr. 2, 2003, http://www.slate.com/id/2081042/ (arranging this and other Rumsfeld responses to reporters' questions in haiku and other poetic formats).

179. For a discussion of the creation of complementary jurisdiction under the Rome Statute, see *supra* notes 76-91 and accompanying text.

the exercise of ICC jurisdiction over conflicts within their borders as a stigmatizing event. If states judge that such stigma will carry real consequences (perhaps, for instance, by impacting foreign investment), complementary deterrence could lead states parties across the globe to criminalize and prosecute crimes they might otherwise ignore for the sake of political expediency. Should such a dynamic play out, the impact of complementary deterrence may simply swamp the impact of the ICC's direct general deterrent effect or other effects. It may be unlikely that such a meaningful complementary deterrent effect will be manifest itself, but it is currently impossible to estimate meaningfully just *how* unlikely. For that reason, it is fair to call complementary deterrence a "wild card."

In addition to complementary deterrence, the long-term potential for moral education is an imponderable with an outside chance of having a major effect on the prevention of atrocities. Realist international relations scholars deny the malleability of human nature, and they may be correct. But it is also worth pointing out that in virtually every place and historical period, societies have condoned the mass killing, rape, and torture of outgroup persons. The fact that roughly half of the world has seen fit to subject itself to a court that punishes the sorts of acts that were formerly a staple of human activity suggests that norms can and do—gradually—change.[180] The goal of fundamentally transforming norms pertaining to the treatment of individuals in war and civil conflict is highly ambitious, but not impossible. If the ICC proves uniquely able to change these norms, this effect could ultimately swamp other effects by orders of magnitude.[181]

To complicate the matter further, there are wild cards on both sides of the ledger. An ICC that fails to balance the interests of "peace" and

180. Of course, the ICC is arguably but one step in a much larger modern normative shift toward the incorporation of human rights norms into international law. This shift, or series of shifts, includes the anti-slavery movement, the codification of international humanitarian law, and the international human rights movement. For a discussion of early eighteenth century anti-slavery courts as forerunners of the modern human rights movement, see Jenny S. Martinez, *Anti-Slavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. 550 (2008).

181. The 1975 Helsinki Accords provide a prime example of a regime whose unforeseen effects on culture and norms far outstripped any expected effect. At the time, the Soviets viewed the agreement as a coup, because its declaration of the inviolability of borders in Europe seemed to legitimize the USSR's post-war dominance of east-central Europe. But the agreement's less remarked human rights provisions also legitimized dissent and spawned important human rights groups whose scrutiny helped ultimately to *delegitimize* Soviet hegemony in that part of Europe. *See* JOHN LEWIS GADDIS, THE COLD WAR: A NEW HISTORY 184-192 (2005). I thank my former professor, Alfred P. Rubin, for pointing out to me the fascinating role Helsinki played. I should note that Professor Rubin has criticized the ICC precisely because, unlike the Helsinki accords, the ICC strives to create a solution in the legal order where, in his view, moral (i.e., non-legal) remedies would be more appropriate. *See* Rubin, *supra* note 119, at 69 (comparing ICC unfavorably to Helsinki process).

"justice" could end up as a cause-in-fact of catastrophic effects in particular circumstances. What if the ICC insists on indicting a powerful spoiler in a country precariously close to civil war? If such an action actually stops a power-sharing accord from being reached, thereby igniting or rekindling a civil war that kills hundreds of thousands, can the court ever hope to offset such harm? In a utilitarian calculus, it is only with difficulty, if at all, that the court could expect any positive benefits to outweigh the costs of catalyzing war or mass atrocity in even one society that would otherwise have found a measure of stability. A clear case of international justice mechanisms leading to mass atrocity has not yet occurred, but many situations in which the ICC may be expected to play a role could present this possibility. Thus, the "peace versus justice" issue must be considered a wild card as well.

One might propose that other considerations discussed in Parts II and III should be considered "wild card" variables—variables whose sheer scope, as well as their type of effect, are simply unknown, due to the novel nature of the ICC regime. My purpose is not to detail every way in which each variable has the potential to swamp the others. It is, rather, to argue that answering the question of the ICC's preventive impact is seriously impeded by the fact that we cannot even begin to estimate the order of magnitude of some of the regime's potential positive and negative effects. In the absence of more facts (that is, more time), even the cleverest empirical studies can only bring us so far.

B. *Relevant Empirical and Theoretical Scholarship*

This dire assessment—that it will be impossible fully to predict the ICC's preventive impact anytime in the near future—does not mean that every aspect of the problem is intractable or that nothing concrete can be said about the topic. In fact, several recent scholarly studies have shed light on aspects of the ICC's potential for prevention. In this Sub-Part, I discuss and, where appropriate, critique four studies of particular relevance to this issue. It will become clear that these efforts, although illuminating, have adequately addressed only small parts of the overall picture.

1. *Snyder and Vinjamuri, 2003/2004*

Several empirical studies have addressed questions relating to the debate over amnesties and prosecution. Of relevance is Jack Snyder and Leslie Vinjamuri's 2003/2004 comparative study of prosecutions and amnesties.[182] Snyder and Vinjamuri studied thirty-two civil wars occurring between 1989 and 2003.[183] In cases they judged to be "successful" post-conflict stories (where "human rights abuses were reduced, peace was secured, and the degree of democracy was substantially improved"), three

182. *See* Jack Snyder & Leslie Vinjamuri, *Trials and Errors*, INT'L SECURITY, Winter 2003/04, at 5 (describing purpose and scope of study).

183. *Id.* at 18.

cases included trials and truth and reconciliation commissions with no amnesties, and five cases included some form of amnesty.[184] The study suggests that, in at least some situations, amnesties may be preferable to prosecutions.[185]

Few ICC proponents today dispute the reality that amnesties for humanitarian atrocities may sometimes be necessary to achieve the best result in a given situation. The Swiss-based International Council on Human Rights Policy has suggested as much in a recent report:

> There may be no clearly "correct" way to approach these dilemmas. Neither an attempt to impose human rights standards as abstract principles, nor the jettisoning of such standards in the search for a cease-fire, is likely to produce lasting solutions. Rather, the best approach to "peace v. justice" dilemmas may simply be to view them as on-going dilemmas which [must] be managed in pursuit of a just and sustainable peace.[186]

The ICC faces the challenge of managing these "on-going dilemmas." Studies like Snyder and Vinjamuri's have succeeded in showing that amnesties often correlate with good outcomes, but this does not answer the key question for the ICC: To what extent will the ICC prosecutor and judges be able correctly to determine whether a prosecution can be pursued in a given situation without endangering peace?[187] Success is a matter not only of institutional capacity but also idiosyncratic individual judgment, with the latter presenting a particularly unpredictable phenomenon.

2. *Gilligan, 2006*

Another recent study by a political scientist asks whether the ICC can have any deterrent effect in the absence of enforcement mechanisms. Using a game theoretic model, Michael J. Gilligan modeled the interactions between a leader who has committed crimes and a foreign state that has the option of offering the leader asylum, comparing worlds in which an ICC-like regime does and does not exist.[188] In Gilligan's model, the ICC does not prolong leaders' reigns and may deter some atrocities "at the

184. *See id.* at 19. The study addressed all trials and amnesties, whether domestic or international. None of the cases directly involved the ICC.

185. *See id.* at 33-39, 43.

186. INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, NEGOTIATING JUSTICE? HUMAN RIGHTS AND PEACE AGREEMENTS 113 (2006); *see also* Hannum, *supra* note 121, at 592 (noting issue).

187. I do not here mean to imply that Snyder and Vinjamuri intended to answer this specific question. Neither this study nor David Wippman's study on the costs of the ICTY, discussed below, were specifically directed toward the topic of the ICC's preventive potential, although both are relevant.

188. Michael J. Gilligan, *Is Enforcement Necessary for Effectiveness? A Model of the International Criminal Regime*, 60 INT'L ORGANIZATION 935, 942-46 (2006).

margin."[189] The ICC's existence allows foreign states "to credibly refuse asylum" in some cases in which they would otherwise prefer to grant asylum rather than allow a criminal leader to remain in power.[190] Although this study provides analytical rigor, its conclusions are highly circumscribed. As Gilligan admitted, "The only leaders who are actually punished in this model are those who willingly accept punishment to avoid retribution from domestic political rivals."[191] Moreover, as with all theoretical models, the salience of the study's conclusions depends upon the accuracy with which its assumptions model the real world.[192]

3. *Wippman, 2006*

Addressing a different question, David Wippman has recently contributed further to the debate about allocating scarce financial resources to international criminal tribunals.[193] Using data obtained from the Administrative Office of the United States Courts, Wippman developed a detailed comparison of the costs of criminal trials in the United States and those at the ICTY.[194] He found that an ICTY trial typically costs much more than an average criminal trial in the United States, but that this fact is, by itself, misleading.[195]

Wippman noted that very complex cases in the United States are expensive: The United States government spent over $82.5 million on prosecution costs in the cases of Oklahoma City bombers Timothy McVeigh and Terry Nichols (not including the costs on appeal!).[196] The reasons that ICTY prosecutions are slow and costly, Wippman concluded, "relate principally to the inherent complexity of the cases being tried, the dependence of the Tribunal on international cooperation, and the costs implicit in its international nature (including translation and travel)."[197] Such

189. *See id.* at 935.

190. *See id.* at 943.

191. *Id.* at 957.

192. Some of the key assumptions may well be questioned. For instance, the model assumes that the existence of an ICC in no way makes "punishing states that harbor atrocity committers easier." *Id.* at 954 n.31. If, in fact, the ICC does make it harder for foreign states to grant an exiled criminal leader amnesty in exile, then there may be an effect of prolonging the reign of criminal leaders. *See* Ku & Nzelibe, *supra* note 74, at 825-26 (pointing out weakness of Gilligan's assumption that potential asylum-granting countries will be indifferent to existence of indictments). More fundamentally, the model assumes that prosecution by the ICC is preferable to domestic retribution at the hands of political opponents. *See* Gilligan, *supra* note 188, at 943. Although the interests of justice might be better served by trying evil dictators rather than allowing political rivals to punish them summarily, it is in no way clear that the interests of deterrence are thus better served.

193. David Wippman, *The Costs of International Justice*, 100 AM. J. INT'L L. 861 (2006).

194. *See id.* at 863-72.

195. *See id.* at 880.

196. *See id.* at 862 n.12.

197. *Id.* at 880.

studies cannot directly answer the question of whether international criminal tribunals like the ICTY and the ICC represent an optimal use of resources, but they can at least help put expenditures in some relevant perspective.

4. *Ku and Nzelibe, 2006*

Julian Ku and Jide Nzelibe analyzed data on the fates of coup plotters in Africa, arguing that the data sheds light on the expected deterrent impact of international prosecution.[198] The data tracks the fates of those who participated in coup attempts, both successful and failed, in Africa between 1955 and 2003.[199] It demonstrates a strong correlation between engaging in plots to overthrow one's government and being executed, imprisoned, exiled, or arrested.[200] Based upon this finding, Ku and Nzelibe concluded that "the deterrent effects of further prosecutions by [international criminal tribunals] are likely to be insignificant" in light of the severity and certainty of sanctions that the individuals in question already face.[201] If coup plotters represent a good proxy for those who commit atrocities, then the threat of international prosecution (in the ICC or other tribunals) should pale in comparison to other threatened sanctions—sanctions that have failed to deter them.[202]

Unfortunately, the data about African coup plotters reveals a great deal more about African coup plotters than it does about the deterrent effect of international criminal tribunals. This is true because the authors' conclusion rests upon two suspect assumptions. First, they assumed that African coup plotters are a good proxy (if an admittedly "second-best" one[203]) for the universe of potential perpetrators of human atrocities. The authors asserted that "there is no strong theoretical reason to assume a priori that humanitarian offenders in Africa are going to face systematically lower sanction risks than coup participants."[204] This begs the question: Is not actively trying to overthrow a government (many of which in this sample were quite brutal) more dangerous than simply hurting or killing victims who may not be under the protection of any strong power like a government?

To answer this question, one need look no further than the highly salient contemporary case of Darfur. The persons thought to have orches-

198. Ku & Nzelibe, *supra* note 74.

199. *See id.* at 799.

200. *See id.* at 804 ("[O]f all coup participants in Africa during the relevant period, including those who were successful, 28% were executed or otherwise murdered, 22% were exiled or imprisoned, and 16% were arrested without any clear outcomes.").

201. *See id.* at 810.

202. Ku and Nzelibe also argued that actual and aspiring political leaders might have a higher tolerance for risk than other people. *See supra* note 74 and accompanying text.

203. *Id.* at 810.

204. *Id.*

trated genocide have acted either in an official government capacity or at the behest of the Sudanese government, rather than in opposition to it.[205] In such a case, the coup plotter data is entirely inapposite, because the Darfur perpetrators benefit from government *protection*, rather than government threats of execution, imprisonment, exile, or arrest.

The second suspect assumption was that "the risks faced by those individuals who try to achieve political change or maintain political power by force will necessarily subsume the risks faced by many of those individuals who attempt to attain similar objectives by committing large scale humanitarian atrocities."[206] Here, the authors essentially assumed that the commission of humanitarian atrocities will continue to be a necessary component of political change in Africa, such that the two things comprise the same "activities."[207] Yet, humanitarian atrocities may be committed in situations in which political change in the sense of regime change is not necessarily at issue, e.g., in clashes between minority ethnic groups or rebel groups. Moreover, by presuming that the regime-change risk calculus from the latter half of the twentieth century will continue to hold true, this view assumed at the outset that changes in the enforcement of international criminal law will have no effect on behavior. It seemed to assume the truth of the conclusion it was trying to prove.

In sum, Ku and Nzelibe's data on African coup plotters may be seen as probative of the deterrence issue only if one conflates the circumstances surrounding coups d'état and humanitarian atrocities in a way often unlikely to square with realities on the ground. Yet these difficulties merely serve to demonstrate just how difficult it is to deal with these complicated questions in a useful and empirically rigorous way. Ku and Nzelibe themselves advised that their analysis should be treated with caution, as there have not yet been enough international criminal prosecutions to allow one "to perform the kinds of rigorous econometric tests that would generate systematic empirical results."[208]

This survey of recent empirical and theoretical studies relevant to ICC prevention suggests that scholars are continuing to make valuable incremental contributions to answering the basic question. Yet, these contributions have provided only a few pieces to a much larger puzzle.

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205. *See* Dawn Yamane Hewett, Recent Development, *Sudan's Courts and Complementarity in the Face of Darfur*, 31 YALE J. INT'L L. 276, 276-77 (2006) (noting government of Sudan's responsibility for serious violations).

206. Ku & Nzelibe, *supra* note 74, at 810.

207. *See id.* at 807 ("Because coup participants in Africa, a representative sample of potential humanitarian offenders, appear to discount significantly the risks that they might get killed or tortured *for their activities*, they are also likely to discount the risks of [international] prosecutions.") (emphasis added).

208. *See id.* at 832.

V. THE MEANING OF ICC PREVENTION AND DETERRENCE DISCOURSE

This Article attempts to catalogue the issues surrounding the ICC's preventive potential in a comprehensive and balanced way, so as to convey the complexity and near-term intractability of the question. Yet it by no means claims to be the first to conclude that answers about the ICC's capacity for prevention are not readily forthcoming.[209] Indeed, deterrence is famously difficult to measure even in established domestic systems. It would be nonsense to imagine that many scholars and policy analysts naively believe that it may be said with any level of certainty whether the ICC will successfully prevent atrocities in any relevant timeframe. Yet, predictions about the court's preventive potential (often referring to "deterrence" rather than the broader term "prevention") continue to appear with some regularity in political and policy discourse.[210] Can this be explained by a failure of scholars and policymakers to appreciate the subtleties of the prevention debate, or might we find another explanation for the strange persistence of the prevention issue in debates about the ICC?

A. *The Secret Ambition of Senator John Edwards*

In an important and controversial article, *The Secret Ambition of Deterrence*, Professor Dan Kahan has suggested that talk about deterrence performs a special function in debates about criminal punishment in the United States.[211] Stated in its simplest form, Kahan's argument is that de-

209. *See, e.g.*, SADAT, *supra* note 71, at 73-75 (conceding that proponents of criminal trials cannot demonstrate prevention empirically but arguing that millions of deaths in post-War world are reason enough to "give justice a chance").

210. *See, e.g.*, The Secretary-General, *Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, ¶ 49, *delivered to the Security Council*, U.N. Doc. S/2004/616 (Aug. 23, 2004) ("[The ICC] is already having an important impact by putting would-be violators on notice that impunity is not assured . . ."); Scheffer, *supra* note 16, at 67 (quoting President Clinton's remarks on December 31, 2000, upon signing Rome Statute: "I believe that a properly constituted and structured International Criminal Court would make a profound contribution in deterring egregious human rights abuses worldwide . . ."); Survey Response of Senator John Edwards, *supra* note 2; Human Rights First, Human Rights First and International Justice, http://www.humanrightsfirst.org/international_justice/what_we_do.htm (last visited Mar. 2, 2009) ("Human Rights First's goal [in participating in the Rome conference] was to mobilize support for a strong and credible Court capable of breaking the cycle of impunity and deterring future atrocities."); Praful Bidwai, *Saddam Hanging Boosts Case for International Criminal Court* (Jan. 6, 2007), http://www.globalpolicy.org/intljustice/tribunals/iraq/2007/0106iccboost.htm (quoting Usha Ramanathan, New Delhi-based legal commentator: "[The ICC] is ideally placed to achieve justice for all, to act as a court of last resort, to remedy the deficiency of ad hoc tribunals, to deter future perpetrators of heinous crimes, and to have true and lasting peace, based on justice.").

211. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

terrence discourse serves to mask commentators' substantive commitments.[212]

Individuals can argue about legal and policy alternatives using vocabularies of either instrumentalism or expressivism.[213] Instrumental language, which includes talk about deterrence, emphasizes the actual empirical effect of a proposed law.[214] Expressivism emphasizes the message that a law is intended to send, e.g., "Hate crime laws 'send the message' that the offender was wrong to see the victim as lower in worth by virtue of his group commitments."[215] The expressivist approach becomes problematic in a pluralistic society, according to Kahan, because legislators who explicitly cite the need to express particular values often do so at the risk of alienating sub-cultural groupings whose values do not conform to those being affirmed.[216] For instance, an expressivist justification for a hate crimes law may lead those of a differing cultural style to oppose the law on the ground that "punishing bias-motivated crimes more severely 'sends the message' that victims of other, non-hate-related crimes matter less in the eyes of the law than do hate crime victims."[217]

Marshalling evidence from cognitive psychology, Kahan argued that people become alienated by laws whose expressive meaning condemns the "cultural style" one admires.[218] For Kahan, laws pertaining to divisive issues like capital punishment, gun control, and hate crimes create a danger of damaging the social fabric not because of any expected practical outcome, but because of the role laws in these areas play in valuing or devaluing certain cultural perspectives.[219] For instance, in Kahan's view, many

212. *Id.* at 417.

213. *See id.* at 419-35 (outlining theories of expressive condemnation and deterrence).

214. *See id.* at 425-35 (discussing deterrence and potential empirical effect of law).

215. *Id.* at 465 (providing hate crime as example of expressive theory of punishment).

216. *See id.* at 466.

217. *Id.*

218. *See id.* at 460. Kahan used the term "cultural style" to denote roughly the difference between political conservatives and liberals, although he did not say this in so many words: "one side is disproportionately rural, southern or western, and Protestant, as well as male and white; the other is disproportionately urban, eastern, Catholic or Jewish, as well as female and black." *Id.* at 453. In a later work, Kahan uses anthropologist Mary Douglas's classifications for cultural worldviews to distinguish between those who prefer individualism and hierarchy and those who prefer communitarianism and egalitarianism. *See* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 122-23 (2007) (describing Douglas's classifications). This strategy again seems to suggest groups roughly equivalent to political conservatives and liberals.

219. It has recently been argued that debates about racial profiling are also prone to the same types of value debates identified by Kahan in *The Secret Ambition of Deterrence*. *See* Steven Wu, Comment, *The Secret Ambition of Racial Profiling*, 115 YALE L.J. 491, 494-97 (2005) (describing perils of open dialogue concerning issue of racial profiling).

of the most vocal supporters of gun control intend gun control laws to send a message that the rugged individualism and patriarchy prized by largely conservative Southerners and Westerners is, in fact, pernicious and deviant.[220] The natural response of the target group to such a message is to reject attempts to restrict gun ownership as an attack on their values and status in society.[221]

Kahan suggested that the idiom of deterrence comes to dominate dialogue at those times when raw expressive discourse threatens to inflame passions and hinder an advocate's substantive goals.[222] A discourse centering on deterrence cools the passions by shifting the focus to a goal shared by the competing cultural styles—preventing crime—and shifting the debate to one about empirics rather than values. By disputing the issue of deterrence, one "can be seen as saying only that [adversaries] are factually misinformed, rather than morally obtuse."[223] For instance, the statement "the death penalty deters crime" is less provocative to death penalty opponents than the statement "the bastard deserved it."[224]

A related observation, also based in cognitive psychology, is that individuals' prior evaluative judgments shape their acceptance of new empirical data.[225] That is to say, somewhat prosaically, that one who already supports capital punishment for its expressive role is more disposed to accept the validity of an empirical study purportedly demonstrating that the death penalty has a deterrent effect. The upshot is that invocations of deterrence may sway the undecided while neither aggravating opponents as much as expressive language would, nor alienating supporters, who are likely to accept the advocate's empirical assumptions even when supported by little evidence. In Kahan's view, deterrence has played a larger role in American public debates about crime than can be otherwise explained because deterrence discourse is used instrumentally to mask and moderate disputes that would otherwise be inflamed if people "said everything they thought."[226]

Applying Kahan's theory to debates about the ICC, it appears that deterrence and prevention discourse has often functioned in a way similar to deterrence discourse in domestic debates about crime and punishment. Consider the statement by Senator John Edwards quoted at the very beginning of this Article.[227] (I choose this quotation merely because it offers an accommodatingly clear example of the phenomenon.) In late 2007, then-

220. *See* Kahan, *supra* note 211, at 452-53.

221. *See id.* (noting varying responses towards gun control legislation from different cultural styles).

222. *See id.* at 497-98.

223. *See id.* at 446.

224. *See id.*

225. *See id.* at 428.

226. *See id.* at 436.

227. *See* Survey Response of Senator John Edwards, *supra* note 2, and accompanying text.

presidential candidate John Edwards responded in writing to a question posed to him regarding the U.S. relationship with the ICC. The candidate (or more likely, his campaign advisors) confidently predicted that the ICC would ensure that the most serious crimes against humanity are punished and that the court would promote peace and security.[228]

Did he frame his statement to convince voters of the empirical truth of these claims? This is unlikely. Rather, the policy statement was more likely intended to convey a more general message of internationalism, in contrast to what many of Edwards's target voters perceived as President Bush's "go-it-alone" approach. Despite a lack of empirical evidence for Senator Edwards's claims, those with a preexisting internationalist bent would naturally tend to believe the claims about the ICC's usefulness, according to both Kahan's theory and common experience. And by stating a non-controversial practical goal (preventing dictators from doing bad things) instead of focusing solely on ideological language, Edwards increased the likelihood of convincing voters uncommitted either to internationalism or sovereigntism, while decreasing the likelihood of alienating committed sovereigntists.[229]

Fundamentally, Senator Edwards's statement on the ICC probably had nothing to do with his perceptions about the institution's likely efficacy in preventing humanitarian atrocities. The purpose, rather, was to send a message about the candidate's valuation of internationalism versus sovereigntism, couched however in pragmatic, rather than blatantly expressive, language. Similarly, Under Secretary John Bolton's statement quoted at the beginning of this Article was likely aimed more at marshalling support to Mr. Bolton's overall sovereigntist and anti-ICC agenda, rather than communicating the results of some specific empirical insight that he had concerning the ICC's deterrent potential.[230] In sum, internationalists and sovereigntists, politicians, and scholars have often used the discourse of prevention to buttress their broader agendas. These have been broad pro- or anti-ICC agendas or even broader pro- or anti-internationalist ones. Hence the persistent resort to such discourse even in the face of dramatic empirical uncertainty.

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228. *See id.* In this example, Senator Edwards also stated that the ICC would "send a message" to would-be tyrants that their crimes would be punished. Normally, the invocation of "sending a message" is classical expressivist rhetoric, rather than deterrence rhetoric, per Kahan's understanding. However, unlike, for instance, sodomy laws, the contested value in the ICC context is *not* the behavior directly subject to punishment. No one's group identity (hopefully!) is tied up with support for genocide or war crimes. The contested issue is about internationalism versus sovereigntism. Sending "would-be tyrants" a message does not devalue the status of any domestic group.

229. I use the term "sovereigntism" as a shorthand to describe a set of viewpoints sharing a skepticism of international law and institutions. *Cf.* Julian G. Ku, *The State of New York Does Not Exist: How States Control Compliance with International Law*, 82 N.C. L. REV. 457, 470 n.63 (2004) (arguing that some scholarship labeled "sovereigntist" would be more appropriately referred to as "revisionist").

230. *See* Bolton, *supra* note 1.

B. *Unmasking Prevention and Deterrence Discourse*

In *The Secret Ambition of Deterrence* and more recent works, Kahan has offered certain proposals for reengineering political discourse to advocate specific goals or to correct for certain cognitive biases.[231] I take no position here on the merits of the normative recommendations Kahan believes flow from his positive insights about deterrence discourse.[232] The purpose of this Article is not to achieve anything so bold as to reengineer social discourse, but rather simply to suggest a possible reason for the strange perseverance of prevention discourse in the context of debates about the ICC—and to caution against any acceptance or rejection of prevention claims without considerable reflection.

So what's wrong with politicians like Senator Edwards invoking a prevention rationale for the ICC? For that matter, what's wrong with attempts by legal scholars like Professors Ku and Nzelibe to muster data that would undermine such a rationale? Nothing, of course, unless policy makers imbue these pronouncements and arguments with more authoritativeness than is warranted, given their supporting evidence or lack thereof. Voters should (as always) look behind politicians' pronouncements to find the expressive messages underlying them. And policymakers should recognize that the few scholarly empirical and theoretical models proposed so far, though impressive on their face, offer only very limited insight into the ICC's full potential to prevent or exacerbate atrocities.

Legal, political, economic, and sociological analyses of the ICC's activities and effects will, of course, continue. It is strictly possible that the academy will someday be able to develop empirical studies that integrate many or all of the most important considerations and yield a reliable prediction as to whether the ICC will tend to prevent or aggravate atrocities. The question is whether that day will occur before the issue becomes moot, either because the United States and other major countries have already chosen to join the ICC or because the ICC has already failed. In any event, that day is not today.

VI. CONCLUSION

Under what circumstances can laws and courts actually prevent crimes? This deceptively simple question has employed generations of criminologists. It is a question that has suddenly become salient in the

231. In the *Secret Ambition of Deterrence*, Kahan concerned himself with attempting (with limited success, he readily concedes) to guide "liberals" as to when expressive arguments may be more effective than deterrence arguments, and vice-versa. *See* Kahan, *supra* note 211. In a more recent article, Kahan argued that the Rawlsian liberal philosophy of public reason is self-defeating and should be replaced by a principle of "expressive overdetermination." Kahan, *The Cognitively Illiberal State*, *supra* note 218, at 145-53.

232. For a multi-front attack on Kahan's normative prescriptions, see Robert Weisberg, *Norms and Criminal Law, and the Norms of Criminal Law Scholarship*, 93 J. CRIM. L. & CRIMINOLOGY 467, 557-75 (2003).

international legal order following the creation of a series of international criminal tribunals over the last fifteen years. The question of prevention (or deterrence, a species of prevention) has played a particularly important role in debates about the value of the International Criminal Court as a regime.

We have seen that three separate but interrelated problems stand out in the literature discussing the ICC's potential to prevent humanitarian atrocities. The first problem is that many commentaries bandy about the rhetoric of prevention without examining it in any systematic way. Parts II and III of this Article provided, it is hoped, a reasonably comprehensive and balanced catalogue of the arguments that are essential to assessing whether the ICC may be expected to succeed in preventing atrocities.

The second problem here addressed is the tendency on both sides of the debate to state relatively strong conclusions without much evidentiary support. The fourth Part of this Article explained how the presence of several "wild card" variables, resulting from the combination of the ICC's novel characteristics and short track record, make an overall assessment of the ICC's preventive potential problematic. This conclusion is borne out by a review of the most relevant recent empirical and theoretical scholarship, which has shed only some light on parts of the overall picture. As the ICC continues to build a track record of investigations and prosecutions over the coming years and decades, further data on its effects will enrich the possibilities for predictive empirical study. This does not, however, aid policy makers in managing their countries' relationships with the ICC in the near future.

Acknowledging the near-term intractability of predicting the ICC's preventive effectiveness leads us to the recognition of the third problem (or perhaps mystery) found in the literature: the odd persistence of claims about prevention and deterrence in debates about the ICC. The fifth Part of this Article briefly explored why this might be the case. ICC prevention and deterrence discourse may have the sort of "secret ambition" described by Professor Dan Kahan in his work on deterrence. Specifically, dialogue about ICC prevention may serve to signal a commitment to internationalism or sovereigntism in a way likely to appeal more broadly than raw expressive discourse.

In summary, policy makers should treat scholarly claims about whether the ICC will prevent or exacerbate atrocities with caution, just as voters should beware of such pronouncements by politicians. Like the parables of a sage, commentary on this issue should be received with an ear toward its underlying message, rather than with uncritical acceptance of its literal truth.