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Can International Courts Deter  
Human Rights Abusers?

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In the spring of 2006, when former Liberian President Charles Taylor was arrested to face trial before the UN-backed Special Court in Sierra Leone, UN Secretary General Kofi Annan commented that Taylor's trial would not only help Liberia, but would send "a powerful message to the region that impunity will not be allowed to stand and would-be warlords will pay a price."<sup>1</sup> This comment reflects a commonly enunciated rationale for international courts that holding current human rights abusers legally accountable and punishing them will deter future abusers. Judges at the International Criminal Tribunal for the Former Yugoslavia (ICTY) have repeatedly argued that deterrence "is a consideration that may legitimately be considered in sentencing."<sup>2</sup> The preamble of the Rome Statute establishing the International Criminal Court (ICC) includes the goal of putting "an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes"<sup>3</sup> and UN documents describing the ICC at its founding note that "effective deterrence is a primary objective of those working to establish" the court.<sup>4</sup> Strong supporters of international courts have even argued that if the ICC becomes administratively strong and its jurisdiction is expanded, "the Court could have a significant deterrent effect on future acts of terrorism."<sup>5</sup> With claims of deterrence so pervasive and central to some justifications for establishing strong international courts, it is crucial to carefully examine the idea that international courts can deter human rights abuse.

In truth, the precise deterrent effects of international courts may never be known. It is often more difficult to empirically measure the absence of an action rather than its occurrence;

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<sup>1</sup> Quoted in Claire Soares, "Liberia's ex-president captured and sent for war crimes trial," *The Independent* (London), March 30, 2006.

<sup>2</sup> For details of ICTY decisions citing deterrence goals, see Mirko Bagaric and John Morss, "International Sentencing Law: In Search of a Justification and Coherent Framework," *International Criminal Law Review* 6 (2006): 18-21.

<sup>3</sup> "Rome Statute of the International Criminal Court," <http://www.un.org/law/icc/statute/romefra.htm>.

<sup>4</sup> "Establishment of an International Criminal Court Overview," <http://www.un.org/law/icc/general/overview.htm>.

<sup>5</sup> Richard J. Goldstone and Janine Simpson, "Evaluating the Role of the International Criminal Court as a Legal Response to Terrorism," *The Harvard Human Rights Journal* 16 (2003): 26.

the dog that does not bark, rather than one that does. Additionally, even if one could establish a measurable decrease in human rights violations, it would be next to impossible to determine the exact contribution of deterrence compared to other variables such as shifts in international norms, differing cultural settings, or changing domestic and international political and economic pressures. One can, however, assess the plausibility of the deterrence argument by drawing on the evidence and models developed by scholars examining the idea of deterrence in domestic court settings, examining the realities of the international system, and using the broad evidence provided by reactions to existing international courts such as the ICTY and the International Criminal Tribunal for Rwanda (ICTR).

Contrary to the hopes of many, the deterrent effect of current international courts is likely to be minimal. Greatly strengthened courts might be able to increase deterrence, but the chance that the international community would establish such strong courts in the foreseeable future is also minimal at best. This does not mean that international courts serve no purpose. Like other court systems they may be important in providing justice through retribution or in reducing abuses by incapacitating current abusers. International courts might also play important roles in establishing a documentary record of abuses, further developing international law, and aiding national reconciliation. Assessing the international courts' ability to achieve these goals is beyond the scope and intent of this paper.<sup>6</sup> My end argument is that if deterrence is unlikely this has two major implications. First, in the pursuit of real justice, judges at the international tribunals, the ICC, or any other future international courts must establish sentencing guidelines

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<sup>6</sup> The recent literature evaluating the international courts' achievements on other goals includes, James Meernick and Kimi Lynn King, "The effectiveness of international law and the ICTY – preliminary results of an empirical study," *International Criminal Law Review* 1 (2001): 343-72; David Mendeloff, "Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm," *International Studies Review* 6 (2004): 355-80; and Lilian A. Barria and Steven D. Roper, "How Effective are International Criminal Tribunals? An Analysis of the ICTY and ICTR," *The International Journal of Human Rights* 9 (2005): 249-68.

around reasonable and attainable goals.<sup>7</sup> Second, whenever institutions are publicly justified based on their ability to meet certain goals and those goals are in fact unattainable, at some point there is sure to be a backlash against the institution. That backlash may overwhelm any evidence of what the institution has in fact achieved in other areas. Therefore, for both true justice and practical reasons, the international courts and their supporters should drop deterrence from the courts' stated missions.

### Building a Model of Effective Deterrence

Deterrence of future crimes has long been recognized as one of the underlying goals of most domestic legal systems. Along with the goals of incapacitation, retribution, and rehabilitation, deterrence is also a central force behind the creation of particular laws and the determination of appropriate punishments for violators. This centrality has led economists, sociologists, criminologists, psychologists, and others to extensively study deterrent effects and how they can be enhanced through new laws, new punishments, and other changes in the legal system. Given the already mentioned difficulties of measuring the absence of events and of disaggregating data to specify the impact of a given variable, as well as the diverse perspectives and methods of researchers, it is not surprising that there are continuing disputes among scholars of domestic deterrence on many particular points. Overall, the research has, though, established key terms and highlighted important variables.

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

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<sup>7</sup> Bagaric and Morss, 194-6.

criminal activity.”<sup>8</sup> In the case of international courts, specific deterrence is of less importance. Whereas a criminal could commit a crime such as burglary at any time, human rights violations are almost always tied to specific political situations, such as a war or period of ethnic cleansing, or power relationships. In most cases, human rights violators will not be arrested and tried until after the political situation has been settled and the violators have been removed from positions of power. Even in cases where violators are arrested earlier, by the time that they have been tried and served their sentence, it is unlikely that they will be returning to similar political circumstances or power. It is really the changed circumstances, perhaps aided by incapacitating the violators arrested early, and not specific deterrence that would decrease future violations. Therefore, for international courts, deterrence can be understood to mean the possibility of general deterrence.

In the domestic setting, one level of general deterrence is brought by the simple existence of a criminal justice system. Knowing that there is a chance of punishment, people limit urges to commit small crimes such as speeding, so deterrence helps bring order to the society. This explains in part why virtually every society has created not only rules governing behavior, but some form of sanctions for violating those rules. At first consideration, this would seem to provide an easy justification for creating international courts where none have existed before. This line of reasoning, though, is based on a false analogy between domestic and international systems. As Hedley Bull has argued, if observers expect parallel institutions to play parallel roles in the two systems, they will overestimate the extent to which the international system is anarchical chaos as opposed to an anarchical society.<sup>9</sup> There is no world government or other authoritative source of international law, but that does not mean that there is no international

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<sup>8</sup> Daniel E. Hall, *Criminal Law and Procedure* (Thompson Delmar Learning, Clifton, NY: 2004): 27-28.

<sup>9</sup> Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1977).

order. The laws used in international courts have been created through treaties, the widespread acceptance of particular norms, the interpretations of previous courts, and so on. Similarly, even without international courts, human rights violators would face a variety of punishments that can include public shaming, limits on travel, loss of diplomatic ties, economic sanctions, and force. These existing punishments can be imposed by a variety of state, non-state, and international institutional actors. In the domestic arena, lack of a court system removes the fundamental deterrent force, but, at the international level, the question is what marginal deterrence courts add to an already complicated deterrent structure.

In examining the deterrent effects of domestic criminal law, Robinson and Darley explore three prerequisites for deterrence.<sup>10</sup> First, the potential offenders must be aware of the laws that are meant to influence them. They must understand what actions are criminalized, and be aware of potential punishments. For international courts, we can add to this knowledge criteria two other hurdles. First, the potential offenders must be aware of the international courts' jurisdiction. Second, they must feel that the laws and previous court decisions are applicable to their situation. That is, they must recognize that a sentence handed down to a past violator from a different country, at a different time, facing different practical situations shows potential punishment for their actions. The second major prerequisite is that potential violators must be capable of rationally calculating the costs and benefits of action at the time that they could commit a human rights violation. Third, the potential abuser must calculate that the overall costs of action outweigh the benefits. The overall costs depend on the potential punishment, but also on the chances that the violator is ever arrested, tried, and convicted, so that a sentence can be

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<sup>10</sup> Paul H. Robinson and John M. Darley, "Does Criminal Law Deter? A Behavioural Science Investigation," *Oxford Journal of Legal Studies* 24 (2004) 174.

imposed. For effective deterrence, all three of the prerequisites must be met. In the international arena, the first two prerequisites are problematic, but the third is highly unlikely to be achieved.

### Knowledge of the Laws and Courts

For deterrence, potential criminals do not need to be legal experts, but they must have some understanding of the laws and the potential punishments they bring. Studies of U.S. residents show that in fact a majority of citizens do not know the laws of their state, regarding such issues as their duty to report known felonies or the use of deadly force in protection of property, that have been specifically designed to encourage or deter actions.<sup>11</sup> Interestingly, their reported belief of the laws' details often more closely matches their view of what the law should be, rather than what it is, suggesting that it is internalized norms that affect behavior more than new laws.<sup>12</sup> One might suspect that criminals would develop a better than average understanding of the law since it is more likely to affect them, but another study found that among males who had been imprisoned for a felony only 22 percent reported that they had known "exactly what the punishment would be" for the crime they committed.<sup>13</sup> Occasionally, though, a particular law receives extensive news coverage and discussion and has more effect. For example, there is evidence that California's much discussed three strikes law, which imposes major punishments after three convictions, has had some deterrent effect, so knowledge must have been widespread.

Turning to international courts, overall knowledge of the laws will be even lower than is found within the U.S. population. Many human rights violations are committed by foot soldiers in civil wars or other lower level officials. The education levels and limited experiences of these

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<sup>11</sup> John M. Darley, Kevin M. Carlsmith, and Paul H. Robinson, "The Ex Ante Function of the Criminal Law," *Law and Society Review* 35 (2001): 165.

<sup>12</sup> Robinson and Darley.

<sup>13</sup> David Anderson, "The Deterrence Hypothesis and Picking Pockets at the Pickpockets' Hanging" *American Law and Economics Review*, 4 (2002): 295 as quoted in Robinson and Darley.



violators make it hard to believe that they will know the details of international law. It is highly improbable that average members of the *janjaweed* militias in Darfur or Lords Resistance Army in Uganda are aware of the Universal Declaration on Human Rights, the Genocide Convention, or past court rulings of international courts establishing what constitutes a war crime. If they are unaware of the international criminality of their potential actions, the idea of deterrence fails at step one.

The leaders and elite of the world are more likely to know at least the outlines of international law. Here, though, one must remember that international laws are often broadly worded and their exact meanings are still debated by legal experts. For example, U.S. soldiers are made aware of the Geneva Conventions governing the treatment of prisoners of war and of U.S. and international laws on torture, but, when there is dispute among experts on the legal status of those captured in the war on terrorism, and on definitions of torture, broad knowledge of the laws may not equate to specific guidance on what tactics are allowable.

Additionally, there are few clear documents tying international crimes to specific punishments. The documents establishing the ICTY, ICTR, and the ICC list crimes that fall within the courts' jurisdiction and in a separate area describe the punishments that the courts can impose. There is no effort to match particular crimes to specific sentences, or even to clearly rank the severity of the crimes to indicate which should receive the longest sentences. In fact, tribunal judges have intentionally resisted creating explicit sentencing guidelines, so that sentences can be "individualized" to reflect aggravating and mitigating factors.<sup>14</sup> There may be good reasons for these practices, but the lack of consistency means that even a knowledgeable potential human rights violator cannot know exactly what punishments his actions could bring.

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<sup>14</sup> *Prosecutor v Jelusic* quoted in Bagaric and Morss, 211.

In a domestic setting, potential criminals may not know exactly what court would hear their case, but, once they know a law, they know that some court has jurisdiction. In the international setting, this is much less clear. The ICTY and ICTR had limited geographic jurisdictions, so their creation could only have a wide deterrent effect if it was clear that tribunals would be established for other cases. This was far from assured, since such future tribunals would require consensus among the great powers and a willingness to expend additional resources. Furthermore, the ICTR could address only crimes committed in a set time period. The start and end dates for that time period were important political decisions since they could shield those then in power in Rwanda from prosecution for any revenge attacks. Therefore, the lesson for other would be violators was that there might someday be a tribunal for their country that might include the time period of their crimes.

The establishment of the ICC removes some of the uncertainty of jurisdiction, but it still leaves important limits. The ICC only has jurisdiction for crimes committed in member countries or by member country citizens. As of 2007, 104 states are party to the Rome Statute and 41 states have signed but not ratified the treaty. This leaves roughly 50 members of the UN, including the well known exceptions of the United States, China, and India, outside of any permanent international court system. Additionally, the principle of complementarity means that the ICC will only hear cases when national courts cannot provide effective justice. There are mechanisms for determining when the ICC needs to step in, but one can certainly imagine future cases where jurisdictional disagreements will slow legal responses and thereby further weaken deterrent effects.

Finally, even when international courts do impose sentences, potential violators may not see that as a direct signal of what will happen to them. International courts are located far from

conflict areas, conduct their business in languages not spoken universally, and are rarely covered by local media. Their actions may thus seem far removed from every day life. This helps explain why the Rwandan government objected to locating the ICTR in Arusha, Tanzania feeling that some of the deterrent effect of the trials would be lost by conducting them so far away from the crimes scenes.<sup>15</sup>

It also is common for people justifying violence to argue that the events and conditions of their country at that time were distinct, and thus demanded unusual actions. It is not clear that they would see a direct connection between say the events of Bosnia and the events of Congo, so it is not assured that they would see the sentencing of a Bosnia official as having relevance to their future actions.

Overall, there will be many potential human rights violators who are unaware of international law and international courts. Those that are aware may still be unclear exactly what punishments their actions might produce, and whether their case would ever go before an international court, plus many will discount past court actions as not directly relevant to their circumstances.

### Rationality of Decision

A second prerequisite for deterrence is that potential criminals are able to rationally calculate the costs and benefits of their action at the time of decision. This does not mean that they must have perfect information, or process information without their own perceptions somewhat skewing the conclusions. It means that they must be able to “intuit the values and costs of an action . . . and act within the limits of their abilities to pursue what they perceive as

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<sup>15</sup> Barria and Roper, 355.

the most satisfying.”<sup>16</sup> There are several factors on an individual and group level that can interfere with such a calculation at the time of a crime, so that the actor’s thought process would not be considered rational by most observers.

Some crimes are committed by people suffering from diagnosable mental or physical illnesses. They will rarely make the rational calculations necessary for deterrence. On a much broader level, evidence suggests that as a group criminals have personality traits that encourage deviant actions. They are “less inclined to think at all about the consequences of their conduct or to guide their conduct accordingly. They often are risk-seekers, rather than riskavoiders, and as a group are more impulsive than the average.”<sup>17</sup> “They are prone to hyperdiscounting of risk and inflation of the immediate value of their actions.”<sup>18</sup>

Additionally, people who would usually fall within normal bounds of rationality can be affected by short-term psychological factors. The desire for revenge is one trigger that can induce rage leading to criminal action. Some studies of domestic deterrent effects therefore suggest that crimes of passion and other cases lacking premeditation cannot be deterred.<sup>19</sup> Group effects also can alter calculations. Prestige within the group may depend on bold and even criminal activities. Studies show there is a group “arousal effect” that can lead to sprees of violence.<sup>20</sup> Other studies suggest a phenomenon called “deindividuation” that leads people to

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<sup>16</sup> David A. Ward, Mark C. Stafford, and Louis N. Gray, “Rational Choice, Deterrence, and Theoretical Integration,” *Journal of Applied Social Psychology* 36 (2006): 572.

<sup>17</sup> Robinson and Darley.

<sup>18</sup> Jeffrey Fagan, Franklin E. Zimring, and Amanda Geller, “Capital Punishment and Capital Murder: Market Share and the Deterrent Effects of the Death Penalty,” *Texas Law Review* 84 (2006): 1809.

<sup>19</sup> Daniel Glaser, “The Realities of Homicide versus the Assumptions of Economists in Assessing Capital Punishment,” *Journal of Behavioral Economics* 6 (1977): 243-68.

<sup>20</sup> Paul F. Cromwell, James N. Olson, and D’Aunn Wester Avary, “Breaking and Entering: An Ethnographic Analysis of Burglary,” *Crime, Law & Justice* 8 (1991): 69-70.

believe that their individual actions as part of a violent mob will be lost in the overall group movement.<sup>21</sup>

On the international level, it is important to remember that genocides are not primitive, emotional outbursts of group violence. They are calculated policy choices.<sup>22</sup> Similarly, torture, group rape, systematic denial of personal rights, and so on are not random actions. Thus, there is usually an overall rationality behind human rights violations, but this does not mean that on an individual level violators are rationally considering their options. Some cases of human rights abuse are so horrific that one can only hope that they are signs of mental illness, rather than the depths of normal humanity. Deterring these crimes is almost impossible for the same reasons it is hard to deter a mentally ill serial killer. The group personality traits of domestic criminals are likely to be repeated in international violators in part because certain traits such as risk-taking are likely to help individuals rise to power in politically unsettled areas. Individual psychological factors like rage induced by desires for revenge can be seen as a major factor in cases in Bosnia, Kosovo, and Rwanda.

Most importantly for explaining cases of widespread rights abuse, group pressures and psychology translate from the domestic arena to the international. In times of war, acts that would normally be considered murder become heroic. Actions that would normally be seen as denying legal rights become accepted forms of interrogation. It is just one step further to see killing people in a gruesome way, killing civilian enemies, or torturing people as something that will aid your prestige within a group. Arousal and deindividuation then can lead to massacres, group rape, or wanton destruction of property.

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<sup>21</sup> Robinson and Darley.

<sup>22</sup> George S. Yacoubian, Jr., "The Efficacy of International Criminal Justice," *World Affairs* 161 (1999).

As even a believer in the deterrent effect of international courts has noted, “The threat of punishment . . . has a limited impact on human behavior in a culture already intoxicated with hatred and violence. . . individuals are not likely to be easily deterred from committing crimes when engulfed in collective hysteria and routine cruelty.”<sup>23</sup> Unfortunately, there are many modern international examples where such conditions were the rule, rather than the exception.

### Costs and Benefits

It is important that potential criminals know the laws designed to guide their actions and that they are able to think rationally, but at its core deterrence rests on the idea that the perceived total costs of an action exceed the perceived total benefits. Understanding total costs and benefits involves calculating not only the possible positive or negative payoffs, but the chance that those payoffs occur. In attempting to deter crime, lawmakers generally focus on altering things on the cost side, either the amount of punishment or its chance, but game research shows that the perceived level and chance of positive rewards is also very important.<sup>24</sup> If criminals perceive that crime will lead them to riches, to power, to personal security, or other gains, they are encouraged to break the law despite costs.

On the cost side of the equation, a key calculation is the probability of being punished. Past gaming studies show that punishment rates of say 50 percent will have a significant deterrent effect. However, if the chance of punishment decreases, while all other variables are held constant, the deterrent effect quickly dissipates.<sup>25</sup> This is important evidence for the chance of domestic deterrence, since the overall conviction rate for criminal offences committed in the

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<sup>23</sup> Payam Akhavan, “Beyond Impunity: Can International Justice Prevent Future Atrocities?” *American Journal of International Law* 95 (2001): 9, 12.

<sup>24</sup> Ward, Stafford and Gray.

<sup>25</sup> Nathan Azran, W. Holz, and D. Hake, “Fixed Ratio Punishment,” *Journal of the Experimental Analysis of Behavior* 6 (1963): 141.

United States is only 1.3 percent, and it is likely that criminals have a more accurate perception of that low number than do average citizens.<sup>26</sup>

There is more dispute over the impact of increasing punishments. Criminologists often argue “that the likelihood of punishment tends to matter more than the severity of punishment,” whereas economists argue “an increase in either the likelihood or the severity of punishment will tend to reduce the net subjective payoff” and therefore reduce crime.<sup>27</sup> This disagreement is one reason why so much research attention has been focused on whether the threat of capital punishment marginally increases deterrence compared to the threat of a life sentence. The findings on capital punishment and other similar increases in severity remain mixed,<sup>28</sup> so it seems reasonable to still consider severity of punishment as a variable, but to not expect a huge surge in deterrence when punishments are increased.

For both benefit and cost, it is important to remember that there may be some delay before the final payout. This is important because people tend to discount future costs compared to current costs. Therefore, a 10 percent chance of being executed ten years in the future will not carry the same weight as a 10 percent chance of dying in a gun battle today. Benefits are similarly discounted, but often the perceived benefits appear more immediate. Overall, “the criminal justice system reflects a picture of a threat of delayed punishment pitted against the attraction of immediate benefits of crime.”<sup>29</sup>

To begin assessing the cost-benefit calculations made in the international arena, it is important to remember that international courts deal with only the most serious violations of

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<sup>26</sup> Robinson and Darley.

<sup>27</sup> Philip J. Cook, “The Deterrent Effects of California’s Proposition 8,” *Criminology and Public Policy* 5 (2006): 414.

<sup>28</sup> For a recent review of death penalty research, see John J. Donohue and Justin Wolfers, “The Ethics and Empirics of Capital Punishment: Uses and Abuses of Empirical Evidence in the Death Penalty Debate,” *Stanford Law Journal* 58 (2005): 791-844.

<sup>29</sup> Robinson and Darley.

international law such as genocide, crimes against humanity, and war crimes. These types of crimes do not arise spontaneously, or come from a series of political miscalculations, but instead stem from leaders' choices on how to address threats. First and foremost leaders seek to stay in power, so they will often oppress members of political, economic, or ethnic rival groups. When these differences rise to the level of civil or international war, the leaders are likely to increase the brutality of tactics they endorse. The perceived benefit of staying in power is a major incentive that may offset the leader's internal moral norms and any punishment that outsiders could threaten.

The possibility of expanding their territory or control can also drive leaders and their followers to brutal tactics. Ethnic cleansing may look like random violence from the outside, but there is calculation behind it. Asserting control of an area, while driving others out, can be seen as a path to future economic and material gain, but also to easier future political control as the area comes closer to the model of a nation-state with congruent cultural and political boundaries. Genocide is the ultimate way to assure a weakened enemy and the aggressor's control of a region.

Human rights abusers in lower levels of authority may be driven by the same ambitions as their leaders. As mentioned earlier, they also may feel that violence is the path to prestige and promotion within the group. Additionally, there may be times when lower officials feel it is necessary for their advancement or even personal security to follow the brutal orders of their superiors. International courts have ruled that violations cannot be excused with the "simply following orders" defense, but this does not change the reality that the short-term benefit of loyalty may outweigh the possible long-term cost of punishment. Similarly, courts have established that not every tactic can be portrayed as a legitimate means of self-defense, but the



goal of survival may drive people in the field to extreme measures. None of these comments is meant to in any way excuse human rights abuse, but rather to suggest that violators will often perceive major benefits from violations and a greater chance of reward than of punishment.

In looking at costs, one must remember that for centuries there were no widely accepted international humanitarian laws and therefore no fear of costs for violating them. For decades, though, laws have existed and have been backed by a range of possible bilateral and multilateral punishments. Despite the laws, human rights violators continue to act with impunity because of barriers to implementing punishments. These barriers are extensive, but mainly relate to two broad issues: political calculation and sovereignty. The international community led by the great powers is unlikely to severely punish or even aggressively criticize countries if they are viewed as strategically important. This constraint was particularly obvious during the Cold War when dozens of dictators around the world were excused their transgressions as long as they remained firmly anti-communist, but it is a natural product of the international system, so has reemerged during the War on Terrorism and will continue into the future. Countries with large economies also often receive less punishment for fear of driving them to other trade partners, or hurting the punishing country's economy. This latter point highlights the idea that countries rarely want to expend their own precious political, economic, and military resources punishing the human rights violations of others. The second main barrier to punishment has been sovereignty. For a time, the idea that sovereign states were free to make their own domestic political choices meant that leaders were shielded from any international criticism for most human rights violations. That type of hard sovereignty has waned, but there remain major inhibitions on asserting that violations have cost a state the right to sovereignty and opened it to international justice and punishments.

In assessing the specific chance of punishment through an international court system, a third major barrier must be considered. Unless courts conduct trials in absentia, they need to take the violator into physical custody to begin the punishment process. Political considerations and sovereignty will again be a factor in who is extradited and how hard states push other states to extradite defendants. The lack of an international police force authorized to make arrests also has been noted by many observers as a fundamental barrier to an effective court system.

Curiously, some scholars that acknowledge and detail the ways political calculation, sovereignty and other barriers have affected past pursuit of punishment, suggest that these factors will suddenly disappear with the emergence of international courts.<sup>30</sup> Similarly, in an interview, former ICTY and ICTR Chief Prosecutor Louise Arbour attributed the tribunal's lack of deterrent effect in Kosovo, which was under the tribunal's jurisdiction and saw widespread human rights violations six years after the tribunal was authorized, to a lack of commitment by the UN Security Council to use its resources to carry out arrest warrants, but then moments later Arbour optimistically suggested that for the ICC "if there's the political will to arrest people who've been indicted, effective prevention of crimes against humanity can be envisaged."<sup>31</sup> Why there might be a sudden shift in political will and calculation was not explained by Arbour, and, in general, is rarely explored by supporters of international courts.

The continued power of political calculations is seen not only in the number of arrests made in the former-Yugoslavia, but also by the people indicted by the tribunal. In its first years, most of those indicted were lower level officials. There was then international pressure to indict higher military officials and political leaders as a sign of the tribunal's serious effort to punish the worst violators. Therefore, later years saw very different types of defendants. There were

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<sup>30</sup> Bruce Baker, "Twilight of Impunity for Africa's Presidential Criminals," *Third World Quarterly* 25 (2004): 1498.

<sup>31</sup> Jacot Martine, "Can We Prevent Crimes Against Humanity?" *UNESCO Courier*, 52 (1999): 36.

also political calculations involved in how many people from each ethnic group were indicted. Many observers felt a high number of Serbs should be indicted since they were perceived to be the worst offenders. However, if only Serbs were indicted, this would have led to accusations that the tribunal was really a victor's court designed to advance the long-term interests of Croats and Muslims. Serbs might then not have cooperated with the tribunal or other efforts to bring peace. Deciding the "fair" number of non-Serbs to indict was therefore a crucial question, but one driven by politics at least as much as justice. Establishing deterrence is difficult, if potential violators know that their chance of indictment may shift based on several factors besides the severity of their crimes.

The continued power of political considerations and sovereignty also can be seen in the cases of Sudan and Uganda, two of the first countries targeted by the ICC. In Sudan, a series of civil wars and other oppression have led to accusations of widespread human rights abuse approaching the level of genocide. There has been criticism of Sudan's government and some punishments imposed, but the imposition of major punishments such as an oil embargo has been opposed by China and other countries. The UN authorized a peacekeeping force for Sudan's Darfur region, but the Sudanese government has refused to accept its deployment and there is little support for the idea of deploying the force over state objections. This background shows it is highly unlikely that there will be major efforts to force Sudan to extradite officials indicted by the ICC. It also will be difficult to build strong cases if international investigators are not allowed into Sudan to speak with victims and witnesses, and to examine physical evidence. In Uganda, the political considerations are different. As part of peace negotiations, members of Lords Resistance Army have sought amnesties. Previously, amnesties have been repeatedly employed globally, often in conjunction with truth telling commissions, as a way to speed peace

and national reconciliation. They may indeed help bring peace and reconciliation, but amnesties weaken the idea of deterrence.

Evidence from the ICTR and ICTY provide some measure of how these various inhibitions to punishment affect the overall chance of being convicted by an international court. In Rwanda, conservative estimates put the death toll in 1994 at 500,000 and a complete list of human rights abuses surely would be several times that number. The Rwandan government responded by jailing well over 100,000 people. Of course, some of those jailed were likely innocent, and many other guilty parties were not jailed because they fled the country or otherwise avoided arrest. Still, the Rwandan arrests suggest that the number of human rights abusers would almost certainly be at least in the tens of thousands. Yet, the ICTR has handed down only 60 indictments.<sup>32</sup> As of 2007, seven of those indicted have been released and 3 were deceased, so even if all 18 of the accused that remain at large eventually are captured and tried, only fifty of the tens of thousands of abusers will go before the international court.

In the former-Yugoslavia there were fewer domestic arrests to use as a proxy number for all abusers, but again the number of international law violators is certainly considerably higher than the 161 people indicted by the ICTY.<sup>33</sup> For several years, one of the greatest challenges facing the ICTY was the low percentage of indicted people taken into custody. This is especially noteworthy since in this case there was no amnesty included in the peace accords, local officials and other countries repeatedly pledged to cooperate in arresting those indicted, there were NATO and UN troops on the ground following the peace accords, and there was the possibility of joining the EU and other European organizations to use as an incentive to encourage the

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<sup>32</sup> Details of the indictments are available at the ICTR website, <http://69.94.11.53/default.htm>.

<sup>33</sup> Details of the indictments are available at the ICTY website, <http://www.un.org/icty/cases-e/index-e.htm>.

cooperation of post-conflict governments.<sup>34</sup> Gradually, most indicted people have been captured, so as of 2007 only six, including Bosnia Serb leaders Radovan Karadzic and Ratko Mladic, remain at large. However, years after the crimes, there are 55 captured accused with ongoing ICTY proceedings. This delay highlights the point that whatever benefit they derived from their crimes came significantly sooner than any punishment they may someday endure. In 47 cases, proceedings concluded without a verdict by the ICTY because the accused were transferred to national jurisdiction, had their indictments dropped, or died before conclusion of their trials. Thus, of all the human rights violators in the former-Yugoslavia, only 53 have reached a final judgment from the ICTY.

From those 53, five were acquitted of all charges, while 48 either pled guilty or were convicted. At first glance, this appears a quite impressive conviction rate for those who finally reach trial. It is important to remember, however, that most people face multiple counts. Excluding those who pled guilty, Meernik, King and Dancy found that as of September 2004 defendants were found guilty on 48.8 percent of individual counts. Subdividing the data they find “the percentage of guilty verdicts for war crimes, crimes against humanity, and genocide cases are 49.8 percent, 62.5 percent, and 20 percent, respectively.”<sup>35</sup> These are impressive numbers if one hopes to show that the accused are given a fair chance to defend themselves, but they are not encouraging numbers for those promoting deterrence. If one considers the low chance of being indicted, the chance that the indicted never reach trial for one reason or another, and the chance that they are acquitted of some or all of the charges, the overall chance that a particular human right abuse results in an international conviction is very, very low.

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<sup>34</sup> Theodor Meron, “Answering for War Crimes,” *Foreign Affairs* 76 (1997): 4-6.

<sup>35</sup> James Meernik, Kimi Lynn King, and Geoffrey Dancy, “Judicial Decision Making and International Tribunals: Assessing the Impact of Individual, National, and International Factors,” *Social Science Quarterly* 86 (2005): 699-700

The other major factor in the total cost calculation is the level of punishment imposed. In contrast to the Nuremberg trials after WWII, recent international court punishment options do not include death sentences because of growing international opposition to capital punishment. The exact wording on the punishments available to ICTY, ICTR, and ICC differs, but in all of the cases they can impose varying sentences up to a life sentence. The judges take into consideration the severity of the crime, but also numerous aggravating and mitigating factors in determining the individualized sentence. These aggravating factors include such things as whether the offense was against women, the person was in a position of authority, and there was direct and enthusiastic participation in the crime. Mitigating factors include cooperation with the prosecution, remorse, willing surrender, age, and character before and after the hostilities.

Since the ICTY has handed out the most sentences, a review of its sentences provides some indication of what future violators can expect. The average final sentence imposed for the 48 people found guilty by the ICTY is just under 15 years.<sup>36</sup> As Table 1 reveals, only five defendants received sentences of longer than 25 years, while many lighter sentences have been imposed. Some of those receiving sentences of a dozen years or less include the killer of seventy Muslims at Srebrenica, and others convicted of multiple counts including inciting genocide.

Table 1: Final Sentences at the ICTY

Range of Sentence In Years	Number Receiving Sentence in this Range	Percentage of Sentenced in this Sentence Range
0-5	5	10
6-10	14	29
11-15	9	19
16-20	12	25
21-25	3	6
26-40	4	8
Life	1	2

<sup>36</sup> Author's calculation of sentences imposed by the trial judges or appeals court based on data at the ICTY website, <http://www.un.org/icty/cases-e/index-e.htm>.

Bringing together the chance of punishment with the levels of punishment, the increase in perceived total costs brought by international courts should be minimal. If an individual previously would have calculated that the benefits of a violation exceeded the costs, such a small increase in costs rarely will change that calculation.

### Implications for the Future

Overall, the chance that international courts will deter human rights violators is very small since many potential violators will not know much about the international laws and courts, they may not be acting rationally at the time of committing an abuse, and those who are aware and make rational calculations will often conclude that the benefits of violation exceed the costs. This conclusion is in line with facts such as that some of the worst violations in the former-Yugoslavia, such as the massacre at Srebrenica, occurred after ICTY indictments of several Bosnian Serb leaders<sup>37</sup> and that violations have continued globally despite the tribunals and creation of the ICC.

It may be possible to increase the deterrent effect of international courts by better publicizing their rulings and sentences, but this would make only a small difference. Heavier sentences could increase the total costs for violators, but again the gains would be minimal. The major shift that could increase deterrence would be if a higher percentage of violators were brought before the court. This could be achieved if states placed the goal of arresting violators above other political calculations, if sovereignty was further weakened, or if a strong international police force was created, but none of these actions are likely and each would bring their own new problems to consider.

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<sup>37</sup> Meron, 6.

Since deterrence is likely to remain weak, it should be dropped as a basis for sentencing practices of international courts. Whether more focus on retribution or incapacitation would lead to significantly different sentences is unclear, but at least those sentences would have a firmer moral and legal basis. Additionally, supporters of international courts should stop touting their deterrent effects and concentrate on arguments that will hold up to scrutiny over time.



