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## Toward a Situational Model for Regulating International Crimes

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# Toward a Situational Model for Regulating International Crimes

Andrew K. Woods\*

## Abstract

*The international criminal regime, as currently conceived, relies almost exclusively on the power of backward-looking criminal sanctions to deter future international crimes. This model reflects the dominant mid-century approach to crime control, which was essentially reactive. Since then, domestic criminal scholars and practitioners have developed and implemented new theories of crime control—theories notable for their promise of crime prevention through ex ante attention to community and environmental factors. Community policing, crime prevention through environmental design, and related “situational” approaches to crime control have had a significant impact on the administration of domestic criminal law.*

*This Article evaluates the implications of these approaches for the international criminal regime. Despite the significant distinctions between international and domestic crimes, there are important similarities—most notably, the finding that environmental factors play a key role in the commission of both sorts of crimes. This finding creates space for the situational turn at the international level. Applying this model to the international regime has implications for how we understand and design tactics aimed at preventing international crimes ex ante. It also has real and theoretical implications for ex post justice.*

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## I. INTRODUCTION

One of the central goals of the international criminal regime is the prevention of international crimes: genocide, war crimes, and crimes against humanity.<sup>1</sup> To date, practitioners and scholars of international criminal law concerned with this goal have largely focused on the preventive capacity of international criminal tribunals where the worst actors are accused of the gravest crimes.<sup>2</sup> They have paid comparatively little attention to other institutions or other mechanisms for preventing international crimes.

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<sup>1</sup> See Rome Statute of the International Criminal Court, Art 5 (1998), 2187 UN Treaty Ser No 90 (2002) (Rome Statute). I do not discuss here the crime of aggression, which is not yet an actionable offense in the International Criminal Court (ICC).

<sup>2</sup> See, for example, *id* at Preamble (stating that the parties to the statute are “[d]etermined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”). See also 22 *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945–1 October 1946* 466 (Nuremberg 1948) (“Crimes against international law are committed by men, not by abstract entities, and *only by punishing individuals who commit such*

This omission is striking on its own. Scholars have long bemoaned the difficulty of achieving the many goals of international criminal law with the single, relatively blunt instrument of the individual criminal trial.<sup>3</sup> But this omission is especially striking today given the significant changes seen in the last forty years to both the theory and practice of domestic crime control.

In that time, criminal law scholars have developed a number of theories to understand how social and environmental factors contribute to the likelihood of crime,<sup>4</sup> and domestic criminal regimes around the world now explicitly seek to influence these factors.<sup>5</sup> Perhaps best known among these is the “broken windows” theory that crime is connected to the perceived disorderliness of a particular environment.<sup>6</sup> The broken windows theory is the most controversial of the many “situational” models of crime and crime control; related theories include community-oriented policing,<sup>7</sup> crime prevention through environmental design,<sup>8</sup> situational crime prevention,<sup>9</sup> and problem-oriented policing,<sup>10</sup> inter alia. While the efficacy of the various situational crime control policies is the subject

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*crimes can the provisions of international law be enforced.*) (emphasis added). See generally Mirjan R. Damaska, *What is the Point of International Criminal Justice?*, 83 Chi Kent L Rev 329 (2008) (noting the many often-competing goals of the international criminal regime—including retribution, deterrence, and conflict resolution—and arguing that trials are unlikely to achieve all aims); Mark A. Drumbl, *Atrocity, Punishment, and International Law* (Cambridge 2007) (noting the limits of the domestic criminal model to address the exceptional nature of mass atrocity).

- <sup>3</sup> See, for example, Jack Snyder and Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 Intl Security 5, 5 (Winter 2003–04) (arguing that the prosecution of individual perpetrators “risks causing more atrocities than it would prevent”).
- <sup>4</sup> See generally Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 Va L Rev 349 (1997) (applying social norms research to criminal law). See also George L. Kelling and Catherine M. Coles, *Fixing Broken Windows: Restoring Order and Reducing Crime in our Communities* 158 (Touchstone 1998) (describing the shift toward community-oriented crime prevention and the importance of prevention rather than reaction).
- <sup>5</sup> See generally Dieter Dölling and Thomas Feltes, eds, *Community Policing: Comparative Aspects of Community Oriented Police Work* (Felix-Verlag 1993) (surveying community policing practices in Germany, Ireland, Belgium, and Hungary, inter alia). I will focus the bulk of my inquiry on crime control theories, but this will necessitate occasionally discussing theories of criminogenesis.
- <sup>6</sup> See generally James Q. Wilson and George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, 249 Atlantic Mag 29 (1982) (introducing the broken windows theory).
- <sup>7</sup> See, for example, Wesley G. Skogan, *Disorder and Decline: Crime and the Spiral of Decay in American Neighborhoods* 159–86 (Free Press 1990) (analyzing community policing as a solution to the relationship between disorder and neighborhood decline).
- <sup>8</sup> See generally, for example, C. Ray Jeffery, *Crime Prevention Through Environmental Design* (Sage 1971); Carri Casteel and Corinne Peek-Asa, *Effectiveness of Crime Prevention Through Environmental Design (CPTED) in Reducing Robberies*, 18 Am J Prev Med 99 (2000).
- <sup>9</sup> See generally Ronald V. Clarke, *Situational Crime Prevention*, 19 Crime & Just 91 (1995).
- <sup>10</sup> See generally, for example, Anthony A. Braga, et al, *Problem-Oriented Policing, Deterrence, and Youth Violence: An Evaluation of Boston’s Operation Ceasefire*, 38 J Rsrch Crime & Delinq 195 (2001); Herman Goldstein, *Improving Policing: A Problem-Oriented Approach*, 25 Crime & Delinq 236 (1979).

of ongoing empirical debate, even the most strident critics welcome the general turn of attention toward social and environmental phenomena *ex ante*.<sup>11</sup> Yet insights from this new approach—insights about both the successes and pitfalls of various situational strategies, as well as more theoretical gains—have not been applied to the international criminal regime.

This Article seeks to fill this gap by showing how and why the situational approach is relevant to international criminal law, by outlining the conceptual and practical reforms implicated by this approach, and by sketching some of the larger implications of incorporating situational models into international criminal law. The effort proceeds in four sections.

Section II outlines the situational approach to crime control and identifies four key features of that approach. The Section then addresses the growing empirical literature evaluating the efficacy of police tactics common to the situational approach.

Section III seeks to explain why situational approaches are relevant to international criminal law. It compares international and domestic regimes, focusing in particular on the similarities and differences in the crimes, the criminals, the politics, and the environments. Recent studies have found that local environments matter to the commission of international crimes.<sup>12</sup> Studies have also shown international environmental effects: a major predictor of a failed state's risk of mass atrocity is the extent to which that state is embedded in

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<sup>11</sup> See Bernard E. Harcourt, *The Illusion of Order: The False Promise of Broken Windows Policing* 21 (Harvard 2001) (offering a critique of broken windows policing, but noting that “the turn to norm-driven hypotheses and social meaning is a positive development for criminal justice”) (emphasis omitted). I discuss the empirical data behind these claims, and their critiques, in Section II.B. Harcourt provides the most thoughtful critique of order maintenance policing as implemented in American cities. There is a substantial debate about “zero tolerance” policies in particular, and broken windows policing in general, though most of this work is not generalizable to other situational reforms such as community partnerships or to environmental reforms such as target hardening. A recent study—one of the only randomized controlled trials—showed that situational police tactics generally had a significant impact on crime, but the study found that the effect could be attributed more to environmental changes such as cleaning up abandoned warehouses than to misdemeanor arrests. See Anthony A. Braga and Brenda J. Bond, *Policing Crime and Disorder Hot Spots: A Randomized Controlled Trial*, 46 *Criminol* 577, 599 (2008). This suggests that situational crime prevention is more effective than order maintenance tactics, and it is consistent with Harcourt's work. See Harcourt, *The Illusion of Order* at 221 (“Instead of arresting turnstile jumpers, for instance, we can—and New York City has begun to—install turnstiles that cannot be jumped.”).

<sup>12</sup> See Daniel Muñoz-Rojas and Jean-Jacques Frésard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, 86 *Intl Rev Red Cross* 189, 203–04 (2004) (observing that the lack of order and discipline in a particular situation contributes to war crimes). Local environmental effects have also been shown relevant to mass atrocity. See Barbara Harff, *No Lessons Learned from the Holocaust? Assessing Risks of Genocide and Political Mass Murder Since 1955*, 97 *Am Pol Sci Rev* 57, 61 (2003).

and interconnected with the international community of states.<sup>13</sup> Section III argues that the presence of environmental influences on crime in the international realm invites the application of the situational approach.

Section IV details some of the practical and theoretical implications of that move. Many of the specific policies called for by this approach already exist in the international realm, but they are under-theorized as aspects of the international criminal regime, and therefore under-developed as tools for regulating crime.<sup>14</sup> Much like signs that warn “this area is under surveillance,” the situational approach would call for warnings issued, for example, to rebel groups poised to commit international crimes. Section IV explores these and other reforms for crime prevention above and beyond the deterrent effect of retributive international criminal trials.

Section V examines how these situational prevention strategies interact with—and potentially interfere with—existing ex post mechanisms of international justice such as international criminal trials. One lesson of the situational trend in the domestic realm is that such reforms are not mere supplements to existing laws and policies. The rise of “community justice” can be seen as an acknowledgment that situational approaches to crime control call for significant reforms by courts and prosecutors.<sup>15</sup> Applying the situational approach to the international criminal regime may similarly prompt a

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<sup>13</sup> See Harff, 97 *Am Pol Sci Rev* at 61–62 (noting that 36 of the 37 genocides between 1955 and 1997 occurred in failed states, when there were 126 such failed states; asking “why some such conflicts lead to episodes of mass murder, whereas most do not”; and suggesting that the “international environment is a major source of both incentives for and constraints on elite’s use of repression [during such conflicts]”).

<sup>14</sup> For example, monitoring for international crimes is a crucial component of the international regime, but available monitoring tools, from satellites to watchdog groups, are largely used to document crimes and prosecute criminals; existing approaches under-appreciate how the same monitoring tools can be deployed to prevent crime ex ante. See Phoebe Wynn-Pope and Steph Cousins, *Early Warning for Protection: Technologies and Practice for the Prevention of Mass Atrocity Crimes* 17 (Oxfam Austl 2011) (“New technology-based approaches in their current forms are generally not focused on predicting crises and tracking long-term trends or patterns.”). This bias toward ex post mechanisms is true for how the international criminal regime is taught as well. One who takes a class on international criminal law will find procedural details about international criminal tribunals, the aims of their sentencing schemes, and the like, but next to nothing on prevention of crime through means other than sentencing. See generally, for example, Antonio Cassese, *The Multifaceted Criminal Notion of Terrorism in International Law*, 4 *J Intl Crim Just* 933 (2006). Domestic criminal law is similarly focused on the traditional institutions of criminal justice, but there is a considerable and influential effort to reform legal education to include a greater emphasis on social and environmental contributors to crime as well as the institutions involved in their regulation. See generally Tracey L. Meares, Dan M. Kahan, and Neal Katyal, *Updating the Study of Punishment*, 56 *Stan L Rev* 1171 (2004) (calling for reform of basic introductory criminal law courses and casebooks to reflect situational insights).

<sup>15</sup> See Anthony C. Thompson, *It Takes a Community to Prosecute*, 77 *Notre Dame L Rev* 321, 322–23 (2002).

reevaluation and reform of the roles of international courts and prosecutors. Insofar as the situational approach better accounts for and/or enhances the regime's ability to prevent international crimes, it may fruitfully inform the contemporary debate about sentencing in international criminal law.<sup>16</sup> If crime prevention is thought to occur outside of or in addition to what is achieved through individual criminal trials, it may lift some of the heavy burden on trials to achieve total deterrence, and in so doing, it may free them to pursue other regime goals: retribution, reconciliation, or truth-telling, inter alia. Furthermore, by treating punishment and prevention as distinct yet interrelated aspects of the regime, this approach may offer insight into the dynamic relationship between the two.

## II. THE SITUATIONAL MODEL OF CRIME CONTROL

Approximately forty years ago—beginning in the US and UK and then spreading to mainland Europe and beyond—criminologists disenchanted with ex post mechanisms for controlling crime began to theorize and implement new, community-oriented police strategies that were concerned with anticipating and directly acting on the social and environmental correlates of crime.<sup>17</sup> This shift has been well documented as a significant change in both the focus of scholarship and the regulation of crime.<sup>18</sup> Consider a typical assessment from criminologist Wesley Skogan:

Community policing is the most important development in policing in the past quarter century. Across the country, police chiefs report that they are moving towards this new model of policing, which supplements traditional crime fighting with a problem-solving and prevention-oriented approach that emphasizes the role of the public in helping set police priorities.<sup>19</sup>

The shift in police priorities was seen worldwide. Evidence from comparative studies suggests that police forces across the world have adopted many aspects of situational policing, and international observers continue to advocate further situational reforms in the police forces of developing countries.<sup>20</sup>

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<sup>16</sup> As Mark Drumbl notes, international criminal law is still on a “[q]uest for [p]urpose.” *Atrocity* at 149 (cited in note 2).

<sup>17</sup> See George L. Kelling and Mark H. Moore, *From Political to Reform to Community: The Evolving Strategy of Police*, in Jack R. Greene and Stephen D. Mastrofski, eds, *Community Policing: Rhetoric or Reality* 3, 9–17 (Praeger 1988).

<sup>18</sup> For a description of the shift, see *id.*

<sup>19</sup> Wesley G. Skogan and Jeffrey A. Roth, *Introduction*, in Wesley G. Skogan, ed, *Community Policing: Can it Work?* xvii, xvii (Wadsworth 2003).

<sup>20</sup> For evidence of the change, see Jeffrey A. Roth, Jan Roehl, and Calvin Johnson, *Trends in Community Policing*, in Skogan, ed, *Community Policing* 3, 5 (cited in note 19) (reporting the results of a nationwide telephone survey finding significant increases from pre-1995 levels to 1998 and 2000 levels of four specific community-oriented police tactics). For an account of the practice not matching the rhetoric, see Dominique Wisler and Ihekwoaba D. Onwudiwe, eds, *Community*



This policing strategy arose as an alternative to the predominant mid-century approach known as the “professional” or managerial model of policing. That model was characterized by the ideal of rapid response to individual reports of crime followed by a host of ex post mechanisms, including investigations by detectives intent on identifying who committed the crime and following up with witnesses and victims in a large post-crime production. Nearly the entire machinery of criminal law enforcement was backwards facing. The scholarship that marks this period focused on sentencing policy and specific deterrence: setting sentences at a level such that a rational actor would find the costs of crime too high despite the expected gains, while taking into account the ex post enforcement machinery and a rapid response police team.<sup>21</sup> These sentences were imagined to operate as a disincentive, in that a potential criminal, just before stealing an automobile, would imagine the harsh sentence he would receive and would be deterred from committing the crime unless he thought the gains from the theft were worth the risk of sanction. Under this model, the strength of the disincentive depends upon the likelihood of detection and enforcement—a criminal would steal the car no matter the harsh sentence if there were no chance of being caught—and so it calls for a focus on swift and sure police response to crime. This model, despite its successes, was criticized in significant part for ignoring social and environmental contributors to crime and for ignoring communities in high crime areas—those well positioned to identify, and in some cases to address, these situational influences.<sup>22</sup>

Situational policing, in contrast, is centrally concerned with police-community dynamics and the environmental correlates of crime.<sup>23</sup> The related scholarship focuses on situational crime regulation as much or more than ex post sanctions, and it is accordingly more broadly focused on criminal trends and their causes rather than on the occurrence of a single criminal act. There are different situational theories implemented by different scholars and policy-makers, but I group them and identify their shared features.

## A. Design Elements

The situational approach to crime control is marked by four key features: environmental design; a “problem-oriented” method that encourages expanding

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*Policing: International Patterns and Comparative Perspectives* vii–ix (CRC 2009) (noting that the language of community-oriented policing has been adopted worldwide but implemented in different ways and with varying degrees of fidelity to the core community policing principles). For an example of a prominent human rights advocate and academic encouraging further police reform along these lines, see *Mission to Nigeria, Report of the Special Rapporteur on Civil and Political Rights*, UN Comm HR, 62d Sess, Agenda item 11(b), UN Doc E/CN.4/2006/53/Add.4 (2006).

<sup>21</sup> For a thorough overview of this period, see Larry Siegel, *Criminology* 526–28 (West 4th ed 1992).

<sup>22</sup> See Kelling and Moore, *From Political to Reform to Community* at 9 (cited in note 17).

<sup>23</sup> I say “correlates” because it is not clear whether in each case these environmental factors were mere byproducts or were in fact contributors to crime.

the scope of regulatory inquiry to include social and environmental phenomena and not simply criminal acts; an expanded conception of police, emphasizing strategic partnerships with public agencies outside of the criminal justice system and partnerships with community members; and finally, an emphasis on proactive laws and policies where older approaches emphasized reaction to crimes.<sup>24</sup>

### 1. Environmental design.

The situational approach to crime regulation explicitly focuses on the relationship between crime and the immediate social and physical environments.<sup>25</sup> As criminologist Ronald Clarke notes, the new policing is marked by “the management, design, or manipulation of the immediate environment in as systematic and permanent a way as possible so as to reduce the opportunities for crime and increase its risks as perceived by a wide range of offenders.”<sup>26</sup> The turn to environmental design comes out of an earlier literature about situational factors—social and physical—that affect misbehavior and that could theoretically be “designed out.”<sup>27</sup> This turn toward environmental factors can be seen as part of a much broader situational trend in legal scholarship.<sup>28</sup>

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<sup>24</sup> I have drawn these from several sources. Roth, Roehl, and Johnson give a summary of the community policing movement (one of several situational criminology movements), outlining four key metrics for evaluating the implementation a situational approach to criminal justice: partnership building, problem solving, prevention, and supportive organizational changes. *Trends in Community Policing* at 5 (cited in note 20). Kelling, meanwhile, notes that the new policing trend is marked by five things: “problem solving, community policing, consultation, partnership, accountability.” George L. Kelling, *Police and Communities: The Quiet Revolution*, Perspectives on Policing 2 (US Dept of Justice June 1988). Different authors focus on other features of the community policing approach, and indeed, different police departments have implemented their own strategies. I focus on these four—prevention, problem-oriented policing, environmental design, and partnership—because they are central to community policing theory and practice and, crucially, they constitute a clear break from past practices.

<sup>25</sup> See Skogan and Roth, *Introduction* at xxi (cited in note 19) (“Community-based prevention remains an active enterprise to this day. Now it is more commonly called ‘situational’ prevention, and it encompasses both resident and police strategies, along with an emphasis on building design, neighborhood layout, and ‘designing out’ crime in the manufacture of products such as automobiles.”).

<sup>26</sup> Ronald V. Clarke, *Situational Crime Prevention: Its Theoretical Basis and Practical Scope*, 4 *Crime & Justice* 225, 225 (1983).

<sup>27</sup> See Skogan and Roth, *Introduction* at xxi (cited in note 19).

<sup>28</sup> See generally Melvin Eisenberg, *Corporate Law and Social Norms*, 99 *Colum L R* 1253 (1999) (examining the relationship between law and norms through three core aspects of corporate law: corporate governance, fiduciary duties, and takeovers). Michael P. Vandenberg applies social norms to environmental regulations:

Studies of tax compliance also support these findings at an individual level. An early study employed questions designed to focus the taxpayer on either deterrence (the prospect of being audited or punished) or on the taxpayer’s internal norms of law compliance. The authors concluded that appeals to

The rise in popularity of environmental “nudges” designed to guide behavior has been seen in a number of fields, including public policy,<sup>29</sup> education,<sup>30</sup> foreign development,<sup>31</sup> and even warfare.<sup>32</sup> If cars could be designed to encourage seat-belt use (with blinking notifications, alarm bells, etc.) and roads can be designed to discourage speeding (with speed bumps, for example), perhaps then neighborhoods and housing projects could also be designed to discourage criminal behavior.<sup>33</sup> Clarke attributes the situational turn to a study that identified that the likelihood of juvenile offenders breaking probation depended more on the design of the probation program than on the characteristics or background of the juvenile, prompting scholars to ask: “If institutional misconduct could in theory be controlled by manipulating situational factors . . . [perhaps] the same might be true of other, everyday forms of crime.”<sup>34</sup>

The broken windows theory is one of the better-known aspects of crime control through environmental design. According to the controversial theory, criminals respond to social cues about law-abidingness in a particular

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internal norms appeared to increase compliance levels, but threats of formal sanctions had little or no impact on compliance levels.

*Beyond Elegance: A Testable Typology of Social Norms in Corporate Environmental Compliance*, 22 *Stan Envir L J* 55, 133–34 (2003).

- <sup>29</sup> See generally Richard Thaler and Cass Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale 2008).
- <sup>30</sup> See generally Edward G. Carr, et al, *Positive Behavior Support: Evolution of an Applied Science*, 4 *J Positive Beh Interv* 4 (2002) (discussing positive behavior support, an “applied science that uses educational and systems change methods to enhance quality of life and minimize problem behavior”). See also Donald M. Baer, Montrose M. Wolf, and Todd R. Risley, *Some Current Dimensions of Applied Behavior Analysis*, 1 *J Applied Beh Analysis* 91, 96 (1968) (discussing applied behavior analysis, in which behavior is observed when influencing variables are controlled and manipulated); George Sugai and Robert R. Horner, *A Promising Approach for Expanding and Sustaining School-Wide Positive Behavior Support*, 35 *School Psych Rev* 245, 255 (2006) (advocating the use of school-wide positive behavior support, an integrative behaviorally based approach to problem behavior among students).
- <sup>31</sup> See generally Abhijit V. Banerjee and Esther Duflo, *Poor Economics: A Radical Rethinking of the Way to Fight Global Poverty* (PublicAffairs 2011) (giving an overview of behavioral economics applied to development economics, and in particular, the rise of the randomized controlled trial as a means of testing development programs); Dean Karlan and Jacob Appel, *More Than Good Intentions: How a New Economics is Helping to Solve Global Poverty* (Dutton 2011).
- <sup>32</sup> See Kristian Williams, *The Other Side of the COIN: Counterinsurgency and Community Policing*, 3 *Interface* 81, 90–91 (2011) (noting the striking similarities between community policing and counterinsurgency doctrine, especially in the emphasis of social and physical environments as mechanisms of achieving community support and guiding behaviors). See also *US Army/Marine Corps Counterinsurgency Field Manual* 5–50 at 174 (Chicago 2007).
- <sup>33</sup> See generally Neal K. Katyal, *Architecture as Crime Control*, 111 *Yale L J* 1039 (2002) (adapting ideas of architectural design for use in the criminal regime).
- <sup>34</sup> Clarke, 19 *Crime & Just* at 94 (cited in note 9).

environment.<sup>35</sup> Where the windows are broken and the streets have litter, the message is clear: rule breaking happens here and no one cares.<sup>36</sup> The broken windows theory suggests a cascade effect where the presence of a broken window, or another sign of disorder, signals the state of social norms and therefore invites crime. Accordingly, broken windows policing often takes the form of “order maintenance”—regulating smaller activities that seem not to have much to do with crime per se but that may invite crime by signaling social disorder, including, for example, littering, loitering, and public drunkenness.<sup>37</sup>

Because the disorder-crime hypothesis turns on the idea that disorder indicates a social norm that no one is watching or that they do not care about rule violations, one of the core strategies of “order maintenance” policing is to express clear disapproval of crimes and any indication of their likely occurrence. This has led to police tactics that include “flash mob” style shows of force in which the police in large numbers descend upon a particular area suspected of heavy crime solely for the purpose of being seen,<sup>38</sup> citizen watch patrols,<sup>39</sup> and a significant increase in the use of surveillance.<sup>40</sup>

But environmental design can also call for a wider range of interventions beyond order maintenance policing. Environmental design calls for specific steps to shape a situation to reduce the likelihood of crime:

Such measures include familiar forms of “target hardening” and property marking; more sophisticated technology including intruder alarms and electronic merchandise tags; the surveillance of specific locations provided by employees such as shop assistants and custodians and other attempts to capitalize on natural surveillance; exact fare systems, personal identification numbers for car radios, and a variety of other measures to reduce crime inducements; and some less easily categorized measures such as the use of public ordinances to control troublesome late-night entertainment spots and the separation of rival soccer fans into different enclosures at the stadium.<sup>41</sup>

Environmental design, then, includes both infrastructural and social changes aimed at reducing inducements to and opportunities for crime.

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<sup>35</sup> See Wilson and Kelling, 249 *Atlantic Mag* at 31 (cited in note 6).

<sup>36</sup> See *id.*

<sup>37</sup> *Id.* at 29–30.

<sup>38</sup> See John Wildermuth, *Police Surge Eases Violence in the Mission* (SF Chronicle Mar 31, 2011), online at [http://www.sfgate.com/cgi-bin/blogs/cityinsider/detail?entry\\_id=86130](http://www.sfgate.com/cgi-bin/blogs/cityinsider/detail?entry_id=86130) (visited Apr 11, 2012).

<sup>39</sup> See Wesley G. Skogan and Susan M. Hartnett, *Community Policing, Chicago Style* 5–6 (Oxford 1999).

<sup>40</sup> See Ronald V. Clarke, *Introduction*, in Ronald V. Clarke, ed., *Situational Crime Prevention: Successful Case Studies* 2, 2 (Harrow & Heston 2d ed 1997) (“As illustrated by the case studies in this volume, dozens of documented examples now exist of successful situational prevention involving such measures as surveillance cameras.”).

<sup>41</sup> Clarke, 19 *Crime & Just* at 91–92 (cited in note 9).

This new focus on social and physical situations is inherently behavioral.<sup>42</sup> The situational criminal trend is “consistent with some psychological research on personality traits and behavior that was finding a greater-than-expected role for situational influences.”<sup>43</sup> Much of the situational crime prevention literature draws heavily from social norms scholarship, in particular from the insight that people respond powerfully to the norms of their social environment.<sup>44</sup> As one criminologist puts it:

Everything we know tells us, in fact, that it is formal sanctions that matter least to offenders. Their own ideas about right and wrong matter most; the ideas of those they care about and respect matter more. . . . Nearly all of us grew up more afraid of our mothers than of the police. If the police cannot get the attention of the streets, it would make sense to organize the mothers to do it. As we have seen, this is in no way implausible.<sup>45</sup>

This move away from the traditional means of controlling crime toward more social and situational factors requires close knowledge of and attention to those environmental factors—that is, it requires an understanding of the situational correlates of crime. Understanding and addressing these factors necessarily includes a wider array of actors than the police and the courts.<sup>46</sup> This is a shift in focus “away from the courts, per se, to look at informal social control, behind-the-scenes processes, and quasi-legal structures in places where one wouldn’t have looked before.”<sup>47</sup>

## 2. Expansive regulatory inquiry.

In order to identify where to place prevention efforts, the situational approach emphasizes organizing the criminal regime around core problems rather than around the crimes that may stem from those problems. As a general matter, police under this model aspire to be responsive to community concerns, based on the idea that community perceptions about safety are important indicators of the likelihood that crime will occur. On this view, problems not only emerge from criminal activities that may go undetected by the police but are also seen as potential underlying causes of crimes, and therefore worthy of police attention. This suggests that police should respond to and take seriously

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<sup>42</sup> See *id.* at 95.

<sup>43</sup> *Id.*

<sup>44</sup> See Tracey L. Meares, *Norms, Legitimacy and Law Enforcement*, 79 *Or L Rev* 391, 392 (2000) (“Social psychologists have determined quite persuasively that the inclination that people have to voluntarily comply with the law is governed much more by norm-based reasons than by instrumental ones.”).

<sup>45</sup> David M. Kennedy, *Deterrence and Crime Prevention: Reconsidering the Prospect of Sanction* 182 (Routledge 2009).

<sup>46</sup> See Harcourt, *The Illusion of Order* at 221–22 (cited in note 11).

<sup>47</sup> Calvin Morrill, et al, *Seeing Crime and Punishment Through a Sociological Lens*, 2005 *U Chi Legal F* 291, 315 (2005).

calls for service even when those calls for service are not clearly and directly related to crimes.

This wider, more holistic approach to policing promises ancillary benefits beyond crime prevention. First, this shift in police priorities can lead to a shift in the degree of trust between the community and the police, partly as a result of the typically large number of non-crime related calls to the police. In a recent study in the UK, for example, researchers estimated that only 20 to 30 percent of calls for service were linked to crimes.<sup>48</sup> Studies have shown that police responsiveness to core community problems is a strong indicator of public satisfaction and willingness to cooperate with the police.<sup>49</sup> Second, the new approach may produce large amounts of data, which can be used to direct public resources more efficiently. Finally, problem-oriented policing is, in its ideal form, diagnostic and reflective.<sup>50</sup> The movement has, in the US and Europe, led to a rise in studies funded by police and justice departments attempting to measure the efficacy of various police practices.<sup>51</sup>

A call for expanding police inquiry may be problematic where there are preexisting concerns about police power.<sup>52</sup> If a community repeatedly complains about, for example, a liquor store that is known to serve as a hangout for criminals, the new strategy might recommend addressing the conditions surrounding the store (including zoning rules, liquor licensing requirements, anti-loitering ordinances, etc.)—things that would have fallen below the police radar

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<sup>48</sup> See Adrian Leigh, Tim Read, and Nick Tilley, *Problem-Oriented Policing: Brit Pop*, 75 *Crime Detect & Prev Ser* 28, 44 (1996).

<sup>49</sup> Yili Xu, Mora L. Fiedler, and Karl H. Flaming, *Discovering the Impact of Community Policing: The Broken Windows Thesis, Collective Efficacy, and Citizens' Judgment*, 42 *J Res Crime & Delinq* 147, 147 (2005) (finding that “disorder has strong direct, indirect, and total effects on crime even with collective efficacy being controlled for” and that disorder has a greater impact on levels of fear than crime).

<sup>50</sup> For example, Community Oriented Policing Services (COPS) observes:

Strategies and programs can be assessed for process, outcomes, or both. If the responses implemented are not effective, the information gathered during analysis should be reviewed. New information may have to be collected before new solutions can be developed and tested. The entire process should be viewed as circular rather than linear.

*Community Policing Defined* 13 (US Dept of Justice 2009).

<sup>51</sup> See, for example, Michael S. Scott, *Burglary of Single-Family Houses in Savannah, Georgia: A Final Report to the to the US Department of Justice, Office of Community Oriented Policing Services on the Field Applications of the Problem Oriented Guides for Police Project 1* (2004) (describing a research project of the Savannah Police Department and noting that while the suggested reforms were not implemented, gains were made in understanding the limits of the current strategies); Simon Mackenzie and Alistair Henry, *Community Policing: A Review of the Evidence*, Scottish Govt Soc Rsrch (Crown 2009) (reviewing data about the worldwide implementation of community policing strategies for the benefit and at the request of Scotland’s Department of Justice).

<sup>52</sup> This expansion of police authority raises other concerns as well, including time and resource constraints, but these can be mitigated through partnerships, which are explored in Section II.A.3.

before because “bothersome” is not the same as criminal, even if it nonetheless contributes to community perceptions of fear and victimization. Of course, there are obvious concerns about the wisdom of having the police serve as the appropriate arbiters of community dispute. Indeed, Chicago’s anti-loitering ordinance—a situational crime control strategy—was controversial in part due to this broadening of police discretion, and the Supreme Court ultimately struck it down.<sup>53</sup> Whether concerns about police power should outweigh a particular community’s plea for help, however, may vary on a case by case basis, depending on the community’s concerns, their uniformity, and the particular police-community dynamic.

### 3. Expanded conception of police.

The situational crime control literature emphasizes the value of strategic partnerships generally, including those between different public agencies, such as the police and the local housing authority, and vertical partnerships between public agencies and the community. For example, this literature emphasizes the promise of partnerships between the police and other institutional actors that directly interact with the community, such as departments of health, housing, sanitation, food, and welfare, because they give the police more and often better information about community needs.<sup>54</sup> These agencies are sometimes directly tasked with the core strategies of environmental design, such as ensuring well-lit streets.<sup>55</sup> Most crucially, these agencies often have more direct relationships with community members, and in some cases higher levels of trust, than the police.<sup>56</sup>

The aim of these partnerships is to extend the reach of the state’s police force beyond the bounds of the traditional criminal justice regime. In Chicago, this meant that the Chicago Police Department (CPD) worked with city agencies to regulate public liquor consumption, to prevent the use of abandoned houses

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<sup>53</sup> *Chicago v Morales*, 527 US 41, 63 (1999) (striking down Chicago’s anti-loitering statute, aimed at reducing gang activity, for being too vague). For an account of the controversy, see Tracey L. Meares and Dan M. Kahan, *When Rights are Wrong*, 24 *Boston Rev* 4, 8 (1999).

<sup>54</sup> See COPS, *Community Policing Defined* at 10–11 (cited in note 50) (noting that community partnerships are crucial for access to reliable information and that “[c]ommunity policing is information-intensive” and “[i]nformation is only as good as its source”).

<sup>55</sup> See Wesley G. Skogan, *Police and Community in Chicago: A Tale of Three Cities* 8 (Oxford 2006) (“Police partners frequently include the bureaucracies responsible for health, housing, and even street lighting.”).

<sup>56</sup> As Skogan observes:

Beat-community meetings and the new plan to keep officers on the beat as long as possible promised to be a vehicle for building familiarity and (perhaps) trust between community activists and police who worked the streets in their neighborhoods. For the first time, police and “the good people” of the community would have a chance to interact in a context that could show the former in a new light—hopefully as less rude and arrogant than many believed.

Id at 276.

for gang and drug activity, and to ensure school safety.<sup>57</sup> The police also created a Strategic Inspections Task Force to conduct inspections for building, fire, and housing codes in a targeted manner, rather than leaving each inspection to be conducted by a different city agency.<sup>58</sup> The idea behind these strategic partnerships is that agencies outside the criminal justice system have different relationships with the community, and they can therefore generate different information and perform different functions from the police.

Partnership building is not just a matter of logistics; it is also about trust.<sup>59</sup> These police-community partnerships are often mediated by a third party who has high levels of community trust, if not direct community involvement, membership, and control. In many cases, this means a religious institution. In Chicago, a prayer vigil organized by a CPD commander with the help of local church groups was credited with increasing trust between police and churchgoers.<sup>60</sup> Another prominent police-community partnership example is the relationship between the Boston police and the local community leader Reverend Eugene Rivers, who, “through his Ten Point Coalition, has been credited as being one of the most important reasons behind Boston’s stunning success in curbing the number of youths murdered by guns.”<sup>61</sup> In communities where churches play an important role in community cohesion, they offer a good starting point for police, namely, community relations.<sup>62</sup>

Trust is especially important in police-community relations because outsiders often police the communities being regulated.<sup>63</sup> Working together through community-police partnerships is part of a larger move to broaden what counts as police activity, but also who counts as part of the community. The US

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<sup>57</sup> See *id.* at 180.

<sup>58</sup> See *id.* at 180–82 (noting that crime rates were lowered where Strategic Inspections Task Force inspections occurred and that this depression was lasting).

<sup>59</sup> See Meares, 79 Or L Rev at 404 (cited in note 44) (“[I]n order to persuade, authorities will have to pay attention to the creation of the necessary social capital that engenders trust relationships between governors and the governed. Such trust cannot be created simply by emphasizing rewards and punishments.”). There is a growing literature about the importance of trust for both social and political contexts. See generally, for example, Russell Hardin, *Trust and Trustworthiness* (Sage 2004).

<sup>60</sup> See Meares, 79 Or L Rev at 413–14 (cited in note 44).

<sup>61</sup> *Id.* at 413.

<sup>62</sup> See Sudhir Alladi Venkatesh, *Gang Leader for a Day: A Rogue Sociologist Takes to the Streets* 104–09 (Penguin 2008) (showing how a pastor was in a unique position to negotiate a truce between rival gangs, with the participation of local police officers and community activists).

<sup>63</sup> Many New York City police officers, for example, do not live within the city. A recent bill was proposed by city assemblymen to require that police live and work within the city. See *Lawmakers Want Cops To Live In 5 Boroughs After Facebook West Indian Day Controversy* (AP Dec 11, 2011), online at <http://newyork.cbslocal.com/2011/12/11/lawmakers-want-cops-to-live-in-5-boroughs-after-facebook-west-indian-day-controversy/> (visited Apr 11, 2012).



Department of Justice Office for Community Oriented Policing Services (COPS) defines community partnerships as “[c]ollaborative partnerships between the law enforcement agency and the individuals and organizations they serve to develop solutions to problems and increase trust in police.”<sup>64</sup> COPS includes in its list of partners government agencies, community members, businesses, and non-profit organizations.<sup>65</sup> Community partnerships are thought to be the source of the information, goodwill, and legitimacy that enhance and enable the other crime control mechanisms of the situational approach. Community partnerships can also demonstrate the weakness in police-community relations. One study has shown how police-community partnerships can crowd out informal community self-policing mechanisms where police members are seen as outsiders.<sup>66</sup> This suggests that it is not always desirable for the police to take the lead in solving community problems. Whether the police should take the lead, or be involved at all, in resolving a community concern will vary by circumstance and location, but the point is that the situational model treats trust and legitimacy as crucial to the success of the criminal regime—much more so than did the older, reactive law-and-order model of crime control.

#### 4. Proactive rather than reactive regulation.

Crime prevention is a core aim of most criminal regimes, but whether a regime’s prevention policies are reactive or proactive varies considerably across criminal regime models. The situational model urges proactive regulation.<sup>67</sup> Under this approach, court-backed criminal sanctions are just one piece of the wider regime—a regime that sees police forces as capable of having a proactive and preventive impact on crime in addition to their ability to bring the perpetrators of crime to justice. The centrality of prevention is explicit in the situational criminal model: “[T]he community anticrime movement . . . played an important role in establishing prevention as an important, and measurable, goal. In a period in which police were still mostly reactive, coming to the scene only after something bad had happened, communities were instinctively proactive.”<sup>68</sup>

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<sup>64</sup> COPS, *Community Policing Defined* at 5 (cited in note 50).

<sup>65</sup> See *id.*

<sup>66</sup> See Brian C. Renauer, *Is Neighborhood Policing Related to Informal Social Control?*, 30 *Policing* 61, 61 (2007) (surveying community policing strategies in Portland, Oregon and finding police attendance at beat meetings negatively correlated with levels of informal social control of neighborhood crime).

<sup>67</sup> See Roth, Roehl, and Johnson, *Trends in Community Policing* at 15–18 (cited in note 20) (giving a brief history of crime prevention strategies).

<sup>68</sup> Skogan and Roth, *Introduction* at xxi (cited in note 19).

A criminal justice system primarily focused on local legitimacy inevitably treats crime prevention as a central goal.<sup>69</sup>

In a sense, the emphasis on crime prevention animates—and justifies—the other strategies adopted under the situational approach. It relies on community relationships to identify community concerns; it prioritizes solving core community problems, even where those problems are not, on their own, evidence of crime; and it involves taking positive steps to mitigate the environmental factors that contribute to criminal behavior. As the CPD’s 1993 description of its then-new community outreach program noted, “It is the focus on prevention through a stronger government-community partnership that holds real hope for addressing some of [Chicago]’s most difficult neighborhood problems—and for doing so in a way that is far less expensive than constantly reacting to those problems after the fact.”<sup>70</sup> Under the old approach, the metric by which police departments were measured was their response rate and response time to reported crimes. The new approach requires new metrics for anticipating crime and addressing it *ex ante*.

## B. Empirical Data

There is a growing body of empirical literature evaluating the efficacy of police tactics common to the situational approach, and situational strategies have had a significant impact on police practices in the last twenty years.<sup>71</sup> However, the empirical data regarding the efficacy of some of these practices are inconclusive.<sup>72</sup> This is partly because situational policing and associated strategies mean different things to different people, and indeed, they are implemented in different ways by different criminal justice systems. This variance makes it extremely difficult to study the impact of the practice as a whole. The National Research Council, reviewing data evaluating the efficacy of community policing practices, “concluded that community policing [is] simply too amorphous a

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<sup>69</sup> See Meares, 79 Or L Rev at 404 (cited in note 44) (“A legitimacy-based program of law enforcement will focus more on persuasion than it will focus on punishment.”). But see Paul H. Robinson and John M. Darley, *The Utility of Desert*, 91 Nw U L Rev 453, 497–98 (1997) (describing the legitimacy of the criminal justice system turning on the community’s desire for criminals to be punished).

<sup>70</sup> Skogan, *Police and Community in Chicago* at 179–80 (cited in note 55).

<sup>71</sup> See Mackenzie and Henry, *Community Policing* at 24–27 (cited in note 51) (comparing studies of community policing reforms in different police forces worldwide and finding significant variation in implementation and effectiveness with significant changes from prior practices).

<sup>72</sup> See generally Ralph B. Taylor, *Breaking Away from Broken Windows: Baltimore Neighborhoods and the Nationwide Fight Against Crime, Grime, Fear, and Decline* (Westview 2001) (surveying the empirical data behind the broken windows theory and the community policing literature more generally, including data from Baltimore that purports to support the theory).

concept to submit to empirical evaluation.”<sup>73</sup> Despite this limitation, two core findings stand out: environments affect the likelihood of crime, and the situational approach, by seeking to regulate those environments, calls attention to important and under-appreciated avenues for regulating crime.

Experimental evidence strongly suggests that environmental factors—such as litter, graffiti, and other indicators of disorder—contribute to the likelihood of rule-breaking behavior.<sup>74</sup> It may therefore be reasonable to assume that regulatory strategies aimed at these environmental factors would have an effect on crime.<sup>75</sup> Indeed, there is evidence that in specific instances where situational policing strategies were implemented, significant reductions in crime occurred. In one study, experimenters conducted a randomized control trial on twenty-four high crime areas in Newark, New Jersey.<sup>76</sup> The crime spots were matched into twelve similar pairs (high violent crime/high violent crime; high burglary rate/high burglary rate), and then one of each pair was randomly assigned to receive problem-oriented policing, which included all of the situational tactics discussed above.<sup>77</sup> By the end of the experimental period, violent crimes were significantly down in the experimental groups as compared to the control groups.<sup>78</sup> Yet analyzing the efficacy of these programs at the city or national level has been challenging. Crime rates in major cities implementing situational

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<sup>73</sup> See Wesley G. Skogan, *The Promise of Community Policing*, in David Weisburd and Anthony A. Braga, *Police Innovation: Contrasting Perspectives* 27, 45 (Cambridge 2006). The amorphous quality of situational policing depends in part upon whether the definition includes each of the different situational components described.

<sup>74</sup> See Kees Keizer, Siegwart Lindenberg, and Linda Steg, *The Spreading of Disorder*, 322 *Science* 1681, 1681 (2008) (reporting the results of six field experiments demonstrating that when people witness another person breaking a rule, they are more inclined to also break that rule, and that this cascade causes disorder to spread); Robert B. Cialdini, Raymond R. Reno, and Carl A. Kallgren, *A Focus Theory of Normative Conduct: Recycling the Concept of Norms to Reduce Littering in Public Places*, 58 *J Personality & Soc Psych* 1015, 1019 (1990) (reporting the results of an experiment showing that descriptive norms—how others behave—can affect rule breaking behavior independent of injunctive norms—how others approve or disapprove of the behavior).

<sup>75</sup> Kahan states:

[L]aws that shape individuals’ perceptions of each others’ beliefs and intentions, for example, may often turn out to be the most cost-effective means of deterring crime. Cracking down on aggressive panhandling, prostitution, and open gang activity and other visible signs of disorder may be justifiable on this ground, since disorderly behavior and the law’s response to it are cues about the community’s attitude toward more serious forms of criminal wrongdoing.

83 Va L Rev at 351 (cited in note 4).

<sup>76</sup> See Anthony A. Braga, et al, *Problem-Oriented Policing in Violent Crime Places: A Randomized Controlled Experiment*, 37 *Criminol* 541, 550, 561 (1999).

<sup>77</sup> Id at 550.

<sup>78</sup> Id at 561.

strategies fell drastically after the introduction of those policies.<sup>79</sup> However, crime rates also fell in other cities that had not fully implemented the situational approach, suggesting that there may have been other explanations for the drop in crime rates.<sup>80</sup> Meanwhile, studies of order maintenance policing alone, measured at the city level, have not demonstrated a significant effect on violent crime rates.<sup>81</sup>

Just as troubling is the lack of a clear causal mechanism through which these situational strategies are thought to work. It could be, as one recent treatment suggests, a number of things: that by going after small crimes, bigger crimes are dissuaded; or that by improving the physical environment, potential criminals assume there is more law enforcement in the area.<sup>82</sup> It remains unclear which, if any, of these mechanisms explains the power of the environmental approach to regulating crime. One recent randomized trial, finding a significant reduction in crime where situational policing was implemented, attributed the biggest impact on crime reduction to environmental changes such as street cleaning, rather than to misdemeanor arrests.<sup>83</sup> Moreover, the most compelling critiques of situational policing tactics have focused in particular on “zero-tolerance” policies, a particularly denuded approach to situational crime control.<sup>84</sup>

Even if one particular police strategy were found to have shortcomings—as the empirical literature suggests order maintenance policing does—dismissing the entire trend would miss one of the central contributions of the situational approach, which is to expand the regulatory lens beyond the individual criminal and toward criminal environments. One can accept this broader lens without accepting any particular crime control tactic contained therein. Indeed, perhaps one of the more limiting aspects of the situational theory in criminology generally has been to essentialize complicated ecosystems—neighborhoods, communities, cities—into a set of social mechanisms that can be regulated in isolation. Regardless of the measured efficacy of, for example, the controversial

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<sup>79</sup> See Steven D. Levitt and Stephen J. Dubner, *Freakonomics: A Rogue Economist Explores the Hidden Side of Everything* 128–30 (William Morrow 2005) (describing the broken windows theory and the economic evidence against it).

<sup>80</sup> Id. See also Bernard E. Harcourt and Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U Chi L Rev 271, 287 (2006) (summarizing data showing that order maintenance policing did not reduce crime).

<sup>81</sup> See Harcourt, *The Illusion of Order* at 67 (cited in note 11).

<sup>82</sup> See Adam M. Samaha, *Regulation for the Sake of Appearance* \*\*42–53 (Chicago Public Law and Legal Theory Working Paper No 364, 2011), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1943174###](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1943174###) (visited Apr 14, 2012).

<sup>83</sup> See Braga and Bond, 46 *Criminol* at 599 (cited in note 11).

<sup>84</sup> See generally Harcourt, *The Illusion of Order* (cited in note 11) (raising concerns about zero-tolerance policing and the data used to support its implementation).

order maintenance tactics of the New York City Police Department in the 1990s, the environmental turn may usefully guide the conceptual and practical development of criminal regimes more generally, in particular by offering insight into the relationship between punishment and prevention.<sup>85</sup>

The study of situational policies also produces valuable information about the costs of those policies. For example, the more damning critiques of broken windows policing suggest, among other things, that it amplifies the power of the state in dangerous ways, producing a discriminatory impact on disadvantaged communities; it risks crowding out more informal mechanisms of social control; and finally, it is doomed to failure without significant changes in the courts in the form of revised sentencing regimes and court procedures.<sup>86</sup> These concerns about situational crime control are real, and they should be carefully considered by international regime designers. Not only do these insights suggest mistakes to avoid at the level of policy, but by identifying where and how *ex ante* crime control strategies are incompatible with or undermine *ex post* crime control mechanisms such as trials, they promise to illuminate and enrich our current understanding of the relationship between prevention and punishment in a given criminal regime.<sup>87</sup>

### III. THE EXCEPTIONAL INTERNATIONAL CRIMINAL REGIME

Conventional wisdom holds that international criminal law is different in kind from domestic criminal law. Not only is international criminal law distinguishable by its size and gravity, but the individuals who commit such crimes are often motivated by different considerations than those that motivate domestic criminals. For example, genocidaires are motivated by ideational factors while many domestic criminals, such as automobile thieves or burglars, simply are not.<sup>88</sup> This Section considers these important distinctions and then

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<sup>85</sup> For a recent summary of the New York City order maintenance policies and the associated empirical literature, see Samaha, *Regulation for the Sake of Appearance* at \*\*42–53 (cited in note 82) (developing three theories for understanding the relationship between the reality and the appearance of regulation and applying those theories to the trend of broken windows policing). See also Section V.

<sup>86</sup> See, for example, K. Babe Howell, *Broken Lives from Broken Windows: The Hidden Costs of Aggressive Order-Maintenance Policing*, 33 NYU Rev L & Soc Change 271, 291–92 (2009) (arguing that strict, zero-tolerance order maintenance policing has harmful effects on minority groups).

<sup>87</sup> See David Thacher, *Order Maintenance Reconsidered: Moving Beyond Strong Causal Reasoning*, 94 J Crim L & Criminol 381, 381 (2004) (arguing for a more expansive approach to order maintenance policing).

<sup>88</sup> For a review of empirical work on genocide, identifying in particular the prominent role of ideational factors, see generally Scott Straus, *Second-Generation Comparative Research on Genocide*, 59 World Pol 476 (April 2007) (reviewing recent studies of genocide, several of which suggest that ideational factors are a crucial component in genocide).

evaluates whether they are distinctions that make a difference for the purpose of applying the situational approach to international criminal law.

### A. Exceptional Crimes

The core crimes of international criminal law—genocide, war crimes, crimes against humanity—are, with a few exceptions, large-scale crimes.<sup>89</sup> The sheer size of the crimes and their impacts may distinguish them from domestic crimes that, whether they are crimes of opportunity, such as robberies and burglaries, or more serious crimes like murder and rape, individually affect a much smaller number of people. This has led scholars to reflect that the gravity of international crimes and their collective dynamics make them distinct from their constituent domestic crimes, such as rape, assault, and murder. International criminal tribunals have reiterated this position in defending their own jurisdiction. For example, when the government of Norway offered to try an accused genocidaire in its protective custody, the International Criminal Tribunal for Rwanda (ICTR) rejected the transfer request on the ground that Norway had not incorporated genocide into its national criminal code; a conviction for murder, the ICTR ruled, would not suffice.<sup>90</sup>

There is also a contextual element to international crimes that is rarely present in domestic crimes.<sup>91</sup> Many international crimes occur in a context of armed conflict or some other similarly transformative event, and the definitions of the crimes reflect this context:

[T]he killing of a civilian will be considered a war crime if “[t]he conduct took place in the context of and was associated with” an armed conflict; a crime against humanity if “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack;” or an act of genocide if “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”<sup>92</sup>

Most domestic crimes are not defined so as to include such contextual requirements. These contextual elements speak to the widespread and collective nature of some international crimes. The collective nature inherent in mass atrocities may call into question the applicability of justice mechanisms that seek to individuate justice. Indeed, it has been suggested that the modern criminal

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<sup>89</sup> Some war crimes, for example, are not large scale. Nor are all crimes against humanity large scale. Given the gravity requirement and the track record of the ICC, however, the crimes most likely to be pursued by an international tribunal are large in scale.

<sup>90</sup> *Prosecutor v Bagaragaza*, Decision on the Prosecution’s Motion for Referral to the Kingdom of Norway, 2005-86-R11bis, ¶ 16 (ICTR 2006). See also William Schabas, *An Introduction to the International Criminal Court* 197–98 (Cambridge 4th ed 2011).

<sup>91</sup> See Adil Ahmad Haque, *International Crime: In Context and In Contrast*, in R.A. Duff, et al, eds, *The Structures of the Criminal Law* 106, 106–26 (Oxford 2011).

<sup>92</sup> *Id* at 106–07.

trial, which is oriented around the culpability of the individual and not the group, may be unsuited to address the collective dynamics of mass atrocity.<sup>93</sup>

Additionally, international crimes often have an ideological component that most domestic crimes do not. Studies of genocide suggest that ideational factors play a crucial component in its commission,<sup>94</sup> and the crime itself is defined to include the “intent to destroy” a persecuted group.<sup>95</sup> Persecution as a crime against humanity also has such a requirement built into its definition.<sup>96</sup> With the exception of a handful of crimes—for example, hate crimes—most domestic crimes do not contain a similar ideological element. There are international crimes, such as many war crimes, that do not require ideological motivations. But war crimes may also be motivated by very different considerations than those that drive most domestic crimes, including strategic concerns. Of course, not all international crimes are distinct from domestic crimes; in the case of terrorism, for example, the prohibited act can in fact be both an international and domestic crime.<sup>97</sup> But as a general matter, the foregoing distinctions separate most international crimes from their domestic counterparts.

## B. Evaluating the Distinctions

Do these distinctions make a difference for the purposes of determining the applicability of the situational approach? No doubt the scale of the crimes and the motivations of the actors matter for determining the morality of the acts or the kinds of sanctions called for in a retributive scheme. But it is less clear that these differences preclude the application of the situational approach to crime prevention. Consider two forms of this claim: a strong and a moderate version of the claim that the domestic situational approach merits application at the international level.<sup>98</sup>

The strong form of the claim is that domestic and international crimes are not so different after all, and therefore, criminal justice insights drawn from one scenario should be applied to the other.<sup>99</sup> This would require disclaiming the

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<sup>93</sup> See Drumbl, *Atrocity* at 35 (cited in note 2) (referencing international criminal law’s “preference for the guilt of a few individuals” over collective guilt).

<sup>94</sup> See Straus, 59 *World Pol* at 483 (cited in note 88).

<sup>95</sup> Rome Statute, Art 6 (cited in note 1).

<sup>96</sup> See *id.* at Art 7.2(g) (“‘Persecution’ means the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.”).

<sup>97</sup> See generally Cassese, 4 *J Intl Crim Just* 933 (cited in note 14) (describing the evolution of the international crime of terrorism, which had conventionally been thought of as a domestic crime).

<sup>98</sup> Whether one takes the strong or moderate form of the claim will determine the granularity of its reliance upon domestic implementation of situational theories.

<sup>99</sup> For an argument that transitional justice—which often features international crimes—is not so different from municipal justice, see generally Eric Posner and Adrian Vermeule, *Transitional Justice as Ordinary Justice*, 117 *Harv L Rev* 761 (2004).

significant distinctions between domestic and international crimes. There is some support for the strong claim, with regard to at least some comparisons. Consider, for example, similarities between the Robert Taylor public housing projects in Chicago and downtown Freetown during the height of Sierra Leone's civil war, two situations that are, *prima facie*, radically different. In both places, rebel groups—in the case of Freetown, the Revolutionary United Forces (RUF), and in Chicago, the Black Kings gang—besieged their communities and committed a wide range of crimes. Both groups used violence to control markets and territory in order to traffic in high-value illicit goods.<sup>100</sup> Both “armies” were built with ranks of disaffected youth, usually men, who sought status and respect; both even spoke of their members as “soldiers.”<sup>101</sup> Both offered public services to the community, in some cases filling a governance gap: the RUF in Sierra Leone created clinics in order to win the support of the local population, and the Black Kings gang in Chicago supported community picnics and a community health initiative.<sup>102</sup> Both expressed ambitions to become legitimate political and economic institutions.<sup>103</sup>

Moreover, in both places there was little or no law enforcement. In Chicago, the CPD had no incentives to enter the Taylor homes. The police came from, and were largely accountable to, a different community, and they had little legitimacy or authority within the projects.<sup>104</sup> International peacekeepers were similarly reluctant to enter Freetown.<sup>105</sup> In both places, the only crime prevention was thought to come from the vague threat of distant arrests and

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<sup>100</sup> For a description of the domestic criminal law literature describing fights over access to markets, see Venkatesh, *Gang Leader for a Day* at 34 (cited in note 62). For a similar discussion in the context of genocide, see generally Manus I. Midlarsky, *The Killing Trap: Genocide in the Twentieth Century* (Cambridge 2005) (describing a prospect theory of genocide that suggests the killing is the result of realpolitik decisions, usually in response to losses—of land, of wealth, etc.).

<sup>101</sup> See Venkatesh, *Gang Leader for a Day* at 77 (cited in note 62) (“You are not just foot soldiers in the Black Kings.”).

<sup>102</sup> See *id.* at 48–49. For evidence of the RUF community programs and health clinics, see *Prosecutor v Sesay et al*, Transcript of Decision on Kallon Motion to Exclude Evidence Outside the Scope of Indictment, 2004-15-T, ¶¶ 91–96 (Special Court for Sierra Leone Trial Chamber I (SCSL), June 26, 2007).

<sup>103</sup> See *id.* For a fuller account of rebel forces establishing governance in civil conflicts, see generally Zachariah Mampilly, *Rebel Rulers: Insurgent Governance and Civilian Life During War* (Cornell 2011). In Chicago, the Black Kings made a concerted effort to become integrated into Chicago politics, in formal and informal ways. Venkatesh, *Gang Leader for a Day* at 73–74 (cited in note 62).

<sup>104</sup> See Venkatesh, *Gang Leader for a Day* at 88 (cited in note 62) (describing how the Black Kings drug gang provided a certain element of security for the community in Chicago's Robert Taylor Homes, and recounting a particular exchange with a local resident: “When you got a problem, I bet you call the police, right?” Michael said. “Well, we call the [Black Kings Gang]. I call T-Bone because I don't have anyone else to call”).

<sup>105</sup> Lansana Gberie, *A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone* 167–68 (Indiana 2005).



prosecutions.<sup>106</sup> Even the criticisms leveled at both regimes are strikingly similar, suggesting that they are backwards looking, out of touch with the needs of disadvantaged communities, racist, politically motivated, and ineffectual.<sup>107</sup> Indeed, the situational movement arose partly as a response to those criticisms in the domestic realm.<sup>108</sup>

This treatment suggests more similarities between domestic and international criminal situations than the exceptional account allows. But this strong form of the claim becomes weaker upon closer scrutiny. There are a host of important factors that distinguish the Robert Taylor Homes from Freetown, such as the ability of the CPD to enforce the law at a moment's notice, without the community's invitation or approval.<sup>109</sup> Moreover, for all its harm, the Black Kings gang did not target civilians in the way that the RUF rebels did, sometimes destroying entire villages.<sup>110</sup> These distinctions undermine the strong form of the claim. Moreover, even if this particular comparison were convincing, it would leave out a huge category of international criminals—those waging violence on behalf of the state against its citizens. State actors constitute a sizeable portion of international criminal defendants and fugitives: the Nazi leadership put on trial at Nuremberg; the Khmer Rouge leadership on trial at the Extraordinary Chambers in the Courts of Cambodia; Muammar Gaddafi and his son, Saif al-Islam, on trial at the International Criminal Court (ICC), to name just a few. These actors are different from domestic criminals insofar as they have direct control over their territories; few domestic criminals control their environments in a way that an autocrat controls the state. This difference not only undermines the strong form of the claim, but it is significant for determining the applicability of the situational approach to the international

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<sup>106</sup> The international criminal regime would later prosecute some of the RUF commanders, much the way the criminal justice system in Chicago would prosecute gang leaders for their most severe crimes. See *Prosecutor v Sesay et al*, Appeal Judgment, 04-15-A (SCSL 2009); *Prosecutor v Moinina Fofana, Allieu Kondewa*, Appeal Judgment, 04-14-A (SCSL 2008).

<sup>107</sup> See, for example, Brendan O'Neill, *That's a First. The ICC is After Muammar Gaddafi—A Man Who Isn't Black* (The Telegraph Mar 4, 2011), online at <http://blogs.telegraph.co.uk/news/brendanoneill2/100078506/thats-a-first-the-icc-is-after-muammar-gaddafi-a-man-who-isnt-black/> (visited Apr 11, 2012) (“[I]t is very hard to avoid the conclusion that the ICC is racist.”); Bill Quigley, *Fourteen Examples of Racism in Criminal Justice System* (Huff Post July 26, 2010), online at [http://www.huffingtonpost.com/bill-quigley/fourteen-examples-of-raci\\_b\\_658947.html](http://www.huffingtonpost.com/bill-quigley/fourteen-examples-of-raci_b_658947.html) (visited Apr 11, 2012).

<sup>108</sup> See Jeffrey Fagan and Victoria Malkin, *Theorizing Community Justice Through Community Courts*, 30 *Fordham Urb L J* 897, 899 (2003) (“One of the recurring crises in . . . many socially and economically disadvantaged neighborhoods is the low rating by citizens of the legitimacy of law and legal institutions.”).

<sup>109</sup> The political hurdles to sending in peacekeepers are significantly higher for a number of reasons, not least of which is that the Security Council is not a single actor.

<sup>110</sup> For a thorough account of the RUF's brutality, see generally Corinne Dufka, *Getting Away with Murder, Rape and Mutilation: New Testimony from Sierra Leone*, 11 *Hum Rts Watch* 3(A) (June 1999).

realm. It may mean that the situational approach offers little to a regime interested in shaping the ground-level conditions in a state run by a ruler determined to violate international criminal norms.

There is a more moderate form of the claim as well. This form suggests that despite all of the important distinctions between the two types of crimes, they both share one essential feature: they are sensitive to and influenced by environmental factors. This claim is on stronger footing, as the evidence suggests that environmental factors, both local and international, play a role in the commission of a wide variety of international crimes.

For example, it is well demonstrated that failed states—that is, states characterized by exceptionally high levels of disorder—are at a significantly higher risk of genocide and politicide.<sup>111</sup> International criminals opportunistically respond to this disorder. Accounts of the 1994 Rwandan genocide, for example, suggest that social collapse not only contributed to the spread of the genocide, but that the genocidaires intentionally emphasized that disorder was spreading.<sup>112</sup> The deliberate distribution and use of radios by genocidaires in Rwanda is thought to have played a significant role in the commission of that country's genocide, and significantly, the radios were broadcasting not just hate but a message suggesting that disorder was the new order of the day.<sup>113</sup>

Environmental factors have also been shown to play an important role in the likelihood of war crimes. In a novel study, conducted with the insights of weapons-bearing combatants, the International Committee of the Red Cross (ICRC) recently found that the common denominator across several combat contexts where war crimes were committed was a lack of order, particularly a lack of discipline and command structure.<sup>114</sup> Describing the context, the ICRC said, “While violations of [international humanitarian law] may sometimes stem from orders given by such an authority, they seem more frequently to be connected with a lack of any specific orders not to violate the law or an implicit

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<sup>111</sup> Harff states:

Empirically, all but one of the 37 genocides and politicides that began between 1955 and 1998 occurred during or immediately after political upheavals, as determined from the State Failure's roster of ethnic and revolutionary wars and adverse regime changes: 24 coincided with ethnic wars, 14 coincided with revolutionary wars, and 14 followed the occurrence of adverse regime changes. As these numbers imply, several geno-/ politicides began after multiple state failures of different types. In addition, four of the 37 sequences of state failure followed the establishment of an independent state, either through decolonization or breakup of an existing state.

97 *Am Pol Sci Rev* at 62 (cited in note 12).

<sup>112</sup> See Allison Des Forges, *Leave None to Tell the Story: Genocide in Rwanda* 263 (Hum Rts Watch 1999).

<sup>113</sup> See *id.* at 57–70.

<sup>114</sup> Muñoz-Rojas and Frésard, 86 *Intl Rev Red Cross* at 194–95 (cited in note 12).

authorization to behave in a reprehensible manner.”<sup>115</sup> The study goes on to identify disorder and the lack of authority as key contributors to the significant gap between soldiers’ knowledge of humanitarian law and their practices.<sup>116</sup>

Not only do local environments matter to the commission of international crimes, but international environments matter as well.<sup>117</sup> The likelihood that a failed state will experience genocide is significantly affected by the political and economic embeddedness of the state.<sup>118</sup> One study found that “countries with below-average numbers of regional memberships are three times more likely to have ethnic wars than countries with above-average numbers of memberships.”<sup>119</sup> Moreover, countries with low levels of international trade, as compared to those with above-average levels of trade, are at significantly higher risk of state failures culminating in genocide.<sup>120</sup> There is support for this idea—namely, that the presence of a watchful and responsive international community makes a difference in the likelihood of international crimes—in the behavior of international criminals. In Rwanda, for example, genocidaires engaged in pre-genocide killings specifically in order to test the responsiveness of the international community.<sup>121</sup> The sleepy response from the international community suggested to them that they could get away with anything.<sup>122</sup>

There are many factors that play a role in the commission of international crimes—ideology, ethnic tension, military orders, to name a few—that may distinguish these situations from those of domestic crimes. Studies of both domestic and international criminal contexts have concluded that the commission of crimes does not turn entirely on the character of the criminals; in both cases, environmental factors have been identified as key correlates of crime. The distinctions that do emerge from this comparison are not ones that clearly make a difference in determining the potential efficacy of the situational approach in the international context. One can acknowledge the important distinctions between the two regimes and still think that the lessons of the

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<sup>115</sup> Id at 194.

<sup>116</sup> See id at 195.

<sup>117</sup> For a theory of how states become acculturated—and even mimic—their neighbor states, thus accounting for regional “neighborhood” effects, see generally Ryan Goodman and Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 Duke L J 621 (2004).

<sup>118</sup> See Harff, 97 Am Pol Sci Rev at 65 (cited in note 12).

<sup>119</sup> Id.

<sup>120</sup> Id at 67.

<sup>121</sup> See Des Forges, *Leave None* at 70–73 (cited in note 112).

<sup>122</sup> See id at 74.

domestic criminal literature on the situations of crime have important implications for the international criminal regime.<sup>123</sup>

The moderate form of the claim leaves room to acknowledge the important distinctions between domestic and international crimes and to incorporate those distinctions into a situational approach. For example, the exceptional scale of some international crimes may mean that the environmental factors considered by regime designers must also be large-scale—that is, the relative unit of analysis might be a state economy rather than a housing project.<sup>124</sup> Similarly, while the motivation of the actors may matter for determining their culpability, it is less clear that it would undermine environmental crime control strategies. After all, one of the central insights of the situational move is to shift regulatory focus away from the individual criminal, whatever their individual dispositions, and toward the criminal situation.

At the most general level, contextual or situational factors play an important role in the commission of both international and domestic crimes. One significant innovation of the new policing approach is to address “neighborhood effects”—the supra-individual, sub-municipal level of social organization and its relationship to crime.<sup>125</sup> As a guide to prevention-based policies for the international criminal regime, this is a novel direction for reform.

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<sup>123</sup> To suggest that the international regime might gain something by looking to innovations from the domestic realm is not unprecedented. See Elizabeth Borgwardt, *A New Deal For The World: America's Vision for Human Rights* 74–77 (Belknap 2005) (noting that the presence of American lawyers and jurists at early meetings to design the Allies' post-war policy played a significant role in the design of Nuremberg and the extent to which the international regime was modeled on domestic criminal regimes).

<sup>124</sup> This is not to say that the design of small-scale spaces is unimportant to controlling international crimes under this approach. One implication of such an approach might be the introduction of security cameras in interrogation rooms on the theory that their presence will reduce the likelihood of harsh interrogations, and one can imagine many other small-scale applications of the situational approach. In fact, this was one recommendation of the Special Rapporteur on Torture after visiting Guardia Civil facilities in Spain. See *Follow-Up to the Recommendations Made by the Special Rapporteur on Torture Visits to Azerbaijan, Cameroon, Chile, China, Colombia, Georgia, Jordan, Kenya, Mexico, Mongolia, Nepal, Pakistan, Russian Federation, Spain, Turkey, Uzbekistan and Venezuela, Report of the Special Rapporteur on Torture*, UNHRC, 7th Sess, Agenda Item 3, UN Doc A/HRC/7/3/Add.2 (2008). There is some evidence that this change led to improved treatment of detainees. See Theodore J. Piccone, *Catalysts for Rights: The Unique Contribution of the UN's Independent Experts on Human Rights: Final Report of the Brookings Research Project on Strengthening UN Special Procedures* 17 (Brookings 2010) (concluding that the recommendation to put cameras in interrogation facilities “ultimately contributed to improved detainee treatment”).

<sup>125</sup> Sudhir Alladi Venkatesh, et al, *The Socio-Spatial Consequences of Inmate Release in New York City* \*9 (Center for Urban Research and Policy 2007), online at <http://www.curp.columbia.edu/publications2/SocioSpatialConsequences.pdf> (visited Apr 11, 2012) (“The so-called ‘neighborhood effects’ literature—a loose assemblage of social scientific studies on the importance of supra-individual and ecological variables—represents one of the most fertile areas of research.”).

### C. Practical Concerns

There are other relevant distinctions between the domestic criminal regime and the international regime beyond the nature of the underlying crimes. Unlike in the domestic realm, where the executive is typically somewhat unitary, the international criminal regime is subject to the political and practical dynamics of an international order controlled by states' interests. These include, but are not limited to, the lack of an international police force, sovereignty concerns, and the general lack of enforcement of criminal sanctions.

There is no quick-acting police force in the international realm that approaches what exists in the domestic realm. The Security Council, the international body that officially authorizes UN peacekeeping operations, is widely considered to be inflexible and slow to act.<sup>126</sup> Regional bodies are similarly constrained by state interests, though the collective action problem is comparatively reduced there, and domestic electorates are notoriously unresponsive to international crimes abroad, let alone warning signs about their imminence.<sup>127</sup> The closest analog to the domestic police force may be the UN Peacekeeping forces. The political barriers to sending peacekeeping forces into a place of conflict are not insurmountable; indeed, the number of peacekeeping operations is significantly on the rise.<sup>128</sup> Moreover, there are now regional peacekeeping forces, such as NATO and the African Union, who may be more responsive to the risk of international crimes in a particular region.<sup>129</sup> Scholars have also suggested that there already exists a global police force in the form of transnational networks of military, paramilitary, and police forces working for some common goal, such as drug control or counter-terrorism.<sup>130</sup> But as I discuss in Section IV, these armed forces may not be the most relevant actors in a situational approach to international criminal law, despite being the closest

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<sup>126</sup> See Muna Ndulo, *The United Nations Peacekeeping Operations and Security and Reconstruction*, 44 *Akron L Rev* 769, 780 (2011) (“[R]esponses to outbreaks of conflict have been slow, often hobbled by conflicting foreign policy interests of Security Council members.”); Allen S. Weiner, *The Use of Force and Contemporary Security Threats: Old Medicine for New Ills?*, 59 *Stan L Rev* 415, 419 (2006) (noting the consensus among scholars about “inevitable Security Council gridlock”).

<sup>127</sup> See Paul Slovic, *“If I Look at the Mass I Will Never Act”: Psychic Numbing and Genocide*, 2 *Judgment & Dec Making* 79, 80 (2007) (proposing a theory to explain the general reluctance of domestic electorates to respond to foreign atrocities).

<sup>128</sup> See Virginia P. Fortna, *Does Peacekeeping Work? Shaping Belligerents Choices After War* 4–5 (Princeton 2008).

<sup>129</sup> See Hilaire McCoubrey and Justin Morris, *Regional Peacekeeping in the Post–Cold War Era* 228 (Kluwer 2000) (describing the rising use of regional peacekeeping measures in the face of UN incapacity).

<sup>130</sup> See Peter Andreas and Ethan Nadelman, *Policing the Globe: Criminalization and Crime Control in International Relations* 163–65, 191–99 (Oxford 2006) (describing the rise of a global police force consisting of transnational networks of local and regional police forces combined with some national forces that have international reach).

analogous to domestic police. There are good reasons to be skeptical of increasing the scope of international peacekeeping forces, just as in the domestic realm there are good reasons to think the police should not be the only or the most relevant actors in the regulation of neighborhoods. The situational approach is as much about expanding the conception of who counts as part of the regulatory framework for crime prevention as it is reforming the role of conventional police forces. Many of the changes called for by this approach can be implemented by actors who, despite being quite unlike a local police force, play a crucial role in policing international crimes.

Of course, sovereignty is a significant concern for the situational approach, just as it is a concern for any international law reform. The situational approach is likely to be less effective responding to a determined ruler marshaling the power of the state to commit international crimes than a rebel group that is poised to commit international crimes. A determined ruler can simply oppose the imposition of outside monitoring bodies in order to cover up ongoing crimes, just as they can resist arrest and trial at the ICC. But to say that a particular international policy will face sovereignty concerns is not to say that it cannot have any effect. Many states in fact invite the international regime in to address international crimes. One benefit of the situational school is to identify certain high-risk situations in advance and to craft intermediary policies that lie between doing nothing and a full-scale armed intervention. Insofar as the situational approach gives the international regime additional strategies for addressing international crimes beyond capture-and-trial, it may in fact pose fewer sovereignty concerns than the current strategy.

There is the additional problem of enforcement: international criminal law is enforced much less robustly than most domestic criminal law. Many domestic crimes go unpunished, but the regime on the whole is much more robust than the international regime, which sees many judgments unenforced and the majority of crimes unpunished.<sup>131</sup> This is a concern for some but not all situational strategies. For example, it would not affect the regulation of physical spaces that make crimes more or less likely; the impact of these strategies does not turn on enforcement measures. But surveillance strategies may only have a preventive effect if the watched party expects the surveillance to be followed by enforcement measures. Ironically, then, one implication of the situational approach may be a much greater need for full (rather than selective) enforcement of international criminal law. This does not imperil the situational project, but it calls for closer coordination between *ex ante* situational strategies and *ex post* justice mechanisms. For example, situational strategies might influence the selectivity of prosecutions, without reducing or eliminating that

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<sup>131</sup> With regard to the crime of genocide alone, there have been over thirty genocides in the last sixty years and only a handful of prosecutions. For a tally of the genocides, see Jack A. Goldstone, et al, *State Failure Task Force Report: Phase III Findings* 43 (Science Applications 2002).

selectivity; the regime might choose to be even more selective about its engagements, while enforcing more fully in places where it has chosen to engage. Selective enforcement of preventive and punitive measures is a tradeoff with which the regime is already quite comfortable.<sup>132</sup>

To be sure, the types of preventive measures described here face bigger political and financial hurdles than international criminal tribunals. It is much harder to garner popular support for preventive actions when the harm is not crystallized.<sup>133</sup> Likewise, where shame and indignation are powerful emotions available to interest groups seeking to build popular support for trials, the same emotions do little for the creation of prevention strategies. Yet despite the foregoing concerns, there are several reasons to think these are not insurmountable hurdles. The first is that many of the activities described here as part of the situational approach—early warning systems, UN officers' seeking to understand the causes of core international crimes, development projects that address these root causes—already exist but are under-developed and under-appreciated as tools for crime control. Addressing these problems does not necessarily require a significant outlay of new capital or resources, but instead, it requires a conceptual shift to understand this work as operating at the core of the international criminal regime. Once that shift is made, a number of reforms may naturally follow—but again, these reforms are primarily modifications of existing practices and calls for greater horizontal and vertical integration between existing actors.

Second, the political will needed to enact more significant reforms seems to be available in a way that it was not before.<sup>134</sup> Non-governmental organizations (NGOs) have been putting mounting pressure on the UN to take clearer action to create an international structure to anticipate international crimes. The result is the nascent Responsibility to Protect project, which, while on its own is a norm with varying amounts of support, is backed by a new high-level post in the form of the Under Secretary for the Prevention of Mass Atrocity.<sup>135</sup> Additionally, the Obama administration recently issued a presidential directive launching a

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<sup>132</sup> See Geert-Jan Alexander Knoops, *An Introduction to the Law of International Criminal Tribunals* 17 (Transnational 2003).

<sup>133</sup> This is a common problem for counterterrorism operations—convincing populations to remain vigilant when the risks of a terrorist attack are not at all apparent and cannot be revealed for security reasons. See Jack Goldsmith, *The Terror Presidency: Law and Judgment Inside the Bush Administration* 188 (Norton 2007) (“[O]ur success—the absence of a second homeland attack—has had the self-defeating effect of enhancing public skepticism about the reality of the threat.”).

<sup>134</sup> For an account of the failure of political will in the face of genocide, see generally Samantha Power, *“A Problem from Hell”: America and the Age of Genocide* (Basic 2002) (describing US and international reluctance to respond to genocides throughout the twentieth century).

<sup>135</sup> See Letter from the Secretary-General to the President of the Security Council, UN Doc S/2007/721 (Dec 7, 2007) (announcing the creation of two high-level posts tasked with designing policies for preventing international crimes).

new initiative, the Atrocities Prevention Board, which draws personnel from the State Department, the White House, and the Pentagon, and which sees the prevention of mass atrocity as a “a core national security interest and a core moral responsibility of the United States.”<sup>136</sup> These institutions and initiatives were created out of an acknowledgment that the international criminal regime sorely needs a set of intermediary policies that operate after the collection of data by monitoring bodies but before a full-scale atrocity is underway. The situational turn in policing arose out of a similar concern for policy options between doing nothing and responding to the scene of a crime. While it remains to be seen what effects these new international initiatives will have on international crimes, the situational approach may offer a useful frame for examining their promise and their pitfalls.

#### IV. THE SITUATIONAL MODEL IN INTERNATIONAL CRIMINAL LAW

What would the situational turn mean for the international criminal regime? In this Section, I begin to answer that question by identifying analogs of the four major components of the situational approach outlined above. The aim here is not to develop policy prescriptions for preventing international crimes; such a task would outstrip available space and present knowledge. Indeed, concerns about causality that arise in the domestic realm are even greater in the international criminal context. Instead, the aim is to explore how the situational model might explain and inform developments in the international context, even at the level of research, if not actual policy.

##### A. Environmental Design

In the international arena, there are a number of activities that appear to address directly the design of local and international environments: food aid, economic development programs, and infrastructure programs, *inter alia*. Core development work—ensuring that a community’s most basic needs are met—may in fact play a key role in preventing international crimes.<sup>137</sup> But these activities are largely seen as lying outside of the international criminal regime, and as a result, they are largely unaddressed by international criminal scholars.

While not direct analogs of domestic environmental crime control strategies, there are several features of the international regulatory order, features

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<sup>136</sup> Directive on Creation of an Interagency Atrocities Prevention Board and Corresponding Interagency Review, Presidential Study Directive/PSD-10, Daily Compilation of Presidential Directives No DCPD200100549 (Aug 4, 2011). See also Helene Cooper, *Obama Takes Steps to Help Avert Atrocities*, NY Times A11 (Aug 3, 2011).

<sup>137</sup> Insofar as development work reduces instability, it may also reduce the risk of genocide. See Harff, 97 Am Pol Sci Rev at 70 (cited in note 12) (referencing the connection between instability and the risk of genocide).



largely ignored by scholars of the international criminal regime, that are consistent with the situational model. I will discuss two such analogs, the use of monitoring and material environmental changes, and ask how the situational approach would inform their contribution to the international criminal regime.

### 1. Visible monitoring.

Monitoring is a core tool of the international criminal regime, and new technologies promise to enhance the regime's monitoring capacity. However, the impact of these technologies is largely understood in earlier, reactive terms. For example, a new technique known as "crisis mapping" draws on the use of social technologies to make it easy for people to pass along reports of actual or impending violence and to collate this information on a map or other useful tracking tool.<sup>138</sup> One organization, FrontlineSMS, has developed a technological platform that allows cell phones to broadcast information to wide numbers of subscribers, creating, in effect, a radio infrastructure where one did not exist before.<sup>139</sup> An example of the benefit of such an innovation is that as troops approach a village, an early warning can immediately be broadcast to villagers "downstream."<sup>140</sup> This tool has also been combined with Ushahidi, a new technology that allows the direct overlay of real-time reports onto maps for the benefit of understanding patterns and identifying areas of need, as was done recently in Kenya to monitor election-related violence.<sup>141</sup> These tools have the potential to give communities autonomous monitoring capabilities even when the state is either unavailable to do so or is directly perpetrating violence against its citizens, including in rural and developing communities.<sup>142</sup> Yet the promise of these technologies is largely measured through the old, reactive model of crime

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<sup>138</sup> See Jessica Heinzelman, Rachel Brown, and Patrick Meier, *Mobile Technology, Crowdsourcing and Peace Mapping: New Theory and Applications for Conflict Management*, in Marta Poblet, ed, *Mobile Technologies for Conflict Management: Online Dispute Resolution, Governance, Participation* 39, 41–42 (Springer 2011).

<sup>139</sup> See FrontlineSMS, *FrontlineSMS Radio*, online at <http://radio.frontlinesms.com> (visited Apr 11, 2012).

<sup>140</sup> Developers of this technology have praised the fact that, unlike a radio transmission, this warning can occur without alerting the oncoming marauders. See *A Crowd-Seeding System in Eastern Congo: Voix des Kivus* (Ushahidi Blog May 17, 2011), online at <http://blog.ushahidi.com/index.php/2011/05/16/voix-des-kivus-a-crowd-seeding-system-in-drc/> (visited Apr 11, 2012). But under the situational model, alerting would-be marauders to the fact that someone is monitoring the environment is necessary for its deterrent effect.

<sup>141</sup> See Patrick Meier and Kate Brodock, *Crisis Mapping Kenya's Election Violence: Comparing Mainstream News, Citizen Journalism and Ushahidi* (iRevolution Blog Oct 23, 2008), online at <http://irevolution.wordpress.com/2008/10/23/mapping-kenyas-election-violence> (visited Apr 11, 2012).

<sup>142</sup> Mobile phone networks are available to over 90 percent of the world's population, and phone penetration in the developing world is now at 68 percent. See Daniel Stauffacher, *Genocide Prevention Presentation*, ICT4Peace Foundation \*4 (2010), online at <http://www.scribd.com/doc/40964522/Genocide-Prevention-Presentation> (visited Apr 11, 2012).

control, as tools for documenting crime rather than as tools for ex ante prevention. Development scholars and practitioners have embraced these technologies as tools for crisis response but much less so for crisis prevention.<sup>143</sup> International criminal scholars have paid even less attention to the crime control promise of these tools.<sup>144</sup>

The same can be said for new satellite technologies. In recent years, for example, non-profit organizations have used satellites to track the movements of rebel groups in the Darfur region of Sudan.<sup>145</sup> Satellite imagery has been a longtime tool of states, but general access to even the crudest of these devices was not freely available on the private market until recently.<sup>146</sup> Today, there are a number of commercially available satellites, and rates have dropped such that non-profit organizations like the American Association for the Advancement of Science and Amnesty International can rent satellite time, as they did during the armed conflict in South Ossetia in 2008, in order to document international crimes.<sup>147</sup> These technologies are under-developed as regulatory tools. As the Special Rapporteur for Extrajudicial Killings noted in a recent report dedicated exclusively to the use of new technologies:

New technologies offer . . . significant improvements in existing fact-finding methodologies. Surprisingly, however, there remains an enormous gap between the human rights and information and communications technology fields. Little sustained work has been undertaken by the human rights community as a whole to apply existing technologies or to study their potential uses and problems, and far too little attention has been given to

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<sup>143</sup> See, for example, Patrick Meier and Rob Munro, *The Unprecedented Role of SMS in Disaster Response: Learning from Haiti*, 30 SAIS Rev Int'l Aff 91, 100 (2010) (detailing the significant contribution of new social media tools in directing aid and finding victims in the aftermath of the earthquake in Haiti in 2010).

<sup>144</sup> One exception is the report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions last year. But the report is largely interested in documentation of and reaction to international crimes, rather than their prevention. See *Interim Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, UN General Assembly, 65th Sess, Agenda Item 69(b), UN Doc A/65/321 at 2 (2010) (Alston Report on New Technologies) (focusing “especially on the relevance of new technologies in tackling the challenge of extrajudicial executions and the rampant impunity that attaches to the phenomenon”).

<sup>145</sup> See *Convoy: Evidence of Heavy Military Activity in Kadugli, South Kordofan*, Satellite Sentinel Project Report (2011), online at <http://www.satsentinel.org/report/convoy-evidence-heavy-military-activity-kadugli-south-kordofan> (visited Apr 11, 2012).

<sup>146</sup> See Eric Lichtblau, *US to Rely More on Private Companies' Satellite Images*, NY Times A26 (May 13, 2003).

<sup>147</sup> See AAAS Geospatial Technologies and Human Rights Project, *AAAS Analysis of Satellite Images Finds Hundreds of Structures Damaged in South Ossetia Fighting*, Press Release (Oct 9, 2008), online at [http://www.aaas.org/news/releases/2008/1009geospatial\\_georgia.shtml](http://www.aaas.org/news/releases/2008/1009geospatial_georgia.shtml) (visited Apr 11, 2012).

the research and development of information and communications technologies with human rights applications.<sup>148</sup>

But even this cutting-edge call for new technologies in the human rights context focuses primarily on the use of new technologies as tools for advocacy, early warning, and evidence collection.<sup>149</sup> Separately, in the international criminal context, these technologies promise to provide accurate and detailed evidence of crimes. As scholars have long noted, the evidence relied upon in international criminal tribunals is often lacking.<sup>150</sup> Information technologies are considered a promising new source of data collection and evidence for later use in international criminal tribunals.<sup>151</sup>

The situational approach would suggest, however, that such technologies have an expressive and therefore preventive capacity in addition to their capacity for documenting crimes. The preventive impact of such technologies turns on how well known and prominently displayed they are.<sup>152</sup> Like security cameras in a dark alley, the promise of these tools goes beyond evidence gathering. They can send a clear and strong message to potential perpetrators that someone is watching, and that may be enough to have an impact in some cases.<sup>153</sup> Yet neither the UN's Human Rights Council (HRC) nor the ICC is cultivating, let alone encouraging, the development of these technologies for this use.<sup>154</sup>

<sup>148</sup> Alston Report on New Technologies at ¶ 5 (cited in note 144).

<sup>149</sup> See *id.*, stating:

Some [new technologies] may enable the reporting of abuses in real time, thereby increasing awareness of incidents and speeding up responsiveness and, potentially, prevention; some provide human rights investigators access to new types of data which may provide important supporting evidence of human rights abuses; and others present new advocacy opportunities.

<sup>150</sup> See generally Nancy Combs, *Fact-Finding Without Facts: The Uncertain Evidentiary Foundations of International Criminal Convictions* (Cambridge 2010) (noting that the international criminal regime's evidentiary requirements are deeply flawed).

<sup>151</sup> See Alston Report on New Technologies at ¶ 5 (cited in note 144).

<sup>152</sup> See Clarke, *Introduction* at 20 (cited in note 40).

<sup>153</sup> One of the best reports on the Rwandan genocide suggests that strategic interventions would have significantly dissuaded and slowed the genocidaires, who were emboldened by an apathetic international community. See Des Forges, *Leave None* at 468–69 (cited in note 112).

<sup>154</sup> See Stauffacher, *Presentation* at \*3 (cited in note 142) (“The technological advances are very fast and originate more from civil society, NGOs and volunteers than UN and Governments. The question is, how to crossfertilize the ICT tools and IM needs and standards between these two communities.”). Moreover, the World Summit on Information Society led, in 2005, to the Tunis Commitment, which reads in part:

We value the potential of ICTs to promote peace and to prevent conflict which, *inter alia*, negatively affects achieving development goals. ICTs can be used for identifying conflict situations through early-warning systems preventing conflicts, promoting their peaceful resolution, supporting humanitarian action, including protection of civilians in armed conflicts, facilitating peacekeeping missions, and assisting post conflict peace-building and reconstruction.

Under the current system, criminals may be ignorant of existing monitoring and surveillance mechanisms, which limits the expressive and preventive capacities of monitoring. The environmental design literature encourages *visible* surveillance—with the aid of signs indicating that “this area is under surveillance”—in addition to actual surveillance. Adapting this approach, the UN could, for example, issue a text message or drop leaflets in a particular area—for example, where rebels are marauding in northern Uganda—that read: “WARNING: SATELLITES ARE MONITORING THIS AREA.” Sending a text message to potential mass murderers may sound like a weak foundation for the prevention of mass atrocity, but consider that such “psychological operations” are now considered a crucial component of modern counterinsurgency warfare.<sup>155</sup>

Further legal reforms could encourage this development. For example, all states party to the Rome Statute, as well as other states, could be urged to ratify the Open Skies Treaty. That international agreement requires all signatory states to open their skies to outside monitoring, with certain limitations on both the monitoring technology and the number of inspections.<sup>156</sup> The treaty has been ratified by thirty-four states, including the US and Russia, and is being considered by a handful more.<sup>157</sup> The approach advocated here would call for a greater push from the Secretary General and other interested actors to encourage global adoption of the treaty. A similar treaty could be introduced, or the Open Skies Treaty could be modified, to authorize the UN to conduct similar surveillance in connection with reports of certain activities, such as land grabs, food shortages, troop movements, or anything known to be an indicator of looming international crimes. The success of these monitoring tools partly depends on the perpetrators’ perception of the likelihood of international action, including an eventual international prosecution. Would-be international criminals could, for instance, ignore the surveillance warning as not credible,

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Tunis Commitment, Second Phase of the World Summit on the Information Society, Doc No WSIS-05/TUNIS/DOC/7-E at ¶ 36 (2005). This led to a call for greater investment in the use of these tools on the part of the UN. Various states pledged to “support the United Nations in establishing an early warning capability.” *2005 World Summit Outcome*, UN General Assembly, 60th Sess, Agenda Items 48 & 121, UN Doc A/60/L.1 at ¶ 138 (2005). Little has come of this.

<sup>155</sup> See US Joint Chiefs of Staff, *Counterinsurgency Operations*, Joint Publication 3-24, VI-3 (2009) (stating that psychological objectives have “a central role in the achievement of [information operations] objectives in support of [counterinsurgency operations]”). See also Eric Schmitt and Thom Shanker, *US Adapts Cold-War Idea to Fight Terrorists*, NY Times A1, A12 (Mar 18, 2008).

<sup>156</sup> See Treaty on Open Skies, Art 1 (1990), S Treaty Doc 102-37 (2002) (“This Treaty establishes the regime, to be known as the Open Skies regime, for the conduct of observation flights by States Parties over the territories of other States Parties, and sets forth the rights and obligations of the States Parties relating thereto.”).

<sup>157</sup> See Open Skies Consultative Commission, online at <http://www.osce.org/oscc> (visited Apr 11, 2012).

given the small risk of an intervention, let alone prosecution by an international body. But with every conviction, the international criminal regime becomes more credible. More robust indicators and more robust surveillance, in addition to the development of intermediate tactics, should increase the likelihood of such interventions.<sup>158</sup>

## 2. Material features of the environment.

The literature on the leading correlates of mass atrocities suggests that material conditions are significant predictors of the likelihood of widespread violence.<sup>159</sup> While it has not been shown that the material environment causes international crimes, this is at least a reasonable hypothesis for future empirical work. If this hypothesis turns out to be true, improving the material environment in a country at risk for international crimes might therefore become a core aim of the international criminal regime. Not only would this call for closer linkages between the institutions of the international criminal regime and the core development institutions, it could also call for a re-examination of the allocation of limited resources by the regime *ex ante* and *ex post*—that is, funds used for criminal tribunals, as opposed to economic investment projects, in places such as Sierra Leone and the Congo where material conditions are considered core contributors to the conflict.<sup>160</sup>

This approach also invites attention to environmental effects at the international level, that is, in the community of states.<sup>161</sup> It has been shown that one of the strongest predictors of a failed state's likelihood of genocide is the extent of the state's economic isolation. Data from a decade-long study on failed states suggest that countries with below-average trade openness (measured as the combination of imports and exports as a percentage of gross domestic product) are six times more likely to experience genocide than countries with above-average trade-openness.<sup>162</sup> This evidence is consistent with a significant body of sociological research on the effects of embeddedness in the world community.<sup>163</sup>

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<sup>158</sup> See *Participating States*, Open Skies Consultative Commission, online at <http://www.osce.org/who/83> (visited Apr 11, 2012). I discuss this in more detail in Section IV.B.

<sup>159</sup> Harff, 97 *Am Pol Sci Rev* at 64 (cited in note 12) (“[A]rmed conflicts and adverse regime changes are more likely to occur in poor countries.”).

<sup>160</sup> See *id.* at 59, 67.

<sup>161</sup> See *id.* at 62.

<sup>162</sup> See Goldstone, et al, *State Failure* at 10 (cited in note 131). The funding for the study was partly provided by the US State Department and the CIA, which merits mentioning, but the study was conducted by a team comprised of political scientists, not policy-makers, and the data is relatively uncontroversial. For a peer-reviewed article examining the study's data and coming to the same conclusions, see generally Harff, 97 *Am Pol Sci Rev* 57 (cited in note 12). This data is also consistent with a significant body of sociological work on the world polity.

<sup>163</sup> See, for example, Emilie M. Hafner-Burton and Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 *Am J Sociol* 1373, 1387–88 (2005) (finding support for

Such a finding may call for efforts to bolster trade in low-trade states—whether through reduced barriers to trade agreements, trade subsidies, or other measures—on the ground that doing so could play a role in preventing international crimes.<sup>164</sup> This approach is inconsistent with current practice, in which economic sanctions are one of the only intermediary mechanisms for addressing states that appear poised to violate international law.<sup>165</sup> Not only might the situational approach encourage drawing states into international and regional mechanisms in order to forestall or prevent international crimes—that is, not only does this approach suggest a new intermediary tactic—it also promises to enhance the threat of economic sanctions down the line. The more international trade at stake, the more the risk of sanctions would be expected to influence state behavior.<sup>166</sup>

As we have seen, the situational approach urges attention to the relationship between crime and its environment. In the international criminal context, this could require rethinking a number of existing policies, including the use of global surveillance technologies, the use of peacekeepers, and the design of trade agreements, *inter alia*. Whether these analogs suggest more fully developing the situational framework in the international regime will depend on further information about the causal mechanisms of international crimes. As more is learned about the causes of international crimes, the more specific these reforms might become. The innovation of the situational approach is not to suggest that communities be strengthened and environments enriched. Rather, the innovation is to suggest that these activities are core components of the criminal regime. It is no more innovative to call for better or more international development work than it is to call for streets to be cleaned. The innovation comes from recognizing the impact of these activities on the likelihood of crime and then evaluating the implications of this for the relevant criminal regime.

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world polity theory in the context of human rights and summarizing studies that suggest that increased economic development contributes to improved human rights records).

<sup>164</sup> Again, there is no clear causality between economic embeddedness and genocide, but the correlation suggests such an hypothesis for future research.

<sup>165</sup> There is a growing literature on the use of economic engagement as opposed to disengagement. See, for example, Miles Kahler and Scott L. Kastner, *Strategic Uses of Economic Interdependence: Engagement Policies on the Korean Peninsula and Across the Taiwan Strait*, 43 *J Peace Res* 523 (2003); Michael Mastanduno, *The Strategy of Economic Engagement: Theory and Practice*, in Edward D. Mansfield and Brian M. Pollins, eds, *Economic Interdependence and International Conflict: New Perspectives on an Enduring Debate* 175, 175–85 (Michigan 2003). For a new proposal for law enforcement, consistent with the use of sanctions and rewards, see generally Anu Bradford and Omri Ben-Shahar, *Reversible Rewards*, 12 *Chi J Intl L* 375 (2012).

<sup>166</sup> This would not suggest that states be drawn into international and regional mechanisms *only* when they appear poised to commit international crimes; such a move would create a significant moral hazard problem.

## B. Expansive Regulatory Inquiry

One of the critical—perhaps essential—tools of the international human rights regime is fact-finding.<sup>167</sup> A number of different actors track reports of crime and other violations and investigate their occurrence.<sup>168</sup> This is a crucial, if limited, inquiry after a crime's occurrence. The quality of these reports varies widely.<sup>169</sup> The UN's Office of the High Commissioner on Human Rights has several Special Rapporteurs, operating under the HRC's Special Procedures mandate, who track and report on selected countries and thematic issues.<sup>170</sup> There are currently forty-one Special Rapporteurs, Independent Experts, and Special Representatives of the Secretary General, and their thematic mandates include issues such as "contemporary forms of slavery," "adequate housing," and "human rights and international solidarity."<sup>171</sup> In addition, there are thousands of NGOs, some quite powerful, whose core methodology for regulating human rights abuses is fact-finding.<sup>172</sup> These UN officials and other fact-finders therefore play a critical role monitoring pre-crime conditions around the world. Yet their work is largely optimized for responding to rights abuses and other criminal events, rather than identifying those events *ex ante*. The situational approach suggests several reforms for human rights fact-finding practices, including rethinking the nature and methodology of human rights reports, in particular the use of indicators as a technology for crime control.

Because reporting practices vary, and given the centrality of reporting to the human rights regime, there has been a push to standardize those practices.<sup>173</sup>

<sup>167</sup> See Frans Viljoen, *Fact-Finding by UN Human Rights Complaints Bodies—Analysis and Suggested Reforms*, 8 Max Planck YB UN L 49, 51 (2004) ("Greater concern for implementation of human rights standards highlights the importance of establishing facts about human rights violations.").

<sup>168</sup> The HRC Code of Conduct requires Special Procedures communications to be:

submitted by a person or group of persons claiming to be victim of violations or by any person or group of persons, including non-governmental organizations, acting in good faith in accordance with principles of human rights . . . and claiming to have direct or reliable knowledge of those violations substantiated by clear information. The communication should not be exclusively based on reports disseminated by mass media.

*Code of Conduct for Special Procedures Mandate-Holders of the Human Rights Council*, HRC Res 5/2, Annex, UN Doc A/HRC/5/21 at Art 9(d)–(e) (2007).

<sup>169</sup> Piccone, *Catalysts for Rights* at 18 (cited in note 124) (explaining ways in which governments can manipulate the findings of the reports).

<sup>170</sup> See *United Nations Special Procedures: Facts and Figures*, Office of the UN High Comm for Hum Rts 2–4 (2010) online at [http://www2.ohchr.org/english/bodies/chr/special/docs/Facts\\_Figures\\_2010.pdf](http://www2.ohchr.org/english/bodies/chr/special/docs/Facts_Figures_2010.pdf) (visited Apr 11, 2012).

<sup>171</sup> *Id.*

<sup>172</sup> See, for example, Kenneth Roth, *Defending Economic, Social and Cultural Rights: Practical Issues Faced by an International Human Rights Organization*, 26 Hum Rts Q 63, 67 (2004) ("[T]he core of our methodology is our ability to investigate, expose, and shame.").

<sup>173</sup> See Piccone, *Catalysts for Rights* at 35 (cited in note 124).

In particular, a significant movement is underway to quantify levels of reported rights abuses—so-called “indicators” of human rights abuses.<sup>174</sup> The benefit of these indicators is, in the words of the HRC, standardization:

The use of a standardized methodology in the collection of information, whether it is through census operations, household surveys or through civil registration systems, and usually with high level of reliability and validity, makes indicators based on such a methodology vital for the efforts to bring about greater transparency, credibility and accountability in human rights monitoring.<sup>175</sup>

The rise of indicators as a tool for the regime can be recast as a problem-oriented approach to crime, insofar as the indicators are an attempt to identify patterns at a higher level of generality than the commission of individual human rights events and to link them to the likelihood of, or underlying correlates of, international crime.<sup>176</sup> However, this is not the way indicators are primarily used.

In the human rights context, indicators are largely used to track reports of crime, *not* to uncover root causes. They are primarily seen as a methodology for measuring violations in a simple and efficient manner. For example, the measure of “right to life”—a norm with many potential implications—can thus be condensed into twelve specific indicators such as arbitrary deprivation of life, disappearances of individuals, health and nutrition, and presence of the death penalty.<sup>177</sup> The aim of this work is to help quantify an otherwise nebulous and immeasurable norm. The HRC’s report on indicators, then, suggests a narrow scope of practical applications for indicators, which it sees largely as a tool for measuring relative zones of need: “The basic objective in developing a conceptual and methodological framework was to adopt a structured and consistent approach for translating universal human rights standards into

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<sup>174</sup> See Sally Engle Merry, *Measuring the World: Indicators, Human Rights, and Global Governance*, 52 *Current Anthro* S83, S84 (2011).

<sup>175</sup> *Report on Indicators for Monitoring and Compliance with International Human Rights Instruments*, UN Ind Hum Rts Instruments, 7th Intercommittee Meeting, UN Doc HRI/MC/2008/3 at 9 (2008) (OHCHR Indicators Report).

<sup>176</sup> The rise of indicators also presents concerns about the power dynamics between government and governed. Christopher Stone states that:

In matters of government, indicators are instruments of power. They are not merely this, for indicators can also be sources of insight and pride, promoting good governance through inspiration rather than coercion. Still, the reason for the present interest in governance indicators is their utility for those who would exercise power in the work of government.

*Problems of Power in the Design of Indicators of Safety and Justice in the Global South*, *Indicators in Development: Safety and Justice* 1, 1 (April 2011). See also Merry, 52 *Current Anthro* at S83 (cited in note 174) (noting that indicators implicate power relations between rich and poor countries).

<sup>177</sup> See OHCHR Indicators Report at 5 (cited in note 175).



indicators that are contextually relevant and useful at country level.”<sup>178</sup> This is largely an inquiry into the past. The benefit of indicators under this view is an objective way to evaluate trouble areas to be addressed by the regime.

In the problem-oriented approach, indicators of neighborhood crime are identifiable, structural features that emerge out of the study of criminal patterns. In other words, indicators would be used to identify underlying problems of community concern that may play a role in the likelihood of crime—problems that can then be addressed by a forward thinking police department or coalition of public agencies.<sup>179</sup> Yet where the situational approach uses indicators to complicate and deepen the traditional police model of responding to single events of crime, the conventional use of indicators in the human rights context appears to be to simplify data gathering and comparison.

The situational approach suggests at least two reforms. First, fact-finders must consider more data than the facts of the abuses themselves; heuristics are required. Infant mortality rates, for example—measured as reported deaths of infants, under one year old, per one thousand live births—have been suggested as indicators of material well-being and the general risk of state collapse.<sup>180</sup> The State Failure report found specifically that “countries with worse-than-average infant mortality faced roughly *double* the odds of an outbreak of ethnic war.”<sup>181</sup> Data about infant mortality, under this view, should appear in reports by the UN’s Special Advisor for the Prevention of Genocide, yet they do not.<sup>182</sup> Moreover, a review of reporting practices by Special Rapporteurs suggests that the majority of reports are limited to the facts and circumstances surrounding reported crimes—so-called “events-based data”<sup>183</sup>—and do not seek to address wider patterns of rights abuse, a hallmark of the problem-oriented policing approach.<sup>184</sup> Just as some police departments now recognize that their field of

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<sup>178</sup> Id at 4.

<sup>179</sup> See Scott, *Burglary of Single-Family Houses* (cited in note 51) (describing detailed indicators for community perceptions about contributors to crime and police performance).

<sup>180</sup> See Harff, 97 Am Pol Sci Rev at 64 (cited in note 12) (“[I]nfant mortality rates are a good surrogate for a wide range of indicators of material standard of living and quality of life.”).

<sup>181</sup> Goldstone, et al, *State Failure* at ix (cited in note 131).

<sup>182</sup> A review of the Advisor’s reports indicates that they make no mention of infant mortality and hardly make use of other known indicators of genocide, including ethnic minority rule, low trade embeddedness, and past history of repression, inter alia. See Harff, 97 Am Pol Sci Rev at 64 (cited in note 12).

<sup>183</sup> UN Report on Indicators for Monitoring Compliance with International Human Rights Instruments, UN Doc HRI/MC/2006/7 at ¶ 25 (May 11, 2006) (“Events-based data (for short) consist[] mainly of data on alleged or reported cases of human rights violations, identified victims and perpetrators.”).

<sup>184</sup> See Piccone, *Catalysts for Rights* at 18 (cited in note 124). There are many exceptions to this general statement. The point is simply that taken as a whole, Rapporteurs tend to be reactive.

inquiry must be broader than simply identifying criminal activities, so too might human rights reporters broaden their scope.

Second, this broader inquiry may call for open-ended investigations into a community's own perception of its health.<sup>185</sup> Just as the police learned that the only way to uncover the indirect correlates of crime was to ask residents what they feared rather than what crimes they had witnessed, Rapporteurs, NGOs, or national human rights institutions (NHRIs) might broaden the scope of their inquiries in order to better understand what issues plague a particular community. This approach, which gives the community credit for identifying the issues most relevant to its thriving, could reveal that extrajudicial killings are closely related to another issue, such as perceived government legitimacy or corruption. Whatever it uncovers, its promise is that it may reveal hidden "problems" that underlie a pattern of rights abuses but that would be missed by the traditional approach of focusing on reports of discrete violations, or even by the modified approach described above of developing a heuristic or set of metrics for deeper issues that contribute to rights abuses. The Advisory Committee of the HRC could propose these changes, which could ultimately result in further revision of the Manual for Special Procedures.

Such an approach provides a hedged strategy for addressing international crime. By aiming for crime prevention through addressing environmental factors—in many cases, quality of life issues—the regime can "miss" on crime and still deliver significant gains for the community. For example, if the regime were to expend great resources to address suspected key contributors to international crime—determined, under this approach, by reference to empirical evidence and through close consultation with community members—and have a negligible impact on international crimes, it could still constitute a worthwhile use of resources. In the process, these tactics may address food shortages, prevent or forestall land grabs, and diffuse ethnic tensions. Insofar as the international regime is considered a development institution, this seems less like an ancillary benefit and more like attainment of a core goal of the regime.

### C. Expanded Conception of Police

There are a number of existing international organizations and institutions, both formal and informal, that already implement many aspects of the situational approach described here. In these cases, the situational model proposes to connect these actors to the international criminal regime. This is largely a conceptual shift, recognizing that many existing actors in the international system play a key role in the regulation of international crime, even if their mandate has nothing to do with crime per se. This would call for a recognition, where supported by the empirical evidence, that development work

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<sup>185</sup> This investment is aided by the partnerships described here.

done by the United Nations Development Program (UNDP), food security work done by the World Food Program (WFP), and order maintenance by UN Peacekeeping forces have a direct impact on the likelihood of international crime. This shift would have real world implications. For example, the UNDP, the WFP, and Peacekeeping operations, which currently have no formal relationship with the major human rights bodies, could coordinate their work in order to further the goals of the international criminal regime. Tightening the link between various international actors, especially actors that do not have any institutional or informal overlap, may make even more sense than the CPD's tightening its connections to public housing and sanitation departments, because these international agencies are not housed in the same centralized administrative body, let alone the same city, the way that municipal agencies typically are. Therefore, institutional links may be necessary to create synergies that might occur naturally in a more centralized administrative setting.

Closer attention to linkages between institutional actors of this sort could clarify the relationship between the international criminal regime and the human rights regime. There is significant overlap between the two regimes. Both are international legal orders that seek to regulate individual as well as state behavior, and many international crimes are in fact human rights abuses.<sup>186</sup> The international criminal regime is typically taught as a subsidiary of the human rights regime; indeed, international tribunals are a standard component of an introductory international human rights course.<sup>187</sup> But core components of the human rights regime, like the economic, social, and cultural rights framework, are hardly mentioned in a typical course on international criminal law.<sup>188</sup> To the extent that food security, economic opportunity, and civil and political rights contribute to the risk of international crime, as some scholarship suggests,<sup>189</sup> addressing these needs is a crucial aspect of the regime's aspiration of crime prevention.

One promise of such partnerships is that they could encourage development of economic, civil, and political rights. The current, court-centric

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<sup>186</sup> See Sergei Vasilev, *Applicability of International Fair Trial Standards in International Criminal Proceedings: Between Universalism and Contextuality* (SIM Special Edition on Human Rights and International Criminal Law 2008), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1718960](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1718960) (visited Apr 11, 2012).

<sup>187</sup> See, for example, International Human Rights Law Syllabus, NYU Law School (Spring 2011) (on file with Author).

<sup>188</sup> See generally, for example, Henry Steiner, Philip Alston, and Ryan Goodman, eds, *International Human Rights in Context: Law, Politics, Morals: Text and Materials* (Oxford 3d ed 2007) (discussing the international criminal regime as a component of the international human rights regime). Compare M. Cherif Bassiouni, ed, *International Criminal Law* (Martinus Nijhoff 3d ed 2008).

<sup>189</sup> For an account that difficult life conditions generally contribute to conflict and the likelihood of genocide, see generally Ervin Staub, *Genocide and Mass Killing: Origins, Prevention, Healing and Reconciliation*, 21 *Pol Psych* 367 (2000).

approach to regulating international crimes focuses on rights *violations*, which requires attention to *violators*. This narrow focus on enforcing the law against violators has obscured wider questions about the human rights regime. Many economic and social rights issues cannot easily be pinned to a single violator, so they are largely unaddressed under this model.<sup>190</sup> The promise of a wider approach, one that involves more actors than the police and the courts in the regulation of international crimes, is that it may provide insights into the impact of those peripheral actors—many of whom are engaged in economic rights work—on the likelihood of international crimes, which are civil and political rights violations of the gravest kind.

Such an approach also calls for closer scholarly attention to and may prompt rethinking the relationship between formal human rights institutions and international criminal institutions, which often do not coordinate activities. The ICC is formally independent from the UN's human rights bodies, such as the HRC, and it has no formal connection with the Special Rapporteurs who are well positioned to produce information relevant to the prevention of international crimes.<sup>191</sup> The Universal Periodic Review, a new project of the HRC to tighten coordination among the different human rights instruments, was created partly to encourage cross-fertilization across the human rights regime.<sup>192</sup> But neither the Office of the Prosecutor (OTP) nor the ICC's Special Advisor on Crime Prevention is a part of the process.

The creation of these partnerships could be encouraged at many points in the human rights regime, but this approach calls for something more substantial, such as a coordinated effort—perhaps organized by the ICC's Special Advisor for Crime Prevention—to encourage and sustain these partnerships, which are currently largely ad hoc. The Vienna Declaration and Programme of Action endorsed by the General Assembly in 1993 calls for greater support and expansion of Special Procedures mechanisms, while noting in particular the potential importance of the launch of the ICC.<sup>193</sup> No current institutional arrangements suggest that the two are crucial to each other's work.<sup>194</sup> This integration could be managed by modifying the Special Procedures to require

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<sup>190</sup> See Roth, 26 Hum Rts Q at 68 (cited in note 172) (noting that the backwards facing shame-and-blame tactics of human rights practitioners make little sense in the economic and social rights context because there is no obvious violator on whom to pin blame).

<sup>191</sup> The first major review of the Special Procedures came to a similar conclusion. See Piccone, *Catalysts for Rights* at xi (cited in note 124) (“The U.N. system should do much more to integrate the work of the Special Procedures into their activities, programs and work plans and find ways to connect their recommendations to funding priorities.”).

<sup>192</sup> See General Assembly Res No 60/251, UN Doc A/RES/60/251 (2006).

<sup>193</sup> Vienna Declaration, World Conference on Human Rights, UN Doc A/CONF.157/24 (Part I) at 20 (1993).

<sup>194</sup> See General Assembly Res 48/121, UN Doc A/RES/48/121 (1993).

that Rapporteurs meet with the ICC and with the UN Under-Secretary for Prevention. For example, the HRC's Special Procedures manual currently "encourages" Rapporteurs to "establish and maintain contacts" with national human rights institutions and with civil society, both of which are specifically identified as potential sources of information as well as partners for policy implementation.<sup>195</sup> But there is no mention of the instruments of the international criminal regime, either the ad hoc tribunals or the ICC. The approach described here would call, at a minimum, for an addendum to this mandate to include that *all Rapporteurs*, not only those working on international crimes, be in dialogue with the ICC and also with the Secretary General's Special Advisor for the Prevention of Genocide.

In addition to these international partnerships, this approach calls for greater vertical partnerships between the regime and local communities under its watch. There are already a number of community organizations whose current scope of activities could be more tightly integrated into the regime. Examples of these sorts of actors include local church groups, local tribal groups, international religious groups, local and international NGOs, international humanitarian aid organizations who often operate in places of political transition and disorder, and corporations and other commercial actors.<sup>196</sup> Strategic partnerships between the international regime and these organizations may be more feasible as a logistical matter than a direct partnership between, for example, the ICC and all of the various communities around the world at risk of international crimes. There are also intermediary institutions that could mediate such partnerships. One option would be for these partnerships to be mediated through NHRIs in countries where such organizations exist. NHRIs are emerging as a key component of the human rights regime in negotiating the local reach of international legal norms.<sup>197</sup> Additionally, many NHRIs are enmeshed in, and coordinate their activities through, regional and global networks.<sup>198</sup>

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<sup>195</sup> UN Hum Rts Comm, *Manual of Operations of the Special Procedures of the Human Rights Council* ¶¶ 130–33 (2008), online at [http://www2.ohchr.org/english/bodies/chr/special/docs/Manual\\_August\\_FINAL\\_2008.doc](http://www2.ohchr.org/english/bodies/chr/special/docs/Manual_August_FINAL_2008.doc) (visited Apr 11, 2012).

<sup>196</sup> During the Liberian civil war, Lebanese traders in Monrovia were able to source goods and materials because their networks did not depend on local suppliers. See Michael Charles Pugh, Neil Cooper, and Jonathan Goodhand, *War Economies in a Regional Context: Challenges of Transformation* 101–04 (Lynne Rienner 2004) (discussing Lebanese trader networks and their connection to the civil wars in Liberia and Sierra Leone).

<sup>197</sup> See Ryan Goodman and Thomas Pegrām, *Introduction: National Human Rights Institutions, State Conformity, and Social Change*, in Ryan Goodman and Thomas Pegrām, eds, *Human Rights, State Compliance, and Social Change: Assessing National Human Rights Institutions* 1, 2–3 (Cambridge 2012).

<sup>198</sup> See Office of High Comm for Hum Rts, *OHCHR and NHRIs*, online at <http://www.ohchr.org/en/countries/nhri/pages/nhrimain.aspx> (visited Apr 11, 2012) (describing the International Coordinating Committee for NHRIs, regional coordinating groups, and international NHRI conferences for coordination).

In the domestic realm, police provide a focal point to facilitate community partnerships among a broad array of actors. There is no obvious corollary in the international criminal regime, a fact that may call for greater hybridity—that is, quasi-international, quasi-national characteristics—in the international criminal regime. For example, hybrid international criminal tribunals—tribunals like the Special Court for Sierra Leone that mix components of domestic and international criminal justice systems—may be uniquely poised to balance international and local demands on justice.<sup>199</sup> One could also imagine a liaison at every NHRI with whom the OTP could coordinate prevention strategies, as well as design particular criminal situations to be tailored to the needs of a particular community.<sup>200</sup> As I show in Section V, for an international criminal regime that is frequently cited as being out of touch with community desires, taking such an approach promises certain benefits beyond crime prevention.<sup>201</sup>

Such a move is also not entirely revolutionary. International tribunals have long been omnibus institutions.<sup>202</sup> Indeed, these community partnerships could be developed as outgrowths of the outreach programs already in place in many international tribunals. The ad hoc international criminal tribunals have whole teams dedicated to outreach,<sup>203</sup> and the ICC has created a number of partnerships in places with ongoing inquiries.<sup>204</sup>

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<sup>199</sup> For an overview of the strengths of hybrid tribunals, see generally Laura A. Dickinson, *The Promise of Hybrid Court*, 97 Am J Intl L 295 (2003).

<sup>200</sup> I investigate this more fully in Section V, where I argue that one of the benefits of the situational approach is that by decoupling punishment from prevention, it calls for closer attention to the coordination of the two as independent levers for achieving different regime aims.

<sup>201</sup> See Section V (noting the benefits to the international criminal judiciary of closer community partnerships, in particular increased legitimacy).

<sup>202</sup> See Jane E. Stromseth, *The International Criminal Court and Justice on the Ground*, 43 Ariz St L J 427, 443 (2011) (noting the outreach capacities of the international tribunals which serve not just as courts but also as development institutions). Indeed, the ICC has its own special advisor for prevention—a person who may be in a unique position to spearhead such an initiative. See ICC, Press Release, *Professor Mireille Delmas-Marty Is Appointed Special Adviser to the Office of the Prosecutor of the International Criminal Court* (May 27, 2011), online at <http://www.icc-cpi.int/NR/exeres/785A45B4-54D2-4E93-A9F5-24E85148801A.htm> (visited Apr 11, 2012) (announcing the appointment of a Special Adviser on the Internationalization of Legal Issues to the OTP of the ICC).

<sup>203</sup> The Special Court for Sierra Leone has a dedicated Outreach Office, which has been hailed as a successful feature of the tribunal that other similar tribunals should emulate. See Thierry Cruvellier, *From the Taylor Trial to a Lasting Legacy: Putting the Special Court Model to the Test*, International Center for Transitional Justice and Sierra Leone Court Monitoring Programme 27–29 (2009).

<sup>204</sup> See ICC, *The ICC and Its Partners in Uganda Conclude a Series of Activities in Gulu District Marking International Criminal Justice Day*, Press Release (July 20, 2011), online at <http://www.icc-cpi.int/NR/exeres/2FC2719D-50C2-4146-8A30-1A69D24F60AB.htm> (visited Apr 11, 2012) (noting the development of partnerships between the court and local groups).

Of course, it is insufficient to say that partnerships matter; the novel contribution of the situational approach is to say that actors other than the police and the courts are central to the successful regulation of crime. It is not that partnerships will single-handedly transform police practices and increase the efficacy of the criminal regime. Rather, the embrace of partnerships is part of a wider approach that recognizes the importance of social context in the commission and prevention of crimes.<sup>205</sup> It is an explicit rejection of the old view, in which partnerships were seen as window dressing, were a burden on core police practices, and were relegated to the office of public relations.<sup>206</sup> In the new domestic model, community partnerships are not just additional tools for crime fighting; instead, they are direct mechanisms for crime control. The situational model acknowledges that in some cases, the community where crime occurs is in a better position to institute reforms than the police.<sup>207</sup>

#### D. Proactive Rather than Reactive Regulation

In the first phase of modern policing, under the so-called professional model, the goal was to increase reaction times to reports of ongoing or recently occurred crimes.<sup>208</sup> This is strikingly similar to modern peacekeeping and humanitarian intervention policy, which has been centrally occupied with reactivity to the outbreak of international crimes.<sup>209</sup> A significant body of scholarship is principally concerned with mechanisms for overcoming political challenges that hinder the rapid international response to outbreaks of crimes.<sup>210</sup>

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<sup>205</sup> See generally Xu, Fiedler, and Flaming, 42 *J Res Crime & Delinq* 147 (cited in note 49).

<sup>206</sup> Lee P. Brown, *Community Policing: A Practical Guide for Police Officials*, 12 *Persp on Policing* 1, 4–5 (1989) (“[Community policing] involves more sweeping and more comprehensive changes. . . . [I]t is the department’s style that is being revamped. . . . Although it is an operating style, community policing also is a *philosophy* of policing.”).

<sup>207</sup> See Renauer, 30 *Policing* at 61 (cited in note 66).

<sup>208</sup> See Skogan and Roth, *Introduction* at xvii (cited in note 19) (“The professional model emphasized responding rapidly when victims called the police.”).

<sup>209</sup> See Fortna, *Does Peacekeeping Work?* at 6 (cited in note 128) (describing peacekeeping as largely reactive). When the UN authorized military force to depose Muammar Qaddafi in Libya in 2011, human rights groups celebrated the rapid response of the international regime. As one reporter from Human Rights Watch celebrated: “It was, by any objective standard, the most rapid multinational military response to an impending human rights crisis in history.” Ryan Lizza, *The Consequentialist: How the Arab Spring Remade Obama’s Foreign Policy* (New Yorker May 2, 2011), online at [http://www.newyorker.com/reporting/2011/05/02/110502fa\\_fact\\_lizza?currentPage=all](http://www.newyorker.com/reporting/2011/05/02/110502fa_fact_lizza?currentPage=all) (visited Apr 11, 2012).

<sup>210</sup> See Neville F. Dastoor, *The Responsibility to Refine: The Need for a Security Council Committee on the Responsibility to Protect*, 22 *Harv Hum Rts J* 25, 26–28 (2009) (reviewing the movement to establish the responsibility to protect norm). There are signs that this is changing, however. Recent reports by the UN Secretary General Ban Ki Moon have emphasized prevention as a key component of the responsibility to protect. See, for example, *Early Warning, Assessment and the Responsibility to*

Even the nascent international norm known as the Responsibility to Protect was initially built around a rapid response—that is, reactive—principle.<sup>211</sup> The situational turn suggests that as important as it is for the regime to be responsive to reported crimes, reactivity on its own is not enough; the criminal regime must anticipate and address, *ex ante*, the environmental correlates of crime.

In addition to the foregoing—partnerships, the problem-oriented approach, and environmental design—the preventive policing approach aspires to a greater cultural shift in which the regime evolves from being backward to forward leaning.<sup>212</sup> This is a second order change, namely a reorientation of the regime’s priorities, giving prevention as much attention and resources as punishment. Instead of relegating the deterrence function to the courts, this approach forces scholars and regime designers to consider other agents who are poised to shape the conditions of crime. Such a shift in regime priorities—indeed, it is as much a shift in priorities as it is a shift in policy—might encourage a more aggressive stance on state sovereignty. This could take many forms. For example, it could call for further modifying the rules governing the relationship between Rapporteurs and states. Rapporteurs are seen as the official early warning system for the international human rights regime.<sup>213</sup> Indeed, the HRC manual for Special Procedures describes Rapporteurs as playing a crucial “role in providing ‘early warning’ and encouraging preventive measures.”<sup>214</sup> In this light, they are the frontline reporters engaged in data collection and problem monitoring. Yet they are hardly forward leaning. The same manual goes on to insist that their “criteria for taking action” depend entirely on reports of rights violations, not on early indicators or attempts,<sup>215</sup> and country visits are exclusively at the invitation of the state.<sup>216</sup> Rapporteurs must request an invitation from the state, often mediated through a third party, and these

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*Protect, Report of the Secretary General*, UN General Assembly, 64th Sess, Agenda Items 48 & 114, UN Doc A/64/864 (2010).

<sup>211</sup> See Dastoor, 22 Harv Hum Rts J at 28 (cited in note 210) (noting that the responsibility to protect norm has been interpreted as a “responsibility to react”).

<sup>212</sup> See text accompanying note 206.

<sup>213</sup> See *Early Warning* at 3 (cited in note 210).

<sup>214</sup> UN Hum Rts Comm, *Manual of Operations* at ¶ 5 (cited in note 195).

<sup>215</sup> *Id.* at ¶ 38 (noting that actionable information largely comes from “NGOs and other groups or individuals claiming to have direct or reliable knowledge of human rights violations”).

<sup>216</sup> The Manual of Operations also states:

A Government may take the initiative to invite a mandate-holder to visit the country. Alternatively a mandate-holder may solicit an invitation by communicating with the Government concerned, by discussions with diplomats of the country concerned, including especially the Permanent Representative to the United Nations Office in Geneva or at Headquarters, or by other appropriate means. The GA, the HRC, or the High Commissioner for Human Rights might also suggest or request that a visit be undertaken.

*Id.* at ¶ 55.



requests can be rebuffed and delayed, as they often are.<sup>217</sup> A more forward leaning approach would suggest making pre-authorization of these invitations the default rule, one that states could opt out of on a case-by-case basis.<sup>218</sup> Such a small change in the design of Rapporteur-state relations could have significant effects on the power of the Special Procedures mechanisms; indeed, there is considerable evidence that default rules guide behavior independent of choice preference.<sup>219</sup>

In order to further limit these pre-authorized interventions, they could be tied to certain triggers that strongly correlate with international crimes. If these interventions are truly preventive—based on triggers that occur well before the commission of atrocities—the relevant state should have fewer reasons to block the Rapporteur’s visit than if crimes were well underway. The further out these triggers run, the less pressure they put on Rapporteur-state relations. For example, sudden increases in landholding inequality have been shown to be a precursor to widespread violence,<sup>220</sup> so with reports of land grabs in a particular state, the international regime could immediately authorize a fact-finding mission and give the state a chance to respond to the allegations. In the meantime, the UN could train satellites on the state to monitor the situation from the sky. The technological and political components of such a system are already in place; what is missing is a centralized framework for understanding and developing their collective impact on international crimes.<sup>221</sup>

In many instances of humanitarian crisis, the hardest policy questions have not been about predicting or responding to the harm, but instead about determining *when* to act and through what procedures. Lessons from the situational approach may inform this as well. Imagine, for example, an escalating scale of metrics that corresponds to an escalating scale of triggers for international action. These triggers could exist in a step-like fashion, in which advisories precede warnings that precede watches—each of which triggers a different set of intervention responses. The default position of the international regime is to intervene only after gross abuses of rights have already occurred.

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<sup>217</sup> See Piccone, *Catalysts for Rights* at xi (cited in note 124).

<sup>218</sup> See *id.* (finding that standing invitations by states would greatly enhance the Special Procedures).

<sup>219</sup> See, for example, Thaler and Sunstein, *Nudge* at 36–37 (cited in note 29).

<sup>220</sup> See Manus I. Midlarsky, *Rulers and the Ruled: Patterned Inequality and the Onset of Mass Political Violence*, 82 *Am Pol Sci Rev* 491, 493 (1988) (showing that violence is closely correlated with patterned inequality, which is defined as “a systematic departure of the pattern of holdings of one societal sector relative to the pattern of holdings of another”).

<sup>221</sup> Such a plan should fall to the UN Special Advisor for the Prevention of Genocide, who is specifically tasked with such duties, when the triggers suggest genocide. But there is no similar position for the prevention of other international crimes, aside from the ICC’s Special Advisor on Crime Prevention. The mandate of the ICC’s Special Advisor should either be expanded or a similar position should be created within the UN system.

But if independent reports suggest, for example, an increase in risk factors for widespread violence, including an elite minority group with a past history of repression, low levels of international embeddedness, and high infant mortality rates, a delegation could be authorized automatically by the UN Security Council without any need for further state approval. Depending on what that delegation finds, another set of actions may be automatically authorized, but in this case, state or Security Council authorization would be needed to *stop* the intervention, not the other way around.<sup>222</sup>

Like the design of situational police tactics, this early stage warning system's design could be informed by social psychological insights. For example, the psychic numbing literature suggests that there is a great risk that international monitors and the citizens of states required to authorize an intervention will fail to fully recognize the cost of great losses of life as the number of losses increases.<sup>223</sup> A shift in default rules might be designed specifically to counteract this problem. Consider how one such lock-step proposal might work to minimize the harms of psychic numbing, harms that could inhibit political action, in the context of an escalating conflict:

Say, for example, that valuations of life begin to drop off significantly after 10 deaths. At 10 deaths, a pre-authorized U.N. investigation would automatically be triggered (implementing new reporting methods, as discussed below); at 100 deaths, that investigatory body would immediately acquire certain authorities. These lock-step provisions can be justified on the grounds that any more subjective metric raises the risk of psychic numbing. If such a system could be implemented, it could limit the opportunity for genocidaire-states to stall international intervention under the guise of diplomatic debate.<sup>224</sup>

In addition to fostering greater sensitivity to early warning signs, a preventive regime could also establish certain default rules (for example, pre-authorized satellite coverage), which are automatically triggered after certain threshold events occur (for example, land grabs).

Triggers have their own risks. They discourage creative thinking and flexible problem solving by quantifying and systematizing complex human political phenomena. Treating the task of monitoring the risk of genocide as a checklist of a series of warning signs may increase the overall

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<sup>222</sup> For an account of default rules in international law, see generally Curtis A. Bradley and Mitu Gulati, *Withdrawing from International Custom*, 120 Yale L.J. 202 (2010).

<sup>223</sup> Psychic numbing is the name given to the phenomenon whereby people value lives less as the numbers of lives at risk goes up. See David Fetherstonhaugh, et al, *Insensitivity to the Value of Human Life: A Study of Psychophysical Numbing*, 14 J Risk & Uncert 283, 283 (1997).

<sup>224</sup> See Paul Slovic, et al, *Psychic Numbing and Mass Atrocity* \*10 (NYU Law School Public Law and Legal Theory Working Paper No 11-56, Aug 2011), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1809951](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809951) (visited Apr 20, 2012) (applying the psychic numbing insight to international human rights and international criminal law).

comprehensiveness of the monitoring effort, but it also may increase the risk that monitors will miss important events that fall outside the scope of their checklist. In this way, the checklist risks complacency. But if the checklist is well designed, the risks imposed by this complacency are unlikely to be greater than the risk that without the triggers the regime will be either unresponsive or insufficiently responsive to mass atrocity.<sup>225</sup> Additionally, just because triggers are deemed a useful mechanism for authorizing intervention does not mean that such intervention will be called for in every case. The trigger would merely resolve the question of authority to intervene, without solving the questions of who and how and when to intervene.

Finally, consider a similar adaptation of the principle of complementarity, which guides the determination of when the ICC can take a case. Currently, the court is meant to “complement” domestic criminal regimes. The principle of complementarity guides the regime’s decisions vis-à-vis criminal investigations, and the regime is only meant to launch an inquiry if a state is “unwilling or unable genuinely” to investigate the occurrence of an international crime.<sup>226</sup> But perhaps the regime should also develop a complementarity principle for preventive policies as well.<sup>227</sup> Under such an approach, the international regime would only launch a problem-oriented investigation, or seek to address environmental factors contributing to the likelihood of crime, and so on, if a state is unwilling or incapable of implementing these features on its own. It would take more space than is available here to develop a full proposal along these lines, but this is an example of the sort of doctrine that the situational policing regime could develop to guide—and to limit—its implementation of preventive policies with the aid of insights from the situational approach. An abundance of theory guides the regime’s ex post mechanisms, but the ex ante side of the regime is comparatively under-developed. Fixing this imbalance may do more than merely prevent crime; as I explore in the next section, it may also call for reforms to ex post justice mechanisms.

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<sup>225</sup> Consider, as an example, the checklists used to increase the safety of airplane travel worldwide. A number of recurring human errors caused a significant number of crashes. Today, the number of crashes is reduced significantly because of the implementation of routine, checklist procedures. See Malcolm Gladwell, *Outliers: The Story of Success* 218 (Little Brown 2008).

<sup>226</sup> Rome Statute, Art 17(1)(a) (cited in note 1).

<sup>227</sup> William Burke-White has similarly proposed transforming the complementarity principle to be more proactive and more forward leaning in order to prompt and empower domestic courts to pursue international crimes. See generally *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of Justice*, 49 Harv Intl L J 53 (2008) (examining proactive complementarity and offering a practical framework for its implementation).

## V. IMPLICATIONS FOR INTERNATIONAL COURTS

One of the deeper impacts of the situational move in the domestic criminal literature has been to call into question the exclusive reliance on punishment as a means of achieving crime prevention. Apart from the effect this turn has on crime, it can be seen as a reorientation of the criminal legal model, one in which punishment is unbundled from prevention. That is, the new approach to criminal justice is not simply a supplement to the old approach: the introduction of situational laws and policies aimed at regulating crime *ex ante* can have a significant impact on more traditional criminal justice mechanisms such as trials.<sup>228</sup> In this Section, I explore some negative interaction effects between the situational approach and the older approach, and then I consider two types of reforms for prosecutors and courts. These reforms might include small-scale changes, such as shifting prosecutorial priorities at the ICC, as well as more fundamental changes, such as rethinking the very purpose of international criminal trials.

### A. Negative Interaction Effects

The most powerful critique of the order maintenance policing strategy is not that it fails to work, but that it has negative side effects when it is implemented in the context of an extremely harsh and inflexible sentencing regime.<sup>229</sup> The result is a huge increase in incarceration rates.<sup>230</sup> As has been well documented in the US, judges and politicians face intense pressure to increase the length of prison sentences.<sup>231</sup> The criminal regime is stuck with the worst of both worlds: a large increase in enforcement (based on “zero tolerance” or other order maintenance strategies) combined with an older crime-and-punishment model reliant on stiff sentences to deter crime.<sup>232</sup> This problem of combining more policing enforcement with traditional sentencing structures may be a larger concern for municipal criminal regimes than the international criminal regime,

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<sup>228</sup> Indeed, the community policing movement triggered a corollary movement in prosecutors’ offices and in courts across the country. See Adriaan Lanni, *The Future of Community Justice*, 40 Harv CR-CL L Rev 359, 366–67 (2005) (discussing the community justice offshoots).

<sup>229</sup> See *id.* at 390 (“Targeting panhandlers or prostitutes may reduce fear of crime in troubled neighborhoods by removing visible signs of disorder, but it does little to solve the broader crisis of legitimacy arising from the harsh practices of the mainstream criminal system.”).

<sup>230</sup> See *id.* at 361.

<sup>231</sup> See William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich L Rev 506, 523–25 (2001).

<sup>232</sup> See Howell, 33 NYU Rev L & Soc Change at 274 (cited in note 86). This is especially poignant because one of the aims of the original “new Chicago school” of criminology, a precursor to the new policing approaches, was created out of a desire for “milder public order alternatives” to harsh sentences. See Harcourt, *The Illusion of Order* at 38 (cited in note 11).

which does not have a fully elaborated sentencing scheme.<sup>233</sup> Since international criminal law is under-enforced, with extremely selective prosecutions and sentences that are frequently criticized for being too lenient,<sup>234</sup> there may be less risk of creating the same situation that concerns domestic critics. But there are other risks.

The turn to formalize *ex ante* strategies for regulating crime may run the risk, significant perhaps, of crowding out more informal, local forms of control. There is some evidence that when community distrust of the police is high, police-community partnerships not only will fail, but they will depress community self-regulation.<sup>235</sup> Without knowing the level of trust that vulnerable populations in general have of outside police forces, it seems reasonable to speculate that the risk of similar crowding out effects is significant. To take just one example, consider that peacekeepers, despite their high rate of success at maintaining peace, have fared poorly on the score of local legitimacy.<sup>236</sup> As many international criminal scholars have noted, local legitimacy is a prerequisite for the expression of moral norms.<sup>237</sup> To the extent that the situational approach risks further weakening the legitimacy of the regime, it might undermine the ability of international tribunals to credibly express moral norms.

There is also the risk of cooptation and mission creep. Calling development work “crime prevention” is not a shift without consequences. For example, counterinsurgency doctrine—which shares many features with community policing, including calling for the closer integration of security services with quality of life services—has effectively co-opted development policy in some areas of conflict. One result of this co-optation is that it is now harder to obtain a grant for a development project unless that work can be justified as serving a

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<sup>233</sup> There is an effort underway to clarify and standardize international criminal sentences. See generally, for example, Allison Marston Danner, *Constructing a Hierarchy of Crimes in International Criminal Law Sentencing*, 87 Va L Rev 415 (2001). Insofar as these efforts are aimed at clarity, they hold real promise. See *id.* at 471. But the situational approach suggests that inflexible sentencing regimes interact in negative ways with *ex ante* situational approaches to criminal regulation.

<sup>234</sup> See Jens David Ohlin, *Towards A Unique Theory of International Criminal Sentencing*, in Göran Sluiter and Sergey Vasiliev, eds, *International Criminal Procedure: Towards a Coherent Body of Law* 381, 382 (Cameron May 2009) (noting the “natural intuition that the special gravity of international crimes requires greater punishment” than those currently meted out by the regime).

<sup>235</sup> See Renauer, 30 *Policing* at 76–77 (cited in note 66) (“[A] community policing style may not be enough to overcome deeply entrenched attitudes toward the police in the most disadvantaged communities and, at worst, may discourage informal social control.”).

<sup>236</sup> See, for example, Andrew Ladley, *Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability on International Peace Operations*, 1 *Pol & Ethics Rev* 81, 82 (2005) (“International peace operations constantly risk adding serious international insult to existing local injury.”).

<sup>237</sup> See Damaska, 83 *Chi Kent L Rev* at 348 (cited in note 2) (“[T]he importance of considering local responses to the decisions of international criminal courts can hardly be overemphasized.”).

security function.<sup>238</sup> The same risk exists in the international criminal regime. For example, if the delivery of essential medical services is thought to reduce the risk of international crime *ex ante*, and institutional arrangements reflect this, then these services could fall under the purview of the criminal regime and be diminished as a result. This is especially important because one measure of the legitimacy of a legal regime is its competence in the performance of basic services.<sup>239</sup>

## B. Implications for the Prosecution of International Crimes

That the situational approach can have negative effects on the larger criminal justice system suggests either abandoning that approach or making accommodations. Many municipalities where situational policing has been introduced appear to have followed the latter course.<sup>240</sup> Empirical evidence suggests that the introduction of situational policing strategies led to shifts in the priorities of district attorney's offices and the practice of judges, to better coordinate the administration of criminal justice. One study of four municipalities over ten years during the introduction of community policing practices found that the change affected judges and prosecutors in several significant ways.<sup>241</sup> For example, a county District Attorney "pioneered a community-based justice program designed to target violent youthful offenders for prosecution and stabilize the remaining population . . . with a coordinated program involving the mayor, chief of police, school superintendents, probation, juvenile court, state agencies, prosecutors and others."<sup>242</sup> In New Jersey, Judge George Nicola created a similar program to coordinate his cases and the sentences meted out with the activities of the local police.<sup>243</sup> He also launched a volunteer network in New Brunswick that supervised court-ordered conditions,

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<sup>238</sup> See Carol Messineo, *The United States Military as an Agent of Development: Counterinsurgency Doctrine and Development Assistance* \*\*17–18 (International Affairs Working Paper 2010-05, 2010), online at [http://www.gpia.info/files/u706/Messineo\\_2010-05.pdf](http://www.gpia.info/files/u706/Messineo_2010-05.pdf) (visited Apr 11, 2012) (arguing that counterinsurgency approaches to development tend to lead to narrow approaches to both security and development).

<sup>239</sup> See Margaret Levi, Tom Tyler, and Audrey Sacks, *The Reasons for Compliance with Law* \*1 (US Studies Centre at the University of Sydney Working Paper Aug 2009), online at [http://ussc.edu.au/s/media/docs/publications/0908\\_levi\\_compliance.pdf](http://ussc.edu.au/s/media/docs/publications/0908_levi_compliance.pdf) (visited Apr 20, 2012) ("One of the most important antecedent conditions of value-based legitimacy is the trustworthiness of government, based on positive assessments of leadership motivations, administrative competence, and, [sic] government performance.") (emphasis added).

<sup>240</sup> See Joan E. Jacoby, Heike P. Gramckow, and Edward C. Ratledge, *The Impact of Community Policing on the Criminal Justice System* 96–97 (Jefferson Institute for Justice Studies 1995).

<sup>241</sup> See *id.*

<sup>242</sup> *Id.* at 9.

<sup>243</sup> Paul B. Wice, *Court Reform and Judicial Leadership: Judge George Nicola and the New Jersey Justice System*, 150–163 (Praeger 1995).

monitored court-ordered activities, and developed alternative responses to incarceration.<sup>244</sup> In other words, both courts and prosecutors have become, in some instances, more community-minded as a result of police practices' becoming community-oriented. By changing prosecutors' charging priorities and tailoring courts to the community-oriented approach, the criminal justice system gained "an opportunity to strengthen public relations; to educate the public about areas of criminal justice largely unknown to them; and, to foster a closer working relationship between their agency, the police, local business communities, schools, and civic organizations."<sup>245</sup>

By 2007, there were over 2,500 "problem solving courts" or "community courts" in the US—courts that had explicitly adapted their procedures in order to coordinate with new situational policing strategies.<sup>246</sup> This development is a direct response to the situational turn in policing:

Problem-solving justice can trace its theoretical roots to innovations in policing, particularly community and problem-oriented policing, which attempted to replace traditional law enforcement's focus on responding to individual offenses with a focus on identifying and addressing patterns of crime, ameliorating the underlying conditions that fuel crime, and engaging the community as an active partner.<sup>247</sup>

In the US, the Conference of Chief Judges and Conference of State Court Administrators have adopted resolutions endorsing the community-oriented approach and urging reforms to coordinate the administration of justice with community policing practices more closely; the American Bar Association has adopted a similar position.<sup>248</sup>

The problem-oriented justice literature suggests that prosecutors must not only adjust their tactics, but must fundamentally redefine their roles. The ambition is to change the mission of the prosecutor away from simply prosecuting crimes and toward solving problems, which is achieved through strategic prosecutions, creative sentences, and partnerships with other public agencies.<sup>249</sup> This requires that prosecutors "look beyond a myopic focus on individual criminal transgressions" and instead focus on structural problems.<sup>250</sup> In this model, the prosecutor actually becomes the central coordinator for addressing the underlying causes of a particular "problem" or crime; "the

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<sup>244</sup> Id.

<sup>245</sup> See Jacoby, Gramckow, and Ratledge, *The Impact of Community Policing* at 8 (cited in note 240).

<sup>246</sup> See Robert V. Wolf, *Principles of Problem Solving Justice* 1 (Center for Court Innovation, Bureau of Justice Assistance 2007).

<sup>247</sup> Id.

<sup>248</sup> See id.

<sup>249</sup> See Thompson, 77 *Notre Dame L. Rev.* at 361–66 (cited in note 15) (noting the new roles of prosecutors in the community justice movement).

<sup>250</sup> Id. at 363.

prosecutor serves as facilitator and coordinator, linking previously disparate actors and organizations in defining problems and identifying solutions.”<sup>251</sup>

The OTP is particularly well poised to act as a coordinator for such horizontal and vertical partnerships. One implication of this research, then, could be a significant enhancement of the OTP’s reach. The OTP’s mandate to investigate “situations” is already inherently problem oriented.<sup>252</sup> That mandate could justify a prosecutorial strategy that accommodates the situational approach, in particular pursuing lesser acts that might precede or even precipitate the worst crimes. Strategic prosecutions, as a general matter, are not at all novel to international justice. As Louise Arbour noted, “in my experience, based on the work of the two Tribunals to date, I believe that the real challenge posed to a Prosecutor is to choose from many meritorious complaints the appropriate ones for international intervention, rather than to weed out weak or frivolous ones.”<sup>253</sup>

The situational approach thus could have significant impact on the OTP and the types of crimes it pursues. Rather than only pursuing the worst actors, the OTP could pursue actors who have not yet but are poised to commit mass atrocities. This would require pursuing borderline cases and cases of inchoate crimes.<sup>254</sup> The OTP is limited in this endeavor by the fact that it has no formal connection to the Security Council, international NGOs, or the human rights bodies who design and implement ex ante crime prevention strategies—and who are most likely to know which environments are dangerously ripe for grave international crimes. A prosecutor in a municipal regime has much closer ties and easier access to the agencies implementing crime prevention policies. But there are signs that the ICC is deepening its reach and embracing a role as a

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<sup>251</sup> Id at 364.

<sup>252</sup> See Rome Statute, Arts 13–15 (cited in note 1) (outlining jurisdictional, referral, and prosecutorial functions).

<sup>253</sup> Schabas, *Introduction to the ICC* at 176 (cited in note 90), quoting *Statement of Justice Arbour to the Preparatory Committee on the Establishment of an International Criminal Court* 7–8 (Dec 8, 1997). Arbour worked as Chief Prosecutor at the ICTY as well as for the ICTR. See Schabas, *Introduction to the ICC* at 176 (cited in note 90).

<sup>254</sup> As Schabas notes:

If the ultimate goal of the [ICC] is to prevent human rights abuses and atrocities, prosecution for attempts ought to be of considerable significance. But the history of war crimes prosecutions yields few examples, probably because the very idea of criminal repression has arisen after the commission of the crimes.

*Introduction to the ICC* at 230 (cited in note 90). Yet attempts have only been charged twice: *Prosecutor v Kony, et al*, Warrant of Arrest for Joseph Kony, 02/04-01/05-53, 12–19 (ICC 2005) and *Prosecutor v Kony, et al*, Warrant of Arrest for Vincent Orti, 02/04-01/05-54, 12–20 (ICC 2005). But in another case, the ICC noted that if it had found specific intent, then attempts could have been included. See id at 231, citing *Prosecutor v Katanga & Chui*, Decision on the Confirmation of Charges, 01/04-01/07, ¶¶ 458–60 (ICC 2008).



problem solver. How far the OTP can adapt may depend on not only outside actors, but also on the ICC's own view as to its jurisdiction.

The international regime is limited as a jurisdictional matter to a small number of extremely severe crimes, "the most serious crimes of international concern."<sup>255</sup> But these crimes themselves leave significant room for interpretation as to their scope and severity. Crimes against humanity, for example, are defined in the Rome Statute as "acts"<sup>256</sup> that are "committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."<sup>257</sup> The category of "other inhumane acts" has been interpreted by the International Criminal Tribunal for the former Yugoslavia to include the forced busing of women and children from one area to another, during which they were subject to taunts and rock throwing.<sup>258</sup> The ICTR relied on the same term to find forced nakedness to constitute a crime against humanity.<sup>259</sup> Given this flexibility in the law, future tribunals could conceivably find that they have jurisdiction over acts, such as patterned land grabs, considered to be precursors to mass atrocity.<sup>260</sup>

The Rome Statute further limits the subject matter jurisdiction of the ICC by requiring that crimes be of "sufficient gravity."<sup>261</sup> While some international judges have interpreted "sufficiently grave" as "exceptionally grave," others have proposed more flexible rules.<sup>262</sup> This would seem to suggest significant room for adapting the determination of gravity to the situational approach. One possible avenue for reform in the international realm would be for the court to accept

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<sup>255</sup> Rome Statute, Art 1 (cited in note 1).

<sup>256</sup> See *id.* at Art 7.1 (defining acts as, inter alia: murder, rape, enslavement, and "other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health").

<sup>257</sup> *Id.*

<sup>258</sup> See Schabas, *Introduction to the ICC* at 119–20 (cited in note 90), citing *Prosecutor v Krstić*, Judgment, 98-33-T, ¶¶ 50-2, 519 (ICTY 2001).

<sup>259</sup> See *Prosecutor v Akayesu*, Judgment, 96-4-T, ¶ 10A (ICTR 1998). For further discussion of the flexibility of the term, see Schabas, *Introduction to the ICC* at 107–10 (cited in note 90).

<sup>260</sup> See Midlarsky, 82 *Am Pol Sci Rev* at 504 (cited in note 220).

<sup>261</sup> Rome Statute, Art 17.1(d) (cited in note 1).

<sup>262</sup> For example, Judge Pikiš noted in a dissent in the Congo Situation: "Which cases are unworthy of consideration by the ICC? The answer is cases insignificant in themselves; where the criminality on the part of the culprit is wholly marginal; borderline cases." Schabas, *Introduction to the ICC* at 44 (cited in note 90), citing *Prosecutor v Lubanga Dyilo*, Judgment on the Prosecutor's Appeal Against the Decision of the Pre-Trial Chamber Entitled "Decision on the Prosecutor's Application for Warrants of Arrest, Article 58," 01/04-186, ¶ 40 (ICC 2006) (separate and partly dissenting opinion of Judge Georgios M. Pikiš). However, the *travaux préparatoires* of the Rome statute shows that an amendment to "exceptional gravity" was not accepted when it was proposed. See Schabas, *Introduction to the ICC* at 201 (cited in note 90), citing *Lubanga*, Judgment on the Prosecutor's Appeal at ¶ 81.

“community impact statements,” which many domestic courts have adopted in response to community justice initiatives, to play a role in the determination of the gravity of a particular crime.<sup>263</sup> Yet, the ICC, at least, appears to be moving in a different direction. When the Pre-Trial Chamber ruled that gravity required a showing of “social alarm,”<sup>264</sup> the Appeals Chamber rejected this requirement because it turned on “subjective and contingent reactions to crimes rather than upon their objective gravity.”<sup>265</sup> Under the situational approach, social alarm would be a key indicator of exactly the types of crimes the regime ought to prosecute.

### C. Unbundling Prevention from Punishment

The deepest impact of the preventive turn in international criminal law may in fact have nothing to do with prevention. By unbundling prevention strategies from punishment strategies, international criminal tribunals may be freed of some of the burden they currently carry to achieve total deterrence through sanction alone.<sup>266</sup> This means, at least in theory, that the design of criminal sentences could become more flexible and could more specifically target other regime goals such as conflict resolution, community reintegration and healing, and the expression of moral norms. There is currently considerable debate about the scope and purpose of international criminal sentences.<sup>267</sup> The extent to which important crime prevention work is seen as part of the regime may have a profound impact on these debates. Whereas before a judge might have felt burdened to give a particular defendant a particular sentence on deterrence grounds, the judge now can entertain other functions, including rehabilitation and community service, if he or she is satisfied that prevention will occur through other channels. This may explain the sentencing patterns of many community courts in the US, which tend to issue sentences considerably lower than they would otherwise be in a traditional court and often with more creative sentences, such as sending defendants to anti-violence programs, rehabilitation clinics, and the like, rather than prison.<sup>268</sup> Perhaps the court is freed to consider

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<sup>263</sup> See Katie Long, *Community Input at Sentencing: Victim's Right or Victim's Revenge?*, 75 BU L Rev 187, 195–96 (1995).

<sup>264</sup> *Prosecutor v Lubanga Dyilo*, Decision Concerning Pre-Trial Chamber I's Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case against Mr Thomas Lubanga Dyilo, 01/04-01/06-8, ¶¶ 42–64 (ICC 2006).

<sup>265</sup> Schabas, *Introduction to the ICC* at 201 (cited in note 90), citing *Lubanga*, Judgment on the Prosecutor's Appeal at ¶ 72.

<sup>266</sup> This is a burden that has been called hopeless. As one scholar notes, the idea of prevention through punishment is akin to a “religious exercise of hope.” Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 Eur J Int L 561, 593 (2002).

<sup>267</sup> See generally Damaska, 83 Chi Kent L Rev 328 (cited in note 2).

<sup>268</sup> See Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 Wash U J L & Poly 63, 91 (2002).

these alternative approaches because it has taken judicial notice of, and indeed coordinated with, efforts to implement situational strategies of crime prevention.

There is another way in which this unbundled approach to crime prevention interacts with the goals of international criminal tribunals. To the extent that enhanced community outreach and community-oriented programs increase trust and legitimacy of a given criminal regime—which the available evidence suggests they can<sup>269</sup>—these programs may enhance the criminal regime’s ability to express moral norms.<sup>270</sup> A growing literature suggests that the expressive function of the international criminal regime is the most powerful of the regime’s many effects.<sup>271</sup> Yet the international regime’s expressive capacity is limited by perceptions of its illegitimacy.<sup>272</sup> The community’s trust and faith in the regime is especially important given the recent finding that when people perceive their government to be procedurally just and trustworthy, they find that the government’s laws ought to be obeyed.<sup>273</sup> The same research showed that performance of basic government services is an important contributor to determining people’s trust and views on the legitimacy of the government.<sup>274</sup> If the provision of basic services and responsiveness to community needs—core elements of the community policing approach—enhance the regime’s legitimacy even a little bit, the benefits to the expressive capacity of the regime may be substantial. But the reverse is true as well: if peacekeepers or other actors associated with the preventive approach fail to maintain community trust, this could undermine the regime’s moral authority. This is not an inconsiderable risk.<sup>275</sup>

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<sup>269</sup> See Jacoby, Gramckow, and Ratledge, *The Impact of Community Policing* at 19 (cited in note 240) (noting that field experiments in Houston, Newark, and Baltimore showed that “closer relationship between community and police raised citizen satisfaction with police, improved quality of life, and lowered levels of fear of crime”).

<sup>270</sup> See Robert D. Sloane, *The Expressive Capacity of Criminal Punishment: The Limits of the National Law Analogy and the Potential of International Criminal Law*, 43 *Stan J Intl L* 39, 69–71 (2007) (noting that the regime’s expressive capacity depends on its legitimacy).

<sup>271</sup> See generally Damaska, 83 *Chi Kent L Rev* 329 (cited in note 2); Sloane, 43 *Stan J Intl L* 39 (cited in note 270).

<sup>272</sup> For a recent study examining local perceptions of the ICTY and finding low levels of perceived legitimacy, see Sanja Kutnjak Ivkovic and John Hagan, *Reclaiming Justice: The International Tribunal for the Former Yugoslavia and Local Courts* 50–51 (Oxford 2011).

<sup>273</sup> See Levi, Tyler, and Sacks, *The Reasons for Compliance* at \*9 (cited in note 239) (using data from American and afrobarometer surveys and finding strong evidence that trustworthiness and legitimacy are crucial determinants of individuals’ willingness to obey the law).

<sup>274</sup> See *id.*

<sup>275</sup> For an account of peacekeeper’s crimes and their legal liability, see generally Tom Dannenbaum, *Translating the Standard of Effective Control into a System of Effective Accountability: How Liability Should be Apportioned for Violations of Human Rights by Member State Troop Contingents Serving as United Nations Peacekeepers*, 51 *Harv Intl L J* 113 (2010).

One argument for adopting this conceptual frame for community policing is that it encourages consideration, by scholars and practitioners, of the interaction between the prosecution and the prevention of crime. Scholars and practitioners have been largely focused on punishment; attention to explicit prevention schemes not only promises to enhance prevention, it also prompts the regime to more closely coordinate prevention and punishment. The result is not only different actors performing different functions, but a wider, more coherent, and more realistic conception of the regime. In domestic criminal law, much attention has been paid to the rich array of regulatory tools available to the state to regulate crime. There is, in other words, a thick conception of the criminal regime, one in which courts and criminal sanctions are just one piece of the fuller regulatory framework.<sup>276</sup> Bolstering this wider conception of the criminal regime is a central ambition of the situational scholarship.<sup>277</sup> A hallmark of this scholarship is a shift in attention “away from the larger and more obvious institutions of criminal justice—the prisons, the courts—toward the more liminal institutions.”<sup>278</sup> One result of this move has been increased scholarly attention to the dynamic relationship between the institutions of crime prevention—that is, the police and other public agencies involved in this new policing—and the traditional institutions of criminal punishment.<sup>279</sup>

Of course, punishment and prevention are not wholly separable, and I do not mean to erect them as two sides of a binary choice. Implementing prevention strategies will inevitably entail a focus on prevention as well as punishment. The current, overwhelming focus on punishment merely invites the questions *why* we punish and *how* it affects the likelihood of crime. But finding that it is lacking and suggesting alternatives for focusing explicitly on prevention is not to say that the two will not or cannot coexist. The situational approach offers a broader vision of the regime, one that encourages the development of specific strategies for crime prevention as well as the coordination of those

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<sup>276</sup> See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L J 1, 3 (1997) (“Criminal procedure’s rules and remedies are embedded in a larger system, a system that can adjust to those rules in ways other than obeying them.”).

<sup>277</sup> See Harcourt, *The Illusion of Order* at 37 (cited in note 11) (noting that the new situational criminal literature seeks to “enrich classical doctrine with a thicker notion of class culture or human nature, as well as a policy orientation that focuses on the environmental and situational cues that encourage people to commit crime”).

<sup>278</sup> Morrill, et al, 2005 U Chi Legal F at 312–13 (cited in note 47) (quoting Harcourt’s discussion of institutional change in the 1970s).

<sup>279</sup> See Section V.B. For an account of the community justice movement, see Lanni, 40 Harv CR–CL L Rev at 365–72 (cited in note 228) (describing the “community justice revolution” as a development that grew out of the community policing movement). See also Fagan and Malkin, 30 Fordham Urb L J at 900 (cited in note 108) (reporting the results of a study of the Red Hook Community Justice Center in New York and highlighting the need for further integration between community-oriented approaches to punishment and prevention).

strategies with existing criminal institutions. One of the lessons of the situational turn in the domestic realm is that what appears to be a largely instrumentalist approach has powerful normative implications for the criminal regime. These implications are problematic in some contexts (for example, enhancing the power of the state in dangerous or discriminatory ways), but in other contexts they may be liberating and community-enhancing, such as by freeing courts to pursue alternative sentences and to invite greater community involvement in criminal justice. Applying the situational turn in the international realm presents some similar and some distinct normative implications.

## VI. CONCLUSION

The conventional understanding of the international criminal regime emphasizes retributive criminal punishment as the central tool for achieving crime prevention; other strategies for regulating crime *ex ante* are largely ignored. The domestic situational approach to crime control provides a framework for recognizing and developing strategies to prevent international crime beyond the threat of criminal sanction. Because the causal pathways of international crimes are not well understood, these implications are tentative for the moment, but they could usefully inform existing reforms and crime control strategies and alert regime designers to potential pitfalls of the situational turn. Moreover, by emphasizing *ex ante* regulatory mechanisms in a regime largely oriented around *ex post* justice mechanisms, this approach illuminates some of the dynamics between the two. As efforts to shape the environments of international crime evolve, they may inform debates about the design and the goals of international justice.