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Do International Criminal Tribunals have a Deterrent Effect on Human Rights Abuses?

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CASE WESTERN RESERVE UNIVERSITY

SCHOOL OF LAW

MEMORANDUM FOR THE EXTRAORDINARY CHAMBERS IN THE COURTS OF
CAMBODIA

**Issue: Do International Criminal Tribunals have a Deterrent Effect on
Human Rights Abuses?**

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I. Introduction

A. Issue and Definitions

This memorandum discusses whether human rights prosecutions by international criminal tribunals deter individuals from committing future human rights abuses.* In recent years, deterrence has been a significant justification for and a goal of international criminal tribunals. However, not all of these tribunals were designed with deterrence in mind. Critics and supporters have debated as to whether or not a deterrent effect exists. Although the prosecution of human rights violations does likely have some deterrent effect, it is difficult to establish much evidence to indicate that this effect is substantial. Factors that work against international criminal tribunals' deterrent effect include: 1. The fact that not all human rights abusers can be deterred; 2. That the societal circumstances in which war crimes occur are not conditions in which deterrence theory is most effective; and 3. The inconsistencies that occur across the tribunals in terms of sentencing, such as which categories of people are prosecuted, which crimes are prosecuted, and issues of rule of law. The often-discussed issue of whether a limited deterrent effect justifies the substantial investment of money and other resources in such tribunals is beyond the scope of this paper. Rather, this paper focuses on ways to measure and enhance the deterrent effect of the international criminal tribunals.

* Does prosecuting large scale human rights abusers in international criminal courts or tribunals have a deterrent effect either in or outside the country where the crimes were committed? In your answer, please provide as much evidential support as possible.

For the purposes of this paper, “international criminal tribunal” refers to any judicial mechanism other than a domestic court that prosecutes human rights violations and war crimes. Examples of this are the International Criminal Court (ICC) and the ad hoc tribunals, such as the International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY). “Leaders” refers not only to presidents and heads of a group but also to other high ranking officials within a political or social group that may be inclined to commit atrocities. “Lower level individuals” refers to rank and file soldiers, members of political groups without a substantial power or control, and also to ordinary citizens.

B. Summary of Conclusions

1. Studies indicate that international criminal tribunals do have a deterrent effect, but the potential deterrent effect of international criminal tribunals is limited due to several factors, as described in conclusions number two through four.
2. The likelihood of deterrence being effective on leaders is slight at best. As discussed in section III(A), certain leaders may not be susceptible to deterrence for a variety of reasons, including deeply held beliefs and their assumption that their socioeconomic or political power will insulate them from prosecution.
3. Section III(B) argues that lower level individuals are susceptible to deterrence because they are often more aware of how vulnerable they are to prosecution. However, although deterrence is more likely to influence lower level individuals than leaders, the societal conditions in which human rights atrocities occur are often such that individuals are likely to behave irrationally or that participating in an atrocity poses a lesser risk than abstaining.

4. For long-term reduction of human rights violations worldwide, the possibility of human rights prosecutions having a deterrent effect is promising. As discussed in section III(C)(i), studies have shown that international criminal tribunals do have a deterrent effect on human rights abuses.
5. International criminal tribunals can enhance their deterrent effect by building more consistent and reliable systems for protecting human rights and punishing human rights abusers, as discussed below in section III(C)(ii).

II. Background

Deterrence is currently a major rationale for criminal punishment administered by international tribunals.¹ However, deterrence was not mentioned in the statutes that created the International Military Tribunal at Nuremberg, the ICTY, or the ICTR; these tribunals' primary objective was punitive.² Deterrence is first formally mentioned as a justification for international tribunals in the 1998 Rome Statute which created the ICC.³ The Rome statute states that the party states are "determined to put an end to

¹Kathryn Sikkink, Hunjoon Kim, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 *International Studies Quarterly* 939, 939-963 (December 2010) [hereinafter *Explaining the Deterrence Effect*] [reproduced in flash drive at Source 1].; Julian Ku, Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 *Washington University Law Review* 777, (2006) [hereinafter *Deter or Exacerbate*]. [reproduced in flash drive at Source 2].

² Chris Jenks , Guido Acquaviva, *Debate: The Role of International Criminal Justice in Fostering Compliance with International Humanitarian Law*, 96 *International Review of the Red Cross* 775, 779 (December 2014) [hereinafter *The Role of International Criminal Justice*]. [reproduced in flash drive at Source 3].

³ *Id.* at 780.

impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes.”⁴ Furthermore, Philippe Kirsch, the former president of the ICC, stated that “by putting potential perpetrators on notice that they may be tried before the Court, the ICC is intended to contribute to the deterrence of these crimes.”⁵ In 2004, prosecutors from the ICC, the ICYT, the ICTR, and the Special Court for Sierra Leone (SCSL) issued a joint statement expressing their commitment to general deterrence in preventing future atrocities, further bolstering the importance of deterrence as a rationale for international tribunals.⁶

The goal of deterrence is to prevent future crimes by punishing past crimes. There are two types of deterrence: specific and general.⁷ Specific deterrence is aimed at preventing a particular offender from committing further crimes; the goal is to prevent repeat offenders. An example of specific deterrence in the context of international criminal tribunals is when courts and statutes refer to ‘ending impunity’.⁸ In contrast, general deterrence punishes and condemns actions in order to prevent other individuals from committing the acts in the future. This paper will address both specific and general deterrence.

⁴ Rome Statute of the International Criminal Court, 17 July 1998 (entered into force 1 July 2002), UN Doc. A/CONF.183/9, Preamble. [hereinafter Rome Statute]. [reproduced in flash drive at Source 4].

⁵ *The Role of International Criminal Justice*, *supra* note 2 at 780. [reproduced in flash drive at Source 3].

⁶ *Id.*

⁷ Rachel Elizabeth Lopez, *The (Re)Collection of Memory after Mass Atrocity and the Dilemma for Transitional Justice*, 48 N.Y.U.J. Int’l L. & Pol. 799, (2015) [hereinafter *Recollection of Memory*]. [reproduced in flash drive at Source 5].

⁸ *The Role of International Criminal Justice*, *supra* note 2 at 780. [reproduced in flash drive at Source 2].

There are many different perspectives on how, when, or if potential criminals can ever be deterred. Both proponents and critics of deterrence are left wanting for hard evidence. National studies of the deterrent effect of punishment are mixed.⁹ Most focus on street crimes, which are committed by a wide array of people in varied circumstances. It may not be possible to deter domestic crime through punishment due to the complex nature of socio-economic stratification within countries, but that question is beyond the scope of this paper.¹⁰

Measuring deterrent effect of international criminal tribunals can also prove difficult. There is no reliable way to measure or find proof of a criminal's state of mind.¹¹ It is virtually impossible to say how many atrocities against human rights would have been committed if the international community had not condemned and begun to prosecute such acts.¹² But it is still possible to measure the deterrent effect of international criminal tribunals to some degree. Scholars have measured the deterrent effect in two ways: 1) by measuring the correlation between the prosecution of certain crimes and any change in

⁹ Jakob Holtermann, *A "Slice of Cheese" – a Deterrence-Based Argument for the International Criminal Court*, 11 *Human Rights Review* 289, 296 (September 2010) [hereinafter *A Slice of Cheese*] [reproduced in flash drive at Source 6]; Katherine Beckett, Theodore Sasson, *Politics of Injustice: Crimes and Punishment in America*, (Jerry Westby et al. eds. 2nd ed. 2004) [hereinafter *Politics of Injustice*] [available for purchase at <http://www.e-bookdownload.net/search/the-politics-of-injustice>]

¹⁰ *Politics of Injustice*, *supra* note 9.

¹¹ *Deter or Exacerbate*, *supra* note 1 at 791. [reproduced in flash drive at Source 2].

¹² Patrick S. Wegner, *The International Criminal Court in Ongoing Intrastate Conflicts*, page 34 (Cambridge Press et al. eds., 1st ed. 2015). [available for purchase at: <https://academic.oup.com/jicj/article-abstract/14/4/1034/2236029/Patrick-S-Wegner-The-International-Criminal-Court>]; *Recollection of Memory*, *supra* note 7 at 834. [reproduced in flash drive at Source 5]; *A Slice of Cheese*, *supra* note 9 at 292.

the commission of those crimes,¹³ and 2) performing a ‘risk assessment analysis’ based on formal and informal sanctions.¹⁴

When it comes to debating the existence of the tribunals’ deterrent effect, proponents of the deterrent effect of international human rights prosecutions such as Anthony Ellis, department chair and professor of philosophy at Virginia Commonwealth University, argue that historically, deterrence works, and the burden is on the critics to prove that the cost of the prosecutions outweighs the deterrent benefit.¹⁵

In order for deterrence theory to work, individuals must be making rational cost-benefit calculations before acting.¹⁶ It is generally accepted that individuals who have more to lose through punishment are more easily deterred from committing crimes.¹⁷ As discussed in section III below [notes 33–34 and accompanying text], both of these factors, rationality and potential loss, are problematic in the context of human rights abuses. In short, human rights violations often occur in chaotic settings that are either not conducive to rational-basis thinking or settings in which obeying international humanitarian law poses a greater risk than breaking it.

Deterrence is most effective when the law is certain and legitimate, and when the individual believes that he or she is likely to be caught and held accountable.¹⁸ Certainty and severity of punishment are key factors.¹⁹ If the law is unclear or individuals do not

¹³ *Deter or Exacerbate*, *supra* note 1 at 791. [reproduced in flash drive at Source 6].

¹⁴ *Id.*

¹⁵ Anthony Ellis, *War Crimes, Punishment and the Burden of Proof*, *Res Publica*, 2010, Vol 16, Issue 2 at 181. [reproduced in flash drive at Source 7].

¹⁶ Dawn L. Rothe, Victoria E. Collins, *The International Criminal Court: A Pipe Dream to End Impunity?*, 13 *International Criminal Law Review* 191, (2013) at 194 [hereinafter *Pipe Dream*] [reproduced in flash drive at Source 8].

¹⁷ *Id.* at 195

¹⁸ *Id.* at 196.

¹⁹ *Deter or Exacerbate*, *supra* note 1 at 792. [reproduced in flash drive at Source 2].

believe they will be caught or held accountable, there is no deterrent effect.²⁰ It is also important to note that susceptibility to deterrence differs among types and classes of potential offenders; some individuals and classes of potential offenders, such as politically-insulated leaders, are not susceptible to deterrence at all.

III. Legal Arguments

A. Certain leaders may not be susceptible to deterrence for a variety of reasons, including their belief that their own socioeconomic power will protect them and other societal factors.

i. Ineffectiveness of deterrence theory on leaders

The likelihood of either specific or general deterrence being effective on political leaders is slight at best. In terms of general deterrence, leaders may be harder to deter for several reasons. Specifically, that: 1) their belief that their political or socio-economic status will grant them impunity from justice and; 2) deeply held personal beliefs that motivate them to commit human rights violations. Across the general population, individuals with the most to lose are easily deterred. However, leaders may feel that they are too powerful to be brought to justice.²¹ Many leaders do not find themselves under the jurisdiction of an international criminal tribunal until after they have lost the majority of their political and social power.

Because international criminal tribunals are typically unable to prosecute leaders who incite or order human rights abuses until after those leaders have been ousted, the

²⁰ *Pipe Dream*, *supra* note 16 at 196. [reproduced in flash drive at Source 8].

²¹ *Id.*

egotistical nature of authoritarian leaders and war lords may prevent them from seeing their own removal from power as a legitimate possibility. Robert Jackson, the lead prosecutor for the Nuremberg trials, said that “the architects of war rarely imagine themselves losing and being held accountable for their actions.”²² This phenomenon of leaders’ egos blinding them to factors that might deter them from committing large scale atrocities may explain why we continue to see political leaders ordering and carrying out large-scale human rights violations despite the threat of prosecution.

Another factor preventing leader deterrence is that individuals with strongly held personal beliefs may not be deterred from acting no matter how severe the ramifications of their actions.²³ Leaders who are motivated to commit crimes by their religious or political beliefs, such as extreme Hutu nationalists who incited and ordered the Tutsi genocide in Rwanda, may be rationally willing to risk any punishment to achieve their goals.

Specific deterrence is less effective against leaders than against other individuals for at least three reasons: 1) Leaders are typically not prosecuted or punished until they have already lost power, and are no longer in a position to commit further human rights abuses; 2) Leaders who are motivated by their deeply held beliefs to commit human rights atrocities are not likely to be deterred, no matter how severe the potential punishment; and 3) After committing human rights violations, leaders faced with punishment may feel that they have more to lose by conforming to international law than by breaking it.²⁴ Because of this, threats of prosecution toward leaders who are

²² *Recollection of Memory*, *supra* note 7 at 834. [reproduced in flash drive at Source 5].

²³ *Pipe Dream*, *supra* note 16 at 195. [reproduced in flash drive at Source 8].

²⁴ *Id.*

actively committing or have recently committed human rights abuses are not especially likely to be effective.

ii. *Inadvisability of deterrence efforts against leaders*

Attempting to deter leaders by prosecution can be dangerous because there is a risk that actions aimed at deterring leaders may radicalize them. Legal scholars have advanced conflicting theories about what increased pressure from the international community does to the mental state of a leader accused of human rights abuses. Rachel Lopez, an associate professor of law at Drexel University, states that the threat of prosecution will not deter leaders who have already committed human rights abuses but instead may lead to these leaders' radicalizing, staging coups, and continuing armed conflict in an attempt to shelter themselves from prosecution.²⁵ In contrast, Patrick S. Wegner, an officer at the German Foreign Office with a PhD in comparative public law and international law, argues that pressure from international criminal tribunals results in leaders compromising and ending conflicts.²⁶ However, recent historical examples including the indictments of Slobodan Milošević and Omar al-Bashir support Lopez over Wegner.

The cases of Slobodan Milošević and Omar al-Bashir illustrate the international criminal tribunals' failure to deter leaders from committing human rights violations. Even after the ICTY indicted Milošević for his crimes in Bosnia, he continued to commit human rights violations in Kosovo.²⁷ Milošević was indicted by the ICTY on May 24,

²⁵ *Recollection of Memory*, *supra* note 7 at 834-835. [reproduced in flash drive at Source 5].

²⁶ International Criminal Court in Ongoing Intrastate conflicts, *supra* note 12 at 34.

²⁷ *Recollection of Memory*, *supra* note 7 at 835. [reproduced in flash drive at Source 5].

1999 but was not in ICTY custody until June 29, 2001. Instead, Milošević remained in power and politically active until April 1, 2001 when the Serbian army took him into custody and eventually turned him over to the United Nations.²⁸ Milošević was eventually charged with deportation; murder; persecutions on political, racial, or religious grounds; and other inhumane acts for his actions in Kosovo, some of which occurred in between the time he was indicted and the time he was captured.²⁹

The current President of Sudan, Omar al-Bashir, has been politically insulated from the international justice system. Al-Bashir, who will be discussed more in depth below in section III(B)(i) [note 83–84 and accompanying text], was originally indicted by the ICC in 2009. This indictment did not deter him from continuing to persecute and murder Sudanese civilians.³⁰ In 2010 the ICC issued another warrant against him for additional human rights violations. Al-Bashir shows no signs of submitting to the ICC's jurisdiction or of ceasing to violate international law.

Because of the risk associated with threatening a leader currently in power, it seems futile to brandish threats of criminal prosecution in hopes of deterring specific individuals from committing further human rights violations.

²⁸ Slobodan Milošević Trial – the Prosecution's case, International Criminal Tribunal for the former Yugoslavia, <http://www.icty.org/en/content/slobodan-milo%C5%A1evi%C4%87-trial-prosecutions-case> (last visited March 30, 2017) [reproduced in flash drive at Source 23].

²⁹ Case Informational Sheet Slobodan Milošević, International Criminal Tribunal for the former Yugoslavia, at http://www.icty.org/x/cases/slobodan_milosevic/cis/en/cis_milosevic_slobodan_en.pdf (last visited March 30, 2017) [reproduced in flash drive at Source 9].

³⁰ *Recollection of Memory*, *supra* note 7 at 835. [reproduced in flash drive at Source 5].

B. Deterrence is more likely to influence low-level would-be perpetrators than leaders.

i. Issues with deterring low-level civilians

Since low level individuals cannot rely on their socio-economic power to protect them, they are more aware of the risks that they face and therefore are easier to deter. However, this does not mean that deterring low level individuals is a straight-forward process or that it is being done efficiently by the international criminal tribunals. The potential deterrent effect of prosecution is diminished both by the societal context in which these individuals live and by the tribunals' decision not to prosecute very many of them.

The biggest difficulty with deterring low level would-be human rights abusers is the perpetrators' societal context. Human rights abuses are typically committed in unstable societal conditions.³¹ Specifically, human rights abuses often occur in an atmosphere of normalized violence.³² When individuals are exposed to violence on a daily basis, the violence becomes normalized and it is harder to deter anyone from participating in it. Furthermore, during times of armed conflict or whenever multiple groups are competing for control, law becomes less certain—that is, it may not be clear what group is in charge and therefore, what laws will be enforced. Less certainty that certain actions are illegal diminishes the deterrent effect of prospective prosecution, and gives individuals the impression that they may not be held accountable for their crimes.

In situations of mass atrocity, individuals may stop engaging in cost-benefit calculation and instead be consumed by “collective hysteria and routine cruelty.”³³ The

³¹ *A Slice of Cheese*, *supra* note 9 at 300.

³² *Id.*

³³ *Recollection of Memory*, *supra* note 7 at 835. [reproduced in flash drive at Source 5].

cost-benefit calculation of rational actors is the premise on which deterrence theory is based. Therefore, when individuals stop behaving as rational actors, they are no longer susceptible to deterrence theory. Indeed, it is possible that even if low-level individuals were to engage in cost-benefit analysis while in the midst of a conflict they might find participating in the violence to be more beneficial than abstaining.

Certain individuals without political power or social status to protect them may join in on atrocities to gain power or merely as a survival method. A comparative study of participants in failed African coups by Ku and Nzelibe found that unstable country conditions which provide an opportunity to commit human rights violations correlate with the highest rate of human rights abuses.³⁴ This finding highlights deterrence theory's failure to influence individuals in unstable and unpredictable societal contexts. More details about Ku and Nzelibe's study, methodology used, and other findings can be found in section III(C)(i) [notes 55–59 and accompanying text].

But this applies only to individuals who are in the midst of conflict; it does not illuminate the roles of individuals in stable regions that have not yet begun to engage in human rights violations. Individuals who are not in the midst of an active conflict are more susceptible to deterrence in that they may be dissuaded from participating in the early stages of human rights atrocities.

- ii. *Low-level members of formal militaries are more likely to be deterred than their civilian counter-parts.*

Members of formal militaries are easier to deter than other armed groups, such as militias. This is because: 1) informal armed groups sometimes have motivations that are

³⁴ *Deter or Exacerbate*, *supra* note 1 811. [reproduced in flash drive at Source 2].

not easily discernable,³⁵ whereas formal militaries have a clear command structure and set goals from the government they are associated with; and 2) because under the Geneva Conventions, signatory states must obey the laws of war.³⁶ In order to meet their obligations under the Geneva Conventions, signatory states train the members of their armed forces on how to comply with international human rights standards and the laws that apply during armed conflict.³⁷ Through this mandated training, formal military members should know that international humanitarian laws still apply even in the uncertain and hectic atmosphere of war. Thus, they are more likely to engage in rational cost-benefit analysis before committing any human rights violation. The clearer motivations of formal militaries in combination with enhanced certainty of law should encourage deterrent effect in rank-and-file military personnel.

iii. Prosecutions of low-level individuals and incentivizing leaders to thoroughly train their subordinates.

Precedent allows international tribunals and courts to prosecute individuals in these lower-level positions for their roles in committing atrocities. Both rank-and-file military members and mid- to upper-level military officials can be prosecuted for human rights abuses. There is no ‘just following orders’ defense that protects rank and file soldiers from prosecution.³⁸ When it comes to crimes against humanity or war crimes resulting in the death of innocent civilians, not even duress can provide a complete defense.³⁹ The

³⁵ *Recollection of Memory*, *supra* note 7 at 835. [reproduced in flash drive at Source 5].

³⁶ Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. [reproduced in flash drive at Source 10].

³⁷ *Id.*

³⁸ *Customary IHL, Rule 155.*, Int’l. Committee of the Red Cross (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule155.

³⁹ Case Information Sheet Dražen Erdemović (IT-96-22), International Criminal Tribunal for the former Yugoslavia

doctrine of command responsibility allows for the prosecution of mid- to high-level military officials and leaders for the crimes committed by individuals in their chain of command.⁴⁰ International criminal tribunals have created an extra incentive for leaders and high-level military officials to ensure that low level military members obey and enforce international humanitarian laws.

A classic example of a low-level individual being prosecuted by an international criminal tribunal is the case of Dražen Erdemović. Erdemović was a soldier in the Bosnian Serb army with no decision-making power or other form authority. The ICTY charged him with murder as a crime against humanity due to his participation in a mass execution. While Erdemović did not order the executions or have the ability to disobey the orders he was given, the ICTY went forward in its prosecution. Erdemović pled guilty in July of 1995.⁴¹

Despite this precedent and the comparative effectiveness of deterrence on low-level individuals as opposed to leaders, international criminal tribunals have prosecuted fewer low-level individuals in recent years. This is in part because of the recent trend in international criminal justice toward increasing leaders' individual criminal accountability for human rights violations.⁴² This newer perspective on human rights prosecutions is reflected in the statutes of the ICC and in the actions of the ICTY and

http://www.icty.org/x/cases/erdemovic/cis/en/cis_erdemovic_en.pdf. (last visited March 30, 2017) [reproduced in flash drive at Source 11].

⁴⁰ *Customary IHL, Rule 153.*, Int'l. Committee of the Red Cross (2017), https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_cha_chapter43_rule153.

⁴¹ *Case Information Sheet Dražen Erdemović (IT-96-22)*, *supra* note 39. [reproduced in flash drive at Source 11].

⁴² *Explaining the Deterrence Effect*, *supra* note 1 at 5. [reproduced in flash drive at Source 1].

ICTR.⁴³ Prioritizing holding leaders personally accountable over holding low-level individuals results in fewer prosecutions of low-level individuals. Prosecuting fewer low-level individuals is also influenced by the limited resources of the tribunals. The lack of tribunal resources results in only the most serious offenders being prosecuted.⁴⁴ Despite the fact that low-level individuals are more susceptible to deterrence, the tribunals' inability and unwillingness to prosecute these individuals unfortunately undermines this potential deterrent effect.

C. Some data indicates that human rights prosecutions have a deterrent effect.

This deterrent effect could be increased by building more consistent and reliable systems for protecting human rights and punishing human rights abusers.

i. Data indicating deterrent effect

Data collected in a 100-country* study by Kathryn Sikkink and Hunjoon Kim indicates that the prosecution of human rights abusers leads to a decreased repression of human rights over time.⁴⁵ The study focused on domestic and international human rights prosecutions between 1980 and 2004.⁴⁶ Sikkink and Kim considered only prosecutions

⁴³ *Id.* at 5-6.

⁴⁴ *The Role of International Criminal Justice*, *supra* note 2 at 781. [reproduced in flash drive at Source 3].

*See appendix 1, attached.

⁴⁵ *Recollection of Memory*, *supra* note 7. [reproduced in flash drive at Source 3]; *Explaining the Deterrence Effect*, *supra* note 1 at 2. [reproduced in flash drive at Source 1].

⁴⁶ *Explaining the Deterrence Effect*, *supra* note 1 at 13. [reproduced in flash drive at Source 1].

in countries that experienced democratic transition, transition from civil war, or transition by state creation.⁴⁷

Each country was given a numeric value on a 9-point scale where “8” represents the highest level of repression and “0” represents the lowest amount of repression.⁴⁸ For the purposes of this study, repression was defined as torture, summary execution, disappearances, and political imprisonment.⁴⁹ Sikkink and Kim compared countries’ ratings over time to see if the presence or absence of a human rights prosecution had any impact on the country’s rating. Their research found evidence that countries with a higher cumulative number of human rights trials are less repressive than countries with fewer human rights trials.⁵⁰ Sikkink and Kim concluded that over time, human rights prosecutions can lead to a 0.78 point decrease.⁵¹ In the context of this index that is a significant change, due to the fact that changing from the most severe authoritarian regime to an ideal democracy would result in a decrease of 1.12 points.⁵²

Sikkink and Kim’s empirical data also indicate that countries which neighbor countries that have held human rights trials are less repressive.⁵³ It should be noted that this study examined prosecuting human rights violations in domestic, foreign, international, and hybrid courts.⁵⁴ It is therefore unclear how much of the deterrent effect recorded is directly related to international human rights prosecutions.

ii. Conflicting Data

⁴⁷ *Id.*

⁴⁸ *Id.* at 17.

⁴⁹ *Id.* at 13-14.

⁵⁰ *Id.* at 3.

⁵¹ *Id.* at 24.

⁵² *Id.*

⁵³ *Id.* at 3.

⁵⁴ *Id.* at 6.

There is other evidence that somewhat contradicts Sikkink and Kim's notion that international criminal tribunals have more than a minimal deterrent effect. Julian Ku and Jide Nzelibe performed a 'risk-assessment analysis' which focused on the fates of individuals who participated in failed coups.⁵⁵ This category of individual was chosen as a prime example of individuals who would be subject to the ICC's jurisdiction. After doing a comparison of 785 participants in failed African coups with regard to the formal and informal negative consequences of their human rights abuses, Ku and Nzelibe concluded that the deterrent effect of international criminal tribunals is very limited at best.⁵⁶ Examples of formal sanctions are any criminal proceedings or arrest. An example of informal sanctions is murder or any other type of extrajudicial killing.

Ku and Nzelibe's study showed that these coup plotters/potential human rights abusers faced much harsher punishments outside of the international criminal justice system than they would have faced within it. Both informal and formal domestic sanctions are more severe than the sanctions imposed by international criminal tribunals. When looking at the fates of coup participants, Ku and Nzelibe found that "35% of all individuals who engaged in failed coups were executed or otherwise murdered, 27% were imprisoned or exiled, and 16% were arrested without any clear outcomes. Similarly, 32% of all individuals who engaged in coup plots were executed or otherwise murdered, 27% were imprisoned or exiled, and 21% were arrested without any clear outcomes."⁵⁷

⁵⁵ *Deter or Exacerbate*, *supra* note 1. [reproduced in flash drive at Source 2].

⁵⁶ *Id.* at 832.

⁵⁷ *Id.*

Due to restrictions, which are discussed further in section III(C)(iii)(b) [notes 86–103 and accompanying text], international criminal tribunals cannot impose sanctions that are as severe as the consequences faced by the coup participants Ku and Nzelibe examined. Considering that prison conditions in unstable countries are far worse than the prisons used by the UN and the somewhat limited sentencing power of international criminal tribunals, these domestic consequences are more severe and more likely to deter criminals. Because of this disparity in severity of punishment, Ku and Nzelibe conclude that criminal prosecutions are not the most effective way of deterring human rights abuses.⁵⁸ This conclusion is based on the fact that at least some of the individuals that international criminal tribunals aim to deter were not deterred by more serious domestic sanctions. Admittedly, at the time of data collection, there had been too few international criminal tribunals to generate systematic empirical results.⁵⁹ Given the small sample size, this study is not conclusive and does not necessarily preclude the possibility of international criminal tribunals having a beneficial deterrent effect.

Even if the international criminal tribunals' prosecutions do not have a considerable deterrent effect directly on criminals, it is still likely that these tribunals do help to increase deterrent effect of domestic courts.⁶⁰ This 'deterrent influence' comes from the actions of international criminal tribunals positively influencing a country's and criminals' legal awareness in addition to fostering the internalization of the law in

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *The Role of International Criminal Justice*, *supra* note 2 at 794 [reproduced in flash drive at Source 3].

the minds of the public.⁶¹ Guido Acquaviva, Chef de Cabinet at the Special Tribunal for Lebanon and former Legal Officer at the ICTY, notes that high-level politicians and military officials making plea deals are an example of when international criminal tribunals' deterrent influence is at its strongest.⁶² Having a high ranking official accept responsibility for his or her crimes increases the public's certainty that the actions in question were illegitimate and reprehensible.⁶³ An illustration of this comes from the ICTR. Jean Kambanda, a former prime minister of the Rwandan interim government, plead guilty to genocide and crimes against humanity. Kambanda's guilty plea occurred in the early stages of trial and set a strong example to the defendants who followed.⁶⁴

The procedural aspects of international criminal tribunals may also enhance their deterrent influence. The ICC operates on a principle of complementarity, which means that the tribunal cannot prosecute individuals who have been legitimately investigated or prosecuted by domestic courts.⁶⁵ While complementarity may seem to hinder the deterrent effect of international criminal tribunals by preventing the ICC's participation in some prosecutions, it can help to deter human rights violations in general by incentivizing stable states to properly investigate and prosecute human rights violations.⁶⁶ The theory is that in order to avoid the embarrassment and reputational

⁶¹ *Id.* at 789.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Simeon P. Sungi, *Is it pragmatism or an injustice to victims? The use of plea bargaining in the International Criminal Court*, 7 *Journal of Theoretical and Philosophical Criminology* 21-33, at 29. [reproduced in flash drive at Source 12].

⁶⁵ *Pipe Dream*, *supra* note 16 at 749. [reproduced in flash drive at Source 8].

⁶⁶ *Id.*

damage of ICC involvement, states that are capable of conducting fair trials, will do so and future criminal criminals will be deterred that way.⁶⁷

International criminal tribunals do play an important role, whether direct or indirect, in clearly denouncing human rights abuses. The aforementioned studies indicate that without international criminal tribunals the illegality of human rights abuses would be less certain, and there would be less accountability for those who commit such atrocities; this indicates that the tribunals have at least some deterrent effect. While quantifying this deterrent effect is difficult and other methods of deterrence may be more effective, when it comes to preventing the most reprehensible crimes known to humanity, any deterrent effect is valuable. Whether or not the deterrent effect of international criminal tribunals justifies their high price, while an important question, is beyond the scope of this paper.

iii. Opportunities for Improving the Deterrent Effect of International Criminal Tribunals

Legal Scholars have criticized international criminal tribunals for diminishing their own potential deterrent effect. Chris Jenks, professor of law at SMU Dedman School of Law, claims that international criminal tribunals have eroded their deterrent effect by the limited number of proceedings, amount of time proceedings take, issuing dense opinions, handing out light sentences, and providing relatively luxurious confinement conditions.⁶⁸ Some of these features (i.e. the limited number of proceedings and the amount of time prosecutions and investigations take) are inherent

⁶⁷ *Id.* at 750.

⁶⁸ *The Role of International Criminal Justice*, *supra* note 2 at 776-777. [reproduced in flash drive at Source 3].

to the judicial and political processes. Other features, such as sentencing and opinion writing are influenced by factors that may be prioritized over deterrence. Proportional retribution and re-establishing clear rule of law are examples of factors that might be prioritized over deterrence. Determining what value international criminal tribunals should place on deterrence in relation to other factors and ideologies is beyond the scope of this paper.

When considering the inconsistencies that harm the deterrent effect of international criminal tribunals, it is important to remember that the international criminal justice system did not explicitly state deterrence as an aim of these tribunals until the ICC was created in 2002. Now that deterrence is a higher priority in the minds of those evaluating the international criminal tribunals, adjustments can be made. When assessing how the international criminal tribunals could improve their deterrent effect, it is vital to keep in mind that deterrence is most effective when there is severe punishment, certainty of law, and certainty of being held accountable.⁶⁹ The deterrent effect of international criminal tribunals could be improved by minimizing inconsistencies across the tribunals in regards to rule of law, sentencing, crimes prosecuted, and class of individual prosecuted.

a. Improving Certainty of Accountability

Current research indicates that the certainty of punishment leads to the strongest deterrent effect.⁷⁰ To achieve certainty of punishment, ideally every individual who commits a human rights atrocity would be prosecuted. However, international criminal

⁶⁹ The Politics of Injustice, *supra* note 9.

⁷⁰ *Deter or Exacerbate*, *supra* note 1 at 792. [reproduced in flash drive at Source 2].

tribunals have limited mandates and limited resources.⁷¹ Without further funding and wider mandates, it will be difficult for the international criminal tribunals to achieve a higher level of certainty of punishment. But the tribunals could improve their deterrent effect by addressing aspects of their jurisdictional limitations.

Currently, the system of rules which creates and regulates international criminal tribunals allows them to operate only in a narrow context. These procedural rules could be adversely affecting the deterrent potential of the international criminal tribunals by diminishing the likelihood that human rights abusers will be prosecuted. Ad hoc tribunals have been created to address specific incidences of human rights abuses and thus have been subject to geographic and temporal restrictions. For example, the ICTY was created by United Nations Security Council in order to address human rights abuses that occurred in the former Yugoslavia starting in 1961 and going forward.⁷² Creating courts to prosecute human rights ‘as needed’ may have contributed to a lack of certainty of prosecution; there was no guarantee that a tribunal would be created to prosecute any individual who commits human rights abuses. The 2002 creation of the ICC as a standing tribunal has partially remedied this issue.

Uncertainty that human rights abusers will be prosecuted may also be caused by the varied jurisdictional rules of the international criminal tribunals. The ICC’s jurisdictional rules differ the most from those of the other tribunals. The ICC has jurisdiction over a case under four circumstances: 1) crimes committed within the

⁷¹ *The Role of International Criminal Justice*, *supra* note 2 at 781. [reproduced in flash drive at Source 3].

⁷² About the ICTY, International Criminal Tribunal for former Yugoslavia, <http://www.icty.org/en/about> (last visited March 30, 2017) [reproduced in flash drive at Source 24].

territory of a state-party to the Rome Statute,⁷³ 2) crimes committed by a state-party,⁷⁴ 3) when a non-party state consents to the ICC's jurisdiction,⁷⁵ and 4) if the United Nations Security Council refers crimes to it.⁷⁶ While there is more certainty of prosecution if the human rights abusers are committing acts in a party state, it is still possible for a large number of criminals to slip through the cracks of the ICC's jurisdiction.

One way individuals can avoid prosecution by the ICC is through the principle of complementarity. The principle of complementarity restricts the ICC in ways that other international criminal tribunals are not restricted.⁷⁷ Complementarity means that the ICC may not prosecute any case that is being prosecuted by a state.⁷⁸ The ICC is also prohibited from prosecuting individuals that were legitimately investigated by a party state but ultimately not charged or those who were legitimately charged.⁷⁹ Even though complementarity restrictions apply only to legitimate investigations and prosecutions, the burden of proof for sham trials is high enough that states may be able to protect leaders or other individuals by conducting sham trials that prevent ICC involvement and shelter human rights abusers from accountability.⁸⁰ It is worth noting that the ICC is not completely prevented from acknowledging and punishing the orchestrators of sham

⁷³ Rome Statute, *supra* note 4 at article 12. [reproduced in flash drive at Source 4].

⁷⁴ *Id.*

⁷⁵ *Id.* at article 15

⁷⁶ *Id.*; *Deter or Exacerbate*, *supra* note 1 at 790. [reproduced in flash drive at Source 2].

⁷⁷ Shai Dothan, *Deterring War Crimes*, 40 North Carolina Journal of International Law & Commercial Regulation 740, (Spring 2015). [reproduced in flash drive at Source 13].

⁷⁸ *Id.* at 740.

⁷⁹ *Id.* at 746.

⁸⁰ Jann K. Kleffner, *Complementarity in the Rome Statute and National Criminal Jurisdictions* 53-55 (Oxford University Press, 1st ed. 2008). [full text available for purchase at

<http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199238453.001.0001/acprof-9780199238453-chapter-2>] [reproduced in flash drive at Source 15].

trials. During the ICC's prosecution of former Congolese vice president Jean-Pierre Bemba, prosecutor Luis Moreno-Ocampo accused him of conducting sham trials of military officials in order to prevent international involvement.⁸¹

However, as discussed above, complementarity also has positive ramifications. More research is needed to determine if the negative effects of complementarity creating inconsistencies across tribunals outweighs the positive deterrent influence that complementary allows the ICC to have over national governments.

Another procedural restriction at issue is that neither the ICC nor the ad hoc tribunals have independent enforcement power. Currently all international criminal tribunals rely on the cooperation of states to take suspects into custody.⁸² This reliance can harm the deterrent effect because if no state-party agrees to act as the tribunal's enforcer, the tribunals often cannot prosecute. The ICC's attempts to take Omar al-Bashir, the president of the Republic of Sudan, into custody is a prime illustration of this jurisdictional and enforcement issue. The ICC issued a warrant for al-Bashir's arrest on March 4, 2009, charging him with five counts of crimes against humanity, two counts of war crimes, and three counts of genocide.⁸³ Despite the severity of these accusations and the evidence against al-Bashir, the ICC has reached an impasse because Sudan is not a signatory state to the Rome Statute and every signatory state with the opportunity to detain al-Bashir has refused to fulfill their obligation to take him into custody. Al-Bashir

⁸¹ Prosecutor's Opening Remarks at Trial, *Prosecutor v. Jean-Pierre Bemba Gombo, Kilolo, Mangenda et al.* (ICC-01/05-01/13), 29-09-2015, p1-2 [reproduced in flash drive at Source 14].

⁸² *Deter or Exacerbate*, *supra* note 1 at 798. [reproduced in flash drive at Source 2].

⁸³ Al Bashir Case - The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, International Criminal Court, <https://www.icc-cpi.int/darfur/albashir> (March 30, 2017) [reproduced on flash drive at Source 25].

has travelled to Nigeria, Kenya, Chad, and Uganda; all of which are signatories to the Rome Statute. As of March 29, 2017, al-Bashir is still at large and currently planning a trip to Jordan for the 28th summit of the Arab League. Human rights groups have called on Jordan, another signatory to the Rome Statute, to apprehend al-Bashir but no action has been taken.⁸⁴

Another illustrative anecdote comes from the ICTY. As late as 2004 there were anecdotes of indicted human rights abusers in the former Yugoslavia who are at large and roam freely through the Serbian countryside.⁸⁵ Most of these fugitives from the ICTY have taken up residence in Serbia, Croatia, or Bosnia and Herzegovina. These individuals are believed to be able to travel somewhat freely through the help of politically powerful support networks.⁸⁶ Fugitives from justice cannot be tried because the ICC, ICTY, and ICTR do not have the power to try perpetrators in absentia.⁸⁷

As discussed in section III(C)(iii)(a) [notes 70-84 and accompanying text], due to several factors international criminal tribunals have had to limit the number of

⁸⁴ Jordan: Arrest Sudanese President Omar Al-Bashir and surrender him to the ICC, Amnesty International (March 29, 2017, 10:51 AM) <https://www.amnesty.org/en/latest/news/2017/03/jordan-arrest-sudanese-president-omar-al-bashir-and-surrender-him-to-the-icc/> [reproduced on flash drive at Source 26]; Jordan: Arrest Sudan's Bashir, Human Rights Watch (March 28, 2017, 12:01 AM) <https://www.hrw.org/news/2017/03/28/jordan-arrest-sudans-bashir> [reproduced on flash on drive at Source 27].

⁸⁵ Carla Del Ponte, Prosecutor of the Int'l Criminal Tribunal for the Former Yugoslavia, Address to the Security Council (Nov. 23, 2004), available at: <http://www.icty.org/en/press/address-carla-del-ponte-prosecutor-icty-un-security-council> [reproduced on flash drive at Source 28].

⁸⁶ *Id.*

⁸⁷ Anne Klerks, *Trials in Absentia in International (Criminal) Law*, LLM Int'l and European Public Law Tilburg University, 5 (June 2008). at 5 [reproduced in flash drive at Source 14]; Rome Statute, *supra* note 4 at Article 63. [reproduced in flash drive at Source 4].

individuals prosecuted. Addressing these factors (lack of funding and the trend toward limiting accountability solely to leaders) would result in an increased deterrent effect.

b. Addressing issues with severity of punishment

The deterrent effect of international criminal tribunals could also be improved by increasing the severity of punishment inflicted upon human rights abusers. International criminal tribunals do have a high conviction rate. The SCSL indicted 13 individuals, sentenced 9, and acquitted none.⁸⁸ The ICTR indicted 93 individuals, sentenced 62 and acquitted 14. The ICTY indicted 161 individuals, sentenced 83 and acquitted 19. Thirteen individuals were referred to national jurisdictions. Of the 83 sentenced, many were minor sentences that were agreed to via plea bargain. For information on how plea bargains affect the deterrent effect of international criminal tribunals see section III(C)(ii) [notes 60-63 and accompanying text]. Despite the positive indictment-to-conviction ratio, the international criminal tribunals' sentencing practices are not as effective in deterring potential criminals as they could be due the relatively mild sentences the tribunals impose.

Creating more severe consequences for violating international law would incentivize rational individuals to follow these laws. Typically, the sentences handed out by international criminal tribunals are relatively light when compared to domestic courts and the conditions of detention are notably comfortable.⁸⁹ The sentences of international criminal tribunals are less severe than domestic repercussions, especially

⁸⁸ Amy Burchfield, Andrew Dorchak, *International Criminal Courts for the Former Yugoslavia, Rwanda and Sierra Leone: A Guide to Online and Print Resources*, on file at Case Western Reserve University. [reproduced in flash drive at Source 17].

⁸⁹ *The Role of International Criminal Justice*, *supra* note 2 at 776. [reproduced in flash drive at Source 3].

when compared to the American criminal justice system. International criminal tribunals have sentenced human rights abusers to 30 years for committing atrocities; Whereas, in America, an individual convicted of a single murder or of drug trafficking can receive the same sentence. Individuals who are convicted by international criminal tribunals are housed in prisons that meet, if not exceed, international humanitarian standards, whereas the unstable countries in which human rights atrocities occur often do not keep their prisons up to the same standards.

On the one hand, from an ethical standpoint, it is difficult to argue that an organization dedicated to protecting human rights should sentence individuals to live in unsafe or otherwise cruel conditions. However, while advocating for prison conditions that do not meet international standards would be immoral, severity of punishment can be improved by ordering longer sentences and adopting a less lenient policy on early release. International criminal tribunals have been criticized by legal scholars and survivors of atrocities for imposing what seem like minor sentences for heinous crimes. Because the death penalty violates international human rights standards, modern international criminal tribunals do not impose it.⁹⁰

Severity of punishment between tribunals can vary because judges in international criminal tribunals have a large amount of discretion when it comes to

⁹⁰ Questions and Answers on The International Criminal Court, Coalition for the International Criminal Court, http://www.iccnw.org/documents/FS_ICC_QA.pdf (last updated Dec. 12, 2005) [reproduced in flash drive at Source 18]; Criminal Proceedings, International Criminal Tribunal for the former Yugoslavia, <http://www.icty.org/en/about/chambers/criminal-proceedings> (last visited March 30, 2017) [reproduced in flash drive at Source 29].

sentencing.⁹¹ The most severe sentences the ICC can impose is 30 years', or imprisonment life imprisonment "when so justified by the gravity of the case."⁹² ICTY and ICTR judges can use their discretion when imposing sentences on convicts. But still this often leads to relatively light sentences. In March of 2016, the ICTY sentenced Bosnian Serb leader Radovan Karadzic to 40 years' imprisonment for committing war crimes and genocide. Survivors of the Srebrenica massacre, the act of genocide that Karadzic was convicted over, found this sentence to be too light.⁹³ In terms of punishment outside of prison terms, the ICC can also order a fine, forfeiture of proceeds, property, or assets derived from the committed crime.⁹⁴

The lack of severe sentences and therefore diminished deterrent effect can be explained by looking at judges' view of deterrence and the factors considered during sentencing. Deterrence is not always a high priority for judges in determining sentencing.⁹⁵ Decisions by judges of the international criminal tribunals both implicitly and explicitly assign little weight to general deterrence.⁹⁶ For example, the sentencing judgment from the ICTY for Miodrag Jokić states that:

⁹¹ Sam Szoke-Burke, *Avoiding Belittlement of Human Suffering*, 10 *Journal of International Criminal Justice* 561, 564 (July 2012) [hereinafter *Avoiding Belittlement*] [reproduced in flash drive at Source 19].

⁹² Questions and Answers on The International Criminal Court, *supra* note 90. [reproduced in flash drive at Source 18].

⁹³ Srebrenic survivors say verdict on Karadzic too lenient, too late, Maja Zuvela and Zeljko Debelnagic, Reuters, (March 24, 2016) <http://uk.reuters.com/article/uk-warcrimes-karadzic-reaction-idUKKCN0WQ1UX> [reproduced in flash drive at Source 30].

⁹⁴ Questions and Answers on The International Criminal Court, *supra* note 90. [reproduced in flash drive at Source 18].

⁹⁵ *The Role of International Criminal Justice*, *supra* note 2 at 788. [reproduced in flash drive at Source 3].

⁹⁶ *Id.*

It would be unfair, and would ultimately weaken the respect for the legal order as a whole, to increase the punishment imposed on a person merely for the purpose of deterring others. Therefore...the Trial Chamber has taken care to ensure that, in determining the appropriate sentence, deterrence is not accorded undue prominence.⁹⁷

The moral arguments about the fairness of punishing convicted criminals more severely in order to deter future criminals are extensive, and are outside the scope of this paper. However, it is important to note that there are legitimate moral arguments for not placing deterrence as the highest priority of international criminal tribunals.

When judges do make positive statements about the deterrent effect of the international criminal tribunals, it appears that general deterrence is still not a top priority.⁹⁸ In *Prosecutor v. Miroslav Deronjić* the trial judges stated:

One of the main purposes of a sentence imposed by an international tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted law and rules have to be obeyed by everybody.⁹⁹

⁹⁷ *Prosecutor v. Miodrag Jokić*, Case No. IT-01-42/1-S, Sentencing Judgment (Trial Chamber), 18 March 2004, para 34. [reproduced in flash drive at Source 20].

⁹⁸ *The Role of International Criminal Justice*, *supra* note 2 at 789. [reproduced in flash drive at Source 3].

⁹⁹ *Prosecutor v. Miroslav Deronjić*, ICTY, Case No. IT-02-61-S, Sentencing Judgment (Trial Chamber), 30 March 2004, para 147. [reproduced in flash drive at Source 21].

This statement implies that specific deterrence, retribution, and reassuring victims and the public that justice has been restored take priority over general deterrence.¹⁰⁰ Statements like this one also imply that judges try to achieve general deterrence by influencing legal awareness and fostering internalization of relevant laws rather than generally deterring potential criminals through fear of punishment.¹⁰¹

The ICTR has been pointed at as having failed to align its sentencing with its stated goal of deterrence.¹⁰² Sentences have ranged from 6 years to life for crimes including genocide and extermination.¹⁰³ This seems mild when considering that the domestic courts of Rwanda often sentence individuals to life imprisonment for the less serious crime of murder.¹⁰⁴ Sam Szoke-Burke claims that the inconsistencies between the ICTR and domestic courts belittles the suffering of victims.¹⁰⁵ The ICTY has been criticized for imposing even less severe sentences than the ICTR.¹⁰⁶ If convicts would face more severe punishment in domestic courts, the deterrent effect of a sentence imposed by an international criminal tribunal is diminished in the mind of a potential criminal; if potential criminals were susceptible to deterrence, they would be deterred by the more severe domestic sentence whether or not there was the threat of punishment from an international tribunal.

¹⁰⁰ *The Role of International Criminal Justice*, *supra* note 2 at 789. [reproduced in flash drive at Source 3].

¹⁰¹ *Id.*

¹⁰² *Avoiding Belittlement*, *supra* note 91 at 568. [reproduced in flash drive at Source 19].

¹⁰³ *Id.* at 562.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Another factor contributing to the relatively light sentences of the international criminal tribunals is the tribunals' early release policies. Modern international criminal tribunals have allowed for early release of convicts. A convict sentenced by the ICTY or ICC is eligible for parole after serving 2/3rd of his or her sentence.¹⁰⁷ Although the explicit temporal requirements for early release vary across each court, there is a presumption that convicts need to serve only 2/3rd of their sentences.

Even if domestic courts did not impose more severe sanctions for crimes than the international criminal tribunals do, the sentencing practices of the tribunals would still be problematic. Because deterrence theory relies on severe punishments to make committing crimes unappealing to potential criminals, such minimal punishment for serious atrocities clearly diminishes the deterrent effect of the international tribunals.

c. Addressing issues with certainty of law (rule of law and opinion writing)

At times, the law applied by international criminal tribunals has been inconsistent or unclear. The tribunals' style of judicial opinion has been criticized for diluting their own potential to deter criminals.¹⁰⁸ Chris Jenks cites the ICTY's trial opinion on Momcilo Perišić's conviction as a prime example of the tribunals creating vague rule of law.¹⁰⁹ The ICTY issued a 600-page judgment that was later reversed in an appellate judgment that obscured the elements of aiding and abetting.¹¹⁰ Jenks contends that no articulable rule

¹⁰⁷Jonathan H. Choi, *Early Release in International Criminal Law*, 123 Yale L. J. 1784, (April 2014). [reproduced in flash drive at Source 22].

¹⁰⁸ *The Role of International Criminal Justice*, *supra* note 2 at 781. [reproduced in flash drive at Source 3].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

could be extrapolated from the Perišić case, even if the trial opinion had not been reversed due to its length.¹¹¹ Judicial opinions from the international criminal tribunals would be optimally effective in deterring future human rights violations if legal advisers and other individuals could easily extract bright line rules and then apply them to future actions.¹¹²

There are also some inconsistencies in the laws applied by the tribunals and in what crimes were prosecuted. These inconsistencies may not be possible to address. Historically, tribunals have been ad hoc and created to address crimes committed in specific conflicts. Some variation in the crimes prosecuted is inherent because not all human rights atrocities involve the same crimes. For example, the ICTY was mandated to prosecute grave breaches of the Geneva Conventions of 1949; violations of the laws of war; genocide and; crimes against humanity. In contrast, the Special Court for Sierra Leone's (SCSL) mandate was for the prosecution of crimes against humanity; violations of international humanitarian law and; serious crimes under Sierra Leonean law.

Other inconsistencies are caused by the evolution of international of law, such as the SCSL's landmark decision to prosecute forced marriage as a crime against humanity. The ICTY was the first tribunal to prosecute rape as a crime against humanity. The SCSL applied this precedent by likewise charging individuals with rape, but also built on it to include other acts, such as taking 'bush wives' as a form of forced marriage, as crimes against humanity. The ICC has in turn built on the SCSL precedent by prosecuting forced marriage as a crime categorically distinct from sexual slavery.¹¹³ The inconsistencies

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Forced marriage as an independent crime against humanity in the ICC decision confirming the charges against Dominic Ongwen, Josepha Close, International Law Blog, (June 20, 2016)

<https://aninternationallawblog.wordpress.com/2016/06/20/forced-marriage-as-an->

caused by the development of law are not necessarily damaging to the tribunals' deterrent effect; as long as tribunals acting concurrently do not directly contradict each other. In order to maintain and enhance their deterrent effect, international criminal tribunals should continue to follow and elaborate on the precedence established by previous tribunals.

IV. Conclusion

Assessing and measuring the deterrent effect of international criminal tribunals is difficult in part due to the fact that most of the international criminal tribunals designed with deterrence as a top priority. In light of this history, it is unrealistic to expect that these tribunals would have a significant deterrent impact on the international community. However, despite not being designed to achieve this goal, the tribunals' human rights prosecutions do have some deterrent effect. The direct deterrent effect of international criminal tribunals is seen in Sikkink and Kim's study, which showed that countries with human rights prosecutions commit fewer human rights violations over time.¹¹⁴ International criminal tribunals also contribute to a broader deterrent effect by placing pressure on individual countries to prosecute human rights abusers and by denouncing and directly prosecuting human rights abusers.¹¹⁵

[independent-crime-against-humanity-in-the-icc-decision-confirming-the-charges-against-dominic-ongwen/](#) [reproduced in flash drive at Source 31].

¹¹⁴ *Explaining the Deterrence Effect*, *supra* note 1 at 24. [reproduced in flash drive at Source 1].

¹¹⁵ *The Role of International Criminal Justice*, *supra* note 2 at 794 [reproduced in flash drive at Source 3].

Unfortunately, not all human rights abusers can be deterred, either due to their deeply held beliefs, their belief that they are too powerful to be prosecuted, or because their societal context does not allow for rational-basis decision making.

The deterrent effect of international criminal tribunals can be improved by addressing issues that negatively impact the following: 1) certainty of accountability; 2) severity of punishment; 3) certainty of law. Certainty of accountability can be improved by allocating more resources to the international criminal tribunals so that more human rights abusers can be brought to justice and by addressing the courts' lack of enforcement powers and the jurisdictional loop holes that may shelter human rights abusers. Improving issues with severity of punishment is more straight forward, but would require the international community to agree that increasing the severity of punishment in the name of deterrence is ethical and fair. Certainty of law can be improved by judges producing opinions that contain clear statements of law and by the tribunals continuing to build on each other's precedent.

Improving the deterrent effect of these tribunals maybe possible, but to do so the international criminal justice system must invest in restructuring the tribunals and engage in an ideological shift that prioritizes deterrence above other factors.

Appendix

Countries analyzed by Sikkink and Kim¹¹⁶

Democratic Transitions

Portugal 1974–; Greece 1974–; Spain 1975–; Thailand 1977–1991, 1992–; Burkina Faso 1977–1980; Peru 1978–1992, 1993–; Ghana 1978–1981, 1996–; Dominican Republic 1978–; Nigeria 1978–1984, 1998–; Uganda 1979–1985; Ecuador 1979–; El Salvador 1979–; Honduras 1980–; Bolivia 1982–; Argentina 1983–; Turkey 1983–; Guatemala 1984–; Brazil 1985–; Uruguay 1985–; Haiti 1986–1991, 1994–; Philippines 1986–; Republic of Korea 1987–; Hungary 1988–; Chile 1988–; Cambodia 1988–1997; Pakistan 1988–1999; Poland 1989–; Paraguay 1989–; Czechoslovakia 1989–1992; Panama 1989–; Romania 1989–; Benin 1990–; Nicaragua 1990–; Comoros 1990–1995, 1996–; Bulgaria 1990–; Fiji 1990–; Mongolia 1990–; Nepal 1990–2002; Albania 1990–1996, 1997–; Republic of Congo 1991–1997; Mali 1991–; Central African Republic 1991–2003; Niger 1991–1996, 1999–; Bangladesh 1991–; Madagascar 1991–; Zambia 1991–1996; Guinea-Bissau 1991–1998, 1999–; Azerbaijan 1992–; Guyana 1992–; South Africa 1992–; Taiwan 1992–; Lesotho 1993–1998, 1999–; Malawi 1993–; Mexico 1994–; Mozambique 1994–; Sierra Leone 1996–1997, 2001–; Iran 1997–2004; Armenia 1998–; Indonesia 1998–; Djibouti 1999–; Cote d’Ivoire 1999–2002; Senegal 2000–; Serbia and Montenegro 2000–; Kenya 2002–; Macedonia 2002–; Algeria 2004–.

Transition from Civil War

Chad 1984–; Lebanon 1990–; Ethiopia 1991–; Angola 1993–; Rwanda 1994–; Bosnia and Herzegovina 1995–; Burundi 1996–; Comoros 1996–; Liberia 1996–; Afghanistan 1996–; Guinea-Bissau 1999–; Lesotho 1999–; Sierra Leone 2001–; Iraq 2003–; Democratic Republic of Congo 2003–; Solomon Island 2003–.

Transition of State Creation

Namibia 1990–; Yemen 1990–; Germany 1990–; Georgia 1991–; Croatia 1991–; Slovenia 1991–; Serbia and Montenegro 1991–; Belarus 1991–; Moldova 1991–; Azerbaijan 1991–; Kyrgyzstan 1991–; Uzbekistan 1991–; Estonia 1991–; Latvia 1991–; Lithuania 1991–; Tajikistan 1991–; Macedonia 1991–; Armenia 1991–; Turkmenistan 1991–; Ukraine 1991–; Kazakhstan 1991–; Bosnia and Herzegovina 1992–; Russia 1992–; Czech Republic 1993–; Slovakia 1993–; Ethiopia 1993–; Eritrea 1993–; East Timor 2002–.

Countries with Transitional Human Rights Prosecutions

Argentina 1983–1990, 1993–2004; Benin 1991–1993; Bolivia 1983, 1995; Bosnia and Herzegovina 1993–2004; Bulgaria 1993, 1994, 1996; Burundi 1996; Cambodia 2003–

¹¹⁶ Kathryn Sikkink, Hunjoon Kim, *Explaining the Deterrence Effect of Human Rights Prosecutions for Transitional Countries*, 54 *International Studies Quarterly* 939, at appendices 1-4 (December 2010) [hereinafter *Explaining the Deterrence Effect*] [reproduced in flash drive at Source 1].

2004; Chad 2000–2003; Chile 1989, 1991–2004; Democratic Republic of Congo 2004; Croatia 1992–2004; Czech Republic 1997, 1998, 2001; East Timor 2002–2004; Ecuador 1992–1995, 1997; El Salvador 1990–1992, 1998; Eritrea 1991, 1993; Ethiopia 1991–1992, 1994–2003; Guatemala 1988, 1991–1994, 1996–2003; Haiti 1986–1987, 1989, 1995–1997; Honduras 1992–1993, 1996–2002, 2004; Hungary 1993, 1999, 2000–2001; Indonesia 2000–2004; Iraq 2003–2004; Republic of Korea 1996; Lithuania 1997–2002; Macedonia 1993–2004; Malawi 1995; Mali 1991, 1993; Mexico 2002–2004; Namibia 1990; Nicaragua 1992–1996; Niger 1992; Panama 1991–1999, 2002, 2004; Paraguay 1989, 1991–1992, 1994–1999, 2002–2004; Peru 1985, 1990, 1993–1995, 2001–2004; Poland 1990, 1993–1994, 1996–2001; Portugal 1980; Romania 1990; Rwanda 1994–2004; Senegal 2000–2004; Serbia and Montenegro 2000–2004; Sierra Leone 2002–2004; Slovenia 1993–2004; South Africa 1992; Spain 1982, 2000; Thailand 1998; Turkey 1983; Uruguay 1998–2000, 2002, 2004